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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

CATALIN VOSS,
YUN HONG,
KRISTEN BELL, and
NICHOLAS MCKEOWN,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendant.

Case No.: CPF-20-517117

REPLY IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDATE, OR ALTERNATIVELY FOR AN ALTERNATIVE WRIT OF MANDATE, TO ENFORCE THE CALIFORNIA PUBLIC RECORDS ACT

Judge: Hon. Ethan P. Schulman

Hearing: July 16, 2020 at 1:30 p.m.

Department: 302

Action filed: June 10, 2020

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INTRODUCTION

Plaintiffs are university researchers building a machine-learning model to identify anomalies in parole decisions. To do so, they must correlate factors by each candidate, including race and ethnicity. Plaintiffs have been stalled in their research, however, because Defendant California Department of Corrections and Rehabilitation (CDCR) refuses to disclose disaggregated race and ethnicity information about parole candidates under the California Public Records Act (CPRA), Gov. Code § 6250 *et seq*.

None of CDCR's arguments can support its position. The public interest in examining whether discretionary parole decisions are colored by race has never been higher. Unprecedented waves of protesters have taken to the streets around the country to call out racism in our criminal justice system. The spread of COVID-19 behind bars has prompted new releases of people from jails and prisons, which may also implicate racial disparities. CDCR cannot show that any privacy interests clearly outweigh the public interest in disclosure. Nor can it avoid transparency through arguments that a privacy statute regarding criminal records applies to a person's race, or that CDCR may unilaterally exempt itself from the CPRA by regulatory fiat.

ARGUMENT

I. Race and Ethnicity Data on Candidates for Parole Is Not Exempt Under § 6254(k).

The requested race and ethnicity data is not exempt from disclosure under Gov. Code § 6254(k) because no federal or state law prohibits its disclosure. The race and ethnicity of parole candidates is not "criminal offender record information" (CORI), so statutory restrictions on the dissemination of CORI do not apply. Nor may CDCR invoke § 6254(k) based on its own rules regarding disclosure of inmate and parolee information, because agency regulations do not qualify as "state law" under the CPRA.

A. Race and Ethnicity Data Is Not Criminal Offender Record Information.

A person's race and ethnicity is not CORI because it has nothing to do with a criminal record. This Court has rejected a previous attempt by CDCR to argue otherwise. *See* Supp. Gagliano Decl. Ex. K at 5–6 (CDCR's September 29, 2016 opposition brief in *ACLU v. CDCR*,

No. CPF-16-515083); *id.* Ex. L at 1 (October 14, 2016 order granting motion for writ in *ACLU*). There is no reason for a different result here.

The Penal Code defines "criminal offender record information" as "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 § 11075(a). CORI is "restricted to that which is recorded as the result of an arrest, detention, or other initiation of criminal proceedings or of any consequent proceedings related thereto." *Id.* § 11075(b). Release of CORI is strictly controlled. *See, e.g.*, *id.* §§ 11076, 11078, 11081; Cal. Code Regs., tit. 11, § 702. "Indeed, such materials are virtually treated as contraband," and unauthorized release is a crime. *Loder v. Mun. Court*, 17 Cal. 3d 859, 873 (1976). The Department of Justice is the only state agency that processes CORI. *Cent. Valley Ch. 7th Step Found., Inc. v. Younger*, 214 Cal. App. 3d 145, 170 (1989).

The text and purpose of this statutory scheme show it is intended to protect information relating to a person's criminal record, not demographic information. The definition limits CORI to information recorded as a result of criminal justice proceedings, and it is subject to stringent safeguards. Criminal history records are so strongly protected because their dissemination can have a devastating effect on an individual's "business or professional licensing, employment, or similar opportunities for personal advancement." *Loder*, 17 Cal. 3d at 868. In contrast, a person's race or ethnicity has nothing to do with their criminal record, and CDCR's release of this information will not result in any lawful denial of economic opportunities. It simply is not part of a criminal record and therefore not within the scope of § 11075.

Westbrook v. County of Los Angeles, 27 Cal. App. 4th 157 (1994), does not support CDCR's argument to the contrary. *See* Opp. at 11. In *Westbrook*, the plaintiff sought a compilation of data that included "the name, birth date and zip code of every person against whom criminal charges are pending in [the Los Angeles municipal courts], together with the case number, date of offense, charges filed, pending court dates, and disposition." 27 Cal. App. 4th at

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160. The opinion mentions race only in the context of listing other information found in the requested records, which also included social security numbers, addresses, license numbers, and other information that "goes far beyond that which would routinely be found" in public court documents. *Id.* at 161. In concluding that the records sought were CORI, the court explained that the danger of disclosure came from the combination of identifying information with information about criminal charges against those individuals. *Id.* at 166–67. That reasoning does not support CDCR's argument that race and ethnicity data on its own is CORI.[1]

CDCR recognizes that race and ethnicity information is not CORI when not opposing CPRA requests. Its Department Operations Manual (DOM) states that an inmate's "[r]ace" is "not exempt" and therefore "may be disclosed." DOM at 35–36, § 13030.23.3[2]; *see* Opening Br. at 14 & n.9. Under the section relating to CORI, the DOM warns staff not to share "information about an inmate's arrest history" or other similar information, with no mention of any demographic information. DOM at 35, § 13030.23.2. CDCR's Opposition offers no explanation for this inconsistency between the policies published in its DOM and what it argues here.

CDCR argues that because its staff members "collect and record the inmates' full names, dates of birth, and race or ethnicity, among other information" from sources including "probation reports, abstracts of judgment, and jail records," and because this information is all put into CDCR's electronic records system, it is CORI. Opp. at 10; Campbell Decl. at ¶¶ 4–5. Not so.

First, this leads to absurd conclusions. It would mean that individuals' full names are CORI, too; it would therefore be unlawful for CDCR or any other criminal justice agency to release those names to the public or even to speak them in the presence of other incarcerated individuals. Yet CDCR rightfully releases the names of people in its custody. *See* Cal. Code

[1] CDCR's other CORI cases likewise do not show that race is CORI. *See Housing Auth. v. Van de Kamp*, 223 Cal. App. 3d 109 (1990) (addressing access to criminal history records); *Younger v. Berkeley City Council*, 45 Cal. App. 3d 825 (1975) (addressing access to state arrest records); *Loder*, 17 Cal. 3d at 859 (1976) (addressing erasure of arrest record).

[2] *Available at* https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2020/03/2020-DOM-02.27.20.pdf.

Regs., tit. 15, § 3261.2. In fact, CDCR posts these names on its website. *See* Cal. Dep't of Corr. & Rehab., Parole Suitability Hearing Results[3] (providing lists of individuals who have been considered for parole suitability and their hearing outcomes). If a person's race were CORI, the police would also be prohibited from releasing the race of a person suspected of a crime, which they routinely do. An appeals court has similarly concluded that booking photos are not protected as criminal history information, because if they were, the police would be unable to conduct photographic lineups or post mug shots. *People v. McCloud*, 146 Cal. App. 3d 180, 183 (1983). In short, applying § 11075 as broadly as CDCR argues for here would lead to untenable results that the Legislature could not have intended.

Second, CDCR uses race for reasons that have nothing to do with CORI. For example, in determining how to house people in CDCR custody, staff "must evaluate all [relevant] factors," including race. Cal. Code Regs., tit. 15, § 3269(a); *see id.* § 3269.1. To obtain this information, staff interview the individuals. DOM at 475, § 54055.6. The information gathered is included in CDCR's SOMS and ERMS databases. *See* DOM at 33, § 13030.16.2. In fact, SOMS has a "screen[] devoted to . . . [the] Initial Housing Review." *Id*. Information collected as part of a housing review cannot be CORI because it is neither "recorded as the result of an arrest, detention, or other initiation of criminal proceedings or of any consequent proceedings related thereto," Pen. Code § 11075(b), nor used "for purposes of identifying criminal offenders [or] of maintaining" a summary of the person's history in the criminal justice system, *id.* § 11075(a). It is simply part of the prisoner files that CDCR maintains for its own administrative purposes.

It is not relevant that CDCR may include race or ethnicity information in its databases along with confidential information.[4] *See* Opp. at 10. It is the nature of the information—not its

[3] *Available at* https://www.cdcr.ca.gov/bph/parole-suitability-hearing-results/.

[4] CDCR's argument about the confidentiality of probation reports is similarly irrelevant, because Plaintiffs are not requesting probation reports. *See* Opp. at 10–11. And while CDCR appears to dispute that it holds public court records containing race and ethnicity data, it ignores Plaintiffs' observation that information about a parole candidate's race can sometimes be found in parole hearing transcripts that CDCR possesses and that are public by law. Opening Br. at 16; Gagliano Decl. at ¶ 11.

location or government classification—that matters under the CPRA. *See Sonoma Cty. Employees' Ret. Ass'n v. Superior Court*, 198 Cal. App. 4th 986, 1000 (2011); *Weaver v. Superior Court*, 224 Cal. App. 4th 746, 750 (2014). Thus, the government cannot "shield information from public disclosure simply by placing it in a file that contains the type of information" made confidential by statute. *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 291 (2007). For example, "peace officers' names, employing agencies, and hiring and termination dates" are not exempt simply because agencies commonly store that information in confidential personnel files. *Id*. at 291, 293–94. Instead, because that data is not like the "types" of information expressly protected by the statute, it must be released. *Id.* at 294. Here, too, the CORI statute enumerates types of confidential information. All directly relate to criminal justice records. The statute does not make other types of information confidential. CDCR cannot transmogrify non-protected data into protected data simply by putting both kinds of data into one database.

B. CCR § 3261.2 Cannot Limit Disclosure Under the CPRA.

State regulations do not qualify as "state law[s]" that may prohibit disclosure under Gov. Code § 6254(k).[5] CDCR is therefore wrong that § 6254(k) applies because CDCR has promulgated a regulation limiting the information its employees may publicly disclose about persons in CDCR custody. Opp. at 12.

First, the CPRA's text and structure show that it uses the term "law" to refer to statutes and constitutional provisions, and the Legislature separately specifies "regulations" where it wants to include them. For example, the CPRA addresses pesticide-related information submitted "in connection with a public proceeding conducted under law or regulation." Gov. Code § 6254.2(i). It also allows phone companies to disclose certain information about public officials when that disclosure is "authorized by federal or state law, regulation, order, or tariff."

[5] None of CDCR's cases on this point involve the CPRA, or even statutory interpretation. *See Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 401 (1976) (equitable rule against enjoining enforcement of valid laws); *In re Lomax*, 66 Cal. App. 4th 639, 643 (1998) (ex post facto prohibitions); *Homan v. Gomez*, 37 Cal. App. 4th 597, 601 (1995) (single-subject rule).

Id. § 6254.21(c)(1)(D)(iii). "Where the same word is used in more than one place in a legislative enactment, [courts] presume the same meaning was intended in each instance." *Castro v. Sacramento Cty. Fire Prot. Dist.*, 47 Cal. App. 4th 927, 932 (1996). "Law," as used in the CPRA, therefore does not include state regulations.

Even if there were some ambiguity, the California Constitution requires that statutes be read "narrowly" if they "limit[] the right of access" to government information. Cal. Const., Art. I, § 3(b)(2). This means that § 6254(k) must be read narrowly to exclude regulations from its scope. *See Sierra Club v. Superior Court*, 57 Cal. 4th 157, 175–76 (2013) ("To the extent that [a statute] is ambiguous, the constitutional canon requires us to interpret it in a way that maximizes the public's access to information 'unless the Legislature has *expressly* provided to the contrary.'").

Second, the CPRA authorizes state and local agencies to adopt rules allowing "greater access to records than prescribed by the minimum standards" of the CPRA, but it includes no corresponding authorization for agencies to adopt rules that provide for less access. Gov. Code § 6253(e). This shows the Legislature did not intend to permit agencies to adopt regulations *restricting* access to records.

Finally, reading § 6254(k) as allowing state agencies to limit the scope of their own disclosure obligations would frustrate the purposes of the CPRA—that is, to facilitate transparency and "increas[e] freedom of information by giving members of the public access to records in the possession of state and local agencies." *L.A. Cty. Bd. of Supervisors v. Superior Court*, 2 Cal. 5th 282, 290 (2016). "[A] regulation which impairs the scope of a statute must be declared void." *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429, 436 (2006). It cannot be that any state agency with the authority to enact rules or regulations can exempt itself from the CPRA's requirements. Otherwise, the CPRA would ensure no transparency at all.

The United States Supreme Court reached the same conclusion in a case under the federal Whistleblower Act, which protects employees who disclose information "if such disclosure is not specifically prohibited by law." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 389

(2015). In response to the government's argument that the Act did not apply because a regulation prohibited disclosure, the Court explained that "[i]f 'law' included agency rules and regulations, then an agency could insulate itself from the scope of [the Act] merely by promulgating a regulation that 'specifically prohibited' whistleblowing." *Id.* at 393. Since "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks," it was "unlikely that Congress meant to include rules and regulations within the word 'law.'" *Id.* Similarly, the purpose of the CPRA is to require government officials to provide records to the public even when they do not want to. The Legislature could hardly have intended to give agencies the power to relieve themselves of this duty.

Thus, although § 3261.2 may properly govern what information its employees can release in the absence of a CPRA request, it does not and cannot authorize CDCR to withhold documents or information that the CPRA requires it to release.

II. Race and Ethnicity Data on Candidates for Parole Is Not Exempt Under § 6254(c).

Disclosure of race and ethnicity data for individuals who have sought parole is not an "unwarranted invasion of personal privacy" justifying an exemption under Gov. Code § 6254(c). The § 6254(c) exemption must be construed narrowly, and the "proponent of nondisclosure bears the burden to demonstrate a 'clear overbalance' on the side of confidentiality." *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 756 (2006). As an appeals court emphasized in another case in which CDCR attempted to withhold information based on privacy grounds, the government must meet its burden with evidence, not just argument. *See ACLU of N. Cal. v. Superior Court*, 202 Cal. App. 4th 55, 74–75 (2011). CDCR fails to meet its burden: it does not, and could not, show that the public interest in withholding the requested data clearly outweighs the strong public interest in disclosure.

Even CDCR concedes that "there is a public interest in studying the state's parole decisions" and "in shedding light on how parole decisions are made." Opp. at 15. Just a few years ago, Plaintiff Dr. Bell found that CDCR's parole decisions were plagued by racial disparities that could not be explained by any non-racial factors. Gagliano Decl. Ex. A (Verified

Petition), at Ex. 1 thereto (Dr. Bell's article), at 525. Plaintiffs need individualized data to see whether this pattern holds on a much larger scale. *See* Voss Decl. ¶¶ 6–12. And the public interest in answering that question is more acute than ever. Demonstrations over the killings of Black Americans by police have swept the nation.[6] Congress is contemplating landmark reforms to the criminal justice system; one bill would create a commission to "make a systematic study of the conditions affecting Black men and boys," including incarceration rates, and create recommendations as to how to address disparities.[7] This passionate debate over the role of race in the criminal justice system "heightens [the] public interest in the information at issue in this case." *ACLU of N. Cal.*, 202 Cal. App. 4th at 71. Moreover, the public has a profound interest in identifying any racial disparities in releases of incarcerated people that are intended to reduce transmission of COVID-19 within prisons,[8] especially given the demonstrated racial disparities in who is dying or otherwise suffering as a result of the pandemic.[9]

The public interest in disclosure of the disputed information is further amplified by the broad discretion that CDCR has to grant or deny parole. When the government makes discretionary decisions, the public has a heightened interest under the CPRA in obtaining information that will allow it to "ascertain whether the law is being fairly and impartially applied." *CBS, Inc. v. Block*, 42 Cal. 3d 646, 655 (1986); *see id.* at 651. Thus, for example, the CPRA requires the release of applications to carry a concealed firearm, not just the licenses that issued, so that the public can see what factors could explain the different treatment. *Id.* at 655.

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[6] *See, e.g.,* Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (June 22, 2020), *available at* https://www.nytimes.com/article/george-floyd-protests-timeline.html.

[7] *See* Commission on the Social Status of Black Men and Boys Act, H.R. 1636, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1636/text.

[8] *See, e.g.,* Matt Hamilton et al., *California's prisons and jails have emptied thousands into a world changed by coronavirus*, L.A. Times (May 17, 2020), *available at* https://www.latimes.com/california/story/2020-05-17/coronavirus-prison-jail-releases.

[9] *See, e.g.,* Claudia Wallis, *Why Racism, Not Race, Is a Risk Factor for Dying of COVID-19*, Scientific American (June 12, 2020), *available at* https://www.scientificamerican.com/article/why-racism-not-race-is-a-risk-factor-for-dying-of-covid-19/.

CDCR's "discretion in parole matters has been described as great and almost unlimited." *In re Rosenkrantz*, 29 Cal. 4th 616, 655 (2002); *cf.* Gagliano Decl. Ex. A (Verified Petition), at Ex. 1 thereto (Dr. Bell's article), at 515–19, 531–33 (explaining this broad discretion leads to inconsistent results). And these discretionary decisions have as much impact on the liberty of those affected by them as any decision that a government official can make. The public therefore has a paramount interest in data that will allow it to find out whether CDCR is now "fairly and impartially" granting parole. The only way for the public to find that out is for CDCR to release individualized information about the race or ethnicity of people granted or denied parole. Voss Decl. ¶¶ 6–12; *see also San Diego Cty. Employees Ret. Ass'n v. Superior Court*, 196 Cal. App. 4th 1228, 1243–44 (2011) (requiring disclosure of individualized information about retirement benefits because aggregate information was insufficient to detect abuses).

By contrast, CDCR has failed to provide concrete evidence, rather than mere rhetoric, about any negative impacts of the release of race and ethnicity information on presently or formerly incarcerated individuals. There is no indication that CDCR received complaints from any of the 268 individuals whose race and ethnicity information was released as a result of the prior ACLU litigation. In fact, CDCR's official policy and practice are to release race and ethnicity information. DOM at 35–36, § 13030.23.3. The agency also posts the names, age, and county of commitment of everyone who has a parole suitability hearing on its website, as well as the results of that hearing. Cal. Dep't of Corr. & Rehab., Parole Suitability Hearing Results, *supra* n.3. The release of a person's race or ethnicity is no more likely to cause "shame or embarrassment" than the information that CDCR already publicly posts.

CDCR also has failed to identify any case law to support its position. It does not even mention—much less distinguish or critique—the FOIA precedent that requires the release of ethnicity information, even though one of the principal cases CDCR relies upon recognizes that the federal and state standards are identical. *Compare Lissner v. U.S. Customs Serv.*, 241 F.3d 1220, 1224 (9th Cir. 2001) (release of information including ethnicity "implicates no personal privacy interest"), *with L.A. Unified Sch. Dist. v. Superior Court*, 228 Cal. App. 4th 222, 239

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(2014) (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1989) as setting § 6254(c) standard); Opp. at 13; Opening Br. at 14–15. Instead, CDCR suggests that the *Sander* opinions allow it to withhold information about race. But the sensitive information at issue in that case was not race but "law school and undergraduate GPA, LSAT scores, and performance on the bar examination." *Sander v. Superior Court*, 26 Cal. App. 5th 651, 655 (2018). And neither *Sander* opinion discusses the CPRA's balancing tests because a statute applicable only to the State Bar specifically exempts all of the information at issue there from disclosure. *Id.* at 657. The reason the plaintiff in *Sander* sought to anonymize the data had nothing to do with any balancing test; rather, it was to try to get around this specific statutory prohibition on disclosing this information in a way that "that may identify an individual applicant." Bus. & Prof. Code § 6060.25(a). No comparable statute applies here.

CDCR has failed to meet its burden to show that the privacy interest that parole candidates have in non-disclosure of their race or ethnicity outweighs the public interest in finding out whether CDCR's parole decisions are tainted by these racial disparities.

III. Plaintiffs Are Entitled to All Relief They Seek Under the CPRA.

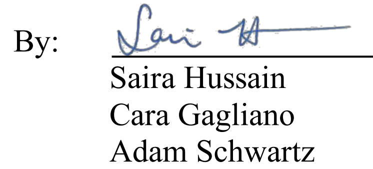
Plaintiffs are entitled to a peremptory writ of mandate ordering CDCR to release the requested records, as well as to their attorneys' fees and costs, because CDCR has failed to meet its burden to show that a CPRA exemption applies. Gov. Code § 6258; *ACLU of N. Cal.*, 202 Cal. App. 4th at 66–67. To the extent CDCR contends that it would be premature to issue a peremptory writ rather than an alternative writ, that argument lacks merit. *See* Opp. at 16–17. The issues have now been fully briefed by the parties, CDCR will have the opportunity to be heard at a duly noticed hearing, and there are no disputed material facts. *See Lewis v. Superior Court*, 19 Cal. 4th 1232, 1240–41 (1999). For the reasons set forth in Plaintiffs' Opening Brief, to which CDCR provides no substantive opposition, the Court should also permanently enjoin CDCR from withholding race and ethnicity data requested under the CPRA. Opening Br. at 17.

CONCLUSION

For the reasons above, Plaintiffs respectfully request disclosure of the disputed data.

Dated: July 9, 2020

Respectfully submitted,

By: 

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