

David Loy, Legal Director
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Direct: 619.701.3993

June 28, 2022

VIA ELECTRONIC MAIL

Margo A. Raison
County Counsel
1115 Truxtun Ave., 4th floor
Bakersfield, CA 93301
Email: mraison@kerncounty.com

Re: Unlawful threat of “False Claims Act” liability for petitioning Attorney General

Dear Ms. Raison:

In a letter dated June 21, 2022, the County Counsel’s office threatened Eddy Laine with exposure to significant financial liability for telling the California Attorney General that Kern County did not comply with Mr. Laine’s public record requests. A copy of that letter is attached.

On behalf of the First Amendment Coalition (“FAC”), I am writing to explain that this baseless threat violates the First Amendment. FAC calls upon Kern County to withdraw that threat immediately and issue a public apology to Mr. Laine. The County should also take appropriate action to ensure such a threat never recurs.

To the extent the June 21 letter addressed the substance of Mr. Laine’s requests and the County’s efforts to respond to them, FAC takes no position at this time on whether the County properly responded to the requests and has no objection to proper engagement with persons requesting public records.

However, the June 21 letter went much further. Noting that Mr. Laine wrote to the Attorney General on June 17 to assert the “County of Kern has not responded” to Mr. Laine’s records request, the June 21 letter contended or implied that Mr. Laine’s statement constituted “presentation of a false claim” exposing Mr. Laine to substantial liability under the California False Claims Act, including triple damages, costs, and penalties.

Regardless of whether Mr. Laine was mistaken or the County complied with the California Public Records Act (“CPRA”), this baseless threat of False Claims Act liability violates the First Amendment.

By writing to the Attorney General, Mr. Laine exercised his rights to “freedom of speech” and “to petition the Government for a redress of grievances.” U.S. Const., amend. 1; see *also* Cal. Const. Art. I, §§ 2(a), 3(a) (protecting “liberty of speech” and the right to “petition government for redress of grievances”). These “cognate rights” are “integral to the democratic process.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011).

In particular, the “right to petition the government for redress of grievances is ‘among the most precious of the liberties safeguarded by the Bill of Rights.’” *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1160 (2007) (quoting *Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967)). “Private citizens have the fundamental right to present concerns to government agencies.” *Evans v. Evans*, 162 Cal. App. 4th 1157, 1172 (2008).

A petition “conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns.” *Guarnieri*, 564 U.S. at 388–89. Therefore, the “right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives.” *Id.* at 388. “The right to petition traces its origins to Magna Carta,” and “petitions on matters of public concern” have been “an essential part of contemporary debates” since “this country’s early history.” *Id.* at 395–96.

Like any local agency, Kern County has constitutional and statutory obligations to ensure access to public records. Cal. Const. Art. I, § 3(b)(1); Govt. Code § 6250 et seq. The County’s compliance with those fundamental obligations is of paramount public concern. *Int’l Fed’n of Prof’l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal. 4th 319, 328 (2007) (“Openness in government is essential to the functioning of a democracy.”). Indeed, any allegation of governmental misconduct “is inherently a matter of public concern.” *Ballou v. McElvain*, 29 F.4th 413, 429 (9th Cir. 2022).

By writing to the Attorney General about the County’s compliance with its CPRA obligations, Mr. Laine exercised his First Amendment rights to speak and petition the government on an issue of public concern. The First Amendment prohibits official actions that “would chill a person of ordinary firmness from continuing to engage” in protected expression, regardless of whether the person’s expression “was actually suppressed or inhibited.” *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (cleaned up).

The improper official threat of “pecuniary harm” contained in the June 21 letter unquestionably interfered with Mr. Laine’s First Amendment rights. *Id.* at 868; see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (“The fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute.”); cf. *Filarsky v. Superior Court*, 28 Cal. 4th 419, 434 (2002) (prohibiting agency from “initiating a declaratory relief action” about compliance with CPRA because “authorizing the agency to commence such an action would chill the rights of individuals to obtain disclosure of public records”).

The threat of False Claims Act liability against Mr. Laine is baseless. The False Claims Act does not apply to speech or petitioning protected by the First Amendment. Instead, it helps “protect the public fisc” against monetary fraud. *Laraway v. Sutro & Co.*, 96 Cal. App. 4th 266, 274 (2002). It is “patterned on a similar federal statutory scheme,” *Rothschild v. Tyco Internat. (US), Inc.*, 83 Cal. App. 4th 488, 494 (2000), the purpose of which “is to enhance the Government’s ability to recover losses sustained as a result of fraud against the Government.” *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1041 (10th Cir. 2004).

False claims laws “provide for restitution to the government of money taken from it by fraud” and deter similar fraud in the future. *In re Commonwealth Cos.*, 913 F.2d 518, 525 (8th Cir. 1990)

(quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943)). They do not apply to the exercise of First Amendment rights to speak or petition the government. To construe them otherwise would bring them into conflict with the Constitution. Therefore, Mr. Laine faces no exposure under the False Claims Act for writing to the Attorney General about Kern County's response to his public records requests.¹

Any legal action against Mr. Laine arising from his letter to the Attorney General would expose the plaintiff to an anti-SLAPP motion and payment of attorney fees, because the letter was written "in furtherance of [Mr. Laine's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." Code Civ. Proc. § 425.16(b)(1).

For all these reasons, the County should immediately withdraw its baseless threat against Mr. Laine, publicly apologize for interfering with his First Amendment rights, and take appropriate action to ensure such a threat never recurs.

Thank you for your attention to this matter. Please let me know if you have any questions.

Sincerely,

FIRST AMENDMENT COALITION



David Loy
Legal Director

cc: Kern County Board of Supervisors
Deputy County Counsel Brian Van Wyk

¹ Nor would any other valid claims arise from Mr. Laine's June 17 letter to the Attorney General. Assuming Mr. Laine made a "categorically false" statement that the "County of Kern has not responded" to his record requests, as alleged by the June 21 letter, and further assuming such a falsehood might be defamatory, the First Amendment prohibits any claim for alleged "libel on government" as such. *Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966); *New York Times*, 376 U.S. at 291. In any event, as stated in Mr. Laine's letter of June 24 to your office, it appears certain email responses were inadvertently directed to Mr. Laine's spam folder, giving him the honest if mistaken impression the County had not responded. Accordingly, even if Mr. Laine made a false and defamatory statement about an identifiable public official, he did so without the necessary knowledge of falsity or reckless disregard for the truth. See *New York Times*, 376 U.S. at 280; *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (2007).



June 21, 2022

Eddy Laine

[REDACTED]

via email -- [REDACTED]

RE: California Public Records Act Request dated May 2, 2022 (“CPRA Request”)

Dear Mr. Laine,

We are in receipt of your letter dated May 2, 2022 requesting certain records and information from the County of Kern (“County”) Government Code section 6253 requires that the County disclose records that it maintains “upon a request for a copy of records that reasonably describes an identifiable record or records....”

Here is a brief summary of your requests:

1. Records showing the number of currently filled Ranger positions.
2. Records showing the number of Rangers assigned to Kern River Parkway area
3. Records showing the contact information for Rangers
4. Records showing whether two Rangers are currently assigned to the County admin building
5. Records regarding “the potential use of this \$5 million in American Rescue Act funding.”
6. Records “reflecting community involvement/engagement regarding options/alternatives/suggestions regarding the use of this \$5 million in American Rescue Act funding.”
7. Records relating to contracts for, or the location of, portable restrooms.

We have previously responded on May 12, 2022, May 24, 2022, and June 7, 2022 and provided you with the County’s response to items 1-4 and 7. We have also provided a partial response to items 5 and 6, namely, the Internet locations of responsive documents such as the budget, its supporting records, records of public hearings relating to the budget, planning documents, etc. that have already been made available to the public.

GROUND  **BOUNDLESS**

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With regards to items 5 and 6, we have previously provided you with certain email communications that we were able to manually identify as being responsive to your request. For reference purposes, I am describing these documents as the “General Services Records,” and “4th Supervisorial District Records.”

I have become aware of certain statements that you have made in relation to this records request that concern me. Specifically, by letter dated June 17, 2022 addressed to Attorney General Rob Bonta, you stated the following:

This letter is requesting your assistance regarding the lack of compliance by the County of Kern regarding California Public Records Act Requests. The County of Kern has not responded to a recent May 2, 2022 letter (a copy of which is enclosed).

Your statement is categorically false. The County has responded to you on at least three occasions, as described above, and I have continued to diligently search for responsive public records, subject to the difficulties discussed in my previous letters.

You should be aware that the California False Claims Act, California Government Code section 12650 et seq., imposes liability upon any person who commits certain enumerated acts related to the presentation of false claims to an officer, employee, or agent of the state or its political subdivisions.

Any person who commits those enumerated acts in violation of the False Claims Act shall be liable to the state or political subdivision for three times the amount of damages that the state or political subdivision sustains because of that act. Furthermore, a person who commits those enumerated acts shall also be liable to the state or political subdivision for the costs of a civil action brought to recover those penalties or damages, and shall further be liable for a civil penalty of not less than \$5,500 and not more than \$11,000 for each violation, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990.

The Act defines a “claim” to include any request or demand for money, property, or services presented to an officer, employee, or agent of the state or its subdivisions. Acting “knowingly” is defined as acting either (1) with actual knowledge of the falsity of a claim; (2) in deliberate ignorance of its truth or falsity; or (3) in reckless disregard of its truth or falsity.

The enumerated, prohibited acts include, among others, (1) knowingly presenting a false claim; (2) knowingly making a false record or statement material to a false or fraudulent claim; (3) conspiring to present a false claim; and (4) as the beneficiary of an inadvertent false claim, failing to disclose that false claim within a reasonable time after discovering its falsity.

In certain circumstances, a court may reduce the damages assessed for a violation to two times those suffered by the public agency, where the person committing the violation has furnished all materials and information known to the person about the violation within 30 days, where the person has fully cooperated with any investigation of the violation, and where no criminal prosecution, civil action, or administrative action has yet commenced with respect to the violation. Liability under the Act is joint and several for any act committed by two or more persons.

I note for the record that your letter to Attorney General Bonta was copied to at least 13 other agencies and organizations. The presentation of a false claim is a serious matter. I have been operating in good faith and responding to your requests to the best of my ability. Please engage with me on the same basis. California Public Records Act requests are not intended to be adversarial.

While we have provided the General Services Records and the 4th Supervisorial District Records, we have still not been able to identify certain other responsive email communications for requests 5 and 6 based on the terms you have provided; my attempt to create a search phrase which would locate responsive documents initially yielded 30,535 items totaling 37.15 GB, which appeared excessive.

I did not hear from you regarding this request, and therefore it is my understanding that you agree that the result greatly exceeds the scope of what you are seeking. As previously discussed, I provided County IT staff with a refined search phrase that would hopefully yield a more manageable number of results.

To conduct that search, we further limited the results to only documents after January 1, 2021. Even as revised, the search is still returning an excessive number of documents (27,453 documents, totaling 27.02 GB). Again, I believe this exceeds what you are seeking. We are going back to run another, further limited search.

That being said, it may be the case that I need a more focused description of the requested documents; if, in relation to this request, you have pulled the various related budget documents that the County has made available to the public online, then you are likely familiar with the keywords and unique identifiers found therein, and you would be better suited to identify any related public records that you seek. Accordingly, I may need a more focused description of those records in order to return a manageable number of documents.

In accordance with Government Code section 6253.1, I am hereby offering to assist you in making a more focused and effective request should you so desire. I have offered this in the past, but I am reiterating my request so you know this is available.

As you may know, we are in receipt of your letter dated June 6, 2022, addressed to Richard K. Delmar, Deputy Inspector General of the U.S. Department of Treasury, also written in relation to this May 2, 2022 request for records (“Letter to Delmar”).

The Letter to Delmar is nine pages long and describes various flaws that you perceive in the County’s response to your requests for records. It contains strong rhetoric and too many misstatements to address in their entirety here. I can tell that you are frustrated with the County’s response, but I must voice my concern that you may be acting with disregard for the truth. There are pointed inconsistencies between your records requests to the County and your descriptions of those requests to others. Please understand that many of the flaws you perceive in our process would be addressed by communicating with County staff more directly.

I note that the Letter to Delmar purports to be authorized by the Sierra Club, Kern-Kaweah Chapter and was copied to at least 5 parties including Attorney General Bonta.

Viewing the claims in the Letter to Delmar in good faith, I now request that you please be mindful of the specific language used to request records. I am also asking for your understanding of the challenges the County faces in interpreting and responding to records requests. Requesting an agreement is different from requesting records of the competitive process used to produce that agreement. Searching the emails of all county employees is orders of magnitude more complicated than searching the emails of a few specific people. It also takes time to appropriately review records to determine if they are public records or if they are documents defined by law as confidential or exempt from disclosure.

If you have identified a specific document that you would like made available to you, I would encourage you to simply request that document directly. I am doing my best to interpret your requests and provide responsive records, but in many cases the requests are simply different from what I later come to understand you were seeking via your letters to other parties. If you need to provide clarification in order to make your requests fully understood, I am happy to take your call and work through the matter with you.

Finally, we have identified additional General Services emails responsive to items 5 and 6 relating to ARPA funding, and responsive to item 7 relating to portable restrooms. I have attached these documents to the email containing this letter.


Subject to the discussion above, I expect to respond further to your request no later than 14 days from the date of today's letter, or by July 5, 2022, due to the need to coordinate with the County's ITS department in the conduct the countywide email search. If you have any suggestions as to how we can better identify the documents you seek, I would sincerely appreciate them.

Please feel free to contact me if you have any questions or concerns.

Sincerely,

Brian Van Wyk

Brian Van Wyk

 Digitally signed by Brian Van Wyk
Date: 2022.06.21 21:59:45 -07'00'

CC: Geoffrey Hill, Chief General Services Officer

Attachments