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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SACRAMENTO

10 DAVID GENTRY, ET AL.,)	CASE NO. 34-2013-80001667
)	
11 Plaintiffs and Petitioners,)	BRIEF IN SUPPORT OF REQUEST FOR
)	PRODUCTION OF WITHHELD
12 vs.)	DOCUMENTS VIA EXPEDITED DISPUTE
)	RESOLUTION PROCEDURE;
13 KAMALA HARRIS, ET AL.,)	[PROPOSED] ORDER
)	
14 Defendants and Respondents.)	Dept.: 31
<hr/>		Action filed: 10/16/2013

15
16 **I. INTRODUCTION**

17 The parties stipulated to an expedited review of the current dispute in lieu of normal
18 motion practice to avoid unnecessary briefing and appearances, intending to save scarce resources
19 for both the parties and the Court. The dispute boils down to whether a few documents being
20 withheld under privilege claims—mainly official information privilege objections—are subject to
21 disclosure. Based on the argument herein, Plaintiffs/Petitioners David Gentry, James Parker,
22 Mark Midlam, James Bass, and Calguns Shooting Sports Association’s (“Plaintiffs”) request for
23 production of documents should be granted, and Defendants/Respondents Kamala Harris and
24 Stephen Lindley (“Defendants”) should be ordered to produce the withheld documents.

25 **II. STATEMENT OF FACTS**

26 **A. The History of the Current Dispute**

27 Plaintiffs served a first set of Requests for Production of Documents (“RFP”) on
28 Defendants on May 14, 2014. (Declaration of Scott M. Franklin in Support of Request for

1 Production of Withheld Documents via Expedited Dispute Resolution Procedure [“Franklin
2 Decl.”] ¶ 2.) Over the course of several months, the parties met and conferred in good faith
3 exchanging several written communications and having at least two detailed telephonic
4 conferences. (*Id.* ¶ 3 at Exs. 1 and 2.) During that time, Defendants produced some responsive
5 documents, in several batches. (*Id.* ¶ 3.)

6 On October 17, 2014, during the meet-and-confer process, Plaintiffs requested that
7 Defendants produce a “privilege log.” (*Id.*) This request was made because Defendants’ RFP
8 responses all included objections and a statement that whatever response given was made
9 “without waiving these objection[.]” (*Id.* ¶ 3 at Exs. 1; ¶ 4.) That is, Defendants’ responses were
10 unclear as to whether or not any documents were being withheld pursuant to the objections raised.
11 (*Id.* ¶ 4.) Defendants produced a privilege log on December 22, 2014. (*Id.* ¶ 5 at Ex. 3.) After the
12 production of the privilege log, Plaintiffs agreed that they would not challenge the withholding of
13 certain documents identified on the privilege log (item nos. 5, 6, and 11). (*Id.* ¶ 6.) As to the other
14 withheld documents, however, the parties agreed they were at an impasse as of February 6, 2015,
15 which led to the suggestion by Plaintiffs’ counsel that the parties submit the matter to the Court in
16 an expedited manner for limited briefing and in camera review. (*Id.* ¶ 7.) A stipulation followed
17 (*id.*), and now the matter is before the Court for in camera review.

18 **B. Summary of the Relevant Portion of Plaintiffs’ Case**

19 The California Department of Justice (the “Department”) collects information on a
20 Dealer’s Record of Sale (“DROS”) Form, and uses the information as part of the background
21 check process that is performed for most firearm purchases. (Compl. ¶ 1.) A fee is collected by
22 the Department regarding each DROS Form that is submitted by a potential firearm purchaser (the
23 “DROS Fee”). (*Id.*) Funds obtained via the DROS Fee, along with certain other money collected
24 by the Department (see, e.g., entertainment firearm permit fees, Penal Code section 29510(a)(1)),
25 are placed into the DROS Special Account, a segregated account in California’s General Fund.
26 (*Id.*) Penal Code section 28235 lists the authorized uses for DROS Special Account funds.

27 The Department is not required to charge the DROS Fee (*id.* ¶ 39), but it is allowed to
28 charge the DROS Fee in an amount that is based on a determination of what it would take to

1 reimburse certain statutorily listed costs. (*Id.* ¶¶ 38-40; *see* Penal Code §§ 28225(a-b), 28230(a).)

2 It appears the Department has never analyzed the specific costs listed in the relevant
3 statute (Penal Code section 28225(b), and that the DROS Fee appears to be excessive and in
4 violation of its statutory basis. It seems the Department actually agreed with that conclusion as of
5 2010, when it commenced rulemaking with an intent to “lower the current \$19 DROS fee to \$14,
6 commensurate with the actual cost of Processing a DROS” Form. (Franklin Decl. ¶ 8 at Ex. 4).
7 Even though the 2010 rulemaking appeared complete, however, something happened in late 2010
8 or thereafter that lead the Department to reverse course and quietly abandon the rulemaking.
9 Thus, Plaintiffs seek to investigate the propriety of the amount of the DROS Fee, which, as of
10 2011, created a surplus such that the Governor was able to borrow \$11,500,000 from the DROS
11 Special Account without affecting the Departments’ operations. (Franklin Decl. ¶ at Ex. 5.)

12 III. ARGUMENT

13 A. **A Prima Facie Claim for the Production of Withheld Documents Is Alleged**

14 If a party deems an objection to a demand for inspection to be without merit, that party can
15 obtain judicial relief upon a timely motion showing: (1) good cause and (2) a sufficient attempt at
16 informal resolution. Civ. Proc. Code § 2031.310. Further, Evidence Code section 915(b) and the
17 stipulation of the parties herein both allow for an in camera review in a situation such as this,
18 where a privilege claim has been made under Evidence Code section 1040. Here, because: (1)
19 documents at issue have already been identified as necessary to Plaintiffs case and clearly relevant
20 (or else they would not have been included in a privilege log); (2) it appears Defendants, i.e., the
21 Department of Justice, are the only source for the information sought; and (3) the parties have
22 stipulated as to the sufficiency of the attempt to resolve this matter informally, Plaintiffs have
23 proven good cause and thus a prima facie case that production should occur per section 2031.310.

24 B. **Defendants’ Objections Are Without Merit**

25 1. **Government Code Section 1040 (Item Nos. 1-4, 7-10, and 12-14)**

26 a. **Legal Authority**

27 As is relevant hereto, Government Code section 1040(a-b) states that:

28 A public entity has a privilege to refuse to disclose official information [i.e.,

1 information acquired in confidence by a public employee in the course of his or her
2 duty and not open, or officially disclosed, to the public prior to the time the claim
3 of privilege is made]¹ if the privilege is claimed by a person authorized by the
4 public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a
5 statute of this state;² or

(2) Disclosure of the information is against the public interest because there is a
6 *necessity for preserving the confidentiality of the information that outweighs the*
7 *necessity for disclosure in the interest of justice*; but no privilege may be claimed
8 under this paragraph if any person authorized to do so has consented that the
9 information be disclosed in the proceeding. In determining whether disclosure of
10 the information is against the public interest, the interest of the public entity as a
11 party in the outcome of the proceeding may not be considered.

(Emphasis added). The California Supreme Court has held that in conducting the balancing test
12 required by Evidence Code § 1040(b)(2), the courts should consider:

13 [(1)] the importance of the material sought to the fair presentation of the litigant’s
14 case, [(2)] the availability of the material to the litigant by other means, and [(3)]
15 the effectiveness and relative difficulty of such other means. The consideration of
16 [(4)] the consequences of disclosure to the public will involve matters relative to
17 the effect of disclosure upon the integrity of public processes and procedures
18 In this respect the court[s] should be fully aware that—in the words of the
19 Assembly Committee on Judiciary—‘the public has an interest in seeing that
20 justice is done in the particular cause as well as an interest in the secrecy of the
21 information.’

Shepherd v. Super. Ct., 17 Cal. 107, 126 (1976) (overruled on other grounds by *People v.*
22 *Holloway*, 33 Cal. 4th 96, 131 (2004)).

23 b. ***The Balance Tips Strongly in Favor of Disclosure Here***

24 i. ***The Material Sought Is Key to the Fair Presentation of Plaintiffs’***
25 ***Case***

26 Plaintiffs believe the DROS Fee was either improperly set in 2004, or that the Department
27 acted improperly in abandoning its DROS Fee reduction rulemaking in 2010, or both. As part of
28 the meet-and-confer process, Plaintiffs sent Defendants a letter stating that:

Defendants’ responses include several privilege claims on issues related to
evidence of how the DROS Fee was set at \$19.00 and similar Department analysis
(see, e.g., Defendants’ responses to Request for Production Nos. 26 and 28,

¹ Presumably, Defendants will attempt to make a showing that the documents at
issue include “official information” as defined under Evidence Code section 1040(a), as
that is their burden. See *Marylander v. Super. Ct.*, 81 Cal. App. 4th 1119, 1126 (2000).

² Defendants are not making a subsection (b)(1) objection. (Franklin Decl. ¶ 10.)

1 Defendants' response to Form Interrogatory No. 15.1). Please be advised that, as to
2 any relevant information withheld pursuant to a privilege claim, Plaintiffs will seek
3 to exclude testimony on such subjects at trial.

4 (Franklin Decl. at Ex. 1.) In response, Defendants identified two supposed sources of evidence as
5 to how the DROS Fee was set at \$19.00: (1) a rulemaking file from 2004, and (2) documents
6 referred to in Defendants' privilege log. (*Id.* at Ex. 2). Defendants' response provides several
7 important pieces of information. First, it confirms that the withheld documents include responsive
8 documents on the issue of how the \$19.00 DROS Fee was set. Second, because the 2004 rule
9 making file does not include any reference to the costs that are required to be considered in setting
10 the DROS Fee (see Penal Code section 28225), that leaves the withheld documents as the *only*
11 identified source of evidence on the issue. (Franklin Decl. at Ex. 2.)³

12 If the withheld documents do provide specifics of how the department set or re-evaluated
13 the amount of the DROS Fee, the information at issue will be plainly relevant to this case—either
14 it will show the Department considered all of the relevant costs and properly set the DROS Fee at
15 \$19.00, or it will not. Defendants have a duty to set the relevant fee properly and they should not
16 be allowed to withhold evidence related to the gravamen of this Action. Plaintiffs will not have a
17 fair chance to present their argument if Defendants are able to keep secret the documents showing
18 how the relevant fee was really set, so this factor weighs strongly in support of disclosure.

19 ii. *The Material Sought Is Simply Not Available from other Sources*

20 Plaintiffs have no reason to think that the information sought, created internally at a state
21 agency, is currently available by any route other than this Action. Defendants have provided no
22 alternative route by which the relevant information might be obtained, proving that it is possessed
23 solely by the Department. Accordingly, this factor cuts strongly in favor of disclosure.

24 ³ Defendants claim the 2004 rulemaking file shows how the Department set the
25 DROS Fee at \$19.00. (*Id.* at Ex. 2.) The relevant rulemaking file, however, simply states
26 the *conclusion* that “the department is adopting fee increases only up to a level to cover
27 actual costs as specified in statute[,]” it does not actually provide the calculations to
28 support that conclusion. (*Id.* ¶ 11 at Ex. 6, p. 3). Unless and until the Department
specifies *where* the Penal Code section 28225 cost calculations appear in the 2004
rulemaking file (which is part of another discovery motion pending before the Court), it is
Plaintiffs' belief that the Department has yet to produce any document showing that the
\$19.00 DROS Fee was properly set based on the statutorily required cost considerations.

1 iii. *The Third Balancing Factor Does not Apply Here*

2 The material sought by Plaintiffs exists only in the Departments' files, so the difficulty of
3 obtaining that information elsewhere is a moot inquiry. Thus, the third factor is inapplicable here.

4 iv. *Secrecy Actually Decreases Integrity in This Instance*

5 The information sought is not strategy information or uninhibited thoughts recorded in the
6 heat of a brainstorming session, it is financial data that should have been publically disclosed both
7 when the \$19.00 DROS Fee was first announced, and when the 2010 rulemaking to reduce the fee
8 was announced. Put plainly, Plaintiffs want to check the "math" behind the \$19.00 fee at issue.

9 This alone is sufficient justification for the production sought. *See San Gabriel Tribune v.*
10 *Superior Court (City of West Covina)*, 143 Cal. App. 3d 762, 776 (1983) (holding that, under
11 section 1040, the public could obtain financial data underling a waste disposal fee rate increase
12 charged to city residents). Furthermore, if the public is not allowed to access the raw data used to
13 calculate fees they are charged, that not only violates the public's right "of access to information
14 concerning the conduct of the people's business" (Cal. Const. art. 1, § 3(b)(1)), it also impinges
15 upon the public's ability to "petition government for redress of grievances[.]" *Id.* § 3(a). Because
16 none of the factors weigh against disclosure and at three weigh heavily in favor of disclosure, the
17 Court should, pursuant to section 1040, order disclosure of the withheld documents.

18 **C. Deliberative Process (Item Nos. 1-4, 7-10, and 12-14)⁴**

19 *Marylander* is clear in re-affirming that, in litigation, Evidence Code section 1040
20 "*represents the exclusive means by which a public entity may assert a claim of governmental*
21 *privilege based on the necessity for secrecy.*" *Marylander*, 81 Cal. App. 4th at 1125 (italics in
22 original) (citations omitted). Regardless, even if a deliberative process objection exists here, the
23 standard of review for a deliberative process objection is basically the same as that which applies
24 to a section 1040 claim, except that the deliberative process standard may actually be harder for a
25 governmental defendant to meet. *Compare id.* at 1126-28 ("Only if the public interest in
26 nondisclosure *clearly* outweighs the public interest in disclosure does the deliberative process

27 ⁴ Defendants also argued an Executive Privilege, but based on discussions
28 between counsel, it appears "Executive Privilege" is just another way of referring to the
Deliberative Process Privilege. (Franklin Decl. ¶ 10).

1 privilege spring into existence.”) (citation omitted) (*italics added*), *with* Evidence Code
2 § 1040(b)(2) (“official information” can only be withheld if the “necessity for preserving the
3 confidentiality of the information that outweighs the necessity for disclosure in the interest of
4 justice”). Accordingly, the Court should ignore Defendants’ deliberative process objections
5 because they are duplicative of the meritless objections made under Evidence Code section 1040.

6 **D. Attorney-Client Privilege (Item No. 4)**

7 California Evidence Code section 954 states that a client may refuse to disclose (1)
8 confidential communications (2) between the client and the attorney. Here, however, privilege log
9 item no. 4 appears to be a draft written by someone who is not an attorney. (Franklin Decl. at Ex.
10 3). Without proof that the intended recipient was an attorney for the author of the document,
11 Defendants cannot state a viable attorney-client privilege claim. Thus, Defendants’ attorney-client
12 privilege objection regarding privilege log item no. 4 should be ignored.

13 **E. Attorney Work Product Doctrine (Item Nos. 4 and 13)**

14 California’s attorney work product doctrine, codified in Code of Civil Procedure section
15 2018.020, states the general policy protecting an attorney’s work product from being unfairly
16 exposed. The doctrine provides absolute protection for an attorney’s “brain work” (e.g., opinions,
17 conclusions, impressions), but for other attorney work product, such material can be obtained
18 upon a showing “that denial of discovery will unfairly prejudice the party seeking discovery in
19 preparing that party’s claim or defense or will result in an injustice.” Civ. Proc. Code § 2018.030.

20 As to item no. 4, the privilege log states that the document at issue was created by David
21 Harper, who does not appear to be an attorney. And Defendants state that the author of item no.
22 13 is unknown. Therefore, as these two documents were not created by attorneys, and Defendants
23 have not provided any suggestion that these documents were produced at the direction of an
24 attorney, there is no reasonable basis for the attorney work product objection made by Defendants.

25 Further, because Defendants have already effectively admitted that the documents are
26 relevant, and because there appears to be no other source for the information at issue, the
27 documents at issue, if produced, are going to provide the key evidence that appears likely to prove
28 or disprove Plaintiffs’ claim that the DROS Fee amount has yet to be properly set via the

1 statutorily required standard.

2 Finally, denial of discovery on this issue will be unfair and unduly prejudicial. Plaintiffs
3 contend that the publically available information related to the DROS Fee amount being set and
4 later kept at \$19.00 shows the Department of Justice is not properly monitoring the fee being
5 charged. The documents at issue are likely to show that either: (a) the information provided to the
6 public is accurate—which supports Plaintiffs’ claim that the DROS Fee amount was improperly
7 set or kept at \$19.00—or (b) the Department of Justice did perform the proper analysis in 2004
8 and 2010, which might be determinative as to at least a portion of Plaintiffs’ case. As there is no
9 other source for the information sought, it would be unfair for Defendants to withhold information
10 about how certain financial decisions were made in a lawsuit specifically challenging those
11 decisions. Therefore, the Court should order the production of privilege log item nos. 4 and 13.

12 **IV. CONCLUSION**

13 Plaintiffs seek relief in this instance for two reasons: (1) if the withheld documents show
14 that the Department did *not* make the statutorily required calculations, that would prove Plaintiffs
15 are correct as to the gravamen of their Action; and (2) if Defendants intend to argue that the
16 withheld documents *do* show that the Department acted properly, Plaintiffs do not want to be
17 unfairly surprised with that argument when this case reaches the merits stage. That is, Defendants
18 should not be able to claim privilege now and then attempt to rely on withheld documents later.
19 Thus, the relief requested should be granted based on the arguments raised herein.

20 Dated: May 4, 2015

MICHEL & ASSOCIATES, P.C.

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24 Scott M. Franklin, Attorneys for Plaintiffs
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ORDER

Based on the stipulation of the parties dated April 16, 2015, and the Court’s review of the briefs and documents submitted for in camera review by the parties pursuant to the aforementioned stipulation, and good cause appearing, the Court **GRANTS** Plaintiffs/Petitioners David Gentry, James Parker, Mark Midlam, James Bass, and Calguns Shooting Sports Association’s (collectively “Plaintiffs”) Request for Production of Withheld Documents via Expedited Dispute Resolution Procedure.

Defendants are ORDERED to serve copies of privilege log items nos. 1, 2, 3, 4, 7, 8, 9, 10, 12, 13, and 14 on Plaintiffs’ counsel within ten days of this Order.

Date: _____

Hon. Michael P. Kenny Judge of the Superior Court

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura L. Quesada, 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 Blvd., Suite 200, Long Beach, California 90802.

On May 4, 2015, I served the foregoing document(s) described as:

BRIEF IN SUPPORT OF REQUEST FOR PRODUCTION OF WITHHELD DOCUMENTS VIA EXPEDITED DISPUTE RESOLUTION PROCEDURE; [PROPOSED] ORDER

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:

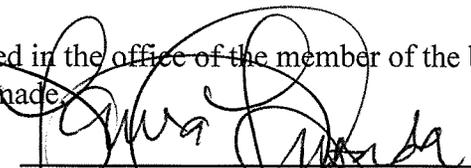
Anthony Hakl, Deputy Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814

X (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 May 4, 2015, at Long Beach, California.

X (VIA ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on May 4, 2015, 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 L. QUESADA