

1 Michael T. Risher (Cal. Bar No. 191627)
Law Office of Michael T. Risher
2 2081 Center St. #154
Berkeley CA 94702
3 Telephone: 510.689.1657
Fax: 510.225.0941
4 michael@risherlaw.com

5 David E. Snyder (Cal. Bar No. 262001)
Glen A. Smith (Cal. Bar No. 106341)
6 First Amendment Coalition
534 4th Street, Suite B
7 San Rafael, CA 94901-3334
Telephone: 415.460.5060
8 Fax: 415.460.5155
dsnyder@firstamendmentcoalition.org
9 gsmith@firstamendmentcoalition.org

10 Attorneys for Plaintiffs

11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SAN FRANCISCO**

13 **First Amendment Coalition,**
Plaintiff,

14 v.

15 **Xavier Becerra, Attorney General of the State**
16 **of California;**
California Department of Justice,
17 Defendant.

Case No. _____

Verified Petition for Writ of Mandate to
Enforce California Public Records Act

Judge:

Department:

19
20
21
22
23
24
25
26
27
28

- 1 1. Before this year, public access to peace-officer personnel files and other documents related to the
2 conduct of California peace officers was extremely limited. But as of January 1, 2019, certain
3 peace-officer personnel files relating to discharge of a firearm, the use of force, sexual
4 misconduct, and dishonesty must be disclosed – they “shall be made available for public
5 inspection pursuant to the California Public Records Act,” “notwithstanding ... any other law.”
6 Penal Code § 832.7(b)(1), as amended by Stats. 2018, ch. 988 § 2 (Senate Bill 1421).
- 7 2. Soon after this law went into effect, Plaintiff First Amendment Coalition (FAC) requested some
8 of these newly available records from Defendant Department of Justice (Department). Attached
9 hereto as Exhibit A is a true and correct copy of FAC’s January 4, 2019 request.
- 10 3. Although the language of this statute, the law’s legislative history, and longstanding legal
11 principles make it clear that these new provisions apply to all existing records regardless of when
12 those records were created, the Department has refused to release any records covered by the
13 new law that “pre-date” January 1, 2019. Attached hereto as Exhibit C is the Department’s
14 February 1, 2019 denial of FAC’s request. The Department does not claim that the new law
15 excludes these records; instead, it argues that because a handful of police unions have sued to
16 prevent the release of records under the new law, and some courts have granted temporary orders
17 to preserve the status quo, it can refuse to release any records “until the legal question of
18 retroactive application of the statute is resolved by the courts.”
- 19 4. However, the Public Records Act (PRA) requires an agency that receives a PRA request to
20 determine whether the requested records are exempt from disclosure within strict deadlines and
21 to promptly release all non-exempt records. It does not allow an agency to deny access while
22 purporting to indefinitely postpone making this determination, as the Department has done here.
- 23 5. The Department also asserted it would not release records it obtained from other agencies.
24 However, the law does not allow a government to refuse to release records in its possession
25 simply because they were created by another agency. Indeed, the PRA defines a public record to
26 include “any writing containing information relating to the conduct of the public’s business
27 prepared, owned, used, *or retained* by any state or local agency.” Gov. Code § 6252(e)

1 (emphasis added). It requires a government agency to release all non-exempt records “*in the*
2 *possession* of the agency.” *Id.* § 6253(c) (emphasis added).

3 6. The Department’s refusal to release any records covered by SB 1421 is anathema to the new
4 law’s purpose of increasing transparency. As the Legislature found when it enacted the new law,
5 the “public has a strong, compelling interest in law enforcement transparency because it is
6 essential to having a just and democratic society.” SB 1421 § 4. Already, the release of records
7 under this new law has revealed serious peace-officer misconduct that had long been hidden. For
8 example, pre-2019 records released under the SB 1421 have shown that “[t]hree Fairfield police
9 officers engaged in sexual misconduct with members of the public. Four others had sustained
10 findings of dishonesty — they withheld evidence, committed forgery or falsified reports.” Megan
11 Cassidy, *Multiple Fairfield Police Officers Disciplined for Sexual Advances, Records Show*, San
12 Francisco Chronicle, 1/31/2019.¹ There is no indication that the Legislature intended to allow
13 records showing this type of malfeasance to remain secret, simply because they were created – or
14 relate to conduct that occurred -- in the past.

15 7. Plaintiff therefore brings this suit to compel the Attorney General to comply with the law and
16 release these important records to the public.

17 **Parties²**

18 8. Plaintiff FAC is a non-profit corporation that is dedicated to advancing free speech rights,
19 ensuring open and accountable government, and promoting public participation in civic affairs.
20 FAC, which is based in Marin County, has long fought to ensure access to public records in
21 California and was active in supporting SB 1421.

22 9. FAC is a member of the public under Government Code §§ 6252 and is beneficially interested in
23 the outcome of these proceedings; it has a clear, present and substantial right to the relief sought
24 herein and no plain, speedy and adequate remedy at law other than that sought herein.

25
26 _____
27 ¹ Available at [https://www.sfchronicle.com/crime/article/Multiple-Fairfield-police-officers-](https://www.sfchronicle.com/crime/article/Multiple-Fairfield-police-officers-disciplined-13578919.php)
28 [disciplined-13578919.php](https://www.sfchronicle.com/crime/article/Multiple-Fairfield-police-officers-disciplined-13578919.php)

² This Petition refers to the parties as Plaintiffs and Defendants as authorized by Code of Civil
Procedure § 1063.

1 10. Defendant California Department of Justice is a state agency that employs approximately 500
2 sworn peace officers and maintains records relating to those officers and to other California
3 peace officers.

4 11. Defendant Xavier Becerra is the Attorney General of the State of California. Under Article 5,
5 § 13 of the California Constitution, he is the “chief law officer of the State.” He is the head of the
6 Department of Justice and ultimately responsible for its actions. Gov. Code § 12510, 15002.5.

7 12. Defendants are state agencies under Government Code § 6252(f).

8 13. Defendants maintain, use, and possesses the records sought by this Petition; the Department
9 created some of them.

10 **Jurisdiction and Venue**

11 14. This Court has jurisdiction under Government Code §§ 6258, 6259, Code of Civil Procedure
12 §§ 1060 and 1085, and Article VI section 10 of the California Constitution.

13 15. Venue is proper in this Court: Because the California Attorney General has an office located in
14 the City and County of San Francisco, any suit against the Defendants that may be brought in
15 Sacramento may also be commenced and tried in this Court. Code Civ. Pro. § 401(1). The
16 records in question, or some portion of them, are situated in the County of Sacramento, meaning
17 that suit may be brought in that County. Govt. Code § 6259(a); Code Civ. Pro. § 401(1).

18 **The California Public Records Act and SB 1421’s New Disclosure Requirements**

19 16. Under the California Public Records Act, Government Code §§ 6250 *et seq.*, all records
20 “containing information relating to the conduct of the public’s business prepared, owned, used,
21 or retained by any state or local agency” must be made publicly available for inspection and
22 copying upon request, unless they are exempt from disclosure. Gov. Code §§ 6253(a) and (b),
23 6252(e). If documents contain both exempt and non-exempt material, the government must
24 disclose all non-exempt material. *Id.* § 6253(a).

25 17. The PRA contains strict deadlines for the government’s responses to a request for records. An
26 agency that receives a request “shall, within 10 days from receipt of the request, determine
27 whether the request, in whole or in part, seeks copies of disclosable public records in the
28

1 possession of the agency and shall promptly notify the person making the request of the
2 determination and the reasons therefor.” Gov. Code § 6253(c).

3 18. “In unusual circumstances,” as defined by the statute, the agency may extend this time limit “by
4 written notice ... to the person making the request, setting forth the reasons for the extension and
5 the date on which a determination is expected to be dispatched. No notice shall specify a date
6 that would result in an extension for more than 14 days.” *Id.*; *see id.* § 6253(c)(1)-(4) (defining
7 “unusual circumstances”).

8 19. Before the enactment of S.B. 1421, PRA requests for peace officer personnel records – defined
9 as all records related to the “advancement, appraisal and discipline” of peace officers – were
10 exempt from disclosure. Penal Code §§ 832.7, 832.8; Gov. Code § 6254(k). This exemption
11 included personnel records regarding investigations into police shootings and other serious uses
12 of force, or allegations of serious misconduct, even when the agency had concluded that the
13 officer had engaged in misconduct. *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411,
14 1431 (1995). As a result, Californians were unable to obtain the vast majority of records relating
15 to the most egregious forms of police misconduct.

16 20. In 2018, the Legislature enacted Senate Bill No. 1421 to address this situation, emphasizing that
17 “[t]he public has a right to know all about serious police misconduct, as well as about officer-
18 involved shootings and other serious uses of force.” Stats 2018 Chapt. 988 § 1 (declarations and
19 findings).

20 21. This new law, effective January 1, 2019, provides broad public access to records that were
21 previously released only in limited circumstances.

22 22. Specifically, the law amended Penal Code § 832.7(b)(1) to require that “[n]otwithstanding ...
23 any other law, the following peace officer or custodial officer personnel records and records
24 maintained by any state or local agency shall not be confidential and shall be made available for
25 public inspection pursuant to the California Public Records Act ...:

26 (A) A record relating to the report, investigation, or findings of any of the following:

27 (i) An incident involving the discharge of a firearm at a person by a peace officer or
28 custodial officer.

1 (ii) An incident in which the use of force by a peace officer or custodial officer
2 against a person resulted in death, or in great bodily injury.

3 (B)(i) Any record relating to an incident in which a sustained finding was made by any law
4 enforcement agency or oversight agency that a peace officer or custodial officer engaged in
5 sexual assault involving a member of the public.

6

7 (C) Any record relating to an incident in which a sustained finding was made by any law
8 enforcement agency or oversight agency of dishonesty by a peace officer or custodial officer
9 directly relating to the reporting, investigation, or prosecution of a crime, or directly relating
10 to the reporting of, or investigation of misconduct by, another peace officer or custodial
11 officer, including, but not limited to, any sustained finding of perjury, false statements, filing
12 false reports, destruction, falsifying, or concealing of evidence.

13 23. The new law specifies that agencies must release a broad range of records relating to these
14 incidents. *See* Penal Code § 832.7(b)(2).

15 24. At the same time, the new law allows, and in some cases requires, agencies to redact – but not
16 withhold -- records when necessary to protect personal privacy or when the public interest in
17 non-disclosure clearly outweighs the public interest in disclosure. *See* Penal Code § 832.7(b)(5)-
18 (7).

19 25. The law additionally allows the government to withhold records in order to protect the integrity
20 of pending investigations and prohibits the release of complaints that are frivolous or unfounded.
21 Penal Code § 832.7(b)(7), (8).

22 **Plaintiff FAC’s Request and Defendants’ Response**

23 26. On January 4, 2019, FAC Legal Fellow Glen Smith emailed a letter to Defendants on behalf of
24 FAC, requesting records under SB 1421. *See* Exhibit A. Specifically, Mr. Smith requested
25 “records relating to a report, investigation or finding (as those terms are used in Penal Code
26 § 832.7(b)(1)(A)&(B)) of any of the following:

27 (1) An incident involving the discharge of a firearm at a person by a peace
28 officer or custodial officer;

1 (2) An incident in which the use of force by a peace officer or custodial officer
2 against a person resulting in death or in great bodily injury; and/or

3 (3) An incident in which a sustained finding was made by any law enforcement
4 agency or oversight agency that a peace officer or custodial officer
5 engaged in sexual assault involving a member of the public.

6 *See Exhibit A.*

7 27. On January 14, 2019, the Department emailed Smith to inform him that it was extending its time
8 limit to respond until January 28, based on its need to collect records from separate offices and to
9 consult with different sections within the Department, under Gov. Code § 6253(c). Attached
10 hereto as Exhibit B is a true and correct copy of the Department’s January 14 letter.

11 28. On February 1, the Department informed Smith that it would not disclose any of the requested
12 records, for three distinct reasons. *See Exhibit C.*

13 29. The first reason for the denial is that the Department claims that SB 1421 and the PRA do not
14 require it to release peace-officer records in its possession unless those records relate to officers
15 that it employs. *See id.* The Department therefore stated that it “will produce only those non-
16 exempt records, if any, relating to peace officers employed by” it. *Id.*

17 30. This distinction between records relating to officers employed by the Department and records in
18 its possession relating to other officers finds no support in the law. To the contrary, the PRA
19 requires an agency to release all records in its possession, regardless of who created them. *See*
20 Gov. Code §§ 6252(e), 6253(c).

21 31. The second reason is based on the Department’s novel claim that “until the legal question of
22 retroactive application of the statute is resolved by the courts, the public interest in accessing
23 these records is clearly outweighed by the public’s interest in protecting privacy rights,” citing
24 Government Code § 6255. *See id.* The Department therefore refused to release any records “at
25 this time.”

26 32. This, too, is wrong. The fact that police unions have brought suit in other jurisdictions to prevent
27 the release of records neither creates a privacy interest in these records nor reduces the public
28 interest in disclosure.

1 33. The Department also cited other exemptions to the CPRA's broad disclosure requirements, *see*
2 Exhibit C, none of which justify its blanket refusal to release some or all of the records requested
3 by FAC.

4 34. FAC has not received any of the records it requested from the Department.

5 35. For these and other reasons, the Department's refusal to comply with FAC's records request was
6 unlawful.

7 **List of Exhibits**

8 36. Exhibit A to this Petition is a true copy of FAC's January 4, 2019 PRA request to Defendant
9 Department.

10 37. Exhibit B to this Petition is a true copy of the Department's January 14, 2019 response to FAC's
11 PRA request.

12 38. Exhibit C to this Petition is a true copy of the Department's February 1, 2019, response to FAC's
13 PRA request, refusing to release any records.

14 **FIRST CAUSE OF ACTION**

15 **For Violations of the California Public Records Act, Penal Code § 832.7(b), and**

16 **Article I, § 3 of the California Constitution**

17 **(Plaintiff FAC v. Defendants California Department of Justice and Becerra)**

18 39. Plaintiff incorporates herein by reference the above allegations, as if set forth in full.

19 40. The PRA, Penal Code § 832.7(b), and the California Constitution require the disclosure of the
20 records FAC requested.

21 41. Defendants' failure to provide the requested records violates the PRA, Penal Code § 832.7(b),
22 and Article I, § 3 of the California Constitution.

23 **Plaintiffs therefore request the following relief:**

24 1. That the Court issue a writ of mandate directing Defendants to provide Plaintiff with all
25 requested records except those records or parts thereof that the Court determines may lawfully be
26 withheld;

27 2. That Plaintiffs be awarded attorneys' fees and costs under Gov. Code § 6259 and any other
28 applicable statutes or basis;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3. For all other and further relief that the Court deems proper and just.

Dated: 2/13/2019

By: 

Michael T. Risher
Attorney for Plaintiffs

1
2
3 **Verification**

4 I, David E. Snyder, am the Executive Director of the First Amendment Coalition and authorized to
5 verify this Petition as an officer. I have read this Verified Petition for Writ of Mandate in *First*
6 *Amendment Coalition v. Becerra and California Department of Justice* and am informed, and do
7 believe, that the matters herein are true. On that ground I allege that the matters stated herein are
8 true.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing
10 is true and correct.

11 DATED: February 13, 2019
12 San Rafael, CA

13 
14 David Snyder

Exhibit A



January 4, 2019

Public Records Coordinator
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2500
PublicRecords@doj.ca.gov

Sent via Email

To the Public Records Coordinator:

On behalf of the First Amendment Coalition (“FAC”), I hereby request the records set forth below. This request is submitted pursuant to the California Public Records Act (“CPRA”), Gov. Code sec. 6250 *et seq.*; the California Constitution, Article I, section 3; and FAC’s rights of access under California common law.

FAC requests the following records relating to a report, investigation or finding (as those terms are used in Penal Code § 832.7(b)(1)(A)&(B)) of any of the following:

- (1) An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;**
- (2) An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or**
- (3) An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.**

As you are no doubt aware, public access to these records has been reenforced by Senate Bill 1421, which amended those sections of Penal Code §§ 832.7 and 832.8 that had previously restricted public access to some of these records. FAC is requesting

records for the “incidents” as defined above that occurred in 2016, 2017 and 2018.

Even without SB 1421, when charges or complaints of wrongdoing are made regarding ordinary public employees, the right of access to public records requires disclosure of all “well-founded” complaints, the information upon which they are based, and any discipline imposed. (*American Federation of State, County and Municipal Employees, et al. v. Regents of University of California* (1978) 80 Cal.App.3d 913, 917; *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041, 1046.) Moreover, in the case of higher-ranking public employees, disclosure of an investigation into misconduct is required even if the charges are found not to be reliable and the official is exonerated. (*BRV, Inc. v. Superior Court* (2006) 143 Cal. App. 4th 742, 759.)

If any portion of the records requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. If you believe that any express provision of law exists to exempt from disclosure all or a portion of the records FAC has requested, you must notify FAC of the reasons for the determination not later than 10 days from your receipt of this request letter. (Cal. Gov’t. Code § 6253(c).) Any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing. (Cal. Gov’t. Code § 6255(b).)

Gov’t. Code section 6253(d) prohibits the use of the 10-day period, or any provisions of the CPRA or any other law, “to delay access for purposes of inspecting public records.”

In addressing this request, please keep in mind that the California Constitution expressly requires you to broadly construe all provisions that further the public’s right of access, and to apply any limitations on access as narrowly as possible. Cal. Const., Art. 1, sec. 3(b)(2). The CPRA recognizes “no limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.” (Cal. Gov’t Code § 6257.5.)

Please send all responses to my email address below. Please contact me to obtain my consent before incurring copying costs, chargeable to FAC, in excess of \$100. Thank you for your timely attention to this request.

Sincerely,

/s/ Glen A. Smith

Glen A. Smith
FAC Legal Fellow
First Amendment Coalition
gsmith@firstamendmentcoalition.org
415-460-5060

cc: Michelle M. Mitchell
Deputy Attorney General
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244
michellem.mitchell@doj.ca.gov

David Snyder
Executive Director
First Amendment Coalition
dsnyder@firstamendmentcoalition.org

Exhibit B



300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6226
Facsimile: (213) 897-5775
E-Mail: Amie.Medley@doj.ca.gov

January 14, 2019

By E-Mail

Glen Smith
First Amendment Coalition
534 Fourth Street, Suite B
San Rafael, CA 94901
gsmith@firstamendmentcoalition.org

RE: Public Records Act Request received January 4, 2019

Dear Mr. Smith:

This letter responds to your request under the Public Records Act (Gov. Code, § 6250 et seq.) seeking records relating to a report, investigation or finding of any of the following:

1. An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;
2. An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or
3. An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

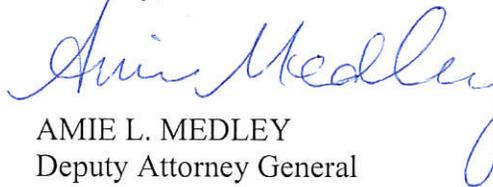
Agencies are required to respond to requests under the Public Records Act within 10 days, but may extend the deadline by up to 14 days under specified circumstances. (Gov. Code, § 6253, subd. (c).) These include:

1. The need to search for and collect records from field offices or other facilities that are separate from the office processing the request.
2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.
3. The need for consultation, which shall be done with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject matter interest therein.

(Id.)

In this instance, an extension is needed both to search for and collect records from separate offices and to consult with different sections within the department having a subject matter interest in the requested records.

Sincerely,



AMIE L. MEDLEY
Deputy Attorney General

For XAVIER BECERRA
Attorney General

ALM:

Exhibit C

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 269-6000
Telephone: (213) 269-6256
Facsimile: (213) 897-5775
E-Mail: Mark.Beckington@doj.ca.gov

February 1, 2019

By E-Mail

Glen Smith
First Amendment Coalition
534 Fourth Street, Suite B
San Rafael, CA 94901
gsmith@firstamendmentcoalition.org

RE: Public Records Act Request received January 4, 2019

Dear Mr. Smith:

This letter responds to your request under the Public Records Act (Gov. Code, § 6250 et seq.) seeking records from 2016, 2017, and 2018, relating to a report, investigation or finding of any of the following:

1. An incident involving the discharge of a firearm at a person by a peace officer or custodial officer;
2. An incident in which the use of force by a peace officer or custodial officer against a person resulting in death or in great bodily injury; and/or
3. An incident in which a sustained finding was made by any law enforcement agency or oversight agency that a peace officer or custodial officer engaged in sexual assault involving a member of the public.

Penal Code section 832.7, as amended by SB 1421, requires the disclosure of certain personnel records of peace officers and custodial officers, as well as records maintained by any state or local agency as required by Penal Code section 832.5. To the extent that the Attorney General has obtained records from other state and local law enforcement agencies, the Attorney General is not the agency that "maintains" those documents. A requester may properly seek disclosure from the employing agency, which not only maintains the records, but will be best situated to assess any applicable exceptions to the disclosure requirement and any statutorily required redactions concerning sensitive and private information. Further, to the extent that the Attorney General has obtained such records in relation to investigations or proceedings that the Attorney General is conducting, the disclosure provisions in section 832.7 do not apply to the Attorney General under section 832.7, subdivision (a). Thus, the Department will produce only

February 1, 2019

Page 2

those non-exempt records, if any, relating to peace officers employed by the Department of Justice. In producing such records, DOJ will redact certain private identifying information, as provided in Penal Code section 832.7, subdivision (b)(5).

Historically, peace officers have had a significant privacy right in their personnel records. Several cases currently pending in the California superior courts raise the issue whether SB 1421 requires the disclosure of records relating to conduct occurring before January 1, 2019, which is the effective date of SB 1421. In two of those cases, the courts have directed local law enforcement agencies not to disclose documents until further proceedings on the issue. (*Los Angeles Police Protective League v. City of Los Angeles* (Super. Ct. Los Angeles County, 2018, No. 18-STCP-03495; *Richmond Police Officers' Association v. City of Richmond* (Super. Ct. Contra Costa County, 2019, No. 19-0169)). Therefore, until the legal question of retroactive application of the statute is resolved by the courts, the public interest in accessing these records is clearly outweighed by the public's interest in protecting privacy rights. (Gov. Code, § 6255.) We will not disclose any records that pre-date January 1, 2019 at this time.

Lastly, SB 1421 provides for the disclosure of responsive records "pursuant to the California Public Records Act." (Pen. Code, § 832.7, subd. (b)(1).) Attorney work product, attorney client privilege, deliberative process privilege, and official information privilege are incorporated into the Public Records Act as an exemption from disclosure. (Gov. Code, § 6254, subd. (k); *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833.) In particular, the attorney work product exception protects the confidentiality of any writing that is maintained as confidential and that reflects an attorney's impressions, conclusions, opinions, legal research, or legal theories. (Code Civ. Proc. section 2018.030.) Some of the records you have requested are exempt from disclosure because they are protected by the attorney work product doctrine and privileges listed above. These records will not be disclosed.

Sincerely,



MARK R. BECKINGTON

Supervising Deputy Attorney General

For XAVIER BECERRA
Attorney General

MRB: