



**County of San Bernardino
OFFICE OF THE DISTRICT ATTORNEY
JASON ANDERSON, District Attorney**

Appellate Services Unit

September 8, 2021

Ellen Leonida, Esq.
BraunHagey & Borden, LLP
351 California St., 10th Floor
San Francisco, CA 94104

Dear Ms. Leonida:

Pursuant to our preliminary response of August 2, 2021, your response of August 13, 2021, and our e-mail exchange of August 25-26, 2021, this is our formal response to your California Public Records Act request of July 23, 2021. You resolved our uncertainty about which of two similar request letters addressed to us was the correct one by your August 13 response, and so we disregard the other. As later explained, we will have a brief followup for you in the coming days.

The (Renewed) 2019 Requests

We are first compelled to note that your history of our interaction with the ACLU in 2019 is inaccurate in multiple respects, and mischaracterizes our response at that time. It is correct that the ACLU brought a request to this office in 2019, that we responded on May 28 and June 14, 2019, and that our May 28 response noted that juvenile records would likely be exempt as confidential. However, our “additional letter” of June 14 (copy attached) was in fact our detailed formal response to that request, and only alleged that a portion of the request was overbroad. Moreover, as to the one demand we did see as overbroad, we nonetheless produced to the ACLU an estimate of the time and cost involved in fulfilling it in the event it were adjudged to be reasonable. Our response addressed all six areas of the CPRA in detail, and provided responsive material in one category (lifer parole hearing statistics) without objection.

You then allege that ACLU “appealed” and received documents in some categories, while we continued to object in others. This does not appear to be so. After inquiry with both our administration and members of my own unit, I can represent that we have no record of any “appeal” on your part after our response, nor of us making any further response to you in regard to that first Request.

Finally, you assert that the ACLU submitted a second CPRA request in July 2019, but received no response from our office. In fact we responded within two days, detailing our objections (copy attached), and heard nothing further from the ACLU at that time. Understanding that you are seeking similar records from many counties, we assume you have simply confused our history with that of another office. We do, however, wish to clarify the record, as it is certainly not our practice to ignore CPRA requests.

In addition to its broad and extensive demands for new categories of materials, the new Request first declares that it “constitutes a renewal of the ACLU’s two prior requests (as relevant, updated to the present day).” Inasmuch as these two prior Requests were fully addressed in 2019 and you offer no basis for them to be revisited beyond the cryptic claim that the well-established attorney work product and deliberative-process doctrines are somehow inapplicable, we will largely stand on our original response.

However, as we had provided a cost estimate for obtaining certain data you requested in 2019, we will note two points. First, of course, your “renewed” request would now cover a substantially longer period of time, meaning that our systems technician would undoubtedly spend at least another 40 hours, and likely more, in assembling the extraordinarily broad database the ACLU requested at that time. And second, the hourly rate for this labor, which we had (under)-estimated at \$52.87 at the time, is today \$71.33. Accordingly, with a time estimate of 120 rather than 80 hours, your estimate for the labor reimbursement would rise substantially, to \$8,559.60. And as a public entity ourselves, we do not waive such expenses.

Your 2019 motion did ask for certain lifer parole statistics, which we provided. Assuming you wished for that database to be updated, I have forwarded a request for updated statistics to our Lifer Parole Unit, and should have data to provide you in the next 1-2 weeks.

Finally, we note that our 2019 response indicated that the office had not formalized its policy on Senate Bill 1421. After renewed inquiry, it appears that this is still the case today, meaning that we have not created any specific database on the topic, and have no responsive documents to provide.

Turning to the specific categories of information identified by your new Request, we respond as follows.

Request 1

Paragraph 1 of the request seeks “[a]ny and all written policies, memoranda or guidance documents” in some twelve separate topic areas, most of them very broad. We must respectfully decline to provide any such materials, on multiple grounds.

First, and most fundamentally, any such internal policies are confidential core attorney work product (“attorney work product”), and therefore privileged. As you are undoubtedly aware, Government Code section 6254, subd. (k), provides that that “records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege” are exempt from disclosure under the CPRA. And Code of Civil Procedure section 2018.030 then provides that “(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances,” and “(b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.”

Because the “policies, memoranda and guidance documents” you seek are self-evidently the product of attorney labor, meant only for internal consumption and reflecting the “impressions, conclusions, opinions or legal research” of those attorneys, we must invoke the privilege for attorney work product.¹

Next, to the extent the request seeks “memoranda” or “guidance documents” we also invoke the “deliberative process” exception, a recognized component of the “catchall” exemption to CPRA disclosure under Government Code section 6255(a). This doctrine is generally considered akin to a claim of “executive privilege” in regard to a request under the federal Freedom of Information Act. (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 478.) And it is understood to provide to senior government officials, such as elected district attorneys, a “qualified, limited privilege not to disclose or be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated.” (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540 [Brown, J., concurring].) While your Request does not further define “memoranda” or “guidance documents,” we interpret it as seeking internal materials relating to the *formulation* of the “policies” that you seek. To that extent, the request intrudes upon the deliberative process, as well as attorney work product, and we decline it for that reason as well.

Request 2

You next ask us for “[a]ny and all policies regarding training, recorded trainings, or related materials” which are either mandatory or optional for prosecutors and/or relate to jury selection. We must decline to provide the office’s policies on any specific topic and internally-generated training materials of any kind, because both, again, are attorney work-product. That is, our internal policies (if any) and training materials

¹ For the record, while the interests of justice in a specific instance will always be considered, the San Bernardino County District Attorney declines to waive any protective doctrine as a matter of general practice.

(which do indeed exist) are protected under Code of Civil Procedure 2018.030, as they would plainly reflect the authoring attorney's "impressions, conclusions, opinions, or legal research or theories," which are not discoverable under any circumstances. (CCP section 2018.030; Government Code section 6254(k).)

Moreover, California case law has established the principle that, pursuant to the "catchall" exemption under Government Code 6255, a public agency is not required to disclose policies when doing so could undermine its operations. (See, e.g., *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788; *Suarez v. Office of Administrative Hearings* (2004) 123 Cal.App.4th 1191.) We therefore also decline to produce the requested materials on that basis.

Request 3

Your third request is for "Records concerning the Racial Justice Act," to include "a. Implementation of and compliance with the RJA; b. Communications concerning the RJA; or c. Trainings related to the RJA."

While training has indeed been undertaken on the topic of section 745, the request for records relating to "trainings related to the RJA" must be declined for the reasons given in our response to Request 2, above. Meanwhile, we have no formal records regarding "implementation of and compliance with the RJA," as I am advised that the office has not yet adopted a formal policy pursuant to section 745.

The request for "communications concerning the RJA" warrants a fairly detailed response. In the attempt to identify all potentially responsive documents, I and the chief deputy of this division sought the assistance of our information technology department in conducting a keyword search of all SBCDA office e-mail accounts. This search, which required many hours of technician labor (including transmission of some 4 gigabytes of data to me), unearthed all references to the "Racial Justice Act," "the RJA," "AB2542," "PC745" and other relevant terms.

The data was broken down by individual e-mail account. I then reviewed the data over a period of more than a week, and ultimately extracted more than 70 e-mail messages bearing in some manner on the RJA. I have then logged and reviewed these messages, and assessed them in light of available privileges.

The net result is that all messages are nondisclosable as 1) attorney work product, as discussed; and/or 2) subject to the deliberative process doctrine, as discussed; and/or 3) records pertaining to pending litigation to which the Office is a party (section 6254(b)); and/or 4) **not public records**, but merely unofficial comment or personal opinion that have not been created or maintained pursuant to official duty. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 618.) In that light, we must decline to produce any of these direct communications.

However, the search also extended to many documents that had been attached to e-mails. To the extent these attachments were our own internally-generated summaries and guidance materials, we continue to invoke the attorney work-product privilege and the deliberative process doctrine. But a portion of the captured e-mails had included externally-generated summary documents, which were then the subject of discussion within the e-mail conversation. Several such documents do reference the RJA and/or closely-related issues, and *do not* fall within the doctrines earlier noted. We are therefore providing them here, specifically:

- 1) A summary of SB 745 by the well-known retired judge J. Richard Couzens, of Placer County, that has been widely disseminated across the state
- 2) A brief filed by this Office in the capital case of *People v. McDaniel*, which centers on the question of racial bias and briefly mentions AB 2542 and section 745
- 3) A legislative summary of AB 2542 from the California Legislature's web site
- 4) A one-page summation from the Legislature's Committee on Revision of the Penal Code, dated May 25, 2021
- 5) A printout of the annotated section 745

We are also in possession of a PowerPoint document touching on bias and the RJA that was created and presented by a member of our office to an outside group of attorneys. As we believe this waives any privilege we might assert, we provide that as well. (For electronic purposes, that document and items 4 and 5 above have been combined into a single PDF document, while the other three items are being sent as separate PDFs.)

Request 4

Finally, you request “[a]ll 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.”

I inquired into the existence and tracking of any such investigations, and have been advised by our senior management that, in fact, **no *Batson-Wheeler* motions have granted against San Bernardino County prosecutors in at least the last 10 years.** Accordingly, there is no repository of “investigations,” nor internal discipline, nor State Bar reports, and therefore we have no public records to provide you.

Batson/Wheeler and ethical jury selection is, of course, a regular topic of internal training, and will no doubt be covered even more extensively after Penal Code section 231.7 takes effect next year. For the reasons earlier discussed, however, we must decline to provide our training materials.

Conclusion

Except as indicated, we decline production of materials under the “renewed” 2019 requests. Under the instant July 2021 request, we decline the demands of sections 1 and 2 on the basis, primarily, of the attorney work product and deliberative process doctrines. We then decline production of all e-mails under section 3 on the basis of multiple and varying privileges, but produce several documents that were created outside our organization and merely received by us, were filed with the court, or, in one case, was generated by an employee and shared with non-prosecutors outside the organization. Finally, we assert that we have no responsive documents to provide under section 4 of the Request.

It should be noted that a very small number of e-mail materials are still under review, and that we are also seeking to finalize our information on in at least two other areas. This includes the Lifer Parole data earlier noted, and we are also consulting with the entity that generated certain other potentially discoverable documents. Moreover, we note that we are in possession of one document, a 252-page summary of the law of bias that focuses extensively on AB 2542 and section 745, that was generated by the Santa Clara County District Attorney’s Office. As the document explicitly restricts distribution beyond law enforcement and prosecutorial channels without the authors’ permission, however, we would suggest that you get in touch with that Office and request it from them directly, if you are interested.

Should you have further questions or requests, do not hesitate to get back in touch. I will, as indicated, provide you a followup e-mail updating you on the final items when the information is received.

Yours sincerely,

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