JASSY VICK CAROLAN LLP
JEAN-PAUL JASSY, Cal. Bar No. 205513
jpjassy@jassyvick.com
KEVIN L. VICK, Cal. Bar No. 220738
kvick@jassyvick.com
800 Wilshire Boulevard, Suite 800
Los Angeles, California 90017
Telephone: 310-870-7048
Facsimile: 310-870-7010

FIRST AMENDMENT COALITION
DAVID E. SNYDER, Cal. Bar No. 262001
dsnyder@firstamendmentcoalition.org
GLEN A. SMITH, Cal. Bar No. 106341
gmith@firstamendmentcoalition.org
534 4th Street, Suite B
San Rafael, California 94901-3334
Telephone: 415-460-5060
Facsimile: 415-460-5155

Attorneys for Petitioner
FIRST AMENDMENT COALITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

FIRST AMENDMENT COALITION, a non-profit organization,

Petitioner/Plaintiff,

vs.

COUNTY OF SAN DIEGO, SUMMER STEPHAN, in her official capacity as the District Attorney for the County of San Diego, and DOES 1-10,

Respondents/Defendants.

Case No. **37-2018-00037504-CU-WM-CTL**

VERIFIED PETITION FOR WRIT OF MANDATE ORDERING COMPLIANCE WITH THE CALIFORNIA PUBLIC RECORDS ACT AND ARTICLE 1, SECTION 3(b) OF THE CALIFORNIA CONSTITUTION; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; EXHIBITS 1-5

Petitioner First Amendment Coalition ("Petitioner"), a non-profit organization, petitions the Court, through this Verified Petition for Writ of Mandate/Complaint, to command Respondents/Defendants County of San Diego, Summer Stephan, in her official capacity as the District Attorney for the County of San Diego and and Does 1-10 (the County, Stephan and Does 1-10 are sometimes referred to collectively herein as "Respondents") to comply with the California Public Records Act ("CPRA"), Government Code §§ 6250, *et seq.*, and California Constitution, Article 1, Section 3(b), and to declare that Respondents have failed to do so. By this Verified Petition/Complaint Petitioner alleges:

INTRODUCTION

1. The CPRA and California's Constitution give the people a right to see the records of California's public agencies and officials. James Madison explained over 200 years ago that public access to information about our government and the activities of our public officials is fundamental to our democracy: "Knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or both." *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 772 (1986). Consistent with this principle, the California Legislature declared in the CPRA that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov't C. § 6250. In 2004, California voters added a provision to California's Constitution reinforcing the "right of access to information concerning the conduct of the people's business, and, therefore, … the writings of public officials and agencies shall be open to public scrutiny." Cal. Const., art. 1, § 3(b).

2. Through this Verified Petition/Complaint, Petitioner seeks disclosure of public records relating to sexual harassment and sexual misconduct claims made against employees of the San Diego County District Attorney's Office. Such records are of significant public interest, as highlighted by the increased scrutiny paid to issues of sexual harassment and misconduct within the past year as highlighted by the "#MeToo Movement"—a movement that has thrown into sharp

relief both the right of the public to know when the powerful abuse their authority, and the salutary social benefits of such transparency. While public transparency and accountability are important for all governmental agencies, the San Diego County District Attorney's Office holds a special place of public trust by nature of the great power the people of San Diego County have granted it—the power to limit the physical liberty, and even lives, of those it prosecutes. The San Diego District Attorney's Office website notes that each year, its 300-plus prosecutors file approximately 40,000 criminal cases on behalf of the County's more than three million residents. The office has enormous discretion to pursue criminal prosecutions, or not, and the people are entitled to see and understand how the office investigates misconduct by those who carry out this solemn mission – and to see how it punishes, or not, those who violate the rules and regulations of the District Attorney's Office, or the laws of the State of California.

3. Petitioner brings this action because although the public has a right to know about sexual harassment and sexual misconduct claims lodged against those employed by San Diego County District Attorney's Office, the County has refused to provide such public records in violation of the CPRA and the California Constitution.

THE PARTIES

4. Petitioner First Amendment Coalition, formerly known as the California First Amendment Coalition, is a nonprofit public interest organization based in San Rafael, California and incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code. The First Amendment Coalition is dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs, including by protecting and promoting the "people's right to know" about their government so that they may hold it accountable. The First Amendment Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations and partnerships, and other for-profit companies.

5. Respondent County of San Diego (the "County") is a public agency and local agency subject to, and obligated to comply with, the CPRA and Article 1, Section 3(b) of the California Constitution. Respondent Summer Stephan, sued in her official capacity, is the duly

elected District Attorney for the County, and is responsible for the operations of the District Attorney's Office, including, upon information and belief, without limitation compliance with the CPRA and Article 1, Section 3(b) of the California Constitution. The County Administration Center is located at 1600 Pacific Highway, San Diego, CA 92101. The San Diego County District Attorney's Office is a department of the County, and its main offices are located at the Hall of Justice, 330 W. Broadway, San Diego, CA 92101.

6. The true names of Respondents named herein as Does 1 through 10, inclusive, are sued in their official capacities and are presently unknown to Petitioner, which therefore sues such Respondents by fictitious names. Petitioner will amend this Complaint to show the true names and identities of these Respondents when they have been ascertained. Does 1-10 are responsible for the denial of access to the requested records as alleged herein.

7. Petitioner is informed and believes, and thereon alleges, that each Respondent herein was the agent or employee of each of the other co-Respondents and, in doing the things hereinafter alleged, was acting within the course and scope of such agency or employment and with the permission and consent of their co-Respondents.

VENUE AND JURISDICTION

8. The relief sought by Petitioner is expressly authorized under Government Code §§ 6258 and 6259(a), Civil Procedure Code §§ 1060 and 1085, *et seq.* and Article 1, Section 3(b) of the California Constitution. Venue is proper under Civil Procedure Code §§ 394 and 395 and under Government Code § 6259(a). Petitioner is informed and believes that some or all of the materials to which it seeks access are situated in San Diego County, and that the acts and events giving rise to the claims, including the denial of access to public records, occurred in the County of San Diego.

GENERAL ALLEGATIONS

9. On April 5, 2018, David Snyder, the Executive Director of the First Amendment Coalition, made a written CPRA request to Tanya Sierra, the Public Affairs Officer of the San Diego County District Attorney's Office (the "April 5, 2018 Request"). That request sought: "**All records relating to sexual misconduct and/or sexual harassment claims lodged against**

employees of the San Diego County District Attorney's office, including but not limited to records of investigations and discipline decisions resulting from those claims since January 1, 2013." (Bold emphasis in original). A true and correct copy of the April 5, 2018 Request is attached hereto as **Exhibit 1** and incorporated here as if set forth in full.

10. Although the County was required to respond to the April 5, 2018 Request within 10 days pursuant to Government Code § 6253(c), i.e., by no later than April 15, 2018, the County failed to provide a timely response, nor did the County timely grant itself an extension. The County's failure to abide by Government Code § 6253(c) constitutes a waiver any claimed exemptions to the April 5, 2018 CPRA Request. In any event, no exemptions warrant the wholesale or partial withholding of records subject to the April 5, 2018 Request.

11. On April 20, 2018, Deputy District Attorney Elizabeth Renner replied to the April 5, 2018 Request. Although she claimed that Petitioner's April 5, 2018 Request was "granted in part and denied in part," she and the County refused to produce *any* public records responsive to the request. Instead, and contrary to the requirements of the CPRA, she provided brief two-sentence narrative "summaries" of four incidents involving employees of the San Diego District Attorney's Office, but added that "[t]o the extent that there are responsive physical records containing the same information already discussed, *they will not be disclosed*." (Emphasis added.) Moreover, the "summaries" provided by Deputy District Attorney Renner appear to be prepared with an eye towards public relations, as they were prefaced with statements such as "none of the claims resulted in monetary claims or awards." Ms. Renner also identified and provided similarly terse summaries of "two additional incidents" involving a District Attorney Investigator and a Deputy District Attorney, but she again did not agree to produce any responsive public records regarding those two incidents. Ms. Renner also claimed that the records sought were exempt from disclosure under the CPRA. A true and correct copy of Deputy District Attorney Renner's April 20, 2018 letter (the "April 20 Letter") is attached hereto as **Exhibit 2** and incorporated here as if set forth in full.

12. On April 25, 2018, the First Amendment Coalition's David Snyder responded. He objected to the County's refusal to produce any responsive public records and provided legal

authorities supporting disclosure. He also added a Supplemental Request (the "April 25, 2018 Supplemental Request") seeking: "**(1) All records relating to the 2015 and 2016 incidents described on page 3 of the April 20 Letter; and (2) Any and all writings, as that term is defined under Cal. Gov. Code Section 6252(g), relating to complaints or allegations of sexual misconduct, including but not limited to sexual harassment, against any employee of the San Diego County District Attorney's office, including but not limited to investigation reports, interview statements, documentary evidence reviewed during any investigation by the San Diego County DA's office, notices to employees, correspondence to or from complainants and discipline or action taken by San Diego County DA's office in response to such complaints or allegations. [E]ncompasses any and all writings (as defined above) created, sent or received after January 1, 2013.**" (Bold emphasis in original.) Mr. Snyder added: "Please note that this request is not limited to 'formal' allegations or complaints--i.e., complaints or allegations that have been processed through any HR department--but any and all investigations into alleged, reported or suspected sexual misconduct and/or harassment." A true and correct copy of the April 25, 2018 letter, which includes the April 25, 2018 Supplemental Request, is attached hereto as **Exhibit 3** and incorporated here as if set forth in full.

13. On May 4, 2018, Elizabeth Renner from the San Diego County District Attorney's Office responded to Mr. Snyder's April 25, 2018 letter. While Ms. Renner provided some additional information regarding the various incidents she had previously mentioned in her April 20, 2018, she again failed to agree to disclose any public records in response to the April 5, 2018 Request. She also refused to provide any public records in response to the first request in the April 25, 2018 Supplemental Request, and stated that the County needed more time to determine whether there were any documents responsive to second request in the April 25, 2018 Supplemental Request. Ms. Renner also claimed that the records sought were exempt from disclosure under the CPRA. A true and correct copy of Ms. Renner's May 4, 2018 letter is attached hereto as **Exhibit 4** and incorporated here as if set forth in full.

14. On June 5, 2018, Deputy District Attorney Renner sent another letter to Mr. Snyder regarding request #2 from the April 25, 2018 Supplemental Request. Once again, Ms. Renner and

the County refused to produce any responsive records. Ms. Renner also claimed that the records sought were exempt from disclosure under the CPRA. A true and correct copy of Ms. Renner's June 5, 2018 letter is attached hereto as **Exhibit 5** and incorporated here as if set forth in full.

15. To date, the First Amendment Coalition has received ***no records*** in response to either the April 5, 2018 Request or the April 25, 2018 Supplemental Request.

16. The delay and failure to produce any records responsive to the April 5, 2018 Request or the April 25, 2018 Supplemental Request are unlawful.

FIRST CAUSE OF ACTION

(Violation of The California Public Records Act, Cal. Gov't C. §§ 6250, et seq. against all Respondents)

17. Petitioner realleges Paragraphs 1 through 16 above as though fully incorporated herein.

18. The April 5, 2018 Request and the April 25, 2018 Supplemental Request each request public records as defined by the CPRA.

19. Respondents violated the CPRA by failing to produce any records in response to the April 5, 2018 Request or the April 25, 2018 Supplemental Request.

20. There are no exemptions or exceptions to the CPRA that warrant withholding materials sought by the April 5, 2018 Request or the April 25, 2018 Supplemental Request, in whole or in part, and, even if there were – which Petitioner does not concede – such exemptions and exceptions have been waived.

21. An actual controversy exists as to whether the materials subject to the April 5, 2018 Request and the April 25, 2018 Supplemental Request must be disclosed, and whether those records, or any part thereof, are exempt from disclosure. Petitioner is entitled to an order declaring that it is entitled to materials sought by the April 5, 2018 Request and the April 25, 2018 Supplemental Request, and that such materials must be made available to Petitioner and the public immediately.

22. Under Government Code § 6258, Petitioner also is entitled to institute proceedings

for a writ of mandate to enforce its rights and the public's right to obtain materials responsive to the April 5, 2018 Request and the April 25, 2018 Supplemental Request. Furthermore, under Government Code § 6258, Petitioner is entitled to have the proceedings resolved on an expedited basis consistent "with the object of securing a decision as to these matters at the earliest possible time." Gov't C. § 6258.

SECOND CAUSE OF ACTION

(Violation of Article 1, Section 3(b) of the California Constitution against all Respondents)

23. Petitioner realleges Paragraphs 1 through 22 above as though fully incorporated herein.

24. Article 1, Section 3(b) of the California Constitution, passed by an overwhelming majority of voters in November 2004, reflects a paramount public interest in access to information about how the government is conducting the people's business.

25. This constitutional amendment expressly requires that any statute, court rule or other authority must be broadly construed if it furthers the public's right of access and narrowly construed if it limits the right of access. Cal. Const., art. 1, § 3(b)(2).

26. The materials sought by the April 5, 2018 Request and the April 25, 2018 Supplemental Request are clearly encompassed within these constitutional mandates regarding the public's right of access to writings of public officials and agencies.

27. Respondents have violated the mandates of Article 1, Section 3(b) of the California Constitution by failing to promptly disclose materials responsive to the April 5, 2018 Request and the April 25, 2018 Supplemental Request.

28. An actual controversy exists as to whether the materials responsive to the April 5, 2018 Request and the April 25, 2018 Supplemental Request must be disclosed and whether those records are exempt from disclosure. Petitioner is entitled to an order declaring that it is entitled to materials sought by the April 5, 2018 Request and the April 25, 2018 Supplemental Request, and that such materials must be made available to Petitioner and the public immediately.

29. Petitioner is also entitled to institute proceedings for a writ of mandate to enforce

its and the public's rights to obtain materials responsive to the April 5, 2018 Request and the April 25, 2018 Supplemental Request.

PRAYER FOR RELIEF

Therefore, Petitioner First Amendment Coalition prays for writ relief and judgment as follows:

1. That this Court issue a peremptory writ of mandate or other order under the seal of this Court, directing Respondents to immediately disclose to Petitioner the requested materials at issue currently being withheld; or, alternatively, that this Court immediately issue an alternative writ of mandate or order to show cause under the seal of this Court, setting a hearing on this matter as early as possible, preceded by an *in camera* review of the withheld materials at issue or a representative sample thereof, and directing Respondents, to show cause why they should not immediately provide the requested materials, and thereafter issue a writ of mandate or other order under the seal of this Court, directing Respondents to immediately disclose to Petitioner the requested materials at issue currently being withheld. *See* Gov't C. §§ 6258, 6259(a); *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1073 (2001).

2. That this Court issue a declaration that the withheld materials are public records as defined by California Government Code § 6252(e) in that they contain information relating to the conduct of the people's business, prepared, owned, used or retained by Respondents and that Respondents violated the Public Records Act by failing to promptly make the materials available to Petitioner and the public.

3. That this Court issue a declaration that the withheld materials are writings of public officials and agencies as set forth in Article 1, Section 3(b)(1) of the California Constitution and that Respondents violated the California Constitution by failing to promptly make the writings available to Petitioner and the public.

5. The Court enter an order awarding costs and attorneys' fees incurred in this action pursuant, *inter alia*, to California Government Code § 6259 and/or California Code of Civil Procedure §§ 1021.5, 1032, 1033.5, and any other applicable law, in addition to any other relief

granted.

6. The Court award Petitioner such other and further relief as is just and proper.

Dated: July 26, 2018

JASSY VICK CAROLAN LLP

By _____

JEAN-PAUL JASSY
KEVIN L. VICK

Attorneys for Petitioner/Plaintiff
FIRST AMENDMENT COALITION

Dated: July 26, 2018

FIRST AMENDMENT COALITION

By _____

DAVID E. SNYDER
GLEN SMITH

Attorneys for Petitioner/Plaintiff
FIRST AMENDMENT COALITION

VERIFICATION

I, David Snyder, do hereby certify and declare as follows:

1. I am the Executive Director of the First Amendment Coalition. I made the requests for records and materials at issue in this matter.

2. I have read the **VERIFIED PETITION FOR WRIT OF MANDATE ORDERING COMPLIANCE WITH THE CALIFORNIA PUBLIC RECORDS ACT AND ARTICLE 1, SECTION 3(b) OF THE CALIFORNIA CONSTITUTION; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; EXHIBITS 1-5** and know the contents thereof and I verify that the same is true of my own personal knowledge, except as to those matters therein stated upon information and belief and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in San Rafael, CA on July 26, 2018.

David Snyder

Exhibit 1

April 5, 2018

Tanya Sierra
Public Affairs Officer
San Diego County District Attorney's Office
tanya.sierra@sdcda.org

Sent via Email

Dear Ms. Sierra:

On behalf of the First Amendment Coalition ("FAC"), I hereby request the records set forth below. This request is submitted pursuant to the California Public Records Act ("CPRA"), Gov. Code sec. 6250 *et seq*.; the California Constitution, Article I, section 3; and FAC's rights of access under California common law.

FAC requests the following records:

All records relating to sexual misconduct and/or sexual harassment claims lodged against employees of the San Diego County District Attorney's office, including but not limited to records of investigations and discipline decisions resulting from those claims since January 1, 2013.

When charges or complaints of wrongdoing are made regarding ordinary public employees, the right of access to public records requires disclosure of all "well-founded" complaints, the information upon which they are based, and any discipline imposed. (*American Federation of State, County and Municipal Employees, et al. v. Regents of University of California* (1978) 80 Cal.App.3d 913, 917; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1046.) Moreover, in the case of higher-ranking public employees, disclosure of an investigation into misconduct is required even if the charges are found not to be reliable and the official is exonerated. (*BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 759.)

FAC acknowledges that records relating to misconduct of sworn peace officers may be subject to withholding under the CPRA. However, there are many employees of DA's office, including Assistant and/or Deputy DA's, who are not peace officers. The DA's office must produce responsive records as to such employees. (See, e.g., *Bakersfield,*

118 Cal.App.4th 1041; *BRV,* 143 Cal. App. 4th 742.)

If any portion of the records requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. If you believe that any express provision of law exists to exempt from disclosure all or a portion of the records FAC has requested, you must notify FAC of the reasons for the determination not later than 10 days from your receipt of this request letter. (Cal. Gov't. Code § 6253(c).) Any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing. (Cal. Gov't. Code § 6255(b).)

Gov't. Code section 6253(d) prohibits the use of the 10-day period, or any provisions of the CPRA or any other law, "to delay access for purposes of inspecting public records."

In addressing this request, please keep in mind that the California Constitution expressly requires you to broadly construe all provisions that further the public's right of access, and to apply any limitations on access as narrowly as possible. Cal. Const., Art. 1, sec. 3(b)(2). The CPRA recognizes "no limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." (Cal. Gov't Code § 6257.5.)

Please send all responses to my email address below. Please contact me to obtain my consent before incurring copying costs, chargeable to FAC, in excess of $100. Thank you for your timely attention to this request.

Sincerely,
David Snyder
Executive Director
First Amendment Coalition
dsnyder@firstamendmentcoalition.org
415-460-5060

Exhibit 2

JESUS RODRIGUEZ
ASSISTANT DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

SUMMER STEPHAN
DISTRICT ATTORNEY

San Diego
330 West Broadway
San Diego, CA 92101
(619) 531-4040

http://www sandiegoda com

April 20, 2018

David Snyder
Executive Director
First Amendment Coalition
dsnyder@firstamendmentcoalition.org

Re: California Public Records Act (CPRA) Request, DA # 18-52

Dear Mr. Snyder,

I am a designated custodian of records for the Office of the San Diego County District Attorney (SDCDA), and I am in receipt of your California Public Records Act (CPRA) request. In your email, you stated that you seek:

> "All records relating to sexual misconduct and/or sexual harassment claims lodged against employees of the San Diego County District Attorney's office, including but not limited to records of investigations and discipline decisions resulting from those claims since January 1, 2013."

Government Code section 6254, subdivision (c) creates a CPRA exemption for personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. However, the CPRA supports disclosure relating to a public employee's wrongdoing under certain circumstances. (*American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913, 918; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045-1046; and the authorities discussed further below.)

Therefore, your request is granted in part and denied in part. I have conducted a reasonable search of our records and have identified the following four incidents as being responsive to your request. None of the following four incidents involved Deputy District Attorneys, District Attorney Investigators, or management. Further, none of the claims resulted in monetary claims or awards.

- In 2013, a male staff supervisor made verbal statements to a female subordinate of a sexual nature. The male employee resigned prior to discipline being imposed.

- In 2016, a male staff supervisor commented on the propriety of a female subordinate's work attire and body, and made an inappropriate joke to the female employee. The male employee was disciplined.

- In 2016, a male employee, in a non-supervisorial position, made a gender-offensive comment to a female co-worker after she received a promotion. The male employee was disciplined.

- In 2017, a male staff supervisor made comments of a sexual nature to a female subordinate and made unwelcome physical contact with the employee's hair. The male employee was disciplined.

To the extent that there are responsive physical records containing the same information already discussed, they will not be disclosed. Employees have a significant privacy interest in their personnel files, and the invasion of that privacy interest must be balanced against competing public policy interests. (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1270.) Although the public has a legitimate interest in how the SDCDA enforces its sexual harassment policy, the internal staff employees in the above-mentioned incidents do not occupy positions of such public trust and responsibility that the CPRA mandates the disclosure of their identities and disciplinary records. (See *Marken*, *supra*, 202 Cal.App.4th at pp. 1275-1276.) Therefore, a summarization of the incidents that provides information as to how the SDCDA enforces its sexual harassment policy meets the disclosure requirements of the CPRA. Also, the identities of any complaining individuals will not be provided, as such knowledge does not further the public's interest or provide information as to how the SDCDA responded to complaints. (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 759.)

Further, as you acknowledge in your request, a different analysis applies to personnel records of sworn peace officers, such as District Attorney Investigators, employed by the SDCDA. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286; *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 286, 289; Pen. Code §§ 832.5, 832.7.) Accordingly, peace officer personnel records that may include information such as discipline records, complaints, or investigations of complaints, are exempt from disclosure under the CPRA and cannot be provided. (*Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at pp. 289-290; Gov. Code, § 6254, subd. (k).)

Finally, there are two additional incidents that fall outside the scope of your request but are included because they were previously reported in the media and are public information.

- In 2015, a District Attorney Investigator made unwelcome physical contact with a female co-worker after work hours at a non-work location. The District Attorney Investigator was suspended and transferred to a different location. The disciplinary information was previously made public by this Office with the Investigator's consent.

- In 2016, it was reported that a Deputy District Attorney took explicit photos in his office and sent text messages and photos during work hours. Although there was no sexual harassment or misconduct complaint, an investigation was conducted. The Deputy District Attorney resigned prior to discipline being imposed.

Please let me know if you have any further questions.

Sincerely,

Elizabeth Renner
Deputy District Attorney

Exhibit 3

FIRST AMENDMENT COALITION

April 25, 2018

Elizabeth Renner
Deputy District Attorney
San Diego County District Attorney's Office
330 West Broadway
San Diego, CA 92101
Elizabeth.Renner@sdcda.org

Sent via Email

Dear Ms. Renner:

This letter responds to your letter of April 20, 2018 (the April 20 Letter), which in turn responded to the California Public Records Act (CPRA) request I submitted on behalf of the First Amendment Coalition (FAC) on April 5, 2018.

This letter also supplements FAC's April 5 request as set forth below.

The April 20 Letter states that "[t]o the extent there are responsive physical records" relating to the four incidents described in that letter, "they will not be disclosed." This is contrary to clear CPRA authority requiring the disclosure records relating to allegations of misconduct. (See, e.g., *AFSCME v. Regents of Univ. of Calif*. (1979) 80 Cal.App.3d 913, 918.)

Thus, it is insufficient under California law for the San Diego County District Attorney (DA) to disclose only select, prepared summaries about instances where discipline was imposed as a result of complaints or allegations of sexual harassment or misconduct. The records themselves must be disclosed. Please do so promptly.

The April 20 Letter also states that the DA will not disclose "the identities or disciplinary records" of the employees accused in the incidents described, because those employees "do not occupy positions of such public trust and responsibility that the CPRA mandates the disclosure of their identities and disciplinary records." Here too the DA's position is contrary to California law. As held in cases including *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041 and AFSCME, *supra*, 80 Cal.App.3d 913, records relating to all "well-founded" complaints, the information upon

which they are based, and any discipline imposed, must be produced -- irrespective of whether whether employees are high-ranking or not. (Compare *BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 759 [distinguishing higher-ranking public employees on the basis that disclosure of an investigation into misconduct is required even if the charges are found not to be reliable and the official is exonerated].)

The above-noted authorities regarding complaints of misconduct hold that the privacy exemption under Gov. Code section 6254(c) gives way to the public interest in disclosure where complaints or allegations are "well founded." Thus, the names of such employees must be disclosed.

Please disclose all records relating to the incidents described in the April 20 Letter, including the identities of those accused and/or disciplined. If FAC does not hear back from you by ***Wed., May 2, 2018***, we will be forced to consider enforcing the public's right of access in court.

Finally, the April 20 Letter notes two additional incidents involving a District Attorney Investigator and a Deputy District Attorney, and states that these incidents "fall outside the scope of [FAC's] request." It is not clear why the DA believes these incidents fall outside the scope of FAC's April 5 request, or whether the DA is withholding other records relating to allegations or complaints of sexual misconduct by Deputy District Attorneys or District Attorney Investigators.

The DA is required to state whether it has responsive records and, if it is withholding those records, note that it is doing so and provide a basis for withholding them. (Gov. Code 6253(c).) Thus, please state whether there are other records relating to sexual misconduct or harassment allegations and Deputy District Attorneys or District Attorney Investigators, and please produce such records or, if you believe they are subject to any exemption under the CPRA, please provide the legal basis for withholding under that exemption.

Although we believe that the incidents described at page 3 of the April 20 Letter fall within the records FAC initially requested, we hereby supplement our request as follows:

Supplemental Request

(1) All records relating to the 2015 and 2016 incidents described on page 3 of the April 20 Letter;

(2) **Any and all writings, as that term is defined under Cal. Gov. Code Section 6252(g), relating to complaints or allegations of sexual misconduct, including but not limited to sexual harassment, against any employee of the San Diego County District Attorney's office, including but not limited to investigation reports, interview statements, documentary evidence reviewed during any investigation by the San Diego County DA's office, notices to employee, correspondence to or from complainants and discipline or action taken by San Diego County DA's office in response to such complaints or allegations. encompasses any and all writings (as defined above) created, sent or received after January 1, 2013.**

Please note that this request is not limited to "formal" allegations or complaints--i.e., complaints or allegations that have been processed through any HR department--but any and all investigations into alleged, reported or suspected sexual misconduct and/or harassment.

Please send all responses to my email address below.

Thank you for your timely attention.

Sincerely,

David Snyder
Executive Director
First Amendment Coalition
dsnyder@firstamendmentcoalition.org
415-460-5060

Cc: Tanya Sierra, tanya.sierra@sdcda.org

Exhibit 4

JESUS RODRIGUEZ
ASSISTANT DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

SUMMER STEPHAN
DISTRICT ATTORNEY

San Diego
330 West Broadway
San Diego, CA 92101
(619) 531-4040

http://www.sandiegoda.com

May 4, 2018

Mr. David Snyder
Executive Director
First Amendment Coalition
Dsnyder@firstamendmentcoalition.org

Re: California Public Records Act (CPRA) Request, DA # 18-52

Dear Mr. Snyder,

This letter responds to your communication on April 25, 2018, seeking records of discipline resulting from complaints or allegations of sexual harassment or misconduct made against employees of the San Diego County District Attorney's Office (hereafter "SDCDA" or "this Office"). Specifically, you state that the "the names of such employees must be disclosed."

This Office appreciates and understands the importance of transparency to public awareness of how the government is conducting its business, how the government is handling important issues such as sex harassment and misconduct in the workplace, and to government accountability in general. We are also certain that the First Amendment Coalition appreciates and understands the quite substantial interest of individual employees in their own privacy. This is especially true where there is no compelling public interest in publicizing the personal identities of those involved such as there might be when the persons involved are in positions of public interaction, trust and responsibility. The individual right to privacy must prevail where personal identities do nothing to further illuminate the government conduct at issue.

Your request for the records and names of employees is therefore denied, because internal staff employees have a greater expectation of privacy in their personnel files than more public figures, and the harm to their privacy interests outweighs the public interest in disclosure. However, in the interest of transparency, this Office is providing additional detail about the incidents.

Government Code section 6254, subdivision (c) creates a CPRA exemption for personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

A three-prong analysis determines whether a disclosure constitutes an "unwarranted invasion of personal privacy" with respect to the CPRA. (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 818 (*Versaci*). First, a court must determine whether the records sought constitute a personnel file; second, whether disclosure of those records would compromise substantial privacy interests; and finally, whether the potential harm to privacy interests from disclosure outweighs public interest in disclosure. (*Id.* at pp. 818-819.)

Applying the test in *Versaci* to your request, as to the first prong, the SDCDA does not dispute that any records of sexual harassment complaints and subsequent discipline are personnel records.

As to the second prong, disclosure of the names and records relating to the discipline of internal staff employees would compromise their substantial privacy interests because they have a higher expectation of privacy in their personnel records than public officials. Employees have a legally protected interest in their personnel files. (*BRV, Inc. v Superior Court* (2006) 143 Cal.App.4th 742, 756 (*BRV*).) Further, the *expectation of privacy* can vary based on the status of the public official. (*Id.* at p. 758.) In *BRV*, a school district's board of education hired an investigator to prepare a report analyzing allegations of verbal abuse of students and sexual harassment of female students by the district's superintendent. (*Id.* at p. 747.) After receiving the full report, the board of education entered into an agreement with the superintendent accepting his resignation in exchange for terms of payment and a promise to keep the report confidential. (*Ibid.*) The court of appeal found that under United States Supreme Court precedent, a public official in the position of a school superintendent has a significantly reduced expectation of privacy in the matters of his public employment. (*BRV, supra,* at p. 758, citing *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.)

Because of the superintendent's position of authority as a public official and the public nature of the allegations, the court of appeal found that the public's interest in disclosure outweighed his interest in preventing disclosure of the investigatory report. (*BRV*, *supra*, at p. 759.) The court of appeal also found the superintendent's status as a public official relevant to two additional points: first, the court applied a lesser standard of reliability for complaints against public officials than for persons who are not public officials, and second, there is less relevance in knowing the identities of the persons who are not public officials. Specifically, the court stated:

> "We note, however, that the public's interest in viewing the [investigatory] report is not furthered by knowing the identities of any of the students, parents, staff members, or faculty members interviewed or mentioned in the report. Nothing in the record indicates these persons are public officials such as [the superintendent]. Knowing their identities does not help the public understand how the Board

responded to the allegations involving [the superintendent]. We will thus direct that names, home addresses, phone numbers, and job titles for such persons be redacted before the report is released." (*BRV*, *supra*, 143 Cal.App.4th at p. 759.)

Although a subsequent court of appeal decision disclosed investigatory reports related to a non-public-official teacher employee, that decision still took into consideration the special position of public trust and responsibility that teachers hold, and is distinguishable because the teacher had a lesser expectation of privacy in his personnel file. (*Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal.App.4th 1250, 1275 (*Marken*).)

In *Marken*, a student complained to a principal about harassing conduct by one of her teachers. (*Marken*, *supra*, 202 Cal.App.4th at p. 1255.) The principal then reported the matter to the school district, which then retained an attorney to independently investigate the matter in accordance with district policy while the teacher was placed on home assignment. (*Ibid.*) Based on the investigation report, the district issued a written reprimand finding that the teacher violated the district's board policy prohibiting sexual harassment of students. The letter of reprimand also stated *that a report of the matter had been made to law enforcement* as *required by school district policy*. (*Id.* at p. 1256.) The court in *Marken* ordered disclosure of the investigation report and disciplinary record. (*Id.* at p. 1276.) In *Marken*, the teacher therefore had a lesser expectation of privacy with regards to sustained findings of sexual harassment because district policy *required* a report to law enforcement.

Accordingly, because the internal employees of the District Attorney's office are not public figures, they have a higher expectation of privacy in their personnel files. Unlike *BRV*, the internal employees mentioned here are not public officials and the allegations against them are not public. Unlike *Marken*, here there is no requirement for disclosure to law enforcement in the case of a sustained finding of sexual harassment, whereas it is appropriate in the case of a teacher working closely with minor children. Therefore, any balancing test must consider the higher expectation of privacy held by these employees.

The final prong is balancing the above-mentioned privacy interests implicated against any public interest in their disclosure. Fundamentally, the strength of the public interest depends on the extent to which disclosure of the requested item or information will shed light on the public agency's performance of its duty. (*Versaci*, *supra*, 127 Cal.App.4th at p. 820.) In determining the weight of a public interest in a given case, as a threshold matter, the weight of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate. (*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 242.)

A line of cases addresses that balancing test after findings of misconduct; however, they present different factual circumstances than the incidents responsive to your request and therefore the results of applying the balancing test are different.

The first case is *American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913, 916 (*AFSE*). In *AFSE*, after an employee reported financial irregularities, the university's chancellor ordered an "audit investigation" that produced a voluminous "audit report." The court of appeal ordered disclosure of portions of an audit report about financial irregularity that it determined to be substantial in nature. (*Id.* at pp. 918-919.) In formulating the balancing test, the court of appeal quoted an analogous case, *Chronicle Pub. Co. v. Superior Court* (1978) 54 Cal.2d 548, 575, stating:

> "[W]here charges are found true, or discipline is imposed, the strong public policy against disclosure vanishes; this is true even where the sanction is a private reproval. In such cases a member of the public is entitled to information about the complaint, the discipline, and the "information upon which it was based." [Citations.] (*AFSE*, *supra*, 80 Cal.App.3d at p. 918.)

Although the court in *AFSE* mandated disclosure and provided portions of a report, it did not mandate the production of *records*, but rather "information about the complaint, the discipline, and the information upon which it was based."

Three subsequent cases, all discussing misconduct allegations against school district employees, emerged. In *Bakersfield City School Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1043-1044 (*Bakersfield*), the trial court reviewed unspecified documents from a school district employee's personnel file and ordered disclosure of documents related to "sexual type conduct, threats of violence and violence" although it made no findings concerning the truth of the allegations. The court of appeal upheld the disclosure, applying the *AFSE* balancing test and holding that disclosure under the CPRA does not require a prerequisite finding that the allegations are true. (*Id.* at p. 1047.)

In *BRV*, mentioned above, the school district's board of education hired an investigator to prepare a report analyzing allegations of verbal abuse of students and sexual harassment of female students by the district's superintendent. (*BRV*, *supra*, 143 Cal.App.4th at p. 747.) The court of appeal in *BRV* ordered disclosure of the 257-page investigatory report in its entirety, with redactions of the names of all persons mentioned except for superintendent. (*Id.* at p. 760.)

Finally, in *Marken*, mentioned above, the school district retained an attorney to independently investigate allegations of sexual harassment in accordance with district policy. (*Marken*, *supra*, 202 Cal.App.4th at p. 1255.) In applying the balancing test, the

court stated:

> "To be sure, [the teacher] may not be a "high profile public official, as was the school district superintendent involved in *BRV* [citation], but the court in *BRV* found that designation relevant only to determine when accusations of misconduct against a public official, even if not well founded, might nonetheless be subject to disclosure. [Citation.] And it is also true the charges against [the teacher] did not involved allegations of violence or sexual abuse, as was the case in *Bakersfield* [citation]. But [the teacher] occupies a position of trust and responsibility as a classroom teacher, and the public has a legitimate interest in knowing whether and how the District enforces its sexual harassment policy. [Citation.]" (*Marken*, *supra*, 202 Cal.App.4th at p. 1275.)

As noted earlier, your request seeks personnel record information under factual circumstances that are distinguishable from *Bakersfield*, *BRV*, and *Marken*. The core purpose of a school district is the education of *children*, which will necessitate a different balancing test than that for internal staff employees of this Office. Misconduct of teachers and school district employees in relation to students is directly related to the school district's performance of its duty, whereas this Office is charged with the prosecution of crimes. Even in *Marken*, the court of appeals noted that the balancing test considered the teacher's position of trust and responsibility, a position that is different than this Office's internal staff. Therefore, the facts here yield a different result when the balancing test from this line of cases is applied.

As addressed in our previous communication, there is, however, a legitimate public interest in knowing how this Office, as a public agency, addresses sustained findings of misconduct. Balancing the increased expectation of privacy of our internal employees, mentioned above, with that public interest, we disclosed summaries of the events and noted that disciplinary action was taken. In your response, you stated that "it is insufficient under California law for the San Diego County District Attorney (DA) to disclose only select, prepared summaries about instances where discipline was imposed as a result of complaints or allegations of sexual harassment or misconduct." You then requested the records.

Your statement is incorrect. *AFSE*, mentioned above, requires disclosure of information about the complaint, the discipline, and the information upon which it was based. It does not require disclosure of records. In *AFSE*, although portions of the audit report of financial irregularities was disclosed, the factual scenario is distinguishable from your request. Misconduct relating to the handling of the public's money is subject to a much higher public interest than the internal discipline of this Office's staff.

Further, "the public interest in efficient and lawful personnel management by government agencies is better served by disclosure of general agency performance rather

than by specific revelation of individual problems…Practically no public interest is advanced by disclosure of the latter." (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, *343*, citing *Campbell v. United States Civil Service Commission* (1976) 539 F.2d 58, 62.)

As such, our previous disclosures were sufficient. However, in the interest of transparency, we are providing the following additional details about the previous four incidents disclosed. As set forth in my earlier response, none of the following four incidents involved Deputy District Attorneys, District Attorney Investigators, or management. Further, none of the claims resulted in monetary claims or awards:

- In 2013, a male staff supervisor made verbal statements to a female subordinate of a sexual nature. The male employee resigned prior to discipline being imposed.

  The SDCDA's retention policy requires that employee files be kept for three years after an employee terminates service. This Office has not located final records for this incident. The summary provided above was based on the recollection of an individual familiar with the matter. Note that the CPRA applies to existing records, and does not require a public agency to create a record that does not exist. (Gov. Code, § 6252, subds. (e), (f).) In the interest of transparency, the above information was provided.

  Although a draft disciplinary letter and notice were located relating to this incident, those drafts are exempt from disclosure because they fall within the deliberative process exemption. This exemption generally involves a right to exempt records that would reveal the deliberative processes of elected members, officers, or employees of a government agency. This exemption protects candid discussion within the office. (Gov. Code, § 6255, subd. (a); see *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166 (*Cal. First*).) Additionally, "[p]reliminary drafts, notes, or interagency or intra-agency memoranda" not retained in the ordinary course of business are exempt. (Gov. Code, § 6254, subd. (a).)

  Because the draft documents in this case are unsigned by any employee and contain no specific details about the incident, this Office cannot determine their veracity or accuracy. Therefore, to provide them could potentially cause the release of misinformation to the public. As such, they are exempt from disclosure.

- On February 18, 2016, a female employee who had been promoted reported that a male employee was upset about not being promoted. The male employee told the female employee that he was happy for her, that she was pretty, and had a nice personality. He also said, "Maybe I should grow a pair of boobs?" in reference to

the female employee's promotion and gestured with his hands to appear as if he was holding a pair of breasts. After meeting with all parties, the male employee was verbally disciplined, and the matter was closed on March 4, 2016.

Although a substantiated complaint, this incident differs from the line of disciplinary cases mentioned above in that there was no formal, written report to be disclosed, just internal communications between employees regarding the complaint and the subsequent discipline. In order to protect the candid discussion of such matters between employees, we incorporate the references to the deliberative process exemption as stated above.

- On May 31, 2016, the Human Resources Department received a report of sexual harassment. During a performance review in January 2016, a male supervisor made a comment about a female employee's work attire that specifically referenced her body. The male supervisor also commented about clothing the female had worn the prior week. In May of 2016, at an on-site gathering of coworkers, the male supervisor made an inappropriate joke about the female employee. On June 9, 2016, the male supervisor was disciplined with a written warning.

  The public's interest is not furthered by a disclosure of the male supervisor's name or the written warning. In addition to the legal exemptions mentioned above, disclosing further details would cause a chilling effect on reporting of future sexual harassment incidents because complaining employees would know that the information they provide is subject to public disclosure. Given the nature of the written warning, the complaining employee can be identified by the details provided, even with the redaction of her name. Other coworkers were present at one incident and would therefore know the complaining employee's identity if the specifics are made public. This, in turn, would cause embarrassment to the complaining employee. Any public interest in the knowledge of the male supervisor's identity would therefore be outweighed by this Office's interest in protecting the identity of the complaining employee.

  Further, preliminary notes, communications between employees, and interviews relating to this incident are exempt under the deliberative process exemption, incorporated by reference above. The Human Resources Department interviewed other individuals relating to this incident, and the disclosure of their communications, even with redaction, could have a potential chilling effect on future witness cooperation within this Office. Further, the disciplined employee may not have known the identities of persons contacted by the Human Resources

Department. Therefore, the investigatory tactics of the Human Resources Department, its subsequent evaluation of the evidence, and the formulation of a disciplinary plan are exempt from disclosure.

- On May 1, 2017, a female employee reported that her male supervisor tugged on her ponytail whenever she was wearing one, made a derogatory comment about a group of people based on sexual orientation, commented "if she was my wife, I wouldn't let her get out of bed" whenever he saw an attractive woman, mentioned that he would get slapped (with sexual overtones) and, when showing the female employee a picture of another female, stated "why doesn't she just send me nudes?" On May 10, 2017, the supervisor was disciplined with a written warning.

  The public's interest is not furthered by a disclosure of the male supervisor's name or the written warning. In addition to the legal exemptions mentioned above, providing additional detail could potentially identify the complaining employee and have a chilling effect on future reporting. Therefore, the public's interest in knowing the male supervisor's name does not outweigh this Office's interest in protecting the identity of the complaining employee.

  Further, preliminary notes, communications between employees, and interviews relating to this incident are exempt under the deliberative process exemption, incorporated by reference above. As mentioned above, the Human Resources Department contacted individuals about these incidents and the investigatory tactics, evaluation of the information received, and the identities of any witnesses is protected under deliberative process.

Finally, you submitted an expanded request for the following information:

1) All records relating to the 2015 and 2016 incidents described on page 3 of the April 20 letter;

   Response:

   As to the 2015 incident involving the District Attorney Investigator, any responsive records cannot be disclosed. Personnel records of sworn peace officers employed by the SDCDA are exempt from production under the CPRA. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286; *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278, 286, 289; Pen. Code §§ 832.5, 832.7.) Accordingly, peace officer personnel records that may include information such as discipline records, complaints, or

investigations of complaints, are exempt from disclosure under the CPRA and cannot be provided. (*Commission on Peace Officer Standards*, *supra*, 42 Cal.4th at p. 289-290; Gov. Code, §6254, subd. (k).)

Although the Investigator previously consented to the limited disclosure of the fact and nature of the discipline that he received, he did not consent to the disclosure of any underlying records. Therefore, there are no additional records this Office can provide.

For the 2016 incident, which is the only incident involving a Deputy District Attorney, pursuant to Government Code section 6253, subdivision (c)(2), additional time is needed to extract and examine multiple individual documents from voluminous records to determine which records, if any, are responsive to your request and not exempt from disclosure under the CPRA. You should receive a determination of your request no later than May 18, 2018.

2) Any and all writings relating to complaints or allegations of sexual misconduct, including but not limited to sexual harassment, against any employee of the San Diego County District Attorney's Office, including but not limited to investigation reports, interview statements, documentary evidence reviewed during any investigation by the San Diego County DA's office, notices to employee, correspondence to or from complainants and discipline or action taken by San Diego County DA's office. The date range encompasses all writings created, sent or received after January 1, 2013.

   You further specified that your request was not limited to "formal" allegations or complaints, but any and all investigations into alleged reported or suspected sexual misconduct and/or harassment.

Response:

This Office has conducted a reasonable search of its records and has already provided you with the disclosable information that falls within your request. The CPRA supports disclosure when complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature and there is reasonable cause to believe the complaint is well-founded. (*AFSE, supra,* 80 Cal.App.3d at p. 918; *Bakersfield*, *supra*,118 Cal.App.4th at pp. 1045-1046.)

Therefore, your expanded request does not require further disclosure than has already been provided.

Sincerely,

Elizabeth Renner
Deputy District Attorney

Exhibit 5

JESUS RODRIGUEZ
ASSISTANT DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

SUMMER STEPHAN
DISTRICT ATTORNEY

San Diego
330 West Broadway
San Diego, CA 92101
(619) 531-4040

http://www.sandiegoda.com

June 5, 2018

Mr. David Snyder
Executive Director
First Amendment Coalition
Dsnyder@firstamendmentcoalition.org
Re: California Public Records Act (CPRA) Request, DA # 18-52

Dear Mr. Snyder,

This letter is in response to your email dated April 25, 2018, wherein you requested all records relating to the 2016 incident described on page 3 of this Office's letter response, dated April 20, 2018.

This Office appreciates and understands the need for government transparency in the conduct of its official business and how it addresses important issues such as misconduct in the workplace. We are also certain that the First Amendment Coalition appreciates the statutory and legal protections related to internal investigations relating to this Office's employees. Numerous exemptions and protections apply to the information we reviewed, such as the "personnel file" exemption, the "deliberative process" exemption, and constitutional and statutory rights to privacy. These statutory and legal protections must prevail when, as in this case, the public's interest is not furthered by disclosure of the records that you seek.

In the interest of transparency, this Office is disclosing the following information related to the records that you request:

Former Deputy District Attorney Michael MacNeil was engaged in a private family matter when a third party obtained personal information about him. The personal information obtained, in the form of photos and electronic communications from his personal, non-work devices, was exchanged with another consenting adult and did not directly relate to his employment. Part of the personal information included nude photos taken on county property and consensually sent to another adult, while another part

included non-sexual photographs taken in a courtroom, in violation of San Diego County Superior Court policy. The third party provided the personal information to a variety of sources, including the media and this Office.

This Office began an internal investigation based on two grounds:

1) Release of personal and private information regarding the employee, District Attorney employees, and others; and
2) Inappropriate conduct in the workplace.

After the third party released the personal communications on the internet, Mr. MacNeil tendered his resignation in June of 2016 in lieu of further proceedings, and the investigation was closed. Although Mr. MacNeil's resignation was effective immediately and he physically left the office, he took accrued leave until November of 2016, at which point his employment with this Office formally ended.

For the reasons stated below, the disclosure of the actual records does not further the public interest. There are two categories of information that this Office examined: its own internal investigatory records, and the information provided by the third party. We will discuss each category of records in turn.

Internal Investigatory Records

Numerous exemptions apply to the internal investigatory records of this Office, which constitute part of Mr. MacNeil's personnel file. This Office's investigatory records contain attorney work product and material related to the deliberative process, the disclosure of which could create a chilling effect on communications and investigations within this Office. The records are also protected personnel records under the CPRA because Mr. MacNeil has a privacy right in his personnel files.

First, the investigatory reports contain intra-office communications that are subject to additional exemptions under the CPRA. The deliberative process exemption protects records that would reveal the deliberative processes of elected members, officers, or employees of a government agency. This exemption protects candid discussion within the office. (Gov. Code, § 6255, subd. (a); see *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.) Disclosure of these records could have a chilling effect on the ability of management to candidly discuss and document their proposed resolutions to personnel issues. The investigatory materials also contain

attorney work product in the form of notes and interviews and is exempt from disclosure. (Gov. Code, § 6254, subd. (k); Civ. Code, § 2018.030, subd. (a).) Disclosure of this information would create a chilling effect on this Office's ability to investigate and document and analyze internal issues.

Further, Mr. MacNeil's personnel records are exempt from disclosure because they would constitute an unwarranted invasion of personal privacy. As mentioned in my April 20 letter, Government Code section 6254, subdivision (c), creates a CPRA exemption for personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. The CPRA supports disclosure when complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature and there is reasonable cause to believe the complaint is well-founded. (*American Federation of State etc. Employees v. Regents of University of California* (1978) 80 Cal.App.3d 913, 918; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045-1046.)

The following three-prong analysis determines whether a disclosure constitutes an "unwarranted invasion of personal privacy" with respect to the CPRA: (1) whether the records sought constitute a personnel file; (2) whether disclosure of those records would compromise substantial privacy interests; and finally, (3) whether the potential harm to privacy interests from disclosure outweighs public interest in disclosure. (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 818-819.)

Regarding the first prong, the records you seek constitute "personnel…or similar files." (Gov. Code, § 6254, subd, (c).)

Regarding the second prong, the disclosure of the records would compromise a substantial privacy interest. Employees have a legally protected interest in their personnel files. (*BRV, Inc. v Superior Court* (2006) 143 Cal.App.4th 742, 756 (*BRV*).) In *BRV*, a school district's board of education hired an investigator to prepare a report analyzing allegations of verbal abuse of students and sexual harassment of female students by the district's superintendent. (*Id.* at p. 747.) After receiving the full report, the board of education entered into an agreement with the superintendent accepting his resignation in exchange for terms of payment and a promise to keep the report confidential. (*Ibid.*) Because of the superintendent's position of authority as a public official and the public nature of the allegations, the court of appeal found that the public's interest in disclosure outweighed his interest in preventing disclosure of the investigatory report. (*Id.* at p. 759.)

BRV is distinguishable from the situation at hand. While a deputy district attorney is more of a public figure than internal staff members, the position is neither elected nor appointed. Further, the allegations against Mr. MacNeil did not directly relate to the performance of his duties, in contrast to the superintendent's alleged actions concerning students in *BRV*. Finally, there is a marked difference between non-consensual allegations of sexual harassment against a superintendent of minor students and the private, consensual exchange of information between adults. Therefore, Mr. MacNeil's privacy interests and expectation of privacy are greater than in *BRV*.

The final prong is balancing the implicated privacy interests, as outlined above, against any public interest in their disclosure. Fundamentally, the strength of the public interest depends on the extent to which disclosure of the requested item or information will shed light on the public agency's performance of its duty. (*Versaci*, *supra*, 127 Cal.App.4th at p. 820.) In determining the weight of a public interest in a given case, as a threshold matter, the weight of that interest is proportionate to the gravity of the governmental tasks sought to be illuminated and the directness with which the disclosure will serve to illuminate. (*Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222, 242.)

Here, the public interest is not served by the disclosure of the investigatory records. Through the media and the internet, the public is already aware of, and has access to, the photographs that are the basis for the investigation. The photographs are unrelated to Mr. MacNeil's performance of trying cases as a prosecutor, and the investigation related to them illuminates no governmental tasks other than how this Office responds to reports of such information. Although there is a public interest in how the District Attorney's Office responded by investigating the matter, the investigatory reports themselves do not provide any additional context that furthers the public interest. As a practical matter, disclosure of investigatory reports to the public at large would have a chilling effect on investigatory efforts within this Office, as witnesses would be hesitant to come forward with information. The above-provided summary, consisting of the investigatory actions taken and the nature of Mr. MacNeil's departure from this Office, is a less-intrusive alternative means that adequately provides you with the substance of the information you seek.

Information Provided to This Office

Further, the materials provided by the third party to this Office are protected by the California Constitution and the CPRA. The California Constitution, article 1, section 1, gives Californians the inalienable right to privacy. (*Hill v. National College Athletic Assn.* (1994) 7 Cal.4th 1, 16 (*Hill*). The California Supreme Court in *Hill* set forth three threshold factors that must be met for a constitutional right of privacy to arise: (1) there must be a legally protected privacy interest; (2) the individual must possess a reasonable expectation of privacy under the circumstances at hand; and (3) the intrusion must involve a serious invasion of the privacy interest in question. (*Id.* at pp. 39-40.) In the instant matter, all three factors are met.

As to the first element, the court in *Hill* enumerated two legally recognized privacy interests: (1) informational privacy, which is an interest in precluding the dissemination or misuse of sensitive and confidential information, and (2) autonomy privacy, which is an interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. (*Hill*, *supra*, 7 Cal.4th at p. 35.) Here, Mr. MacNeil was engaged in a personal family matter and exchanged personal information with another consenting adult. His interest in informational privacy precludes the dissemination and misuse of those sensitive personal communications and photos. He also has an interest in keeping matters that relate to his family private. Therefore, the first element of a constitutional right to privacy is satisfied in this matter.

As to the second element, Mr. MacNeil had an expectation of privacy in his communications to another consenting adult. A reasonable expectation of privacy is an objective entitlement founded on broadly-based and widely accepted community norms. (*Hill*, *supra*, 7 Cal.4th at p. 37.) Private communications on personal devices are highly protected in society and by law, as reflected by the passage of California's own Electronic Communications and Privacy Act (Pen. Code § 1546, et. seq.). Therefore, Mr. MacNeil has an established expectation of privacy and the second element is met.

As to the final element, disclosure of the communications would be a serious invasion of Mr. MacNeil's privacy interests. The communications were released without Mr. MacNeil's consent, contained highly personal information, and were not intended for a public audience. Much of the information in question is still readily accessible on the internet, and to provide it again or to provide anything further would achieve no purpose other than to further harm and embarrass Mr. MacNeil and his family. The fact that the information was released to the public by someone else does not allow this Office to

further violate a constitutional privacy interest where permission has not been given by the former employee. Therefore, the third element has been satisfied and the California Constitution prevents disclosure of the contents of the communications.

There are additional protections of the material related to the CPRA. Not everything written by a public employee is subject to review and disclosure as a public record. To qualify as a record, a writing must contain information relating to the conduct of the public's business. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618 (*City of San Jose*), internal quotations and citations omitted.) Communications that are primarily personal, containing no more than incidental mentions of agency business, will not constitute public records. (*Id.* at pp. 618-619.) Specifically, the California Supreme Court stated:

> [T]he public might be titillated to learn that not all agency workers enjoy the company of their colleagues, or hold them in high regard. However, an employee's electronic musings about a colleague's personal shortcomings will often fall far short of being a "writing containing information relating to the conduct of the public's business."

(*City of San Jose, supra*, 2 Cal.5th at p. 619.)

Resolution of the question, particularly when writings are kept in personal accounts, will often involve an examination of several factors: the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment. (*City of San Jose*, *supra*, 2 Cal.5th at p. 608.)

As to Mr. MacNeil's communications, which are personal messages directed to a consenting adult on his personal devices, there is an insufficient nexus with agency business to warrant disclosure.

Should there be any further responsive records, this Office reserves the additional exemptions under the "catchall" provision of Government Code section 6255, subdivision (a), and the "case file" exemption pursuant to Government Code section 6254, subdivision (f).

Therefore, due to the above-outlined exemptions and the complex and substantial privacy interests involved in the resolution of this matter, no further records will be disclosed.

Sincerely,

Elizabeth Renner
Deputy District Attorney