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Maggie Fleming
District Attorney

August 20, 2021

Ellen Leonida
351 California Street, 10th Floor
San Francisco, CA 94104

Re: Public Records Act Request

Dear Ms. Leonida:

We are in receipt of your request for records under the California Public Records Act (CPRA) dated July 23, 2021.

You attached two exhibits to your request. Exhibit 1 is a copy of a July 29, 2019, CPRA request, and Exhibit 2 is copy of an August 26, 2019, CPRA request; both of these were submitted tothis office on behalf of the ACLU in 2019. Responses to both were timely issued.

In your current request, you write:

> "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 Humboldt to for the time - period 2015 to present."

You then set forth what we interpret to be your current request in items 1a-l, 2a-e, 3a-c, and 4a-d.As to this current request, I will address each item individually as follows:

1. "Any and all written policies, memoranda, or guidance documents regarding:

   a. Diversion eligibility and/or programming."

   This request seeks various information regarding diversion programs. We are interpreting your request for "diversion eligibility and/or programming" to apply to defendants charged with a crime, as the Humboldt County District Attorney's Office does not itself utilize pre-filing diversion programs.

   We do not have an index that identifies all documents relevant to this response. The CPRA applies to existing records and does not require a public agency to create a record that does not exist. (Gov't Code section 6252(e) and (f).) Further, such a request is unduly burdensome, as it would require us to hand search tens of thousands of files and 63 employees offices to locate potentially responsive documents. This is unduly burdensome, something not required under the CPRA. However, we have been able to locate several items that we are providing to you, as explained below.

Your request does not clarify what you consider "diversion." California Penal Code section 1000 et seq. provides several statutory diversion programs. As for the documents you seek regarding eligibility for such programs, the various criteria are set forth by statute and thus this information is already available to you publicly.

In 2018, AB 1810 added Penal Code sections 1001.35 and 1001.36, which created the mental health diversion program. Similarly, the requirements for this diversion are set forth by statute.

In Humboldt County, we have several collaborative courts, which involve partnerships between our office, the Superior Court, the Probation Department, the Public Defender's Office, and sometimes community-based organizations to provide services and avoid incarceration for certain offenders. These programs do not fall within the statutory definition of diversion as set forth in Penal Code section 1000 et seq. However, successful completion of some of these programs may result in a dismissal of charges, similar to the effect of a statutory diversion program. We are interpreting your request as including within your definition of "diversion" those programs where dismissal is available.

Regarding documents identifying office policies or guidelines regarding diversion courts, it is our practice, pursuant to the law, not to disclose these types of policy documents because they are exempt from disclosure under the CPRA by the deliberative process privilege. (Government Code section 6255. *Times Mirror Co. v Superior Court* (1991) 53 Cal.3d 1325; *Rogers v Superior Court* (1993) 19 Cal.App.4th 469; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136.) In addition, the courts have ruled that written policies concerning how prosecutors exercise their discretion in charging and sentencing are not subject to discovery. (*Keenan v. Superior Court* (1981) 126 Cal.App.3d 576; *People v. Keenan* (1988) 46 Cal.3d 478.) Thus, these documents are exempted from disclosure not only by the deliberative process privilege but also by Government Code section 6254(k). Other notations regarding specific cases are also exempt as privileged attorney work product.

Given the broad scope of your request, to the extent that we may possess materials related to diversion that may be contained in any of our investigatory files, Government Code section 6254(f) exempts from CPRA disclosure records of complaints to or investigations conducted by any local police agency, investigatory files compiled by any local police agency, and investigatory files compiled by any other local agency for law enforcement or licensing purposes. Under the California Constitution and by statute, the District Attorney is vested with broad authority to investigate violations of the law, and prosecute such matters in criminal, civil, or administrative actions, as may be appropriate. The District Attorney's employees include peace officers, attorneys, and other staff who perform such investigations. There can be no question that the District Attorney's Office is a local agency that conducts police or law enforcement investigations and has complaints and investigatory files within the meaning of section 6254(f). Case law supports this conclusion. (See *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048; *Rackaucas v. Superior Court* (2012) 104 Cal.App.4th 169; Fagan v. Superior Court (2003) 111 Cal.App.4th 607; *County of Los Angeles v. Superior Court* (2005) 130 Cal.App.4th 1099.) This exemption applies not only to documents generated by the agency, but also to records gathered from victims, witnesses, and others. (See *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.) This exemption continues to apply even if the case is complete, and the investigation closed. (See *Rivero v. Superior Court* (1997) 54 Cal.App.4th 1048; *Williams v. Superior Court* (1993) 5 Cal.4th 337.) To the extent that we may be in possession of some of the materials you seek, such materials are part of our investigatory files and are thus exempt from production under the CPRA.

Further, we would not necessarily be able to identify documents related to diversion programs simply from searching outcomes in our computerized case management system. We would have to examine the case event history or our physical files for notations. Given the time frame you have identified and the number of cases that would be involved, this would require a hand search of voluminous materials and would be unduly burdensome, something not required under the CPRA. (See Gov't Code section 6255; *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 600-60; see also *American Civil Liberties Union v. Deukmejian* (1982) 32 Cal.3d 440, 452-454.)

b. "Custody and/or bail recommendations."

We do not have an index that identifies documents relevant to this response. The CPRA applies to existing records and does not require a public agency to create a record that does not exist. (Gov't Code section 6252(e) and (f).) Further, to locate all materials relevant to this request would require us to examine all of our investigatory files for the time period you specify. As noted above, those files are exempt from production under the CPRA. Further, such a request is unduly burdensome, as it would require us to hand search tens of thousands of files, something not required under the CPRA. Depending on the content of any such materials, other exemptions could apply such as the deliberative process privilege, attorney work product, or other exemption.

In addition, these types of policy documents are exempted from disclosure under the CPRA by the deliberative process privilege. Government Code § 6255. Times Mirror Co. v Superior Court (1991) 53 Cal.3d 1325; Rogers v Superior Court (1993) 19 Cal.App.4th 469; Wilson v. Superior Court (1996) 51 Cal.App.4th 1136. The courts have ruled that written policies concerning how prosecutors will exercise their discretion in charging and sentencing are not subject to discovery. Keenan v. Superior Court (1981) 126 Cal.App.3d 576; People v. Keenan (1988) 46 Cal.3d 478. Thus, these documents are exempted from disclosure not only by the deliberative process privilege but also by Government Code section 6254(k).

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."

Given the broad scope of this request (including all sub-requests), to the extent that we may possess relevant materials in our investigatory files, such materials are exempt from production under Government Code section 6254(f). Further, it is our practice, pursuant to the law, not to disclose these types of policy documents because they are exempt from disclosure under the CPRA by the deliberative process privilege. (Government Code section 6255. *Times Mirror Co. v Superior Court* (1991) 53 Cal.3d 1325; *Rogers v Superior Court* (1993) 19 Cal.App.4th 469; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136.) In addition, the courts have ruled that written policies concerning how prosecutors exercise their discretion in charging and sentencing are not subject to discovery. (*Keenan v. Superior Court* (1981) 126 Cal.App.3d 576; *People v. Keenan* (1988) 46 Cal.3d 478.) Thus, these documents are exempted from disclosure not only by the deliberative process privilege but also by Government Code section 6254(k).

d. "Compliance with Brady v. Maryland, 373 U.S. 83 (1963)."

The Humboldt County District Attorney's Office trains its attorneys on federal and California cases regarding ethical discovery practices, including those set forth in _Brady v. Maryland_. It has been our practice not to disclose specific training materials. The documents you seek are exempt from disclosure by the deliberative process privilege, work product privilege, and also on the ground that the public interest served by not disclosing these outweighs the public interest served by disclosing them. (Gov't Code section 6255; *Times Mirror Co. v Superior Court* (1991) 53 Cal.3d 1325; *Rogers v Superior Court* (1993) 19 Cal.App.4th 469; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136.) These records reflect the thought processes of those whose responsibility it is to interpret the law and train our attorneys on the ethical administration of justice. Disclosure would expose the decision-making process in such a way as to discourage candid discussion and thereby undermines the ability of the District Attorney's Office to perform its function of ensuring the fair administration of justice.

Furthermore, under Government Code section 6254(k), the release of records is restricted if doing so would violate any federal or state law, including laws relating to privileges. Code of Civil Procedure section 2018.030(a) provides a work product privilege for any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." This privilege provides an absolute protection against disclosure. Such a writing is not discoverable under any circumstances. (*Id.*)

Finally, we do not have in index identifying all the materials specified in this request, to conduct a search for them would be unduly burdensome, and any such materials contained within our investigatory files are exempt from CPRA production as detailed in the response to 1.a., above.

e. "Jury selection."

The Humboldt County District Attorney's Office trains its attorneys on federal and California cases regarding the ethical selection of jurors. It has been our practice not to disclose specific training materials. The documents you seek are exempt from disclosure by the deliberative process privilege, work product privilege, and also on the ground that the public interest served by not disclosing these outweighs the public interest served by disclosing them. (Gov't Code section 6255; *Times Mirror Co. v Superior Court* (1991) 53 Cal.3d 1325; *Rogers v Superior Court* (1993) 19 Cal.App.4th 469; *Wilson v. SuperiorCourt* (1996) 51 Cal.App.4th 1136.) These records reflect the thought processes of those whose responsibility it is to interpret the law and train our attorneys on the ethical administration of justice. Training discussions include tactical and strategic information.Disclosure would expose the decision-making process in such a way as to discourage candid discussion and thereby undermines the ability of the District Attorney's Office to perform its function of ensuring the fair administration of justice.

Furthermore, under Government Code section 6254(k), the release of records is restricted if doing so would violate any federal or state law, including laws relating to privileges. Code of Civil Procedure section 2018.030(a) provides a work product privilege for any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." This privilege provides an absolute protection against disclosure. Such a writing is not discoverable under any circumstances. (*Id.*) If you wish to further clarify this request, please do so.

f. "Referral of cases for federal prosecution."

Any cases we have referred for federal prosecution would be part of our investigatory files exempt from disclosure under Government Code section 6254(f), as noted above. Otherwise, we have no responsive documents.

2. "Any and all policies regarding training as well as any training materials, recorded trainings, or related materials:"

   a. "Which are mandatory for prosecutors."

   These types of documents are exempted from disclosure under the CPRA by the deliberative process privilege. Government Code section 6255. Times Mirror Co. v Superior Court (1991) 53 Cal.3d 1325; Rogers v Superior Court (1993) 19 Cal.App.4th 469; Wilson v. Superior Court (1996) 51 Cal.App.4th 1136.

   In addition, this office employs over 18 attorneys and possesses a large amount of material in the form of books, treatises, memoranda, publications, and other documents that could be considered within the scope of your request for "all training materials." A large amount of these materials has been purchased or received by this office, and a large number of materials have been purchased or received by individual members of this office. Given the nature of criminal case litigation, the materials or portions of materials could be located in individual offices, online, in criminal case files, and elsewhere. To locate all such materials would be unduly burdensome, as it would require us to hand search employees' offices, computers, and tens of thousands of files, something not required under the CPRA.

   Further, a significant amount of such documents is subject to United States Copyright law. Legal publications and treatises – all within the scope of your request - and other non-agency publications used in the education and training of our staff are controlled by federal copyright law. (See, e.g., 17 U.S.C. sections 102, 103.) Release of such copyrighted materials would similarly violate Government Code section 6254(k). We believe that copyrighted materials produced by an outside source which this office has are not the type of public records contemplated for release within the meaning of the CPRA.

   Further, under Government Code section 6254(k), the release of records is restricted if doing so would violate any federal or state law, including laws relating to privileges. Code of Civil Procedure section 2018.030(a) provides a work product privilege for any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." This privilege provides an absolute protection against disclosure. Such a writing is not discoverable under any circumstances. (*Id.*)

   b. "Which are optional for prosecutors." See

   response to 2.a., above.

   c. "Which relate to jury selection." See

   response to 2.a., above.

d. "Which relate to bias, implicit bias, unconscious bias, and/or racism."

See response to 2.a., above.

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)."

See response to 2.a., above.

3. "Records concerning the Racial Justice Act:"1

a. "Implementation of and compliance with the RJA."

To the extent that our investigatory files potentially contain materials related to the implementation of, compliance with, or communications concerning Penal Code section 745, such materials are exempt from production pursuant to Gov. Code section 6254(f).

As with any new law, "records concerning" the implementation of, compliance with, or communications concerning the new law could potentially be located in the office of any attorney and could be in various form. We do not have an index that identifies the records you seek and are not required under the CPRA to create one. To search over 17 attorneys' offices and potentially over 17 computers and thousands of criminal case files is unduly burdensome and not required under the CPRA.

Further, depending on the content of any such materials, multiple exemptions and/or privileges could apply including the deliberative process privilege, attorney work product privilege, exemptions pursuant to Gov. Code section 6254(k), and others.

b. "Communications concerning the RJA:" See

response to 3.a., above.

c. "Trainings related to the RJA." See

response to 3.a. and 2.a., above.

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."

1 I assume by "Racial Justice Act" you mean Penal Code section 745. If I am mistaken, please advise me

This request seeks records of "all investigations into Batson-Wheeler motions" that includes but is not limited to "Motions filed, "Motions granted," "Internal training and/or discipline," and "Reports to the State Bar relating to any Batson-Wheeler motions made and granted."

We do not track such motions in our computerized case management system, nor do we have an index that identifies them. The only means to identify documents relative to motions being filed and/or granted would be to hand search tens of thousands of files, which again is unduly burdensome. Further, except for motions filed in court by this office, any other documents relevant to this request would come from our investigatory files, which are exempt from production pursuant to Gov. Code section 6254(f).

Regarding internal training, please see response to 2.a., above.

I now turn to your "renewal" of two prior CPRA requests submitted on behalf of the ACLU on July 29, 2019, and August 26, 2019. You write that "This CPRA letter constitutes a renewal of the ACLU's two prior requests (as relevant, updated to the present day)." I do not understand what you mean by "renewal … as relevant, updated to the present day" in this context. We issued written responses to those requests in 2019 and were e-mailed to sagarwal@aclunc.org..

I cannot tell if you were not aware that we provided responses to those requests, or if the intent of your statement regarding our responses to the prior CPRA requests was not meant to be interpretated as asserting that we provided nothing, but rather whether you were referring to certain items not provided that you believe should have been provided. I ask you to please clarify exactly what you are asking for at this time.

Sincerely,

Maggie Fleming
District Attorney

EXHIBIT 1

Northern
California

July 29, 2019

Transmitted by email

Humboldt County District Attorney's Office
825 5th St Fl 4,
Eureka, CA 95501
Email: districtattorney@co.humboldt.ca.us

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 records[1], 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

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[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.

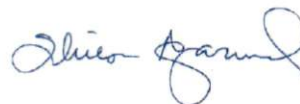
Pursuant to Government Code Section 6253(b), the requested records must be "promptly available," for inspection and copying, based on payment of "fees covering direct costs of duplication, or statutory fee, if applicable." No express provisions of law exist that exempt the record(s) from disclosure. 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 you time and attention to this request.

Sincerely,



Shilpi Agarwal
Senior Staff Attorney

EXHIBIT 2

August 26, 2019

Transmitted by email

Humboldt County District Attorney's Office
825 5th St Fl 4,
Eureka, CA 95501
Email: districtattorney@co.humboldt.ca.us

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

To Whom it May Concern:

The ACLU of Northern California appreciates the Humboldt County District Attorney's initial response to our June 29, 2019 Public Records Act ("PRA") requests seeking copies of the following materials in the agency's possession:

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

After reviewing the District Attorney's initial PRA document response, we have some concerns, which are outlined below.

I. California Government Code § 6253

With respect to the language of both of our requests, CA. GOV'T. CODE § 6253.1(a) requires the District Attorney's Office to help identify the records sought. In the case that our requests were found to be insufficiently focused or effective, CA. GOV'T. CODE § 6253.1(a) requires that the District Attorney provide assistance in identifying the records and information that are responsive to this request or to the purpose of this request, and that the District Attorney provide a description of the information technology and physical location in which the records exist. In addition, CA. GOV'T. CODE § 6253.1(a) also requires that the District Attorney provide the ACLU of Northern California suggestions for overcoming any practical basis for denying access to the records or information sought.

Moreover, the California Constitution requires that any statute, including each exemption to the PRA's disclosure requirements, must be "narrowly construed if it limits the right of access." CAL. CONST. art. I, § 3(b)(2).

II. Federal copyright law does not exempt requested materials

As the District Attorney's response acknowledges, federal copyright law is a form of protection from the copying of documents, and not for the inspection of documents. *See* 17 U.S.C. § 101 (2010) *et seq*. However, any materials created by the District Attorney's Office cannot be withheld as copyrighted. *Cty. of Santa Clara v. Sup. Ct.*, 170 Cal. App. 1301 (2009). Furthermore, the restriction on copying is subject to a number of exclusions. For the purposes of the PRA, the most important of these exclusions is the "fair use" doctrine. Under the doctrine, the fair use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching …, scholarship, or research" is not a copyright infringement, and the statute enumerates four factors to consider in determining whether, in a given case, the use is a fair use. 17 U.S.C. § 107.

In considering the ACLU of Northern California's intended investigative use of the requested training materials, the four determining factors further support a finding that the fair use doctrine applies. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). Moreover, our request is limited to training documents produced or documents relied on by the District Attorney to address *Batson* and *Wheeler* issues.

To clarify: we are not requesting copies of the entirety of the copyrighted materials, only the portions of the work referred to in our requests. The limited nature of our requests supports application of the fair use doctrine. If a portion of the information requested is exempt from disclosure by express provisions of law, CA. GOV'T. CODE § 6253(a) additionally requires segregation and deletion of that material so that the remainder of the information may be released.

III. Work product exemptions do not apply

The bulk of the requested training materials does not qualify as attorney work product. The statutory basis for the work product doctrine is found in CCP § 2018.010 *et seq*. The work product doctrine "creates for the attorney a qualified privilege against discovery of general work product and an absolute privilege against disclosure of writings containing the attorney's impressions, conclusions, opinions or legal theories." *BP Alaska Expl., Inc. v. Sup. Ct.*, 199 Cal. App. 3d 1240 (1988). To be clear, our request does not include materials containing attorney "impressions, conclusions, opinions or legal theory" directed at, or in anticipation of, a particular case. *Id*. Courts have specifically held that the the work product doctrine "only applies to materials authored in anticipation of litigation." *Masters v. Gilmore*, No. 08-CV-02278LTBKLM, 2009 WL 4016003, at *1 (D. Colo. Nov. 17, 2009) (holding that materials prepared by Deputy District Attorney for presentation at a conference did not qualify as work product).

Moreover, the requested materials do not qualify as work product because the work product doctrine is intended to "preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases" and to "prevent an attorney from taking undue advantage of his adversary's industry or efforts." *Id*. These purposes are not served by non-disclosure of the requested materials in this context.

Although the work product doctrine can apply to both litigation and nonlitigation matters, it applies only to "the work product of an attorney generated in his role as *counselor*" with respect to a particular case. *Aetna Cas. & Sur. Co. v. Sup.Ct.* 153 Cal. App. 3d 467 (1984) (emphasis added). The ACLU's requests are not for materials produced by an attorney acting as a counselor.

IV. Deliberative process privileges do not apply

As the District Attorney noted in its response, the PRA provides limited protection for records reflecting certain aspects of policy formation through CA. GOV'T. CODE §§ 6254(a) and 6255. For example, the PRA exempts from disclosure "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." CA. GOV'T. CODE § 6254(a). The materials requested include completed materials—materials prepared for the purpose of providing or aiding in training regarding the requirements under *Batson* and *Wheeler*. As such, the materials requested cannot be characterized "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business" and therefore the deliberative process privilege does not apply.

Even if the materials could be characterized in that manner, in order to qualify for the exemption with respect to the training materials requested by the ACLU of Northern California, the District Attorney must show that: (1) the requested record is a preliminary draft, note, or memorandum; (2) the requested record is not retained in the ordinary course of business; and (3) the public interest in withholding the record clearly outweighs the public interest in disclosure. *Citizens for a Better Env't v. Dept. of Food & Agric.*, 171 Cal. App. 3d 704 (1985).

V. Attorney-client privilege does not apply

The ACLU of Northern California has not requested materials containing any confidential communications between clients and attorneys. Attorney-client privilege applies, in general, when a client—whether or not a party—has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and his or her lawyer. CAL. EVID. CODE. § 954. Indeed, the privilege "is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." *Gordon v. Super. Ct.*, 55 Cal. App. 1546 (1997).

For the privilege to apply, however, the communication "must be made for the purpose of the legal consultation, rather than some unrelated or ancillary purpose" *Id*. The requested materials consist of materials prepared for the purpose of providing training on *Batson* and *Wheeler* issues, not for the purpose of legal consultation of a client, or in anticipation of a particular case. Furthermore, the California Supreme Court has determined that a district attorney is not an 'attorney' who represents a 'client' as such. But instead, that a District Attorney is a public officer, under the direct supervision of the Attorney General, and that "the extent to which the fruits of his investigations are entitled to confidentiality is governed entirely by provisions governing official information." *Shepherd v. Super. Ct.*, 17 Cal. 3d 107 (1976). Thus, the requested training materials do not constitute records protected by attorney-client privilege. If by

any case a portion of the information requested is exempt from disclosure by express provisions of law, CA. GOV'T. CODE § 6253(a) additionally requires segregation and deletion of that material in order that the remainder of the information may be released.

VI. Personal privacy law does not apply

As the District Attorney is aware, the PRA contains a general exemption, excluding from the duty to disclose "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." CA. GOV'T. CODE § 6254(c). The PRA also contains a broader public interest exemption in CA. GOV'T. CODE § 6255. Under CA. GOV'T. CODE § 6255, the public interest in disclosure is balanced more generally against the public interest in nondisclosure. By contrast, under CA. GOV'T. CODE § 6254(c), the public interest in disclosure is balanced specifically against the likelihood of an unwarranted invasion of personal privacy. CA. GOV'T. CODE § 6254(c)'s personal privacy exemption was modeled after Exemption 6 in the federal Freedom of Information Act (FOIA). 5 U.S.C. § 552(b)(6). Exemption 6 is FOIA's requirement to make information available to public does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." With respect to our requests, it is unclear how the District Attorney expects this privacy protections to apply to the requested training documents.

Furthermore, in evaluating the relevance of these protections, California courts may look to federal law for guidance on the application of the PRA exemption for personnel, medical or similar files. *Versaci v. Sup.Ct.* 127 Cal. App. 805 (2005). Using FOIA caselaw as guidance, the requested documents will not be found to be protected by personal privacy law. Federal courts construing the FOIA's "substantively identical" Exemption 6 apply a three-part test to determine whether records qualify for the "unwarranted invasion of personal privacy" exemption. In applying this test, courts construe the exemption narrowly, and the burden is on the agency to prove that the exemption is appropriate. *Id*. First, "the court must determine whether the records sought constitute a personnel file, a medical file or other similar file." *Id.* Here, no such files have been requested. Second, if the records are found to be personnel, medical or similar files, the court must next determine whether disclosure would compromise a "substantial" privacy interest. *Id.* at 101. It is unlikely that such information would be found in the requested documents. And, again, if a portion of the information requested is exempt from disclosure by express provisions of law, CA. GOV'T. CODE §6253(a) additionally requires segregation and deletion of that material in order that the remainder of the information may be released.

VII. Requested materials are not exempt from disclosure

Per the above sections, we have continuing concerns that the protections and caselaw cited by the District Attorney do not apply with respect to the specific training materials we have requested. We would like to reiterate our initial requests and welcome any additional responses to our cited concerns. Again, CA. GOV'T. CODE §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* CA. 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* CA. 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 you time and attention to this request.

Sincerely,

Shilpi Agarwal
Senior Staff Attorney