



OFFICE OF THE
DISTRICT ATTORNEY
EL DORADO COUNTY, CALIFORNIA

VERN PIERSON, DISTRICT ATTORNEY

September 27, 2021

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

RE: PRA Request

Dear Ms. Leonida,

We are writing to you in response to your Public Records Act request dated July 29, 2019. We have attached a copy of that request as Attachment A to this response. Your PRA request sent in July 2021 referenced this older PRA 2019 request. We could not find a response to that 2019 request, so in an abundance of caution we will respond to both PRA requests in separate correspondence.

PRA Request dated July 29, 2019

In your July 29, 2019 letter you request:

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.

Our response to both items requested 1 and 2, from 1990 to the present (the date of this letter), is as follows:

A. PRA Requests 1 & 2 seek materials protected by copyright.

The training materials, manuals and books that we may have in our possession related to jury selection or *Batson/Wheeler* motions from 1990 to the present most often come from outside vendors who sell/provide copyrighted materials. Most often these are materials and trainings from the California District Attorneys Association. These outside source materials you seek were not created by this

office. There is a specific exemption from the CPRA when another law exempts the materials. Section 6254(k), which states: "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." (Cal. Gov't Code § 6254.) Federal law prohibits us from violating Federal copyright law. We cannot provide copyrighted material to you. You must buy it from the providers. There is a strong argument to be made that such copyrighted materials, even if in our possession, are not government writings and not subject to the CPRA. Most of the material that relates to training is provided when an employee attends a training to meet their MCLE requirements. Those materials, if any still exist, would not become a public record just because an employee attended the class. The logic that such a document becomes a public record under those circumstances does not withstand scrutiny under the reasoning of *Citizens Oversight, Inc. v. Vu*, (2019) 35 Cal. App. 5th 612 (see also, *Anderson-Barker v. Superior Court*, (2019) 31 Cal.App.5th 528, 539 and *Board of Pilot Commissioners v. Superior Court*, (2013) 218 Cal.App.4th 577, 598.)

B. PRA Requests 1 & 2 seek records protected by the attorney work product privilege.

In addition to the training materials, manuals, and books we obtain from sources outside of our office, there are likely many internal emails, memos, and/or in-house training materials from 1990 to the present that were prepared by and for Deputy District Attorneys in our office relating to jury selection and/or *Batson/Wheeler* motions. Not only is the request for these documents protected by copyright laws, but also protected by the attorney work product privilege.

Government Code section 6254(k) exempts from disclosure a prosecutor's work product. (71 Ops.Cal.Atty.Gen 5, 7 ["undeniable" that public attorney can rely to "full extent" upon protection of attorney work product.]) This allows a prosecutor to bar "under any circumstances" release of materials, which reflect his or her "impressions, conclusions, opinions, or legal research or theories . . ." (Code of Civil Procedure section 2018.030(a); Penal Code section 1054.6 [specifically protecting prosecutorial work product]; *Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810, 816 [work product also includes materials prepared in non-litigation context].) The preparation of internal emails, memos, and/or in-house trainings materials relating to jury selection and/or *Batson/Wheeler* motions is based upon a prosecutor's opinion, mental impressions, conclusions, and/or legal theories and is made in anticipation of litigation. The work product privilege states: "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (CCP § 018.030(a). See also, *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 68, fn. 2; *Izazaga v. Superior Court* (1991) 54 356, 382, fn. 19.; *County of Los Angeles v. Sup. Ct.* (2000) 82 Cal.App.4th 819, 833 ["the protection afforded by the attorney work product doctrine is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a non-litigation capacity."]) In the case of *People v. Superior Court (Laff)*, (2001) 25 Cal. 4th 703, the Supreme Court discussed the work product privilege holding it applied even before a criminal case existed.

If our office did training, or prepared a memo, or sent an email, for our attorneys on jury selection and/or *Batson/Wheeler* motions it would be a legal opinion and theory on the best jurors for a case and how to approach and handle *Batson/Wheeler* motions. These are the type of materials that would necessarily disclose our trial strategies and would not be in the public's interest to disclose such information because it would put the prosecution of criminal cases at a disadvantage by telling the defense what jurors we would pick and what strategy we may take. This is clearly the type of material protected by work product rules.

C. PRA Request 1 & 2 seek records protected by the deliberative process privilege.

Not only would the internal trainings, emails, or memos be protected by the attorney work product privilege, but they would also be protected by the deliberative process privilege. Specifically, records which reflect the mental processes by which a given decision was reached are exempt from disclosure. (Gov. Code, § 6255, subd. (a); see *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 170.) This exemption protects 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.)

As the Supreme Court observed in its decision in *Times Mirror* the need for the deliberative process exemption arose because of the fear that: "frank discussion of legal or policy matters" might be inhibited if "subjected to public scrutiny," and that "efficiency of Government would be greatly hampered" if, with respect to such matters, government agencies were "forced to operate in a fishbowl." (*Times Mirror Co. v. Superior Court*, (1991) 53 Cal.3d 1325, 1340)

The deliberative process privilege prohibits others from invading the District Attorney's thought processes. Internal trainings, emails, or memos concerning jury selection and *Batson/Wheeler* motions may potentially include documents pertaining to a deputy district attorney's thoughts and mental processes on decision made by that attorney or this office, and may also reveal the deliberative process about directives given by management and/or supervisors to attorneys when handling jury selection or *Batson/Wheeler* motions. Therefore, any such records, if they existed from 1990 to the present, would be exempt.

D. PRA Requests 1 & 2 are overly burdensome

Our office does not have a central repository of training materials. Each attorney may go to different trainings, some in-person at a conference, some in-house, some online live, and some via recorded webinar. And, each attorney may have different reference manuals, memos, emails, cases or books in their office, and maybe even some additional materials around the office that may be dated from 1990 to the present. Also, many times, a training or material related to jury selection or *Batson/Wheeler* motions is just a sub-part or sub-topic of a larger training relating to a totally different topic or subject matter area. As such there is no place to search for these specific training materials except each individual DDA computer, office and physical/electronic file, and

often digging into a training manual on a totally unrelated topic to attempt to find a training or material related to jury selection and/or *Batson/Wheeler*.

“A clearly framed request which requires an agency to search an enormous volume of data for a ‘needle in the haystack’ or, conversely, a request which compels the production of a huge volume of material may be objectionable as unduly burdensome.” (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166 (Cal. First).) As said in the *County of Los Angeles v. Superior Court*, (1993) 18 Cal.App.4th 588, case: “.... we cannot ignore the financial aspect of the requested disclosure.”

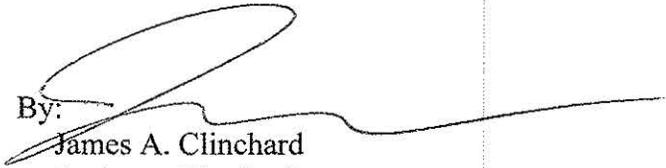
By the very nature of such a broad request this office would be required to hand search each and every manual and book, and electronic files of every attorney, as far back as 1990 to determine if we have any record that might be responsive. This Office concludes that the public interest in nondisclosure clearly outweighs the public interest in disclosure, thus making the material exempt from a CPRA request under Government Code §6255. Because the request is overly burdensome, the public interest in non-disclosure outweighs the interests in disclosure. (Gov. Code, § 6255(a); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.)

For all the aforementioned reasons above, we will not be turning over any documents relating to your July 19, 2019 PRA request.

If you have anything further you would like to discuss about this request, please do not hesitate to contact us.

Very truly yours,

VERN R. PIERSON
District Attorney

By: 

James A. Clinchard
Assistant District Attorney