County of San Bernardino
Office of the District Attorney
JASON ANDERSON, District Attorney

Appellate Services Unit

June 14, 2019

Yoel Haile
ACLU of Northern California
39 Drumm St.
San Francisco, CA 94111

Dear Mr. Haile:

This letter is to follow up on our original letter of response, dated May 28, 2019, to your California Public Records Act request. I apologize for it being submitted a bit past the 14-day extension period contemplated by the statute, which is partially due to my own brief absence from the office and some delay in preparing a full time estimate for satisfaction of your your case data request.

You have, of course, made an exceedingly broad request for materials. We conclude that you are effectively asking for:

- Complete identifying, charging and outcome information on **every case** this office prosecuted, adult or juvenile, felony or misdemeanor, during calendar years 2017 and 2018
- Additional detail, including racial data, in regard to diversion programs
- All lifer parole hearing statistics for those years
- All district attorney policy manuals, **not** limited to 2017-2018
- All information on policies and procedures relating to the potential immigration effects of convictions and post-conviction litigation under Penal Code § 1473.7
- All materials created by this office in response to Senate Bill 1421, creating new authority for the obtaining and release of peace officer personnel records

Our response, at this time, is (1) to object to the request in regard to the full case information as overbroad and unreasonably burdensome; (2) to convey to you the anticipated *cost* of generating, compiling and providing that case and diversion information if the request were to be found appropriate as presented; 3) to inform you that we have no responsive documents in regard to diversion programs; (4) to advise you that we keep only a portion of the requested lifer hearing data you seek, but to provide that portion to you without objection (see attached); (5) to object to producing

our office policies on the basis of the exemptions for attorney work-product and deliberate process; (6) to inform you that we have no relevant "policies" on immigration issues, and (7) to inform you that we have no new policies on SB 1421, and to decline to provide any potential materials on the development of such a policy on the basis of attorney work-product and deliberate process.

The details of our position follow.

DATA ON 2017-2018 CASES

We are first compelled to assert that this Public Records Act request, while largely limited to a two-year period, is otherwise so extraordinary broad as to be unreasonable. For that reason, we must object to it on fundamental terms before detailing the projected cost of compliance under Government Code § 6253.9.

To be sure, the California Public Records Act creates a broad right of access on the part of the public, and a public agency must generally comply with a Public Records Act request if it can idenitfy and locate responsive records with "reasonable effort." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 627.) But this does not require agencies to undertake "extraordinarily extensive or intrusive searches." (*Id.*, citing *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440 and *Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 371-372; *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 227, quoting *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165-166.) This means that an agency may properly object to a CPRA request on the basis that it is "overbroad" or "unduly burdensome," or that the documents cannot be located with reasonable effort. (*Fredericks, supra*, at p. 225, citing *First Amendment Coalition, supra*, at pp. 165-166.) Thus "[t]he purposes of the CPRA should be honored through such a reasonableness standard, so that not only an agency response, but the request that generates it, are within reasonable boundaries that are appropriate in light of the statutory scheme." (*Fredericks* at p. 227.)

Here, as you know, you have sought the following information:

1. Records of prosecution data within your possession for calendar year 2017 and 2018, including but not limited to:
    a. Unique identifiers[1] for each person, charges and outcomes for all minors prosecuted directly in adult court in San Bernardino County . . . under Welfare and Institutions Code section 707.
        i. Unique identifiers for each person, charges and outcomes for all minors prosecuted in adult court in San Bernardino County after any one of the following:

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1 We take this term to mean names or dates of birth.

1. A judicial certification to adult court following a juvenile transfer hearing under the newly amended Welfare and Institutions Code section 707, subsection (a);
2. A juvenile defendant's waiver of transfer hearing or stipulation to adult court following the District Attorney's motion to transfer to adult court.

b. Unique case identifiers in juvenile court in San Bernardino County, including but not limited to demographic data, charges filed, and case outcomes during the calendar year[s] of 2017 and 2018.
c. Unique case identifiers, charges, and outcomes (including diversion) of all misdemeanor charges for minors and adults in San Bernardino County.
d. Unique case identifiers, charges, enhancements and outcomes (including diversion) of all felony charges for minors and adults in San Bernardino County.

(CPRA Request, pp. 1-2.)

Since they cover all adults, juveniles, felonies, and misdemeanors, we can only interpret these requests, collectively, to mean that you wish to be provided the names and/or dates of birth, the charges (plus enhancements) and the outcomes for **all cases prosecuted in San Bernardino County** during the two years in question.

For the reasons detailed in our May 28 letter, we cannot provide such information for cases brought and addressed to completion in juvenile delinquency court, as they are inherently confidential and such confidentiality is of stronger force than the provisions of the CPRA. Rather, to see any such records you would be obliged to petition for them in that court itself. (See *T.N.G. v. Superior Court* (1971) 4 Cal.3d 767, *Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103, 106; *In re Keisha T.* (1995) 38 Cal.App.4th 220.)

The remainder of the case data request is, in our eyes, patently overbroad, and thus "unreasonably burdensome." (*California First Amendment Coalition, supra,* 67 Cal.App.4th at p. 166.) While we recognize that the purpose of a CPRA request is not a primary factor in whether it should be honored, the "catchall" exemption to CPRA compliance under Government Code § 6255(a) provides that disclosure may be properly denied when the "public interest in non-disclosure clearly outweighs the public interest in disclosure." A CPRA request that "compels the production of a huge volume of material," or would create excessive expense and inconvenience in segregating non-exempt from exempt information, may satisfy the § 6255(a) requirement. (*American Civil Liberties Foundation v. Deukmejian, supra,* 32 Cal.3d 440, 453, fn. 13; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321.) The failure to articulate any public interest rationale at all for the compilation and disclosure of records and documents would seem to weaken your position under that standard, and the inconvenience (and risk) it creates for the public agency cannot lightly be disregarded.

We are certainly willing to discuss with you the possibility of narrowing the request, which could alleviate our strongest objections and also save you considerable money (see below). Or, of course, a court might find that the request is, even as written, sufficiently reasonable to require a search for responsive materials. And in either scenario, of course, we will comply to the best of our abilities.

To the extent it were found appopriate to divulge any *existing* records, of course, your expenses would be limited to a fixed rate for copying. But your request for, in effect, all available 2017-2018 case records – with the added request for further detail specific to diversion programs – goes far beyond that point, and would indeed require "data compilation, extracting or programming to produce the record," under Government Code § 6253.9. And under that section, and in these circumstances, "the requester shall bear the cost of a producing a copy of the record, including the cost to construct the record."

I have, as indicated, conveyed your request in detail to our Information Technology division, and specifically to the systems analyst who most often undertakes such tasks. To illustrate the scale of the job, she told me that an initial search of cases active in the year 2017 alone (which would include the records of multiple defendants within an individual case) returned more than 90,000 individual records. After several days of consideration and a followup discussion with me, she has now estimated that due to the enormous number of records in question, the time that would be involved in developing the ideal search and sorting functions and the need to assemble the information into digestible form once compiled, your request for case information would take **80 hours** – two full-time work-weeks – to complete. At the most recent rate that I know to have been in effect, which is $52.87 per hour, this would amount to an estimated cost of **$4,229.60**.

We would require that sum to be paid in advance by check or money order, payable to District Attorney – County of San Bernardino, with the understanding that if the time expended actually proved less, we would refund the overpayment to you, and likewise that we would send you a supplemental bill if the actual time exceeded the estimate.

In sum, we must object to the requests for all case information from 2017 and 2018 on the basis that they are overbroad and unduly burdensome, but provide you the projected cost of compliance if our objections were to be overruled. And we are happy to discuss a narrower request.

DIVERSION PROGRAM RECORDS

Relatedly, you next seek:

2. All documents and records related to all diversion programs offered or used by the DA's office, how many people utilized those programs, demographics of those people, the charges they were facing, outcomes of

those cases, requirements for completing diversion, and any charges or costs associated with those diversion programs for calendar years 2017 and 2018.

This, again, is an extremely broad request, and one we cannot realistically fulfill. We do not separately categorize persons and cases addressed within diversion programs, or maintain any related databases, and therefore we not only have no available statistics to provide, we have no realistic method of obtaining them. Moreover, we do not ourselves maintain the "requirements for completing diversion," which are not established by us, but by the courts, and no more would we have any information on "charges or costs associated with these diversion programs," as this, again, is set by and administered by the courts. Finally, we should note that to the extent participants in diversion program take part in active treatment, their treatment records (and identities) are confidential, creating further limits on the information we could provide even if it were otherwise available. We have no responsive documents to provide.

LIFER PAROLE HEARING RECORDS

You then request:

3. All records relating to how many parole hearings the office attended, how many hearings your office opposed, and how many parole hearings your office opposed when the next of kin took no position in the calendar years of 2017 and 2018.

We do maintain a month-by-month database of the numbers of hearings attended, and their outcomes, and I have enclosed it here for the years 2017 and 2018. As you'll see, our data shows that we appeared at **183** hearings in 2017 and **191** in 2018, often by telephone or video-conference rather than in person. The parole-grant rate was 26% in 2017 and 30% in 2018, and the spreadsheet gives a breakdown of the length of parole denials. (As you may note, not a single case resulted in maximum denial, with the great majority being the minimum three-year period.)

We do not keep records of our position on cases. For what it's worth, however, I can tell you as a long-time "fill-in" for the unit that we do not automatically oppose parole, and fairly often do nothing more than make suggestions for conditions of release. I can add that in practice, next-of-kin do not always continue to attend parole hearings in murder cases, so we often act without their direct input, but that such persons are overwhelmingly likely to oppose parole if they have remain involved. But, more fundamentally, our office's position on an inmate's suitability for release – like the Board's – is almost entirely governed by the established factors for suitability.

In sum, I'm providing you the database we maintain, verbatim, and we otherwise have no responsive materials to provide.

"ALL OFFICE POLICIES" AND "RECORDS" RELATING TO IMMIGRATION

You then request:

4. Copies of all office policies, including but not limited to Brady compliance policy, charging and plea deal offer policies, pardons and commutations, etc. Request #3 [sic] is not limited to calendar year 2017 and 2018.

5. Copies of all office policies that relate to immigration including but not limited to:
    a. Records that refer to office efforts to implement its obligations under Penal Code 1016.3(b);
    b. Records that refer to office efforts to implement its obligations under Penal Code 1473.7; [and]
    c. Records, memoranda, and e-mails that relate to the creation and development of an immigration policy for the office.
    d. Request #5 is not limited to calendar year 2017 and 2018.

To take section "5" first, after reviewing our office policies in full I can represent to you that we have no substantive materials to provide. We have created no "policy" in regard to Penal Code § 1016.3. While we very frequently litigate motions under Penal Code § 1473.7, we have no "policy," nor does the statute create "obligations" for us to consider. And we have no "policy" of any kind in regard to the immigration consequences of cases, as we take the request to mean by "immigration policy." Rather, all cases are considered individually, on their merits, including under section 1473.7 – where, for what it is worth, we quite often reach compromise agreements in the interests of justice that may assist immigrant defendants.

Returning to section "4," but applicable also to "5" if any such documents existed, office policies, legal guidance and the requested "records" are inherently attorney work-product, and are not subject to disclosure. Government Code section 6254, subd. (k), provides that that "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege" are exempt from disclosure under the CPRA. And Code of Civil Procedure section 2018.030, in turn, establishes that "(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances," and "(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice."

Thus, such materials are privileged and not subject to CPRA disclosure. While you have not distinguished among the widely varying "policies" put in place by the office, some of which are administrative, we presume you are interested in those of legal substance, guiding our daily actions in court. All such policies are the product of labor,

research and analysis by attorneys within this office for the benefit of other attorneys, and reflect their legal opinions, conclusions and impressions. They are therefore privileged, and we must decline to provide them.

Moreover, in our view the withholding of such materials is also warranted under the "deliberative process" exception, a recognized component of the "catchall" exemption to CPRA disclosure under Government Code section 6255(a). This doctrine is generally considered akin to a claim of "executive privilege" in regard to a request under the federal Freedom of Information Act. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 478.) And it is understood to provide to senior government officials, such as elected district attorneys, a "qualified, limited privilege not to disclose or be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540 [Brown, J., concurring].)

As the California Supreme Court has confirmed, "the key question in every case 'is whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby under the agency's ability to perform its functions.'" (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342 [internal quotation and citation omitted].) The public dissemination of policies that by their nature reflect exactly this analytical process and reveal the inner workings of an agency that seeks to safeguard the public would sabotage its efforts, and in the bargain provide a potential "roadmap" to the legal process and the most effective ways to circumvent or minimize the consequences a lawbreaker would otherwise face. And the disclosure of such documents as internal memoranda and e-mails generated in an attempt to *create* possible "policies" in regard to cases with immigration consequences, as request in section "5," would more clearly yet violate the spirit of the deliberative process rule.

In sum we respectfully decline to provide our office policies under sections 4 and 5, and such materials as e-mails under section 5, on the basis of privilege and exemption.

MATERIALS CONCERNING SENATE BILL 1421

Finally, you seek:

6. All records concerning implementation of SB 1421, including copies of any new policies, training manuals or procedures regarding SB 1421, including any policies, procedures or training manuals for making SB 1421 requests, maintaining SB 1421 records, disclosures of SB 1421 requests to criminal defendants, revisions of any *Brady* policies in light of SB 1421, and all policies and procedures for reviewing all criminal convictions, arrests and charging

decisions, in view of SB 1421. Request #4 [sic] is not limited to calendar year 2017 and 2018.

It goes without saying, I hope, that we are fully mindful of our *Brady* duties in every context, and strictly adhere to our constitutional and statutory obligations. We have, as yet, no formulated office policy in regard to SB 1421, which took effect only in January. I am unaware whether any informal training manuals, other forms of guidance or other office materials on SB 1421 have been generated, but to the extent they do, we would consider all to be plainly exempt from disclosure as attorney work-product and under the deliberative-process exception, detailed above. We therefore can provide you nothing under this request.

CONCLUSION

I recognize, of course, that this will not be a particularly satisfying response to your request, and we are not in a position to consider a waiver of such privileges and exemptions as apply to our internal documents. However, your request for case data does not implicate privilege, but rather is overwhelming in scale and potential cost to us both. If you might wish to discuss a significant narrowing of the request, I'm happy to speak to you on that front, or to respond to any other questions you might have. I am also happy to reconsider the request if I have somehow misunderstood it.

At risk of stating the obvious, too, the case data you have requested from us is generally public information, and San Bernardino County has a free searchable public web site, available at https://portal.sb-court.org/portal, though I realize that it may not be a practical source for data on the scale you seek.

For your reference, I will be away from the office June 21-25, then again in early July, but do feel free to contact me before or after that time.

Regards,

JASON ANDERSON
District Attorney

ERIC M. FERGUSON
Deputy District Attorney
Appellate Services Unit
San Bernardino County District Attorney

LIFER STATS

MONTH	# HRGS	GRANTS	STIPS	DENIALS	3 YR	5YR	7 YR	10 YR	15 YR	TOTAL YRS	% GRANTS
JAN 2017	19	6[1]	2	11	6	4	3	0	0	59	32%
FEB 2017	15	3	1	11	4	5	3	0	0	58	20%
MAR 2017	14	4[2]	0	10	5	4	1	0	0	42	29%
APR 2017	17	3[3]	3	11	5	6	2	1	0	69	18%
MAY 2017	19	4	4	11	5	3	5	2	0	85	21%
JUN 2017	14	4	3	7[4]	5	4	0	0	0	35	29%
JUL 2017	17	4	3	10	7	3	3	0	0	43	24%
AUG 2017	16	3	1	12	8	4	1	0	0	51	19%
SEP 2017	17	3	1	13	9	4	1	0	0	54	18%
OCT 2017	11	4[5]	1	7[6]	6	1	0	0	0	23	36%
NOV 2017	10	4	1	5	3	2	1	0	0	26	40%
DEC 2017	14	3	1	10	8	3	1	0	0	46	21%
TOTALS	**183**	**45**	**21**	**118**	**71**	**43**	**21**	**3**	**0**	**591**	**26%**

[1] One of the grants was reversed by en banc review, but later granted again in October
[2] One of the grants was reversed by the governor
[3] One of the grants was extradited to CO to serve a 20-year sentence
[4] Rescission Hearing – Grant was denied; no term given
[5] Rescission Hearing – Grant was affirmed
[6] Medical Parole Hearing – No term given for denial

LIFER STATS

MONTH	# HRGS	GRANTS	STIPS	DENIALS	3 YR	5YR	7 YR	10 YR	15 YR	TOTAL YRS	% GRANTS
JAN 2018	16	8	1	7	7	0	1	0	0	28	50%
FEB 2018	15[7]	5	3	2	4	1	0	0	0	17	33%
MAR 2018	19[8]	9	2	6	5	3	0	0	0	30	47%
APR 2018	14	2	5	7	9	1	2	0	0	46	14%
MAY 2018	18[9]	6[10]	1	8	4	4	0	1	0	42	33%
JUN 2018	18[11]	0	3	13	9	6	0	0	0	58[12]	0%
JUL 2018	12	6	1	5	4	2	0	0	0	22	50%
AUG 2018	14[13]	4	3	7	6	1	3	0	0	44	29%
SEP 2018	14	4	2	8	4	3	3	0	0	48	29%
OCT 2018	21[14]	6	4	9	9	3	1	0	0	49	29%
NOV 2018	17	3	4	10	8	5	0	1	0	59	18%
DEC 2018	13[15]	4	2	6	6	2	0	0	0	28	31%
TOTALS	**191**	**57**	**32**	**86**	**69**	**31**	**10**	**2**	**0**	**471**	**30%**

[7] 4 hearings were postponed and 1 hearing resulted in a 1 year waiver.
[8] One was a reconsideration hearing and 1 hearing was suspended in the middle, due to the defense attorney becoming ill – it will continue at the next available calendar.
[9] 2 hearings were continued and 1 was waived for 1 year.
[10] 1 Grant was an Expanded Medical Parole Hearing, but the inmate was only subject to a 7-year prison sentence and was not a lifer. If not included in the percentage, our grant rate was 28%
[11] 2 Hearings were continued after they began, resulting in neither a grant nor a denial.
[12] A reconsideration hearing resulted in a maximum 1-year denial.
[13] 3 hearings were postponed.
[14] 1 hearing was waived and 1 hearing was postponed.
[15] 1 hearing was postponed.