C. D. Michel – S.B.N. 144258
Scott M. Franklin – S.B.N. 240254
Sean A. Brady – S.B.N. 262007
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445
Email: cmichel@michellawyers.com

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MIDLAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION, Plaintiffs and Petitioners, vs. KAMALA HARRIS, in Her Official Capacity as Attorney General for the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, BETTY YEE, in Her Official Capacity as State Controller for the State of California, and DOES 1-10. Defendants and Respondents.	CASE NO. 34-2013-80001667 **REPLY IN RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL** Date: 10/28/16 Time: 9:00 a.m. Dept.: 31 Action filed: 10/16/2013

INTRODUCTION

Defendants claim the Dealers' Record of Sale ("DROS") fee charged by the California Department of Justice ("Department") is set at a proper amount, but they will not confirm what costs were, or were not, considered in reaching that conclusion. Defendants claim various law enforcement activities performed by the Department's Bureau of Firearms are based on information from the Armed and Prohibited Person System ("APPS"), but when presented with the Department's own public statements that contradict the supposed link to APPS, the Department now claims that taking a position on the issue it previously publicized would create a safety risk.

To use a mixed metaphor, Plaintiffs' attempts to obtain forthright discovery responses on keystone issues over the last three years have been akin to something between pulling teeth and pulling hens' teeth. As shown in the underlying motion and this Reply, Defendants' objections cannot survive scrutiny and should be overruled. Accordingly, Defendants should be ordered to produce the documents and information sought by Plaintiffs.

ARGUMENT

I. The Documents Listed on the Privilege Log Should Be Ordered Produced, Especially Because Plaintiffs Do Not Object to the Redaction of Irrelevant Material

Defendants have lodged the documents identified in the relevant privilege log with the Court, purportedly to show "the documents at issue concern broader D[epartment] and Bureau of Firearms' budget issues more than they concern any discreet issue related to the 'setting' or 'amount' of the DROS fee[,]" two issues that this Court has identified as relevant discovery issues in this case. (Opp'n at 4.) Plaintiffs, however, have no objection to the disclosure of the withheld documents, redacted such that they only disclose information that is relevant to this action. Thus, the presence of purportedly irrelevant material in the documents at issue does not weigh against disclosure because such information can easily be redacted, which moots Defendants' argument on this point.

A. Privilege Log Item Nos. 15-19 and 21-24 Should Be Produced Because the Privileges Claimed Are Neither Supported by Admissible Evidence Nor Substantively Meritorious

First, it is worthwhile to reiterate that the deliberative process and executive privileges are really just species of the official information privilege, meaning that all claims under these privileges are evaluated under the same standard: "A public entity has a privilege to refuse to disclose official information [if d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evid. Code, § 1040; see *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125.)

Second, Defendants' privilege claims are purportedly supported by two declarations, but those declarations are, in large part, inadmissible. As more fully explained in Plaintiffs' objection to the declarations of David Harper and Stephen Lindley, those declarations are not proper evidence to the extent they are neither based on personal knowledge nor offer non-speculative factual assertions. (See *Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1427 [citing Evidence Code section 702, subdivision (a), and holding that a declaration was inadmissible because it was not based on personal knowledge]; *People v. Thorton* (2007) 41 Cal.4th 391, 429 [quoting Evidence code section 800, subdivision (b), and affirming trial court's determination that speculative testimony was inadmissible because it would not be "[h]elpful to a clear understanding of [the witness'] testimony.")

For example, David Harper admits that, as to privilege log item nos. 15 and 16, not only are the author(s) and recipient(s) of each document unknown, but that he is basing his opinion of what the documents are solely on the contents of the documents. (Harper Decl. at ¶¶ 2-6.) Further, Harper claims that he is "informed and believes" that all of the documents at issue were "created in confidence by government employees[,]"but this is speculation based on nothing more than the fact that the documents, like presumably all documents used internally by the Department, were located in a secure location (*Id.* at ¶ 6.). Similarly, Harper fails to explain why each of the documents at issue were created, stating only the *non-exclusive* assertion that documents are created by government employees "for a variety of reasons, including . . . ." (*Ibid.*) These

statements do not help the Court in analyzing Defendants' privilege claims, and thus they are inadmissible under Evidence Code section 800, subdivision (b). This Court does not need inadmissible lay opinion to assist it in interpreting whether or not documents listed on the privilege log should be produced, especially in light of the fact that those documents have been provided for in camera review. Because Defendants have the burden of proof on their privilege claims (*Marylander*, *supra*, 81 Cal.App.4th at p. 12), and they have failed to produce sufficient proof to support their privilege claims, Defendants' objections should be overruled.

Third, even assuming Defendants had produced competent evidence that "items 15 and 16 on the privilege log reflect internal departmental deliberations and recommendations regarding the content of an intended Finance Letter" (Opp'n at pp. 3-4),[1] Defendants' privilege claims still fail for two separate reasons. One reason is that Defendants have not shown that the documents sought reflect the mental process of a *senior official*—and as Defendants admit, the privilege only applies regarding deliberations by senior officials of the three branches of government.[2]

The other reason is that they cannot meet their burden under the applicable balancing test; "[o]nly 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, italics added.) As this Court previously held when it ordered other budgetary documents produced, "[t]he public clearly has an interest in disclosure of documents which identify the budgetary analyses performed by Respondents to support the amount of the DROS fee." (Order filed June 1, 2015, at 4.)

Though it might not be apparent, budgetary decisions related to the amount of money

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[1] Similar assertions are made regarding privilege log items 18, 19, and 21-24. (Opp'n at 4).

[2] (See Opp'n at 2 [quoting *San Joaquin Local Agency Formation Common v. Superior Court* (2008) 162 Cal.App.4th 159, 170].) Harper states that privilege log item nos. 15 and 16 seem to be "written in support of the executive decisions making process regarding the DOJ Budget." (Harper Decl. at ¶ 2.) This appears to be an attempt to link staff-level work with executive-level decision making and impermissibly broaden the scope of the relevant privilege, inasmuch as Plaintiffs contend these documents were likely written by Department Staff not for senior level review, but for their superior, the Department's Director of Administration. (*Ibid.*)

going into, and coming out of, the DROS Special Account are relevant to the way in which the Department purportedly calculates the DROS fee. As Defendants have already admitted, it is their position that the DROS fee can be set based on the amount of money *purportedly* spent on "the Department's actual year-end expenditures on the Dealers Record of Sale program" divided by an estimate of the number of DROS transactions processed by the Department during a given year. (See Franklin Decl. ISO Reply, ¶ 2, Ex. 1.) "Purportedly" is used above because one of the critical issues in this case is whether the Department is using DROS Special Account money for field operations limited to activities that are truly related to the APPS program (which was the intent behind Senate Bill 819),[3] or, if discussed *infra* in Section II.B., the Department is using money designated for APPS-based law enforcement activities for investigations that do not arise from APPS. If the Department is burying general law enforcement costs—and especially costs unrelated to APPS enforcement or processing DROS applications— in what it calls "the Department's actual year-end expenditures on the Dealers' Record of Sale program[,]" then it is improperly inflating the numerator in the equation purportedly being used to set the DROS fee. The improper calculation of the DROS fee is one of the primary controversies pleaded in this case. (First Am. Compl. at ¶¶ 89-100.)

Further, the documents at issue are, as Defendants claim, "potentially responsive" Request for Production ("RFP") No. 53, which seeks the production of documents that refer to how the (multi-million dollar) DROS Special Account surplus might be reduced. (See Sep. Statement Mot. Compl. Further Resp. to RFP at 2). This topic is also related to whether the Department is properly calculating the DROS fee, inasmuch a massive surplus appeared in the DROS Special Account circa 2007-2008, when these documents were apparently created. Logically, if the Department had been sufficiently monitoring costs and expenses and adjusting the DROS fee accordingly, the surplus would have never occurred.

Defendants' deliberative process argument is basically the same as what the Court rejected

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[3] Section 1, subdivision (g), of Senate Bill 819 (Leno, 2011), states that "it is the intent of the Legislature in enacting this measure to allow the [Department] to utilize the Dealer Record of Sale Account for the additional, limited purpose of funding enforcement of the Armed Prohibited Persons System."

in its Order filed June 1, 2015. (Compare Order filed June 1, 2015, at 3 [reciting Defendants claim that disclosure would "chill" "full and candid assessment(,)" with the same statement found in the Opp'n at 4].) Therein, this Court recognized that the balance tipped in favor of disclosure notwithstanding Defendants' assertion that "disclosure of ['budget reports, draft letters, concerning budgetary issues, and budget analysts' analyses] would chill the full and candid assessment of departmental budget issues." (Order filed June 1, 2015, at 3). Further, this Court recognized "that the relevant budgetary analysis appears to be designed for public scrutiny in light of the statutory limitations imposed." (*Ibid.*) The issues here are effectively the same as those ruled on in the aforementioned order. Therefore, this Court should order the production of privilege log item nos. 15-19 and 21-24, because Plaintiffs' deliberative process/official information privilege claims are insufficient.

B. Defendants Have Not Sufficiently Alleged Attorney Involvement, Nor Any Other Plausible Basis, Upon Which the Relevant Pages of Privilege Log Item No. 14 Can Be Withheld

Defendants claim that an attorney was "involved" with preparation of the three pages at issue, and thus such pages are privileged under the attorney-lawyer privilege and the attorney work product doctrine. Plaintiffs are aware of no authority that a bare claim of attorney "involvement[,]" with nothing more, brings a document under the umbrella of protected work product or lawyer-client protection. If the attorney at issue was only "involved" in the preparation of these pages because they were provided to her, that level of "involvement" does not create any protection against disclosure that did not already exist. (See *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 397; *San Francisco Unified School Dist. v. Super. Ct.* (1961) 55 Cal.2d 451, 456.) Further, the document at issue, as described, does not seem to be a communication between an attorney and a client in the course of representation that is protected by the lawyer-client privilege (see Evid. Code, § 954); it seems to be a factual status memorandum. Presumably, the Court's in camera review of the three pages at issue will clarify whether there is any indicia of attorney involvement such that withholding these pages is proper.

Finally, given the timing of this document's creation, which occurred while the DROS Special Account surplus was extant and while the Department was moving forward on

rulemaking to reduce the DROS fee (Cal. Reg. Notice Register 2010, No. 30-Z, pp. 1110-1111), any balancing to be done clearly weighs in favor of disclosure, as the public has the right to know if the Department did calculations that showed the DROS fee was set to high, thus presaging the (later abandoned) rulemaking aimed at reducing the DROS fee. For the foregoing reasons, this item should be produced.

C. It Is Unclear if Baseline Budgets Exist, But If they Do, Defendants Cannot Avoid Producing Them

Defendants state that the Department does not submit any stand-alone document called a "baseline budget" to the Department of Finance, and thus the documents requested do no exist. (Opp'n at 8.) There may be no dispute here, but Plaintiffs are still unclear as to whether baseline budgets created by or for the Department exist, regardless of whether they were actually expressly entitled "baseline budgets," which seems to be a distinction made by defendants in their Opposition. (*Ibid.*) Thus, if the Department submitted proposed budgets, e.g., baseline budgets, to the Department of Finance under any name, those documents are relevant and should be produced.

II. Defendants' Objections to Special Interrogatory Nos. 25, 29, and 30 Are Without Merit and Appear to Be Interposed Primarily to Avoid Admissions Material to this Action

A. Defendants Are Not Being Forthright With the Court In Claiming they Have Sufficiently Responded to Special Interrogatory No. 25

Special Interrogatory No. 25 was propounded specifically to limit Defendants' ability to provide an evasive response to Special Interrogatory No. 24, which asked Defendants to "[s]tate the total amount of expenditures attributed to tasks referred to in Penal Code section 28225 for the fiscal year 2013-2014." (Sep. Statement Mot. Compl. Further Resp. to SI at 2.) Thus, when, after two rounds of meeting and conferring, Defendants claimed for the first time that they were unable to respond to Special Interrogatory No. 24, Plaintiffs were required to explain that assertion, per the inquiry made via Special Interrogatory No. 25. (*Id.* at pp. 2-4.) Instead, however, Defendants' response to Special Interrogatory No. 25 bobs and weaves around the question actually asked. Defendants state that they cannot make the required calculation because they do not know how it

was done in the past. (*Id.* at 4). This is nonsense; the fact that the Department supposedly does not know how the total at issue had been calculated in previous years in no way prevents it from tallying up subtotals now.

The information being obfuscated is at the heart of this case. The DROS fee can only be set based on the amount reasonably necessary to cover costs identified in Penal Code section 28225. Defendants are trying to avoid a forthright response here by alluding to the total expenditures from the DROS Special Account, which is not the same tabulation as the total Section 28225 costs. The distinction is critical: if the Department is basing the DROS fee on total costs being paid for out of the DROS Special Account, as opposed to total of the costs that are actually authorized to be utilized in setting the DROS fee (i.e., the costs listed in Section 28225), then, once again, the Department appears to be improperly inflating the numerator in the equation it is using to determine the "necessary" DROS fee.

Therefore, when Defendants claim they "have stated the basis for the calculation of" "the total amount of DROS Fund Expenditures for fiscal year 2013-2014[,]" they are dragging a red herring across the trail by answering a question Plaintiffs *did not ask*. (Opp. at p. 8). And Defendants seek to confuse the issue further by stating Special Interrogatories Nos. 24 and 25 are not "cogently worded." (*Ibid.*) Assuming arguendo that was true, Defendants' counsel has participated in the meet-and-confer process and therefore had a sufficient opportunity to resolve any lack of cogency. (Franklin Decl. ISO Reply at ¶ 3.) Plaintiffs' attorney also participated in that process, and he has no doubt that, when the parties finally determined the process had reached its end, there was no misunderstanding as to what information was sought via the two interrogatories under discussion. (*Ibid.*).

B. Defendants Mischaracterize the Information Sought via Special Interrogatory Nos. 29 and 30 to Bolster Their Claim that the Release of Such Information Would Create a Safety Risk

The only reasonable definition of an "APPS case" is a case that the Department pursued because an individual was on the APPS list. What Plaintiff argued in the underlying motion, which is left unaddressed in Defendants' opposition thereto, is that if these two cases are really "APPS cases" then the horse is already out of the barn. That is, Defendants contend there is a

"necessity for preserving the confidentiality of the information[;] but the Department already disclosed the relevant facts by labeling the 'APPS cases' with that name[,]" meaning the relevant facts are not confidential so as to potentially justify Defendants' privilege claim. (Mot. Compl. SI, at 8-9.) Alternatively, if these cases are not really "APPS cases," then Defendants still have no grounds to object: the weight of the public interest surely must tip strongly against allowing governmental employees to mislead the Governor and the public.

The "APPS case" discussed in Special Interrogatory No. 29 show exactly how the Department is speaking out of both sides of the mouth. The Department provided the following synopsis of an "APPS case" to the public: "In June 2013, agents received an anonymous tip that an ex-felon was working as the manager and firearms instructor at his family's shooting range in Corona. The business is located on a 1,200-acre ranch and is well known to local shooting enthusiasts." (Franklin Decl. ISO Mot. Compl. Further SI Resp. ["Franklin Decl. ISO Mot."], at Ex. 3, 18). Furthermore, Department spokeswoman Michelle Gregory is quoted in local news accounts as saying the case "was pretty cut and dry [sic]" because the ex-felon was "clearly working . . . in and around all the firearms[.]" (Franklin Decl. ISO Reply at ¶ 4, Ex. 2). Even if the ex-felon was on the APPS list, the reason the Department gave for his arrest was that he was working around guns, not that he still possessed firearms identified on the APPS list. (*Id.*)

Given the unique and detailed information released to the public by the Department, there is no doubt that "local shooting enthusiasts[,]" and anyone with internet access, knew what range, and what person, the Department was referring to. (See http://raahauges.com/club-info/our-story/, last visited Oct. 20, 2016 [identifying a 1,200 acre family-operated shooting range in Corona]).

But what the Department identified as a "significant APPS case" is not an "APPS case" at all: (1) the case arose from an anonymous tip, not from a "hit" on the APPS list, and (2) the Department did not need to rely on the APPS list to obtain the search warrant which yielded 88 firearms and over 10,000 rounds of ammunition; the search warrant was obtained based on an agent seeing the ex-felon in possession of firearms at his family's shooting range. (Franklin Decl. ISO Mot. at Ex. 3. 18.) Nothing about the forgoing sounds like an APPS case, other than that the Department, instead of local law enforcement, performed the investigation. Accordingly, the

public interest is strongly in favor of the relevant disclosure because it will help determine if the Department is improperly using funds the legislature set aside for APPS on cases that are not actually "APPS cases."

Defendants attempt to sidestep this issue by mischaracterizing the relevant interrogatories, and the banal information sought thereby, as a plot to obtain "intricate details of Bureau of Firearms law enforcement operations totally unrelated to this case[.]" (Opp. at p. 9.) This hyperbole is unfounded. Whether or not a case is an "APPS case" is not an "intricate detail . . . of . . . law enforcement operations[,]" it is little more than an accounting designation. The Department's position here especially unjustified inasmuch as the Department is already required under Penal Code section 30015 to publicly report on "[t]he number of people cleared from APPS[, t]he number of firearms recovered due to the enforcement of APPS[, and t]he number of contacts made during APPS enforcement efforts. (Pen. Code, § 30015, subds. (3), (6), and (7).) At most, Special Interrogatory Nos. 29 and 30 seek the same information being publically reported, just on a more granular level.

Defendants vaguely contend that Plaintiffs seek disclosure of "procedures" that could be used by a "person seeking or anticipating a confrontation with law enforcement" so as to create a risk to Department Agents, the public, and those who are to be disarmed pursuant to the APPS program. (Opp'n at 9.) Safety concerns are indisputably of the highest importance, but Defendants' have not provided any link between the information sought and a secret "procedure" used in the course of an APPS investigation.

The Department claims that if it is forced to identify whether two closed[4] cases it chose to discuss publically are "APPS cases[,]" then "a person seeking or anticipating a confrontation with law enforcement, who knows in advance what the relevant procedures are, obviously has a distinct advantage." (Opp'n at 9.) But because the information sought would not disclose a "relevant procedure" in any way, there is no "distinct advantage"—obvious or otherwise—that

[4] Per the Department, "[a] case is considered resolved (closed) when the APPS gun(s) is seized, the APPS subject is arrested, and/or all investigative leads have been exhausted." (Franklin Decl. at ¶ 3, Ex. 2.)

would flow from Defendants being forced to explain their seeming contradictory statements concerning the "APPS cases."

In any event, Defendants' claim is spurious because "a person seeking or anticipating a confrontation with law enforcement [e.g., a prohibited person in possession of a firearm]" already has access to multiple public sources on the internet and otherwise confirming that APPS enforcement is a possibility against a person in this situation, including the statutorily required APPS reports the Department is required to publish. (Pen. Code, § 30015.) Because distinguishing "APPS cases" from other cases tells potential APPS targets nothing beyond what already publically known about APPS-based law enforcement, the Court should recognize Defendants' have not shown that production of the information sought would create any safety risk, and that such argument is insufficient to tip the scale towards nondisclosure.

To be sure, if information on a specific procedure used by Department Agents is somehow within the scope of the relevant interrogatories and disclosure would pose a risk to anyone's safety, Plaintiff expressly disclaims any interest in pursuing such information. But based on all of the available information and the Department's failure to provide a plausible link between the information sought and claimed safety risk, there is no perceivable weight in Defendants' position. Accordingly, the public's substantial interest in determining whether the Department is mischaracterizing non-APPS cases as APPS cases—which would indicate the Department is using limited-purpose funds for an unauthorized purpose and keeping the the DROS fee unjustifiably inflated—weighs decisively in favor of this Court ordering further responses to Special Interrogatory Nos. 29 and 30.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motions to compel in full.

Dated: October 21, 2016

MICHEL & ASSOCIATES, P.C.

Scott M. Franklin, Attorney for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On October 21, 2016, the foregoing document(s) described as

REPLY IN RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Anthony Hakl, Deputy Attorney General
Kamala D. Harris, Attorney General of California
Office of the Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814

___ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on October ____, 2016, at Long Beach, California.

_X_ (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on October 21, 2016, at Long Beach, California.

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

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

LAURA PALMERIN