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VIA ELECTRONIC MAIL

University of California, Berkeley
Public Records Office
Office of Legal Affairs
200 California Hall, MC #1500
Berkeley, CA 94720-1500
Email: pra@berkeley.edu

Re: California Public Records Act Requests

Dear University of California, Berkeley:

The First Amendment Coalition (“FAC”) is a nonprofit public interest organization dedicated to advancing free speech, open and accountable government, and public participation in civic affairs. I am writing on behalf of FAC to address your response to a California Public Records Act (“CPRA”) request submitted by journalist Emilie Raguso.

1. CPRA request and responses

On July 24, 2023, Ms. Raguso requested the following records from University of California, Berkeley (“UC Berkeley”): “Any and all email communications regarding the UC Berkeley skeleton or bones found at Clark Kerr – in addition to but not limited to emails to and from Tom Mucha.”

On August 1, 2023, Assistant Public Records Coordinator Janesa Shearer stated that Ms. Raguso’s request, “as currently drafted, is overly board, and compliance with the request would be unduly burdensome pursuant to Government Code section 7922.000” and suggested that Ms. Raguso narrow the scope of her request.

On the same day, Ms. Raguso responded and agreed to narrow her request to “emails to and from Tom Mucha dating back to June 2021,” “emails from 2023 that may relate to this topic within [Tom Mucha’s] division and within the president’s office,” and “any records in this subject from within UCPD,” subject to any applicable exemptions.

The Public Records Office did not acknowledge receipt of Ms. Raguso’s narrowed request within 10 days, as required by California Government Code section 7922.535, subdivision (a). It also never gave written notice justifying a 14 day extension pursuant to Government Code section 7922.535(b). Two weeks later, Ms. Raguso reached out to the Public Records Office again to ask whether it received her earlier message. Again, the Public Records Office failed to respond.

On August 17, 2023, Ms. Raguso called Public Records Coordinator Liane Wong, left a voicemail, and followed up with an email to Ms. Wong and other university officials to notify

them that UC Berkeley was out of compliance with the CPRA due to the Public Records Office's failure to respond.

The next day, Ms. Raguso finally received an initial response to her request from Ms. Wong. The response stated that "we have made a preliminary determination that the request likely does seek disclosable records within the possession of the University," but UC Berkeley did not "state the estimated date and time when the records will be made available" as required by Government Code section 7922.535(a).

Ms. Raguso nonetheless responded and asked when she could expect to hear back, and Ms. Wong stated, "[w]e will provide an update when available" and that "the current timeframe for fulfillment of most requests is ten weeks[.]"

Ten weeks after Ms. Raguso received her initial response, on October 26, 2023, she reached out for an update. On November 7, 2023, Ms. Shearer responded that the Public Records Office was "working on searching for and collecting records" but that "each of the steps in the process takes time" and that it is "concurrently fulfilling numerous other requests." Ms. Raguso responded on November 17, 2023, reminding the Public Records Office that they were past the original estimated processing time and that she substantially narrowed her original request. Ms. Raguso never received a response to her last email and has not received any update in months.

2. Duty to respond promptly to CPRA requests

The California Constitution and CPRA require state and local agencies to make any public record available for inspection or copying on request unless the record falls within a specific exemption. Cal. Const., Art. I, § 3(b)(1); Gov. Code §§ 7922.000, 7922.525, 7922.530(a). This letter explains why the exemptions asserted by the City are mistaken and the City must immediately disclose the requested records.

An agency that withholds requested records bears the burden of demonstrating that an exemption applies. Gov. Code § 7922.000; *Int'l Fed'n of Pro. & Tech. Eng'rs, Local 21 v. Superior Ct.*, 42 Cal. 4th 319, 329, (2007). Because the party opposing disclosure bears the burden of proof, any "doubtful cases must always be resolved in favor of disclosure." *Essick v. County of Sonoma*, 81 Cal. App. 5th 941, 950 (2022).

An agency's unreasonable delay in disclosing responsive records is actionable under the CPRA. Gov. Code § 7923.000 ("Any person may institute a proceeding for injunctive or declarative relief, or for a writ of mandate, in any court of competent jurisdiction, to enforce that person's right under this division to inspect or receive a copy of any public record or class of public records.") The CPRA requires a California court to compel disclosure, or order the government to show cause as to why it should not compel disclosure, whenever "certain public records are being *improperly withheld* from a member of the public." Gov. Code § 7923.100 (emphasis added).

In the CPRA context, "improperly withheld" means "to hold back" or "refrain from" disclosing public records without justification under the circumstances or protection by a narrowly construed exemption under the procedures of the CPRA. *Coble v. Ventura Cnty. Health Care*

Agency, 73 Cal. App. 5th 417, 425–26 (2021) (“A fundamental principle of statutory construction is that if there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.”); *Improper*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/improper> (last visited Feb. 21, 2024) (defining “improper” as “not suited to the circumstances” and “not in accord with . . . right procedure”); *Withhold*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/withhold> (last visited Feb. 21, 2024) (defining “withhold” as “to hold back from action,” and, in alternative definition “to refrain from granting, giving, or allowing”).

Based on these definitions, an agency does not need to formally deny a request to improperly withhold documents; it is actionable when agency merely holds back or refrains from producing the records within a reasonable time or without claiming a specific exemption. See *Improper*, *supra*; *Friends of Oceano Dunes v. Dep’t of Parks & Recreation*, No. 34-2020-80003496, 2021 Cal. Super. LEXIS 110202, *10-11 (collecting cases) (noting that the appellate cases that “mention timeliness seem to acknowledge that an agency acts properly so long as it . . . produces all requested records in a ‘reasonably timely’ or ‘reasonably prompt’ manner given the breadth of the particular request. The touchstone thus appears to be reasonableness.”). As the Court of Appeal has said, “the effect of” a local agency’s “inability or unwillingness to locate and produce these documents until court-ordered discovery ensued . . . , is tantamount to withholding requested information from a PRA request.” *Sukumar v. City of San Diego*, 14 Cal. App. 5th 451, 466 (2017) (emphasis original).

The CPRA also requires that “[n]othing in this division shall be construed to permit an agency to delay or obstruct the inspection or copying of public records” and that an agency “shall make the records promptly available.” Gov. Code §§ 7922.500, 7922.530(a). The provisions prohibiting delay, mandating prompt disclosure, and authorizing suit for improper withholding must be read together. *City of San Jose v. Superior Ct.*, 2 Cal. 5th 608, 617 (2017) (holding that consideration of portions of a statute must be made in the context of the entire statutory scheme). Unreasonable delays in production violate these provisions because such delays would “permit an agency to delay or obstruct the inspection or copying of public records” indefinitely and without consequence. See Gov. Code §§ 7922.500, 7922.530(a).

Except where the statutes are materially different, California courts look to cases interpreting the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for guidance in interpreting the CPRA. *Citizens for A Better Env’t v. Dep’t of Food & Agric.*, 171 Cal. App. 3d at 712 (holding that FOIA may be used to interpret the CPRA). FOIA, like the CPRA, requires responsive records be produced “promptly” after an initial determination has been made by the responding agency. 5 USC § 552(a)(3)(A); *Citizens for Resp. & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). Federal courts interpret “promptly” to “mean within days or a few weeks of a ‘determination,’ not months or years.” *Citizens for Resp. & Ethics*, 711 F.3d at 188; see also *Sierra Club v. U.S. EPA*, No.18-cv-03472, 2018 U.S. Dist. LEXIS 219383, at *14 (N.D. Cal. Dec. 26, 2018) (same) (quoting *Citizens for Resp. & Ethics*, 711 F.3d at 188).

When an agency delays disclosure for months or years without justification, this “amounts as a practical matter in most cases to saying ‘regardless of whether you are entitled to the documents, we will not give them to you.’” *Fiduccia v. U.S. DOJ*, 185 F.3d 1035, 1041 (9th Cir.

1999). As the D.C. Circuit said with respect to FOIA, “the statute does not allow agencies to keep FOIA requests bottled up for months or years on end while avoiding any judicial oversight.” *Citizens for Resp. & Ethics*, 711 F.3d at 190. The same is true for the CPRA.

UC Berkeley has not produced any records in the more than seven months since Ms. Raguso submitted her request. Besides noting that “each of the steps in the process takes time” and that it is “concurrently fulfilling numerous other requests,” UC Berkeley has not justified this delay in any way. Ms. Raguso narrowed her original request, repeatedly communicated cooperatively with the Public Records Office, requested estimated dates of production, and notified UC Berkeley that it is out of compliance with the CPRA to no avail. Thus, UC Berkeley’s delay constitutes an improper withholding of public records in violation of Gov. Code § 7923.100, failure to “make the records promptly available” in violation of Gov. Code § 7922.530(a), and delaying or obstructing disclosure in violation of Gov. Code § 7922.500.

Given the amount of time that has passed since Ms. Raguso made her request, her efforts to prompt a proper response, and UC Berkeley’s failure to demonstrate any basis to continue withholding the records, UC Berkeley must disclose the records immediately.

These violations of the CPRA expose UC Berkeley to litigation that would result in an order compelling disclosure under the CPRA and an award of substantial attorneys’ fees and expenses. Gov. Code § 7923.115.

I hope this matter may be resolved without litigation if possible. Please let me know if UC Berkeley will promptly disclose the records Ms. Raguso requested and make it unnecessary for her to pursue legal action to vindicate the public’s right to disclosure.

Very truly yours,

FIRST AMENDMENT COALITION



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