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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11
 12
 13 **DAVID GENTRY, JAMES PARKER,**
 14 **MARK MID LAM, JAMES BASS, and**
 15 **CALGUNS SHOOTING SPORTS**
ASSOCIATION,

16 Plaintiffs and Petitioners,

17 v.

18 **KAMALA HARRIS, in her official capacity**
 19 **as Attorney General for the State of**
 20 **California; STEPHEN LINDLEY, in his**
 21 **official capacity as Chief of the California**
Department of Justice Bureau of Firearms,
BETTY T. YEE, in her official capacity as
 22 **State Controller, and DOES 1-10.,**

23 Defendants and
24 Respondents.

Case No. 34-2013-80001667

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTIONS TO COMPEL**

Date: October 28, 2016
 Time: 9:00 a.m.
 Dept: 31
 Judge: The Honorable Michael P.
 Kenny
 Trial Date: None
 Action Filed: October 16, 2013

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INTRODUCTION

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2 Defendants Kamala D. Harris, the Attorney General of California, and Stephen Lindley,
3 Chief of the Bureau of Firearms of the California Department of Justice (“DOJ”), submit this
4 brief in opposition to plaintiffs’ motions to compel further responses to requests for production of
5 documents and further responses to special interrogatories. The concurrently filed declaration of
6 Chief Lindley supports this opposition, as does a declaration by David Harper, the Deputy
7 Director of Administration of DOJ. Defendants also have lodged a privilege log and copies of the
8 relevant documents with Department 31 in a sealed envelope so that the Court can review the
9 documents in camera.

10 As this Court is aware from the other motions that have been filed in this case, plaintiffs’
11 complaint challenges DOJ’s expenditure of Dealer’s Record of Sale (DROS) fee revenues on
12 California’s Armed Prohibited Persons System (APPS) program. The DROS fee is a \$19.00
13 firearms transaction fee, and APPS is a DOJ law enforcement program aimed at recovering
14 firearms from persons prohibited from possessing them due to criminal behavior or mental
15 illness.

16 Currently at issue are a handful of plaintiffs’ latest requests for production of documents
17 and special interrogatories. However, all of the documents at issue are protected from disclosure
18 under the deliberative process and official information privileges. One of the documents, the
19 confidential Transition Report drafted for the incoming Attorney General in December of 2010, is
20 additionally protected under the attorney-client privilege and work product doctrine.

21 With respect to the interrogatories, defendants’ answer to Special Interrogatory No. 25 is
22 more than sufficient in light of the question asked by plaintiffs. And in light of the compelling
23 interests of preserving the safety and efficacy of Bureau of Firearms law enforcement operations
24 and personnel, no further answers should be ordered with respect to Special Interrogatory Nos. 29
25 or 30.

26 For these reasons, and as explained in detail below, this Court should deny plaintiffs’
27 motions to compel in their entirety.
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ARGUMENT

I. EACH OF THE DOCUMENTS LISTED ON DEFENDANTS' AMENDED PRIVILEGE LOG DATED MARCH 10, 2016, IS PROTECTED FROM DISCLOSURE UNDER THE DELIBERATIVE PROCESS AND OFFICIAL INFORMATION PRIVILEGES.

“Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated. [Citation].” (*San Joaquin Local Agency Formation Common v. Superior Court* (2008) 162 Cal.App.4th 159, 170.) “The privilege rests on the policy of protecting the decision making processes of government agencies. [Citation].” (*Ibid.*) It prohibits discovery of both the agency’s reasoning and “what evidence the administrator relied upon in reaching a decision.” (*Guilbert v. Regents of the Univ. of Cal.* (1979) 93 Cal.App.3d 233, 246.) “The key question in every case is whether the disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” (*San Joaquin Local Agency Formation Com’n, supra*, 162 Cal.App.4th at pp. 170-71.)

Courts have recognized that “[n]ot every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence.” (*Cal. First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172; see also *Connell v. Superior Court* (1997) 56 Cal.App.4th 601; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296.

With respect to the official information privilege, Evidence Code section 1040, subdivision (b)(2) provides: “A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] . . . (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the

1 information that outweighs the necessity for disclosure in the interest of justice.” Section 1040
2 also provides: “(a) As used in this section, ‘official information’ means information acquired in
3 confidence by a public employee in the course of his or her duty and not open, or officially
4 disclosed, to the public prior to the time the claim of privilege is made.”

5 The official information privilege in Evidence Code section 1040, subdivision (b)(2), is also
6 a conditional privilege. (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125–26.)
7 “If the public entity satisfies the threshold burden of showing that the information was acquired in
8 confidence, the statute requires the court next to weigh the interests and to sustain the privilege
9 only if there is a necessity for preserving the confidentiality of the information that outweighs the
10 necessity for disclosure in the interest of justice.” (*Id.* at p. 1126, internal quotations and citations
11 omitted.) “A trial court commits error under this section if the court fails to make the threshold
12 determination or fails to engage in the process of balancing the interests. (*Ibid.*)

13 Here, all of the documents at issue (i.e., privilege log items 15-19 and 21-24) are protected
14 from disclosure under the deliberative process and official information privileges. All of the
15 documents were located on an internal, secured departmental computer hard drive housing a
16 variety of documents. (Decl. of Dave Harper in Supp. of Defs.’ Opp’n to Pls.’ Mots. to Compel
17 (“Harper Decl.”) ¶ 6.) Additionally, all of the documents were created in confidence by
18 government employees within the scope of their employment for a variety of reasons that include
19 briefing superiors, discussing issues, making recommendations, and providing advice. (*Ibid.*) All
20 of the documents were communicated in confidence, to the extent they were communicated at all;
21 all were intended to be maintained as confidential; and none of documents has been disclosed
22 publicly. (*Ibid.*)

23 Additionally, a balance of the relevant interests weighs in favor of nondisclosure, whether
24 that balance is conducted in the context of the deliberative process privilege or the official
25 information privilege. The documents at issue offer a glimpse into how and why DOJ reached
26 particular determinations or made certain decisions regarding its budget, and what DOJ personnel
27 may have been thinking during its budget development process. For example, items 15 and 16 on
28 the privilege log reflect internal departmental deliberations and recommendations regarding the

1 content of an intended Finance Letter. (Harper Decl. ¶¶ 2-5.) Item 17 reveals a deliberative
2 exchange between DOJ and the Department of Finance preceding a January budget proposal. (*Id.*
3 ¶¶ 7-8.) Items 21 and 23 reflect a similar question and answer exchange between DOJ Budget
4 Office staff and other government officials concerning budget development. (*Id.* ¶¶ 11-12.)
5 Documents 18 and 19 are internal documents that reflect DOJ's deliberations prior to a Budget
6 Change Proposal ("BCP") and regarding the development of its budget. (*Id.* ¶¶ 9-10.) Finally,
7 the relevant portions of document 24 reflects the Bureau's deliberative processes concerning
8 numerous aspects of the Bureau's work, including but not limited to the operation of its programs,
9 litigation, and law enforcement activities. (Decl. of Stephen Lindley in Supp. of Defs.' Opp'n to
10 Pls.' Mots. to Compel ("Lindley Decl.") ¶¶ 3-9.)

11 Disclosure of this thinking and related decision-making processes would chill the full and
12 candid assessment of departmental budget and other issues. Such an assessment directly depends
13 on the honest consideration of a variety of data, analyses, and options, all of which is intended to
14 support DOJ's departmental decision making. Indeed, many of the documents reflect internal
15 mental processes of DOJ staff as it considered internal questions from DOJ and questions outside
16 the agency, such as inquiries from the Department of Finance. These kind of mental deliberations
17 are protected from disclosure under the deliberative process and official information privilege.

18 Indeed, in a prior discovery order this Court observed that the relevant discovery issues in
19 this case concerned defendants' "budget and expenditure decisions related to the setting and
20 continuation of the DROS fee" and any "budgetary and other calculations concerning the
21 appropriate amount of the DROS fee." (Order filed June 1, 2015, at p. 4.) In connection with the
22 current discovery dispute, defendants have submitted the relevant documents for this Court's in
23 camera review. That review will reveal that the documents at issue concern broader DOJ and
24 Bureau of Firearms' budget issues more than they concern any discreet issue related to the
25 "setting" or "amount" of the DROS fee. This attenuated relevance, especially when weighed
26 against the intrusion and impact on DOJ's executive decision making process, also counsels in
27 favor of nondisclosure.

1 For these reasons, the Court should find that documents 15-19 and 21-24 are protected from
2 disclosure under the deliberative process and official information privileges and deny plaintiffs'
3 motions to compel accordingly.

4 **II. ITEM 24 LISTED ON THE PRIVILEGE LOG IS ALSO PROTECTED FROM DISCLOSURE**
5 **UNDER THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE.**

6 The attorney-client privilege, which is set forth in Evidence Code section 954, confers a
7 privilege on the client "to refuse to disclose, and to prevent another from disclosing, a
8 confidential communication between client and lawyer. . . ." The fundamental purpose of the
9 privilege "is to safeguard the confidential relationship between clients and their attorneys so as to
10 promote full and open discussion of the facts and tactics surrounding legal matters." (*Costco*
11 *Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732.) The privilege is absolute and
12 precludes disclosure of confidential communications even though they may be highly relevant to
13 a dispute. (*Ibid.*)

14 A party that seeks to protect communications from disclosure based upon the attorney-
15 client privilege must establish the preliminary facts necessary to support its exercise (i.e., a
16 communication made in the course of an attorney-client relationship). (*Costco, supra*, 47 Cal.4th
17 at p. 733.) "Once that party establishes facts necessary to support a prima facie claim of
18 privilege, the communication is presumed to have been made in confidence and the opponent of
19 the privilege has the burden of proof to establish the communication was not confidential or that
20 the privilege does not for other reasons apply." (*Ibid.*)

21 "An attorney-client relationship exists when the parties satisfy the definitions of 'lawyer'
22 and 'client' as specified in Evidence Code sections 950 and 951, respectively. (*City of Petaluma*
23 *v. Superior Court* (2016) 248 Cal. App. 4th 1023, 1032, review denied (Sept. 14, 2016).) For
24 purposes of the attorney-client privilege, "client" is defined in relevant part as "a person who,
25 directly or through an authorized representative, consults a lawyer for the purpose of retaining the
26 lawyer or securing legal *service or advice* from him in his professional capacity. . . ." (Evid.
27 Code, § 951, italics added.) A "confidential communication" means "information transmitted
28 between a client and his or her lawyer in the course of that relationship and in confidence" by

1 confidential means. (Evid. Code, § 952.) A confidential communication may include “a legal
2 opinion formed and the advice given by the lawyer in the course of that relationship.” (*Ibid.*)

3 “In assessing whether a communication is privileged, the initial focus of the inquiry is on
4 the ‘dominant purpose of the relationship’ between attorney and client and not on the purpose
5 served by the individual communication.” (*City of Petaluma, supra*, 248 Cal.App.4th at p. 1032,
6 quoting *Costco, supra*, 47 Cal.4th at pp. 739–740.) “If a court determines that communications
7 were made during the course of an attorney-client relationship, the communications, including
8 any reports of factual material, would be privileged, even though the factual material might be
9 discoverable by other means.” (*Id.* at p. 1032, quoting *Costco*, 47 Cal.4th at p. 740.)

10 Related, “[t]he attorney work product doctrine is codified in section 2018.010 et seq. of the
11 Code of Civil Procedure.” (*City of Petaluma, supra*, 248 Cal.App.4th at p. 1033.) The meaning
12 of “client” for purposes of the work product doctrine is the same as that used for the attorney-
13 client privilege. (Code Civ. Proc., § 2018.010.) “The attorney work product doctrine serves the
14 policy goals of ‘preserv[ing] the rights of attorneys to . . . investigate not only the favorable but
15 [also] the unfavorable aspects’ of cases and to ‘[p]revent attorneys from taking undue advantage
16 of their adversary’s industry and efforts.’” (*City of Petaluma*, 248 Cal.App.4th at p. 1033,
17 quoting Code Civ. Proc., § 2018.020, subs. (a) & (b).)

18 ““The work product rule in California creates for the attorney a qualified privilege against
19 discovery of general work product and an absolute privilege against disclosure of writings
20 containing the attorney’s impressions, conclusions, opinions or legal theories.”” (*Wellpoint*
21 *Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 120; Code Civ. Proc.,
22 § 2018.030.) “An attorney’s work product that is subject to a qualified privilege is not
23 discoverable unless a court determines that denial of discovery would unfairly prejudice the party
24 seeking discovery or result in an injustice.” (*City of Petaluma, supra*, 248 Cal.App.4th at p. 1033,
25 citing Code Civ. Proc., § 2018.030, subd. (b).) Finally, while the attorney-client privilege applies
26 only to communications (Evid. Code, § 954), the “work product protection applies irrespective of
27 whether any material claimed to be privileged is communicated to the client.” (*City of Petaluma*,
28 248 Cal.App.4th at p. 1033.)

1 Here, the “Transition Report,” with the subtitle “Department Descriptions, Issues and
2 Challenges,” is approximately 101 pages in length. (Lindley Decl. ¶ 3.) But only three pages of
3 the report, those that address the Bureau of Firearms, are relevant to this discovery dispute. (*Id.*
4 ¶ 4; see In Camera Documents, Bates Nos. AGIC126-128.) Moreover, the staff involved in the
5 preparation of the portion of the report covering the Bureau included Chief Stephen Lindley;
6 Deputy Attorney General Kimberly Granger, who served as staff counsel for the Bureau at the
7 relevant time; the Assistant Chiefs of the Bureau; and relevant supporting staff. (*Id.* ¶ 6.) The
8 purpose of the Transition Report was to provide confidential and candid information, advice, and
9 counsel to the incoming Attorney General, who had been elected to her position earlier in 2010,
10 regarding DOJ, especially a description of DOJ’s numerous bureaus, offices, sections, programs,
11 and units, and the issues and challenges facing each those segments of DOJ. (*Id.* ¶ 7.) The
12 portion of the report concerning the Bureau in fact describes the Bureau and such issues and
13 challenges. (*Ibid.*) That portion of the report specifically references legal challenges (i.e.,
14 litigation) and law enforcement operations, among other matters. (*Ibid.*)

15 The portion of the report concerning the Bureau also contains information derived from
16 attorney-client communications and attorney work-product materials. (Lindley Decl. ¶ 8.) It
17 reflects the Bureau’s deliberative processes concerning numerous aspects of the Bureau’s work,
18 including but not limited to the operation of its programs, litigation, and law enforcement
19 activities. (*Ibid.*) The Report contains sensitive information about internal Bureau processes and
20 operations. (*Ibid.*) Disclosure of this information may jeopardize the Bureau’s operations
21 because it would chill the free exchange of information needed to adequately prepare an incoming
22 Attorney General for his or her responsibilities concerning the Bureau of Firearms. (*Ibid.*)

23 For these reasons, the Transition Report listed as item 24 on defendants’ privilege is
24 protected from disclosure under the attorney-client privilege and work product doctrines.
25 Plaintiffs’ motions to compel should be denied accordingly.
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1 **III. THE COURT SHOULD DENY THE MOTION TO COMPEL A FURTHER RESPONSE TO**
2 **REQUEST FOR PRODUCTION NO. 63.**

3 To the extent plaintiffs' motions to compel seek an order compelling the production of the
4 "baseline budget" documents referred to in Request for Production No. 63, the motions should be
5 denied. As explained in the relevant declaration filed with this opposition, plaintiffs' document
6 request seeks "[e]ach and every baseline budget submitted by the CAL DOJ to the California
7 Department of Finance since January 1, 2003." (Harper Decl. ¶ 14.) However, no such
8 document exists for the relevant fiscal years. To explain, DOJ does not submit any stand-alone
9 document called a "baseline budget" to the Department of Finance. Rather, as defendants
10 understand the term, a "baseline budget" for a given fiscal year is DOJ's portion of the state
11 budget passed by the Legislature and signed by the Governor. (*Ibid.*) And the annual state
12 budget is a public document, and enacted budgets for fiscal years 2007-2008 through 2016-2017
13 are available online at <http://www.ebudget.ca.gov>. (*Ibid.*)

14 **IV. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO COMPEL FURTHER ANSWERS**
15 **TO SPECIAL INTERROGATORY NOS. 25, 29, AND 30.**

16 Special Interrogatory No. 25 asked defendants to "state the basis" for their answer to a
17 preceding interrogatory, Special Interrogatory No. 24. Neither of those interrogatories is cogently
18 worded. Yet in their answer to Special Interrogatory No. 24, defendants stated that the total
19 amount of DROS Fund expenditures for fiscal year 2013-2014 was \$29,144,382. And in their
20 answer to Special Interrogatory No. 25, defendants have *stated the basis* for the calculation of that
21 figure. More specifically, defendants stated that the details of the calculation were laid out in a
22 table and multiple pages of supporting expenditure reports that had already been produced. In
23 short, defendants' answer to Special Interrogatory No. 25 speaks for itself. And it is a sufficient
24 answer to the question asked by plaintiffs.

25 With respect to Special Interrogatory No. 29, plaintiffs have asked defendants to explain
26 what made a particular law enforcement operation an "APPS case" and have gone so far as to
27 request that defendants explain "how data from the Armed Prohibited Persons System was used
28 in the case." Special Interrogatory No. 30 is in the same vein, asking defendants to explain what

1 made a separate law enforcement operation “an ‘APPS case[,]’ including, but not limited to, how
2 data from the Armed Prohibited Persons System was used in the case.” These interrogatories are
3 clearly objectionable and no further responses should be ordered. Plaintiffs are individual firearm
4 owners and a firearms rights advocacy group. Under the deliberative process and official
5 information privileges, discussed above, their asserted need to understand the confidential,
6 intricate details of Bureau of Firearms law enforcement operations totally unrelated to this case is
7 grossly outweighed by the Bureau’s need to maintain the safety, security, integrity, and efficacy
8 of those and similar operations. The public’s interest in ensuring law enforcement officer safety,
9 the safety of the public, and the security of law enforcement databases further tips the scales in
10 favor of nondisclosure. Nearly every day DOJ Special Agents risk their lives enforcing state law.
11 (Lindley Decl. ¶ 10.) The focus of the APPS program in particular is to disarm convicted
12 criminals, mentally ill persons, and other dangerous individuals. (*Ibid.*) The public’s safety, the
13 safety of the Agents involved, and the safety of the person(s) being disarmed is dependent, in
14 part, on the procedures DOJ employs to carry out its mission. (*Ibid.*) Public disclosure of those
15 procedures could jeopardize this dangerous undertaking. (*Ibid.*) A person seeking or anticipating
16 a confrontation with law enforcement, who knows in advance what the relevant procedures are,
17 obviously has a distinct advantage – one that is not in the public’s interest to concede. (*Ibid.*)
18 This Court should deny the motion to compel further answers to Special Interrogatory Nos. 29
19 and 30. (See *People v. Jackson* (2003) 110 Cal.App.4th 280, 290 [denying discovery of police
20 investigation information even though investigation was no longer ongoing]; *Orange v. Superior*
21 *Court* (2000) 79 Cal.App.4th 759, 767 [trial court erred in granting discovery request for criminal
22 investigation file protected by official information privilege]; *People v. Wilkins* (1955) 135
23 Cal.App.2d 371, 377 [denying production of police department records of arrest of individuals,
24 for use in cross-examination]; *Runyon v. Board of Prison Terms & Paroles* (1938) 26 Cal.App.2d
25 183, 184-185 [denying inspection of letters and other documents sent by individuals to state
26 parole board dealing with applications for parole] *People v. King* (1932) 122 Cal.App. 50, 56
27 [denying request for criminal investigation information used to track stolen cars].
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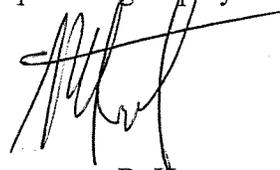
CONCLUSION

For the reasons set forth above, the Court should deny plaintiffs' motions to compel in their entirety.

Dated: October 17, 2016

Respectfully Submitted,

KAMALA D. HARRIS
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SA2013113332

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Gentry, David, et al. v. Kamala Harris, et al.**
No.: **34-2013-80001667**

I declare:

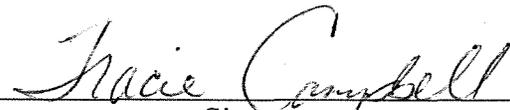
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 17, 2016, I served the attached **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Scott Franklin
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Long Beach, CA 90802
SFranklin@michellawyers.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 17, 2016, at Sacramento, California.

Tracie L. Campbell
Declarant



Signature