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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

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

ASSIGNED FOR ALL PURPOSES TO
HONORABLE WALTER SCHWARM

RELATED TO ROA NO. 53

**RESPONDENTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR JUDGMENT ON VERIFIED WRIT
OF MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

**[Declaration of Johanna Kim and Request
for Judicial Notice filed concurrently
herewith]**

DATE: June 13, 2023
TIME: 9:00 a.m.
DEPT: C32

Action Filed: October 31, 2022
Trial Date: June 13, 2023

Respondents/Defendants TODD SPITZER, and COUNTY OF ORANGE ("Respondents"),
hereby submit their Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for
Judgment on Verified Writ of Mandate and Complaint for Declaratory and Injunctive Relief.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Petitioner-Plaintiffs (“Petitioners”) seek, by way of the California Public Records Act (“CPRA”), local summary criminal history information in violation of Penal Code section 13300. In addition, their lawsuit is a thinly-veiled attempt to circumvent the statute¹ that gives the Orange County District Attorney (“OCDA”) and other local prosecutorial agencies until **March 1, 2027**, to compile and release many of the same prosecutorial data elements at issue here. Not only are Petitioners aware of this timeline, but Petitioners ACLU of Southern California and ACLU of Northern California (“ACLU Petitioners”), co-sponsored the very bill that gave rise to the statute.

Moreover, Petitioners seek an order from this Court that would require OCDA to produce policy and training records that are exempt from disclosure based upon numerous other privileges under the CPRA, including but not limited to the deliberative process privilege, the attorney work product doctrine, and the investigatory file exemption. As discussed below, not only has OCDA justified these exemptions, but it has also properly redacted the materials disclosed and done so in a timely manner. Indeed, the entire petition and complaint should be dismissed, with prejudice, as to Respondent County of Orange as Petitioners have failed to allege a single act or omission on the part of the County. Finally, Petitioners’ request for attorneys’ fees is premature. Accordingly, Petitioners’ Motion for Judgment should be denied in its entirety, and judgment should be entered against Petitioners and in favor of Respondents OCDA and the County of Orange.

II. STATEMENT OF FACTS**A. Prosecutorial Data****1. Petitioners’ Requests and OCDA’s Responses**

In essence, there are four requests for prosecutorial data at issue in this case: (1) ACLU of Northern California’s February 4, 2021 Request; (2) ACLU of Southern California’s September 27, 2021 Request; (3) ACLU of Northern California’s February 18, 2022 Request; (4) Chicanxs Unidxs’
//

¹ Penal Code section 13370, “The Justice Data Accountability and Transparency Act” (“JDATA”) went into effect January 1, 2023.

1 July 8, 2022 Request.² Each of these requests sought prosecutorial data elements that largely overlap
2 with the 54 data elements specified in Penal Code section 13370. (Pen. Code § 13370(e); see also,
3 Declaration of Johanna Kim [“Kim Decl.”], ¶4; Petitioners’ Motion for Judgment [“Mot.”] at 16:6-9.)
4 These CPRA requests can be broken down into two general categories, which will be addressed
5 separately—prosecutorial data and training materials.

6 OCDA responded in a timely manner to each request. (Kim Decl., ¶5.) In several of these
7 instances, OCDA provided either a substantive response or referred the requestors to data that could be
8 obtained from other sources. (*Ibid.*) For the remainder of the requests for prosecutorial data, however,
9 OCDA asserted that the records were exempt from disclosure based on several objections, including not
10 limited to Government Code sections 7927.705 and 7922.000.^{3 4} While OCDA set forth the reasons for
11 its denials, it reserved the right to present additional theories and authority for non-disclosure in
12 response to each request. (Pet., Exhs. B, D, N, R, U, X, CC.) Finally, while OCDA may have produced
13 certain *types* of prosecutorial data prior to 2019, it has never produced the specific data sought by
14 Petitioners in this case, in the format requested. (Kim Decl., ¶6.)

15 2. Assembly Bill 2418

16 On February 17, 2022, Assembly Bill 2418, the “Justice Data Accountability and Transparency
17

18 ² Petitioners also make similar allegations on behalf of two non-parties, Abby Taylor of the Orange
19 County Public Defender’s office and Lee Stonum of the Alternate Defender’s office, who made CPRA requests
20 for prosecutorial data on May 10, 2021, and June 10, 2022, respectively. (See Pet. at pp. 20-21; Exhs. GG, HH.)
21 However, Petitioners lack taxpayer standing to bring such allegations as they have not established—by mere
22 assertion of two isolated CPRA requests by non-parties over the course of several years—an actionable policy or
23 practice. (*Waste Mgmt. of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240
24 [“General allegations, innuendo, and legal conclusions are not sufficient” for a taxpayer action. Instead, a
25 “plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc
26 is occurring or will occur.”]; see also, *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130-
27 131 [taxpayer standing requires allegations that public funds are being spent to enforce *specific* policies and
28 practices that violated the CPRA].)

25 ³ The CPRA Recodification Act of 2021 went into effect on January 1, 2023, after the present
26 lawsuit was filed. The Act renumbered the CPRA without substantive change. For consistency, the new numbers
27 will be used herein, regardless of the old numbering system contained in the CPRA requests at issue in this case,
28 or as set forth in the Petition filed with this Court.

27 ⁴ OCDA also had specific additional objections to subsets of these requests, for example, an
28 objection to the disclosure of criminal records relating to minors to the extent a court order would be required
pursuant to Welfare & Institutions Code section 827 (Gov. Code, §7927.705). (Pet., Exh. B.)

1 Act” (“AB 2418” or “JDATA”) was introduced by Assemblymember Ash Kalra. (Request for Judicial
2 Notice [“RJN”], filed concurrently herewith, Exh. A.) It was signed by Governor Gavin Newsom on
3 September 29, 2022, and recorded by the Secretary of State on that same day as Chapter 787 of the
4 Statutes of 2022. (*Ibid.*) It was ultimately codified as Penal Code section 13370. Significantly, AB
5 2418 was co-sponsored by the ACLU Petitioners in this case.⁵ (*Ibid.*)

6 According to the Third Reading Analysis prepared by the Office of Senate Floor, AB 2418
7 “requires, *according to specified timeframes*, state and local prosecution offices to collect and transmit
8 various data regarding criminal cases to the Department of Justice (DOJ), which is required to verify and
9 publish the data.” (*Ibid.* [emphasis added].) AB 2418’s provisions set timelines for completion of
10 various preparatory benchmarks prior to rollout. Perhaps most importantly, AB 2418 “[p]rovides that,
11 *beginning March 1, 2027*, every agency statewide shall collect every specified data element for cases in
12 which a decision to reject charges or to initiate criminal proceedings by way of complaint or indictment
13 has been made by that agency from that date forward.” (*Ibid.* [emphasis added].) Local agencies shall
14 *begin* transmitting their required data elements to the department on a quarterly basis from June 1, 2027,
15 until June 1, 2028, after which time the data elements shall be transmitted on a monthly basis. (*Ibid.*)
16 The information in the prescribed 54 discrete data elements shall be public records for the purposes of
17 the CPRA with personal information redacted. Finally, the Senate Floor Amendments of August 25,
18 2022, expressly made the operation of the bill’s provisions contingent on an adequate appropriation by
19 the Legislature. (*Ibid.*)

20 AB 2418 was required to make legislative findings consistent with the requirements of Article 1,
21 section 3, of the California Constitution, which mandates that ‘a statute that limits the right of access to .
22 . . the writings of public officials and agencies be adopted with findings demonstrating the interest
23 protected by the limitation and the need for protecting that interest.’ The Legislature acknowledged:
24 “The provisions set forth in Section 1 further the need to protect the privacy of individuals arrested for
25 and prosecuted for crimes while balancing the public’s right to access.” (*Ibid.*)

26
27 ⁵ AB 2418 was sponsored by ACLU California Action, which is a 501(c)(4) organization jointly
28 formed by the three ACLU affiliates in California: ACLU of Northern California, ACLU of Southern California,
and ACLU of San Diego and Imperial Counties. (*Ibid.*)

1 The bill provided that the DOJ would act as a single data aggregator and repository, “providing
2 the technological resources and aggregation. . . [to] allow offices that lack adequate technology or
3 resources to comply with the mandate.” (*Ibid.*) The Senate Appropriations Committee noted potentially
4 reimbursable costs “possibly in the *tens of millions* for prosecuting agencies to provide detailed
5 information to the DOJ regarding all misdemeanor and felony prosecutions” and also acknowledged the
6 “*gargantuan effort* that is sure to take years, maybe decades, and a significant amount of labor and
7 financial resources” to collect, transmit, verify and publish this data. (*Ibid.*[emphasis added].)

8 While some agencies may already have the processes and infrastructure in
9 place to collect and transmit these elements, *most agencies subject to this*
10 *bill likely do not*. Many agencies in smaller jurisdictions still use paper files
11 to record case information and only digitally record a fraction of the data
12 elements required under the bill. Even in larger jurisdictions, many agencies
13 use a hybrid of paper records and computer systems, which may be outdated
14 and incompatible with the DOJ’s data processing technology. It should also
15 be noted that several of the data elements may not currently be collected or
16 recorded by agencies at all, and are instead primarily recorded by the courts.
17 (*Ibid.* [emphasis added].)

18 In fact, the ACLU sent a support letter to Assemblymember Kalra on June 21, 2022, expressly
19 acknowledging that “district attorneys are not *currently* required to report [this] public data[.]” (*Ibid.*
20 [emphasis added].)

21 **B. Training Materials**

22 **1. Petitioners’ Requests and OCDA’s Responses**

23 In conjunction with its July 23, 2021, request for prosecutorial data, the ACLU of Northern
24 California also requested policies, training materials, and other records related to the implementation of
25 the Racial Justice Act (“RJA”) (hereinafter “training materials”). (Kim Decl., ¶7; Pet., Exh. V.) In
26 response, OCDA produced a significant number of records that were carefully redacted based on
27 responsiveness and various exemptions, including but not limited to the deliberative process privilege,
28 undue burden, attorney work product, and the investigatory file exemption/privilege. (Kim Decl., ¶7,
Exh. 1; Pet., Exhs. O, P.)

29 **2. Claimed Exemptions**

30 **a. *Deliberative Process***

OCDA redacted information protected by the deliberative process privilege from these training

1 materials, insofar as the information related to the thought processes of how attorneys ought to proceed
2 in a given circumstance. (Kim Decl., ¶7.) For example, the team meeting agendas contain reference to
3 litigation strategy and issues for attorneys to consider. Similarly, the training bulletins and alerts contain
4 reference to investigative and litigation strategy. The weekly reports were redacted mainly because they
5 contained references to other cases that were not responsive to the CPRA requests. The names, email
6 addresses, and phone numbers of staff who prepared the reports were redacted as well. (*Ibid.*; see also,
7 Kim Decl., Exh. 1.)

8 *b. Attorney Work Product*

9 OCDA redacted information from the training materials that was governed by the attorney work
10 product doctrine, consisting of attorney opinions and advice, personal impressions, legal research,
11 theories and conclusions. (Kim Decl., ¶9.) For example, the team meetings discuss litigation strategy,
12 the training bulletins discuss investigative and litigation strategy, and the PowerPoint presentations and
13 training handouts contain attorney advice on how to handle certain legal issues. (*Ibid.*)

14 *c. Miscellaneous Exemptions*

15 OCDA also redacted information based on the investigative file exemption (private and sensitive
16 information pertaining to victims as well as other information from investigative files) and copyrighted
17 materials from other agencies, as well as withheld records that would have been unduly burdensome to
18 produce. (Kim Decl., ¶¶10-12, Exh. 1.)

19 3. Timeliness of Response

20 OCDA provided a timely response to each of the above CPRA requests, producing the records
21 they had as soon as they became available on a rolling basis, only taking extensions as necessary to
22 continue their review and production. (Kim Decl., ¶13.) OCDA's Professional Responsibility and
23 Training Unit ("PRTU") was enlisted to assist in preparing the responses as the process of searching for
24 and compiling records was both labor intensive and time-consuming due to the volume of records
25 needed to be searched as well as the time frame requested. (Kim Decl., ¶14.) A team of attorneys and
26 paralegals from the PRTU scanned voluminous training materials and made the records searchable.
27 (*Ibid.*) Further, due to the voluminous nature of the request, it was not possible for the limited staff of
28 the PRTU to conduct a manual review, which necessitated making the training materials searchable by

Optical Character Recognition to conduct a preliminary search of the training materials for potentially responsive records. This process alone took months and was necessary before a search for responsive records could even be conducted. During this time, PRTU also lost some staff members who were available to work on this request due to medical issues and other office operation needs and this resulted in more time being needed to work on this request. (*Ibid.*) Following two separate reviews for responsiveness (first by PRTU and then by the lead attorney) the records were carefully redacted prior to production. (*Ibid.*)

III. ARGUMENT

A. **OCDA Does Not Have a Present Duty to Disclose Prosecutorial Data**

1. OCDA Has No Duty to Disclose Summary Criminal History Information Protected by Penal Code Section 13300⁶

The CPRA does not require an agency to release records “the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. (Gov. Code, § 7927.705.⁷) Penal Code section 13300, in turn, restricts access to “local summary criminal history information,” which is defined as “the master record of information compiled by any local criminal justice agency . . . pertaining to the identification and criminal history of any person, such as name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions,” etc.⁸ Here, the prosecutorial data that Petitioners seek is, by definition, “local summary criminal history information.” (Pen. Code, § 13300; Kim Decl., ¶2.) While “[t]he statutory restrictions on dissemination of the information do not affect

⁶ Petitioners devote a large portion of their brief to addressing the undue burden exemption as it relates to Government Code section 7922.000’s balancing test. However, this exemption becomes irrelevant in the face of the express statutory provisions of Penal Code section 13300, which are directly applicable to the prosecutorial data sought in this case. (See also, Gov. Code, § 7927.705.)

⁷ All further statutory references are to the Government Code unless otherwise indicated.

⁸ While OCDA did not expressly assert Penal Code section 13300 in response to the CPRA requests for prosecutorial data, it did nevertheless reserve all rights to assert additional theories and authority for non-disclosure. (Pet., Exhs. B, D, N, R, U, X, CC.) Moreover, the CPRA is modeled on the federal Freedom of Information Act, under which an agency does not waive exemptions by not raising them during the administrative process. (*Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 238; *Young v. C.I.A.* (1992) 972 F.2d 536, 538-539.)

1 any right of access to *individual* criminal offender record information authorized by any other law[.]"

2 including the CPRA, the data elements that Petitioners seek, individually and in the aggregate, are not

3 disclosable as discussed below. (*Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, 162-

4 163 [emphasis in original]; see also, Pen. Code, §§ 13300, 13302; 89 Ops.Cal.Atty.Gen. 204 (2006).)

5 Indeed, "there is a qualitative difference between obtaining information from a specific docket or on a

6 specified individual, and obtaining docket information on every person against whom criminal charges

7 are pending[.]" (*Westbrook, supra*, 27 Cal.App.4th at p. 165.) "It is the aggregate nature of the

8 information which makes it valuable to [the requestor]; it is that same quality which makes its

9 dissemination constitutionally dangerous." (*Ibid.*)

10 Moreover, in contrast to the CPRA, *nondisclosure* is the general rule under Penal Code section

11 13300, and *exceptions to nondisclosure* are to be construed narrowly. (*Westbrook, supra*, 27

12 Cal.App.4th at p. 164; see also, *Housing Authority v. Van de Kamp* (1990) 223 Cal.App.3d 109, 116

13 ["[W]e are mindful that under the statutory scheme set forth by the Legislature, nondisclosure of

14 criminal records is the general rule" and "exceptions are to be narrowly construed." "Because these

15 records contain extremely sensitive and private information, all doubts are resolved against

16 disclosure."].) In fact, because these records are "compiled without the consent of subjects and

17 disseminated without their knowledge," local prosecuting agencies have "a *duty* 'to resist attempts at

18 unauthorized disclosure.'" (*Westbrook, supra*, 27 Cal.App.4th pp. 165-166 [emphasis added])[quoting

19 *Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, 77].)

20 Penal Code section 13300(j) states that a "public prosecutor *may*" release local criminal history

21 information "if release of the information would enhance public safety, the interest of justice, or the

22 public's understanding of the justice system and the person making the request declares that the request

23 is made for a scholarly or journalistic purpose." (Emphasis added.) However, even assuming *arguendo*

24 that Petitioners had executed a declaration stating that their CPRA request was made "for a scholarly or

25 journalistic purpose" (they did not), the release of records under Penal Code section 13300(j) is

26 *permissive*, not mandatory, based on the statutory use of the term "*may*." (*California Correctional Peace*

27 *Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1143.)

28 Similarly, Penal Code section 13202(a) also permits a public prosecutor to release criminal

1 offender record information to “a public agency or bona fide research institution concerned with the
2 prevention or control of crime, the quality of criminal justice, or the custody or correction of offenders.”
3 However, there are no facts alleged here (let alone proven) that any of the Petitioners are public agencies
4 or “bona fide research institutions.” (See, e.g., Pet. at ¶¶9-12.) Further, as with Penal Code section
5 13300(j), Penal Code 13202 is permissive in nature. Indeed, the permissiveness of the statute is
6 confirmed by its legislative history, as the original language of the statute, first enacted in 1973, stated
7 that “[e]very public agency or research body . . . *shall* be provided with criminal record offender
8 information . . .” (Stats. 1973, c. 992 (A.B. 135), § 1 [emphasis added].) However, the statute was later
9 amended in 1979 to read that “[e]very public agency or research body . . . *may* be provided with criminal
10 record offender information.” This remains the current language of the statute.

11 In summary, publicly providing records from a criminal history database that can be used to
12 identify the holder of the underlying record will, in general, violate the law. As such, these records are
13 exempt from disclosure under the CPRA pursuant to Government Code section 7927.705.

14 2. Penal Code Section 13370 Presently Exempts Even Non-Identifying Prosecutorial
15 Data from Disclosure Pursuant to Government Code Section 7927.705

16 While it is not a violation of the Penal Code statutes relating to local summary criminal history
17 information “to disseminate statistical or research information obtained from a record, provided that the
18 identity of the subject of the record is not disclosed,” the prosecutorial data elements specified in
19 JDATA, in aggregate form, are not *presently* subject to disclosure pursuant to the CPRA. (Pen. Code,
20 §§ 13305, 13370.) Indeed, an interpretation of the CPRA that would permit disclosure of these
21 prosecutorial data elements prior to March 1, 2027, in circumvention of the express provisions of Penal
22 Code section 13370, would render Penal Code section 13370 meaningless.⁹

23 The prosecutorial data sought by Petitioners significantly overlaps the 54 data “elements”
24 governed by Penal Code section 13370, which is not surprising since the ACLU Petitioners co-

25
26
27 ⁹ In addition, to the extent that Petitioners’ CPRA action serves as an ostensible petition for
28 *traditional* mandamus to force OCDA to comply with the provisions of Penal Code section 13370, such an action
is not ripe in light of the March 1, 2027, compliance timeline. (See also, Ans., ROA #21, Third Affirmative
Defense (Ripeness).)

1 sponsored AB 2418. (See Pen. Code, § 13370(e).) Petitioners acknowledge this overlap. (Mot. at 15:6-
2 11.) This is enough to equitably estop Petitioners from pursuing any claims relating to these data
3 elements. (*Jarboe v. Hanlees Auto Group* (2020) 53 Cal.App.5th 539, 555 [“Equitable estoppel
4 precludes a party from asserting rights he otherwise would have had against another when his own
5 conduct renders the assertion of those rights contrary to equity.”]; see also, Respondents’ Answer to
6 Verified Petition for Writ of Mandate and Complaint [“Ans”], ROA# 21, Seventh Affirmative Defense
7 (Equitable Estoppel).) Petitioners—and the public—will have the aggregate prosecutorial data they seek
8 beginning in March 2027. Petitioners have remained conspicuously silent about AB 2418’s timelines
9 despite repeated reference to AB 2418 in their briefing. Petitioners do not and cannot articulate the
10 public interest served by forcing OCDA to undertake the “gargantuan effort” of creating records and
11 producing this data prior to March 1, 2027, at taxpayer expense. Accordingly, this data is presently
12 exempt from disclosure pursuant to section 7927.705.

13 **B. OCDA Has Met Its Burden in Establishing that Certain Policies, Training Materials**
14 **and Other Information Are Exempt from Disclosure**

15 1. Training Records Exempt Under State or Federal Law Pursuant to Section 7927.705

16 As stated above, section 7927.705 exempts from disclosure “[r]ecords, the disclosure of which is
17 exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the
18 Evidence Code relating to privilege.” Here, OCDA properly redacted training materials that were
19 independently protected pursuant to the attorney work product doctrine (Code Civ. Proc., § 2018.010 et
20 seq.) and copyright (Civ. Code, § 980; 17 U.S.C. § 102 et seq.).

21 Documents subject to the absolute attorney work product privilege are *categorically* exempt, and
22 are not subject to disclosure *under any circumstances*, including an in camera hearing. (Code Civ.
23 Proc., § 2018.030(a) [“[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal
24 research or theories is not discoverable under any circumstances”]; see also, *Roman Catholic*
25 *Archbishop of Los Angeles v. Sup. Ct.* (2005) 131 Cal.App.4th 417, 457.)

26 When the *absolute* attorney work product privilege applies, “courts do not invade upon the
27 attorney’s thought process by evaluating the content of the writing.” (*Rico v. Mitsubishi Motors Corp.*
28 (2007) 42 Cal.4th 807, 820; see also, *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889,

911–912 [“court cannot require the material to be produced for in camera review to evaluate the claim of privilege”].) Moreover, “the doctrine is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity.” (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 993 [quoting *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833].) Accordingly, because Petitioners cannot establish waiver or otherwise overcome the burden that has shifted to them to overcome the presumption of privilege, these documents are properly exempt from disclosure pursuant to section 7297.705, as the redactions contained in the training materials relating to attorney work product consist of attorney opinions and advice, personal impressions, legal research, theories and conclusions.

Likewise, copyrighted materials are similarly exempt from disclosure pursuant to state and federal law. (Civ. Code, § 980; 17 U.S.C. § 102 et seq.; see also, *Smith v. Paul* (1959) 174 Cal.App.2d 744; 64 Ops. Cal. Atty. Gen. 186 (1981).) Accordingly, OCDA properly withheld training materials that included records created by other agencies that were subject to copyright protections.

2. Records Exempt Under Section 7923.600 (Investigatory File Exemption)

As described in the Privilege Log attached as Exhibit 1 to the Declaration of Johanna Kim, many of the training materials are protected by the investigatory file privilege set forth in CPRA, which exempts the following from disclosure:

Records of complaints to, or investigations conducted by . . . any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.

(§ 7923.600.)

Here, the Declaration of Johanna Kim is sufficient to establish that the redactions made to training materials to remove private and sensitive information relating to victims, as well as other information from OCDA’s investigative files, are exempt. (Kim Decl., ¶10.)

3. Records Protected by the “Catchall” Exemption of Section 7922.000

a. *Section 7922.000’s Balancing Test*

OCDA also properly withheld training materials as protected by the deliberative process

1 privilege as well as undue burden pursuant to section 7922.000, which is the “catchall” exemption to the
2 CPRA that requires the Court to engage in a balancing test involving the public interest. Section
3 7922.000 allows an agency to withhold a record if it can demonstrate on the facts of a particular case
4 that “the public interest served by not disclosing the record clearly outweighs the public interest served
5 by disclosure of the record.” The exemption was designed to encompass those records that are not
6 enumerated in other sections of the CPRA, but that should nevertheless be exempt in the spirit of the
7 other exemptions. (*Times Mirror Co. v. Sup. Ct.* (1991) 53 Cal.3d 1325, 1338-39.)

8 Here, to the extent these records are also exempt based on other exemptions (i.e., section
9 7927.705), a balancing test need not be performed. However, to the extent that the records do not neatly
10 fit into any of the CPRA’s enumerated exemptions, the records are nevertheless exempt because any
11 public interest in disclosure is clearly outweighed by public interest in nondisclosure.¹⁰

12 “Even where a public interest exists, if it is minimal or hypothetical, disclosure will not be
13 compelled.” (*Id.* at pp. 248-249.) “[T]he issue is ‘whether disclosure would contribute significantly to
14 public understanding of government activities.’” (*County of Santa Clara v. Sup. Ct.* (2009) 170
15 Cal.App.4th 1301, 1324 [quoting *City of San Jose v. Sup. Ct.* (1999) 74 Cal.App.4th 1008, 1018].) The
16 Court must limit its analysis strictly to the public interest in determining whether a record can be
17 released under the CPRA, which “does not take into consideration the individual requesting party’s
18 profit motives or needs.” (*Connell v. Sup. Ct.* (1997) 56 Cal.App.4th 601, 616.) Courts have
19 consistently held that disclosure is only marginally useful in uncovering “what the government is up to”
20 where there is an alternative, less intrusive means of verifying that an agency is complying with its
21 duties. (*Santa Clara, supra*, 170 Cal.App.4th at p. 1320 [holding that the “availability of less intrusive
22 means to obtain the information may be a factor in the analysis”].)

23 *b. Records Subject to the Deliberative Process Privilege are Exempt*

24 There is a heightened public interest in nondisclosure of records where disclosure would have a
25 chilling effect on what is called the “deliberative process,” which is rooted in section 7922.000. The
26 deliberative process privilege “reflects a concern that the quality of decision making suffers when the
27

28 ¹⁰ Naturally, and as discussed *supra*, it is not in the public interest to disclose the records as the
Petitioners demand prior to March 1, 2027, since such a disclosure would circumvent the express provisions of
Penal Code section 13370.

deliberative process is prematurely exposed to public scrutiny.” (*California First Amendment Coalition* [“CFAC”] v. *Sup. Ct.* (1998) 67 Cal.App.4th 159, 170.) There are three policy bases for this privilege:

- (1) To protect creative debate and candid consideration of alternatives within an agency;
- (2) To protect the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon; and
- (3) To protect the integrity of the decision-making process itself by confirming that officials should be judged by what they decided, not for matters they considered before making up their minds.

(*Ibid.* [internal citations omitted].)

The key question in every case involving the deliberative process privilege in the context of section 7922.000 is “whether the disclosure of materials would expose an agency’s decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” (*Times Mirror v. Sup. Ct.* (1991) 53 Cal.3d 53 1325, 1342.)

“The deliberative process privilege recognizes that the deliberative process can be impaired by exposure to public scrutiny. The disclosure of records containing only factual matters can impair the deliberative process by revealing the thought processes of the government decision maker.” (*CFAC, supra*, 67 Cal.App.4th at p. 170.) Courts have also held that the deliberative process can be impaired by the chilling effect sustained by removal of assurances of confidentiality, holding that confidentiality is necessary “to prevent inhibition of the free flow of information.” (*Ibid.* [internal citations omitted].)

Here, the portions of the training materials that were redacted based on the deliberative process privilege consisted of information relating to the thought processes of how attorneys proceed in given circumstances and references to litigation strategy. Disclosure of these records would impair the ability of OCDA to engage in candid discussions and chill deliberations in the context of training.

c. The Public Interest in Nondisclosure Clearly Outweighs the Public Interest in Disclosure of Records that are Unduly Burdensome to Produce

The analysis pertaining to the undue burden of producing training materials likewise involves the balancing of public interests as set forth in section 7922.000. As discussed in the Declaration of Johanna Kim, the training materials at issue here consist of over 3,000 trainings since 2015 that would

1 require a staggering amount of staff, time, expense and resources to review. (Kim Decl., ¶12.)
2 Moreover, nearly every document for which section 7922.000's exemption was claimed was also
3 exempt based on other privileges or exemptions that did not involve a balancing of the public interests.
4 (Kim Decl., Exh. 1; see also, § 7927.705.) Accordingly, these documents were properly withheld.

5 **C. OCDA Responded to All CPRA Requests in a Timely Manner**

6 OCDA does not dispute that it has a duty, pursuant to section 7922.530, to make records
7 "promptly" available in response to a CPRA request. Indeed, it has done so here, as evidenced by the
8 fact that OCDA began producing non-exempt records on a rolling basis as soon as they became
9 available. (Kim Decl., ¶13-15.) Moreover, pursuant to section 7922.535, the agency may extend the
10 time necessary to produce documents in "unusual circumstances," such as the circumstances that present
11 themselves in this case, which include the need to "search for, collect, and appropriately examine a
12 voluminous amount of separate and distinct records," as well as the need to consult with counsel prior to
13 disclosure. (§§ 7922.535(c)(2)&(3).) Indeed, "reasonableness goes both ways" and "a person who
14 seeks public records must present a reasonably focused and specific request, so that the public agency
15 will have an opportunity to promptly identify and locate such records and to determine whether any
16 exemption to disclosure applies." (*Community Youth Athletic Center v. City of National City* (2013) 220
17 Cal.App.4th 1385, 1427.)

18 **D. The Court Need Not (and in some instances cannot) Conduct an In Camera Review**

19 As discussed above, the Court cannot review documents for which the attorney work product
20 doctrine is claimed in order to rule on the claim of privilege where, as here, preliminary facts have been
21 established to show that the privilege applies. (See discussion, *supra*.)

22 In addition, enough information has been set forth in the accompanying declaration and privilege
23 log to enable the Court to determine whether or not the remaining records should be disclosed without
24 resort to an in camera hearing. This is true even if this Court were to determine that a balancing test is
25 necessary to determine whether the public interest in nondisclosure outweighs the public interest in
26 disclosure. "[A]n in-camera hearing is not always necessary to resolve the weighing process required by
27 section 6255." (*CFAC, supra*, 67 Cal.App.4th at p. 174; see also, *Times Mirror Co, supra*, 53 Cal.3d at
28 p. 1360 fn. 15 ["We have never construed [the CPRA] to compel an in camera review where—as here—

1 such review is unnecessary to the court’s decision, and we decline to do so here.”].)

2 However, should this Court disagree and determine that an in camera hearing is required, section
3 7923.105(a) requires the in camera examination to be conducted pursuant to Evidence Code section
4 915(b) which, in turn, describes the in camera process as follows:

5 When a court is ruling on a claim of privilege. . . and is unable to do so
6 without requiring disclosure of the information claimed to be privileged, the
7 court may require the person from whom disclosure is sought or the person
8 authorized to claim the privilege, or both, to disclose the information in
9 chambers out of the presence and hearing of all persons except the person
authorized to claim the privilege and any other persons as the person
authorized to claim the privilege is willing to have present.

10 Although OCDA believes that the Court need not reach this point, the Court must examine the
11 records in camera prior to ordering that any records be produced.

12 **E. The Entire Petition and Complaint Should be Dismissed, With Prejudice, as to**
13 **Respondent County of Orange**

14 The Petition does not contain a single allegation against Respondent County of Orange
15 (“County”), other than to state that the County is “a local public agency within the meaning of
16 Government Code section 6252(a) and (d).” (Pet. at ¶14.) There is no relief sought as to the County, nor
17 is the County even mentioned or referenced in the Prayer for Relief. Even the Memorandum in Support
18 of Petitioners’ Motion for Judgment is conspicuously silent as to the County. Not a single allegation or
19 scintilla of evidence has been presented to suggest any wrongdoing whatsoever on the part of
20 Respondent County.¹¹

21 Accordingly, this Court should deny Petitioners’ Motion for Judgement against Respondent
22 County of Orange and should instead enter judgment of dismissal (with prejudice) in favor of
23 Respondent County of Orange and against Petitioners.

24 //

25 //

26 _____
27 ¹¹ Respondent County has reserved all affirmative defenses, including but not limited to, failure to
28 state a cause of action, (First Affirmative Defense) and unknown affirmative defenses (Eighth Affirmative
Defense). This on its own is enough for the Court to issue a judgment on the pleading on its own motion. (Code
Civ. Proc., §§ 438(b)(2) & (c)(3)(B)(ii).)

Petitioners claim that they are entitled to an award of attorneys’ fees and costs. However, pursuant to section 7923.115(a), the Court shall only award “costs and *reasonable* attorneys’ fees to the requester” if “the requester prevails in litigation filed pursuant to this chapter.” Accordingly, any request for attorney’s fees is premature at this stage of the litigation. Respondents hereby reserve the right to further brief this issue in response to a properly noticed motion for fees.

IV. CONCLUSION

For all the foregoing reasons, Respondents respectfully requests that this Court deny Petitioners’ Motion for Judgment/Petition for Writ of Mandate and issue judgment in favor of Respondents and against Petitioners.

DATED: March 27, 2023

Respectfully submitted,

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By /s/ Rebecca S. Leeds

Rebecca S. Leeds, Senior Deputy

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PROOF OF SERVICE

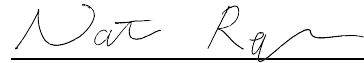
I declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 400 West Civic Center Drive, Suite 202, Santa Ana, California 92701; and my email address is nathan.reynolds@coco.ocgov.com. I am not a party to the within action.

On March 27, 2023, I served the following document, **A RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON VERIFIED WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**, on all other parties to this action in the following manner:

BY ELECTRONIC SERVICE: Pursuant to California Rules of Court, rule 2.251(c), et seq., I caused an electronic version of the document(s) to be sent to the person(s) listed below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 27, 2023



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