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FILED
San Francisco County Superior Court

JAN 07 2020

CLERK OF THE COURT

BY: *Salene Polonio*
Deputy Clerk

8 Attorney for Plaintiff Michael Brodheim

9
10 SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

11 Michael Brodheim,

12 Plaintiff,

13 v.

14 California Department of Corrections and
15 Rehabilitation,

16 Defendant.

Case No. CPF-20-516978

17 Verified Petition for Writ of Mandate to
18 Enforce the Public Records Act

Judge:

Hearing Date:

Department:

19 Trial Date: none set
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BY FAX

Brodheim v. CDCR

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

1 1. The California Department of Corrections and Rehabilitation (“CDCR”) is refusing to release
2 records showing the race of persons who appeared for parole consideration before the Board of
3 Parole Hearings, claiming that disclosure of this information would cause an unwarranted invasion
4 of privacy under Government Code § 6254(c).

5 2. Plaintiff Brodheim has already challenged this refusal by sending the CDCR a copy of this
6 Court’s order that rejected this exact argument in a prior case, *ACLU of Northern California v.*
7 *CDCR*, No. CPF-16-515083. In that litigation, this Court ordered the CDCR to release the race of
8 prisoners serving life-without-parole sentences for crimes they had committed as juveniles. A true
9 copy of the October 14, 2016 Order on Petition’s Motion for a Writ of Mandate in that case is
10 attached to this Petition as Exhibit A. But the CDCR continues to refuse to release this same type of
11 information here, asserting that because this Court’s Order does not constitute binding precedent, it
12 will not apply it.

13 3. An analysis of similar data from 2014-2015 — released after that earlier litigation — found
14 “significant differences in [California’s] parole grant rate among different racial groups” when other
15 potentially confounding variables are held constant. *See* Kristin Bell, *A Stone of Hope: Legal and*
16 *Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 *Harvard Civil Rights-Civil*
17 *Liberties Law Review*, 455, 473, 486 (2019). Specifically, Dr. Bell determined that “[i]n the
18 majority of categories, the grant rate among Black candidates is lower than that of candidates of
19 other racial/ethnic groups.” *Id.*

20 4. Disclosure of the requested records is necessary to allow the public to see whether similar
21 racial disparities exist in CDCR’s more-recent parole decisions.

22 5. Because the CDCR improperly refuses to release these records, Plaintiff brings this Petition.

23 **1. PARTIES¹**

24 6. Petitioner Brodheim is a member of the public as defined by the California Public Records
25 Act (“CPRA”). He is a California resident who pays sales, income, and other California taxes.

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28 ¹ This Petition refers to the parties as Plaintiffs and Defendants as authorized by Code of Civil
Procedure § 1063.

1 7. Respondent CDCR is a public agency within the meaning of Government Code § 6252(d). It
2 is the parent agency of the Board of Parole Hearings (“Board”).

3 8. The CDCR possesses the records sought by this Petition.

4 2. JURISDICTION AND VENUE

5 9. This Court has jurisdiction under Government Code §§ 6258 and 6259, Code of Civil
6 Procedure § 1085, and Article VI of the California Constitution.

7 10. Venue is proper in this Court. Because the California Attorney General has an office located
8 in the City and County of San Francisco, any suit against the CDCR that may be brought in
9 Sacramento may also be commenced and tried in this Court. Code Civ. Pro. § 401(1). The records in
10 question, or some portion of them, are situated in the County of Sacramento, meaning that suit may
11 be brought in that County. Gov. Code § 6259(a); Code Civ. Pro. § 401(1). In addition, the CDCR
12 resides in, and the acts and omissions complained of herein occurred in, Sacramento. *See* Code Civ.
13 Proc. §§ 393, 395(a).

14 3. FACTS

15 11. Brodheim is a graduate student at San Francisco State University, currently enrolled in the
16 University’s Master’s in Public Administration program. One of the courses he is now taking
17 requires that he set up a research project, which he will then complete when he takes Applied Data
18 Analysis next semester. Brodheim has chosen to look at parole outcomes for prisoners who are
19 eligible for release at the discretion of the Board, including prisoners sentenced as youthful
20 offenders. One of his research questions is whether parole outcomes depend on the race/ethnicity of
21 the parole applicant; a related question is whether parole outcomes depend on the race/ethnicity of
22 the Commissioners who conduct the parole consideration hearings for the Board.

23 12. On September 18, 2019, Brodheim submitted a CPRA request to the Board asking for
24 records containing 14 categories of information with respect to lifer parole consideration hearings
25 conducted by the Board between July 1, 2018, and June 30, 2019. On September 22, 2019,
26 Brodheim amended his request to include two additional pieces of information. Brodheim requested
27 the following pieces of information: (1) the name of the parole applicant; (2) his/her prison ID
28 number; (3) the gender of the parole applicant; (4) the controlling commitment offense (e.g., murder

1 1st or murder 2nd); (5) the sentence (e.g., 25 years to life or 15 years to life); (6) the parole
2 applicant's minimum eligible parole date; (7) the prison where the parole hearing was conducted; (8)
3 the names of the Commissioners who conducted the hearing; (9) whether it was a youthful offender
4 hearing; (10) whether it was an elder parole hearing; (11) whether it was a "three strikes" hearing;
5 (12) whether parole was granted or denied; (13) the length of the parole denial (if parole was
6 denied); (14) if parole was granted, whether the Board's decision was subject to reversal by the
7 Governor under Penal Code Section 3041.2; (15) whether the Governor reversed the Board's
8 decision, or if the Governor's decision was still pending (in the event that the parole grant was
9 subject to reversal by the Governor); and (16) the race/ethnicity of the parole applicant, as identified
10 in CDCR records. *See Ex. B.*²

11 13. On September 30, 2019, the Board responded to Brodheim's CPRA request, indicating that
12 the requested information was not readily available; that it would be necessary to construct a
13 computer program to extract and compile the data; that it would be necessary to consult with
14 CDCR's Office of Research for assistance in gathering the data; and that, under Government Code
15 Section 6253.9(b), Brodheim would have to bear the cost of producing a copy of the record,
16 including the cost to construct a record and the cost of programming and computer services
17 necessary to produce a copy of the record. *See Ex. C.*

18 14. Over the next month, Brodheim obtained some of the requested information from the Board,
19 but not the race and ethnicity data. In early November, the Board indicated that Brodheim should
20 contact another part of the CDCR about this data.

21 15. On October 23, 2019, Brodheim submitted a CPRA request to CDCR, indicating that he had
22 obtained from the Board a list of inmates who had had parole hearings in fiscal year 2018-2019.
23 Brodheim indicated that there were close to 3200 names on the list; he offered to share the list with
24 CDCR via a PDF file. Brodheim requested the race/ethnicity of each inmate on the list. *Ex. D.*

25 16. On November 5, 2019, the OR's PRA Coordinator denied this request (identified as PRA
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28 ² The exhibits to this Petition are true copies of the documents that they appear to be and are
incorporated into this Petition. Some repetitive parts of email chains are not included.

1 15011), stating that “Per Government Code section 6254(c), CDCR is unable to release offenders’
2 additional personal identifying information, such as race and/or ethnicity.” Ex. E.

3 17. On November 5, 2019, Brodheim responded to the OR’s denial of his CPRA request,
4 indicating (1) that, because he had not requested disclosure of “[p]ersonnel, medical, or similar
5 files,” Government Code Section 6254(c) was not applicable to his CPRA request; and (2) that,
6 notwithstanding its claim that it could not do so, CDCR had in fact disclosed racial/ethnic data to
7 Kristen Bell, who had just had an article published in the Harvard Civil Rights-Civil Liberties Law
8 Review. Brodheim provided a citation and link to the article³ and specified the page where
9 discussion of the race/ethnicity of youthful offender parole applicants commenced. He indicated that
10 since CDCR had disclosed race/ethnicity data, clearly Government Code Section 6254(c) did not
11 prevent disclosure of that information. Ex. F.

12 18. On November 8, 2019, the Office of Research responded that it had completed a thorough
13 search of outgoing data and stated that it had *not* released racial/ethnic data to Kristen Bell. It
14 speculated that she had gotten her data from Board transcripts, which “are open to the public and
15 may provide ethnicity details.” It then reiterated that it would not, “[u]nder the auspices of Public
16 Records Act,” release “ethnicity of individual inmates.” Ex. G.

17 19. Although Brodheim had never indicated to the Office of Research, that he was doing
18 research, on November 8, 2019, that Office sent Brodheim information about its research protocols.
19 It indicated that the current research application review cycle had closed on May 10, 2019, and that
20 the next cycle would open after the first of the year 2020. Ex. H.

21 20. In response to a further request, the CDCR disclosed records showing that it initially agreed
22 to release race and ethnicity data to Dr. Bell under its research protocols, but then did not take action
23 on the proposal. *See* Ex. I.

24 21. On November 20, 2019, Brodheim responded to the denial of his CPRA request by noting (1)
25 that CDCR had released racial/ethnic data to Dr. Bell and that, pursuant to Government Code

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27 ³ A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions.
28 *Harvard Civil Rights-Civil Liberties Law Review*. 2019. Vol. 54: 455-548, available at
https://harvardcrcl.org/wp-content/uploads/sites/10/2019/07/54_2-K-Bell.pdf.

1 Section 6254.5, that disclosure constituted a waiver of the exemptions specified in Section 6254 or
2 6254.7 of the Government Code, or other similar provisions of law; and (2) that, in any event,
3 CDCR was violating this Court's October 14, 2016 Order in Case No. CPF-16-515083, *ACLU-NC v.*
4 *CDCR*, holding that the specific sections CDCR was now citing could not be used to withhold the
5 racial/ethnic data being requested. Brodheim attached a copy of the referenced Court Order to his
6 communication and urged CDCR to reconsider its response to his previous request. Ex. J.

7 22. On December 11, 2019, the OR responded that this court's ruling in *ACLU-NC v. CDCR* was
8 not binding legal precedent. It also claimed that the information it had disclosed to Dr. Bell had been
9 released pursuant to the Information Practices Act, not the CPRA, that she had agreed to keep the
10 information confidential, and that therefore the disclosure did not constitute a waiver under
11 Government Code Section 6254.5. Ex. K.

12 23. The CDCR has not released the requested records.

13 24. The Department releases to the public information relating to escaped inmates, including the
14 individual's race, under the CDCR's Department Operations Manual § 13010.9.

15 25. The CDCR possesses publicly available records that show the race of many if not all inmates
16 who had parole hearings in 2018-2019, including hearing transcripts that must be made available to
17 the public under Penal Code § 3042(b) and judicial records obtained from the sentencing courts.

18 26. The research review process takes a number of months and there is no guarantee that the
19 CDCR will grant its approval for the proposed research. The process requires the researcher to
20 submit, *inter alia*, a preliminary assessment request and an agreement to comply with the
21 Department's confidential data policy. The researcher must also secure local Institutional Review
22 Board approval, approval from the California Committee for the Protection of Human Subjects, and
23 final approval from the Department's ROC. It took well over a year for Dr. Bell to obtain the
24 information she requested.

25 4. THE PUBLIC INTEREST IN THE REQUESTED RECORDS

26 27. The public interest in disclosure of the requested records is strong. Questions surrounding
27 racial disparities in the criminal-justice system are the topic of intense debate, both nationally and in
28 California. As the Legislature has recently recognized, even putting aside conscious racism, implicit

1 bias continues to adversely affect socially stigmatized groups – particularly African Americans – in
2 the criminal-justice system. *See* 2019 Stats. cf. 418 § 1 (AB 242) (requiring Judicial Council to take
3 steps “to ameliorate bias-based injustice in the courtroom.”).

4 28. Looking more narrowly at the question of whether decisions to grant parole are infected with
5 implicit or explicit racial bias, scholars have used individualized race data like those here at issue to
6 come to varying conclusions. Dr. Bell’s regression analysis of CDCR data relating to youth-offender
7 parole grants found that “Black candidates face significantly lower prospects of parole when
8 disciplinary history and participation in programs are held constant, and when a regression is run that
9 accounts for fifteen other variables.” Bell, *supra*, at 525; *see id.* at 475-508, 537-548. Studies in
10 other jurisdictions have reached varying conclusions. *See, e.g.*, Shamena Anwar and Hanming Fang,
11 *Testing for Racial Prejudice in the Parole Board Release Process: Theory and Evidence*, 44 *Journal*
12 *of Legal Studies* 1 (2015); Kathryn D. Morgan and Brent Smith, *The Impact of Race on Parole*
13 *Decision-Making*, 25 *Justice Quarterly* 411 (2008); Beth M. Huebner and Timothy S. Bynum, *The*
14 *Role of Race and Ethnicity in Parole Decisions*, 46 *Criminology Issue* 4 (2008). Other researchers
15 have noted the need to ensure that new methods of release decision-making – such as risk-
16 assessment tools – do not aggravate racial disparities in prison release, an endeavor that requires an
17 analysis of these disparities. *See* Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, *The Future of*
18 *Parole Release*, 46 *Crime & Just.* 279, 281 (2017).

19 29. Brodheim seeks the information on race/ethnicity to add to the body of knowledge available
20 to the public regarding the impact of race/ethnicity on parole decisions. He particularly wants to
21 know if Dr. Bell’s finding that the Board’s decisions are influenced by illegitimate factors such as
22 race in its decision-making still holds in its treatment of youthful offenders and adults.

23 30. Generalized statistics showing the rates of parole grants to prisoners of various ethnicities or
24 races are insufficient to allow the public to understand the process. As the above studies show,
25 individualized data that show the particulars of each individual case are necessary to account for
26 potentially confounding factors such as the seriousness of the offense, efforts at rehabilitation, and
27 representation by retained counsel at parole hearings.

28 31. The government must not be permitted to hide the identities and basic information about the

1 people in our state prisons—particularly when there is now a question, raised by Dr. Bell’s research
2 findings, regarding the extent to which the Board’s release decisions are affected by race. Allowing
3 the public access to this basic information is critical to ensuring that the public and the Legislature
4 can see how California officials are discharging their duties. Additionally, it is critical for the Board
5 itself to know the extent to which its Commissioners’ decisions are influenced by bias, implicit or,
6 otherwise, in making decisions to grant or deny parole, so that the Board can know whether it should
7 implement training or take other remedial steps.

8
9 **FIRST CAUSE OF ACTION**
10 **Violation of the California Public Records Act, Gov. Code § 6250 *et seq.*, and**
11 **Article I, § 3 of the California Constitution**

12 32. Plaintiff incorporates by reference the above allegations, as if set forth in full.

13 33. The CPRA requires the disclosure of the records that Brodheim requested.

14 34. The CDCR’s refusal to disclose the requested records violates the CPRA and Article I, § 3 of
15 the California Constitution.

16 **RELIEF REQUESTED**

17 Brodheim therefore asks the Court for the following:

- 18 1. A writ of mandate directing Defendant CDCR to provide Petitioner Brodheim with the
19 requested records, including records showing the race/ethnicity of the applicants it
20 considered for parole between July 1, 2018, and June 30, 2019, inclusive.
- 21 2. A writ of mandate prohibiting Defendant CDCR from refusing to release data showing the
22 race/ethnicity of the applicants it considered for parole in response to future CPRA requests.
- 23 3. Attorney’s fees and costs.
- 24 4. Such other and further relief as the Court deems proper and just.

25 January 7, 2020

26 By: 

27 Michael T. Risher
28 Attorney for Plaintiff

VERIFICATION

I, Michael Brodheim, am the plaintiff in this matter. I have read the foregoing Petition for a Writ of Mandate to Enforce the Public Records Act. I have personal knowledge that the facts stated in paragraphs of the Petition 1-4, 6, 11-23, and 28-30 are true. I am informed, and do believe, that the matters stated in the remainder of the Petition are true. On these grounds I allege that the matters stated herein are true.

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

DATED: _____

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

DATED: 1/6/2020

Michael Brodheim