ONLINE SERVICES

Tentative Rulings

DEPARTMENT 86 LAW AND MOTION RULINGS

Case Number: 20STCP00664 **Hearing Date:** October 21, 2022 **Dept:** 86

CONSUMER WATCHDOG v. CALIFORNIA DEPARTMENT OF INSURANCE

Case Number: 20STCP00664

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[Tentative] ORDER DENYING PETITION FOR WRIT OF MANDATE

Petitioner, Consumer Watchdog, seeks a writ of mandate pursuant to Code of Civil Procedure section 1085 and the California Public Records Act (CPRA) (Government Code sections 6250, *et seq.*) compelling Respondents, Ricardo Lara, in his official capacity as the Insurance Commissioner of the State of California, and the California Department of Insurance (CDI) (jointly, Respondents), to produce documents under the CPRA.

Alternatively, Petitioner requests the court conduct an in-camera review of the 96 withheld records as well as six redactions made to public records.

Respondents oppose the petition.

The Petition is denied.

Petitioner's request for judicial notice (RJN) is granted as to Exhibits 1 and 15 only. Respondents' objections to the court taking judicial notice of the other exhibits are sustained. The court largely finds the material for which judicial notice is sought irrelevant to the specific issues in this CPRA proceeding.

The court sustains Respondents' objections to the Bambenek declaration as follows: 2 in part (as to "It would have been reasonable and taken little effort for Department IT staff to utilize Microsoft's Outlook eDiscovery Tool to search the email accounts of all 1,400 Department staff, as that process is fully automated"), 3, 4, 5, 6, 7, 8, 9 and 10. (The court notes objection 11 is not an objection to evidence.) The remaining objections are overruled. (The court finds the Bambenek declaration marginally relevant to these proceedings.)

The court sustains all Respondents' objections to the Bambenek reply declaration except 26 which is overruled. (The court also finds the Bambenek reply declaration marginally relevant to these proceedings.)

The court sustains Respondents' objections to the Powell declaration as follows: 12, 13, 14, 15, 16, 17, 18, 21, 24 and 25. The remaining objections are overruled.

The court rules on Petitioner's Evidentiary Objections to Respondents' Declarations and Opposition Brief as follows:

Objections 1 and 2 (set forth as Objection A) are overruled. The court finds other discovery responses provided by Respondent advised Petitioner each person responded. ("Each Department [listed] staff that received Ms. De Guzman's . . . emails to conduct a search . . . informed Ms. De Guzman that no responsive records were found . . . ." [Opening Brief, Ex. 28, 23:2-6.])

Objection 3 (set forth in Objection B) is overruled. Exhibits C, D and E do not specifically set forth job duties related to the CPRA. Exhibits C, D and E are distinct from the duty statements of the Legal Analyst, Senior Legal Analyst and the Attorney IV position which all reference job responsibilities related to the CPRA. (See Opening Brief, Ex. 45, Lor Decl., Ex. B.)

Objection 4 (set forth in Objection B) is sustained. Exhibit B of the Lor Declaration should have been produced as Exhibit B is responsive to request for production 12. The court strikes Exhibit B. The court does not strike paragraph 3 of the Lor Declaration (except as to its reference to Exhibit B) because Respondent advised Petitioner, "Attorneys within the GLB work with and assist the analysts to respond to record requests submitted to the Department. . . ." (Opening Brief, Ex. 28, p. 19:23-24.)

Objection 5 (set forth in Objection C) is sustained. A "wildcard" search is directly relevant to the issue of an adequate search. Respondent's discovery response omitting the "wildcard" searches is misleading: "The search terms used to conduct the searches were . . . ." (Opening Brief, Ex. 28, p. 21:28-22:5.) That Respondent conducted "wildcard" searches and the searches themselves should have been disclosed. The statement in the Lor declaration at paragraph 20, p. 7:25 ("includes Wildcard searches") is stricken.

Objection 6 (set forth in Objection C) is sustained. The information provided should have been provided and was not. The information is new.

Objections 7, 8, 9 (set forth in Objection C) are overruled. The court finds a fair and reasonable response to the discovery requests would not have elicited the information to which Petitioner objects. The court will strike "(beyond those already identified by Susan Bernard)" of the Lor declaration (at p. 11:11-12) in Objection 7 based on the ruling for Objection 6 above.

Objection 10 (set forth in Objection C) is sustained. The statement is unsupported by admissible evidence.

Objection 11 (set forth in Objection C) is overruled for the same reasons Objection 7 is overruled.

Objection 12 (set forth in Objection C) is sustained for the same reasons Objection 5 is sustained. The sentence in the opposition brief at p. 22:14—"Petitioner wrongly assumes that eDiscovery does not include Wildcard searches."—is stricken.

Objection 13 (set forth in Objection D) is overruled. Respondent's discovery responses set forth its position on the confidential nature of some of the respondent held by Respondent. (See Opening Brief, Ex. 28 pp. 8-11.) Striking the Bernard declaration in its entirety is unwarranted.

Objection 14 (set forth in Objection D) as to paragraphs 9 and 10 of the Bernard declaration is overruled. The information provided is consistent with Respondent's discovery responses and the confidential nature of some of the records held by Respondent. It is clear from Respondent's discovery responses it withheld documents from the production it believed were confidential. As to paragraph 12, the objection is sustained in part for those same reasons specified in Objection 6. The court strikes the Bernard declaration at paragraph 12, p. 5:7-17.

Objections 15 through 27 (as set forth in Objection D) are overruled. The information provided by Respondent in its privilege log and discovery responses provided sufficient detail to Petitioner to advise it of the basis for Respondent's exemption claim. While

Respondent's discovery responses could have been more detailed, there could be no question of the basis on which Respondent claimed responsive documents were exempt from the CPRA.

STATEMENT OF THE CASE

On June 4, 2019, Petitioner requested documents from Respondents pursuant to the CPRA. (Pet., ¶ 22.) On June 7, 2019, Respondents acknowledged receipt of the request and advised the request "as currently written, is overbroad and will be unduly burdensome on staff to search for responsive records." (Pet., ¶ 23.) Following meet and confer efforts, Petitioner narrowed the request. On September 4, 2019, Respondents provided a number of responsive records to the narrowed request, primarily consisting of email correspondence amongst various employees of Respondent and Lara's campaign staff. (Pet., ¶¶ 24-30.)

On July 19, 2019, Petitioner made another request for documents under the CPRA. Petitioner requested email and/or any other communications between Lara and the individuals identified in its June 4, 2019 request. (Pet., ¶ 33.) On September 16, 2019, Respondents produced some records in response to the July 19, 2019 request but also indicated they withheld numerous records pursuant to various claims of privilege and/or exceptions to the CPRA. (Pet., ¶ 34.)

This proceeding then ensued.

CPRA Requests at Issue:

Following meet-and-confer efforts between the parties, Petitioner and Respondents agreed on the following language as Petitioner's CPRA request:

1. "All appointment schedules, calendars, meeting logs, phone call logs, mobile phone records, and any other records relating to any meetings or phone calls ('Conferences') between Insurance Commissioner Lara or his representatives, including staff of the Department, and the following individuals: Steven M. Menzies, Jeffrey A. Silver, Stephen Acunto, Carole Acunto, Carl DeBarbrie, Theresa DeBarbrie, Sidney R. Ferenc, Jon M. McCright, Marc M. Tract, Robert L. Stafford, Justin N. Smith, Darlene Graber, and Larry R. Graber. This request also includes records of Conferences between Insurance Commissioner Lara and any individuals employed by or representing Applied Underwriters, California Insurance Company ('CIC'), Constitution Insurance Company, or Independence Holding Company ('IHC'). This request specifically relates to the following Department staff: the Executive Office staff, all Deputy Commissioners, and the

Government Law Bureau.3 Individuals in these positions shall be prioritized, however this request also includes any Department staff involved in any decisions or proceedings involving Applied Underwriters, CIC, or IHC, including but not limited to decisions or proceedings at the Administrative Hearing Bureau or pursuant to Insurance Code section 1215.2. This request includes, but is not limited to, records providing the identities of the individuals participating in the Conferences as well as records reflecting when and where the Conferences occurred and the topics of those Conferences. This request seeks records from January 7, 2019 to the present. Request 1 does not seek records subject to the attorney work product or attorney-client privileges properly invoked by the Department." ("Meetings CPRA Request.") (Pet., ¶ 29, Ex. 7.)

2. "All e-mail or any other communications ('Communications') between Insurance Commissioner Lara or his representatives, including staff of the Department, and the following individuals: Steven M. Menzies, Jeffrey A. Silver, Stephen Acunto, Carole Acunto, Carl DeBarbrie, Theresa DeBarbrie, Sidney R. Ferenc, Jon M. McCright, Marc M. Tract, Robert L. Stafford, Justin N. Smith, Darlene Graber, or Larry R. Graber. This request also includes Communications between Insurance Commissioner Lara or his representatives, including staff of the Department, and any individuals employed by or representing Applied Underwriters, California Insurance Company, Constitution Insurance Company, or Independence Holding Company. This request includes, but is not limited to, records providing the identities of the individuals participating in the Communications, the topics of those Communications, and the contents of those Communications. This request includes, but is not limited to, any Communications regarding matters pending before the Department, including before the Administrative Hearing Bureau. This request seeks records from January 7, 2019 to the present." ("Communications CPRA Request") (Pet., ¶ 33, Ex. 9.)

STANDARD OF REVIEW

Code of Civil Procedure section 1085, subdivision (a) provides in relevant part:

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

"There are two essential requirements to the issuance of a traditional writ of mandate: (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (*California Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy . . . ." (*Pomona Police Officers' Ass'n v. City of Pomona* (1997) 58 Cal.App.4th 578, 583-84.)

"When there is review of an administrative decision pursuant to Code of Civil Procedure section 1085, courts apply the following standard of review: '[J]udicial review is limited to an examination of the proceedings before the [agency] to determine whether [its] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law.' [Citations.]" (*Id.* at 584)

Pursuant to the CPRA, individual citizens have a right to access government records. In enacting the CPRA, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) Government Code section 6253 states:

> "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so." (Gov. Code, § 6253, subd. (b).)

Finally, the CPRA provides "[a]ny person may institute proceedings for injunctive or declarative relief or writ of mandate in any court . . . to enforce his or her rights to inspect or to receive a copy of any public record or class of public records under this chapter." (*Id.,* at § 6258.) Where the court finds a violation of the CPRA, the court shall order the government agency to disclose the public record. (*Id.,* at § 6259, subd. (a).)

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ANALYSIS

Petitioner contends Respondents failed to comply with their mandatory duties under the CPRA. Petitioner therefore requests the court order Respondents to (1) conduct a new search for and produce responsive records of meetings and communications with "any individuals employed by or representing" the companies, and (2) produce 96 withheld and six redacted records in an unredacted form.

Whether Respondent CDI Failed to Adequately Search for Records:

Petitioner challenges the adequacy of Respondents' search for records on numerous grounds.

As a preliminary matter, the court notes the CPRA "does not prescribe specific methods of searching for . . .[responsive] documents." (*City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, 627.) Rather, the CPRA only imposes a duty to locate all records with "reasonable efforts," and does not "require that agencies undertake extraordinarily extensive or intrusive searches." (*Id.*) An agency may develop its own method for searches, and it "must 'communicate the scope of the information requested to a custodian of its records,' "although it need not use the precise language of the request." (*Id.* at 627-628.)

First, Petitioner claims Respondents failed to update its search terms and did not search for individuals Respondents would have learned were representatives of Applied Underwriters (Applied) during their search. Petitioner argues: "Respondents' own production of records establishes that they failed to modify their search for responsive records once they discovered (and indeed, produced to Petitioner) records indicating that, for example, Eric Serna and Jamie Sahara did in fact represent Applied."[1] (Opening Brief 10:21-24.) Petitioner asserts Respondents were on notice of Serna and Sahara's status as representatives of Applied "but failed to include their names among the search terms for other responsive records." (Opening Brief 10:24-25.)

Respondents note Petitioner's claim attacks their discretion—the manner they elected to undertake a search for records. The court agrees Respondents could reasonably believe their search for "the names of the four insurance companies or some derivative thereof . . . . would have located records involving those insurance companies and any *other* individuals 'employed by or representing' those companies because entities only speak through individual representatives." (Opposition 16:4-7.) Indeed, it appears unreasonable to expect Respondents to constantly modify its ongoing search for specific individuals given its search for specific individuals and insurance companies.

Among other cases, Petitioner relies upon *Whitaker v. Central Intelligence Agency* (D.D.C. 2014) 31 F.Supp.3d 23 (*Whitaker*) to support its position. In *Whitaker*, the district court required the agency to conduct a records search for a single individual who had not been named in the public records request. The underlying search concerned the disappearance of an individual and an airplane. The district court ordered the agency to search using the co-pilots name because the search would probably lead to additional records.

According to the district court, *Whitaker* was the "rare case[]" "in which an agency record contains a lead so apparent that the [agency] cannot in good faith fail to pursue it." (*Id.* at 45.) The court explained an agency cannot ignore a lead that is "clear and certain" but "need only pursue leads that raise red flags pointing to the probable existence of responsive agency records that arise during its efforts to respond to a [records] request." (*Id.* at p. 43.)

The court finds the circumstances here are distinguishable from those in *Whitaker*. Petitioner's demand—in the face of the search undertaken, the terms used and the rationale for those terms—would require extraordinary effort from Respondents resulting in an intrusive search. As a practical matter, Petitioner would have Respondents determine whether a name (not otherwise identified by

Petitioner) in any document produced pursuant to the request should be searched because the otherwise unidentified individual might be employed by or representing one of the search target insurance companies. Assuming Respondents believed the otherwise unidentified individual might be employed by or representing one of the search target insurance companies, Respondents would then be required to undertake a new search for that individual.

The scenario envisioned by Petitioner is not required by the CPRA. (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 372. ["[U]nder the PRA, a governmental agency is only obliged to disclose public records that can be located with *reasonable* effort and cannot be subjected to a 'limitless' disclosure obligation."]) The court finds Respondents' failure to expand its search to names revealed in documents produced given the scope of Respondents' search and terms used did not render the search unreasonable under the CPRA. Respondents could reasonable assume records related to employees and representatives of the target insurance companies would be produced based on the search it devised and undertook.[2]

Next, Petitioner asserts Respondents conducted an inadequate search because "Respondents failed to question any Department employees or Respondent Lara about other individuals representing Applied that they met or communicated with." (Opening Brief 14:8-9.) Petitioner cites no authority requiring Respondents to undertake such an investigation. The claim centers on how Respondents exercised their discretion in undertaking a search for records. Nothing suggests the search devised and undertaken by Respondents—given their search terms—Respondents failed to comply with their mandatory duties.[3]

Petitioner also challenges the scope of Respondents' search claiming "only certain Department staff were asked to search their emails on a Department-issued mobile device or their personal mobile devices, even though such records were covered by the CPRA Requests." (Opening Brief 14:17-19.)

The court acknowledges *City of San Jose v. Superior Court*, *supra*, 2 Cal. 5th at 627 held the CPRA requires personal electronic devices of public employees be searched where such devices hold public records. The Supreme Court suggested a two-step process for CPRA search compliance with personal devices. First, the agency should communicate the request to the employees in question. Then, the agency "may then reasonably rely on the employees to search *their own* personal files, accounts, and devices for responsive material." (*Id.*, at 627-628 [emphasis in original].)

City of San Jose v. Superior Court does not dictate how an agency must conduct a search under the CPRA. The "CPRA does not proscribe specific methods of searching for those documents. Agencies may develop their own internal policies for conducting searches." (*Id.,* at 627.) That Respondent "asked" "only certain Department staff" to search their mobile devices does not demonstrate an unreasonable search of mobile devices. (Opening Brief 14:17.) Respondents could reasonably determine which staff members would likely have responsive documents. (Opening Brief, Ex. 28 p. 21. ["As in-house counsel within the GLB, Chao Lor was also assigned to assist the GLB analysts in reviewing, processing, and responding to Petitioner's PRA requests. Upon receipt of Petitioner's

PRA requests, Ms. De Guzman and Ms. Lor reviewed each request and then, as to each request, identified which Department staff, divisions and bureaus within the Department could potentially have responsive records.")

Respondents also had their "IT staff conduct a search of the Commissioner's and Department's staff's Microsoft 365 email accounts because a search of those accounts would include any official business emails and calendar entries or meetings they may have had with the 13 named individuals and/or four insurance companies, whether created or received on a Department-issued or personal device, and stored on the Department's systems." (Lor Decl., ¶¶ 19, 26-27.)

Petitioner also challenges the reasonableness of Respondents' search arguing Respondents "did not even attempt to search agency phone records, nor were any staff asked to search for or produce records of phone calls on their mobile devices, even though such records were covered by the CPRA Requests." (Opening Brief 14:26-28.)

Respondents represent they had no reasonable method to search phone records. Specifically, Respondents state:

> " . . . Petitioner did not provide GLB with any phone numbers to search, and the Department does not keep a third-party call log. The Department's normal business practice is for staff to schedule conference meetings through the Outlook Calendar, which assigns a conference phone number for staff to use to conduct telephone conference meetings. The only way to know if a particular conference phone number might have been used for a meeting or conference call with any individual or entity is to refer it back to the Outlook calendar meeting entry. All Outlook Calendar entries are searchable and would have been turned over to GLB via the searches conducted. Also, as noted, GLB had staff search their mobile devices for meetings and conferences." (Lor Decl., ¶ 30.)[4]

Petitioner next challenges Respondents' search on the grounds Respondents' verified discovery document production contains emails requesting that 37 staff members search for responsive records. Petitioner contends six staff members—including Respondent Lara's Scheduling Director Roberta Potter and Deputy Commissioner Mike Peterson—failed to respond to the email request. (Powell Decl., ¶ 43.) Respondents produce evidence contradicting Petitioner's conclusion and represent all 37 staff members responded to the email. All staff members reported they had no responsive records or they provided records responsive to the request. (Lor Decl., ¶ 26; Opening Brief, Ex. 28, 23:2-6.])

Petitioner also contends certain staff members had only one night to search for and produce documents responsive to Petitioner's requests. According to Petitioner, the short search time increased the likelihood of errors and missed records. Petitioner's claim is speculative and unsupported.[5] In any event, Respondents explain those staff members with limited search time were not expected

to have any responsive documents but were nonetheless asked to search. Moreover, none of those staff members asked for additional time to search and all indicated they had no responsive records. (Lor Decl., ¶ 25.) Respondents' search conduct was not unreasonable based on a claim of limited search time.

In an undeveloped argument, Petitioner asserts Respondents inadequately searched for responsive records based on records not produced: "Seventh, records reflecting campaign contributions to Respondent Lara from individuals named in the CPRA Requests were not produced or identified as withheld records. (Ex. 16.)" (Opening Brief 15:14-15.)

While the challenge appears to be related to production and not whether Respondents conducted a reasonable search, the court finds Petitioner has not met its burden of establishing a violation of the CPRA. Petitioner argues "Respondents offer no reason why records reflecting contributions to Respondent Lara's re-election campaign would not be in Respondent Lara's possession, especially since he was Treasurer of the campaign." (Reply 10:13-14.) Respondents contend Petitioner has not demonstrated such records are public records under the CPRA. They also indicate they undertook a search for such records "but located no records." (Opposition 22:11.)

Finally, Petitioner contends the search was inadequate because Respondents "only searched for the full names and last names of the individuals, not for only the first names in conjunction with other identifiers and Respondents did not search by email addresses of the individuals identified in the CPRA Requests or emails generated by domains associated with the insurance companies involved in the pay-to-play scandal." (Opening Brief 4:18-22.) Respondents explain they:

> "do not use email domains to conduct a search because that type of search is limited and likely to miss documents while using search terms is all-inclusive and also includes records that contain an email address. For instance, searches for 'Silver' would include records that contained an email address such as '@silver-law.net." (Chao Decl., ¶ 34.)

Given Respondents' explanation, the court cannot find Respondents' failure to search email addresses resulted in an unreasonable search.[6]

Based on the foregoing, the court finds Petitioner has not demonstrated Respondents' search failed to comply with the CPRA. Given the evidence, the court finds Respondents devised and undertook a reasonable search related to Petitioner's CPRA requests.

Whether Respondent Improperly Withheld or Redacted Records:

Petitioner claims Respondents have wrongly withheld 96 public records[7] and redacted six others responsive to Petitioner's Communications CPRA Request. Respondents advise they withheld the responsive records as exempt under Government Code section 6254, subdivision (d) and Insurance Code section 735.5, made applicable to the CPRA pursuant to Government Code section 6254, subdivision (k).

Under the CPRA, "the public agency has the burden of proof when asserting an exemption under the CPRA or when claiming certain documents should be redacted." (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 398.)

1. *Claimed Exemptions Regarding "Form A" Communications:*

Respondents report they withheld from disclosure 30 responsive records of communications between staff and Applied representatives. They explain the records are exempt because they relate to Applied's Form A application.[8] (Ex. 29 [List of withheld record].) Respondents claim Section Government Code section 6254, subdivisions (d)(1) and (4) as the source of the exemptions.

Government Code section 6254 subdivision (d) identifies otherwise responsive records as exempt:

> "(d) Records contained in or related to any of the following:
>
> (1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.
>
> . . .
>
> (4) Information received in confidence by any state agency referred to in paragraph (1)."

Petitioner asserts Respondents have failed to carry their burden of proving any applicable exemption. Petitioner argues Respondents have not made a sufficient factual showing "specific enough to give the requestor a meaningful opportunity to contest the withholding of the documents and the court to determine whether the exemption applies." (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 83.) Petitioner claims Respondents withheld not only Form A records "but more *broadly any communications* regarding the proposed sale of CIC, [as] 'confidential' and exempt from disclosure even

though the sale of CIC is no longer pending, and Respondents make no showing of the interest being protected as required by the California Constitution." (Opening Brief 17:11-14.)

Respondent provides a fulsome response. Respondent provides evidence the responsive records withheld are exempt under Government Code section 6254 subdivision (d), Insurance Code section 12919[9] and Evidence Code section 1040.

First, Respondents submit evidence the 30 withheld records came from confidential files accessible only to Respondents. (Bernard Decl., ¶ 9.) Further, Susan Bernard, a Deputy Commissioner for Respondent CDI who oversees CDI's Financial Surveillance Branch,[10] personally reviewed the withheld records. (*Id.*, at ¶¶ 1, 13, 19.) Bernard thereafter determined each withheld record contained information related to the Form A application for the proposed acquisition of CIC. Bernard explains Respondents obtained the information in "official confidence." (Bernard Decl., ¶¶ 2, 18-19; see also Lor Decl., ¶¶ 37, 40-42.)

The court finds the evidence submitted by Respondents meets their burden of demonstrating the responsive documents are exempt from disclosure under the CPRA.

That the sale of CIC is no longer pending is of no consequence to the confidential nature of the information.

Additionally, so long as the information falls within the scope of the exemption in Government Code section 6254 subdivision (d), Insurance Code section 12919 or Evidence Code section 1040, the CPRA does not require consideration of a constitutionally protected interest. While narrowly construed, the exemptions are absolute.

Finally, the public disclosure of the Form A application (Opposition 25:11-12), Respondents persuasively demonstrate with evidence the communications *related to the application* are exempt under Government Code section 6254 subdivision (d)(4). (Bernard Decl., ¶¶ 2, 18-19; see also Lor Decl., ¶¶ 37, 40-42.)

Based on the foregoing, Respondents have demonstrated that the 30 responsive but withheld documents related to the Form A application are exempt from disclosure.

That said, the court requests Respondent address Petitioner's contention concerning redactions. As noted by Petitioner, Respondents are required to "use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged

portions." (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 292.) It would seem based on the publicly available Form A information statement some Form A communications are not exempt. (Opening Brief, Ex. 15.)

1. *Claimed Exemptions Regarding CIC Examination Communications:*

Respondents report they withheld from disclosure 66 responsive records of communications related to CIC's examination—email and various attachments. They explain the records are

exempt under Government Code section 6254, subdivision (d)(2) and (4), Insurance Code section 735.5, and Evidence Code section 1040.

Respondents also redacted 18 responsive records. (Powell Decl., ¶ 20, Ex. 18.) Petitioner challenges six redactions. Petitioner seeks a court order compelling Respondents to produce in an unredacted format the following redacted records: Bates 5, 31, 32 [two emails], 34 and 35, and 41 and 42. (Powell Decl., ¶ 20, Ex. 18.)[11]

Government Code section 6254 subdivision (d) identifies otherwise responsive records as exempt:

> "(d) Records contained in or related to any of the following:
>
> 1. Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.
>
> 2. Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).
>
> 1. . . . .
>
> 2. Information received in confidence by any state agency referred to in paragraph (1)."

Additionally, Insurance Code section 735.5, subdivision (c) provides "[a]ll working papers, recorded information, documents . . . produced by, obtained by, or disclosed to the commissioner or any other person in the course of an examination . . . shall be given confidential treatment and are not subject to subpoena and shall not be made public . . . ."

In January 2018, Respondent CDI's Field Examination Division decided to initiate an examination of CIC pursuant to Insurance Code section 730 for the period January 1, 2014 through December 31, 2017. (Bernard Decl., ¶¶ 20-22.) The division initiated the examination in 2018 and completed it in the first half of 2019. (Bernard Decl., ¶ 22.)

To support its exemption claim, Bernard again represents she reviewed the withheld documents and determined:

> "the redacted attachments and withheld records constitute documents produced by the examiner during the course of the examination, confidential working papers, and/or documents or copies thereof obtained by Field Examination in the course of the examination . . . ." (Bernard Decl., ¶¶ 24-25.)

As to the redactions (Powell Decl., Ex. 18, Bates 31, 32, and 41 and 42), Petitioner argues there is a strong suggestion "the claimed exempt material was discussed simultaneously with political fundraising, and therefore the redaction is not justified." (Opening Brief 22:21-23.) That an entire communication is not exempt does not preclude other parts of the same conversation from being exempt.

Finally, Petitioner contends Respondent use of redactions suggests other records withheld could have been redacted. The argument, however, cuts both ways. Respondents demonstrate with redactions they understand exempt material in a record may be redacted and the balance of the document produced. That other records were withheld by Respondent and not redacted suggests the entire document is exempt or exempt and nonexempt material is not segregable.

Respondents have met their burden of demonstrating that the withheld/redacted records were exempt.

CONCLUSION

Based on the foregoing, the petition is denied.

IT IS SO ORDERED.

October 21, 2022 _____

Hon. Mitchell Beckloff

Judge of the Superior Court

[1] Petitioner also asserts Respondents failed to search for two other alleged affiliates of Applied for similar reasons. (Opening Brief 13:5-9.)

[2] While it is not relevant to whether Respondents complied with their duties under the law, Respondents note a practical solution —"all Petitioner had to do was submit a new request once it identified them." (Opposition 15:22-24.)

[3] The court struck Bambenek's attestation on this issue in response to Respondents' evidentiary objection.

[4] While Petitioner disputes this evidence, the court struck Bambenek's statements on this issue in response to Respondents' evidentiary objection.

[5] The court struck Bambenek's statements on this issue in response to Respondents' evidentiary objection.

[6] The court notes it sustained evidentiary objections made by both parties to evidence relevant on this issue.

[7] Of the 102 total withheld records, Petitioner is not challenging six records: two records regarding a 2019 Annual Review of California Insurance Company (CIC) and four records regarding a declaration of CIC's dividends/solvency. (Opening Brief 5, fn. 13.)

[8] The Form A records are related to the sale of Applied's subsidiary, CIC, at the heart of Petitioner's pay-to-play scandal allegations. Specifically, Petitioner's Opening Brief states: "In early 2019, individuals linked to Applied Underwriters, Inc. ('Applied'), Applied's two subsidiaries, California Insurance Company ('CIC') and Constitution Insurance Company, and Independence Holding Company ('IHC') made $54,300 in campaign contributions to Respondent Lara's 2022 re-election campaign . . . ." (Opening Brief 2:13-16 [Pet., ¶ 4].)

[9] "Communications to the commissioner or any person in the commissioner's office in respect to any fact concerning the holder of, or applicant for, any certificate or license issued under this code are made to the commissioner in official confidence within the meaning of Sections 1040 and 1041 of the Evidence Code." (Ins. Code, § 12919.)

[10] Bernard's key responsibilities "including directing the activities and providing general oversight of Financial Surveillance, which include overseeing the monitoring of insurance companies, directing the ongoing examination and surveillance of insurance companies, and representing the Commissioner at meetings held by the National Association of Insurance Commissioners." (*Id.,* at ¶ 2.)

[11] Of the six redacted emails, four relate to the March 12, 2019 fundraising meeting organized by Eric Serna on Applied's behalf "to benefit Ricardo Lara for Insurance Commissioner 2022." (Powell Decl., ¶ 20, Ex. 18, Bates 30.)