

Ellen Leonida, Esq.
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August 13, 2021

VIA EMAIL

Eric M. Ferguson
Deputy District Attorney
Office of the District Attorney of San Bernardino County
303 West Third Street, 5th Floor
San Bernardino, CA 92415
Email: eferguson@sbcda.org

Re: California Public Records Act (“CPRA”) Request (July 23, 2021)

Dear Mr. Ferguson:

I write in response to your August 2, 2021 letter regarding our CPRA Request. Thank you for your response. As you requested, attached is the version of our CPRA letter you were intended to receive, and apologies for any confusion. I also respond to your requests for clarification below.

First, with respect to your request for clarification of the date range of our new Request 4, my July 23 letter specified a time period for responsive records of “2015 to the present.” This date range applies to each of the enumerated requests including, of course, Request 4.

Second, with respect to your request for clarification about the scope of Request 4, that request seeks documents regarding your office’s investigation into *Batson-Wheeler* motions filed against you, those that were granted, any internal training and/or discipline that your office carried out after a *Batson-Wheeler* motion was filed or granted, and any reports by your office to the State Bar following the filing or granting of such motions. Further, as also noted in my letter, there should be no distinction between documents created by your office and documents created by a third party; responsive records must be produced so long as it is (or was) “used” or “retained” by your office.¹

To the extent that you claim any records are exempt from disclosure (as you suggest you will in response to Requests 1, 2 and 3²), please specifically identify in writing the legal

¹ *Id.* § 6252(e); see *California State Univ. v. Superior Ct.*, 90 Cal. App. 4th 810, 824–25 (2001) (concluding that documents which were “unquestionably ‘used’ and/or ‘retained’ by [an agency]” were public records).

² We note that Requests 1 and 2 seek your office’s policies and training materials, neither of which seem likely to be subject to attorney-client or deliberative process privileges, as your letter suggests. See, e.g., *ACLU of N. California v. Superior Ct.*, 202 Cal. App. 4th 55, 75–76 (2011) (“the deliberative process privilege does not justify

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authority for any claimed exemptions and how the record in question is exempt for each individual request.³ We also expect that you will produce any records, in whole or in part, for which you do not claim an exemption as required.⁴ We request that you produce any such records on a rolling basis.

Thank you again for your assistance with this request. We look forward to your further response and production of records.

Sincerely,



Ellen V. Leonida

nondisclosure of a document merely because it was the product of an agency's decision making process.") Also, Request 3 seeks records concerning the RJA, which as you know just went into effect at the beginning of this year, therefore any responsive records that exist are unlikely to be voluminous.

³ Gov't Code § 6255; *see also id.* § 6253(d)(3).

⁴ *Id.* § 6253(a), (c).

Ellen Leonida, Esq.
Partner
leonida@braunhagey.com

July 23, 2021

SENT VIA U.S. MAIL AND EMAIL

Jason Anderson
Office of the District Attorney of San Bernardino
303 West Third Street, 6th Floor
San Bernardino, CA 92415
(909) 382-3800
da@sbcda.org

Re: California Public Records Act Request

To the Office of the District Attorney of San Bernardino:

Pursuant to the California Public Records Act (“CPRA”)¹ and the California Constitution,² I am writing on behalf of the American Civil Liberties Union of Northern California (“ACLU”) to request records relevant to the implementation of California’s Racial Justice Act (“RJA”).³ The RJA was enacted “to eliminate racial bias from California’s criminal justice system” and “to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing.”⁴ The ACLU submits this CPRA request in the public’s interest and as a member of a coalition of community groups, non-profit organizations, academic institutions, and other entities. The records that you produce will help us to implement and realize the objectives of the RJA.

On May 13, 2019, the ACLU submitted an initial CPRA request to your office seeking prosecution data for 2017 and 2018, including certain diversion records, records of your office’s engagement with the parole process, office policy records, and records concerning implementation of Senate Bill No. 1421.⁵ (See **Exhibit 1**, attached.) Your office acknowledge receipt on May 28, 2019, citing exemptions under Welfare and Institutions Code § 827 for juvenile court proceedings. On June 14, 2019, the ACLU received an additional letter from your office stating that all of ACLU’s “requests are overbroad”. The ACLU appealed on June 25, 2019, to which the Office of District Attorney of San Bernardino replied with responses to the first three requests, while asserting work-product and deliberative process exemptions for requests #4, 5, and 6. These are not permissible bases for withholding the requested records.

¹ Gov’t Code §§ 6250 *et seq.*

² Cal. Const., art. I, § 3(b)(2).

³ Pen. Code § 745.

⁴ See AB-2542 *Criminal Procedure: Discrimination*, Stats. 2020, Ch. 317, § 2(i); see also Pen. Code §§ 745, 1473, 1473.7.

⁵ See SB-1421 *Peace Officers: Release of Records*, Stats. 2020, Ch. 988; see also Pen. Code §§ 832.7, 832.8.

Even if a record was created by a member of another government agency, a member of the public, or a private entity, it still must be produced so long as it is (or was) “used” or “retained” by the Office of the District Attorney of San Bernardino.⁶ On July 29, 2019, the ACLU submitted a separate CPRA request to your office seeking training materials concerning (1) jury selection and/or (2) constitutional requirements under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *People v. Wheeler*, 4 Cal. 4th 284 (1993). That request also sought training materials related to the handling of *Batson-Wheeler* claims or motions. (See **Exhibit 2**, attached.) The ACLU did not receive a response from your office.

This CPRA letter constitutes a renewal of the ACLU’s two prior requests (as relevant, updated to the present day) and also a request for the additional following records in the possession or control of the Office of the District Attorney of San Bernardino for the time-period 2015 to present:

Records Requested:

1. Any and all written policies, memoranda, or guidance documents regarding:
 - a. Diversion eligibility and/or programming;
 - b. Custody and/or bail recommendations;
 - c. Charging recommendations and/or decisions, including, but not limited to:
 - i. Charging recommendations and/or decisions regarding enhancements;
 - ii. Charging recommendations and/or decisions regarding special circumstances; or
 - iii. Charging recommendations and/or decisions regarding wobblers;
 - d. Compliance with *Brady v. Maryland*, 373 U.S. 83 (1963);
 - e. Jury selection;
 - f. Sentencing recommendations;
 - g. Prosecution of minors;
 - h. Parole recommendations;
 - i. Pardon and commutation recommendations;
 - j. Reports to the State Bar relating to discipline and/or prosecutorial misconduct;
 - k. Data collection relating to criminal matters, including demographic data of defendants and victims; or
 - l. Referral of cases for federal prosecution.

2. Any and all policies regarding training as well as any training materials, recorded trainings, or related materials:
 - a. Which are mandatory for prosecutors;
 - b. Which are optional for prosecutors;
 - c. Which relate to jury selection;

⁶ *Id.* § 6252(e); see *California State Univ. v. Superior Ct.*, 90 Cal. App. 4th 810, 824–25 (2001) (concluding that documents which were “unquestionably ‘used’ and/or ‘retained’ by [an agency]” were public records); see also *Cty. of Santa Clara v. Superior Ct.*, 170 Cal. App. 4th 1301, 1334 (2009) (“[W]hile section 6254.9 recognizes the availability of copyright protection for software in a proper case, it provides no statutory authority for asserting any other copyright interest.”).

- d. Which relate to bias, implicit bias, unconscious bias, and/or racism; or
 - e. Which relate to presentation and/or use of evidence from social media platforms (including but not limited to YouTube, Snapchat, Instagram, TikTok, Twitter, Facebook, Reddit and Tumblr) and other media (including but not limited to movies, song lyrics, and videos).
3. Records concerning the Racial Justice Act:
 - a. Implementation of and compliance with the RJA;
 - b. Communications concerning the RJA; or
 - c. Trainings related to the RJA.
 4. All investigations into *Batson-Wheeler* motions, including, but not limited to:
 - a. Motions filed;
 - b. Motions granted;
 - c. Internal training and/or discipline; or
 - d. Reports to the State Bar relating to any *Batson-Wheeler* motions made and granted.

In responding to this request, please note that the CPRA broadly defines the term “record.” Specifically, the term includes “any writing containing information relating to the conduct of the people’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”⁷ The CPRA defines, in turn, a “writing” as any “means of recording upon any tangible thing any form of communication or representation.”⁸ The present request therefore applies to *all* paper documents, as well as to *all* emails, videos, audio recordings, text messages, social media, or other electronic records within the Office of the District Attorney of San Bernardino’s possession or control.

As permitted by the CPRA, this request sets forth the specific categories of information that we are seeking, rather than asking for documents by name.⁹ It is your obligation to conduct record searches based on the criteria identified herein.¹⁰ But if you believe the present request is overly broad, you are required to: (1) offer assistance in identifying responsive records and information; (2) describe “the information technology and physical location in which the records exist;” and (3) provide “suggestions for overcoming any practical basis” that you assert as a reason to delay or deny access to the records or information sought.¹¹

The CPRA requires that you respond to this request in ten (10) days.¹² If you contend that an express provision of law exempts a responsive record from disclosure, either in whole or in part, you must make that determination in writing. Such a determination must specify the

⁷ Gov’t Code § 6252(e).

⁸ *Id.* § 6252(g).

⁹ Gov’t Code § 6253(b).

¹⁰ *See id.* §§ 6253–6253.1.

¹¹ *Id.* § 6253.1(a).

¹² *Id.* § 6253(c).

legal authority on which you rely, as well as identify both the name and title of the person(s) responsible for the determination not to disclose.¹³ Additionally, even if you contend that a portion of a record requested is exempt from disclosure, you still must release the non-exempt portion of that record.¹⁴ Please note that the CPRA “endows” your agency with “discretionary authority to override” any of the Act’s statutory exemptions “when a dominating public interest favors disclosure.”¹⁵

Because the ACLU is a non-profit organization and because these requests pertain to matters of public concern, we request a fee waiver. None of the information obtained will be sold or distributed for profit. We also request that, to the extent possible, documents be provided in electronic format. Doing so will eliminate the need to copy the materials and provides another basis for the requested fee-waiver.

If, however, you are unwilling to waive costs and anticipate that costs will exceed \$100, and/or that the time needed to copy the records will delay their release, please contact us so that we can arrange to inspect the documents or decide which documents we wish to have copied and produced. Otherwise, please copy and send all responsive records as soon as possible and, if necessary, on a rolling basis, to: preresponse@braunhagey.com or to Ellen Leonida – PRA Responses, BraunHagey & Borden LLP, 351 California Street, 10th Floor, San Francisco, CA 94104.

Thank you in advance for your assistance with this request. We look forward to receiving your response within 10 days. And once again, if you require any clarification on this request, please let us know.

Sincerely,



Ellen Leonida

¹³ *Id.* § 6255; *see also id.* § 6253(d)(3).

¹⁴ *Id.* § 6253(a), (c).

¹⁵ *CBS, Inc. v. Block*, 42 Cal. 3d 646, 652 (1986); *see also Nat’l Conference of Black Mayors v. Chico Cmty. Publ’g, Inc.*, 25 Cal. App. 5th 570, 579 (2018) (construing the CPRA’s exemptions as “permissive, not mandatory—they allow nondisclosure but do not prohibit disclosure”).

EXHIBIT 1



Northern
California

May 13, 2019

Via U.S. Mail and Email

District Attorney Jason Anderson
San Bernardino County District Attorney's Office
303 W. Third Street San
Bernardino, CA 92415
lbari@sbcda.org

Re: Public Records Act Request

Dear District Attorney Jason Anderson:

We write to request the release of public records from the San Bernardino county's District Attorney's office pursuant to the California Public Records Act (Government Code section 6250 *et seq.*), we seek to obtain the following information:

1. Records¹ of prosecution data within your possession for calendar year 2017 and 2018, including but not limited to,
 - a. Unique identifiers for each person, charges, and outcomes for all minors (any persons under the age of 18) prosecuted directly in adult court in San Bernardino County (adult court is defined as a court of criminal jurisdiction) (otherwise known as "pipeline" or "direct file" cases) 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:

¹ The term "records" as used in this request is defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Govt. Code § 6252, subsection (e). "Writing" is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Govt. Code § 6252 (g).

American Civil Liberties Union of Northern California

EXECUTIVE DIRECTOR Abdi Soltani • BOARD CHAIR Magan Pritam Ray

SAN FRANCISCO OFFICE: 39 Drumm St. San Francisco, CA 94111 • FRESNO OFFICE: PO Box 188 Fresno, CA 93707
TEL (415) 621-2493 • FAX (415) 255-1478 • TTY (415) 863-7832 • WWW.ACLUNC.ORG

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, charges, and outcomes for all minors prosecuted in juvenile court in San Bernardino county, including, but not limited to demographic data, charges filed, and case outcomes during the calendar year 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.
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.
 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.
 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 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.
 - c. Records, memoranda, and emails 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.
 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 is not limited to calendar year 2017 and 2018.

Please respond to this request in ten days, either by providing the requested information or providing a written response setting forth the specific legal authority on which you rely in failing to disclose each requested record, or by specifying a date in the near future to respond to the request. See Cal. Gov't Code § 6255.

If any records requested above are available in electronic format, please provide them in an electronic format, as provided in Govt. Code § 6253.9. To assist with the prompt release of responsive material, we ask that you make records available to us as you locate them, rather than waiting until all responsive records have been collected and copied.

If I can provide any clarification that will help expedite your attention to my request, please contact us at yhaile@aclunc.org.

Because this request is made by a non-profit organization with the intent to make this material accessible to the public as promptly as possible, we request that you waive any fees. However, should you be unable to do so, we will reimburse your agency for the "direct costs" of copying these records plus postage. If you anticipate these costs to exceed \$50.00, please notify us prior to making the copies.

Thank you in advance for providing the records we have requested. Please do not hesitate to contact us with any questions regarding this letter.

Yours Truly,

Yoel Haile
Criminal Justice Associate
ACLU of Northern California

EXHIBIT 2



Northern
California

July 29, 2019

Transmitted by email

San Bernardino County District Attorney's Office
303 West Third Street, 6th Floor
San Bernardino, CA 92415
Email: da@sbcda.org

Re: Request for Records Pursuant to the California Public Records Act

To Whom it May Concern:

I am writing on behalf of the American Civil Liberties Union of Northern California to request records pursuant to the California Public Records Act, California Government Code sections 6250 to 6270 and article 1 section 3(b) of the California Constitution.

I seek copies of the following materials in the agency's possession, regardless of who wrote them, from 1990 onwards:

1. Any training materials related to jury selection
2. Any training materials related to the constitutional requirements under *Batson v. Kentucky* and *People v. Wheeler*, including training materials related to handling *Batson-Wheeler* claims or motions.

Batson v. Kentucky (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258. This request construes "materials" to mean any records¹, publications, memoranda, writings, electronic data, mail, media files, nonstandard documents, or other forms of communication.

In the case that this request is found to be insufficiently focused or effective, California Government Code Section 6253.1(a) requires (1) Assistance in identifying the records and information that are responsive to this request or to the purpose of this request; (2) Description of

¹ The term "records" as used in this request is defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252, subsection (e). "Writing" is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." Cal. Gov't Code § 6252, subsection (g).

the information technology and physical location in which the records exist; and (3) that suggestions be provided for overcoming any practical basis for denying access to the records or information sought.

Pursuant to Government Code Section 6253(b), the requested records must be “promptly available,” for inspection and copying, based on payment of “fees covering direct costs of duplication, or statutory fee, if applicable.” No express provisions of law exist that exempt the record(s) from disclosure. As it is determined whether this request seeks copies of disclosable public records, be mindful that Article I, Section 3 (b)(2) of the California Constitution requires that a statute, court rule, or other authority be broadly construed if it furthers the right of access to the information requested and that a statute, court rule, or other authority limiting right of access be narrowly construed.

If a portion of the information requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) additionally requires segregation and deletion of that material in order that the remainder of the information may be released. If it is determined that an express provision of law exists to exempt from disclosure all or a portion of the material requested, Government Code Section 6253(c) requires notification of the reasons for the determination not later than 10 days from receipt of this request. Moreover, Government Code Section 6253(d) prohibits the use of the 10-day period, or any provisions of the Public Records Act “to delay access for purposes of inspecting public records.”

Please send copies of the requested records to me at the address shown above or email them to me at sagarwal@aclunc.org. We request that you waive any fees that would be normally applicable to a Public Records Act request. In addition, if you have the records in electronic form you can simply email them to me without incurring any copying costs. *See Gov’t. Code § 6253.9.* Should you be unable to do so, however, the ACLU will reimburse your agency for the direct costs of copying these records plus postage. *See Gov’t. Code § 6253(b).* To assist with the prompt release of responsive material, we ask that you make records available to me as you locate them, rather than waiting until all responsive records have been collected and copied.

If you have any questions regarding this request, please feel free to contact me at (415) 621-2493 or at sagarwal@aclunc.org. Thank you in advance for your time and attention to this request.

Sincerely,



Shilpi Agarwal
Senior Staff Attorney