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VIA ELECTRONIC (MICHAEL.PALMISANO@CHHS.CA.GOV) MAIL ONLY

June 9, 2020

Mr. Michael Palmisano
California Health & Human Services
Atten: PRA Request
1600 9th Street, Room 460
Sacramento, CA 95814

RE: California Public Records Act Request in re Corona Virus Pandemic / COVID-19 – Public Health orders regarding “Shelter in Place”, “Face Covering” and “Cancel Mass Gathering” orders.

Dear Mr. Palmisano

Thank you for your letter of June 9, 2020 in response to my client’s May 30, 2020 CRPA requests.

Apparently regarding items 1 and 2 of Request No. I, the Department invoked the “Deliberative Process” exemption under Govt. Code section 6255. As I am sure you are aware, the “Deliberative Process” exemption is not absolute and since it arises under section 6255, it is the government’s burden to establish that the public interest in non-disclosure outweigh the public’s interest in disclosure.

We should note here that the materials requested are the “data” (or the “science”) upon which the Department issued its various orders and extended / modified orders regarding the COVID-19 pandemic. We are not requesting documents regarding an appointment by the Governor to a Supervisor’s seat or a judicial nomination. I would ask the Department to consider that the public’s right to disclosure regarding the science behind the decisions to issue “Stay At Home”, “Face Covering” and “Cancel Mass Gathering” orders is very high especially considering the massive impact to California citizens’ incomes, freedoms, right to assembly peacefully, etc. caused by these orders and modified orders.

You cited correctly the *California First* case regarding the Deliberative Process “exemption” – the *Court in Citizen’s for Open Gov’t v. City of Lodi* quoted with approval the ruling from *California First* and then ruled that the City of Lodi had failed to meet its

burden of proof to justify withholding records under the CPRA. Here are two sections of the Citizen's decision that are very germane here:

This court has explained the showing that must be made by the one **468 claiming the deliberative process privilege: **“Not every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence. The burden is on the [one claiming the privilege] to establish the conditions for creation of the privilege. The trial court's determination is subject to de novo review by this court, although we defer to any express or implied factual findings of the superior court.”** (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172–173, 78 Cal.Rptr.2d 847.)

Citizens for Open Gov't v. City of Lodi, 205 Cal. App. 4th 296, 306, 140 Cal. Rptr. 3d 459, 467–68 (2012)

Lodi First is correct the city never established the conditions for creation of the privilege. The city's explanation in the trial court of why the privilege applies, i.e., to “foster candid dialogue and a testing and challenging of the approaches to be taken,” was simply a policy statement about why the privilege in general is necessary. Indeed, the city's explanation was similar to one of the policy reasons for the deliberative process privilege enunciated by this court: the privilege **“ ‘protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions.’ ”** (*California First Amendment Coalition v. Superior Court, supra*, 67 Cal.App.4th at p. 170, 78 Cal.Rptr.2d 847.) While the policy behind the privilege makes sense, invoking the policy is not sufficient to explain the public's specific interest in nondisclosure of the documents in this case. That policy could apply to almost any decisionmaking process. The city therefore failed to carry its burden to explain what the public's specific interest in nondisclosure was *in this case*.³ **469 (*California First Amendment Coalition v. Superior Court, supra*, 67 Cal.App.4th at p. 172, 78 Cal.Rptr.2d 847.) The city also failed to carry its burden to explain why the public's interest in nondisclosure in this case “clearly outweigh[ed]” the public interest in disclosure. (*Ibid.*) Because the city failed to carry its burden, the court erred in excluding 22 e-mails from the administrative record based on the deliberative process privilege.

Citizens for Open Gov't v. City of Lodi, 205 Cal. App. 4th 296, 307, 140 Cal. Rptr. 3d 459, 468–69 (2012) [Emphasis in original]

The Department simply has invoked the “exemption” without giving any justification for that withholding which the Court in *Citizen’s* ruled was insufficient.

I am aware that an agency is not obligated to give a requestor a “privilege log” or a “Vaughn Index” of withheld documents prior to the requestor filing a Petition for Writ of Mandate with the Court. However, to the extent the Department is willing to engage with me on this matter, I am hopeful we can avoid litigation.

Towards that end would you be willing to discuss these things with me? Some things that will help would be answering questions like:

1. How many responsive documents for items 1 and 2 for Request No. I were found?
2. Of those, how many were “data” or scientific studies, analysis, etc. which formed the basis for the orders and extended / modified orders versus simply e-mails (for example between Department employees discussing the potential for extending an order)?
3. How many of the studies, data, etc. were from sources from outside the Department?

Overall I suggest the Department also consider waiving any potential exemptions like “Deliberative Process” in the interest of transparency and openness. The Governor has been quick to say often that he and the State are following the “science” in the issuance of these orders. This is the opportunity for your Department to show the “science” the Governor is talking about.

Please let me know if you will discuss these matters with me.

Thank you in advance for your courtesy and cooperation in this matter.

Very truly yours,

//s//

Craig P. Alexander