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San Francisco Police Commission
1245 Third Street, 6th Floor
San Francisco, CA 94158

Re: Record Disclosure Dispute

Dear Members of the San Francisco Police Commission:

In 2016, the San Francisco Police Department and the San Francisco District Attorney's Office entered a Memorandum of Understanding wherein the District Attorney assumed responsibility for criminally investigating all officer-involved shootings. To protect the integrity of these investigations, the District Attorney maintains that all evidence, generated either by the District Attorney or the Police Department, belongs to the District Attorney and may not be disclosed to third parties until the close of the criminal investigation. In support of this position, the District Attorney cites the official information privilege and its investigative authority under state law. Local law, however, empowers the Department of Police Accountability to administratively investigate officer-involved shootings. Additionally, DPA possesses a subpoena power, whereby it may compel production of records from any other City agency, unless disclosure violates state or federal law.

The question before the Commission is whether DPA may invoke its subpoena power to compel the Police Department to provide records of an ongoing criminal investigation, to which the District Attorney claims privilege. For three reasons, the answer is no.

First, the official information privilege prohibits disclosure to DPA. Second, DPA may not subpoena records of an on-going criminal investigation because doing so would interfere with the District Attorney's investigative and prosecutorial functions. Third, DPA previously agreed to receive the District Attorney evidence only after the completion of the District Attorney's investigation.

The Commission must also decide a procedural obstacle: the Commission lacks authority to decide this controversy because the dispute is between the District Attorney and DPA, but the Commission lacks jurisdiction over the former.

I. The Commission lacks authority to decide disputes between DPA and the District Attorney.

A. The Commission may only decide disputes between the Police Department and DPA.

The Police Commission must determine whether it is empowered to decide this matter. The Commission's power "is limited to that conferred by statute or the Constitution."[1] "An administrative agency must act within the powers conferred upon it by law and may not act in excess of those powers. Actions exceeding those powers are void."[2]

The Commission may only decide disputes between DPA and *the Police Department*. DPA brought this matter to the Commission by invoking the document dispute protocol.[3] That protocol's stated purpose is "to ensure the timely response to [DPA] requests to the SFPD for documents and other materials . . . ."[4] The appeal procedure specifically regards disagreements between DPA and the Police Department.[5] The District Attorney is neither mentioned in nor is it party to the protocol. Moreover, the power to enter the protocol stems from Administrative Code section 96.3, which sets forth a dispute resolution process that considers disputes between DPA and the Police Department. [6] Like the protocol, that section makes no mention of the District Attorney.

B. The Police Commission lacks jurisdiction because the District Attorney is the real party in interest.

Facially, this case appears properly before the Commission. DPA requested documents from the Police Department, who denied the request. But a deeper look shows that this is a disagreement between DPA and *the District Attorney*, with the Police Department acting merely as an agent of the latter.[7]

As the lead investigator in the criminal inquiry, the District Attorney exercises authority over the investigations' evidence, so long as the criminal investigation or prosecution remains open. The Police Department ceded this investigative authority to the District Attorney's Office because "the District Attorney . . . is not under the auspices of the [SFPD]."[8] It would contradict this purpose to find that the District Attorney leads the investigation, but the Police Department—whose members are being investigated—is the ultimate authority on when and where to disclose the District Attorney's evidence. Thus, when the Police Department ceded authority to the

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[1] *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 135, fn. 19 (2019).
[2] *Am. Fed'n of Lab. v. Unemployment Ins. Appeals Bd.*, 13 Cal. 4th 1017, 1042 (1996).
[3] DPA Opening Memorandum at 1, Sep. 22, 2023 (citing *Protocol Between the Office of Citizen Complaints and the San Francisco Police Department re: Responding to Request for Documents for OCC Investigations,* Jul. 16, 2003 ("Protocol")).
[4] *Protocol* at 1, § I.
[5] *Id.* at 2, § IV.
[6] Admin. Code § 96.3(b).
[7] City Attorney Memorandum at 6, Sep. 20, 2023.
[8] *Id.* at 4.

District Attorney to investigate officer-involved shootings, the Police Department necessarily lost control over evidence subject to those investigations. Therefore, this dispute cannot be between the Police Department and DPA—as the former lacks any agency and authority—but is instead between DPA and the District Attorney. This answers this dispute: the Commission cannot command the District Attorney and therefore cannot enter judgment here.

II. The official information privilege prevents disclosure to DPA.

Even if the jurisdictional issue were overcome, the official information privilege prevents disclosure to DPA until the close of the District Attorney's criminal investigation. All evidence gathered during a criminal inquiry is considered official information and withholding the evidence until the investigation's closure is appropriate because the District Attorney's interest in confidentiality outweighs DPA's interest in immediate disclosure.

A. DPA's subpoena power is not absolute; it is limited by state law, including legal privileges.

DPA argues that its subpoena power is so absolute that it may ignore the official information privilege and, by implication, any privilege. While DPA may compel the Police Department—and any City agency—to produce documents, DPA may not compel unlawful conduct.

1. DPA may not compel disclosure of privileged evidence.

All City departments, including the District Attorney, must provide records to DPA upon request.[9] No production is required, however, when disclosure is "prohibited by state or federal law."[10] DPA's subpoena power is also reflected in Administrative Code section 96.3(a), which states that "the Police Department shall promptly disclose all documents and records requested by DPA except where disclosure to the DPA is prohibited by law."

Privileged documents are not subject to disclosure because privileges by their nature "grant someone the legal freedom to do or not to do a given act."[11] That is particularly true here, where the Police Department is compelled by the holder of a privilege to withhold records.[12] If DPA could compel production of privileged records absurdity would ensue: DPA could compel attorney-client privileged communications between department heads and their lawyers,[13] communications between patients and their doctors,[14] statements between a domestic violence

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[9] San Francisco City Charter § 4.136(j).
[10] *Id.*
[11] *Privilege, Black's Law Dictionary* (11th Ed. 2019).
[12] Evid. Code § 1040(b) ("A public entity has a privilege to refuse to disclose official information, *and to prevent another from disclosing official information* . . . ." (emphasis added)).
[13] Evid. Code § 954 (Lawyer-Client Privilege).
[14] Evid. Code § 994 (Physician-Patient Privilege).

survivor and their counselor,[15] the identities of confidential informants,[16] and so on. This is an unreasonable consequence the Charter does not contemplate.[17]

2. The statutory scheme limits DPA's authority.

In an apparent concession that it may not subpoena privileged records, DPA instead argues that disclosure in this matter is not governed at all by the power described in the Charter and section 96.3, but instead by Administrative Code section 96.11, which purportedly contains a silent but unbound subpoena power. According to DPA, that OIS-specific section mandates that the "Police Department . . . shall provide the DPA with prompt and full cooperation and assistance." But since that section has no limiting language, "SFPD's reliance on Evidence Code § 1040, at least when it comes to OISes is misplaced."[18] This asks the Commission to ignore the statutory scheme as a whole and argues that DPA's subpoena power is so absolute that the Police Department must comply *even if compliance is unlawful.*

When determining the meaning of a statute, "we begin by examining the statute's words, giving them a plain and commonsense meaning. We do not, however, consider the statutory language in isolation. Rather, we look to the entire substance of the statute . . . in order to determine the scope and purpose of the provision . . . ."[19] "We must harmonize the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statuary framework as a whole."[20] Finally, "[a] word or phrase repeated in a statue should be given the same meaning throughout."[21]

A whole reading of the applicable law demonstrates that the Police Department is not required to comply with an unlawful DPA disclosure request. Section 96.11 does not qualify DPA's subpoena power, because it does not *define* DPA's subpoena power.[22] Rather, the section (1) merely establishes DPA's authority to investigate OISes; and (2) commands the Police Department to cooperate with and assist DPA in carrying out its investigative function. But what "full cooperation and assistance" means is clarified by section 96.3(a):

> In accordance with the obligation of the Police Department . . . under Charter Section 4.127 to provide prompt and *full cooperation and assistance* in connection with complaints being investigated by the DPA, the Police Department shall promptly disclose all documents

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[15] Evid. Code § 1037.5 (Domestic Violence Counselor-Victim Privilege).
[16] Evid. Code § 1041 (Privilege for Identity of Informer).
[17] *People v. Bullard*, 9 Cal.5th 94, 107 (2020) ("[W]e must instead choose a reasonable interpretation that avoids absurd consequences . . . .").
[18] DPA Op. Mem. at 4.
[19] *People v. Murphy*, 25 Cal.4th 136, 142 (2001) (citations omitted).
[20] *People v. Acosta*, 29 Cal.4th 105, 114 (2002).
[21] *Id.*
[22] Ironically, even if DPA's hyper-focused reading were appropriate, it would still not lead to the result DPA suggests: not only does section 96.11 not mention the subpoena power's limiting language, it does not specifically mention the subpoena power *at all*. This would not lead to DPA's preferred interpretation—that it has an absolute subpoena power—*but that it does not have* any *subpoena power in OIS investigations.*

> and records requested by the DPA except where disclosure to the DPA is prohibited by law.

One cannot find that "full cooperation and assistance" means that the Police Department must provide records unless unlawful in one context, but where that same phrase is used elsewhere it suddenly takes on a whole new meaning. Moreover, where DPA's subpoena power is specifically mentioned, both in Charter section 4.136(j) and Administrative Code section 96.3, the limiting language is included.

Even if the statute's language were ambiguous, "consideration must be given to the consequences that will flow from a particular interpretation."[23] We must assume a reasonable result; "not absurd consequences."[24] DPA's interpretation would mean the Police Department would be required to produce not only privileged documents but other documents that are specifically forbidden under state law, such as juvenile records and CLETS information.

B. The official information privilege applies to evidence in the District Attorney's ongoing investigation.

Finding that privileges prevent disclosure, the Commission must now determine whether the official information privilege applies. This requires a two-step analysis. First, the Commission must determine whether the evidence is considered official information. If so, the Commission must then determine whether the District Attorney's interest in non-disclosure outweighs DPA's interest in disclosure.

1. Evidence acquired during a criminal investigation is "official information."

The official information privilege applies to "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."[25]

The District Attorney's ongoing investigative files are by their nature "official information." "The official information privilege applies to information obtained in the course of a governmental investigation."[26] This includes "official non-public information obtained by prosecutors and their law enforcement counterparts."[27] More specifically, the California Supreme Court has held that "*ongoing* [criminal] investigations fall under the privilege for official information."[28] The records here unequivocally qualify as official information because they are part of the District Attorney's on-going criminal investigation.

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[23] *Cal. School Employees Ass'n v. Governing Bd. of South Orange County Community College*, 124 Cal.App.4th 574, 588 (2004).
[24] *Id.*
[25] Evid. Code § 1040(b)(2).
[26] *Wood v. Superior Court of San Diego County*, 46 Cal.App.5th 562, 584 (2020).
[27] *Electronic Frontier Foundation, Inc. v. Superior Court*, 83 Cal.App.5th 407, 417 (2022).
[28] *People v. Suff*, 58 Cal.4th 1013, 1059 (2014) (emphasis added).

a. DPA misstates the meaning of "acquired in confidence."

DPA argues that the records are not official information because they were not "acquired in confidence."[29] DPA misstates the meaning of "acquired in confidence." Evidence in an *ongoing* criminal investigation is assumed to have been acquired in confidence.

In *County of Orange v. Superior Court*, a litigant argued, as DPA does here, that the privilege did not apply to an open criminal investigative file where certain evidence, such as witness statements, photos, and police reports, was "not acquired in confidence."[30] In rejecting this argument, the Court noted this "emphasis on the manner in which the file's contents were gathered misses the point. . . . Evidence gathered by police as part of an *ongoing* criminal investigation *is by its nature confidential*."[31] The Court found "no need to separately analyze the manner in which each element of the file was obtained for application of the official information privilege."[32]

2. The balancing test weighs in favor of non-disclosure while the criminal case is open because the District Attorney's interest is at its height, whereas DPA's is at its low.

The second step entails a balancing test. "A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if . . . [¶] (2) [d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice."[33] To conduct this test, the Commission must consider "the consequences to the litigant of nondisclosure, and the consequence to the public of disclosure."[34]

a. The District Attorney's interest in non-disclosure is at its peak during the investigation because disclosure could cause interference.

Cases reviewing the consequences for disclosure of investigative files return to similar themes: (1) evidence could reach suspects; (2) evidence could influence witnesses; and (3) non-confidentiality could dissuade witness participation. These concerns apply here.

First, although DPA has a duty of confidentiality, information could still reach suspects. Presumably the reason why DPA insists on immediate disclosure is that it wishes to use that evidence to conduct compelled interviews of subject officers during the pendency of the criminal investigation. Information could be leaked, however inadvertently, to targets of the District Attorney's investigation through this questioning. This could result in adverse consequences as leaks would "enable [suspects] to invent stories, explain away evidence thus far gathered, and intimidate or otherwise influence potential witnesses."[35]

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[29] DPA Op. Mem. at 5.
[30] 79 Cal.App.4th 759, 764 (2000).
[31] *Id.* (emphasis added) (*Cf. Shepherd v. Superior Court*, 17 Cal.3d 107, 124 (1976) [holding that voluntary statements of a *closed* investigation are not considered confidential]).
[32] *Id.* at 765.
[33] Evid. Code § 1040(b).
[34] *County of Orange*, 79 Cal.App.4th at 765.
[35] *Id.* at 766.

Second, disclosing evidence also runs the risk that witnesses could be tainted. DPA could—and would, for why else would it want the evidence now—use District Attorney information to conduct not only suspect but also witness interviews, which in turn may influence those witnesses.[36] These witnesses could then, armed with information from DPA interviews, provide tainted statements to criminal investigators. This is of particular concern where a witness could initially refuse to speak to criminal investigators, wait to be interviewed by DPA, and then return to criminal investigators now armed with new information.

Third, witnesses could be dissuaded from cooperating at all with the District Attorney if they knew their statements would immediately be furnished to DPA. "Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward."[37] This is perhaps even more of a concern in the case of confidential or anonymous informants, who may be unwilling to come forward if they knew their statements and, even identity, would be immediately turned over to DPA during a criminal inquiry.[38]

Of course, the cases on point were decided in the context of public disclosure, whereas DPA is subject to confidentiality. But the distinction is one without a difference. The overriding harm is that information could flow to suspects and witnesses. That harm is still present here, as the only reason DPA could want immediate disclosure is for immediate use.

Ultimately, the deference given to on-going criminal investigations cannot be understated. The law is clear: "Ongoing investigations fall under the privilege for official information."[39] Furthermore, the law considers criminal investigations of the highest importance: "Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints."[40] In criminal matters, "[e]very effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable."[41] Finally, evidence of an ongoing investigation is presumed to be confidential.[42] Allowing DPA to compel evidence of an ongoing District Attorney investigation interferes with that paramount public policy goal.

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[36] DPA can compel witness cooperation; the District Attorney cannot.
[37] *See, e.g., Rivero v. Superior Court*, 54 Cal.App.4th 1048, 1059 (1997).
[38] DPA argues that the Police Department could simply redact information. But this contradicts their argument that their subpoena power is absolute. If the Police Department cannot withhold records, why would it be able to redact them?
[39] *People v. Jackson*, 110 Cal.App.4th 280, 287 (2003).
[40] *Rivero*, 54 Cal.App.4th at 1059.
[41] *Id.*
[42] *See County of Orange,* 79 Cal.App.4th at 764 ("Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential.").

b. DPA's interest in disclosure is at its lowest during the criminal investigation because DPA has no legal need to begin its investigation and is incentivized to wait until the end of the criminal proceeding.

DPA has a negligible interest in *immediate* disclosure: DPA can fulfill its mandate to investigate officer-involved shootings just as ably, if not better, by waiting until the close of the criminal investigation.

First, there is no legal requirement that DPA complete its investigation with all due haste. In fact, the law presumes that administrative investigations *follow* criminal investigations, because the statute of limitations for administrative investigations tolls during criminal matters.[43] Indeed, while DPA has made much of its authority to investigate officer-involved shootings *generally*, DPA has made no argument regarding why it *immediately* needs the District Attorney's criminal investigation files.

Second, DPA *benefits* by waiting until the close of the investigation. At that point, DPA receives the District Attorney's investigation file. DPA may then review the District Attorney's analysis, all witness statements, reports, physical evidence, and so on. DPA is then able to build their own investigation off the criminal matter and focus resources where needed, rather than starting an investigation out of whole cloth.

Third, in practice, this is precisely what DPA does. We are unaware of a single officer-involved shooting investigation where DPA completed and submitted its report prior to the conclusion of the criminal investigation. In cases where police officers were criminally charged, DPA waited *years* to complete its investigation, as it—wisely—waited to see how the criminal matters would conclude. Not only has DPA offered no compelling reason for requiring the evidence now, but historical practice also proves the point.

DPA only argues that the public interest demands that it receive immediate disclosure.[44] But all DPA points to are recommendations that SFPD collaborate with DPA and conduct more "timely" investigations.[45] But conducting a "timely" investigation does not mean that DPA may ignore privilege, may interfere with the District Attorneys' investigation, or is required to complete their investigation prior to the close of the criminal matter. Cooperating with DPA does not mean the Police Department must act in violation of state law.

III. DPA cannot compel disclosure because that would constitute interference with the District Attorney's investigative function.

Beyond the issue of privilege, DPA may not invoke its powers to interfere with an investigation conducted by the District Attorney.

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[43] Evid. Code § 3304(d)(2)(A).
[44] DPA Op. Mem. at 5.
[45] *Id.* at 5-6.

A. Local governments may not interfere with a District Attorney's investigative function.

District attorneys possess investigative and prosecutorial powers regarding the enforcement of California's criminal law.[46] Since "investigation and prosecution of state criminal law are statewide concerns," local governments, such as the City and County of San Francisco, may not issue—or enforce—"conflicting local ordinances."[47] Local laws that "affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the . . . district attorney" may not be enforced.[48] Importantly, DPA's Charter mandate specifically recognizes that its authority shall not be applied in a manner that interferes with the District Attorney's duties.[49] Thus, while DPA has the general authority to compel records from City departments, it cannot do so in a manner that interferes with the District Attorney's investigative authority.

This of course invites the question: does compelling the District Attorney to provide records of an ongoing criminal investigation unlawfully interfere with the District Attorney's investigative function? Yes, and in all cases.

B. DPA may exercise its subpoena power, but only in a manner that avoids interference with the District Attorney's investigative function.

DPA certainly has the authority to seek disclosure of District Attorney records. But it cannot interfere with the District Attorney's investigations. In *Dibb v. County of San Diego*, the California Supreme Court upheld the creation of an oversight board with subpoena powers similar to DPA's. That support, however, was qualified. The court "assume[d] the [oversight board] will not interfere with the proper functioning" of the district attorney.[50] Thus, while the subpoena power was broadly constitutional, the Court warned that it could find certain exercises unlawful.

Justice Kennard's concurrence demonstrates how that could be: "Our decision should not be misconstrued as evidencing lack of concern with the not inconsiderable risk of conflict between the Board's investigations and those undertaken by the county sheriff or district attorney, *particularly when those investigations are conducted simultaneously*."[51] Whether the oversight committee's subpoena power constituted unlawful obstruction would "depend largely upon the subject under subpoena *and the stage of the investigation being conducted by . . . the district attorney*, and will necessarily be a fact-intensive determination."[52] The implication is clear: the District Attorney's interest in maintaining confidentiality is at its peak during an on-going criminal investigation and should be afforded significant deference.

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[46] Gov. Code §§ 26500, 25303; *Rivero*, 54 Cal.App.4th at 1058.
[47] *Rivero,* 54 Cal.App.4th at 1059.
[48] Gov. Code § 25303.
[49] Charter § 4.136(j) ("Nothing in this Section 4.136 is intended or shall be construed to interfere with the duties of the Sheriff or the District Attorney under state law, including their constitutional and statutory powers and duties under Government Code section 25303 . . . .").
[50] 8 Cal.4th 1200, 1210 & 1218 (1994).
[51] *Id.* at 1219 (Kennard, J., concurring) (emphasis added).
[52] *Id.* (emphasis added).

A second case provides more guidance. In *Rivero v. Superior Court*, the First District held that the San Francisco Sunshine Task Force Ordinance's mandate that the District Attorney disclose closed investigative files conflicted with the District Attorney's investigative function and, therefore, was invalid as applied.[53] The Court noted that the mere *possibility* that witnesses, including confidential informants, could be dissuaded from cooperating if their statements were disclosed was sufficient to show unlawful interference.[54] Perhaps most importantly, the District Attorney was not required to show specific and articulable harm: "The propriety of locally compelled disclosure of a district attorney's closed investigation files is a question of *policy and of law.* It is not to be decided differently in each county based on evidence about a particular district attorney's office or the factual nuances of individuals cases."[55]

C. DPA may not issue blanket subpoenas for records of on-going investigations because that necessarily interferes with the District Attorney's investigation.

So long as the criminal investigation remains open, any disclosure of District Attorney evidence could run the risk of interfering with its investigation, as detailed above in section II(B)(2)(a). Ultimately, once the District Attorney no longer has control over its evidence, it no longer has control over its investigation.

DPA objects to these possibilities on the basis that they are theoretical.[56] But that's precisely the inquiry. The *Rivero* court made clear that there is no requirement that the District Attorney prove in a particular instance that disclosure would interfere and specifically dismissed arguments to the contrary. The question, again, is one of "policy and law." Moreover, the Police Department is not actually in a position where it can provide a fact and case specific basis for interference: the District Attorney—not the Police Department—is the party invoking its power and privilege.

D. A case-by-case approach is unworkable because there is no way for the District Attorney to know the extent to which a particular piece of information could be interpreted.

One may think that a narrow approach, requiring a "case by case"—or "piece by piece"—analysis should be applied here. This would prove to be an unworkable standard that would result in the parties repeatedly relitigating cases.

There often is no way for the District Attorney to truly understand the significance of each piece of evidence in the immediate aftermath of an incident. The value of a particular piece of evidence may not be discovered until late in an investigation or may not be apparent until compared with other evidence. The whole may be greater than the sum of its parts, which the District Attorney may not recognize piece by piece.

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[53] 54 Cal.App.4th at 1058.
[54] *Id.* at 1058-59.
[55] *Id.* at 1058 (emphasis added).
[56] DPA Op. Mem. at 6.

Moreover, there is no guarantee that DPA would abide by the District Attorney's determination that a particular piece of evidence should be withheld. We are here on this very matter because DPA disagrees with the District Attorney's assessment that its evidence is confidential. Requiring a case-by-case analysis would result in the parties relitigating this issue *ad nauseum*.

III. DPA previously agreed not to receive materials until the close of the criminal investigation

A final issue is that DPA has effectively waived the argument it makes here. In their 2018 Memorandum of Understanding, the District Attorney and DPA agreed that the District Attorney would disclose critical incident investigative materials only "*after* declination of criminal charges or completion of all prosecutions relating to the investigation, whichever is later."[57] The agreement also gives the District Attorney carte blanche authority to withhold records it deems "protected."[58] Although DPA seeks materials through the Police Department, the records belong to the District Attorney's critical incident investigation. Mandating disclosure through SFPD would constitute a violation of the agreement DPA has already entered.

The Commission should deny DPA's request to compel production of ongoing investigative records. Mandating disclosure would violate the District Attorney's privilege to maintain confidentiality and would interfere with the District Attorney's investigative function. In short, compelling production would violate state law. DPA may certainly want the records out of convenience for their investigation. But the issue is not what is convenient for DPA; it is what the law requires when balancing the competing interests of the involved parties.

Sincerely,

STEVEN M. BETZ
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Risk Management Office

Total word count: 3,959

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[57] MOU between DPA and District Attorney at 3, Jul. 5, 2018.
[58] *Id.* at 2.