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SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

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| American Civil Liberties Union, American Civil Liberties Union of Northern California,<br><br>Petitioners,<br><br>v.<br><br>California Department of Corrections and Rehabilitation,<br><br>Respondent. | Case No. CPF-16-515083<br><br>Memorandum of Points and Authorities in Support of Motion for Writ of Mandate<br><br>Date: October 13, 2016<br>Time: 9:30 am<br>Judge: Hon. Harold Kahn<br>Department: 302<br>Reservation Number: 08241013-05<br><br>Trial date: None set<br>Date filed: June 7, 2016 |

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## INTRODUCTION

The California Department of Corrections and Rehabilitation ("Department" or "CDCR") is obstructing access to two categories of records that should be available to the public under the California Public Records Act ("PRA"). First, it has unlawfully withheld records containing identifying information and basic facts of conviction and confinement for individuals in the Department's custody serving life sentences without the possibility of parole for crimes committed as juveniles ("juvenile LWOP" inmates). Second, the Department unlawfully refuses to provide statistics, demographics, and other basic information about inmates that should be readily available under the PRA, unless the requestor goes through a complex research-review process that is intended to vet experimental research that is to be conducted *on* prisoners, not to control the release of demographic, statistical or other preexisting information.

Petitioner American Civil Liberties Union of Northern California ("ACLU-NC") therefore seeks a writ of mandate 1) ordering the Department to produce the requested information on juvenile LWOP inmates; 2) prohibiting the Department from relying on 15 California Code of Regulations § 3261.2 to deny requesters access to records subject to disclosure under the PRA; and 3) prohibiting the Department from requiring requesters to submit to the Department's research-review process in order to get records that should be publicly available under the PRA.

## FACTS

### A. The Department failed to disclose records on juvenile LWOP inmates.

Petitioner ACLU-NC submitted a public record request to the Department seeking the following information about juvenile LWOP inmates: names, dates of conviction, counties of conviction, current places of confinement, sentence dates, race, gender, date of birth and inmate number. Declaration of Micaela Davis in Support of Motion for Writ of Mandate ("Davis Decl.") ¶¶ 2-3; Exs. A, C. In response, the Department asserted that this information constituted "criminal offender record information," which cannot lawfully be disclosed. It nevertheless released some of this information for 289 of the inmates, claiming that its regulations give it discretion to do so. *Id*. ¶ 9; Ex. D. But it refused to release any of the prisoners' dates of birth, dates of conviction, race, gender, or inmate numbers, because these categories are not listed in its regulation governing release of information. *Id*. ¶¶ 4-5, 9; Exs. A, D (citing 15 California Code of Regulations § 3261.2). The Department also suggested that this information is exempt from disclosure under California

Government Code § 6254(c),[1] which protects personnel and medical files. *Id*. ¶¶ 5, 9; Exs. A, D.

Finally, the Department refused to release *any* information about 16 juvenile LWOP inmates, claiming that "release of [the inmates'] information may pose a safety and security issue to themselves or to CDCR" and that the information was exempt under § 6254(f). Davis Decl. ¶¶ 7, 9; Exs. B, D.

Petitioner asks that the Court issue a writ of mandate requiring the Department to release these records. Petitioner, as a taxpayer and as a member of the public that routinely requests information from the Department, also requests that the Court issue a writ of mandate prohibiting the Department from relying on 15 California Code of Regulations § 3261.2 to deny the release of records under the PRA in the future.

### B. The Department is requiring members of the public to go through a lengthy research-review process in order to get information that should otherwise be readily available under the PRA.

The Department is erroneously applying a process that is meant to protect subjects of behavioral or biomedical experimental research to routine requests for existing public records and information.

#### 1. Background: The Department has a research-review process designed to vet research that is to be conducted on inmates.

State law requires the Department to protect the rights of prisoners and parolees who are subject to behavioral and biomedical research. *See* Pen. Code §§ 3500-3524 (providing guidelines for behavioral and biomedical research involving inmates). In order to comply with its responsibilities, the Department has implemented a research-review process to vet these types of research projects. *See* 15 C.C.R. § 3369.5 (promulgating rules for conducting research "on inmates/parolees"). This process requires researchers to secure approval from the local Institutional Review Board ("IRB"), the California Committee for the Protection of Human Subjects ("CPHS"), and the Department's Research Advisory Committee. Declaration of Sarah Mehta in Support of Motion for Writ of Mandate ("Mehta Decl.") ¶ 6; Ex. D at 1; Declaration of Kristen Bell in Support of Motion for Writ of Mandate ("Bell Decl.") ¶¶ 3-4; Ex. B at 1.

Researchers must provide the Department with comprehensive information on the study,

[1] All code sections refer to the Government Code unless otherwise noted.

including a summary of the research, the source of funding for the research, estimated beginning and end dates of the study, estimated department staff time required, operating or equipment costs to the state, estimated time required of inmate subjects, compensation to inmate participants, the potential value that the research may contribute to the Department's mission, the objective and purpose of the study, description of research methods and approaches, resumes of each staff member of the research project, and a certification of privacy. *See* 15 C.C.R. § 3369.5(b); Mehta Decl. ¶ 6; Ex. D at 3-5; Bell Decl. ¶ 4, Ex. B at 16-18. In some instances, researchers must also complete a request for access to inmate for research purposes. Mehta Decl. ¶ 6; Ex. D at 1, 19; Bell Decl. ¶ 4; Ex. B at 19.

Finally, researchers are required to comply with the Department's Confidential Data Policy for Research Organizations, under which they must agree not to "use, disseminate or otherwise distribute confidential records or said documents or information . . . other than in the performance of the specific authorized research," and that "unauthorized use, dissemination or distribution is grounds for immediate termination of [the requester's] agreement with the CDCR and may subject [the requester] to penalties both civil and criminal." Mehta Decl. ¶ 6; Ex. D at 18; Bell Decl. ¶ 4; Ex. B at 15.

The research-review process can take several months to complete. *See* Davis Decl. ¶ 13; Ex. F (Respondent's Answer to Verified Petition for Writ of Mandate ("Answer") ¶ 38); Bell Decl. ¶¶ 14, 24.

**2. The Department improperly requires members of the public seeking information under the PRA to submit to the research-review protocol.**

The Department has been requiring members of the public to go through the research-review process in order for the Department to consider standard PRA requests that have nothing to do with research conducted on or involving human subjects.

For example, the National office of the American Civil Liberties Union ("ACLU") submitted a PRA request to the Department seeking demographic and statistical information about individuals serving life sentences, including the number of persons serving life sentences who were under 18 or between 18 and 25 at the time of the offense, lengths of sentences for that population, and racial breakdown for that population. Mehta Decl. ¶¶ 2-3; Ex. A at 4. The request explained that "[t]he information sought in this record request will be compiled in an ACLU research document on prisoners and parole and will be made available to the public through our website." *Id*. ¶ 3; Ex. A at 5.

Although the Department initially agreed to supply the information, six months after the initial

request (and after it had cashed the checks the ACLU submitted in payment) it changed course and informed the ACLU that it had "overlooked [the] statement that this request was for research purposes." Mehta Decl. ¶¶ 4-5; Exs. B, C. It therefore refused to comply with the request unless the ACLU completed the Department's "formal research-review process pursuant to PC §§ 3500-3524, California Code of Regulations, Title 15 Article 9.1 3369.5 and the Department Operations Manual, Article 19, Section 14020.5 and 14020.5.1." *Id*. ¶ 6; Ex. D.

The Department similarly required attorney Kristen Bell to go through the research-review process to get information on race and ethnicity for inmates scheduled for youth-offender parole hearings, information that should have been available under the PRA. Bell Decl. ¶¶ 3, 10, 12; Ex. B. Although the Department initially accepted the request as a basic PRA request and asserted objections based on PRA exemptions, when asked to reconsider its denial, it refused to do so, telling Ms. Bell she was required to go through the research-review process. *Id*. ¶¶ 6-7, 10; Exs. D, E.

An email from a Department attorney to Ms. Bell confirmed that the Department requires the research-review process for any request for data from the Department, including requests under the PRA. Bell Decl. ¶ 10. Ms. Bell went through the research-review process. *Id*. ¶ 12. The process took several months and was delayed in part because both the Department and CPHS demanded prior approval from the other before making its determination about the request. *Id*. ¶¶ 12, 14-19; Exs. B, F-I.

Although the ACLU has since obtained the records at issue as a result of this lawsuit, and Ms. Bell has received preliminary approval through the research-review process,[2] the Department refuses to change its policy. Mehta Decl. ¶ 8; Ex. E; Bell Decl. ¶¶ 19-20; Ex. I, J; Davis Decl. ¶¶ 18-20; Exs. J, K, L. Petitioner, as a taxpayer and as a member of the public that routinely requests information from the Department, requests that the Court issue a writ of mandate prohibiting the Department from requiring requesters to go through the research-review process to get information that is subject to disclosure under the PRA.

[2] As of the date of this motion, Ms. Bell has still not received any of the information she requested. Although Ms. Bell requested additional information during the course of the research-review process, she has still not received the records on race and ethnicity she requested under the PRA over a year ago. Bell Decl. ¶ 24.

## SUMMARY OF THE PUBLIC RECORDS ACT

In California, "information concerning the conduct of the people's business is a fundamental and necessary right of every person." § 6250; *see also* CAL. CONST. art. I, § 3(b)(1). The PRA thus requires the government to release all requested records unless it can demonstrate either (1) "that the record in question is exempt under express provisions" listed in § 6254, or (2) "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." § 6255(a); *Comm'n On Peace Officer Standards And Training v. Superior Court*, 42 Cal. 4th 278, 301 (2007) ("*CPOST*"). "Record" is defined broadly to include information stored in databases or other electronic formats. *See Sierra Club v. Superior Court*, 57 Cal. 4th 157, 165 (2013).

Exemptions to the PRA "are to be narrowly construed, and the government agency opposing disclosure bears the burden of proving that one or more apply in a particular case." *Cty. of Los Angeles v. Superior Court*, 211 Cal. App. 4th 57, 63 (2012) (citation omitted); *see CPOST*, 42 Cal. 4th at 299; *Am. Civil Liberties Union of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 83-86 (2011). If documents contain both exempt and non-exempt material, the government must disclose the non-exempt material. § 6253(a).

The PRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." § 6257.5. Nor does it allow agencies to require a requester to comply with extra-statutory conditions in order to obtain public records. *Cty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1335-36 (2009). "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." CAL. CONST. art. I, § 3(b)(2).

Mandate lies to compel the government to comply with the PRA and the California Constitution. § 6258; Code Civ. Proc. § 1085. "[A]lthough as a general rule mandate will not lie in the absence of a present duty to act, the remedy may be sought when it is clear from the circumstances that the public office does not intend to comply with his obligation when the time for performance arrives." *Young v. Gnoss*, 7 Cal. 3d 18, 21 n.4 (1972). Mandate may therefore be used both to require the Department to release the records it is still withholding and also to require it to stop forcing requesters to comply with the research-review process to obtain existing records and information. *See Cty. of Santa Clara v. Superior Court*, 171 Cal. App. 4th 119, 129 (2009) (taxpayer may sue to challenge agency's practices that violate PRA); *Green v. Obledo*, 29 Cal. 3d 126, 143-45

(1981) (Citizen could "seek a writ of mandate commanding defendants to cease enforcing [a state regulation] in its entirety"); *cf. Cty. of Del Norte v. City of Crescent City*, 71 Cal. App. 4th 965, 973 (1999) (A permanent injunction "is available in a mandamus proceeding and is appropriate to restrain action which, if carried out, would be unlawful.").

## ARGUMENT

### A. The Department cannot withhold the requested information about juvenile LWOP inmates.

In refusing to release inmates' dates of birth, dates of conviction, race, gender, or inmate numbers, the Department cited § 6254(k), 15 California Code of Regulations § 3261.2, the statutes regulating criminal history information and § 6254(c). In refusing to release any information on 16 prisoners, the Department cited safety and security reasons, and § 6254(f). None of these provisions supports its refusal.

#### 1. Title 15 of the California Code of Regulations § 3261.2 does not permit the Department to withhold information on inmates in its custody.

Title 15 of the California Code of Regulations § 3261.2 is entitled "Authorized Release of Information" and provides that "the only inmate or parolee data which may be released [by the Department] without a valid written authorization from the inmate/parolee to the media or to the public" is name, age, birthplace, place of previous residence, commitment information from the adult probation report, facility assignments and behavior, general state of health, cause of death and sentencing and release action. 15 C.C.R. § 3261.2(e). The Department contends that this regulation allows it to withhold records under the PRA's exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law." § 6254(k); Davis. Decl. ¶ 13; Ex. F (Answer, p. 10 (Seventh Affirmative Defense)). Thus, it refuses to release the requested information on race, sex, date of birth, inmate number and date of conviction, which are not on the regulation's list. *See* Davis Decl. ¶¶ 4-5, 9; Exs. A at 2-3, 6; D (citing § 6254(k)'s exemption under other laws as basis for withholding race, gender, date of birth and inmate number); Bell Decl. ¶¶ 7-8; Ex. D (refusing to disclose race and ethnicity based on regulation). The Department also claims that the regulation gives it discretion to withhold even the information specified on the list. Davis Decl. ¶ 9; Ex. D.

The Department is wrong, because state regulations do not fall under § 6254(k)'s definition of laws that prohibit disclosure. Although state regulations (like local ordinances) may sometimes be regarded as "laws," this is not how the PRA uses the term. Instead, the PRA uses "laws" to refer to

statutes, and specifies "regulations" when it wants to include them. For example, the PRA allows the disclosure of certain pesticide-related information submitted "in connection with a public proceeding conducted under law or regulation." § 6254.2(i). It also allows the disclosure of personal information about public officials when that disclosure "is authorized by federal or state law, regulation, order, or tariff." § 6254.21(c)(1)(D)(iii). In addition, in order to "to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act," the PRA contains a list of "statutes and constitutional provisions" that create § 6254(k) exemptions. §§ 6275, *et seq*. The list does not reference or contain regulations.

"Where the same word is used in more than one place in a legislative enactment, [courts] presume the same meaning was intended in each instance." *Castro v. Sacramento Cty. Fire Prot. Dist.*, 47 Cal. App. 4th 927, 932 (1996) (citation omitted). "Law," as used in the PRA, therefore does not include state regulations. Even if there were some ambiguity, the California Constitution requires that statutes be read "narrowly" if they "limit[] the right of access" to government information. CAL. CONST. art. I, § 3. This means that § 6254(k) must be read narrowly so as to exclude regulations from its scope. *See Sierra Club*, 57 Cal. 4th at 175-76 ("To the extent that the [statutory term] is ambiguous, the constitutional canon requires us to interpret it in a way that maximizes the public's access to information 'unless the Legislature has *expressly* provided to the contrary.'") (citation omitted).

The Department's claim that it can promulgate a regulation to limit its obligations under the PRA also contradicts other parts of the statutory scheme. The PRA authorizes state and local agencies to adopt rules allowing "greater access to records than prescribed by the minimum standards" of the PRA, with no corresponding authorization to adopt rules that provide for less access. § 6253(e). The Legislature's explicit authorization to create rules to increase access indicates that it did not intend to permit agencies to adopt rules *restricting* access to records.

Nor does the Department's general authority to "prescribe and amend rules and regulations for the administration of the prisons" authorize it to limit access to records under the PRA. Pen. Code § 5058(a). Even if this general statute did give the Department authority to enact regulations relating to the PRA, a "regulation which impairs the scope of a statute must be declared void." *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 436 (2006) (citation omitted). The notion that an agency can promulgate a regulation that eliminates its duties under the PRA is contrary to the fundamental purposes of the PRA. It cannot be that any state or local agency with the authority to enact rules, regulations, or statutes can exempt itself from the PRA's requirements. Otherwise, any city or county could pass an ordinance declaring that it need not disclose any records at all.

The United States Supreme Court reached the same conclusion in a case under the federal Whistleblower Act, which protects employees who disclose information "if such disclosure is not specifically prohibited by law." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015). In response to the Agency's argument that the Act did not apply because a regulation prohibited disclosure, and that the disclosure was therefore "prohibited by law," the Court wrote that "[i]f 'law' included agency rules and regulations, then an agency could insulate itself from the scope of [the Act] merely by promulgating a regulation that 'specifically prohibited' whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word 'law.'" *Id.* at 920. Similarly, the purpose of the PRA is to require government officials to provide records to the public even when they do not want to do so. The Legislature could hardly have intended to give agencies the power to pass regulations to allow them to evade this duty.

Thus, although the Department's regulation properly governs what information its employees can release in the absence of a PRA request, it does not and cannot authorize the Department to withhold documents or information that the PRA requires it to release.

**2. The Department cannot rely on § 6254(c) to withhold identifying information on the inmates, such as date of birth and inmate number.**

The PRA permits withholding of "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." § 6254(c). This exemption, like its counterpart in the federal Freedom of Information Act (5 U.S.C. § 552(b)(6)), is intended "to protect intimate details of personal and family life" of governmental employees, such as home addresses, social-security numbers, and bank-account numbers. *Braun v. City of Taft*, 154 Cal. App. 3d 332, 344 (1984) (citation omitted); *see San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 777 (1983) (provision serves to "protect information of a highly personal nature") (citation omitted). Thus, courts have refused to allow agencies to invoke this provision to withhold information that merely identifies individuals or gives basic personal information. *See Braun*, 154 Cal. App. 3d at 344-45; *see also Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 73 (2014) (§ 6254(c) does not bar disclosure of names of officers in officer-involved shootings); *Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 330 (2007) (§ 6254(c) does not exempt public employee names and salary information). Even more specifically, the Court of Appeal has held that this provision does not justify refusing to reveal whether a person

has been convicted of a crime. *See CBS Broad. Inc. v. Superior Court*, 91 Cal. App. 4th 892, 907 (2001). Thus, § 6254(c) does not apply to the basic identifying information at issue here.

Even if § 6254(c) did protect this type of information, disclosing it here would be warranted because of the strong public interest in disclosure. The government must not be permitted to hide the identities and basic information about the people in our state prisons – particularly not those who are serving the most serious possible sentence that can be imposed on them as juveniles. Allowing the public access to this basic information on these individuals is critical to ensuring the public knows who the state is depriving of their liberty and for what reasons.[3]

Similarly, the public has an interest in the inmate's date of birth in order to adequately identify the person in custody. Without the date of birth, the public would not know which of many identically named citizens is in fact being held in prison. This is why the PRA requires the government to release the date of birth of everybody it arrests, along with their name and description. § 6254(f)(1). Similarly, inmate numbers serve only to distinguish one prisoner from another with the same or a similar name; they raise no privacy concerns.

The Department also ignores the myriad instances in which basic identifying information on prisoners is already made available to the public. The Department's own website allows the public to input a name and find corresponding inmate numbers, age, admission date and current institution for most inmates. *See* California Department of Corrections and Rehabilitation website, "Inmate Locator."[4]; Davis Decl. ¶¶ 10, 13; Ex. F (Answer ¶ 27). The sex of an inmate in also revealed, because a W is placed in front of female inmates' CDCR numbers. The public may also do the reverse and input an inmate number and pull up name, age, admission date and current institution. In the event of an escape, the Department releases information on escaped inmates to the public, including the individual's name, CDCR number, date of birth, race, sex, and commitment offense. *See* California Department of Corrections and Rehabilitation, Adult Institutions, Programs and Parole, "Operations Manual" (2016) § 13010.9;[5] Davis Decl. ¶ 11. The Department Operations Manual also explains that date of birth, inmate number, race and commitment offense, among other information, is not exempt and non-personal information. Operations Manual §§ 13030.23.3 and 86060.5; Davis Decl. ¶ 11. The

[3] For the same reasons the Department would not meet its burden under the § 6255 balancing test where it would have to show that the "public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." § 6255(a).

[4] *Available at*: http://inmatelocator.cdcr.ca.gov/ (last visited Sept. 12, 2016).

[5] *Available at*: http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202016/2016_DOM.PDF.

multiple avenues of release of identifying information underscores that release of this information does not constitute an unwarranted invasion of privacy that would bar disclosure under § 6254(c).

**3. The Department may not withhold all records on 16 inmates based on vague safety and security concerns or the PRA's investigatory and security files exemption.**

In order for the Department to withhold information based on the claim that the release of information "may pose a safety and security issue to themselves or CDCR," the Department must articulate a threat to safety or security that is more than "conjectural or speculative." *Am. Civil Liberties Union of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 75 (2011) (rejecting CDCR's claim that release of names of drug manufacturers would compromise those companies' security). Although "[s]ecurity may be a valid factor supporting nondisclosure . . . the 'mere assertion of possible endangerment does not "clearly outweigh" the public interest in access to these records.'" *Cty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th at 1329 (citation omitted); *see also, e.g., CBS, Inc. v. Block*, 42 Cal. 3d at 646, 652 (1986) (mere assertion that disclosing applications for concealed carry permits would endanger permit holders did not justify withholding); *Long Beach Police Officers Assn.*, 59 Cal. 4th at 74 ("Vague safety concerns that apply to all officers involved in shootings are insufficient to tip the balance against disclosure of officer names.").

Here, the Department has articulated no basis for its claim that the names and basic identifying information of the 16 prisoners would endanger the safety and security of the inmate or the institution. Threats would have to be serious indeed to justify refusing to let the outside world know the mere identities of prisoners, particularly those serving life sentences. And even if the Department does have sufficient reason to withhold *some* information about these 16 prisoners, it is hard to imagine any reasons that would justify withholding *all* of the requested information. If some of the information is non-exempt, it must be disclosed. *See* § 6253(a); *Block*, 42 Cal. 3d at 653 (any information on the concealed weapon application that indicated times or places where the licensee might be vulnerable to attack could be withheld, but "[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document") (citation omitted).

Nor may the Department withhold inmates' basic identifying information and information about the inmates' convictions under § 6254(f)'s exemption for "investigatory or security files." § 6254(f). Petitioner has not requested records relating to any investigation or records that would show whether a prisoner is under investigation; it simply wants records that show names, identifying information, and basic information on convictions for those serving juvenile LWOP sentences.

Because merely disclosing the identities of the prisoners "would not link those names to any . . . protected information," the names must be released. *Long Beach Police Officers Assn.*, 59 Cal. 4th at 73 (requiring release of names of peace officers involved in shootings, even though information about investigation of shooting would be exempt). The basic identifying information and facts about convictions must be disclosed for the same reason.

Similarly, the information identifying who is in our state prisons and the facts of their convictions and sentences has nothing to do with the security of an institution. They are simply facts of who is in the prison system and under what circumstances they are being held. Therefore, the information cannot qualify as "security files" under § 6254(f).

Neither law nor policy permits the government to operate secret prisons. The public's right to know who is in government custody and for what reasons overrides the government's desire to withhold that information. Thus, the federal government even releases the names, dates of birth, internment serial numbers, countries of citizenship, and birthplace for all detainees being held in its custody at its Guantanamo Bay Detention Camp. *See* Associated Press Special Interactive, "Shutting Down the Guantanamo Bay Detention Camp" (Sources and Methodology).[6] If the federal government released information on these purportedly high-risk detainees, the state prison system can surely release the names of juvenile LWOP inmates.

**4. The Department may not withhold inmates' basic identifying information and information on specific convictions based on California's criminal offender record information statutes.**

Contrary to the Department's assertion, the requested information, including inmates' identifying information and the basic facts about the convictions for which inmates are serving juvenile LWOP sentences, does not constitute the type of "summary" or aggregate information that falls within the definition of "criminal offender record information" under the governing statutory scheme. Davis Decl. ¶ 9; Ex. D; Pen. Code § 11075 ("'criminal offender record information' means records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a *summary* of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release") (emphasis added); § 13102 (same). The criminal record information statutes specify that "[n]othing in this article shall be construed to affect the right of access of any person or public agency to *individual* criminal

[6] *Available at*: http://hosted.ap.org/specials/interactives/wdc/guantanamo/index.html?SITE=FLDAY (last visited Sept. 12, 2016).

offender record information that is authorized by any other provision of law." *Id.* § 11080 (emphasis added); § 13200 (same); *see Westbrook v. Cty. of Los Angeles*, 27 Cal. App. 4th 157, 163 (1994) ("The statutory restrictions on dissemination of the information do not affect any right of access to *individual* criminal offender record information authorized by any other law.") (citation omitted). Moreover, it is well-established that "the fact a specific individual suffered a criminal conviction is a matter of public record." *CBS Broad. Inc.*, 91 Cal. App. 4th at 908. It is the dissemination of aggregated information, not the fact that a specific prisoner is serving a sentence for a specific conviction, that is forbidden. *See Westbrook*, 27 Cal. App. 4th at 165.

Here, there is a qualitative difference between obtaining basic identifying information for a specified group of prisoners in the custody of the state prison system, as well as basic facts related to a single conviction for each of those prisoners, versus obtaining extensive data reflecting numerous criminal cases or on an unlimited number of individuals.

Moreover, as explained above, the PRA explicitly allows disclosure of identifying information and basic facts about individuals' encounters with the criminal justice system in other contexts, such as requiring an arresting agency to release the "full name and occupation of every individual arrested by [an] 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 factual circumstances surrounding the arrest . . . [and] the location where the individual is currently being held." *See* § 6254(f). It is not reasonable to conclude that such information about a person who has not yet been convicted of any crime *must* be released, but that similar information – and in fact less detailed information – relating to an individual convicted and serving time in a state prison, cannot be. And as described above, there are numerous ways in which this information is already made publicly available.

Finally, the Department may not withhold this information based on Penal Code § 3003(e)(5). Davis Decl. ¶ 13; Ex. F (Answer p. 10 (Sixth Affirmative Defense)).[7] This statutory scheme requires the Department to provide local law enforcement agencies with detailed information about parolees and people placed on post-release community supervision ("PRCS"), including social security numbers, driver's license numbers, home addresses and health information. Pen. Code § 3003(e)(4). The law also prohibits local law enforcement agencies from releasing that information. *Id.* § 3003(e)(5).

The statute is not relevant in the context of release of information on inmates who are currently

[7] The Department actually cited Penal Code § 3003(e)(4) in its Answer, but it appears it intended to cite to subsection (e)(5).

serving terms. Nor does the statute prohibit disclosure of each individual piece of information listed in the statute. Instead, it prohibits wholesale release of this collection of information that includes both personal information as well as basic identifying information. It cannot be that simply because parolees' names are on the list of information that the Department gives to local law enforcement, the public may then never find out the names of any persons on parole. Therefore, Penal Code § 3003 would not apply to bar record requests for basic information even on parolees or persons on PRCS.

For the foregoing reasons the Court should issue a writ ordering the Department to provide the requested information on all juvenile LWOP inmates, including names, dates of conviction, counties of conviction, current places of confinement, sentence dates, date of birth and inmate number.

### B. It is unlawful for the Department to require members of the public to go through the Department's research-review process in order to obtain records otherwise available under the PRA.

An agency cannot place conditions on disclosure that are not specifically authorized by statute. *Cty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th at 1335-36. There is nothing in the statute here that authorizes the Department to force members of the public to go through the research-review process in order to obtain information otherwise available under the PRA.

First, the PRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." § 6257.5. The Department's decision to grant the ACLU's request, but then to deny it when it noticed its purpose, shows it is violating this statutory mandate. Mehta Decl. ¶¶ 4-5; Ex. B, C.

Second, the Department's formal research-review process is intended for research that is to be conducted on inmates. It is simply not applicable to requests for demographic and statistical information or for basic data or information requests that do not directly involve inmates. Instead, it is directed at biomedical and behavioral research involving prison inmates. *See* Pen. Code §§ 3500-3524. Behavioral research includes "the investigation of human behavior, emotion, adaptation, conditioning, and response in a program designed to test certain hypotheses through the collection of objective data." *Id.* § 3500(a). It "does not include the accumulation of statistical data in the assessment of the effectiveness of programs." *Id.* Biomedical research is "research relating to or involving biological, medical, or physical science." *Id.* § 3500(b). The statutes cited by the Department all relate to the rights of inmates in the context of actual experiments and studies conducted on inmates and to the prison's responsibilities to protect those rights. *See* Mehta Decl. ¶ 6; Ex. D (citing Pen. Code §§ 3500-3524); Bell Decl. ¶¶ 3-4; Ex. B (same). The sole purpose of the statutory scheme is to provide

guidelines for research on or involving inmates. The guidelines simply do not apply to requests for preexisting demographic and statistical information, identifying information such as date of birth, inmate number, race, sex, or other basic information regarding the inmate population.

The Department's own regulations confirm this conclusion. Title 15 of the California Code of Regulations § 3369.5(a) provides that "[n]o research shall be conducted *on inmates/parolees* without approval of the research advisory committee established to oversee research activities within the department." 15 C.C.R. § 3369.5(a) (emphasis added). And the exhaustive list of information the Department requires in the process is nonsensical in the context of simple data and information requests, including the requirement to provide a statement of the objectives of the study, description of methods and measuring devices to be used, estimate of the time needed from the inmates, source of funding and certification of privacy. *Id*. § 3369.5(b). The same applies to the Department's requirement that researchers secure approval from an Institutional Research Board and the Committee for the Protection of Human Subjects. *See* Mehta Decl. ¶ 6; Ex. D; Bell Decl. ¶ 9; Ex. B (same). Finally, the Department's requirement that the researcher sign a confidentiality agreement restricting use of the information is antithetical to release of information that is by definition available to the public under the PRA. *See Fontana Police Dep't v. Villegas-Banuelos*, 74 Cal. App. 4th 1249, 1252 n.2 (1999).

The Department has a record of forcing requesters to unnecessarily submit to the research-review process. *See, e.g.*, Mehta Decl. ¶ 5; Ex. C; Bell Decl. ¶¶ 3-4, 10; Ex. B. It has also admitted that a member of the public seeking any data, whether through a public record request or otherwise, is required to submit to the research review process as a matter of course. Bell Decl. ¶ 10. This practice effectively denies requests or, at best, forces requesters to expend unnecessary resources complying with the process and results in significant and unlawful delays in release of the information. *See* Davis Decl. ¶ 13; Ex. F (Answer ¶ 38); Bell Decl. ¶¶ 14, 24; *Powers v. City of Richmond*, 10 Cal. 4th 85, 118 (1995) (George, J., concurring) ("the *timeliness* of disclosure often is of crucial importance in actions brought under the Public Records Act").

For example, the Department took months to process Ms. Bell's request even after she had submitted her request through the necessary channels. Bell Decl. ¶¶ 14-22; Exs. B, F-K. Part of the delay was caused by the Department and CPHS simultaneously requiring approval from the other agency prior to making a determination on the proposal. *Id*. at ¶ 14-18; Exs. B, F. Although the agencies eventually agreed that the Department could issue a preliminary approval that would allow CPHS to move forward, that back and forth slowed the process, on top of the months it was already

taking the Department to internally process the request. *Id.* at ¶¶ 14-24.

The Department has refused to agree to change its policy in response to this litigation. Davis Decl. ¶¶ 15-30; Exs. G-L. The Court should therefore issue a writ of mandate prohibiting the Department from forcing requesters to undergo the research-review process for information otherwise available under the PRA.

## CONCLUSION

For the foregoing reasons the Court should issue a writ of mandate 1) ordering the Department to produce the requested information on juvenile LWOP inmates; 2) prohibiting the Department from relying on 15 California Code of Regulations § 3261.2 to deny requesters access to records subject to disclosure under the PRA; and 3) prohibiting the Department from requiring requesters to submit to the Department's research-review process in order to get records otherwise publicly available under the PRA.

Dated: September 15, 2016

By: _____

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