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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

Michael Brodheim,

Plaintiff,

v.

California Department of Corrections and Rehabilitation,

Defendant.

Case No. CPF-20-516978

~~[proposed]~~ Order Granting Peremptory Writ of Mandate

Judge: Hon. Ethan P. Schulman
Hearing Date: July 16, 2020 at 1:30 pm
Department: 302
Trial Date: none set
Reservation No: **03050408-08**

Petitioner Brodheim's petition for writ of mandate to compel respondent California Department of Corrections and Rehabilitation to produce the requested records regarding the race/ethnicity of the applicants considered for parole between July 1, 2018 and June 30, 2019 is granted.

Petitioner sought the above records pursuant to the California Public Records Act ("CPRA"). (See Cal. Gov't Code § 6250 *et seq.*) The CPRA requires the government to release all requested records unless it can demonstrate that they are exempt from disclosure. (See *Am. Civil Liberties Union of N. California v. Superior Court* (2011) 202 Cal.App.4th 55, 67 ["Since disclosure is favored, all exemptions are narrowly construed. The agency opposing disclosure bears the burden of proving that an exemption applies."].)

Respondent argues that the requested records cannot be disclosed based on several exemptions. The court rejects respondent's contentions.

Under Gov't Code § 6254(k) of the CPRA, a state agency is not required to release information or public "[r]ecords, the disclosure of which is exempt or prohibited pursuant to federal or state law[.]" In effect, the CPRA "incorporates other [disclosure] prohibitions established by law." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 61, internal quotations and citations omitted.)

Respondent fails to show that the requested information is "criminal offender record information" not subject to disclosure under Penal Code §§ 11076 and 13202. The Penal Code provides that: "'criminal offender record information' means records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release." (Pen. Code § 13102; Pen. Code § 11075 [same].) Thus, to be exempt from disclosure, the "criminal offender record information" must include a *summary* of the person's criminal history. In this case, petitioner is seeking specific race/ethnicity information regarding parole applicants; he is not seeking disclosure of the applicants' aggregate criminal history. "It is the aggregate nature of the information which makes it valuable to respondent; it is that same quality which makes its dissemination constitutionally dangerous." (*Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, 165 [discussing county municipal court's "electronic rap sheet"].) The CPRA allows disclosure. "The statutory restrictions on dissemination of the information do not affect any right of access to individual criminal offender record information authorized by any other law. (Pen. Code, § 13200.)" (*Id.* at 163 (emphasis removed).)

Respondent's cases discussing the dissemination of "extremely sensitive and private" "criminal history information" do not compel a different result. (*Housing Authority v. Van de Kamp* (1990) 223 Cal.App.3d 109, 116; *Younger v. Berkeley City Council* (1975) 45 Cal.App.3d 825.) The race/ethnicity of prisoners who have already been identified by name and inmate number is an issue discrete from the prisoner's criminal history. Respondent's incongruous reading of the CPRA would mean that the disclosure of prisoner identifying information such as race or hair color is barred while the disclosure of similar information for arrestees is mandated. (See Gov't Code § 6254(f)(1).) Even respondent's own Department Operations Manual (DOM) instructs employees that information about an inmate's "[r]ace" is "not exempt" and therefore "may be disclosed." DOM at 35-36. § 13030.23.3 (Risher Dec. Ex. D).

Respondent contends that disclosure of the requested information will violate the Information Practices Act and 15 CCR § 3261.2. However, the "Information Practices Act does not apply to records that are disclosable pursuant to the California Public Records Act." (*State Dep't of Pub. Health v. Superior Court* (2015) 60 Cal.4th 940, 960; Civ. Code § 1798.24(g) ["An agency shall not disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains *unless* the information is disclosed" pursuant to the CPRA].) Moreover, respondent promulgated the cited regulation per Penal Code § 5058 to aid in the administration of prisons. The regulation provides guidance to respondent's employees regarding how and when they can unilaterally release information and nothing more. Neither Penal Code § 5058 nor the Information Practices Act provides respondent with the authority to create CPRA exemptions and respondent cannot create them out of whole cloth. In addition, respondent's position is contrary to the text of the CPRA. Gov't Code § 6254(k) prohibits disclosure per "federal or state law" and the subsection does not refer to regulations. Other sections of the CPRA, however, expressly refer to the dissemination of information in the context of "law" and/or "regulations." (See Gov't Code § 6254.2(i) [disclosure of information in connection with proceedings "under law or regulation"]; Gov't Code § 6254.21(c)(1)(D)(iii) [disclosure of official's personal information "authorized by federal or state law, regulation"].) The fact that Gov't Code § 6254(k) does not refer to an exemption pursuant to regulation defeats respondent's argument. (See *Department of Homeland Security v. MacLean*, (2015) 574 U.S. 383, 391 ["Congress's choice to say 'specifically prohibited by law' rather than 'specifically prohibited by law, rule, or regulation' suggests that Congress meant to exclude rules and regulations."].)

Respondent also argues that the records are exempt from disclosure because they constitute "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Gov't Code § 6254(c).) This exemption applies to "information of a highly personal nature." (*San Gabriel Tribune v. Sup. Crt.* (1983) 143 Cal.App.3d 762, 777.) "Under section 6254, subdivision (c), the court balances the public interest in disclosure against the individual's interest in privacy." (*Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 240 (italics omitted).) The *Los Angeles Unified School Dist.* case, 228 Cal.App.4th at 243, described the test as follows:

> (1) We determine if there is a public interest served by nondisclosure of the records; (2) If so, we determine if a public interest is served by disclosure of the records; and (3) If both are found, we determine whether (1) clearly outweighs (2). If it does not, the records are disclosed. In applying this test, we keep in mind the public policy favoring disclosure of records dealing with the public's business, the policy of construing exemptions narrowly, and the fact that the burden is on the party resisting disclosure to prove an exemption applies.

(See also *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755 [providing that the same test applies to catchall exemption of Gov't Code § 6255 and Gov't 6254(c)].)

The public interest in nondisclosure is minimal. Sensitive personal information is not at stake in this case as one's race is often obvious based on mere observation. "The CPRA was modeled after the federal Freedom of Information Act…Accordingly, federal legislative history and judicial construction of the FOIA ...serve to illuminate the interpretation of its California counterpart." (*Los Angeles United School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222, 238 (internal quotations omitted).) In *Lissner v. U.S. Customs Serv.* (9th Cir. 2001) 241 F.3d 1220, the court ordered release under the FOIA of certain identifying information regarding police officers arrested by U.S. Customs officials, observing "[a] general physical description of the officers, including their height, weight, eye color, and ethnicity, implicates no personal privacy interest." (*Id.* at 1224.) A similar conclusion follows here.

On the other side of the scale, this case unquestionably involves a weighty public interest in disclosure, i.e., to shed light on whether the parole process is infected by racial or ethnic bias. The importance of that public interest is vividly highlighted by the current national focus on the role of race in the criminal justice system and in American society generally. (See *Am. Civil Liberties Union of N. California*, 202 Cal.App.4th at 71 ["the passionate nature of the death penalty debate … *heightens* public interest in the information at issue in this case"].) Disclosure insures that

government activity is open to the sharp eye of public scrutiny. Requiring production of the information will contribute significantly to public understanding of government activity and reveal whether improper animus affects respondent's performance of its duty. (See *Los Angeles Unified School Dist.*, 228 Cal.App.4th at 241.) The balance is not close. (See *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 73-74 [police officers' personal privacy interest in records of names of officers involved in on-duty shootings outweighed in most cases by the public's substantial interest in the conduct of its peace officers]; *Int'l Fed. of Prof'l and Technical Engineers v. Superior Court* (2007) 42 Cal.4th 319, 330-334 [disclosure of city employees' salary information would not constitute unwarranted invasion of personal privacy, in light of the strong public policy encouraging transparency in government and the strong public interest knowing how the government spends its money].)

The court rejects respondent's argument that a lesser public interest is at stake because petitioner can apply to respondent's research oversight committee to obtain the information. First, the CPRA allows the public—not merely researchers—to obtain access to public records. (See *Sacramento Cty. Employees' Ret. Sys. v. Superior Court* (2011) 195 Cal.App.4th 440, 472 [rejecting alternative ways to obtain information argument]; *Cty. of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1325 ["Even where a requester has an alternative means to access the information, it should not prohibit it from obtaining the documents under the CPRA."].) Second, compliance with the research process is cumbersome and anathema to the CPRA's quick timing requirements. (See 15 CCR § 3488(b) [listing 17 informational items that must be provided for a research project]; Gov't Code § 6253 §§ (b) & (c) ["records promptly available"; 10-day response to request].)

In sum, Respondent fails to meet its burden to show that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure. (See *BRV, Inc. v. Superior Court* (2005) 143 Cal.App.4th 742, 755-756.) The court denies petitioner's request to make any future rulings regarding CPRA requests that are not presently before the court.

DATE July 16, 2020

Hon. Ethan P. Schulman
Judge of the Superior Court.