SEAN GARCIA-LEYS (SBN 313558)
sean.garcialeys@gmail.com
PEACE AND JUSTICE LAW CENTER
2501 E. Chapman Ave., Suite 245
Fullerton, CA 92831
Telephone: (323) 490-2412

EMI MACLEAN (SBN 319071)
emaclean@aclunc.org
CHESSIE THACHER (SBN 296767)
cthacher@aclunc.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493

ROBERT PONCE (SBN 341501)
RPonce@aclusocal.org
EVA BITRAN (SBN 302081)
EBitran@aclusocal.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, INC.
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-9500

Attorneys for Petitioners/Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

CHICANXS UNIDXS DE ORANGE COUNTY, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA,

Petitioners/Plaintiffs,

vs.

TODD SPITZER, in his official capacity as the District Attorney of Orange County, and THE COUNTY OF ORANGE,

Respondents/Defendants.

Case No. 30-2022-01291297-CU-WM-CJC

NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Date: June 13, 2023
Time: 9:00 a.m.
Judge: Hon. Walter Schwarm
Courtroom: Department C32

[Filed concurrently with Declarations of Emi MacLean, Sean Garcia-Leys and Minouche Kandel]

NOTICE OF MOTION AND MOTION

TO EACH PARTY AND TO COUNSEL OF RECORD FOR EACH PARTY:

PLEASE TAKE NOTICE THAT on June 13, 2023 at 9 a.m., or as soon thereafter as the matter may be heard, in Department 32 of the Orange County Superior Court, located at the Central Justice Center, 700 Civic Center Drive West, Santa Ana, CA, 92701, Petitioners/Plaintiffs Chicanxs Unidxs de Orange County ("Chicanxs Unidxs"), and the American Civil Liberties Union of Northern California and the American Civil Liberties Union of Southern California (together, "ACLU California Affiliates"), will and hereby do move, pursuant to California Code of Civil Procedure section 1085 *et seq*., the California Public Records Act (Gov. Code, § 7920.000 *et seq*.), and Article I, section 3 of the California Constitution, for judgment on the verified petition for writ of mandate and complaint for declaratory and injunctive relief, filed against Respondents/Defendants Todd Spitzer, in his official capacity as the District Attorney of Orange County, and the County of Orange.

Petitioners seek an order that Respondents/Defendants immediately comply with the Public Records Act and the California Constitution, release all records sought by Chicanxs Unidxs and the ACLU California Affiliates, and provide prospective relief. Petitioners further seek a declaratory judgment that Respondents/Defendants have failed to comply with their statutory and constitutional obligations. Upon successful resolution of this matter and pursuant to Government Code section 7923.115 and Code of Civil Procedure section 1021.5, Petitioners request that the Court award them all attorneys' fees and costs incurred in bringing this action.

This motion is based upon this Notice of Motion and Motion; the accompanying Memorandum of Points of Authorities; the supporting declarations and exhibits filed concurrently herewith; the supporting declarations and exhibits filed concurrently with the Verified Petition for a Writ of Mandate and Complaint for Declaratory and Injunctive Relief; the other pleadings and papers on file in the above-captioned matter; any subsequent briefing; and any evidence or argument that may be requested or permitted by the Court.

Dated: January 26, 2023

Respectfully Submitted,

/s/ Emi MacLean

Emi MacLean
Chessie Thacher
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NOTHERN CALIFORNIA

Sean Garcia-Leys
PEACE AND JUSTICE LAW CENTER

Robert Ponce
Eva Bitran
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA

Attorneys for Petitioners/Plainttiffs

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INTRODUCTION

Petitioners/Plaintiffs move to compel the Orange County District Attorney ("OCDA") to produce unlawfully withheld records and for declaratory and injunctive relief that will ensure OCDA's compliance with the Public Records Act ("PRA") and the California Constitution.

OCDA's failure to produce records in response to five PRA requests made by Petitioners, and to more than thirty other requests elaborated herein, demonstrates a pattern and practice of unlawfully withholding public records. OCDA has disclaimed the existence of records despite clear evidence to the contrary, feigned an inability to produce records without explanation or merit, and asserted unjustified and boilerplate exemptions.

In early 2021, OCDA adopted a blanket policy of refusing to extract and produce *any* electronically stored prosecutorial data in response to PRA requests. OCDA thus began systematically denying access to prosecutorial data that, in the weeks and months prior, it had readily disclosed. At the same time, OCDA refused to produce various policies, training materials and communications, relying on overbroad exemptions as a basis for nondisclosure.

A prosecutor may not flout legal obligations to provide the public with vital information about prosecutorial practices. Nor may he shroud his office in secrecy to thwart accountability. OCDA's refusal to provide the requested records violates the PRA and the California Constitution. OCDA's actions also limit the implementation of the Racial Justice Act ("RJA"), which is intended "to eliminate racial bias from California's criminal justice system." (*See* AB 2542 Criminal Procedure: Discrimination, Stats. 2020, Ch. 317, § 2(i); AB 256 Criminal Procedure: Discrimination, Stats. 2022, Ch. 739; *see also* Pen. Code, §§ 745, 1473, 1473.7.) OCDA's failure to comply with its legal obligations harms Petitioners and the public.

Absent the relief requested, Petitioners have no plain, speedy, or adequate remedy at law.

FACTS

OCDA failed to comply with its PRA obligations when responding to the five requests at the core of this lawsuit—refusing to produce any prosecutorial data in response to four PRA requests, and asserting overbroad and unsupported exemptions in response to a fifth request for

policy and training materials. Evidence drawn from approximately thirty other requests produced by OCDA—and an internal OCDA email—show that OCDA's refusal to produce prosecutorial data is systemic. In late February 2021, the agency changed its policy and began refusing to extract and produce electronically stored prosecutorial data in response to PRA requests, where it previously routinely provided such records. OCDA documents show that, subsequent to this policy change, OCDA extracted and produced *no* prosecutorial data in response to *any* PRA request—whether made by journalists, criminal defendants, academics, or the general public.

A. Petitioners' Requests for Prosecutorial Data

Petitioners submitted four separate requests for prosecutorial data over a sixteen-month period between early-2021 and mid-2022. OCDA refused to produce *any* responsive data. It asserted, consistently, that the requests sought data in a form not currently stored in OCDA's system and thus were records that did not exist, and, in some cases, that the requests were unduly burdensome. OCDA adopted this position despite having previously produced the same or substantially similar data in response to previous PRA requests.

1. ACLU of Northern California's February 4, 2021 Request

On February 4, 2021, ACLU of Northern California requested that OCDA produce certain prosecution data for the years 2019 and 2020. OCDA had previously provided the same data for the years 2017 and 2018 in response to earlier requests. (Declaration of Emi MacLean ["MacLean Dec."] ¶¶ 2, 4; Ex. A.[1]) OCDA refused to produce any responsive prosecution data, asserting on February 28, 2021 that the request was "overbroad and unduly burdensome" and "call[ed] for a compilation of information not existing" within OCDA. (MacLean Dec. ¶ 3; Ex. B at p. 2.)

2. ACLU of Southern California's September 27, 2021 Request

On September 27, 2021, ACLU of Southern California requested that OCDA produce data related to sex work prosecutions. (Declaration of Minouche Kandel ["Kandel Dec."] ¶ 2; Ex. C at

[1] References to Exhibits A through HH relate to the exhibits filed in support of the Verified Petition for a Writ of Mandate on October 28, 2022. Petitioners/Plaintiffs verify these exhibits again here in the Declarations of Emi MacLean, Minouche Kandel, and Sean Garcia-Leys, filed concurrently herewith. References to Exhibits II to PP refer to new exhibits also filed concurrently herewith, and verified in the MacLean and Garcia-Leys Declarations.

p. 1.) OCDA refused to disclose any data, asserting that it lacked responsive records due to the failure of its "Case Management System . . . [to] maintain records in the format requested." (Kandel Dec. ¶ 3; Ex. D at pp. 1) OCDA persisted in its denial notwithstanding that ACLU of Southern California explained that OCDA was unique among Districts Attorney in its refusal to produce the requested records. (Kandel Dec. ¶¶ 5-9; Ex. E-I.) OCDA refused requests to meet and confer and closed the request over objection. (Kandel Dec. ¶¶ 5-9; Ex. E-I.)

3. ACLU of Northern California's February 18, 2022 Request

On February 18, 2022, the ACLU of Northern California requested that OCDA produce certain prosecution data from 2015 to the present. (MacLean Dec. ¶ 5; Ex. J. *See* Exs. K-P.) OCDA refused to produce any responsive records, asserting that the request "call[ed] for a compilation of information not existing" within the OCDA's office and that OCDA therefore had no disclosure obligation. (MacLean Dec. ¶ 7, 9, 11; Exs. L, N, P at p. 3.) OCDA also asserted that the request was "overbroad and unduly burdensome." (Ex. L at p. 3.)

4. Chicanxs Unidxs' July 8, 2022 Request

On July 8, 2022, Chicanxs Unidxs requested that OCDA produce prosecution data from 2000 to the present. (Declaration of Sean Garcia-Leys ["Garcia-Leys Dec."] ¶ 2; Ex. Q.) Chicanxs Unidxs attached a copy of records that OCDA had previously disclosed, which confirmed that OCDA possessed the requested data. (Garcia-Leys Dec. ¶¶ 3-4; Ex. Q.) OCDA refused, however, to produce any records, asserting that its case management system "does not maintain records in the format requested," and that the request thus called for "a compilation of information . . . that does not exist." (Garcia-Leys Dec. ¶ 5; Ex. R at p. 2.) OCDA further objected on the ground of undue burden. (Ex. R at p. 2.) Chicanxs Unidxs thereafter sought assistance narrowing the request, but OCDA only reiterated its denial and recommended that Chicanxs Unidxs seek data from the California Department of Justice instead. (Garcia-Leys Dec. ¶¶ 6-8; Ex. U at p. 1.)

B. Request for Policies and Training Materials by ACLU of Northern California

On July 23, 2021, the ACLU of Northern California separately requested that OCDA produce policies, training materials, and other records related to the implementation of the RJA. (MacLean Dec. ¶ 12; Ex. V.) In response, OCDA produced fewer than 50 records, slowly over

fifteen months. (MacLean Dec. ¶¶ 9, 11, 13-23; Exs. N, P, W-FF, II.) OCDA refused to disclose large quantities of the requested records, claiming broad and unsupported exemptions. OCDA asserted that it withheld records on the grounds of deliberative process privilege, attorney work product, or copyright; or because the request was unduly burdensome. (MacLean Dec. ¶¶ 9-11, 14.) However, OCDA provided no specificity as to the records withheld, which exemptions applied to which records, or the requisite justification for the withholding. (*Ibid*.; Ex. X.) OCDA also refused to justify numerous redactions. (MacLean Dec. ¶¶ 11, 14, 18, 20, 23; Exs. M, N, P, II.)

C. OCDA's General Policy of Refusing to Produce Prosecutorial Data

In late February 2021, immediately after the RJA took effect, OCDA began to systematically refuse production of *any* prosecutorial data requested pursuant to the PRA. OCDA rebuffed all requestors seeking records necessary for prosecutorial oversight—including journalists, criminal defendants, academics, and the public. (See MacLean Dec. ¶¶ 24-58; Exs. LL, MM.)

On March 2, 2021, an OCDA employee confirmed this change. In an email, she relayed her instructions from the OCDA Public Information Officer: "[G]oing forward we will not prepare records that are not already in existence in response to a Public Records Act request. This applies and includes data extraction requests[.]" (Ex. LL; MacLean Dec. ¶ 25.)

This was a dramatic about-face from past practice. (Compare Ex. OO [Sept. 2020 response in which OCDA produced extensive prosecutorial data] with Ex. B [Feb. 28, 2021 response in which OCDA refused to disclose any prosecutorial data]. *See, e.g.*, MacLean Dec. ¶¶ 2-4.) One week prior to this policy change, OCDA had produced a nearly 400-page spreadsheet of extracted prosecutorial data in response to a request from the Los Angeles Times. (Ex. MM at pp. 2-5; MacLean Dec. ¶ 28.) Separately, in June 2021, a journalist sought to renew a PRA request that he had made in 2018, and access updated data. (Ex. MM at pp. 8-12; MacLean Dec. ¶ 30.) In response, OCDA issued a blanket denial, asserting that its previous disclosure was a mere act of good will rather than legal obligation. (Ex. MM at p. 13-14.)

OCDA has confirmed to Petitioners that it received 34 requests for prosecutorial data between January 1, 2021 and December 2022, including the four in the instant litigation. (Ex. JJ-MM; MacLean Dec. ¶¶ 24-27.) Of these 34 requests, OCDA only produced extracted prosecutorial

data on February 21, 2021 in response to the request from the LA Times.[2] For all subsequent requests, OCDA relied on the same arguments—that such requests would require OCDA to create records that did not exist. (*See, e.g.*, Ex. MM & MacLean Dec. ⁋⁋ 27, 34 [the "request calls for a compilation of information not existing within the Orange County District Attorney's Office" and the OCDA "case management system . . . does not maintain records in the format requested so [they] are unable to conduct a reasonable search for the requested record"], 29-58.)

D. Importance of Prosecutorial Oversight in Light of OCDA's History of Prosecutorial Misconduct and Racially Discriminatory Enforcement

The five information requests by Petitioners at issue in this case all seek greater transparency and accountability at OCDA, as well as information relevant to the implementation of the RJA, which is intended to end racially disparate charging practices. The need for transparency, accountability, and oversight at OCDA is particularly salient given OCDA's history of prosecutorial misconduct, disparate enforcement practices, and racial bias at the highest level, as well as the Office's deficient information management systems.

OCDA's racially disparate charging practices are well-documented. Accountability efforts, however, have been stymied by OCDA's lack of transparency. For instance, a report by the ACLU California Affiliates concerning the OCDA's charging practices found that Black people were substantially overrepresented among people criminally charged, that OCDA was more likely to charge Black and Latinx people with felonies and sentencing enhancements than white people, and that OCDA was less likely to offer Black and Latinx people diversion as an alternative to incarceration. The report relied on 2017 and 2018 data produced by OCDA. But when the ACLU California Affiliates sought updated data for the years since Spitzer took office, OCDA refused to provide the data.[3] (MacLean Dec. ⁋⁋ 2-4.) A court has also found that District Attorney Spitzer personally violated the RJA, making him "the first elected prosecutor in California found to have violated [this] law

[2] OCDA included limited data in three response letters, *see* MacLean Dec. ⁋⁋ 51, 52, 57, and in one instance, produced responsive criminal case records. *See* MacLean Dec. ⁋ 58. But OCDA refused to extract and produce any prosecutorial data after February 22, 2021. *See* MacLean Dec. ⁋ 27.

[3] *See, e.g.*, ACLU of Northern California, "In(Justice) in Orange County: A Case for Change and Accountability," Feb. 2022, *at* https://tinyurl.com/InjusticeInOrangeCounty.

against showing racial bias toward defendants."[4] Yet Petitioners' attempts to advocate for a robust implementation of the RJA are hamstrung by the absence of current data on racial disparities, and policies and training materials. Meanwhile OCDA has responded to criticism regarding its policies and practices only with unsupported counterattacks.[5]

Moreover, the U.S. Department of Justice has found that there are gaps in OCDA's information management which cause "OCDA . . . to struggle to identify and maintain its case materials" and "manage, oversee, and audit its own performance."[6] Shoddy information management can serve to limit meaningful oversight, both internally and from the public. Due to OCDA's actions, there is currently an information vacuum about OCDA's prosecutorial practices.

ARGUMENT

The PRA and California Constitution require prompt disclosure of all non-exempt public records. Despite OCDA's mandatory, non-discretionary duties to produce public records, the District Attorney has flouted his obligations and refused Petitioners' requests for information of heightened public importance.

A. The PRA and Constitution Require Prompt Disclosure of Nonexempt Public Records.

The PRA and the California Constitution create a presumptive right of access to public records. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-17.) Under the PRA, "access to information concerning the conduct of the people's business"—business conducted by public agencies on behalf of the people—is a "fundamental and necessary right of every person in this state." (Gov. Code, § 7921.000.) The PRA evinces "a strong policy in favor of disclosure of public records." (*California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 831.) The

[4] The ruling followed the disclosure of racist remarks made by District Attorney Spitzer in an OCDA strategy session about whether prosecutors should seek the death sentence for a Black man. Nick Gerda, "Judge Finds OC DA Todd Spitzer Violated Racial Bias Law – Could Be First in State for an Elected DA," Voice of OC, June 6, 2022, https://tinyurl.com/SpitzerViolatedRacialBiasLaw.

[5] *See, e.g.*, Sean Emery, "Civil rights groups call for state AG investigation of OCDA's office after Todd Spitzer's racial comments," Orange County Register, March 11, 2022, https://tinyurl.com/GroupsCallForDAInvestigation.

[6] *See* U.S. Department of Justice Civil Rights Division, Investigation of the Orange County District Attorney's Office and the Orange County Sheriff's Department, Oct. 13, 2022, pp. 49-59, https://www.justice.gov/opa/press-release/file/1542116/download.

Constitution further requires that any "statute, court rule, or other authority," such as the PRA, "be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (*See also* Cal. Const., art. I, § 3, subd. (b), par. (2).)

The PRA provides that a person may seek injunctive or declaratory relief or seek a writ of mandate to enforce the right to access any nonexempt public record; and that a court shall order disclosure where records are being improperly withheld. (Gov. Code, §§ 7923.000, 7923.100. *See also* Code Civ. Proc., §§ 1085 *et seq*.) The PRA requires courts to proceed "with the object of securing a decision as to these matters at the earliest possible time." (*Gov Code,* § 7923.005.)

B. The Requested Prosecutorial Data and Policies Are of Heightened Public Importance.

Public disclosure of prosecutorial records is of heightened importance. (*See Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 752 ["it is inconceivable to us that any countervailing interest that the District Attorney could assert outweighs the magnitude of the public's interest" in the disclosure of certain non-privileged prosecution records].) Here, Petitioners seek information essential to oversight of the District Attorney and records critical to implementation of the RJA, including data and policies concerning racial bias in the criminal legal system.

The Legislature has identified the disclosure of data regarding racial disparities in prosecutions as particularly important among prosecution records. 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." (Penal Code, § 745(h)(1).) In recognizing that the identification of racial and ethnic disparities may depend on statistical evidence or aggregate data, the Legislature has presumed public access to such information, as well as confirmed that access to this information is required to maintain the "integrity of the judicial system." (AB 2542, *supra*, Stats. 2020, Ch. 317, § 2(i).) The effective implementation of the RJA and the realization of its legislative intent require that the public be able to access data and policies concerning whether and how California prosecutes cases, and whether such prosecutions are tainted by bias. Petitioners/Requesters seek exactly these records.

Last year, California also enacted the Justice Data Accountability and Transparency Act ("JDATA"), again identifying records of criminal prosecutions as particularly important. (AB 2418 Crimes: Justice Data Accountability and Transparency Act, Stats. 2022, Ch. 787 [making criminal prosecution data publicly available "is an important state interest"].) AB 2418 will require prosecutors to collect and transmit various pieces of data for all criminal cases to the California Department of Justice for publication. Many of the data elements identified by the Legislature for uniform public disclosure in AB 2418—including the case number and the date of the crime and arrest, data about the charges, data about diversion and collaborative court programs, and data about the defendant charged—overlap with the data requested by Petitioners. (Exs. A, C, J, Q.) The recent passage of this act affirms the Legislature's recognition that the prosecutorial data at issue is a public record, of public importance, and appropriate for public disclosure.

C. OCDA's Conduct Violates the PRA and the California Constitution.

For each of the five requests here, the District Attorney has failed to comply with the PRA's disclosure obligations. Petitioners' requests seek information essential to the oversight of public prosecutions. By stonewalling records requests; asserting improper, unsupported and boilerplate exemptions; and selectively—as well as belatedly—producing limited records, OCDA has denied the fundamental right of Petitioners and the public to information.

1. OCDA's Refusal to Produce Electronic Data Violates the PRA and Constitution.

All four of the requests for prosecutorial data at issue involve requests for information that OCDA stores in its electronic data systems. (Exs. A, C, J, Q.) Before OCDA's change in policy in early 2021, OCDA routinely produced substantially similar information. (MacLean Dec. ¶¶ 2-4; Kandel Dec. ¶¶ 5-6; Garcia-Leys Dec. ¶¶ 2-4; Exs. Q, NN-OO, PP, MM at pp. 2-5, 8-14.) However, in response to these requests, and all other prosecutorial data requests since the OCDA change in policy in late February 2021, OCDA has repeatedly declined to produce any prosecutorial data and asserted that production would require "compilation of information not existing" within the District Attorney's Office. (*See, e.g.*, MacLean Dec. ¶¶ 3, 7, 24-58; Exs. B, D, R, LL, MM.) This assertion wrongly equates the extraction of data to the creation of a new record. Such a position misconstrues the PRA's statutory scheme and is inconsistent with OCDA's

obligations. (Gov. Code, § 7922.570, subd. (a) [requiring agencies to produce electronic "information that constitutes an identifiable public record"].)

OCDA's policy of refusing to extract and produce electronically stored records directly contradicts decisional authority interpreting the PRA. (See *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 502-503.) The PRA commands 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.'" (*Id.* at p. 503 [quoting *Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 669].) Non-exempt electronic records must be made available even when "the information must first be retrieved and then exported into a separate record." (*Id.* at p. 502.) Responding to a request for a copy of electronically stored information is not the creation of a "new" record unless it requires collecting and analyzing new information. (*See id.* at p. 503 ["segregating and extracting data is a far cry from requiring public agencies to undertake the extensive 'manipulation or restructuring of the substantive content of a record'"] [quoting *Sander, supra*, 26 Cal.App.5th at p. 669].)

Because Petitioners' data requests concern information already collected by OCDA and stored in its case management system, none ask for new records. If the mere extraction of data from an electronic system constituted the creation of a new record, then no agency would ever be obliged to provide electronic records. (*Cf.* Gov. Code, § 7922.570, subd. (a) ["public record … in an electronic format shall . . . [be made] available in an electronic format . . . ."].) OCDA relied on *Sander v. State Bar of California* (2014) 58 Cal.4th 300, for the proposition that the PRA does not compel disclosure here. (*See, e.g.*, Exs. B at p. 2, D at pp. 1-2.) But *Sander* actually *supports* compelling disclosure as the Supreme Court recognized in that case that state agencies are obliged to disclose "rough data." (*Sander, supra*, 58 Cal.4th at pp. 324–25 [requiring access to "information in the database" used by the State Bar if privacy concerns could be managed].)

2. OCDA's Assertion of Undue Burden Cannot Be Justified.

OCDA improperly asserted that it need not search for and produce the requested records because doing so would be unduly burdensome. (Exs. B at p. 2, L at p. 3, R at p. 2, X at pp. 8-9.)

First, the PRA recognizes that some burden is appropriate as access to information about

governmental activities is of fundamental importance to democracy. Indeed, courts have consistently held that "an agency may be forced to bear a tangible burden in complying with the act absent legislative direction to the contrary." (*Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 614-615.) The question is whether OCDA's compliance with Petitioners' requests for information would be *unduly* burdensome. (*State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190, fn.14 ["There is nothing in the Public Records Act to suggest that a records request must impose *no* burden on the government agency."].)

Second, the heightened public interest in prosecutorial data justifies the burden of producing it. In *Weaver*, for example, the California Court of Appeal concluded that the expense of generating a list of death penalty cases potentially showing selective prosecution "pale[d] in comparison" to the interests of public disclosure. (*Weaver*, *supra*, 224 Cal.App.4th at p.752; *see also ACLU of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 71 [heightened public interest justifies disclosure].) Here, the information requested is essential to understanding how the OCDA is using its extraordinary authority to prosecute criminal cases; and to identifying racial disparities in charging decisions and implementing the RJA. OCDA's assertion that disclosure of the requested records would be unduly burdensome collapses when compared to the information's public importance. (*See Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 931 [recognizing that the Legislature chose to enact legislation favoring information disclosure "despite its awareness that the [agency's] compliance would entail significant expense"].)

Third, OCDA's conclusory assertions of undue burden lack the requisite detail to satisfy its obligations. Without "meaningful detail" about the "public fiscal and administrative concerns over the expense and inconvenience of responding" to records requests, an agency cannot justify that the public interest in nondisclosure "clearly outweigh[s] the public interest in disclosure." (*Becerra, supra*, 44 Cal.App.5th at p. 930 [rejecting as insufficiently lacking in "meaningful detail" an agency's estimate that producing records would take nearly 4,500 attorney hours"].)[7]

[7] With respect to the degree of burden, OCDA's responses restate elements of the request and declare them unreasonable, or generally describe the work required to produce the requested data. OCDA never provides any details as to the burden these requests create. (*See* Ex. R at p. 2 ["any

Fourth, OCDA's argument that the requests are unduly burdensome rings hollow where they have previously provided nearly identical prosecutorial data before changing their policy. (Exs. A-B & MacLean Dec. ¶¶ 2-4 [ACLU of Northern California seeking updated prosecutorial data which OCDA previously provided]; Ex. F & Kandel Dec. ¶¶ 5-6; Exs. Q, S, U, NN-PP & Garcia-Leys Dec. ¶¶ 2-5 [Chicanxs Unidxs requesting prosecutorial data similar to that previously provided]; Exs. LL, MM at pp. 2-5, 8-14 & MacLean Dec. ¶¶ 28, 30 [OCDA produced substantial prosecutorial data to journalists before the change in policy, and refused to do so after].) Thus, OCDA's past practice has demonstrated that production is *not* unduly burdensome.

Lastly, a government agency must offer an opportunity to cure any asserted overbreadth or undue burden. (Gov. Code, § 7922.600.) An agency has the duty to assist requesters because of the agency's superior knowledge about the contents of its records. (*Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1417.) OCDA failed to do so here despite follow-up requests from Petitioners. (*See, e.g.*, Exs. S-U; Garcia-Leys Dec. ¶¶ 6-8.)

3. OCDA's Boilerplate and Overbroad Exemptions Are Improper and Unsupported.

The PRA imposes on agencies a non-discretionary obligation to disclose public records unless "exempt from disclosure by express provisions of law" or there is an overwhelming public interest justification in withholding the requested record. (Gov. Code, § 7922.530, subd. (a); *id.*, § 7922.000.) The burden for demonstrating that a record is exempt or otherwise properly withheld is on the agency withholding a record. (Gov. Code, § 7922.000, ; *Getz v. Superior Court* (2021) 72 Cal.App.5th 637, 651, *rehg. den.*, Mar. 16, 2022.) OCDA has failed to meet this burden in response to the ACLU of Northern California's request for policies, training materials and other information. First, OCDA asserted exemptions generally without identifying whether it was indeed withholding certain records, what records it was withholding, and what justification it was asserting for any withholding. Second, the exemptions asserted cannot be supported in law. Third, OCDA has not complied with the PRA's obligation for timely disclosure of responsive records.

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compilation of the requested data is unreasonable in light of the volume of the requested data, programming needed to extract it and the public interested served by disclosure of the records"]; Ex. X at pp. 8-9 [a review of training materials would require "time, expense and resources including attorneys and staff" to review and redact the materials].) This is clearly insufficient.

a. OCDA's Boilerplate Exemptions Are Insufficient.

The government bears "the burden of affirmatively showing that withheld materials need not be disclosed." (*ACLU of Northern California, supra*, 202 Cal.App.4th at p. 82; *see also* Gov. Code, § 7922.000.) OCDA has not met its burden. OCDA systematically failed to provide specificity as to the records withheld, which exemptions applied to which records, or the requisite justification for the withholding; and repeatedly issued boilerplate exemptions contrary to law.

An agency is required to provide "'adequate specificity to assure proper justification'" for withholding. (*ACLU of Northern California, supra*, 202 Cal.App.4th at p. 82 [quoting *Vaughn v. Rosen* (D.C. Cir. 1973) 484 F.2d 820, 827].) Such justification requires more than "[c]onclusory or boilerplate assertions that merely recite statutory standards." (*Id.* at p. 83.) "Because the agency has full knowledge of the contents of the withheld records and the requester has only the agency's . . . descriptions of the documents, its affidavits must be specific enough to give the requester a meaningful opportunity to contest the withholding of the documents and the court to determine whether the exemption applies." (*Ibid.* [internal citations and quotations omitted].)

OCDA has failed to demonstrate either that the requested records fall under a specific legal exemption or that the public interest served by denying disclosure "clearly outweighs" the public interest that would be served by its disclosure. (Gov. Code, § 7922.000) For instance, OCDA sought to justify withholding an expansive and undefined quantity of policies and RJA-related communications with the mere assertion that they are "exempt from disclosure under the attorney product privilege and the deliberative process privilege." (Ex. X at pp. 4-8, 10-11; *see also* Kandel Dec. ¶ 4; MacLean Dec. ¶ 14, 27; Ex. HH.) "[B]are conclusion[s] that information is not responsive to a request" or "that information is exempt" do not satisfy an agency's obligations. (*ACLU of Northern California, supra*, 202 Cal.App.4th at p. 82; *see Getz*, *supra*, 72 Cal.App.5th at p. 654 ["more than vague suggestions and statutory references are needed to invoke a privilege"].)

Further, OCDA has repeatedly invoked boilerplate exemptions impermissible under the PRA. Numerous OCDA responses "claim[], enforce[], and appl[y] all applicable exemptions, privileges, and proscriptions against public disclosure of records, including but not limited to, those listed in Article 2 of the Government Code, Title 1, Division 7, Chapter 3.5, the California

Evidence and Penal Codes, and the Federal Rules of Evidence." (*See, e.g.*, Exs. B at p. 3; D at p. 3.) This statement provides no specific basis for withholding *any* individual record, much less the requisite detailed justification. Exemptions must be narrowly construed, and blanket exemptions are never appropriate. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617, 629; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321.)

b. OCDA's Asserted Exemptions Cannot Be Supported.

OCDA asserted that it could, or did, withhold certain records on the grounds of deliberative process privilege, attorney work product, or copyright. These asserted exemptions are improper.

First, OCDA's assertion of the attorney work product exemption as grounds for withholding policies, training materials, and RJA communications stretches the exemption beyond its breaking point. As courts have previously held, the "work-product rule does not extend to every written document generated by an attorney." (*Coastal States Gas Corp. v. U.S. Department of Energy* (D.C. Cir. 1980) 617 F.2d 854, 864].)[8] Here, the request was for public records that lay out general standards guiding OCDA's lawyers and are therefore disclosable. (*ACLU of Northern California v. United States Department 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]; *Judicial Watch, Inc. v. United States Department of Homeland Security* (D.D.C. 2013) 926 F.Supp.2d 121, 142–44 [ruling that memoranda communicating policies, guidelines, and "general standards" to government staff attorneys not protected by work-product privilege].)

Nor does the deliberative process privilege embodied in Government Code section 6255 support withholding the requested records (Gov. Code, § 7922.000) The California Supreme Court identified "the key question" in examining the applicability of this 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

[8] The PRA is modeled after the federal Freedom of Information Act ("FOIA") 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* (1991) 53 Cal.3d 1325, 1338 [quoting *ACLU of Northern California v. Deukmejian* (1982) 32 Cal.3d 440, 447].)

functions." (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342.) The privilege "does not justify nondisclosure of a document merely because it was the product of an agency's decision-making process." (*ACLU of Northern California, supra*, 202 Cal.App.4th at p. 76.) For, "if that were the case, the PRA would not require much of government agencies." (*Ibid.*) Policies, guidance documents, and training materials do not categorically "expose an agency's decision-making process," but rather articulate final decisions. (*Times Mirror Co., supra*, 53 Cal.3d at p. 1342.)

Lastly, OCDA asserted without specificity, or even certainty, that responsive training materials may also be "subject to the Federal/State Law Copyright Exemption (Gov. Code, § 7927.705; Civ. Code, § 980.)" (Ex. X.) This response constitutes an improper blanket exemption.

4. OCDA's Delays Violate the PRA.

The PRA codifies specific requirements and deadlines that agencies must observe upon receipt of a public records request. (Gov. Code, § 7920.000 *et seq.*) It requires that, in response to a request, agencies "make the records promptly available," so long as the records are not expressly exempt. (Gov. Code, § 7922.530, subd. (a).) Delay is permitted "only to the extent reasonably necessary to the proper processing of the particular request." (Gov. Code, § 7922.535)

Here, in response to the ACLU of Northern California's policy request, OCDA produced certain policy, training, and communications records on a rolling basis, sporadically over fifteen months, without providing either justification for the prolonged delays or any estimated timeline for the completion of production. (*See, e.g.*, MacLean Dec. ¶ 22.) More than one year after this request, OCDA purports that "[r]ecords are being reviewed" and will be produced "on a continuous rolling basis until complete." (Ex. N at pp. 1-2.) But OCDA provides no explanation as to the volume of records remaining to be reviewed or the timeline for when production might be complete. This dribble of information, coupled with OCDA's extensive and unjustified delays, is inconsistent with OCDA's obligations pursuant to the PRA.

5. OCDA Did Not and Cannot Support Redactions to Policy and Training Records.

An agency must segregate exempt from nonexempt material and disclose "[a]ny reasonably segregable portion of a record." (Gov. Code, § 7922.525, subd. (b).) If an agency makes a partial denial of a request for records, it must issue that denial in writing and justify the partial

withholding. (Gov. Code, § 7922.540 , subd. (a).) "[B]are conclusions" that redactions are necessary do not suffice. (*ACLU of Northern California, supra*, 202 Cal.App.4th at p. 82.) Here, OCDA produced redacted training documents, case summaries, and RJA Team Agendas. (MacLean Dec. ¶¶ 9, 13, 17, 23; Ex. O, X at p. 10, II.) OCDA provided only conclusory and general explanations for these redactions, *i.e.*, asserting on October 17, 2022 that "[r]ecords that have been produced already and any future records that may be produced have been and will be redacted to exclude attorney work product and records that are protected by the 'deliberative process' privilege.'" (Ex. P at p. 2. *See also* Ex. X at p. 10.) OCDA's redactions cannot be justified by the conclusory assertions provided.

D. Additional Judicial Remedies Can Be Used to Enforce the PRA.

This Court should declare that OCDA's blanket policy of refusing to produce electronically stored data in response to PRA requests is unlawful and issue an injunction requiring OCDA to publicly publish prosecutorial data. Taxpayers may sue for illegal expenditure of public funds under Code Civil Procedure section 526a to enforce the PRA. As the California Court of Appeal has observed, the "purpose of the CPRA is furthered, not obstructed, by citizen suits under . . . [section] 526a to enforce the CPRA's provisions." (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130.) OCDA's persistent pattern and practice of refusing to comply with its disclosure obligations—for the five PRA requests at issue here as well as dozens of other requests for prosecutorial data—constitutes not only a violation of the PRA, but also of Section 526a (Code Civ. Proc., §§ 526a.) Given the evidence presented of OCDA's efforts to withhold information of heightened public importance, a declaratory judgment and prospective relief are appropriate.

E. Petitioners are Entitled to Recover Their Attorneys' Fees and Costs

Because Petitioners have demonstrated that OCDA violated the PRA, they are entitled to an award of attorneys' fees and costs. (Gov. Code, § 7923.115, subd. (a)-(b); *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1391.)

CONCLUSION

For the foregoing reasons, this Court should grant the relief requested.

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Respectfully Submitted,

/s/ Emi MacLean

Emi MacLean
Chessie Thacher
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NOTHERN CALIFORNIA

Sean Garcia-Leys
PEACE AND JUSTICE LAW CENTER

Robert Ponce
Eva Bitran
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA

Attorneys for Petitioners/Plaintiffs