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Stanislaus County

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September 27, 2021

Ellen Leonida, Esq.
Braun Hagey & Borden, LLP
351 California Street, 10th Floor
San Francisco, CA 94104

Re: California Public Records Act Request

Dear Ms. Leonida:

We are writing in response to your July 23, 2021 Public Records Act request for records relevant to the implementation of California's Racial Justice Act. The California Constitution[1] forbids us from granting you a "fee waiver," as you requested. The Stanislaus County Board of Supervisors has enacted Stanislaus County Code section 2.96.010 which requires a fee of $0.25 per page for reproduction costs or $10.00 for a copy of records in electronic format. In accordance with your email request, we are providing responsive documents electronically in return for a fee of $10.00. We have enclosed a USB flash drive upon which documents responsive to your request have been copied. Below, I address each of your requests independently.[2]

Request for Records from 2015 to the present:

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

    a. Diversion eligibility and/or programming;
    b. Custody and/or bail recommendations;
    c. Charging recommendations and/ decisions, including but not limited to:
        i. Charging recommendations and/or decisions regarding enhancements
        ii. Charging recommendations and/or decisions regarding special circumstances; or

[1] "...nor shall it have power to make any gift or authorize the making of any gift, or any public money or thing of value to any individual, municipal or other corporation whatever...." Cal. Const. art. XVI, § 6. Even if the Constitution allowed us to waive the minimal fees charged, we would exercise our discretion to deny your request so as not to burden taxpayers with the cost of your request.

[2] Our responses to your renewed 2019 request remain the same.

iii. Charging recommendations and/or decisions regarding wobblers;

d. Jury Selection;
e. Sentencing recommendations;
f. Prosecution of minors;
g. Parole recommendations;
h. Pardon and commutation recommendations;
i. Compliance with *Brady v. Maryland*, 373 U.S. 83 (1963);
j. Reports to the State Bar relating to discipline and/or prosecutorial misconduct;
k. Data collection relating to criminal matters, including demographic data of defendants and victims; or
l. Referral of cases for federal prosecution.

Response

All policies and/or "guidance documents," as well as memoranda related to them, of the District Attorney's Office are exempt from disclosure under the Deliberative Process Exception (Gov. Code, § 6255(a)). The deliberative process privilege is designed to protect materials reflecting deliberative or policy-making processes. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1341-1342; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 478; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142.) California courts have found that materials relating to the discretionary decisions by a District Attorney's Office, such as charging decisions, are not subject to disclosure. (See *Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 581-584; *People v. Keenan* (1988) 46 Cal.3d 478, 504-507.) The policy and "guidance documents" you seek would reflect the thought processes of those whose responsibility it is to decide how prosecutors should proceed under varying circumstances. Their disclosure would expose the decision-making process in such a way as to discourage candid discussion, undermining the ability of the District Attorney's Office to perform its function of ensuring the fair administration of justice. As such, these materials are at the core of the deliberative process. Given that the two *Keenan* cases support the proposition that even a criminal defendant is not entitled to knowledge of the internal workings of the District Attorney's Office through the discovery process, we conclude that the court opinions cited here protect this material from disclosure.

Further, many of our records are not disclosable as public records because they are privileged as attorney work product. (Code Civ. Proc., § 2018.033(a) and (b), made operative by Gov. Code, § 6254(k).) The District Attorney's Office is a litigation firm and materials prepared, maintained, and continually updated by attorneys for attorneys in preparation for current and future litigation make our records non-disclosable as work product.

Also, as the District Attorney's Office serves a law enforcement function, many of its policies, procedures, and techniques also fall within the law enforcement privilege developed out of the executive privilege. (See *Commonwealth of Puerto Rico v. United States* (1st Cir. 2007) 490 F.3d 50, 64; *In re City of New York* (2nd Cir. 2010) 607 F.3d 923, 941-942 and fn. 18; *In re United States Dept. of Homeland Security* (5th Cir. 2006) 459 F.3d 565, 569-571.) For example, in *Suarez v. Office of Administrative Hearings* (2004) 123 Cal.App.4th 1191, the appellate court held that a real estate broker accused of fraud was not entitled to disclosure of Department of Real Estate (DRE) audit and enforcement deputy manuals in an administrative proceeding; the record indicated that confidentiality would protect DRE's ability to investigate and would thus advance the public interest, and that the broker did not need the manuals for his defense. Likewise, in *Eskaton Monterey Hospital v. Myers* (1982) 134 Cal.App.3d 788, the Court of Appeal denied "disclosure of law enforcement materials which when revealed assist in thwarting and circumventing the law is not in the public interest." (*Id.* at p. 793.)

Moreover, in California, courts have interpreted Evidence Code section 1040(b) to specifically allow law enforcement to protect tools and techniques from disclosure, if the release of the information is against "public interest." For example, disclosure of a camera's location worn by an informant could jeopardize the informants' safety and ability to purchase drugs if drug dealers knew the precise location of the surveillance equipment. (See, e.g., *People v. Haider* (1995) 34 Cal.App.4th 661, 666 [disclosure of surveillance location would likely endanger occupants of the building whose rooftop was used for surveillance and would impair further investigation of narcotics offenses]; *People v. Walker* (1991) 230 Cal.App.3d 230, 235 [disclosure of hidden observation post would likely destroy the future value of location for police surveillance and threaten the safety of officers using the post]).

However, without waiving the previously noted exceptions, and in an effort to share documents that satisfy your request, the following responsive documents have been saved to the enclosed USB flash drive:

- **Brady Policy**
- **DVP Eligibility and Suitability Procedure**
- **DVP Terminations**
- **Rehab and Pardon Policy**
- **Three Strikes Policy**
- **Vehicular Manslaughter Policy**

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

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 YouTube, Snapchat, Instagram, TikTok, Twitter, Facebook, Reddit and Tumblr) and other media (including but not limited to movies, song lyrics, and videos).

Response

As explained previously, all policies of the District Attorney's Office are exempt from disclosure under the Deliberative Process Exception (Gov. Code, § 6255(a)). Further, as we explained in our response to your 2019 request for records from 1990 to 2019, a request you renewed with this request, we do not maintain a training materials repository. If such records existed, they would be in the possession of individual staff members or in individual case files. To determine whether there were any documents responsive to your request, we would have to search individual offices and case files, making this request overly burdensome in a manner not contemplated by the CPRA. (Gov. Code, § 6255(a).) As the Court of Appeal in *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588 explained: "....we cannot ignore the financial aspect of the requested disclosure. As we have noted above, section 6254, subdivision (f) does not authorize the release of 'records' and 'files' containing the information sought by Kusar, but only of 'information' extracted from the records. (*Williams v. Superior Court* [1993] 5 Cal.4th [338] at pp. 348, 360-361.) This means that to comply with Kusar's request, the sheriff's department not only must retrieve records and files going back many years, but must itself extract from those records and files the information requested, rather than merely duplicating certain records and turning them over to Kusar. The record before us reflects that to generate, copy and disclose the requested information would impose a substantial financial burden on the sheriff which he does not have the budget or authority to incur. Yet the Legislature (§ 6257) has provided only for recovery of duplication costs by the law enforcement agency involved. This is a restriction which is both reasonable and appropriate where the mandatory disclosure is limited to current records of contemporaneous activity, but totally unreasonable and inappropriate where both generation and compilation of information from historical archives is required." (*Id.* at pp. 600-601.) Case law goes on to note that, "[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.)

Similarly, a search would involve excessive time and expense in locating or collecting this information and under Government Code section 6255(a) is not required. (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453, fn. 13; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321; *Bertoli v. City of Sebastopol* (2015) 233 Cal.pp.4th 353, 360-363, 372 ["When weighing the benefits and costs of disclosure, any expense or inconvenience to the public agency may properly be considered."]; *State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1188 [same].) It would be costly to search through thousands of current and archived files back to 1990 to determine whether documents exist, and those records would then be exempt, as explained in the following paragraphs. As such, we conclude that the public interest in nondisclosure outweighs the public interest in disclosure, making the material exempt under § 6255(a) and *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074-1075.

As stated above, were we to locate responsive documents, they are exempted from disclosure under § 6254(k) because our trainings are provided almost exclusively by the California District Attorneys Association (CDAA). As such, federal law prohibits us from violating copyrights. You must buy the copyrighted material from the provider. The California District Attorneys Association may be contacted at 2495 Natomas Park Drive, #575, Sacramento, CA 95833. Further, there is a strong argument to be made that such copyrighted materials, even if in our possession, are not government writings and, therefore, not subject to the CPRA. This argument flows from statutory constructions. "[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (*City of Fresno v. Superior Court* (1988) 205 Cal.App.3d 1459, 1476 quoting Code Civ. Proc. § 1859.) Likewise, in *Poway Unified Sch. Dist. v. Superior Court (Copley Press)* (1998) 62 Cal. App.4th 1496, 1503–04, the Court of Appeal explained that "[t]he principle of striving for harmony between disparate parts applies even though the two provisions are in separate codes. Under the extrinsic interpretive principle of in pari materia, two statutes touching upon a common subject are to be construed in reference to each other, so as to 'harmonize the two in such a way that no part of either becomes surplusage.'"

Another exemption applicable to our training materials would arise if this office generated its own training materials. If there are internal documents related to the topics of your request that were generated by this office, they would be "work product" because materials generated by a litigation firm, such as ours, that is continually updated by attorneys for attorneys in

preparation for current and future litigation is privileged. (Code Civ. Proc. § 2018.030(a) and (b), made operative by Gov. Code, § 6254(k).) Subdivision (k) of section 6254 provides an exemption for a prosecutor's work product. (Lawyer-Client Privilege & Work Product Rule, 71 Ops. Cal.Atty. Gen. 5, 7 (1988) ["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, legal research or theories..." (Code Civ. Proc., § 2018.030, subd. (a); Pen. Code, § 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 nonlitigation context].) As such, attorney work product found in any training materials analyzing case issues, jury selection strategies, or even how to respond to defense challenges would be exempt from disclosure as our work product.

Additionally, Gov. Code § 6255(a) stands for the idea that when the public interest in nondisclosure outweighs the public interest served by disclosure the responding party need not supply the requested materials. To determine "the meaning of public interest under the CPRA, we may draw on the legislative history and judicial construction of the FOIA." (*Los Angeles School District v. Superior Court, supra*, 228 Cal.App.4th at p. 241.) "'[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would "she[d] light on an agency's performance of its statutory duties" or otherwise let citizens know "what their government is up to."'[Citations]." (*Ibid.*) "California courts have followed the same approach." (*Ibid.*) But "just because a member of the public has an interest in something does not necessarily make that interest one of public concern." (*Id.* at p. 240.) Indeed, "no disclosure [is appropriate] when disclosure would serve curiosity rather than public interest." (*United States Dept. of Justice v. Reporters Committee* (1989) 489 U.S. 749, 774-775; see also *ACLU Foundation of So. Calif. v. Sup. Ct.* (2017) 3 Cal.5th 1032, 1043-1047 (*ACLU*).) Here, the rather dubious benefit of determining what training courses were offered or mandated is of fleeting or no real public concern. Training materials available to an everchanging staff is nothing more than additional information offered to attorneys who have themselves completed law school, potentially attended numerous other trainings during their careers and are professionals in a field traditionally defined by its member's ability to analyze, challenge, parse and apply legal doctrine. Any individual training in the context of an attorney training is a collection of ideas and propositions to be considered by the recipient. Attorney trainings are therefore far different than a training offered to a technician who, when plying their trade, often rely on and directly act in accordance with what they learn. Disclosure of the material sought here by the requestor therefore serves no function other than to assuage their curiosity.

Notwithstanding these objections to your requests, the following responsive documents have been saved to the enclosed USB flash drive. Note: CDAA waived their copyrights and consented to disclosure of the training materials copied on the flash drive.

- **A Look at Bias**
- **AB 2542**
- **AB 3070 Peremptory Challenges**
- **Bias-Winter Workshop**
- **Charging and Sentencing Child Sexual Assault**
- **Charging and Sentencing Sexual Assault**
- **Felony Murder Rule**
- **Felony Prosecutor Academy-Wheeler**
- **Felony Sentencing**
- **Gang Symposium-Elimination of Bias**
- **Hate Crimes**
- **Jury Selection Voir Dire**
- **Jury Selection-Examination-Impeachment**
- **Juvenile Justice System**
- **Life Offers**
- **Misdemeanor Sentencing Training**
- **One Strike Training**
- **Preparing a Case**
- **Trial Advocacy-Voir Dire**
- **Values & Ethics of Prosecution**
- **Vior Dire DV Misdemeanors**
- **Voir Dire Defendant**
- **Voir Dire DV Stalking**
- **Voir Dire Elder Abuse**
- **Voir Dire for Domestic Violence**
- **Voir Dire in Drug Cases**
- **Voir Dire in Gang Cases**
- **Voir Dire in Gun Cases**
- **Voir Dire in Homicide Capital Cases**
- **Voir Dire in Sex Cases**
- **Voir Dire New Prosecutors**
- **Voir Dire Objections**
- **Voir Dire Questions for People V1**
- **Voir Dire Questions for People V2**
- **Voir Dire Wheeler Trial Checklist**

3. Records concerning Racial Justice Act:
    a. Implementation and compliance with the RJA;

Response

There are no documents responsive to your request.

b. Communications concerning the RJA; or

Response

There are no documents responsive to your request.

c. Trainings related to the RJA.

Response

There are no documents responsive to your request.

4. All investigations into *Batson-Wheeler* motions, including, but not limited to:

a. Motions filed;

Response

We do not track types of motions filed; thus, your request would require a hand-search of all of our files. This would be overly burdensome. (Gov. Code, § 6255(a) and *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074-1075.) However, motions filed in all cases are available at the Stanislaus Superior Court Clerk's Office at 800 11th Street, Room 140, Modesto, CA 95354. Further, any cases involving *Batson-Wheeler* issues that reached the appellate level are available to the public by searching the Fifth District Court of Appeal's website. The website addresses for published and unpublished opinions are, respectively:
Published / Citable Opinions - court_opinions (ca.gov)
Unpublished / Non-Citable Opinions - court_opinions (ca.gov)

b. Motions granted;

Response

Our office does not track motions granted, no matter the type; thus, your request would require a hand-search of all of our files, which would be overly

burdensome. (Gov. Code, § 6255(a); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1074-1075.) However, motions filed in all cases are available at the Stanislaus Superior Court Clerk's Office at 800 11th Street, Room 140, Modesto, CA 95354. Further, any cases involving *Batson-Wheeler* issues that reached the appellate level are available to the public by searching the Fifth District Court of Appeal's website. The website addresses for published and unpublished opinions are, respectively:
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c. Internal trainings and/or discipline; or

Response

The *Batson-Wheeler* training materials you seek relate to an attorney's ethical duties. These duties are codified in statutory law, case precedent and the California Rules of Professional Conduct. The California Rules of Professional Conduct are available on the State Bar of California's website at:
https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct

There is little to no discretion as to ethical duties. Because the standards are codified in statutes, cases and rules, it is unlikely that any documents related to them would contribute to the public's understanding of government activities. (See *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 234.) As such, the burden of the searches is not outweighed by disclosure. For instruction as to prosecutorial ethics, including *Batson-Wheeler* issues, we access statutory and case law by subscription to vendors such as Westlaw, Thomson Reuters, CEB and so on. Any document provided to us by these vendors is protected by copyright laws and, therefore, exempt pursuant to Government Code sections 6254(k) and 6255, even if they were found to be public records. Courts have found that publishers and vendors of government legislation or court opinions are entitled to copyright protection.[3] Further, we contend that simply because an employee receives training from an outside source such as the State Bar or the California District Attorneys Association, the training materials do not become the "records" of this office and they remain protected copyrighted materials. Also, employees may have independently sought, purchased and obtained training materials, but those are likewise not the records of this office and so are not subject to disclosure.

[3] "The West Publishing Company's arrangement is a significant work of skill and enterprise which is itself entitled to copyright protection. 17 U.S.C. § 103. That protection has been properly perfected and is of a nature cognizable in this Court." (*W. Pub. Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571, 1578 (D. Minn. 1985) affd, 799 F.2d 1219 (8th Cir. 1986).)

As for discipline related to *Batson-Wheeler*, there are no documents responsive to your request.

d. Reports to the State Bar relating to any *Batson-Wheeler* motions made and granted.

Response

There are no documents responsive to your request.

I have attempted to provide a full explanation for the denial of a portion of your request. We reserve the right to present in the future additional theories and authority for nondisclosure. If you disagree with the positions I have taken in this letter, I am willing to reconsider my views based on any reasons you wish to present or any legal authorities you wish to cite.

Sincerely,

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District Attorney

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