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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO**

BRETT D. HOLT, an individual
Petitioner,
v.
CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM,
Respondent.

Case No. 34-2019-80003207

**MEMORANDUM OF POINTS AND
AUTHORITIES (OPENING BRIEF) IN
SUPPORT OF PETITION FOR
DECLARATORY RELIEF AND WRIT
OF MANDATE UNDER THE
CALIFORNIA PUBLIC RECORDS ACT
(GOV. CODE § 6258)**

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I.

INTRODUCTION

This Petition for Writ of Mandate seeks access to records of vital importance to all persons that participate (either as a public employee or retiree from a public agency) in the California Public Employees' Retirement System [CalPERS]. Since 1994, Respondent received money from the County of Placer and Placer County employees to fund retirement benefits that included longevity pay in the calculation of "final compensation". Throughout the years, Respondent regularly reviewed the County of Placer longevity pay provision as being in compliance with the Public Employees Retirement Law (PERL) and included it in the calculation of final compensation (*i.e.* Respondent considered the County's longevity pay to be "PERSable")¹. County of Placer employees and the County of Placer paid approximately 16.2 million dollars to Respondent related to longevity pay, and Respondent processed the payments and paid retirement benefits on the basis that longevity pay was PERSable. In 2019, however, Respondent began denying County of Placer employees' final compensation calculations that included "longevity pay," even though the relevant statutes and regulations had not changed. The only thing that had changed was Respondent's interpretation of the County of Placer's longevity pay provision.

In four separate Public Record Act requests [Gov. Code §6250 *et al.*], Petitioner sought records that would shed light on why, after 25 years, Respondent changed its opinion as to Placer County's longevity pay provision. The requests sought Respondent's internal records that would provide factual information as to when Respondent changed its interpretation, who was responsible for the change in Respondent's interpretation, on what basis did Respondent change its interpretation and how did Respondent communicate, teach and instruct Respondent's staff on the new interpretation.

Unfortunately, after nearly two months, Respondent produced no internal documents that would answer or clarify how Respondent could so radically change its interpretation of the County

¹ "PERSable" is a commonly used term to describe a special compensation that is accepted by CalPERS as being compliant with the PERL and included in the calculation of final compensation.

1 of Placer's longevity pay provision. Respondent only produced records that were in the public
2 domain or records of Respondent's communications to third persons, but did not produce any
3 internal records. For example, while Respondent electronically produced full volumes of the
4 California Public Employees Retirement Law [PERL] for each year from 2016 to 2019, it did not
5 produce a single internal record from 1992 to 2019 (*i.e.* a record between Respondent's employees
6 such as e-mails, correspondence, bulletins, notices, training material, or sections of policy or
7 procedural manuals) that would explain, apply, teach or implement the relevant statute or
8 regulation. [Gov. Code § 20636 or 2 CCR §571.] In essence, Respondent's response to the four
9 PRA's was a complete denial to the record requests. Respondent's refusal to respond to Petitioner's
10 "meet and confer" requests to produce internal records forced the filing of present petition.

11 It is well established that there is a manifest public interest in the avoidance of secret law
12 and a correlative interest in the disclosure of an agency's working law. [*State Board of Equalization*
13 *v. Superior Court* (1992) 10 Cal.App.4th 1177, 1186-1187, citing *NLRB v. Sears, Roebuck & Co.*
14 (1975) 421 U.S. 132, 153 and *Citizens for a Better Environment v. Department of Food &*
15 *Agriculture* (1985) 171 Cal.App.3d 704, 714, fn. 7.] The court explained:

16 The revelation of an agency's working law promotes its accountability to the public and
17 the consistent, predictable and nonarbitrary application and enforcement of the law.
18 This working law is found in the application of an agency's regulations to cases coming
19 before it and in the opinions of its counsel and audit staff training materials which guide
the Board's employees in the performance of their duties. It is in the application of a
rule to the facts of a case that its meaning is frequently disclosed.

20 [*State Board of Equalization, supra*, 10 Cal.App.4th at 1186 (citations omitted)(finding public
21 interest in disclosure of documents concerning application and construction of state sales and use
22 tax law outweighed burden to respondent).]

23 As will be discussed below, Respondent's complete refusal to produce any internal records
24 violates the Public Records Act. To the extent that Respondent claims an exemption exists based on
25 Government Code §6254 and §6255, the records are not exempt from production or, in the
26 alternative, Respondent's tactic of asserting a blanket refusal to produce any internal records
27 resulted in the over withholding of records that are required to be produced. Petitioner now seeks
28

1 the court's assistance in compelling Respondent to produce the non-exempt records that were
2 requested.

3 **II.**

4 **PARTIES**

5 Petitioner is an employee of the County of Placer, an attorney and a recipient of longevity
6 pay. He is eligible to retire and is entitled to retirement benefits from Respondent. As with other
7 employees that receive longevity pay, Petitioner will have his retirement benefit substantially
8 reduced if Respondent can decide (without legally changing the statutes or regulations) that
9 longevity pay is no longer included in the calculation of County of Placer employee retirement
10 benefits even though it complies with PERL.

11 Respondent is the California Public Employees' Retirement System of California
12 [CalPERS]. The CalPERS Board of Administration is vested with the authority to delineate
13 specifically and exclusively what constitutes 'special compensation'. [Gov. Code § 20636(c)(6).]
14 CalPERS is a public agency subject to the Public Records Act. [Gov. Code § 6252(d).] CalPERS'
15 headquarters is located in the City and County of Sacramento.

16 **III.**

17 **FACTUAL BACKGROUND**

18 Petitioner made four separate PRA requests through Respondent's website. Respondent
19 assigned a number to each request. Respondent identified Petitioners' requests as #4479, #4480,
20 #4481 and #4529.

21 **A. Request No. 4479**

22 On May 10, 2019, Petitioner made a Public Records Act request to Respondent as follows:

23 Pursuant to the Public Records Act [Gov. Code §§ 6250 et seq.], I respectfully
24 request records related to CalPERS interpretation of Government Code §20636 and 2
25 CCR §571

- 26 1. All CalPERS records that, in whole or in part, discuss, consider, confer,
27 advise, examine, explain, review, deliberate, debate, weigh, opine, order, instruct,
28

1 interpret, teach, deliver, speak to, reflect on, offer, take up, or relate to Circular
2 Letter No. 200-049-07.²

3 [See Exhibit A attached to the Declaration of Brett D. Holt in Support of Petition for Writ of
4 Mandate.]³ Respondent provided its ten-day response on May 22, 2019, which noted that it was
5 still searching for potentially responsive information, did not ascertain whether it determined
6 whether any documents were in fact responsive, and asserted Government Code section 6254 and
7 6255 generally as possible exemptions.

8 On June 26, 2019, Respondent produced a portion of the records responsive to Requests #
9 4479. With the partial production, Respondent wrote as to each request, in relevant part:

10 Attached is a portion of the information you requested. Staff continues to search for
11 and review potentially responsive information. We estimate all responsive
12 documents subject to disclosure under the PRA, mailed to you by July 17, 2019.

13 Personal information is exempt from disclosure under Government Code 20230 and
14 6254(k) and has therefore been redacted.

15 [See Exhibit B.]

16 On July 16, 2019, Respondent communicated that it had provided all responsive documents
17 for Request #4479 and that Respondent considered the PRA fulfilled and closed. The final
18 response provided, in relevant part, the following:

19 Our staff located records that are responsive to your request, which you will find
20 attached to this letter. Our staff also determined that other responsive records in our
21 possession are exempt from disclosure or have been redacted under California Code
22 sections 6254(k) attorney-client communications; 6254(a) and 6255 deliberative
23 process records; and 6254(b) records concerning litigation.

24 Personal information is exempt from disclosure under Government Code Section
25 20230 and 6254(k) and had therefore been redacted.

26 By providing you this information we consider your PRA request fulfilled and
27 closed.

28 _____
² Circular Letter No. 200-049-07 dated 8/28/07 is titled “‘Group or Class of Employment’ May include Employees considered Together Based on Date of Hire.”

³ All exhibits referenced are attached to the Declaration of Brett D. Holt. The exhibits are provided as supporting evidence in lieu of an administrative record. (See Code Civ. Proc. § 1089.5 (noting that record is not always required on writ petitions).)

1 [Exhibit C]

2 On July 17, 2019, Respondent produced public circular letters that were not included in the
3 final production. The records produced included no internal Respondent's records (*i.e.* a record
4 between Respondent's employees such as e-mails, correspondence, bulletins, notices, training
5 material, or sections of policy or procedural manuals) that would explain, apply, teach or implement
6 the relevant statute or regulations related to Circular No. 200-049-07.

7 **B. Request No. 4480**

8 On May 10, 2019, Petitioner made a second Public Records Act request to Respondent as
9 follows:

10 Pursuant to the Public Records Act [Gov. Code §§ 6250 et seq.], I respectfully
11 request records related to CalPERS' interpretation of Government Code § 20636 and
12 2 CCR § 571.

13 1. All CalPERS records that, in whole or in part, discuss, consider, confer,
14 advise, examine, explain, apply, review, deliberate, debate, weigh, opine, order,
15 instruct, interpret, teach, deliver, speak to, reflect on, offer, take up, or relate to the
16 case of *DiCarlo et al. v. County of Monterey* (2017) 12 Cal.App.5th 468; 218
17 Cal.Rptr.3d 829.⁴

18 [See Exhibit D.] Respondent provided its ten-day response on May 22, 2019, which noted that it
19 was still searching for potentially responsive information, did not ascertain whether any documents
20 were responsive yet, and asserted Government Code section 6254 and 6255 as possible exemptions.

21 On June 26, 2019, Respondent produced a portion of the records responsive to Request #
22 4480. With the partial production, Respondent wrote as to each request, in relevant part:

23 Attached is a portion of the information you requested. Staff continues to search for
24 and review potentially responsive information. We estimate all responsive
25 documents subject to disclosure under the PRA, mailed to you by July 17, 2019.

26 Personal information is exempt from disclosure under Government Code 20230 and
27 6254(k) and has therefore been redacted.

28 [See Exhibit E.]

⁴ The *DiCarlo* case examined whether a longevity-performance provision in the County of Monterey complied with PERL.

1 On July 16, 2019, Respondent communicated that it had provided all responsive documents
2 for Request #4480 under PRA Requests #4479 and #4481 and that Respondent considered the PRA
3 fulfilled and closed. [See Exhibit F.] Respondent did not assert any objections in its final response.

4 In response to Request #4480, Respondent's production again failed to include any internal
5 Respondent's records (*i.e.* a record between Respondent's employees such as e-mails,
6 correspondence, bulletins, notices, training material, or sections of policy or procedural manuals)
7 that would explain, apply, teach or implement the decision of *Dicarlo et al. v. County of Monterey*
8 (2017) 12 Cal.App.5th 468.

9 **C. Request No. 4481**

10 On May 10, 2019, Petitioner made a third Public Records Act request, Request #4481, to
11 Respondent as follows:

12 Pursuant to the Public Records Act [Gov. Code §§ 6250 *et seq.*], I respectfully
13 request records related to CalPERS' interpretation of Government Code §20636 and
14 2 CCR § 571.

15 I understand that this request may result in a significant number of responsive
16 documents. Therefore, I am tailoring my request to a limited selection of the most
17 important documents and most relevant timeframe.

18 As set forth below, for purposes of Requests 1 through 5, I do not seek all records
19 that may reference Government Code § 20636 and 2 CCR § 571, but only a limited
20 set of "Decisional Documents or Records" that, in whole or in part, discuss, consider,
21 confer, examine, explain, review, deliberate, debate, weigh, opine, order, instruct,
22 interpret, teach, deliver, speak to, reflect on, offer, take up, or relate to:

- 23 1. CalPERS' interpretation of the definition of longevity pay contained in 2
24 CCR §571(1);
- 25 2. CalPERS' interpretation that special compensation be "available to all
26 members in the group or class" contained in 2 CCR § 571(b)(2);
- 27 3. CalPERS' interpretation of "group or class of employment" contained in
28 Gov. Code §20636(e)(1);
4. CalPERS' determination that that the County of Placer's longevity pay does
not meet PERL's exclusive definition of Longevity Pay; or
5. CalPERS' determination that the County of Placer's longevity pay is not
available to the group or class because it is limited to employees at the top step of the
pay range.

1 The term "CalPERS" means all divisions, sub-divisions, departments, working
2 groups, directors, officers, managers and employees of the California Public
Employees' Retirement Systems.

3 The term "records" as used in this request is defined as "any writing containing
4 information relating to the conduct of the public's business prepared, owned, used, or
5 retained by any state or local agency regardless of physical form or characteristics."
6 [Gov. Code § 6252(e)] "Writing" is defined as "any handwriting, typewriting,
7 printing, photostating, photographing, photocopying, transmitting by electronic mail
8 or facsimile, and every other means of recording upon any tangible thing any form of
communication or representation, including letters, words, pictures, sounds, or
symbols, or combinations thereof, and any record thereby created regardless of the
manner in which the record has been stored." [Gov. Code § 6252 (g)]

9 Records Request No. 1: All DECISIONAL DOCUMENTS OR RECORDS,
10 including but not limited to, all writings, memoranda, correspondence, electronic
11 correspondence, audits, agenda, letters, circular letters, bulletins, manuals,
12 instructions, reports, opinions, advisories, research, policies, procedures, notes,
13 messages, minutes, announcements, directives, or records from January 1, 1992 to
the PRESENT related to CalPERS' interpretation of the definition of longevity pay
contained in 2 CCR §571(1). [Note: This request does not seek documents already
produced in response to Ms. Sarah Glatt's PRA request – Tracking No. 4301]

14 Records Request No. 2: All DECISIONAL DOCUMENTS OR RECORDS,
15 including but not limited to, all writings, memoranda, correspondence, electronic
16 correspondence, audits, agenda, letters, circular letters, bulletins, manuals,
17 instructions, reports, opinions, advisories, research, policies, procedures, notes,
18 messages, minutes, announcements, directives, or records from January 1, 1992 to
the PRESENT related to CalPERS' interpretation that special compensation be
"available to all members in the group or class" contained in 2 CCR § 571(b)(2).
[Note: This request does not seek documents already produced in response to Ms.
Sarah Glatt's PRA request – Tracking No. 4301]

19 Records Request No. 3: All DECISIONAL DOCUMENTS OR RECORDS,
20 including but not limited to, all writings, memoranda, correspondence, electronic
21 correspondence, audits, agenda, letters, circular letters, bulletins, manuals,
22 instructions, reports, opinions, advisories, research, policies, procedures, notes,
23 messages, minutes, announcements, directives, or records from January 1, 1992 to
the PRESENT related to CalPERS' interpretation of "group or class of employment"
contained in Gov. Code §20636(e)(1). [Note: This request does not seek documents
24 already produced in response to Ms. Sarah Glatt's PRA request – Tracking No.
4301]

25 Records Request No. 4: All DECISIONAL DOCUMENTS OR RECORDS,
26 including but not limited to, all writings, memoranda, correspondence, electronic
27 correspondence, audits, agenda, letters, circular letters, bulletins, manuals,
28 instructions, reports, opinions, advisories, research, policies, procedures, notes,
messages, minutes, announcements, directives, or records from January 1, 1992 to

1 the PRESENT supporting CalPERS' determination that that the County of Placer's
2 longevity pay does not meet PERL's exclusive definition of Longevity Pay. [Note:
3 This request does not seek documents already produced in response to Ms. Sarah
4 Glatt's PRA request – Tracking No. 4301]

5 Records Request No. 5: All DECISIONAL DOCUMENTS OR RECORDS,
6 including but not limited to, all writings, memoranda, correspondence, electronic
7 correspondence, audits, agenda, letters, circular letters, bulletins, manuals,
8 instructions, reports, opinions, advisories, research, policies, procedures, notes,
9 messages, minutes, announcements, directives, or records from January 1, 1992 to
10 the PRESENT supporting CalPERS' determination that the County of Placer's
11 longevity pay is not available to the group or class because it is limited to employees
12 at the top step of the pay range [Note: This request does not seek documents already
13 produced in response to Ms. Sarah Glatt's PRA request – Tracking No. 4301]

14 Records Request No. 6: All audit procedure manuals from January 1, 1992 to the
15 PRESENT that, in whole or in part, discuss, consider, confer, advise, examine,
16 explain, review, deliberate, debate, weigh, opine, order, instruct, interpret, teach,
17 deliver, speak to, reflect on, offer, take up, or relate to how CalPERS' interprets the
18 definition of Longevity Pay contained in 2 CCR §571(1). This request specifically
19 includes all amendments to the audit procedure manual from 1992 to the PRESENT.
20 [Note: This request does not seek documents already produced in response to Ms.
21 Sarah Glatt's PRA request – Tracking No. 4301]

22 Records Request No. 7: All audit procedure manuals from January 1, 1992 to the
23 PRESENT that, in whole or in part, discuss, consider, confer, advise, examine,
24 explain, review, deliberate, debate, weigh, opine, order, instruct, interpret, teach,
25 deliver, speak to, reflect on, offer, take up, or relate to how CalPERS' interprets the
26 definition of Longevity Pay contained in 2 CCR §571(1). This request specifically
27 includes all amendments to the audit procedure manual from 1992 to the PRESENT.
28 [Note: This request does not seek documents already produced in response to Ms.
Sarah Glatt's PRA request – Tracking No. 4301]

Records Request No. 8: All audit procedure manuals from January 1, 1992 to the
PRESENT that, in whole or in part, discuss, consider, confer, advise, examine,
explain, review, deliberate, debate, weigh, opine, order, instruct, interpret, teach,
deliver, speak to, reflect on, offer, take up, or relate to how CalPERS' interprets the
requirement that all special compensation be “available to all members in the group
or class” contained in 2 CCR §571(b)(2). This request specifically includes all
amendments to the audit procedure manual from 1992 to the PRESENT. [Note: This
request does not seek documents already produced in response to Ms. Sarah Glatt's
PRA request – Tracking No. 4301]

Records Request No. 9: All audit procedure manuals from January 1, 1992 to the
PRESENT that, in whole or in part, discuss, consider, confer, advise, examine,
explain, review, deliberate, debate, weigh, opine, order, instruct, interpret, teach,
deliver, speak to, reflect on, offer, take up, or relate to how CalPERS' interprets
“group or class of employment” contained in Gov. Code §20636(e)(1). This request

1 specifically includes all amendments to the audit procedure manual from 1992 to the
2 PRESENT. [Note: This request does not seek documents already produced in
response to Ms. Sarah Glatt's PRA request – Tracking No. 4301]

3 Records Request No. 10: All electronic communications from January 1, 1992 to the
4 PRESENT wherein any of the following persons [Rene Ostrander, Brad Hanson,
5 Charles Miller or any other person in the CalPERS' Office of Audit Services or the
6 CalPERS' Employer Account Management Division or any other CalPERS'
7 division, excluding the Legal Division] were authors, recipients, or participants in
8 anyway and the electronic communication, in whole or in part, discussed,
9 considered, conferred, advised, examined, explained, reviewed, deliberated, debated,
10 weighed, opined, ordered, instructed, interpreted, taught, delivered, spoke to,
11 reflected on, offered, took up, or related to any of the following topics:

- 12 1. CalPER's interpretation of the definition of longevity pay contained in 2
13 CCR §571(1);
- 14 2. CalPER's interpretation that special compensation be "available to all
15 members in the group or class" contained in 2 CCR § 571(b)(2);
- 16 3. CalPERS' interpretation of "group or class of employment" contained in
17 Gov. Code §20636(e)(1);
- 18 4. CalPERS' determination that that the County of Placer's longevity pay does
19 not meet PERL's exclusive definition of Longevity Pay;
- 20 5. CalPERS' determination that the County of Placer's longevity pay is not
21 available to the group or class because it is limited to employees at the top step of the
22 pay range.

23 Records Request No. 11: All audit reports by CalPERS' Office of Audit Services
24 from January 1, 1992 to the PRESENT of Placer County.

25 [See Exhibit G.] Respondent provided its ten-day response on May 22, 2019, which noted that it
26 was still searching for potentially responsive information, did not ascertain whether any documents
27 were responsive yet, and asserted Government Code section 6254 and 6255 as possible exemptions.
28 Respondent did not respond to each individual request by Petitioner individually, but rather
provided a single blanket response to the numerous requests.

On June 28, 2019, Respondent produced records in response to Request #4481. With the
production, Respondent wrote, in relevant part:

Our staff located the information responsive to your request and disclosable under
the PRA. Enclosed please find the documents responsive to your request.

1 By providing you this information we consider your PRA request **fulfilled and**
2 **closed.**

3 [See Exhibit H.] Respondent did not indicate any exemptions in response to Request Number 4481,
4 and failed to respond to each individual request for information.

5 In response to Request #4481, Respondent's production included no internal Respondent's
6 records (*i.e.* a record between Respondent's employees such as e-mails, correspondence, bulletins,
7 notices, training material, or sections of policy or procedural manuals) that would explain, apply,
8 teach or implement on 2 CCR §571 and Gov. Code §20636.

9 **D. Request No. 4529**

10 On or about June 3, 2019, Petitioner made a fourth Public Records Act request, Request
11 #4529, to Respondent. The requests were similar to Request No. 4481 but used the phrase "Time in
12 Grade" or "Time in Classification." [See Exhibit I.] Respondent failed to provide a response ten
13 days from receipt of Request No. 4529. (*See* Holt Decl. ¶ 20.)

14 On July 16, 2019, Respondent communicated that it had provided all responsive documents
15 for Request #4529 in response to Request #4479 and #4481 and that Respondent considered the
16 PRA request fulfilled and closed. Respondent did not state any objections in response. [Exhibit J.]

17 Respondent did not produce any internal records in response to this Public Records Act
18 request.

19 **E. Meet and Confer Attempts**

20 On June 28, 2019, Petitioner prepared a "meet and confer" electronic communication to
21 Respondent. [Exhibit K.] On the same date, Respondent's representative responded that she was
22 waiting for a full response from the program area and that she was told that some of the documents
23 for PRA #4479 and #4480 were also responsive to PRA #4481. She further stated that she was
24 waiting for additional documents for PRA #4479 and 4480. [Exhibit L.]

25 On July 11, 2019, Petitioner prepared a second "meet and confer" electronic communication
26 to Respondent, as Respondent had not further responded. [Exhibit M.]

1 On July 12, 2019, Respondent responded to Petitioner's second meet and confer letter as
2 follows:

3 *No documents were withheld for PRA #4481.* The issue is that some of the
4 documents for PRA #4479 and #4480 are also response to this PRA (#4481). And
5 we are still waiting for additional documents for #4479 and #4480.

6 I should have closed all three PRAs at the same time but I wanted to send the
7 responsive documents as soon as possible and I realized this has caused confusion. I
8 apologize for my mistake.

9 I am still waiting for the additional documents to close out #4479 and #4480. If any
10 documents are withheld, there will be specific government codes for the exemptions.

11 [See Exhibit N; emphasis added]

12 On July 12, 2019, Petitioner further responded to Respondent detailing the whole categories
13 of documents that would be responsive and that were not produced. [See Exhibit O.] Respondent
14 responded to the correspondence by stating that it was still producing additional records. [See
15 Exhibit P.]⁵

16 **F. CalPERS Referral to Legal Counsel – PRA No. 4535**

17 On June 10, 2019, Petitioner sent a fifth PRA requests to Respondent to determine whether
18 or not Respondent had referred the County of Placer's longevity appeal to Respondent's legal
19 counsel or to the Office of Administrative Hearings. Respondent identified the request as PRA No.
20 4535. This request was for the following records:

21 Pursuant to the Public Records Act [Gov. Code §6250 et seq.], I request all
22 records that reflect that you (or anyone else at CalPERS) have referred the
23 County's appeal to CalPERS legal department/division for handling or
24 referred the County's appeal to OAH for adjudication. The time for which I
25 request records is from February 13, 2019 to June 7, 2019.

26 On July 16, 2019, Respondent provided the following response, in relevant part: "After a
27 diligent search of our records staff determined that there are no responsive records as our Legal
28

⁵ After Petitioner's service of the petition, Petitioner's counsel conferred with Respondent's counsel to confer about
potential dates on the hearing on this Petition. One of the available dates Respondent's counsel provided was
November 1, 2019, which is the date Petitioner reserved. (Declaration of Renju Jacob ¶¶ 2-3.)

1 Office did not receive the case until after the specified date range. Therefore we have nothing to
2 produce in response to your request. [¶] By providing you this information we consider your PRA
3 request fulfilled and closed.” [Exhibit Q.]

4 **IV.**

5 **ARGUMENT**

6 Under the Public Records Act [PRA], a public agency must make public records promptly
7 available to any person who submits a PRA request that “reasonably describes an identifiable record
8 or records.” [Gov. Code § 6253 (b).] The PRA enables persons to seek “injunctive or declarative
9 relief or writ of mandate” to enforce that person’s right to inspect or receive copies of public
10 records. [Gov. Code §§ 6258, 6259.]

11 The PRA imposes on agencies an affirmative obligation to make available to the public any
12 public records in their possession, absent a specific statutory basis for exclusion or a showing that
13 the public interest served by not disclosing the record clearly outweighs the public interest served
14 by disclosure of the record. [Gov. Code §§ 6253, 6254, and 6255.] In the broadest terms, the public
15 interest in disclosure is “prevention of secrecy in government.” [*State Board of Equalization, supra*,
16 10 Cal.App.4th at 1186-87.] The PRA recognizes that “access to information concerning the
17 conduct of the people’s business is a fundamental and necessary right of every person.” [Gov. Code
18 § 6250.] As stated by the California Supreme Court:

19 Openness in government is essential to the functioning of a democracy. ‘Implicit in the
20 democratic process is the notion that government should be accountable for its actions.
21 In order to verify accountability, individuals must have access to government files.
22 Such access permits checks against the arbitrary exercise of official power and secrecy
23 in the political process.

24 [*International Federation of Professional and Technical Engineers Local 21 v. Superior Court*
25 (*IFPTE*)(2007) 42 Cal.4th 319, 328-29 (disclosure of government salaries is not exempt under the
26 Public Records Act); *see also, CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 (upholding the public’s
27 right to records of concealed weapons permits over privacy concerns of permit holders).]

28 The PRA creates a “presumptive right of access to any record *created or maintained* by a
public agency that relates in any way to the business of the public agency,” unless that record is

1 exempt from disclosure. [*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 (italics in
2 original)(finding that public records on employee personal accounts are subject to the Public
3 Records Act).] Although the PRA contains numerous statutory exemptions, these exemptions must
4 be narrowly construed. [*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819,
5 825(finding that Public Records Act is available even when also sought in civil discovery).] The
6 Court must “broadly construe” the PRA to the extent that it “furthers the people’s right of access”
7 and “narrowly construe” the PRA to the extent that it “limits the right of access.” [*Sierra Club v.*
8 *Superior Court* (2013) 57 Cal.4th 157, 166 (finding that computer software exemption did not apply
9 to a parcel map database).] “The party seeking to withhold public records bears the burden of
10 demonstrating that an exemption applies.” [*IFPTE, supra*, 42 Cal.4th 319 at p. 329; *see also*, Gov.
11 Code § 6255.]

12 **A. Respondent Failed to Meet its Obligations Under the Public Records Act by not**
13 **Timely and Sufficiently Responding to Record Requests.**

14 The Public Records Act requires a response within ten days that determines whether
15 disclosable records will be provided along with the supporting reasons. “Each agency, upon a
16 request for a copy of records, shall, within 10 days from receipt of the request, determine whether
17 the request, in whole or in part, seeks copies of disclosable public records in the possession of the
18 agency and shall promptly notify the person making the request of the determination and the
19 reasons therefor.” (Gov’t Code § 6253(c).) “A response to a written request for inspection or copies
20 of public records that includes a determination that the request is denied, in whole or in part, shall
21 be in writing.” (Gov’t Code § 6255.)

22 Respondent failed to meet these requirements in several ways. For request number 4529,
23 Respondent declined to provide any initial response ten-days from receipt of the request as required
24 under Section 6253(c). Instead, Respondent only provided a final response with some records and
25 without identifying any objections on July 16, which was 43 days after the request was made. (Ex.
26 I.)

1 For the remaining three requests (#4479, 4480, and 4481), Respondent provided a generic
2 response within ten-days that does not note whether responsive documents have actually been
3 identified, whether documents will in fact be produced, or whether exemptions indeed apply. (*See*
4 Exs. A, D, and G.) Indeed, aside from quoting the request, these ten-day responses could be
5 submitted in response to any PRA request, because it simply says that: “Staff is searching for and
6 reviewing potentially responsive information. Should responsive documents be identified, we
7 estimate all responsive documents subject to disclosure under PRA, provided under Government
8 Code section 6254 and 6255, to be mailed to you by . . .” (*Id.*)

9 In essence, it is a form letter that has placeholders for quoting the request and adding an
10 expected production date. This language essentially says that Respondent *might* have information
11 and one of the possible exemptions under law *might* be applicable. The Public Records Act requires
12 more. Respondent needs to actually identify whether responsive documents will be provided and if
13 not the reasons why. (Gov’t. Code §§ 6253(c), 6255.) If warranted, Respondent could have
14 invoked a fourteen-day extension for exceptional circumstances. (Gov’t. Code § 6253(c).) The fact
15 that the Legislature provided for this fourteen-day extension under exceptional circumstances shows
16 that it intended for the ten-day response to be meaningful.

17 Respondent also failed to comply with the PRA in its ten-day responses to Request Numbers
18 4481 and 4529, which was comprised of numerous specific requests. (Exs. H and I.) Section 6253
19 requires a response to each individual request, but instead Respondent just provided a single blanket
20 response to each request as a whole. As a result, Petitioner cannot ascertain for which requests
21 under Requests Numbers 4481 and 4529 that Respondent provided responsive records, and for
22 which requests Respondent did not. Petitioner is entitled to know that under the Public Records
23 Act.

24 Petitioner seeks a determination from the Court that Respondent failed to comply with the
25 Public Records Act and mandate its compliance with respect to future requests it receives. It also
26 seeks the court order a further response identifying which specific requests under Request Number
27 4481 and 4529 it provided responsive documents and for which specific requests it did not.

1 **B. By Excluding ALL Internal Communications and Responsive Records, Respondent**
2 **Incorrectly Applied PRA Exemption - Government Code § 6254(k) – Attorney-**
3 **Client Communications.**

4 In response to Request No. 4479 which concerns Circular Letter No. 200-049-07,
5 Respondent asserted that it withheld documents based upon the attorney-client privilege. (Exhibit
6 C.) Respondent did not identify that it withheld responsive documents on the basis of the attorney-
7 client privilege as to the remaining three requests subject to this petition. Petitioner disputes
8 Respondent’s claim of attorney-client privilege as the basis for withholding all internal documents.

9 The California Public Records Act exempts from disclosure “[r]ecords, the disclosure of
10 which is exempted or prohibited pursuant to federal or state law, including, but not limited to
11 provisions of the Evidence Code relating to privilege.” [Government Code §6254(k)] By its
12 reference to the privileges contained in the Evidence Code, the Public Records Act has made the
13 attorney-client privilege applicable to public records. [*Roberts v. City of Palmdale* (1993) 5 Cal.4th
14 363, 370 (finding that attorney opinion to city council was exempt from production under the Public
15 Records Act).]

16 Evidence Code § 954 confers a privilege on the client “to refuse to disclose, and to prevent
17 another from disclosing, a confidential communication between client and lawyer.” A “confidential
18 communication,” is defined as:

19 information transmitted between a client and his or her lawyer in the course of that
20 relationship and in confidence by a means which, so far as the client is aware,
21 discloses the information to no third persons other than those who are present to
22 further the interest of the client in the consultation or those to whom disclosure is
23 reasonably necessary for the transmission of the information or the accomplishment
24 of the purpose for which the lawyer is consulted, and includes a legal opinion formed
25 and the advice given by the lawyer in the course of the relationship.

26 [Evid. Code §952.]

27 The attorney-client privilege applies only to those communications between the lawyer and
28 the client that are made for the purpose of seeking or delivering the lawyer’s legal advice or
29 representation. [Evid Code § 952; *Los Angeles Cty. Bd. Of Supervisors v. Superior Court* (2016) 2
30 Cal.5th 282, 294-296 (finding that attorney billing invoices are not categorically privileged).] In
31 order for a communication to be privileged, it must be made for the purpose of the legal

1 consultation, rather than some unrelated or ancillary purpose. [*Id.* at 296-297 (billing invoice is not
2 “made for the purpose of the legal representation”).] A client cannot protect unprivileged
3 information from discovery by transmitting it to an attorney. [*Id.* at 296.]

4 To evaluate whether the party claiming the privilege has made a prima facie showing of an
5 attorney-client communication, the focus is on the purpose of the relationship between the parties to
6 a communication. [*Id.* at 295. .] When the dominant purpose of the relationship was an attorney-
7 client relationship, the communication is protected by the privilege. [*Id.*; *League of California*
8 *Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 988-90] Whether a particular communication
9 is “predominantly” in furtherance of the attorney-client relationship is a question of fact.

10 *League of Cities* serves as an example of how the attorney-client privilege can be abused.
11 The court received a declaration asserting that each of the emails withheld were protected by the
12 attorney-client privilege. Yet, upon the court’s examination of the privilege log, it noted that some
13 of the emails for which the privilege was claimed were sent by the legal assistant and may have
14 included other persons which would eliminate the confidential nature of communication. The
15 appellate court found there was no evidence that (1) these e-mails constituted confidential
16 communications between an attorney and a client, and (2) the legal assistant was acting as an
17 attorney’s agent. (*Id.* at 990-991.)

18 Should Respondent establish that there were in fact confidential communications between
19 attorney and client that is not conclusive as to the privilege determination. The Supreme Court
20 explained:

21 The mere fact that an attorney transmitted a communication to his or her client
22 confidentially (in the sense that no one other than the recipient could see the
23 communication) does not end the inquiry into whether the communication's contents
24 are protected by the attorney-client privilege. After all, just about every
25 communication between a lawyer and client is intended to be kept private, regardless
26 of whether the communication has any connection to legal consultation at all. Even
27 the fact that the information communicated may have some ancillary bearing on an
28 attorney's relationship to a client (as information about an office move or political
fundraiser might have) does not end our inquiry into whether the attorney-client
privilege applies. Nor does the fact that an attorney would prefer to keep the
information confidential (as most people would prefer for their e-mails).

(*Los Angeles Cty. Bd. of Supervisors, supra*, 2 Cal. 5th at 296–97.)

1 Petitioner provides the following examples of situations in which the attorney-client
2 privilege does not apply to the court in making this determination of whether Respondent has met
3 its burden for invocation of the privilege.

4 1. The privilege is not applicable when an attorney acts merely as a negotiator for a client or is
5 providing business advice, in that case the relationship between the parties to the communication is
6 not one of attorney-client. [*Los Angeles Cty. Bd. Of Supervisors, supra*, 2 Cal.5th at 296.]

7 2. Communications forwarding to counsel non-privileged records in the guise of reports will
8 not create an attorney-client privilege with respect to such records and their contents where none
9 existed before. [*San Francisco Unified School District v. Superior Court for City & County of San*
10 *Francisco* (1961) 55 Cal.2d 451, 457.]

11 3. Communications between corporate officers or employees that are routine and non-
12 privileged and that transact general business of a company do not attain privileged status solely
13 because in-house or outside counsel is “copied in” on correspondence or memoranda. [*Zurich*
14 *American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1504, citing *Doe 2 v. Superior*
15 *Court* (2005) 132 Cal.App.4th 1504, 1521-1522.]

16 4. Communications of any relevant fact may not be withheld merely because it was
17 incorporated into a communication involving an attorney. [*Upjohn Co. v. U.S.* (1981) 449 U.S. 383,
18 395-396; *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 143.]

19 5. Communications of independent facts related to a communication such as the fact that a
20 communication occurred, or the communication’s time, date and participants. [*Samuels v. Mix*
21 (1999) 22 Cal.4th 1, 20 n. 5; *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 Cal.App.4th
22 625, 640.]

23 6. Communications made to an investigator by individuals were not for the purpose of
24 obtaining legal advice and thus not privileged where an investigator was retained and directed by
25 law firms representing organizations seeking information about the individuals, who had retained
26 their own personal attorneys in the matter. [*Uber Technologies, Inc. v. Google LLC* (2018) 27
27 Cal.App.5th 953, 967.]

1 7. Reports prepared by off-duty police officers in the performance of their duties and given to
2 their attorneys are not protected by the attorney-client privilege. [*Green v. Shinee v. Superior Court*
3 (*People*)(2001) 88 Cal.App.4th 532, 537.]

4 8. Confidential business information conveyed to a real estate broker consulted by a client was
5 not protected by the attorney-client privilege and did not become privileged even when the
6 information was subsequently disclosed to the client's counsel. [*DeLuca v. State Fish Co., Inc.*
7 (2013) 217 Cal.App.4th 671, 687.]

8 In the present case in response to PRA #4479, Respondent specifically referred to
9 Government Code §6254(k) – attorney client communications. Respondent's claim of the attorney-
10 client privilege in response to request number 4479 is questionable. Notably, Respondent indicated
11 in response to Request No. 4535, that there were no records reflecting that Respondent had sent the
12 County of Placer's appeal to Respondent's legal division for the period of February 13, 2019 to
13 June 7, 2019. Yet there are no internal communications produced for that time period or any prior
14 time period, even though the response to Request No. 4535 implies that Respondent had not sought
15 legal advice until after June 7, 2019.

16 Glaringly absent from Respondent's production was any record between CalPERS'
17 employees such as e-mails, correspondence, bulletins, notices, training material, or sections of
18 policy or procedural manuals that would explain, apply, teach or implement the relevant statute or
19 regulation or discuss the specific situation of the County of Placer. [Gov. Code § 20636 or 2 CCR
20 §571.] To claim that there are no disclosable internal documents that would provide such guidance
21 to staff in a large government employer like CalPERS strains reason.

22 Petitioner's requests go back years yet there was absolutely no internal communications or
23 records produced. Petitioner requests the court to compel Respondent to produce the following
24 records:

25 1. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
26 or procedural manuals that would explain, apply, teach or implement the relevant statute or
27 regulation or relate to the topics requested. These records would presumptively not be records
28

1 subject to the attorney-client privilege as the dominant purpose for the record or communication
2 was not in furtherance of an attorney client relationship, but to train and educate Respondent's staff
3 on policies and procedures. This would include records or communications that Respondent
4 prepared and copied Respondent's attorney, but Respondent's attorney did not offer any legal
5 advice or opinion.

6 2. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
7 or procedural manuals that contain non-privileged factual information. For example, internal
8 records that would provide factual information as to when CalPERS changed its interpretation, who
9 was responsible for the change in CalPERS interpretation, on what basis did CalPERS change its
10 interpretation and how did CalPERS communicate, teach and instruct CalPERS staff on the new
11 interpretation, as the dominant purpose of the communication would be to relay factual information.
12 This would include records or communications that Respondent prepared and copied Respondent's
13 attorney, but Respondent's attorney did not offer any legal advice or opinion.

14 3. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
15 or procedural manuals that were intended to be discussed with third parties to inform, train and
16 educate third parties on Respondent's policies and procedures. For example, internal records and
17 communications that would were prepared for Respondent's education seminars, as the dominant
18 purpose of any communication was not intended to be privileged but to be shared with third parties.
19 This would include records or communications that Respondent prepared and copied Respondent's
20 attorney, but Respondent's attorney did not offer any legal advice or opinion.

21 4. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
22 or procedural manuals that would explain, apply, teach or implement the relevant statute or
23 regulation or relate to the requested PRA topics that did not include Respondent's attorney in the
24 record or communication. These records would presumptively not be records subject to the
25 attorney-client privilege as the communication or record did not include an attorney.

1 **C. By Excluding ALL Internal Communications and Responsive Records,**
2 **Respondent Incorrectly Applied PRA Exemption - Government Code § 6254(a).**

3 In response to Request No. 4479, Respondent additionally asserted that it withheld
4 documents based upon the deliberative process privilege. (Exhibit C.) Respondent did not identify
5 that it withheld responsive documents on the basis of this privilege as to the remaining three
6 requests subject to this petition. Petitioner disputes Respondent’s claim of the deliberative process
7 privilege as the basis for withholding all internal documents.

8 The Public Records Act exempts from disclosure “[p]reliminary drafts, notes, or interagency
9 or intra-agency memoranda that are not retained by the public agency in the ordinary course of
10 business , if the public interest in withholding those records clearly outweighs the public interest in
11 disclosure.” [Gov’t. Code § 6254(a).]

12 To qualify for the exemption, the public agency must show that: (1) the record is a
13 preliminary draft, note, or memorandum; (2) the record is not retained in the ordinary course of
14 business; and (3) the public interest in withholding the record clearly outweighs the public interest
15 in disclosure. [*Citizens for a Better Environment v. Department of Food & Agriculture* (1985) 171
16 Cal.App.3d 704, 712.] The phrase “not retained by the public agency in the ordinary course of
17 business” requires more than just that the agency’s policy or custom is to discard the type of
18 document sought. If, in fact, the document has been retained in contravention of the asserted policy
19 or custom, it is not eligible for exemption as a preliminary draft not retained in the ordinary course.
20 [*Citizens for a Better Environment, supra*, 171 Cal.App.3d at 714.]

21 The key question in every case is whether the disclosure of materials would expose an
22 agency’s decision making process in such a way as to discourage candid discussion within the
23 agency and thereby undermine the agency’s ability to perform its functions. [*Times Mirror Co. v.*
24 *Superior Court (State of California)* (1991) 53 Cal.3d 1325, 1342.] Courts have uniformly drawn a
25 distinction between **predecisional** communications, which are privileged; and **communications**
26 **made after the decision** and designed to explain it, which are not. [*Id.* at 1340 (quoting *NLRB v.*
27 *Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151-152.)]

1 It is insufficient for an agency to simply invoke the general policies favoring nondisclosure,
2 such as fostering candor and encouraging creative debate in formulating government policy which
3 could apply to almost any decision making process. The agency must explain the public specific
4 interest in nondisclosure of the documents in a specific case. [*Citizens for Open Government v. City*
5 *of Lodi* (2012) 205 Cal.App.4th 296, 307]

6 Respondent asserted that records were withheld pursuant to Government Code §6254(a),
7 and respondent failed to produce any internal record responsive to any of the topics requested. This
8 section applies only to predecisional records or communications. However, once the decision has
9 been made, then the exemption no longer applies. Further, the public interest in avoiding secret law
10 and the disclosure of an agency's working law outweighs any reason Respondent could conjure up
11 to support its claim of exemption. [*State Board of Equalization, supra*, 10 Cal.App.4th at 1186; *see*
12 *also, Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788, 793-794 (recognizing
13 "secret law" is a target of Freedom of Information Act (FOIA) and Public Records Act (PRA), but
14 denying disclosure of state audit manual to avoid harm to law enforcement.)]

15 Petitioner requests the court to compel Respondent to produce the following records:

16 1. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
17 or procedural manuals that are post-decisional records that would explain, apply, teach or
18 implement the relevant statute or regulation or other topics requested. These records would
19 presumptively not be records subject to Government Code §6254(a).

20 2. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
21 or procedural manuals that are pre-decisional records that were a preliminary draft, note, or
22 memorandum and that were, in fact, retained in the ordinary course of business. These records
23 would presumptively not be records subject to Government Code §6254(a).

24 3. Internal e-mails, correspondence, bulletins, notices, training material, or sections of policy
25 or procedural manuals that are pre-decisional and post-decisional records that would explain, apply,
26 teach or implement the relevant statute or regulation or other topics requested. These records would
27
28

1 presumptively not be records subject to Government Code §6254(a) as the manifest public interest
2 supports the disclosure of these records.

3 **D. By Excluding ALL Internal Communications and Records, Respondent**
4 **Incorrectly Applied PRA Exemption - Government Code § 6255.**

5 In response to Request No. 4479, Respondent further asserted that it withheld documents
6 based upon Government Code section 6255. (Exhibit C.) Respondent did not identify that it
7 withheld responsive documents on the basis of section 6255 as to the remaining three requests
8 subject to this petition. Petitioner disputes Respondent’s claim of this exemption as the basis for
9 withholding all internal documents.

10 Government Code § 6255 allows a public agency to exempt from production any record if
11 the agency can demonstrate “that on the facts of the particular case the public interest served by not
12 disclosing the record clearly outweighs the public interest served by the disclosure of the record.”
13 [Gov. Code §6255(a)] The public agency must show a “clear overbalance” in favor of non-
14 disclosure. [*Michaelis, Monanari & Johnson v. Superior Court (City of Los Angeles Dept. of*
15 *Airports)* (2006) 38 Cal.4th 1065, 1071] Assertions of dire consequences from disclosure require
16 evidentiary support, not mere speculation. [*CBS, Inc. v. Block, supra* 42 Cal.3d at 652.]

17 In *State Board of Equalization*, the Third District Court of Appeal address an analogous
18 issue involving the State Board of Equalization (Board). In that case, Associated Sales Tax
19 Consultants (Associated) sought documents which showed the Board’s practice in interpreting and
20 applying Sales and Use Tax Regulations sections 1660 and 1667. [18 CCR §§ 1660, 1667]
21 Specifically, the Board requested “published opinions, internal memoranda and correspondence,
22 preliminary hearing officer reports on audit protests, replies to taxpayer inquiries, and audit staff
23 training materials.” [*State Board of Equalization, supra*, 10 Cal.App.4th at 1182.]

24 The court found the public interest in disclosure of the records to be substantial in light of
25 the manifest public interest in the avoidance of secret law and a correlative interest in the disclosure
26 of an agency’s working law. [*Id.* at 1190] The court further required the Board to create a list of
27 documents responsive to a PRA request. [*Id.* at 1193]

1 As in *State Board of Equalization*, the court herein should compel Respondent to produce
2 the records requested. Specifically, Respondent cannot not set forth facts that would overcome the
3 public interest in the avoidance of secret law and the disclosure of an agency's working law. After
4 25 years, Respondent changed its interpretation of the County of Placer's longevity provision when
5 there was no change to the relevant statutes, regulations or longevity pay provision. Respondent's
6 action is a classic "secret law" that the Public Records Act is intended to protect against. Further,
7 the public has a substantial interest in knowing that a governmental agency is not exercising its
8 power in a consistent, predictable and non-arbitrary manner [*CBS, Inc, supra.* 42 Cal.3d at 651.] If
9 Respondent can change its interpretation of Placer County's longevity pay provision after receiving
10 payments for 25 years and after accepting and paying retirement benefits that include longevity pay,
11 then all public agencies, public employees and retirees are subject to the exact same arbitrary use of
12 power. The public has a right to know the facts when dealing with Respondent's decisions. Here,
13 the balance of interests clearly supports the disclosure of the requested internal e-mails,
14 correspondence, bulletins, notices, training material, or sections of policy or procedural manuals
15 that would explain, apply, teach or implement the relevant statute or regulation or other topics
16 requested in the Public Record Act Requests.

17 **E. By Excluding ALL Internal Communications and Records, Respondent**
18 **Incorrectly Applied Government Code §6254(b) – Pending Litigation Records.**

19 The last challenged objection noted in response to Request No. 4479 pertains to the pending
20 litigation record exemption. (Exhibit C.) Respondent did not assert this as a basis for the remaining
21 three requests. Petitioner disputes Respondent's claim of this exemption as the basis for
22 withholding all internal documents.

23 The Public Records Act exempts from disclosure records pertaining to pending litigation to
24 which the public agency is a party, or to claims made pursuant to the Government Claims Act [Gov.
25 Code § 810 *et seq.*] until the pending litigation or claim has been finally adjudicated or otherwise
26 settled. [Gov. Code §6254(b).] The pending litigation exemption focuses on the purpose of the
27 document. The record must not only "pertain" to pending litigation, but must have been "specially
28 prepared for use in litigation." [*County of Los Angeles v. Superior Court (Axelrad)* (2000) 82

1 Cal.App.4th 819, 830.] This requirement precludes abuses such as an agency placing preexisting
2 documents, including potential evidence, beyond reach simply because litigation subsequently
3 arose.

4 To qualify for the pending litigation exemption, the record must have been prepared by the
5 agency. [*Id.* at 831-32.] It covers work by agency staff and those acting at an attorney’s direction,
6 provided the work is generated in connection with litigation or “in anticipation of litigation.”
7 [*Fairley v. Superior Court (City of Long Beach)* (1998) 66 Cal.App.4th 1414, 1421.] The pending
8 litigation exemption expires once “the pending litigation or claim has been finally adjudicated or
9 otherwise settled. [Gov. Code § 6254(b).]

10 Petitioner believes that Respondent may be withholding records based upon the pending
11 litigation exception related to *Dicarlo et al. v. County of Monterey* (2017) 12 Cal.App.5th 468. The
12 *Dicarlo* case was decided by the Sixth Appellate District Court on May 24, 2017. The petition for
13 review by the Supreme Court was denied on September 20, 2017. [*See, DiCarlo v. County of*
14 *Monterey*: CA. Supreme Ct Case No. S243157.] As the *DiCarlo* case has concluded, any reliance
15 on this case pertaining to the pending litigation objection is misplaced.

16 On February 13, 2019, the County of Placer served its first appeal on Respondent related to
17 Respondent’s decision to not include longevity pay in the calculation of final compensation. As of
18 June 7, 2019, Respondent’s legal office had not received a referral of the County of Placer’s appeal.
19 (Exhibit Q.) The application of the claim would be dubious in light of the fact that the case had not
20 yet been referred to legal counsel. The claim of the pending litigation exemption is also
21 inappropriate to the extent that Respondent is applying pending litigation exemption to records prior
22 to June 7, 2019 involving the County of Placer’s appeal, unless the records were “specially prepared
23 for use in litigation” against the County of Placer. [*County of Los Angeles v. Superior Court*
24 (*Axelrad*) (2000) 82 Cal.App.4th 819, 830.]

25 Further, the pending litigation exemption would not apply to the vast majority of records
26 requested. For example, internal e-mails, correspondence, bulletins, notices, training material, or
27 sections of policy or procedural manuals that would explain, apply, teach or implement the relevant
28

1 statute or regulation or other topics requested in the PRAs would not have been records specifically
2 prepared for litigation or pending litigation against the County.

3 **F. Mechanisms to Explore Validity of Respondent's Claims of Lack of Responsive**
4 **Records and Exemption.**

5 Petitioner recognizes that he does not have the benefit of knowing the precise nature of the
6 documents that Respondent is withholding on the basis of an exemption or its claim that additional
7 records that do not exist. However, that will typically be the case for documents for which a
8 privilege is claimed in response to a Public Records Act request because a petitioner is operating
9 with less information than Respondent.

10 Petitioner requests the Court require Respondent to take additional steps to justify its
11 responses to Petitioner's Public Record Act requests. The first step is to require Respondent to
12 actually respond to the individual requests listed in Requests Numbers 4481 and 4529, as opposed
13 to the single blanket response that Respondent provided. (*See* Section A, *supra*.)

14 Additionally, courts can review sworn declarations supporting the invocation of privilege or
15 a claim that no documents exist. (*See League of California Cities, supra*, 241 Cal.App.4th at 990-
16 91.) The trial court can also evaluate a privilege log for the documents withheld or review the
17 documents *in camera* when requested by Respondent. "The court shall decide the case after
18 examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence
19 Code, papers filed by the parties and any oral argument and additional evidence as the court may
20 allow." (Gov't Code § 6259.) "[T]he holder of the privilege may request an in camera review of
21 alleged privileged communications to aid the trial court in making the preliminary fact
22 determination . . ." (*League of California Cities* at 990.)

23 Petitioner is also entitled to seek civil discovery to probe Respondent's contentions should
24 that become necessary. (*City of Los Angeles v. Sup.Ct. (Anderson-Barker)* (2017) 9 Cal.App.5th
25 272, 290 ("When assessing motions to compel discovery (or motions seeking a protective order) in
26 CPRA proceedings, the trial court has discretion to consider whether the petitioner has made an
27 adequate showing that the discovery is likely to aid in the resolution of the particular issues
28 presented in the proceeding.")) Courts can also order persons most knowledgeable depositions of

1 respondents to determine whether there are no additional responsive documents. (*See Sukumar v.*
2 *City of San Diego* (2017) 14 Cal. App. 5th 451, 459–61 (describing procedural history in Public
3 Records Act appeal concerning attorneys’ fees).

4 Petitioner encourages Respondent to utilize the methods available such as sworn
5 declarations, privilege logs, and *in camera* review to support its claims and resolve the factual
6 matters set forth in this Petition. Should it decline to do so or it otherwise become necessary,
7 Petitioner reserves the right to conduct targeted discovery.

8 V.

9 CONCLUSION

10 At the most basic level, the Public Records Act is intended to prevent secrecy in government
11 and to contribute to the public’s understanding of government activities. By requiring public
12 agencies to disclose non-exempt public records, the Public Records Act promotes the manifest
13 public interest in the avoidance of secret law or the arbitrary application of law.

14 Petitioner’s four PRA requests sought reasonably identifiable records that would provide
15 factual information as to when Respondent changed its interpretation of the County of Placer’s
16 longevity pay provision, who was responsible for the change in Respondent’s interpretation, on
17 what basis did Respondent change its interpretation and how did Respondent communicate, teach
18 and instruct Respondent’s staff on the new interpretation. In response, Respondent refused to
19 produce any and all internal communications and records.

20 As discussed herein, the records are not exempt from production and that the public interest
21 in the disclosure of the records is substantial. Petitioner respectfully requests that Respondent be
22 ordered to produce the internal e-mails, correspondence, bulletins, notices, training material, or
23 sections of policy or procedural manuals that would explain, apply, teach or implement the relevant
24 statute or regulation or other topics requested in Petitioner’s four PRAs.

25 Dated: September 16, 2019

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