

**Margo A. Raison**  
COUNTY COUNSEL

**ASSISTANT COUNTY COUNSEL**

Kendra L. Graham

**CHIEF DEPUTIES**

Gurujodha S. Khalsa  
Elizabeth M. Giesick  
Marshall S. Fontes



OFFICE OF THE  
**COUNTY COUNSEL**

**Bryan C. Walters**

(661) 868-3851

[bwalters@kerncounty.com](mailto:bwalters@kerncounty.com)

**DEPUTIES**

Jerri S. Bradley  
Kelli R. Falk  
Jeffrey N. Estey  
Judith M. Denny  
Jennifer E. Feige  
Brian Van Wyk  
Bryan E. Alba  
Phillip W. Hall  
Bryan C. Walters  
Gillian Smith  
Kathleen Rivera  
Phillip T. Jenkins  
Kelli M. King  
Carissa A. Rarick  
Robert J. Rice  
Ann S. Garza  
Kyle W. Holmes  
Andrew C. Hamilton  
Stephanie M. Bouey  
Alexandria M. Ottoman  
Gustavo Maya  
Christina J. Oleson

August 16, 2021

Ellen Leonida, Esq.  
BraunHagey & Borden, L.L.P.  
351 California Street, 10th Floor  
San Francisco, CA 94104

via email *ONLY* to: [leonida@braunhagey.com](mailto:leonida@braunhagey.com)

Re: July 23, 2021, California Public Records Act Request Made to Kern County District Attorney's Office

Dear Ms. Leonida,

This office represents the Kern County District Attorney's Office ("District Attorney"), and I am assigned to assist the District Attorney in connection with the request for records you made on July 23, 2021, under California Public Records Act (Gov. Code § 6250 et seq. ("CPRA")).

Your letter dated July 23, 2021, states in part as follows:

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"). [Footnote Omitted.] ... [¶]

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 responded asking for clarifications on May 21, 2019, and responded again via letter on June 10, 2019, asserting that you had no responsive records for some requests and asserting exemptions for the remaining requests. The ACLU appealed on June 27, 2019, and your office responded by stating your records did not evidence "a single policy manual". On July 29, 2019, the ACLU reiterated its request for policy records and 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.*

1115 Truxtun Avenue, Fourth Floor  
Bakersfield, California 93301  
Phone: (661) 868-3800  
Fax: (661) 868-3643  
TTY Relay: 1-800-735-2929

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*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.) Your office responded on January 23, 2020 asserting several exemptions and stating that, "after a diligent search", you are not in possession of any "nonexempt materials" that would be responsive.

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 Kern County for the time-period 2015 to Present:

Your letter appears to misunderstand the District Attorney's intent in its prior response to the ACLU. Your letter states, "[Y]our office responded by stating your records did not evidence 'a single policy manual'." What the District Attorney stated was that the District Attorney's policies are not gathered together in a single policy manual.

Because your letter renews the CPRA requests previously made the ACLU, I will quote those prior requests here, with the understanding that you have now extended the scope of both prior requests to include documents up to the present day. The CPRA request sent by the ACLU dated May 13, 2019, requested the following records:

1. Records [footnote omitted] of prosecution data<sup>1</sup> 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 Kern 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.<sup>2</sup>
    - i. Unique identifiers for each person, charges, and outcomes for all minors prosecuted in adult court in Kern County after any one of the following:
      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 Kern county [sic], including, but not limited to

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<sup>1</sup> This first category of information described in the ACLU's May 13, 2019, CPRA request is described herein as "Prosecution Data."

<sup>2</sup> This sub-category of Prosecution Data is hereafter identified as "Direct File Data."

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- demographic data, charges filed, and case outcomes during the calendar year of 2017 and 2018 [*now to present*].<sup>3</sup>
- c. Unique case identifiers, charges, and outcomes (including diversion) of all misdemeanor charges for minors and adults in Kern county [sic].<sup>4</sup>
  - d. Unique case identifiers, charges, enhancements and outcomes (including diversion) of all felony charges for minors and adults in Kern county [sic].<sup>5</sup>
- 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.<sup>6</sup>
  - 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.<sup>7</sup>
  - 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.<sup>8</sup>
  - 5. Copies of all office policies that relate to immigration including but not limited to:<sup>9</sup>
    - 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.

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<sup>3</sup> This sub-category of Prosecution Data is hereafter referred to as "Juvenile Data."

<sup>4</sup> This sub-category of Prosecution Data is hereafter referred to as "Misdemeanor Data."

<sup>5</sup> This sub-category of Prosecution Data is hereafter referred to as "Felony Data."

<sup>6</sup> This second category of information described in the ACLU's May 13, 2019, CPRA request is described herein as "Diversion Program Data."

<sup>7</sup> This third category of information described in the ACLU's May 13, 2019, CPRA request is described herein as "Parole Hearing Data."

<sup>8</sup> This fourth category of information described in the ACLU's May 13, 2019, CPRA request is described herein as "Office Policies."

<sup>9</sup> This fifth category of information described in the ACLU's May 13, 2019, CPRA request is described herein as "Immigration Policies."

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Request #4 is not limited to calendar year 2017 and 2018.<sup>10</sup>

In turn, the CPRA request sent by the ACLU on July 29, 2019, asked for the following records:

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

- I. Any training materials related to jury selection<sup>11</sup>
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.<sup>12</sup>

*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

Your CPRA letter dated July 23, 2021, renews the requests previously made by the ACLU, extending the scope to the present day, and it additionally seeks the following additional records:

1. Any and all written policies, memoranda, or guidance documents regarding:<sup>13</sup>
  - 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;

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<sup>10</sup> This sixth category of information described in the ACLU's May 13, 2019, CPRA request is described herein as "SB 1421 Records."

<sup>11</sup> This first category of information described in the ACLU's July 29, 2019, CPRA request is described herein as "Jury Selection Training Materials."

<sup>12</sup> This first category of information described in the ACLU's July 29, 2019, CPRA request is described herein as "*Batson-Wheeler* Training Materials."

<sup>13</sup> This first category of information described in your July 23, 2021, CPRA request is described herein as "Written Policy Materials."



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- 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:<sup>14</sup>
  - a. Which are mandatory for prosecutors;
  - b. Which are optional for prosecutors;
  - c. Which relate to jury selection;
  - 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 You Tube, 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:<sup>15</sup>
  - 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:<sup>16</sup>
  - 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.

The District Attorney understands that the CPRA broadly defines “public records” (Gov. Code § 6252, subd. (e)) and writing” (Gov. Code § 6252, subd. (g)). The District Attorney additionally recognizes the holding in *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825 [finding that documents sought by newspaper were public records as they were “unquestionably ‘used’ and/or ‘retained’ “ and they “clearly relate[d] to the conduct of the public’s business”)]. The District Attorney is not disputing that your request properly identifies public records under the CPRA.

The District Attorney’s Office has conducted a search as required under Government Code section 6253, subdivision (b), for records responsive to the ACLU’s CPRA requests dated May 13, 2019, and July 29, 2019, as well as your current CPRA request.<sup>17</sup> These searches were

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<sup>14</sup> This second category of information described in your July 23, 2021, CPRA request is described herein as “Training Policies and Materials.”

<sup>15</sup> This third category of information described in your July 23, 2021, CPRA request is described herein as “RJA Materials.”

<sup>16</sup> This fourth category of information described in your July 23, 2021, CPRA request is described herein as “*Batson-Wheeler* Investigation materials.”

<sup>17</sup> These requests are collectively referred to herein as the “Pending CPRA Requests.”

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conducted keeping the broad definitions of “public record” and “writing” in mind. The search for responsive records was supervised by Supervising Attorney Mark Pafford.

Initially, the District Attorney asserts each of the following exemptions concerning at least a portion of the records that would be responsive to the Pending CPRA Requests:<sup>18</sup>

- ***Investigatory Files Exemption:*** Insofar as the Pending CPRA Requests seek information from the District Attorney's case files, those are investigatory files that are exempt from disclosure under Government Code section 6254, subdivision (f) and the holdings of *Williams v. Superior Court* (1993) 5 Cal.4th 337, 341, 354, 362, and *Rivero v. Superior Court* (1977) 54 Cal.App.4th 1048, 1059;
- ***Personally Identifying Information Exemption:*** Insofar as the Pending CPRA Requests seek information from the District Attorney's case files, those files contain personally identifying information that is exempt from disclosure as an unwarranted invasion of personal privacy (Gov. Code § 6254, subd. (c); Cal. Const. article I, § 1; see also *Voice of San Diego v. Superior Court of San Diego County* (2021) 66 Cal.App.5th 669, as modified (July 27, 2021));
- ***Juvenile Court Records Exemption:*** Insofar as the Pending CPRA Requests seek information from the District Attorney's case files in connection with juvenile court delinquency matters, that information is exempt from disclosure and may only be obtained by filing an appropriate petition in the juvenile court (See Gov. Code § 6254, subd. (k); Welf. & Inst. Code § 827);<sup>19</sup>
- ***Summary Criminal History Exemption:*** Insofar as the Pending CPRA Requests seek summary criminal history information from the District Attorney's case files, that information is exempt from disclosure (see Gov. Code § 6254, subd. (k); Penal Code §§ 11075, 11105, and 11300 et seq.; but see Penal Code § 11144 [permits release of de-identified information for statistical or research purposes]);
- ***Attorney Work Product:*** Insofar as the Pending CPRA requests seek policy materials, training materials, and file specific materials, that information is protected as attorney work product (Gov. Code § 6254, subd. (k); Code Civ. Proc. § 2018.030; Penal Code § 1054.6; see also *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 128-135 and *Fellows v. Superior Court (Los Angeles County)* (1980) 108 Cal.App.3d 55, 63);
- ***Deliberative Process Privilege Exemption:*** Insofar as the Pending CPRA requests seek policy materials, training materials, and file specific materials, the deliberative process privilege under Government Code section 6255 applies each of the pending CPRA

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<sup>18</sup> Claims of exemption will be made by referring to the Bold and Italicized descriptions to the right of the bullet points.

<sup>19</sup> Unlike the Summary Criminal History Exemption (see Penal Code §§ 11075 and 11105), which specifically contains a subdivision allowing the release of statistical and de-identified information (Penal Code § 11144), the Juvenile Court Law appears to have no such exemption permitting a District Attorney to release such information (see Welf. & Inst. Code §§ 827 et seq.; *c.f.* Welf. & Inst. Code § 827.12, subd. (a)(2)).

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requests. (See, *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, and *Times Mirror Co. v. Superior Court* (1991) 33 Cal.3d 1325.)

- **Catchall Exemption:** The public interest in disclosure for some of the requested materials is clearly outweighed by the public interest served by non-disclosure. (Gov. Code § 6255; *Wilson v. Superior Court* (1997) 51 Cal.App.4th 1136, 1139-1143.)

The claimed exemptions will be identified when applicable as to each category and sub-category of the Pending CPRA Requests below:

**1. Prosecution Data.**

As to the first category articulated in the ACLU's request dated May 13, 2019, the District Attorney previously explained that it did not have the ability to search for or retrieve the types of Prosecution Data requested. Mr. Pafford consulted with Assistant District Attorney James Simson, who is the head of the District Attorney's Information Technology unit. Mr. Simson explained that there is no way to program a query that would be responsive to your request. The District Attorney uses the Criminal Justice Information System (CJIS) as their database. CJIS is a legacy system that is shared among the District Attorney, the Kern County Sheriff's Department, the Kern County Public Defender, the Kern County Probation Department, and the Kern County Superior Court. Due to the shared access by multiple departments, the District Attorney did not have access to all of the data needed to run a search responsive to your request.

As to your renewal of this request, the District Attorney continues to use CJIS as its database, but the District Attorney now uses County Information Technology services for its IT Services. Ray Palmer, Supervisor for the Kern County Information Technology Services Criminal Justice System and Kern Property System, indicates that he is able run a query to extract some of the information you are seeking. Writing the code to run such a query and write a report would require approximately 16 hours of programmer time at an the cost of \$90 per hour. The fee for these services would be payable to County of Kern ITS. The check should be sent with an explanation of the payment to IT Services at 4175 Mount Vernon Ave. Bakersfield, CA 93306. The data that may be retrieved and the limitations on what may be retrieved are described in the next several paragraphs per sub-category.

**a. Direct File Data**

As to Direct File Data, the report produced would contain "[u]nique identifiers for each person, charges, and outcomes for all minors prosecuted in adult court in Kern County." However, to the extent your request seeks information concerning whether the case involved a certification by the court or a waiver or stipulation by the minor, the District Attorney would not have access to some of the information required to construct the query without accessing information from the Juvenile Court's side of CJIS. That would require a juvenile court order.

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Accordingly, to the extent that running the query would require data from the Kern County Juvenile Court, the District Attorney raises the following objections:

- *District Attorney Has No Access To Necessary Data*
- *Juvenile Court Records Exemption*
- *Catchall Exemption*

**b. Juvenile Data**

As to the Juvenile Data sought by the ACLU's first request, the following exemptions are claimed:

- *District Attorney Has No Access To Necessary Data*
- *Juvenile Court Records Exemption*
- *Catchall Exemption*

**c. Misdemeanor Data**

As to the Misdemeanor Data sought by the ACLU's first request, the District Attorney can provide a report concerning the adult population within the 16-hour time estimate for programming stated above. To the extent that you seek data from the juvenile court case files, the following exemptions are claimed:

- *District Attorney Has No Access To Necessary Data*
- *Juvenile Court Records Exemption*
- *Catchall Exemption*

**d. Felony Data**

As to the Felony Data sought by the ACLU's first request, the District Attorney can provide a report concerning the adult population within the 16-hour time estimate for programming stated above. To the extent that you seek data from the juvenile court case files, however, the following exemptions are claimed:

- *District Attorney Has No Access To Necessary Data*
- *Juvenile Court Records Exemption*
- *Catchall Exemption*

**2. Diversion Program Data.**

The District Attorney previously explained that the office is not in possession of any materials that would be responsive to the second category in the ACLU's May 13, 2019, CPRA request regarding Diversion Program Data.

Upon receipt of your new request, the District Attorney located two documents that deal with a Misdemeanor Diversion Program. The first is the Misdemeanor Diversion Program in document form. The document is named "Misdemeanor Diversion Program.pdf." It will be provided to you



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in a shared folder via One Drive. The second is a pamphlet form of the first in a document named "Misdemeanor Diversion Program Pamphlet.pdf" The District Attorney also located a DV Court Protocols document that is also responsive to your request. That document is named "DV Court Protocols.pdf" and is being shared via One Drive. A link to access the files responsive to your request will be sent separately.

The District Attorney does not track or maintain data related to diversion programs, so there are no other documents responsive to your request.

### **3. Parole Hearing Data.**

The District Attorney previously responded that the office did not have any materials that would be responsive to the third category of the ACLU's May 13, 2019, CPRA request concerning Parole Hearing Data.

Upon receiving your new request, the District Attorney complied information to assist in responding to your request. They have provided the following numbers, noting the caveat stated below:

2017: 111 hearings on calendar; 0 appearances; 87 opposition letters  
2018: 100 hearings on calendar; 3 appearances; 64 opposition letters  
2019: 168 hearings on calendar; 48 appearances; 65 opposition letters  
2020: 258 hearings on calendar; 84 appearances; 28 opposition letters

The staff who compiled the data explained, "Accounting for the rest of the numbers each year – the hearings were either removed, waived, postponed, cancelled, or the inmate had passed away." The staff who compiled the information indicated information from before February 2021 was not reliable due to inconsistency in maintaining the logs. The District Attorney is providing what it has on record, but it is unable to vouch for the reliability of the information.

### **4. Office Policies.**

As to the fourth category of the ACLU's May 13, 2019, CPRA request, the District Attorney previously responded as follows:

We will comply with this request [for Office Policies] subject to the extent required by law. We will not be providing some documents as they will reveal our deliberative process. Additionally, there are certain documents we will not provide pursuant to Evidence Code §§ 1040 and 1041. The documents we will provide are in electronic format, and there is a \$25 charge for producing them on a CD...

I do not know whether the ACLU paid the requested fee for the documents the District Attorney was willing to produce.

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As to your renewal of the ACLU's request for Office Policies extends the scope of the ACLU's Office Policies request to the present day. The District Attorney will produce copies of some Office Policies as described in the request, but as to the remainder, the District Attorney claims the following exemptions:

- *Attorney Work Product*
- *Deliberative Process Privilege Exemption*
- *Catchall Exemption*

Please refer to "PRA Response Attachment A Policies" which is included in the documents being shared via One Drive, for a list of the documents responsive to this request for Office Policies. A listing of "None" in the exemptions column either indicates that there is no exemption applicable or that the District Attorney has exercised discretion to waive any applicable exemptions as to the document. The documents being produced will be made available via One Drive, and you will be sent a link to access the documents.

**5. Immigration Policies.**

The District Attorney previously notified you that after a diligent search of the office's records, there were no materials responsive to the fifth category of the ACLU's May 13, 2019, CPRA request regarding Immigration Policies.

As to your renewal of the ACLU's request for Immigration Policies, the District Attorney has identified two policies that may be responsive to your request. In the shared drive, you will find a document named "U Visa and T Visa Certifier" that contains the policies responsive to your request. The District Attorney waives the exemptions for attorney work product and deliberative process exemption with respect to these immigration policies.

**6. SB 1421 Implementation.**

The District Attorney previously notified you that after a diligent search of their records, there were no materials responsive to the sixth category of the ACLU's May 13, 2019, CPRA request regarding SB 1421 Implementation.

The District Attorney has once again conducted a diligent search of their records, and there are no materials responsive to the requested category of SB 1421 Implementation.

**7. Jury Selection Training Materials.**

The District Attorney previously responded to the ACLU's July 29, 2019, CPRA request by asserting that the requested materials were exempt from disclosure under several exemptions, which are asserted again through this reference to the District Attorney's prior responses as if set forth in full.

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As to your current iteration of the request for Jury Selection Training Materials, all of the requested materials are exempt from disclosure under the following:

- *Attorney Work Product*
- *Deliberative Process Privilege Exemption*
- *Catchall Exemption*

Your attention is directed to the document named "PRA Response Attachment B Trainings.pdf" being shared via One Drive.

**8. Batson-Wheeler Training Materials.**

The District Attorney previously responded by asserting that the requested materials were exempt from disclosure under the same exemptions noted in the section immediately above. The District Attorney stated that after completing a diligent search, the office has no non-exempt materials.

As to your current iteration of the request for *Batson-Wheeler* Training Materials, all of the requested materials are exempt from disclosure under the following:

- *Attorney Work Product*
- *Deliberative Process Privilege Exemption*
- *Catchall Exemption*

Your attention is directed to the document named "PRA Response Attachment B Trainings.pdf" being shared via One Drive.

**9. Written Policy Materials.**

Your request for Written Policy Materials essentially duplicates the ACLU's request for Office Policies, although you enumerate more specific policies in your request. The District Attorney's response to your request is the same as the response to the ACLU's request for Office Policies.

The District Attorney will produce copies of some Written Policy Materials described by your request, but as to the remainder, the District Attorney claims the following exemptions:

- *Attorney Work Product*
- *Deliberative Process Privilege Exemption*
- *Catchall Exemption*

Please refer to "PRA Response Attachment A Policies.pdf" which is included in the documents being shared via One Drive, for a list of the documents responsive to this request for Office Policies. A listing of "None" in the exemptions column either indicates that there is no exemption applicable or that the District Attorney has exercised discretion to waive any applicable

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exemptions as to the document. The documents being produced will be made available via One Drive, and you will be sent a link to access the documents.

**10. Training Policies and Materials.**

As to your request for Training Policies and Materials, the District Attorney claims the following exemptions as to this entire category of your request:

- *Attorney Work Product*
- *Deliberative Process Privilege Exemption*
- *Catchall Exemption*

Please refer to ““PRA Response Attachment A Policies.pdf” and “PRA Response Attachment B Trainings.pdf” which are included in the documents being shared via One Drive, for a list of the documents responsive to this request for Office Policies. Any Documents responsive to this category of your request are subject to these claims of exemption even though claims of exemption are sometimes waived as to documents in other categories.

**11. RJA Materials.**

The District Attorney has no documents responsive to this category or requested information.

**12. Batson-Wheeler Investigation Materials.**

Your request for Batson-Wheeler motions seeks information that is subject to the following claims of exemption:

- *Investigatory Files Exemption*
- *Personally Identifying Information Exemption*
- *Juvenile Court Records Exemption*
- *Summary Criminal History Exemption*
- *Attorney Work Product*
- *Deliberative Process Privilege Exemption*
- *Catchall Exemption*

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**Conclusion**

This letter, along with the link to responsive documents being shared via One Drive, will complete the District Attorney's response to the Pending CPRA Requests. If you have any trouble accessing the link in One Drive, please let me know and I will arrange to have someone provide assistance.

I would be happy to discuss this matter if you would like.

Respectfully,

Margo A. Raison  
Kern County Counsel

By 

\_\_\_\_\_  
Bryan C. Walters, Deputy