

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

4 EMI MACLEAN (SBN 319071)
emaclean@aclunc.org
5 CHESSIE THACHER (SBN 296767)
cthacher@aclunc.org
6 AMERICAN CIVIL LIBERTIES UNION
7 FOUNDATION OF NORTHERN
CALIFORNIA, INC.
8 39 Drumm Street
San Francisco, CA 94111
9 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

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF ORANGE**

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

16 Petitioners/Plaintiffs,

17 vs.

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

20 Respondents/Defendants.
21
22
23
24
25
26
27
28

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

**REPLY IN SUPPORT OF MOTION FOR
JUDGMENT ON VERIFIED PETITION
FOR PEREMPTORY WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Date: June 13, 2023

Time: 9:00 am

Courtroom: C32

Action Filed: October 13, 2022

Trial Date: June 13, 2023

TABLE OF CONTENTS

1		
2		
3	TABLE OF AUTHORITIES	III
4	INTRODUCTION	1
5	ARGUMENT	1
6	A. OCDA Abandoned Its Primary Justification for Refusing to Produce Data	1
7	B. OCDA’s New Justifications Do Not Support Withholding Prosecutorial Data	1
8	1. AB 2418 Does Not Absolve OCDA of Its PRA Obligations.	2
9	2. Penal Code Section 13300 Does Not Prevent Disclosure of Anonymous	
10	Prosecutorial Data.....	3
11	C. OCDA’s Opposition Further Demonstrates the Need for Injunctive Relief.....	5
12	D. OCDA Has Not Carried Its Burden to Establish that Certain Policies, Training	
13	Materials and Other Information Are Exempt from Disclosure.	5
14	1. OCDA’s Search and Production of Responsive Records Is Incomplete	6
15	2. OCDA Is Silent Regarding Its Previously Asserted Categorical Withholdings	
16	of Policies, Training Materials, and Communications	6
17	3. OCDA Has Not Carried Its Burden to Provide “Adequate Specificity” to	
18	Support Its Redactions or Withholdings.....	7
19	4. OCDA Cannot Refuse to Produce Training Materials as Unduly Burdensome	
20	Without Considering the Public Interest in Disclosure	9
21	E. Petitioners’ Request for Attorney Fees Is Proper	10
22	F. Orange County is a Proper Respondent.....	10
23	CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases	Page(s)
<i>ACLU of Northern California v. Superior Court</i> (2011) 202 Cal.App.4th 55	5, 7, 8, 9
<i>ACLU of Northern California v. United States Department of Justice</i> (9th Cir. 2018) 880 F.3d 473	8
<i>California First Amendment Coalition v. Superior Court</i> (1998) 67 Cal.App.4th 159	9
<i>CBS Broad. Inc. v. Superior Court</i> (2001) 91 Cal.App.4th 892	10
<i>City of San Jose v. Superior Court</i> (2017) 2 Cal.5th 608	10
<i>Coronado Police Officers Association v. Carroll</i> (2003) 106 Cal.App.4th 1001	6
<i>Essick v. County of Sonoma</i> (2022) 81 Cal.App.5th 941	10
<i>Filarsky v. Superior Court</i> (2002) 28 Cal.4th 419	6
<i>Golden Door Properties, LLC v. Superior Court of San Diego County</i> (2020) 53 Cal.App.5th 733	10
<i>Haynie v. Superior Court</i> (2001) 26 Cal.4th 1061	7
<i>Housing Authority v. Van de Kamp</i> (1990) 223 Cal.App.3d 109	3
<i>International Federation of Professional & Technical Engineers, Loc. 21, AFL-CIO</i> <i>v. Superior Court</i> (2007) 42 Cal.4th 319	3, 9
<i>Jarboe v. Hanlees Auto Group</i> (2020) 53 Cal.App.5th 539	3
<i>Mendoza v. Continental Sales Co.</i> (2006) 140 Cal.App.4th 1395	10
<i>People v. Szarvas</i> (1983) 142 Cal.App.3d. 511	8

1	<i>Register Division of Freedom Newspapers, Inc. v. County of Orange</i>	
	(1984) 158 Cal.App.3d 893	6
2	<i>State Department of Public Health v. Superior Court</i>	
3	(2015) 60 Cal.4th 940	4
4	<i>Times Mirror Co. v. Superior Court</i>	
5	(1991) 53 Cal.3d 1325	8
6	<i>Weaver v. Superior Court</i>	
	(2014) 224 Cal.App.4th 746	4
7	<i>Westbrook v. County of Los Angeles</i>	
8	(1994) 27 Cal.App.4th 157	3
9	<i>Williams v. Superior Court</i>	
10	(1993) 5 Cal.4th 337	8
11	Statutes	
12	Assem. Bill No. 2418 (2021-2022 Reg. Sess.) Stats. 2022, Ch. 787.....	2, 3, 4
13	Evid. Code, § 623	2
14	Evid. Code, § 915	6
15	Gov. Code, § 7922.000	2, 9
16	Gov. Code, § 7922.535	1
17	Gov. Code, § 7923.100	5
18	Gov. Code § 7923.105	6
19	Gov. Code, § 7923.110	5
20	Gov. Code, § 25203	10
21	Gov. Code, § 25303	10
22	Pen. Code, § 13300	3, 4
23	Pen. Code, § 13302	4
24	Pen. Code, § 13370	4
25	Other Authorities	
26	89 Ops.Cal.Atty.Gen. 204 (2006)	3
27		
28		

INTRODUCTION

In their Opposition, Respondents/Defendants Orange County District Attorney Todd Spitzer and the County of Orange (“Respondents” or “OCDA”) abandoned their initial argument for withholding all prosecutorial data from Petitioners/Plaintiffs (“Petitioners”) and dozens of other requesters. Now, OCDA has crafted new justifications for refusing public access to prosecutorial data. Too little, too late. OCDA’s new arguments are as meritless as its first one. Moreover, Respondents continue to rely on insufficient boilerplate and cursory justifications for withholding policies, training materials, and communications. OCDA’s defiance of public oversight and transparency violates the PRA and frustrates the implementation of the Racial Justice Act (“RJA”). This Court should order the release of the requested prosecutorial data; the production of all outstanding policies and training materials; and the ongoing publication of prosecutorial data.

ARGUMENT

A. OCDA Abandoned Its Primary Justification for Refusing to Produce Data.

Over a two-year period, OCDA denied Petitioners’ four PRA requests for prosecutorial data (and all other contemporaneous requests for data made by dozens of requesters) under the premise that production would require “compilation of information not existing” within the District Attorney’s Office and the “creation of a new record.” (Petitioners’ Mem. Of Points & Authorities in Supp. Of Mot. for Judgment [“Mot.”] at pp. 9-12.) But before this Court, OCDA abandons this argument. OCDA is notably silent as to Petitioners’ assertion that the agency’s prior productions demonstrate that the data requested exists within its case management system and is subject to disclosure. (*See, e.g.*, Respondents’ Mem. In Opp. to Mot. for Judgment [“Opp.”] at p. 8.)

B. OCDA’s New Justifications Do Not Support Withholding Prosecutorial Data.

Respondents concede that they are now relying on new arguments to justify nondisclosure. (Opp. at p. 6, fn. 8.) OCDA’s yearslong delay in invoking these arguments is contrary to the PRA’s requirement that officials “promptly” notify requesters of the reasons for withholding (Gov. Code, § 7922.535, subd. (a)); and it also reveals the arguments’ inherent weakness. None justifies withholding the records sought here.

1 **1. AB 2418 Does Not Absolve OCDA of Its PRA Obligations.**

2 AB 2418 does not displace the PRA as Respondents contend. Rather, AB 2418 creates new,
3 prospective obligations to collect and disclose prosecutorial data to the California Department of
4 Justice. These obligations operate distinctly from—yet remain compatible with—an agency’s
5 *current* PRA obligations to the public. AB 2418 demonstrates the Legislature’s belief that the data
6 Respondents are withholding is a public record of significant import. (Mot. at p. 15; *see also* AB
7 2418 Crimes: Justice Data Accountability and Transparency Act, Stats. 2022, Ch. 787 [making
8 criminal prosecution data publicly available “is an important state interest”].)

9 In arguing that AB 2418 absolves OCDA from its PRA obligations, Respondents miss the
10 Legislature’s point and misconstrue the rationale behind the legislation’s January 2027 effective
11 date.¹ (Opp. at p. 8.) AB 2418’s prolonged implementation is designed to accommodate agencies
12 that do not yet collect prosecutorial data. But OCDA, unlike certain other District Attorney Offices,
13 has been collecting prosecutorial data for years. (*See* Mot. at p. 11; Ex. MM at pp. 8-14; MacLean
14 Dec. ¶¶ 2-4 [discussing OCDA responses to earlier PRA requests seeking prosecutorial data].)

15 Moreover, to the extent OCDA cites AB 2418 for the general proposition that disclosing
16 already-collected prosecutorial data is unreasonably burdensome, this argument falls short. (*See*
17 Opp. at p. 4.) Under the PRA, OCDA must demonstrate that the facts of this “particular case”
18 support a finding that the public interest in nondisclosure “clearly outweighs the public interest
19 served by disclosure.” (Gov. Code, § 7922.000.) OCDA nowhere grapples with the Legislature’s
20 finding that this information is of significant public interest, or that OCDA previously produced—
21 without undue burden—the same or substantially similar prosecutorial data.

22 In a final specious argument related to AB 2418, OCDA hides behind equitable estoppel.
23 (Opp. at pp. 8-9.) OCDA, however, misunderstands this legal principle. Equitable estoppel bars a
24 party that has “led another to believe a particular thing true and to act upon such belief,” from
25 contradicting its original position. (Evid. Code, § 623.) Petitioners have not induced OCDA to act
26 in any way vis-à-vis the passage of AB 2418. That the ACLU California Affiliates co-sponsored

27
28 ¹ Respondents acknowledge that the Legislature designed AB 2418 in such a way as to balance the
right to privacy with the need for public disclosure of prosecutorial data. (Opp. at p. 3.)

1 AB 2418 (alongside the California District Attorneys’ Association, of which Respondent is a
2 member²) shows a broad consensus that disclosing prosecutorial data is in the public interest. This
3 conduct does *not* estop Petitioners from seeking prosecutorial data in California under the PRA.³

4 **2. Penal Code Section 13300 Does Not Prevent Disclosure of Anonymous
Prosecutorial Data.**

5 OCDA next advances the novel argument that Petitioners are seeking “local summary
6 criminal history information,” which the law prohibits disclosing. (Opp. at pp. 6-8.) Untrue. Penal
7 Code section 13300 does not bar disclosure of the anonymized data that Petitioners seek.⁴

8 “Local summary criminal history information” is “the master record of information
9 compiled by any local criminal justice agency . . . pertaining to the *identification* and criminal
10 history of any person . . .” (Pen. Code, § 13300, subd. (a)(1) [emphasis added]; *see also id.*, §
11 13300, subd. (j).) Petitioners do not seek such identifying information. Rather their requests
12 comport with the California Attorney General’s own guidance, which explicitly opined: “[W]here
13 requests are limited to supporting statistical analyses and do not seek identifying information about
14 the persons involved, Penal Code section 13300, subdivision (h) states: ‘It is not a violation of this
15 article to disseminate statistical or research information obtained from a record, provided that the
16 identity of the subject of the record is not disclosed.’” (89 Ops.Cal.Atty.Gen. 204 (2006) at p. 13.)

17 Respondents’ reliance on *Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157,
18 164, and *Housing Authority v. Van de Kamp* (1990) 223 Cal.App.3d 109, 116 is misplaced. (Opp.
19 at p. 7.) Respondents ignore that the requesters in *Westbrook* and *Van de Kamp* sought *identifying*,
20 and not anonymized, information. Further, as the Supreme Court recognized, *Westbrook* should
21 only be read to limit the disclosure of records that “do[] not . . . contribute to the public’s
22 understanding of government operations.” (*International Federation of Professional & Technical*
23 *Engineers, Loc. 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 340.) Here, the data

24 _____
25 ² Cal. Dist. Att’y Ass’n, <https://www.cdaa.org/district-attorney-roster> (last visited Apr. 18, 2023).

26 ³ Not only does Respondents’ sole legal authority on this point—*Jarboe v. Hanlees Auto Group*
27 (2020) 53 Cal.App.5th 539, 555—support Petitioners’ interpretation, it is also inapposite. (*See* Opp.
at p. 9.) The *Jarboe* court analyzed equitable estoppel in the specific context of a nonsignatory
defendant’s right to compel arbitration in a contract dispute, factors that have no bearing here.

28 ⁴ To the extent Petitioners’ requests can be construed as initially having sought identifying
information, Petitioners clarify that they request only anonymized data.

1 requested by Petitioners is *not* summary criminal history information—and *is* essential to the public
2 understanding of OCDA’s operations and prosecutorial decisionmaking.

3 Lest there be any doubt about the interaction between Penal Code section 13300 and the
4 PRA, the California Legislature amended Penal Code section 13302 more than a decade ago to
5 confirm that prosecutors may disclose records pursuant to the PRA: “Nothing in this section shall
6 prohibit a public prosecutor from accessing and obtaining information from the public prosecutor’s
7 case management database to respond to a request for publicly disclosable information pursuant to
8 the [PRA].” (Pen. Code, § 13302 [2012 amendment].) Interpreting this provision, the Court of
9 Appeal rejected an argument from the San Diego District Attorney that it would violate California
10 law to comply with a request to generate charging documents for filed homicide cases. (*See Weaver*
11 *v. Superior Court* (2014) 224 Cal.App.4th 746, 751.) The same result should govern here.

12 AB 2418 also undermines OCDA’s contention that Penal Code section 13300 commands
13 withholding the requested data. Respondents concede that many of the data elements Petitioners
14 seek overlap with the data elements subject to disclosure under AB 2418. (Opp. at p. 8.) And yet,
15 the Legislature required the prospective disclosure of anonymized prosecutorial data without
16 amending Penal Code section 13300. (*See* Pen. Code, § 13370, subd. (e) [“the following data
17 elements shall be gathered and published” . . .].) These statutes must be read as consistent. (*State*
18 *Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 [“A court must, where
19 reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe
20 them to give force and effect to all of their provisions.” [citations omitted].) It cannot be that Penal
21 Code section 13300 *prohibits* disclosing the same data elements that AB 2418 *compels* disclosing.⁵

22 Because Respondents offer no valid justification for withholding anonymized prosecutorial
23 data, Petitioners respectfully ask the Court to order OCDA to disclose the requested information.

24
25
26
27 ⁵ If Respondents’ argument were correct, OCDA’s prior disclosure of substantially similar
28 information would be a criminal offense. (Mot. at p. 11; *see also* MacLean Dec. ¶¶ 2-4; *compare*
id., Ex. B with Ex. 00.) Respondents cannot have it both ways.

1 **C. OCDA’s Opposition Further Demonstrates the Need for Injunctive Relief.**

2 Rather than substantively debate the merits of Petitioners’ claim that OCDA engages in a
3 pattern and practice of failing to comply with PRA requests for prosecutorial data, Respondents
4 level far-fetched evidentiary objections at documents bearing OCDA’s letterhead that Petitioners
5 attest Respondents produced to them—a fact which OCDA does not deny.⁶ Those documents,
6 properly admitted, are incontrovertible evidence of a policy OCDA cannot, and does not, defend.
7 Respondents do not deny that beginning in February 2021, soon after the RJA took effect, OCDA
8 began systematically refusing PRA requests for *any* prosecutorial data—data it routinely produced
9 prior to that date. (*See* Mot. at p. 11, Exs. JJ-MM.) Nor do they claim to have rescinded instructions
10 from the OCDA Public Information Officer that “going forward we will not prepare records that
11 are not already in existence in response to a Public Records Act request. This applies and includes
12 data extraction requests[.]” (MacLean Dec. ¶ 25; *id.*, Ex. LL.) Indeed, Respondents’ briefing
13 abandons the only justification OCDA ever offered Petitioners for their failure to produce—the
14 assertion that extracting data would require the creation of a new record. (*See* Section A, *supra*.)
15 Petitioners therefore request that the Court declare unlawful OCDA’s blanket refusal to produce
16 data and issue an injunction requiring OCDA to publish prosecutorial data it already collects.

17 **D. OCDA Has Not Carried Its Burden to Establish that Certain Policies, Training**
18 **Materials and Other Information Are Exempt from Disclosure.**

19 Because OCDA has failed to comply with its PRA obligations in response to Petitioner
20 ACLU of Northern California’s July 23, 2021 request for policies, training materials,
21 communications, and other information relevant to the implementation of the RJA, Petitioners
22 respectfully request that the Court order disclosure of all requested records. (*See* Mot. at pp. 10-11,
23 18-22; *see also* MacLean Dec. ¶¶ 12-23; *id.*, Ex. V.) But should the Court deem any requested
24 record potentially subject to withholding, Petitioners ask that the Court issue an order to show
25 cause as to why disclosure is not warranted, order further briefing and argument, and conduct an in
26 camera review as appropriate. (Gov. Code, §§ 7923.100, 7923.110; *see also* ACLU of Northern

27 _____
28 ⁶ For an explanation of why these evidentiary objections should be overruled, *see*
Plaintiffs/Petitioners’ Reply to Respondents’ Evidentiary Objections, filed concurrently herewith.

1 *California v. Superior Court* (2011) 202 Cal.App.4th 55, 87 [“[A] trial court’s prerogative to
2 inspect documents in camera ‘is not a substitute for the government’s burden of proof’].)”⁷

3 **1. OCDA’s Search and Production of Responsive Records Is Incomplete.**

4 OCDA ceased production of records responsive to the July 23, 2021 Request more than five
5 months ago, even as its last message promised an ongoing rolling production.⁸ OCDA concedes it
6 has a “duty . . . to make records ‘promptly’ available in response to a CPRA request.” (Opp. at p.
7 13.) But it wrongly implies that a “rolling” production with no end date and an abrupt halt in all
8 communication complies with this obligation. (*Ibid.*) This conduct runs contrary to “the Act’s
9 purpose of ensuring speedy public access to vital information regarding the government’s conduct
10 of its business.” (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 434.)

11 **2. OCDA Is Silent Regarding Its Previously Asserted Categorical
Withholdings of Policies, Training Materials, and Communications.**

12 In response to the July 23, 2021 Request, OCDA initially asserted that it possessed, but
13 would not disclose, certain policy documents, communications, and trainings. (*See* Mot. at 11, 18-
14 21, MacLean Dec. ¶ 14, Ex. X.) OCDA contended it was categorically withholding these records,
15 relying on work product and deliberative process. (Ex. X [Response to Request Nos. 4-6, 9c, 9f, 9g,
16 9i, 11b, 11c].) But these categorical exemptions are nowhere reiterated for these specific records, or
17 types of records, in Respondents’ Opposition.

18 Respondents instead emphasize that undue burden justifies categorically withholding
19 “training materials for over 3,000 trainings.” (Opp. at pp. 10-13; Dec. of Johanna Kim (“Kim
20 Declaration” or “Kim Dec.”) ¶¶ 12, 15; *see* Ex. X [Response to 10a, 10b].) Such a generalized
21 undue burden argument lacks merit. (*See infra* Sec. D.4.)

22 More concerning still is the status of the important RJA-related policies, communications
23 and subset of RJA-related trainings about which Respondents now say very little. (*See* Ex. X
24

25 ⁷ Contrary to Respondents’ assertion (Opp. at pp. 9-10, 13-14), the Court may conduct in camera
26 review of the disputed documents. (*See* Gov. Code § 7923.105; Evid. Code, § 915, subd. (b);
Register Division of Freedom Newspapers, Inc. v. County of Orange (1984) 158 Cal.App.3d 893,
901; *Coronado Police Officers Association v. Carroll* (2003) 106 Cal.App.4th 1001, 1013.)

27 ⁸ On November 13, 2022, OCDA sent its last response in connection with this request: “We
28 continue to search for additional responsive records, and will make responsive, non-exempt records
available to you on a continuing rolling basis until complete.” (MacLean Dec. ¶ 23; Ex. II.)

1 [Response to Request Nos. 4-6, 9c, 9f, 9g, 9i, 11b, 11c].) It is unclear whether Respondents are
2 standing on the categorical exemptions that OCDA initially asserted—categorical exemptions that,
3 in any event, would be improper for reasons already elaborated. (*See* Mot. at pp. 18-21; *see also*
4 *infra* Sec. D.3.) Given Respondents’ shifting arguments, Petitioners respectfully ask that the Court
5 order Respondents to confirm what, if anything, OCDA is withholding based on categorical
6 exemptions, where the records are not otherwise referenced in the log. Where OCDA cannot
7 support a withholding, Petitioners further request the Court order production of that record.

8 **3. OCDA Has Not Carried Its Burden to Provide “Adequate Specificity” to**
9 **Support Its Redactions or Withholdings.**

10 OCDA’s declaration and privilege log fail to justify its categorical withholdings and
11 redactions because they ignore any records withheld in full and include only vague descriptions of
12 redacted information. (*See* Kim Dec. & Ex. 1; *see also, e.g.*, MacLean Dec. ¶ 20.) For instance,
13 OCDA produced two single-page training slides, and now asserts that an unspecified portion of
14 these training records have been withheld as “[a]ttorney impressions, opinions and thought
15 processes; non-responsive records; [and] [n]ames [phone number] and email address[es] of staff.”
16 (Kim Dec. Ex. 1 [Bates Nos. 608 & 609].) Prior to receipt of the privilege log, Petitioners were
17 unaware that *any* portion of these trainings had been withheld, and they have little more knowledge
18 about what—or how much—is being withheld now. (MacLean Dec. ¶ 10; *Id.*, Ex. O, Appendix [list
19 of records ACLU of Northern California believed to be redacted prior to receipt of the privilege
20 log].) The Kim Declaration does not afford Petitioners a meaningful opportunity to contest any
21 withholdings or permit the Court to evaluate whether an invoked exemption applies.⁹ (*ACLU of*
22 *Northern California, supra*, 202 Cal.App.4th at p. 85 [A “detailed justification” is “ordinarily
23 required to withhold information.”].)

24 Respondents purport to have withheld certain information based on “careful[] redact[ions].”
(Opp. at p. 4.) This is unsupported and in some instances clearly false. OCDA repeatedly provided

25 ⁹ Although Respondents need not produce an inventory of all potentially responsive records “at the
26 prepetition stage” (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074), once PRA litigation is
27 initiated, an agency must provide “an adequate factual basis” for withholding (*ACLU of Northern*
28 *California, supra*, 202 Cal.App.4th at p. 83). This basis may be “established, depending on the
circumstances of the case, through affidavits, a *Vaughn* Index, *in camera* review, or through a
combination of these methods.” [quotations and citation omitted].)

1 only “[c]onclusory or boilerplate assertions that merely recite statutory standards”; these “are not
2 sufficient” to justify withholding. (*ACLU of Northern California, supra*, 202 Cal.App.4th at p. 83.)
3 OCDA asserts, for example, that it is withholding “records of investigatory files” pursuant to the
4 “investigatory files” exemption—without providing a sufficient description to allow Petitioners or
5 the Court to evaluate this claim. (Opp. at 10; Kim Dec. ¶ 10; Kim Dec. Ex. 1 [Bates Nos. 605, 856-
6 70].) But a “public agency may not shield a document from disclosure with the bare assertion that it
7 relates to an investigation.” (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 356.)

8 Relatedly, Respondents refuse to produce training materials drafted by “other counties and
9 government agencies” pursuant to copyright. (Kim Dec. ¶ 11; Opp. at p. 10.) But OCDA does not
10 identify which counties or agencies created the contested material, what the material consists of, or
11 how much material OCDA construes as subject to copyright protection. Nor does “copyright”
12 appear as a justification for withholding on OCDA’s privilege log. Copyrighted material—
13 particularly material that, as here, is informational in nature and used for non-commercial
14 educational purposes—is at minimum subject to the fair use exception to the copyright owner’s
15 exclusive rights. (*See People v. Szarvas*, (1983) 142 Cal.App.3d. 511, 519.)

16 OCDA also asserts that it redacted information relating to “attorney work product” and
17 “deliberative process,” but does not consistently provide context for these redactions.¹⁰ The mere
18 fact that a record contains “attorney opinions and advice, personal impressions, legal research,
19 theories and conclusions” (Kim Dec. ¶ 9) does not justify withholding as attorney work product.
20 (*See ACLU of Northern California v. United States Department of Justice* (9th Cir. 2018) 880 F.3d
21 473, 484-89.) Nor does the fact that a record contains “thought processes of how attorneys ought to
22 proceed in a given circumstance” (Kim Dec. ¶ 8) justify, without more, a deliberative process
23 exemption. (*See Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342.)

24 Even at the level of generality present in the OCDA’s privilege log, the exemptions cannot
25 plausibly support withholding. OCDA asserts that it relied upon deliberative process to justify
26

27 ¹⁰ See, e.g., Kim Dec. ¶¶ 6, 8; *id.*, Ex. 1 at Bates Nos. 47-49, 240-309, 368-371, 423-600, 605-06,
28 608-09, 613-75, 827-55, 858-82 (redacting “[a]ttorney impressions, opinions and thought processes
[and] internal office procedure” as “attorney work product” and/or “deliberative process”).

1 redactions of names, email addresses, and phone numbers of staff. (Kim Dec. ¶ 8; Kim Dec., Ex. 1
2 [Bates Nos. 46, 372-80, 601-04, 607-09, 851-71].) But the names of cases, judges and government
3 staff are not “deliberative process”; they are matters of public record. (*See, e.g., International*
4 *Engineers, supra*, 42 Cal.4th at p. 339 [upholding order requiring disclosure of names, job titles,
5 and gross salaries of city employees pursuant to the PRA].)

6 OCDA also asserted that nonresponsive records could be withheld as deliberative process.
7 (Kim Dec. ¶ 8.) But asserted nonresponsiveness rarely justifies redaction, does not justify
8 withholding due to deliberative process, and does not eliminate the requirement of explanation.
9 (*See ACLU of Northern California, supra*, 202 Cal.App.4th at p.86 “[W]here an agency seeks to
10 withhold portions of an otherwise disclosed document solely on grounds of nonresponsiveness,
11 there may be a particular reason for concern. The need for redaction in such circumstances seems
12 highly questionable, as the information is not claimed to be exempt and therefore does not pose the
13 risks addressed by the statutory exemptions from the rule of disclosure.”].)

14 **4. OCDA Cannot Refuse to Produce Training Materials as Unduly** 15 **Burdensome Without Considering the Public Interest in Disclosure.**

16 OCDA’s assertion that it is unduly burdensome to search for and produce training materials
17 is unfounded. (*See Opp. at pp. 12-13.*)¹¹ OCDA concedes that the law requires an agency to exert
18 “reasonable effort” to respond to a PRA request. (*Opp. at p. 13; see also California First*
19 *Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.) An analysis of whether a
20 search would be unduly burdensome, and what constitutes “reasonable effort,” requires a
21 consideration of the public interest in disclosure. (*See Gov. Code, § 7922.000.*) Here, as previously
22 discussed, OCDA did not consider *at all* the public interest, despite the clear articulation of such an
23 interest by Petitioners, and the Legislature’s recognition of such a public interest. (*Supra B.1; Mot.*
24 *at pp. 12-15.*) Further, the review and production of an estimated 3,000 prosecutorial training
25 records does not constitute an “extraordinarily extensive or intrusive search[.]” (*See City of San*

26 ¹¹ Petitioner ACLU of Northern California requested training materials since 2015. (Ex. V at p. 2.)
27 OCDA, in an abuse of discretion, chose to search for and produce only certain categories of
28 training materials—e.g., those related to bias and social media. (Ex. X [Compare Response to
Request Nos. 10d, 10e, 11c, in which OCDA claimed to have searched for training materials
related to, e.g., bias and social media, and Response to Request Nos. 10a & 10b, in which OCDA
asserts a global undue burden justification to refuse to review or produce other training materials].)

1 *Jose v. Superior Court* (2017) 2 Cal.5th 608, 627 [“CPRA requests invariably impose some burden
2 on public agencies.”]; *CBS Broad. Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909 [cost was
3 invalid reason to deny PRA request for information in the public interest even where agency
4 estimated disclosure would cost \$43,000].) Nor can OCDA rest on the questionable assertion that
5 “nearly every document” withheld pursuant to undue burden analysis “was also exempt based on
6 other privileges or exemptions.” (Opp. at p. 13.) The law is clear: an agency “must describe the
7 justification for nondisclosure with reasonably specific detail.” (*Golden Door Properties, LLC v.*
8 *Superior Court of San Diego County* (2020) 53 Cal.App.5th 733, 790.)

9 **E. Petitioners’ Request for Attorney Fees Is Proper.**

10 Respondents acknowledge what the law requires: a prevailing plaintiff in a PRA lawsuit is
11 entitled to recover attorneys’ fees and costs. (Opp. at p. 15 [citing Gov. Code, § 7923.115, subd.
12 (a).] Petitioners’ inclusion of this issue in their Motion merely preserves their right.

13 **F. Orange County is a Proper Respondent.**

14 The County’s cursory request for dismissal invites the Court to misread both the law and
15 the facts. (Opp. at p. 14) Legally, the County “supervise[s]” both this litigation and the OCDA’s
16 official conduct. (Gov. Code, §§ 25203, 25303.)¹² And factually, Petitioners’ Prayer for Relief
17 seeks attorneys’ fees and costs, which will be the County’s obligation to pay. (Pet. at p. 25.) It
18 would be improvident and reversible error to dismiss the County *with prejudice* at this point in the
19 litigation. (*See Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.)

20 **CONCLUSION**

21 For the foregoing reasons, the Court should grant relief as requested in Petitioners’ Verified
22 Petition for Peremptory Writ of Mandate for Declaratory and Injunctive Relief, order the OCDA to
23 produce immediately the requested records, and award attorneys’ fees and costs.

24
25
26
27 ¹² See also *Essick v. County of Sonoma* (2022) 81 Cal.App.5th 941, 952 [although a county board
28 lacks authority to “direct” how an elected official performs their duties, the board still has statutory
“oversight responsibility” of that official] [quotations omitted].

1 Dated: April 28, 2023

Respectfully submitted,

2
3 */s/ Eva Bitran*

4 Robert Ponce
5 Eva Bitran
6 AMERICAN CIVIL LIBERTIES UNION
7 FOUNDATION OF SOUTHERN
8 CALIFORNIA

9 Emi MacLean
10 Chessie Thacher
11 AMERICAN CIVIL LIBERTIES UNION
12 FOUNDATION OF NORTHERN
13 CALIFORNIA

14 Sean Garcia-Leys
15 PEACE AND JUSTICE LAW CENTER

16
17
18
19
20
21
22
23
24
25
26
27
28 *Attorneys for Petitioners/Plaintiffs*

1 **PROOF OF SERVICE**

2 I, Melissa Rios, am employed in the County of Los Angeles, State of California. I am over the
3 age of 18 and not a party to the within action; my business address is 1313 W. 8th St., Los Angeles,
4 CA 90017. On April 28, 2023, I served a copy of the following:

5 **REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON VERIFIED PETITION FOR**
6 **PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND**
7 **INJUNCTIVE RELIEF**

8 On the interested parties in this action as follows:

9 Rebecca S. Leeds 10 Senior Deputy County Counsel County of Orange, Office of the County Counsel 400 West Civic Center Dr., Suite 202 11 Santa Ana, CA 92701 Rebecca.leeds@coco.ocgov.com 12 Attorney for Defendants, Todd Spitzer and 13 County of Orange	Carolyn M. Khouzam Senior Deputy County Counsel County of Orange, Office of the County Counsel 400 West Civic Center Dr., Suite 202 Santa Ana, CA 92701 Carolyn.khouzam@coco.ocgov.com Attorney for Defendants, Todd Spitzer and County of Orange
---	---

14
15 ☒ **By E-Service**

16 By causing such documents to be electronically served via One Legal pursuant
17 to section 1010.6 of the Code of Civil Procedure. The file transmission was reported as
18 completed and a copy of the transmission page will be maintained
with the documents in our office.

19 ☐ **By Electronic Mail**

20 I caused said document to be transmitted by electronic mail pursuant to California
21 Rules of Court, Rule 2.251 and CCP § 1010.6. The names and email addresses of the
22 persons served are set forth above. The document was transmitted by electronic
transmission and without error.

23 I declare under penalty of perjury that the foregoing is true and correct.

24 Executed on April 28, 2023 at San Bernardino, California.

25
26 s/ Melissa Rios
27 Melissa Rios
28