May 17, 2022

Via Email and Overnight Mail

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RE: Public Records Act Request 2022-00138 – "Telematics"

The Department of Insurance is engaged in a pattern and practice of delaying production of disclosable public records in a manner inconsistent with Proposition 103 and the California Public Records Act's ("CPRA") declaration of intent 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.)[1]

Public and private statements by certain firms and individuals subject to our records request establish that the agency has and is engaged in extensive ongoing activities concerning telematics. The Commissioner himself has weighed in on the issue of telematics. The purpose of government transparency, which is enshrined in the California Constitution, is undermined when records concerning issues of significant contemporary interest to Californians are not produced in a timely manner.

Yet, the Department has repeatedly granted itself revised deadlines for producing documents that cumulatively reflect an unreasonable delay forbidden by the CPRA and Proposition 103. In the three months since this

[1] To the extent this request seeks records "provided to the Commissioner pursuant to" Proposition 103, the request is made under the authority of Insurance Code Section 1861.07. However, because this request also seeks records that were not "provided to the Commissioner pursuant to" Proposition 103, such as agency meeting notes, calendars, internal non-privileged communications and documents, and communications from CDI to recipients outside the agency, Consumer Watchdog seeks those records under the Public Records Act.

records request was submitted, your agency has produced just 16 records totaling approximately 30 pages.

Your agency owed us another production last Friday (May 13, 2022), but that self-imposed deadline passed without a word from you. The timeline of events summarized below appears to demonstrate intentional foot-dragging on the part of the agency, which is particularly egregious as the records sought by this request relate to a matter of public policy that is currently being debated behind closed doors and to which prompt access to public records is essential to the interests of consumers:

February 23, 2022 – Consumer Watchdog submits its records request seeking records involving a targeted set of Department personnel: the Commissioner, all Deputy Commissioners, and Department staff within the following agency offices: the Executive Office, the Office of the Special Counsel, the Legal Branch, the Rate Regulation Branch, the Enforcement Branch, the Policy and Legislation Branch, and the Communications and Press Relations Branch. As we noted in the records request, "[i]ndividuals in these positions should be prioritized; however, this request also includes any Department staff involved in any decisions, investigations, enforcement actions, or proceedings concerning telematics as defined above."

March 3, 2022 – Your agency sent Consumer Watchdog a letter granting itself an extension to respond until March 18, 2022, noting that the records request sought records of approximately 632 employees in the Department branches identified by Consumer Watchdog.

March 18, 2022 – Your agency sent another letter granting itself a further extension until April 18, 2022. This letter and the letter of March 3rd were sent to the wrong email address (utilizing .com instead of the correct .org suffix) and were not received by Consumer Watchdog until the error was pointed out to you.

April 5, 2022 – In a meet and confer call with Harvey Rosenfield and Ben Powell, you asked that Consumer Watchdog further prioritize, by agency unit, the order in which records should be produced in order to facilitate a prompt production. On that call we provided you Consumer Watchdog's priorities as follows: 1. the Insurance Commissioner; 2. the Deputy Commissioner; 3. Executive Staff; 4. Rate Regulation; 5. the Legal Branch.

On that April 5, 2022 call, you also stated that though you had sent the request to all possible units, you had only received a response from the Rate Enforcement Bureau. In other words, you seemed to indicate your CPRA unit would produce records from Consumer Watchdog's priority categories, *but only to the extent* that your team had heard back from those agency units. You also indicated on the April 5, 2022 call that certain records might be designated "confidential" or consisting of "trade secrets," but you could not confirm whether in fact any documents would be withheld. You said that for anything marked "confidential," you had to first notify the sender—the entity or individual—and confirm whether they agreed that the documents and communications could be produced.

April 15, 2022 – Your agency produced 16 records consisting of 30 pages and indicated it would provide additional documents "on or before Friday, May 13, 2022." Once again, the April 15, 2022 email was sent to the wrong .com email address, and as a result Mr. Rosenfield did not receive the letter and documents until they were re-sent to the correct email address on April 20, 2022.

April 28, 2022 – Mr. Rosenfield returned a phone call from Department analyst Adrianna Cabassa. Ms. Cabassa called to confirm whether Consumer Watchdog wanted external as well as internal communications related to the telematics issue. Mr. Rosenfield asked Ms. Cabassa if she was aware of the previous conversation Mr. Rosenfield had had with you on April 5th. Ms. Cabassa replied that she was. Mr. Rosenfield asked Ms. Cabassa why she was asking the question, since the CPRA request was clear and Mr. Rosenfield had previously confirmed with you that the CRPA request sought all email, calendar entries, and documents. Given how duplicative this call was, it appears to Consumer Watchdog that communication within the agency concerning public requests for records is poor.

May 13, 2022 – Despite the self-imposed deadline for an additional production in your April 15 letter, no records were provided on May 13, nor did we receive any correspondence from your agency.

There are several breaches of the Department's duty to produce documents reflected in this timeline:

First, regarding the repeated delays in producing records—the Department is required to identify and produce records "promptly" and without "delay or obstruct[ion]." (Gov. Code, §§ 6253(b), (c), (d).)

The Public Records Act requires that "[e]ach agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and ***shall promptly*** notify the person making the request of the determination and the reasons therefor." (Gov. Code § 6253(c) [emphasis added].) The only time that an agency may take longer than 10 days to make its determination is in statutorily-defined "unusual circumstances," which is not the case here. (*Id.*) Even in cases where "unusual circumstances" exist, agencies are never permitted to take more than 24 days to make a determination and promptly notify the requestor. (Gov. Code § 6253(c).) The Department was required to make a determination by March 21, 2022, at the latest, as to whether Consumer Watchdog's February 23, 2022 CPRA Request included, in whole or in part, disclosable records in its possession. Once an agency makes and notifies the requestor of its determination, it is required to state the estimated date and time that the records will be made available. (Gov. Code § 6253(c).)

If Section 6253 subdivisions (b), (c), and (d) are to have any meaning, they must require that the Department of Insurance provide a good faith estimate of the time needed to produce responsive records, not merely successive dates on which the agency will issue itself another extension. Absent an effort to estimate when records will be available, the date is little more than a façade designed to discourage a requestor from filing suit to compel production.

Furthermore, there is absolutely no basis for the repeated delays under the mandatory production requirements for documents "provided to the Commissioner pursuant to" Proposition 103, which historically the Department has provided immediately. (Ins. Code § 1861.07.)

An agency's duty to comply with Proposition 103 and the Public Records Act is mandatory. "[W]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." (*Carrancho v. California Air Resources Board* (2003) 111

Cal.App.4th 1255, 1267, quoting *Great Western Savings & Loan Association v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413 [internal quotation marks omitted].) Moreover, Proposition 59, which amended the California Constitution to guarantee access to public records, requires that the CPRA, along with its remedial provisions, be read broadly in favor of public access. (Cal. Const., Art. I § 3.)

Second, the duty to produce applies to the agency as a whole, not just your CPRA unit.

The apparent excuse for the delay in producing records during the April 5, 2022 meet and confer call was that various divisions of the Department, including the Office of the Commissioner, had failed to provide you communications and documents exchanged with the insurance industry or other responsive records.

Your position seems to be that you are doing all you can and that you are more or less beholden to the other divisions of the Department, and that it is *their* foot dragging that is causing delays. Under this scenario, no one is accountable, resulting in an indefinitely long response period. Further, there is still no indication from you whether or not any public records are being withheld on the basis of a claimed privilege or exemption. Again, such a response appears to be designed to discourage a requestor from filing suit to compel production.

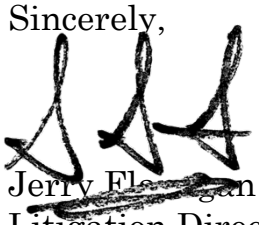
It is the Department of Insurance as a whole that is subject to the mandatory duties of the Public Records Act and Proposition 103, not just your CPRA unit. Overall, it seems the Department is slow-walking responses from the Commissioner and Executive staff.

Third, as noted above, to the extent this request seeks records "provided to the Commissioner pursuant to" Proposition 103, the request is made under the authority of Insurance Code Section 1861.07. Records subject to 1861.07 cannot be withheld *on any grounds*, including under claims of confidentiality or on the basis that records contain trade secrets. (*See, e.g.*, *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029.)

Fourth, regarding your statement that you must reach out to the senders of the correspondence and documents that Consumer Watchdog seeks to get their agreement to the production, this is also wrong. Under the CPRA, an agency may not allow "another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." (Gov. Code § 6253.3.) Under Proposition 103, all information provided to the Commissioner must be disclosed.

Please provide all responsive records by May 31, 2022.

Sincerely,



Jerry Flanagan
Litigation Director