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August 13, 2024

VIA ELECTRONIC MAIL

Judicial Council of California
Attention: PAJAR, Legal Services
455 Golden Gate Avenue
San Francisco, CA 94102
PAJAR@jud.ca.gov

Re: Professor Jonathan Abel: request for judicial administrative records

Dear Counsel:

I represent Professor Jonathan Abel with respect to his request for judicial administrative records dated January 18, 2024, a copy of which is attached for convenience. I write in hopes of resolving this matter without litigation if possible. This matter concerns a single document withheld by the Judicial Council, which should be disclosed for the reasons discussed below.

If the Judicial Council discloses the document by Tuesday, August 27, 2024, the matter need not be litigated, but if it proceeds to litigation, Professor Abel reserves the right to seek all remedies available under applicable law, including but not limited to recovery of costs and attorney fees.

I. Background

Professor Abel requested copies of training materials regarding the Racial Justice Act provided to judges from January 1, 2020, to January 18, 2024. I understand the Judicial Council disclosed certain records, including the agenda for an Appellate Justice Institute held October 18–20, 2023 in Costa Mesa, which described a session on the Racial Justice Act: "This panel will provide an introduction to the Racial Justice Act … We will discuss the legislative history of the Act and describe its key provisions. We will explore interpretive challenges in applying the statute and examine the relevant case law."

However, the Judicial Council disclosed no other documents from the Appellate Justice Institute, stating in correspondence with Professor Abel, "The only other responsive records are exempt under rule 10.500(f)(12) of the California Rules of Court and/or are nondisclosable adjudicative records." As the Judicial Council confirmed, "We have only one document. It was created by the judge presenters." This record is referred to herein as the Training Document.

The Judicial Council contended that if the Training Document is a judicial administrative record, "it is exempt under rule 10.500(f)(12), because the record was created by judges solely as a tool or aid for other judges, to inform the judicial deliberation process. The public interest in

nondisclosure clearly outweighs the public interest in disclosure, because disclosure would deter and possibly halt the creation and sharing of such resources, removing critical resources for judicial officers statewide."

In the alternative, the Judicial Council argued, "If the requested document is best characterized as an adjudicative record, then it is nondisclosable because it does not represent the final official work of a court, and is not formally filed in any specific case," and instead "the record is preliminary, a job aide created in the course of judicial work and for the purpose of carrying out judicial duties."

II. Discussion

Under Rule 10.500 of the California Rules of Court, the Judicial Council must disclose judicial administrative records that are not covered by a listed exemption. The rule "clarifies and expands the public's right of access to judicial administrative records and must be broadly construed to further the public's right of access." Rule 10.500(a)(2); *see also* Cal. Const., Art. I, § 3(b)(2) ("A statute, court rule, or other authority … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.").[1]

Unless otherwise indicated, Rule 10.500 is interpreted consistently with the California Public Records Act ("CPRA"). Rule 10.500(d); *see also* Advisory Committee Comment to Rule 10.500 (discussing CPRA cases and principles). The CPRA was modeled on the federal Freedom of Information Act ("FOIA"). *Filarsky v. Superior Ct.*, 28 Cal. 4th 419, 425 (2002). As a result, CPRA and FOIA cases are instructive in deciding whether documents are subject to disclosure under Rule 10.500.

As discussed below, the Training Document must be disclosed because it is neither an adjudicative record nor covered by the exemption asserted by the Judicial Council.

A. The Training Document Is Not an Adjudicative Record.

The Training Document is not an adjudicative record. It was not "prepared for or filed or used in a court proceeding" or "the judicial deliberation process," and it has nothing to do with "the assignment or reassignment of cases and of justices, judges (including temporary and assigned judges), and subordinate judicial officers, or of counsel appointed or employed by the court." Rule 10.500(c)(1); *cf. Copley Press, Inc. v. Superior Ct.*, 6 Cal. App. 4th 106, 114 (1992) (noting "preliminary drafts, personal notes and rough records" that were "created in the course of judicial work and for the purpose of carrying out judicial duties," such as "initial drafts" of decisions or jury instructions or notes of "testimony and argument," are exempt from disclosure).

Instead, the Training Document is the final version of a presentation delivered as part of the Judicial Council's mission to educate judges on "developments in the law" outside the confines of any given case. Gov't Code § 68551. Unlike preliminary drafts of a ruling or notes of testimony, it was not created by a judge presiding over a particular case to aid in the decision of that case. Accordingly, it does not qualify as an adjudicative record.

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[1] Unless otherwise noted, all references to rules are to the California Rules of Court.

As explained in the agenda disclosed to Professor Abel, the Training Document was designed to "provide an introduction to the Racial Justice Act … discuss the legislative history of the Act and describe its key provisions … explore interpretive challenges in applying the statute and examine the relevant case law." Because such a document presumably represents a neutral and objective discussion of the statute, legislative history, and case law in the abstract, its disclosure would not expose any court's "decisionmaking process" in a given case or "undermine the [court's] ability to perform its functions" in resolving specific disputes. *Times Mirror Co. v. Superior Ct.*, 53 Cal. 3d 1325, 1342 (1991). For that reason, the Training Document cannot be withheld as an adjudicative record.

B. The Training Document Is Not Exempt from Disclosure.

To withhold the Training Document as a judicial administrative record, the Judicial Council contended only that "on the facts of the specific request for records, the public interest served by nondisclosure of the record clearly outweighs the public interest served by disclosure of the record." Rule 10.500(f)(12). That language parallels the CPRA's catchall exemption, under which an agency may withhold records if "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Gov't. Code § 7922.000.

The catchall exemption "contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality." *Am. Civil Liberties Union Found. v. Superior Ct.*, 3 Cal. 5th 1032, 1043 (2017). As one court has explained, the catchall exemption must be narrowly applied to prevent it from swallowing the general rule of transparency:

> We remain mindful that openness in the activities of government is fundamental to the exercise of our constitutional rights and our ability to function as a democracy. Courts must be alert to contentions by government entities that exaggerate the interest in nondisclosure, lest they be used as a pretext for keeping information secret for improper reasons, such as to avoid embarrassment over mistakes, incompetence, or wrongdoing. After all, to some extent any request for disclosure of public records will place a burden on government. Both the voters and their elected officials have established the general policy that this burden is well worth bearing in order to keep democracy vital. If the catchall provision of the CPRA becomes a loophole used to improperly keep public records from the people, the important purposes of the CPRA would be undermined.

L.A. Unified Sch. Dist. v. Superior Ct., 228 Cal. App. 4th 222, 250 (2014).

There is enormous public interest in matters related to the Racial Justice Act. As the Court of Appeal recently explained, the Racial Justice Act is "groundbreaking legislation [that] seeks to reduce or eliminate convictions and sentences that differ based solely on race, ethnicity, or national origin," in part by allowing defendants "to show that some participant in the process has exhibited bias" and "seek relief regardless of whether the discrimination was purposeful or

unintentional; in other words, the alleged bias can be implied rather than express." *Bonds v. Superior Ct.*, 99 Cal. App. 5th 821, 823 (2024).

The public also has a compelling interest in access to records that "contribute significantly to public understanding of government activities" by revealing the extent to which the government is properly performing its duties. *County of Santa Clara v. Superior Ct.*, 170 Cal. App. 4th 1301, 1324 (2009). "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files." *Int'l Fed'n of Pro. & Tech. Eng'rs, Local 21 v. Superior Ct.,* 42 Cal. 4th 319, 328–29 (2007) (quoting *CBS, Inc. v. Block*, 42 Cal. 3d 646, 651 (1986)). The "justification for disclosure" is "the right of the public and the press to review the government's conduct of its business" and "ensure that public officials are acting properly." *CBS*, 42 Cal. 3d at 654.

Even as to ostensibly routine operations, the government is not entitled to "exercise absolute discretion, shielded from public accountability," and "the public interest demands the ability to verify" the proper performance of official duties. *Connell v. Superior Ct.*, 56 Cal. App. 4th 601, 617 (1997); *cf. City of Los Angeles v. Metro. Water Dist. of S. Cal.*, 42 Cal. App. 5th 290, 306 (2019) ("The public benefit is the scrutiny of the records by the public. Even when a particular disclosure does not reveal newsworthy wrongdoing, the requirement to disclose reinforces the agency's awareness that its actions are open to scrutiny.").

As noted in the Advisory Committee Comment to Rule 10.500, "The Judicial Council recognizes the important public interest in access to records and information relating to the administration of the judicial branch." In particular, the public has a compelling interest in verifying the extent to which the Judicial Council is properly fulfilling its mission to keep judges "informed concerning new developments in the law," Gov't Code § 68551, and provide them "with the knowledge, skills, and abilities required to perform their responsibilities competently, fairly, and efficiently." Rule 10.451(b)(1).

Judges "are entrusted by the public with the impartial and knowledgeable handling of proceedings that affect the freedom, livelihood, and happiness of the people involved." Rule 10.452(a). Public access to training materials sponsored by the Judicial Council is necessary to allow the people to evaluate whether and to what extent the Judicial Council has complied with the mandate to provide judges with "a comprehensive and high-quality education program" enabling them to perform their important function. *Id.*; *cf. State Bd. of Equalization v. Superior Ct.*, 10 Cal. App. 4th 1177, 1186 (1992) (recognizing public interest in disclosure of "audit staff training materials which guide the Board's employees in the performance of their duties"). Without disclosure of the Training Document, "the public cannot judge" whether the Judicial Council has properly fulfilled its mission of informing justices and judges about the Racial Justice Act. *CBS,* 42 Cal. 3d at 657.

The Judicial Council contended the Training Document is exempt because it "was created by judges solely as a tool or aid for other judges, to inform the judicial deliberation process. The public interest in nondisclosure clearly outweighs the public interest in disclosure, because disclosure would deter and possibly halt the creation and sharing of such resources, removing critical resources for judicial officers statewide."

The Judicial Council did not argue the Training Document is part of "the judicial deliberation process." Instead, it claims only that the document should be exempt because it was intended to "inform" such a process. That argument proves too much, because it would exempt from disclosure all materials that educate judges on the relevant law—and by extension, all materials that educate any public officials or employees on the rules that govern their decision-making. In other circumstances, public agencies disclose similar training materials, and the Judicial Council should be no different.

The Training Document is not preliminary, deliberative, or tentative. It is the Judicial Council's final product, created to fulfill its mission to inform judges about developments in the law, in this case the Racial Justice Act as adopted by the Legislature and interpreted by courts. In these circumstances, any interest in keeping such records secret does not clearly outweigh the public's compelling interest in evaluating the Judicial Council's compliance with its duties, especially on a matter of such compelling public interest as the Racial Justice Act.

In analogous circumstances, courts have held that FOIA requires disclosure of materials used to train agency personnel on how to perform their duties because the materials merely conveyed pre-existing rules and did not reveal the process behind individual decisions. *Am. Immigration Council v. United States Dep't of Homeland Sec*., 905 F. Supp. 2d 206, 218 (D.D.C. 2012) (holding "PowerPoint slides used in presentations by USCIS's Office of the Chief Counsel to train agency employees about interacting with private attorneys" must be disclosed because "training is not a step in making a decision; it is a way to disseminate a decision already made"); *Freedom of the Press Found. v. DOJ*, 493 F. Supp. 3d 251, 262 (S.D.N.Y. 2020) (holding slides used in training were not exempt because "although the guidance in the slides may assist with future decision-making applying the policy to specific scenarios, the policy itself and management's expectations concerning its application have already been determined").

For similar reasons, the Training Document is subject to disclosure. It is not part of the process of making any particular decision pending before a judge. Rather, it simply conveys rules already established by the Legislature and appellate courts. The disclosure of such materials exerts no cognizable chilling effect on future discussions. *See Freedom of the Press Found.*, 493 F. Supp. 3d at 264 (holding disclosure of "single slide of hypotheticals" could not "reveal such significant insight into how DOJ-CRIM officials would decide future, specific, concrete cases as to have a chilling effect on future discussions").

Nor would disclosure of the Training Document exert a cognizable chilling effect on the "creation and sharing" of such materials. To fulfill the Judicial Council's mission of informing judges of "developments in the law," Gov't Code § 68551, and equipping them "with the knowledge, skills, and abilities required to perform their responsibilities competently, fairly, and efficiently," Rule 10.451(b)(1), such materials must be objective, accurate, and complete. There is no legitimate interest in depriving the public of its ability to verify whether training materials sponsored by the Judicial Council meet that standard.

For the foregoing reasons, the Judicial Council is respectfully requested to disclose the Training Document to Professor Abel in the interest of resolving this matter without time-consuming and

potentially expensive litigation. I look forward to hearing your response at your earliest convenience. Please let me know if you have any questions.

Sincerely,

FIRST AMENDMENT COALITION

David Loy
Legal Director

cc: Professor Jonathan Abel