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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO
UNLIMITED JURISDICTION

KELLY CLARK, DIANNE WOOTON, KIONA MILLIRONS,

Plaintiffs and Petitioners,

vs.

SACRAMENTO COUNTY DISTRICT ATTORNEY'S OFFICE, SACRAMENTO POLICE DEPARTMENT—*a political subdivision of the City of Sacramento*, CITY OF SACRAMENTO,

Defendants and Respondents.

Case No. 34-2020-80003417-CU-WM-GDS

REPLY MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND CALIFORNIA CONSTITUTION, ARTICLE I, SECTION 28

Date: April 9, 2021
Time: 11:00 a.m.
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Defendants have devoted much of their memoranda of points and authorities to arguing that disclosing *any* document from their files could undermine the prosecution of Ronald Seay. But their arguments cannot be squared with the plain language and legislative intent of the California Public Records Act ("CPRA.") And, while Defendants have fought these basic record requests with every tool in their arsenal, they have failed to point to any specific facts in *this* case that justify withholding the requested documents. The purported risks that they cite are undercut by the facts of this case—facts known to Defendants—but which they chose to ignore. The Defendants have not met their burden, and misinterpret the plain language of the statute and applicable law. The public's interest weighs in favor of disclosure.

Though they do not disclose this in their briefs and accompanying declarations, Defendants have long known that the Clark family is pursuing its own investigation into the source of Mr. Seay's guns through a private investigator hired by counsel. But until last week, they had never raised any concerns to the Plaintiffs about this investigation. Though Defendants now speculate about tainted witnesses, failed prosecutions, and the risk of victims carrying out their own investigations, the facts on the ground demonstrate that these hypotheticals exist only on the pages of Defendants' declarations, or in other cases not now before this Court.

What is really at work here is Defendants' wholesale policy "not [to] disclose the contents of investigatory records in advance of criminal trials and appeals…" despite what CPRA requires.[1] (Dkt. No. 78, Declaration of Scott MacLafferty, at ¶ 4 (hereinafter "MacLafferty Decl.").) Defendants attempt to justify this blanket policy by pointing to abstract dangers, but these justifications have no relevance to the facts of *this* case, to *these* documents, and to *these* plaintiffs. Recycling speculative

[1] Cases citied in this brief refer to California's Public Record Act in some cases as the "CPRA," and in others, the "PRA."

and conclusory arguments and then presenting them as expert opinions does not carry Defendants' burden to justify withholding the responsive records at issue here. Nor does it allow them to substitute their judgment for that of the Legislature, which has already carefully balanced competing policy concerns and determined that crime victims like the Clark family are entitled to records showing what happened to their loved ones. Plaintiffs' petition should be granted in full.

I. Additional Background Facts

The facts of this case are unique. Contrary to Sgt. MacLafferty's assertion, we know what the defense will be at trial: not guilty by reason of insanity. (*See* Dkt. No. 82, Declaration of Rod Norgaard, at ¶ 8 (hereinafter "Norgaard Decl."); *see also* Dkt. No. 80, Mem. of Points and Auth. in Support of Sacramento County District Attorney's Office Opp'n to Petn. for Writ of Mandate, at 12:20–26, 13:4–11 (hereinafter "County Br.").) This defense is raised in less than one percent of cases. (Callahan, Steadman, & Robbins, The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study (1991) Bulletin of the American Academy of Psychiatry, Vol. 19, No. 4). The identity of the killer is not in question and will not be a contested issue at trial. (*See* County Br. at 16:17–19). Mr. Seay's presence at the scene will not be a contested issue at trial. None of the actions Mr. Seay took to effectuate the murder of Amber Clark will be contested issues at trial. There are no known accomplices. The primary issue of contention at trial will be whether Mr. Seay could form the requisite *mens rea* to be held responsible for his conduct.[2]

Investigators informed Plaintiff Kelly Clark, Amber Clark's husband, of Ronald Seay's lengthy criminal and mental history early in the investigation. (Declaration of Kelly Clark (hereinafter "Clark

[2] The County accuses Plaintiffs of "naivety" regarding the nature of homicide prosecutions. (County Br. at 23:18–21.) To the contrary, Plaintiffs' team includes both a former public defender and a former federal prosecutor with collective criminal experience numbering in the hundreds of cases—including international narcotics trafficking cases, murders, and terrorism cases that required top-secret clearance and careful attention to confidentiality issues.

Decl."), filed herewith, at ¶ 3.) Despite this history, Mr. Clark learned that Mr. Seay purchased the gun he used to kill Amber Clark from an unidentified pawnshop in Missouri in the summer of 2018, and took possession of the firearm before a background check was completed. (*Ibid.*) Since his wife's murder, Mr. Clark has been concerned that someone with Mr. Seay's criminal and mental health history was able to purchase a firearm. (*Id*. at ¶ 4.) He set out to learn whether there are any flaws in the system that allowed Mr. Seay to purchase the murder weapon. (*Ibid.*)

Throughout Plaintiffs' quest to find out how Ronald Seay was able to obtain the gun he used to murder Amber Clark, they have been forthright to Defendants about both their motivations and the steps they were taking to find answers. Mr. Clark informed District Attorney Norgaard in October 2019 that his legal team had retained a private investigator to explore the provenance of the crime gun in this case. (*Id.* at ¶ 8, Ex. A.) He wanted District Attorney Norgaard to be aware of his efforts so as not to jeopardize the criminal investigation in any way. (*Id.* at ¶ 10.) In fact, to ensure the integrity of the criminal investigation, Mr. Clark informed District Attorney Norgaard that his team was working with a former federal prosecutor with experience in criminal investigations. (*Ibid.*) District Attorney Norgaard expressed no concerns or objections to Mr. Clark then, and neither declarant now asserts that this "outside investigation" has hindered the prosecution in any way. (*Id.* at ¶ 11; *see, generally,* Norgaard Decl., MacLafferty Decl.) As victims of this crime, Plaintiffs share Defendants' interest in a successful prosecution.[3]

Plaintiffs requested ten (10) categories of records from both Defendants. The City asserted objections to requests 1 through 3 and 8 through 10, and claimed that no responsive records exist for requests 4 through 7. (Mem. of Points and Auth. in Support of City of Sacramento, Including

[3] Should the Court direct disclosure of the requested records, Plaintiffs would be willing to coordinate with Defendants and the Court on these efforts—as they do with counsel experienced in criminal investigations.

Sacramento Police Dept.'s Opp'n to Petn. for Writ of Mandate, at 7:2–24 (hereinafter "City Br.").) The County asserted objections for all ten requests, appearing to concede that responsive records exist for all ten. (*See* County Br. at 6:25–7:12.) As of this reply, Defendants have collectively produced only the hearing exhibits from Ronald Seay's December 14, 2020 arraignment—all of which had already been filed publicly in Sacramento County Superior Court. (*See* City Br. at 8:10–14; *see also* County Br. at 7:21–26.) These exhibits include three photographs believed to depict Mr. Seay's vehicle, three diagrams of the murder scene, a trespass notice naming Mr. Seay, and Amber Clark's death certificate.

While Defendants have not specified what documents they continue to withhold, to date Plaintiffs have not received any firearms tracing information (Request 1), property vouchers (Request 2), firearm purchase or sale records (Request 4), witness or party statements (Requests 5, 7, and 8), criminal records (Request 9), or communications with other law enforcement agencies (Request 10).

II. Plaintiffs' Requests are Procedurally Proper under the CPRA.

Before turning to the merits, Defendants present a thicket of meritless procedural arguments. Each of these procedural arguments attempt to undermine the CPRA's victims' access provision to the point where they can either assert that no responsive non-exempt documents exist, or that their disclosure obligations are already satisfied by public filings in the Seay criminal case. These arguments misread the applicable law—as well as Plaintiffs' requests—and should be rejected.

A. The CPRA's Victims' Access Provision Requires Disclosure of the Records at Issue.

Defendants first argue for a narrow construction of the victims' access provision, conceding that it overlaps requests 2, 3, and 8, but contending that it does not reach records responsive to requests

1, 4–7,[4] or 9–10. (*See* City Br. at 11:12–16; *see also* County Br. at 15:20–16:16.) By refusing to describe—even categorically—the withheld documents responsive to each request, Defendants fail to establish a factual foundation to credit this assertion as to any document. (*See Am. Civil Liberties Union of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 82 ["[T]he agency must be required [to] provide the requesting party adequate specificity … to assure[e] proper justification by the government agency." (internal quotations omitted)] (hereinafter referred to as "*ACLU of N. Cal.*").) It is insufficient for Defendants to simply proclaim that responsive documents could not "possibly" fall within an exemption. (City Br. at 11:12–16; *see also* County Br. at 15:20–21.) "Because the agency has full knowledge of the contents of the withheld records and the requester has only the agency's affidavits and descriptions of documents, its affidavits must be specific enough to give the requester 'a meaningful opportunity to contest' the withholding of documents and the court to determine whether the exemption applies." (*ACLU of N. Cal.*, 202 Cal.App.4th at 83.)

Here, no Defendant explains how firearms trace reports and "records relating to the purchase, sale, or transfer of any firearm(s)"—requests 1 and 4, respectively—could possibly fail to include "a description of any property involved" that would bring them within the victims' access provision.[5] In fact, trace reports are an essential description of a crime gun. Plaintiffs seek these descriptions for the same reason Defendants did: They tell the story of a crime gun's history. "ATF tracks a firearm from its manufacturer or importer, through the supply chain of licensed dealers and wholesalers, and on to the first retail purchaser of that gun. A trace usually, but not always, stops with the first retail

[4] Because the City claims to have no records responsive to requests 4–7, (*see* City Br. at 7:12–17), it appears that only the County withholds documents responsive to requests 4–7 on the grounds that the victims' access provision does not reach these records.

[5] Similar absurdities arise as to other requests. For example, the County never explains how a "witness statement" about Seay's gun purchases (request 5) could possibly fall outside the category of "statements of all witnesses[] other than confidential informants" that the CPRA requires be disclosed to crime victims.

purchaser…." (*Ctr. for Investigative Reporting v. U.S. DOJ* (9th Cir. 2020) 982 F.3d 668, 676) Obtaining this description of the crime gun is important to Plaintiffs as they continue to grieve their loss because it may help them identify how Mr. Seay purchased one or more firearms, despite an incomplete background check. (*See* Clark Decl. at ¶ 6 ["In addition to providing some measure of closure for me and my family, I hope this work will help to prevent future tragedies. No family should have to suffer the anguish Amber's murder has inflicted upon our family."].)

Defendants also cite no authority for their contention that disclosure of "description[s] of any property involved … to victims of an incident" refers only to property that has been damaged in a crime. (City Br. at 11:17–26; County Br. at 15:22–27.) A plain reading of the statute lays bare Defendants' misreading:

> However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation.

(Cal. Gov. Code, § 6254, subd. (f).)

"Victims of an incident" and "any person suffering bodily injury or property damage or loss" are two distinct categories of people who are entitled to "the description of any property involved." If the Legislature intended for victims to receive only descriptions of property that had been damaged, they surely knew how to craft language to reflect it. Conflating these two different phrases "contravenes the principle that when different words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended."

(*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343.) Defendants' cramped reading of the statute violates basic principles of statutory construction and should be rejected. (*See* Cal. Const., art. I, § 3, subd. (b)(2) ["A statute, court rule, or other authority … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."]; *see also BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750-751 [same].)

B. Plaintiffs are Entitled to Records, Not Merely the Information Defendants Choose to Disclose.

Next, Defendants contend that they are only required to disclose "selected information," rather than "records," under the victims' access provision, and therefore that Plaintiffs' requests are either overbroad (City Br. 10:26–11:5, 13:26–14:24; County Br. at 15:6–19) or already satisfied by publicly filed charging instruments and hearing exhibits (County Br. at 15:20–22). These arguments misconstrue both the Plaintiffs' requests and Defendants' obligations under the CPRA.

Plaintiffs are not seeking Defendants' "entire investigatory file." (*See* City Br. at 13:26–27; County Br. at 19:5–6.) Rather, Plaintiffs seek an order requiring Defendants to disclose responsive, non-exempt records in their possession. This is Defendants' core statutory obligation under the CPRA, (*see* Gov. Code, § 6253, subd. (b)), and it is not diminished by Plaintiffs' status as crime victims rather than members of the general public. After all, the victims' access provision is part of the CPRA, (*see* Gov. Code, § 6254(f)), and the statutory mechanism to enforce this right of access—like all rights under the CPRA—is through a request for "public records." (*See* Gov. Code, § 6258 ["Any person may institute proceedings … to enforce his or her right to inspect or to receive a copy of any public record or class of public records under this chapter."].)

Defendants' citations to *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072, and *Williams v. Superior Court* (1993) 5 Cal.4th 337, 361 are not to the contrary. Critically, both *Haynie* and *Williams* involved members of the public (a detainee and a newspaper, respectively), and thus were

controlled by a *different subpart* of Gov. Code § 6254(f) with *different language* than the victims' access provision. (*See Haynie,* 26 Cal.4th at 1064, 1072; *Williams*, 5 Cal.4th at 361.) That separate provision for public access, section 6254(f)(2), explicitly mandates disclosure of "information"—as in, "law enforcement agencies shall make public the following *information*." (Gov. Code § 6254, subd. (f)(2) [emphasis added]; *see also ibid.* [allowing agencies to withhold "disclosure of a particular item of information" that would endanger public safety].) Gov. Code § 6254, subd. (f)(2) involves information and not records because that specific provision requires it.

In contrast, the victims' access provision does not mention "information" or frame its disclosure requirement in these terms. Instead, it says that "law enforcement agencies shall disclose" items like "diagrams," "statements of the parties," and "statements of all witnesses"—all of which are records. (*See* Gov. Code, § 6254(f)). It also allows agencies to withhold "that portion of those investigative files" that reflect officer analysis or conclusions, further reinforcing that the basic unit of disclosure in the victims' access provision is a record. (See *ibid.*) To the extent Defendants argue that the victims' access provision does not require disclosure of records, but only information derived from records (and presumably memorialized in some new form), their argument is hard to square with the CPRA for a second reason. "[T]he PRA (like the federal Freedom of Information Act, on which the PRA was based) does not require agencies to 'create new records to satisfy a request.'" (*Nat. Law. Guild, S.F. Bay Area Ch. v. City of Hayward* (2020) 9 Cal.5th 488, 501–02 [*quoting Sander v. Superior Ct.* (2018) 26 Cal.App.5th 651, 665].)

Regardless of whether it is framed in terms of records or information, a partial disclosure does not relieve Defendants of their remaining disclosure obligations under the CPRA. (*See*, e.g., County Br. 15:20–16:2.) For the first time, the County contends that that the electronic disclosure of public exhibits from Mr. Seay's criminal case satisfies its disclosure requirement. (County Br. at 15:20–21;

see also id. at 20:10–12.) This argument plainly fails under section 6253 of the Government Code, which requires public agencies to make "[a]ny reasonably segregable portion of a record . . . available for inspection by any person requesting the record after deletion of the portions that are exempted by law." (Gov. Code, § 6253.) What this means is that "[a]ll documents maintained by a public entity are subject to disclosure … unless a statutory exemption applies or the catchall exemption, section 6255, is satisfied…." (*Fredericks v. Superior Ct.* (2015) 233 Cal.App.4th 209, 223[remanding for further proceedings to determine extent to which agency was required to produce records underlying derivative summaries already produced], disapproved of on other grounds by *Nat. Law. Guild*, *supra*, 9 Cal.5th at 508, n.9.)[6]

III. A Case-Specific Consideration Makes Clear the Disclosure Required.

Defendants carry a high evidentiary burden to justify nondisclosure.[7] Here, they fail to support any of their merits arguments with meaningful evidence. They also fail to acknowledge the specific facts of this case that make clear their speculative fears are unfounded. The public's interest in honoring rights of victims favor disclosure.

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[6] Finally, Defendants suggest that because Plaintiffs have not addressed arguments they claim were raised by the bare invocation of the evidence code with no explanation in its denial letters, those objections are waived on Reply. (County Br. at 21:9–11; City Br. at 15:27–16.3.) The case they cite, *Citizens for Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609, 629–630—which does not involve a public-records request—provides no support for this startling proposition. Instead, it provides that on appellate review an argument raised with no citations to the underlying record or authority is disregarded. (*Ibid*.) It is plainly inapplicable here, and there is no waiver issue in this case.

[7] Defendants attempt to minimize their burden by arguing that they are "entitled to a presumption that they have reasonably and in good faith complied with the obligation to disclosure responsive information." (County Br. at 8:25–27; City Br. at 9:5–8.) But their citations to *ACLU of N. Cal.* both omit the Court's next sentence: "But that presumption cannot be permitted to obstruct the prodisclosure purpose of the PRA and FOIA, which create a statutory presumption that all government records are available to any person." (*ACLU of N. Cal.*, *supra*, 202 Cal.App.4th at 85.) Nor do they acknowledge that "[s]ince disclosure is favored, all exemptions are narrowly construed. [Citations.] The agency opposing disclosure bears the burden of proving that an exemption applies. [Citation.]" (*Id.* at 67.)

A. Defendants' Witnesses Offer Only Vague, Conclusory Opinions of Limited Evidentiary Value.

Rather than discuss the specific facts of this case, Defendants purport to offer speculation, generalized fears, and policy objections in the guise of expert opinions. Defendants' witness declarations are of little evidentiary value and do not provide a factual basis for withholding. (*See Humane Society of the U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1256–57) [collecting cases holding that the strength of an expert assumptions affects weight rather than the admissibility of opinions].) "Vaguely worded declarations making only general assertions" do not satisfy the government's burden of establishing risk under the CPRA. (*Long Beach Police Officers Assn v. City of Long Beach* (2014) 59 Cal.4th 59, 75.) Because Defendants' declarations fail to engage with the individual facts of this case in any meaningful way and omit key information, the Court should accord them little persuasive value.

In *Commission on Peace Officer Standards & Training v Superior Court* (2007) 42 Cal.4th 278, a newspaper sought to compel the release of the names and employment data of peace officers throughout California. The government agency refused disclosure and cited the safety of its police officers as a public interest. (*Id.* at 301.) The Supreme Court recognized the legitimacy of the public interest identified—protecting the safety and well-being of peace officers. "[B]ut the Commission's contention that peace officers in general would be threatened by the release of the information in question is purely speculative. A mere assertion of possible endangerment is insufficient to justify nondisclosure…. The Commission has not offered any persuasive illustration of how disclosure of the innocuous information at issue could 'create mischief' for peace officers in general." (*Id.* at 302 [citations and quotation marks omitted]; *see also ACLU of N. Cal.*, *supra*, 202 Cal.App.4th at 66–68 [reversing trial court's decision to allow withholding under Evid. Code, § 1040, Gov. Code, § 6254, and Gov. Code, §6255 where decision was not based on "substantial evidence"]; *CBS Inc. v Block*

(1986) 42 Cal.3d 646, 652 ["[M]ere assertion" that disclosure of identifying information to the press would endanger concealed weapon applicants did not "clearly outweigh" public interest in disclosure].)

Defendants fall far short of the meeting their evidentiary burden to justify nondisclosure. Instead of pointing to case-specific factors as the law requires declarants MacLafferty and Norgaard list a litany of speculative fears or general policy objections that, if credited, would effectively eliminate the victim's access provision entirely. Nothing in either declaration identifies a feature or circumstance specific to this case that suggests a particular concern about disclosure to these plaintiffs. Instead, Defendants ask the Court to consider speculative future harms about claimants who do not yet exist. (Norgaard Decl., at ¶13 ["In my opinion disclosure of materials in this instance would create a bad precedent for my office *with respect to future requests to provide such information*." (emphasis added)].) Instead of a case-specific discussion of the merits of this public records request, Defendants present policy objections to the Legislature's decision to establish the victims' access provision. While Defendants may not believe that victims should have timely access to these materials, that policy judgment is not theirs to make. (See *Williams*, *supra*, 5 Cal.4th at 350 ["Our primary task in construing a statute is to determine the Legislature's intent, and [t]he statutory language, of course, is the best indicator of legislative intent." (quotation marks omitted; alteration in original)].)

The balance of the expert declarations contains either conjecture about harms that may occur or arguments based on features of the case that might be true of *any* criminal investigation. (*See*, e.g., MacLafferty Decl. at ¶6 ["[T]here is an extreme likelihood of intense investigation up to and through the trial process."]; *id.* at ¶ 5 ["A secondary investigation *could* taint future statements, damage trial testimony of existing witnesses, and create another set of facts not vetted with full knowledge of a trained police investigator…. Outside investigation and attention by secondary interested parties would

have *the potential* to create bias and animosity of potential witnesses in the criminal matter…."]; *id*. at ¶ 8 ["Any release of direct evidence specific to the involved firearm(s) *could be prejudicial* to the defendant's ability to a fair trial [sic].…" (emphasis added)]; *see also* Norgaard Decl., at ¶ 11 ["[D]isclosure of the records and the information contained therein *could jeopardize* this investigation as well as future investigations.… Release of this information *could* result in additional motions being made in the criminal matter, *could* contribute to delay in the case tried…." (emphasis added)].) Both declarants fail to identify any specific factual circumstances in this case to support their dire speculation. In fact, none of these experts is so bold as to declare that they believe that any of these harms *will* happen if the Court releases *these* documents to *these* victims. The declarants rely so heavily on hypothetical scenarios because a meaningful case-specific inquiry makes clear there is no evidentiary basis to make such bold predictions.

B. Defendants Fail to Establish that Disclosure of Responsive Documents Will Jeopardize the Prosecution of Ronald Seay.

Defendants contend that nondisclosure under the victim's access provision is permissible because further disclosure will jeopardize their efforts to hold Amber Clark's murderer accountable. (*See* Gov. Code, § 6254(f).) Plaintiffs agree that an important objective. But there is no evidence-based reason that this shared objective is threatened by disclosing records to help the Clark family understand where Ronald Seay obtained the guns used to murder their wife, their sister, their daughter. Defendants' witnesses offer only speculative opinions about generalized harms from disclosure that have no basis in the facts of this case.

Here, the victims' conduct makes clear they share the same stated objective of ensuring that the criminal prosecution holds the right person accountable. Although District Attorney Norgaard failed to disclose it in his declaration, Kelly Clark made sure to inform him of the steps his team was taking in the investigation to learn about the murder weapon. (*See* Clark Decl. at ¶ 8, Ex. A.) Mr. Clark wanted

District Attorney Norgaard to know that his team was working with a former prosecutor with extensive criminal investigation experience. As victims of Amber Clark's murder, Plaintiffs did not want to jeopardize the criminal investigation and they have taken careful steps not to at all stages. (*Ibid.*)

Defendants' declarations reveal that their resistance to disclosure here is not based on the facts of this particular case, but rather on a blanket policy to withhold all investigative records during the pendency of any investigation, prosecution, and appeal. (*See* MacLafferty Decl. at ¶ 4 ["The Sacramento Police Department does not disclose the contents of investigatory records in advance of criminal trials and appeals for several reasons."].) This policy is manifestly incompatible with Defendants' obligations under the CPRA, and with their burden to furnish individualized proof that disclosing these responsive documents will undermine the prosecution of Ronald Seay. Defendants fail to carry their burden to establish that disclosure would threaten their investigation.

C. Disclosure to these Victims Favors the Public Interest.

Had Defendants submitted declarations of evidentiary value, the Court would also be required to consider whether the public interest favored nondisclosure under both Evidence Code section 1040 (incorporated into the CPRA under Government Code section 6254, subdivision (k) and Government Code section 6255. (*ACLU of N. Cal.*, *supra*, 202 Cal.App.4th at 69 ["Because '[t]he weighing process mandated by Evidence Code section 1040 requires review of the same elements that must be considered under section 6255 … [,] rejection of the claim of exemption under 6255 on the ground that the public interest weighs in favor of disclosure similarly requires rejection of the claims of exemption under 6254, subdivision (k) and Evidence Code section 1040.'" (alterations in original) (citation omitted)].) It is clear that the public interest weighs in favor of disclosure.

The government can withhold records only where it can demonstrate that:

> "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure … ." [Citation.] [This inquiry] "contemplates a case-by-case balancing … ." [Citation.] Where the

> public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information. [Citation.]

(*Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 239–240.) Absent any meaningful discussion of the facts of this case, Defendants' vague, conclusory declarations do not carry their burden of establishing a harm that "clearly outweighs" the benefits of disclosure.

Defendants rely upon *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759 to argue that the risks of disclosure are too great. (County Br. at 22:24–23:3; City Br. at 17:22–25.) But the circumstances in this case are sharply different. Most notably, Plaintiffs in this action are victims—not suspects—in this tragedy. In *County of Orange*, the Court of Appeal reversed a trial court's decision to direct disclosure of investigation records to the *suspects* in an unsolved murder. The risk of releasing investigation records to very targets of the investigation drove the Court's analysis:

> For its part, the County paints a compelling picture of the dire consequences that could result from the disclosure of the contents of an investigative file to the suspects in a possible murder. The County invokes the powerful public interest in solving homicides and bringing killers to justice. Undoubtedly, that interest is at risk if confidential information about the homicide investigation is released to suspects. There is an obvious danger that they may learn crucial information that would enable them to avoid apprehension. More specifically, permitting suspects to review materials in an investigative file "will enable them to invent stories, explain away evidence thus far gathered, and intimidate or otherwise influence potential witnesses."

(*County of Orange*,79 Cal.App.4th at 766.)

Without doubt, solving homicides and bringing killers to justice is a powerful public interest, but the operative factors in that case are absent here. As victims, Plaintiffs' interests are aligned with the goals of the prosecution, and the declarants fail to discuss with any meaningful specificity based on the facts of this case how disclosure will undermine that public interest. What is more, the *County of Orange* court's concerns about suspects evading apprehension and intimidating witnesses are clearly inapt in this case, since the undisputed killer, Mr. Seay, is already in custody.

In *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, the First District Court of Appeal upheld a lower court's decision directing the California Department of Justice to disclose public records. The government agency in that case contended, as Defendants contend here (Norgaard Decl. at ¶ 11 ["Release of the information … will result in a significant amount of public resources."]), that disclosure would expend public resources and be unduly burdensome. But, unlike Defendants in this case, the government agency in *Becerra* attempted to provide specific facts supporting their conclusions. (*See Becerra,* 44 Cal.App.5th at 930.) They offered the two-page declaration of a Senior Assistant Attorney General, who represented that responding to one portion of the request would involve a review of 109,000 documents and take a minimum of 3,600 attorney hours. A second portion would involve 26,000 items and would take approximately 860 hours to review. (*Ibid.*) That level of specificity—far more than Defendants offer here—was insufficient for the Court of Appeal. As the court explained:

> In assessing whether an agency has satisfied its burden in invoking the CPRA catchall exemption, courts may accept expert and other predictions based on solid foundations. [citation] Because Newman's declaration was lacking in meaningful detail, we conclude it fell short of demonstrating that public fiscal and administrative concerns over the expense and inconvenience to real parties in interest's records request clearly outweigh the public interest in disclosure.

(*Ibid.*) It is insufficient to simply identify a public interest at issue. Defendants must also prove by competent evidence that the identified public interest is imperiled by disclosure. Even expert predictions must be based upon "solid foundations." (*Ibid.*) Instead of solid foundations, Defendants offer speculation, generalized fears, and policy disagreements. The evidentiary value of these declarations fall well short of the standards courts require to justify nondisclosure.

The public interest in protecting the rights of victims is enshrined in the Constitution. (Cal. Const., art. I, § 28, subd. (a), par. (1). ["Criminal activity has a serious impact on the citizens of California. The rights of victims of crime and their families in criminal prosecutions are a subject of

grave statewide concern."].) Plaintiffs agree that Defendants' proffered public interests—the need to pursue killers and bring them to justice, constitutional guarantees of a fair trial, and the efficient administration of justice are important. But Defendants fail to identify how these interests would be undermined by the disclosure of records to the victims of Amber Clark's murder. Instead, they offer vague speculations that are contradicted by the factual record in this case. A victim's right to disclosure outweighs these speculative harms. Defendants' objections under Government Code section 6254, subdivision (k), and section 6255 and Evidence Code section 1040 are unavailing.

IV. Plaintiffs Did Not Fail to Join Indispensable Parties.

Finally, the County contends that relief should be granted because Plaintiffs failed to name indispensable parties. Tellingly, the County glosses over the question of *whether* the ATF (Bureau of Alcohol, Tobacco, Firearms, and Explosives) and Ronald Seay are indispensable parties, instead simply asserting they are and reciting the standard for whether a case must be dismissed *in the absence* of an indispensable party. (County Br. at 9:3–11.) But a party is not indispensable unless it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." (Code Civ. Proc., § 389, subd. (a)(2).) As explained below, the ATF and Ronald Seay have no such interests in this case.

A. Defendants—Not ATF—Have Control Over Defendants' Records, so ATF is Not an Indispensable Party.

The County tries to sidestep Plaintiffs' arguments for why federal law is not a basis for withholding under Government Code section 6254, subdivision (k), by arguing that ATF is an indispensable party because it or some other federal agency "owns" investigative records in the Sacramento DA's files. (County Br. at 9:3–12:6.) This argument is unavailing. Nor, in any event,

does the County address the underlying problem that the federal statute it asserts as a basis for withholding—the Tiahrt Rider—is unconstitutional as applied to state actors.

ATF is not an indispensable party. Plaintiffs seek an order that state actors (the City and County) have obligations under state law (the CPRA) to produce public records that are in the state actors' sole possession. The County's efforts to claim that a federal agency "owns" a portion of the County's investigative files does not establish the existence of an indispensable party. The County offers only that that the "owner" of the documents is "presumably the ATF or other federal agency." (County Br. at 11:15.) Nor is there an explanation of what "specific interest" this unnamed federal "owner" might have in the County's public records. (County Br. at 11:13–14.) And the County fails to identify a single document, code provision, or witness to support its vague claims of federal ownership and oversight of County records. For its part, the Tiahrt Rider is silent on ATF having any role in the downstream use of trace data, once it has completed a local entity's tracing request and returned the results. (*See* Consolidated and Further Continuing Appropriations Act of 2012, Pub.L. No. 112-55 (Nov. 18, 2011) 125 Stat. 552, 609–610 [providing, in relevant part, that ATF may not spend appropriated funds to disclose trace data except to law enforcement entities].) As far as the Tiahrt Rider is concerned, ATF's role in trace data begins and ends with the expenditure of appropriated funds. And nothing that Plaintiffs are requesting in this case would require an expenditure by the ATF.

The County's cited authority is simply inapposite. Plaintiffs are not seeking an order requiring ATF to do anything, unlike the city councilperson found indispensable in *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1297. Nor are Plaintiffs seeking documents that are in ATF's possession. (Cf. *id.* at 1294 [documents at issue were personal emails in absent party's sole

possession].) Nor was ATF ever named, and then dropped, from this lawsuit due to a clerical error. (*Id. at* 1295–1296.)

Furthermore, the County overlooks that joining ATF to a CPRA action against state actors would create a lawsuit that no court has the authority to completely adjudicate. The United States is not amenable to suit in state court absent a waiver of immunity or consent to suit. (*See, e.g., Gray v. Bell* (D.C. Cir. 1983) 712 F.2d 490, 506 [sovereign immunity insulates the United States from unconsented suit].) Federal courts lack jurisdiction to enjoin state governments to comply with state law. (*See Pennhurst State School & Hosp. v. Halderman* (1984) 465 U.S. 89, 124–125.) This not only creates an intractable jurisdictional problem, it prevents ATF from being considered indispensable under the California Rules of Civil Procedure. (*See* Code Civ. Proc., § 389, subd. (a) [party can only be considered indispensable if "joinder will not deprive the court of jurisdiction over the subject matter of the action," among other factors].)

Finally, the County argues in passing that disclosures under the victims' access provision of Government Code section 6254(f) count as public disclosure here because of Plaintiffs' "stated interest" in advocating for lifesaving reforms. (County Br. at 10:16–27.) Not so. The disclosure would be "public" if Plaintiffs were exercising their CPRA rights as members of the public, which would entitle other members of the public to access the records in turn. (*See* Gov. Code, § 6254.5.) But section 6254(f) plainly distinguishes between victims and the public by mandating separate disclosure requirements for the victims and the public. Here, Plaintiffs are asserting a right of access as crime victims, which does not trigger wider disclosure. The Tiahrt Rider does not give the County a basis to withhold responsive records under Government Code section 6254, subdivision (k).

B. Ronald Seay is not an Indispensable Party.

Nor is Amber Clark's alleged murderer an indispensable party. (Cf. County Br. 12:8–13:16.) Mr. Seay is no more an agent of California's government or subject to the CPRA than the ATF is, and

Plaintiffs are not seeking any documents in his possession or control. The County points to no request seeking medical or mental health records relating to Mr. Seay, and Plaintiffs have not made any such request. Rather than explain how Mr. Seay is legally indispensable to this action, the County resorts to multi-step speculation that if: (1) authorities obtained a statement from Mr. Seay in violation of *Miranda*, (2) the statement is suppressed at his criminal trial, and (3) that statement is disclosed to plaintiffs before trial and then widely publicized, then (4) it might taint jurors. (*See* County Br. at 13:8–12.) They do not explain how this would make Seay an indispensable party, and in any event, this harm is exceedingly unlikely. Plaintiffs—as victims in Amber Clark's murder—have the same incentive that prosecutors do in seeing Amber's killer brought to justice. Moreover, the Legislature has already balanced the speculative harm raised by the County—a harm that would in theory apply in every criminal case—and found it outweighed by the concrete needs of crime victims in obtaining information about the circumstances of their injury (*See* Gov. Code, § 6254(f) [requiring disclosure of "statements of the parties involved in the incident"].)

CONCLUSION

The California Legislature has clearly announced that the public's right to understand how its government functions is a public interest. That interest is particularly acute as it relates to Plaintiffs—the victims of a horrific crime. If the Defendants seek to avoid those obligations, they must meet a heavy evidentiary burden to justify their conduct based on facts specific to this case. Here, they fail to do so and instead rely upon conclusory statements, speculative fears, or no support at all. For these reasons, and any others that may appear to the Court, Plaintiffs respectfully urge the Court to grant their Petition for a Writ of Mandate in full, and to direct Defendants to disclose the requested records. In the alternative, Plaintiffs request that the Court conduct an in camera review of the responsive documents. Such a review, which Plaintiffs requested in their opening memorandum and Defendants

do not oppose in their papers, will confirm that Plaintiffs are entitled to the records and that disclosure will in no way prejudice the Defendants' case against Mr. Seay. To the extent the Court has additional concerns, Plaintiffs would request an opportunity to propose tailored protective measures to allay them.

Respectfully submitted,

DATED: March 29, 2021 By: _____

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