



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 23, 2021. We have attached a copy of that request as Attachment A to this response. Your request also references and attaches an earlier PRA requests dated July 29, 2019. We could not find a response to that request, so in an abundance of caution we will respond to both PRA requests in separate correspondence.

PRA Request dated July 23, 2021

In your July 23, 2021 letter you request information from 2015 to the present relating to four separate categories of records:

1. Any and all written policies, memoranda, or guidance documents regarding a variety of topics including: (a) diversion eligibility/programing; (b) custody/bail recommendations; (c) charging recommendations/decision including enhancements, special circumstances and wobblers; (d) *Brady v. Maryland* compliance; (e) jury selection; (f) sentencing recommendations; (g) prosecuting minors; (h) parole recommendations; (i) pardons/commutation recommendation; (j) reports to state bar relating to discipline/misconduct; (k) data collection (including demographics of defendant/victim); and (l) referral of cases for federal prosecution.
2. Any and all policies regarding training as well as any training materials, recorded trainings, or related materials: (a) which are mandatory; (b) which are optional; (c) which relate to jury selection; (d) which relate to

- bias, or implicit/unconscious bias, and or racism; (e) which relate to social media evidence presentation and use.
3. Records concerning the Racial Justice Act, including: Implementation of and compliance with the RJA; Communications concerning the RJA; or Trainings related to the RJA.
 4. All investigations into Batson-Wheeler motions, including, but not limited to: Motions filed; Motions granted; internal training and/or discipline; or Reports to the State Bar relating to any Batson-Wheeler motions made and granted.

Our response to items 1-4 requested from 2015 to the present (the date of this letter), is as follows:

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

PRA request 1 seeks any and all written policies, memoranda, or guidance documents regarding a variety of topics including: (a) diversion eligibility/programing; (b) custody/bail recommendations; (c) charging recommendations/decision including enhancements, special circumstances and wobblers; (d) *Brady v. Maryland* compliance; (e) jury selection; (f) sentencing recommendations; (g) prosecuting minors; (h) parole recommendations; (i) pardons/commutation recommendation; (j) reports to the state bar relating to discipline and or prosecutorial misconduct; and (l) referral of cases for federal prosecution.

PRA request 2 seeks any and all policies regarding training as well as any training materials, recorded trainings, or related materials: (a) which are mandatory; (b) which are optional; (c) which relate to jury selection; (d) which relate to bias, or implicit/unconscious bias, and or racism; (e) which relate to social media evidence presentation and use.

These requested documents are either outside training materials protected by copyright laws², or were policies, memos and guidance documents prepared by and for Deputy District Attorney's relating to these subject areas concerning criminal cases in our office.

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

¹ We do not object to PRA Request 1, sub item (k) as protected by attorney client privilege.

² To the extent your request for guidance documents includes copyright protected training materials, such materials are exempt from disclosure pursuant to Government Code 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."

product also includes materials prepared in non-litigation context]. The preparation of written policies, memoranda, or guidance documents relating to the subject matter sought under PRA Request 1 and 2 are based upon a prosecutor's opinions, mental impressions, conclusions, and/or legal theories and are 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 Cal.3d 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 have written policies, memoranda, or guidance documents for our attorneys on the subject matters requested in PRA Requests 1 or 2 they would be legal opinions and theories on the best way to handle various types of criminal cases at various stages in their proceedings. 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 our strategy would be at various stages of a case. This is clearly the type of material protected by work product rules.

PRA Request 1, sub part (k), seeks written policies, memoranda, or guidance documents concerning data collection (including demographics of defendant/victim). We do not have any such documents. Our office would be guided by statutory, case law, and the California Rules of Professional Conduct on how to proceed concerning data collection.

B. PRA Requests 1 and 2 seek records protected by the deliberative process privilege³

PRA request 1 seeks any and all written policies, memoranda, or guidance documents regarding a variety of topics including: (a) diversion eligibility/programing; (b) custody/bail recommendations; (c) charging recommendations/decision including enhancements, special circumstances and wobblers; (d) *Brady v. Maryland* compliance; (e) jury selection; (f) sentencing recommendations; (g) prosecuting minors; (h) parole recommendations; (i) pardons/commutation recommendation; (j) reports to the state bar relating to discipline and or prosecutorial misconduct; and (l) referral of cases for federal prosecution.

PRA request 2 seeks any and all policies regarding training as well as any training materials, recorded trainings, or related materials: (a) which are mandatory; (b) which are optional; (c) which relate to jury selection; (d) which relate to bias, or implicit/unconscious bias, and or racism; (e) which relate to social media evidence presentation and use.

³ We do not object to PRA Request 1, sub item (k) as protected by deliberative process privilege.

Not only are these documents 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. Written policies, memoranda, guidance documents and/or training materials concerning the various topics covered in PRA Requests 1 and 2 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 the various stages of criminal proceedings referenced in PRA Requests 1 and 2. Therefore, any such records, if they existed, would be exempt and protected by the deliberative process privilege.

C. PRA Requests 1 and 2 are overly burdensome⁴

Our office does not have a central repository of all written policies, memoranda, guidance documents and/or training regarding the variety of topics referenced in PRA Requests 1 and 2 from 2015 to the present. While we have current written policies that may relate to some of the documents and topic areas requested, attorneys in our office may have various training manuals, different memos or guidance documents they have obtained over the last 6 years concerning the subject matters requested in PRA Requests 1 and 2. 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 that they use as guidance documents, and maybe even some additional materials around the office that may be dated from 2015 to the present. Also, many times, a policy, memo, guidance documents or training material related to the subject matters requested in PRA Requests 1 and 2 are just a sub-part or sub-topic of a larger policy, memo, guidance document or training relating to a totally different topic or subject matter area. As such there is no place to search for these specific memos and guidance documents except each individual DDA computer, office and physical/electronic file, and often digging

⁴ We do not object to PRA Request 1, sub item (k) as overly burdensome.

into a memo, guidance document or training manual on a totally unrelated topic to attempt to find material related to the subject matters requested in PRA Requests 1 and 2.

"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 for the past 6 years to determine if we have any records 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 23, 2021 PRA Request No. 1 or No. 2.

D. PRA Request 3 seek records concerning the Racial Justice Act

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 they may be some limited communications concerning implementation and training relating to the RJA, such documents are protected by the attorney work product and deliberative process privileges (which are more fully explained in our responses hereinabove). For the reasons earlier discussed, however, we must decline to provide our communications concerning this matter.

We have no records regarding "implementation of and compliance with the RJA," and do not have a formal office policy. For now, we are guided solely by the law in this matter.

E. PRA Request 4 seek records concerning the Batson-Wheeler motions

Your fourth request is for "All investigations into *Batson-Wheeler* motions" including: (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.

We do not have any list or repository where such motions or investigations to such motions are tracked in our office, or where we would be able to find "filed motions." Typically it seems in practice *Batson-Wheeler* motions are done orally in court during

jury selection. Accordingly, we do not have any documents responsive to sub part (a) of PRA Request 4.

Further, senior management staff was consulted and, to our recollection, there has been no *Batson-Wheeler* motion granted against our office or deputy district attorneys from our office from 2015 to the present (the time frame requested in your PRA). Accordingly, there is repository of "investigations," nor internal discipline, nor State Bar reports, and therefore we have no public records to provide you concerning PRA Request 4, sub parts (b), (c) or (d). To the extent you seek internal training materials related to *Batson-Wheeler* in PRA Request 4 sub part (c), such training material are exempt from disclosure as attorney work product, copyright, and deliberative work process (which are more fully explained in our responses hereinabove). For the reasons earlier discussed, however, we must decline to provide our training materials.

For all the aforementioned reasons above, we will not be turning over any documents relating to your July 23, 2021 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