

Todd D. Riebe
District Attorney



October 15, 2021

Criminal Division

Investigations
Victim Witness

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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:

I am responding to your September 7, 2021, Public Records Act request for records relevant to the implementation of California's Racial Justice Act. Having now had ample time to explore the presence of information you seek and to determine the feasibility of supplying this information, I have concluded that my office is unable to provide the requested information for the reasons set out below.

Records Requested

- 1. Unique identifier(s) associated with each defendant, each case, and each arrest**
 - a. Name of the defendant
 - b. Court case number(s)
 - c. Arresting agency number(s)
 - d. Any other unique identifier(s)
- 2. Demographic and other information concerning each defendant**
 - a. Race
 - b. Ethnicity
 - c. Country of origin or nationality
 - d. Gender/sex
 - e. Age or date of birth
 - f. Prior criminal convictions of a defendant
- 3. Information regarding each arrest**
 - a. Zip code of arrest
 - b. Date of arrest
 - c. Charge identified by law enforcement referring individual (including top charge by law enforcement referring)
- 4. ADA assigned to the case**

5. Decisions to decline to prosecute

- a. Date of the decision to decline to prosecute
- b. Identity of person who made final decision to decline prosecution
- c. Charges declined to prosecute (charge-level declinations as opposed to individual—or case—level where available)
- d. Reasons for the declinations to prosecute, including but not limited to:
 - i. police misconduct involved in case;
 - ii. injuries to person involved;
 - iii. injuries to suspect;
 - iv. financial loss to persons involved;
 - v. prior criminal record of suspect; and
 - vi. victim's level of cooperation in prosecuting case.

6. Diversion offers and decisions (formal and informal, and including collaborative court and deferred prosecution)

- a. Date of diversion offer
- b. Type of diversion offered
- c. Whether diversion accepted
- d. Whether diversion completed

7. Charges filed

- a. Statutes (applicable code section)
- b. Severity (i.e., infraction, misdemeanor, wobbler, felony)
- c. Any enhancements (Conduct enhancements, including but not limited to PC Section 12022.53 (gun), PC Section 186.22 (gang); Status enhancements including but not limited to PC Section 667.5 (prison prior), PC Section 667(a) (serious felony prior), PC Section 1170.12 and 667(b)-(i) (strike prior), PC Section 11370.2 (drug prior), PC Section 12022.1 (committed while on bail/OR); Special circumstances (PC Section 190.2); Any other modifications or enhancements.)
- d. Maximum sentence

8. Factors considered in deciding charges to file, and level of charges, including

- a. Injuries to persons
- b. Financial loss to persons
- c. Status of victim (i.e., law enforcement, child, spouse, etc.)
- d. Prior criminal history of defendant
- e. Victim's cooperation

9. Bail/custody information

- a. Bail amount requested
- b. Detention orders sought
- c. Whether bail was set or denied
- d. Whether individuals were released on bail or not
- e. Pre-plea/pre-trial custody status

10. Plea offers

- a. Charge(s) offered, including severity
- b. Dates of plea offers
- c. Sentence(s)/disposition(s) offered
- d. Records of whether any plea offer was accepted, including date of acceptance

11. Case outcomes

- a. Charges of conviction
- b. Dismissed charges
- c. Sentences

12. Counsel for defendant, whether public defender or private counsel

13. Demographic and other information concerning victims

- a. Race
- b. Ethnicity
- c. Gender/sex

14. Recommendations regarding parole

15. Recommendations regarding pardon or commutation

Response to the CPRA Request

The very nature of your request is something beyond information that is public. Your request tasks us with writing a new report. The Public Records Act applies to existing records and does not require an agency to create a record that does not exist. (Govt. Code sec. 6252(e).) A public record, as defined by the Government Code "includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by the state ... agency regardless of physical form or characteristics." 'Writing' is further defined by section 6252(e) as "...handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards. Discs, drums, and other documents." (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774.)

While some of the information requested is contained in an electronic database, it is not possible to extract the data as requested without significant reprogramming and therefore your request is ultimately asking us to create a new record. This office does not have an existing document that contains the information you request. (See, *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 327. See also, *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 162 [federal Freedom of Information Act does not require agency to create documents; it requires only "disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create"]; *Center for Public Integrity v. Federal Communications Comm'n* (D.D.C.2007) 505 F.Supp.2d 106, 114 [producing data in the form requested would amount to creation of a new record, which is not required by Freedom of Information Act].)

Additionally, the very nature of such a broad requests would require our office to hand search each and every file back to 2015 to determine if we have information that might be responsive. Regarding the data we currently store in our computerized database, in order for our office to extract, organize, test, and produce the report you request, we would have to expend a considerable amount of staff time and office expense. We have never tracked the information you seek and to do so to fulfill your request would be overly burdensome. As stated in *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588:

“...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, supra*, 5 Cal.4th 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 authority to incur. Yet the Legislature (sec. 6257) has provided 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.)

Further, we are small rural county District Attorney’s Office with extremely limited resources. For the past two months we have been in COVID outbreak status, meaning that 3 or more employees have tested positive for COVID, without a sufficient corresponding break where no new employee COVID cases have occurred. Additionally, we have had 2 attorneys leave the office and are struggling just to meet our day-to-day prosecutorial responsibilities. We lack the resources to hire temporary staff that would be necessary to comply with your request.

Given the cost it would take to sort through thousands of criminal case files both physical and electronic our 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 section 6255. More importantly, even if we could undertake such a burdensome task to find responsive records, the records would be exempt from disclosure for other reasons.

Additionally, Government Code section 6254(f) speaks directly to the type of records you seek. And while there are several categories of information within your request that are enumerated exceptions to the general ban on disclosing this sort of information, the vast majority of the items you seek are not excepted. Had the Legislature intended law enforcement agencies to divulge the information you pursue through your request, they would have included it within the exceptions noted in Government Code sections 6254(f)(1) and 6254(f)(2). Given the nature of the information you are requesting, which includes the names and birthdates of all individuals having contact with the criminal justice system no matter if charges were filed, rejected, expunged, or otherwise disposed of, the legislature was no doubt concerned with exposing people who otherwise would prefer to not have their interaction with the criminal justice system brought to public attention potentially against their wishes. For example, absent a physical individual inspection of every paper or electronic file, it would be impossible for our office with its current database to discern which defendants have had their records sealed by court order

following a dismissal of charges. Were we to supply records for those individuals, whom are substantial in number, we would be in violation of a court order and exposing the very matter the defendant sought to avoid revealing to public scrutiny. Therefore, since many of the requested items are not enumerated within Government Code section 6254(f) and, further, that the limitations of our database are such that there is no practical way to parse the appropriate information allowed within the excepted categories, we are unable to supply the requested information.

Importantly, the state constitutional right of privacy extends to protect criminal defendants from unauthorized disclosure of criminal history records. For example, in *Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, a private entity sought a compilation of information from the database maintained by the Los Angeles Municipal Court, including the name, birthdate and zip code of every person against whom criminal charges were pending in those courts, together with the case number, date of the offense, charges filed, pending court dates, and disposition. The Court of Appeal recognized that docket and court file information is open to the public but observed a qualitative difference between obtaining information from a specific docket or on a specified case and obtaining docket information on every person or case pending in court. Reversing a lower court order, the appellate court held that the material sought was covered by Penal Code sections 13300 to 13305, and that it was a violation of law to provide such a compilation to an unauthorized private entity. Likewise, in *Craig v. Municipal Court* (1979) 100 Cal.App.3d 69, a criminal defendant had obtained a discovery order compelling the California Highway Patrol (CHP) to disclose the names and addresses of all persons arrested by specific CHP officers on specific charges for the preceding two years. On a petition for writ of mandate, the Superior Court vacated the order, and the Court of Appeal affirmed, holding the disclosure would be a violation of Penal Code sections 13300 and 13305.

Finally, the obligation to provide information under both sections 6254(f)(1) and (f)(2) applies only when a CPRA demand is contemporaneous with the agency's handling of the matter. (*County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588, 601-602.) The decision in *Kusar*, limiting such matters to contemporaneous requests, was based on the court's lengthy review of the Legislative history pertaining to subdivisions (f)(1) and (f)(2). (*Kusar, supra*, at pp. 595-601.) Your request seeks records dating back to 2015 and are, therefore, not contemporaneous.

Response to Sections 5, 6, 8 and 10

In addition to the reasons stated above, the materials you request in sections 5, 6, 8 and 10 are exempt from the CPRA under section 6254 as part of the deliberative process. 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, at 1341-2; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, at 478; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142.) 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 records you seek reflect the thought processes of those whose responsibility it is to decide how prosecutors should proceed given various circumstances. Disclosure would expose the decision-making process in such a way as to discourage the use of discretion, and thereby undermines the ability of the District Attorney's Office to perform its function of ensuring the fair administration of justice. Given that the two *Keenan* cases together support the proposition that even a criminal defendant is not entitled to the internal workings of the District Attorney's Office requested through the discovery process, we conclude 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 section 6255. The cited cases, Government Code sections 6254(k) and 6255, protect this material from disclosure.

Similarly, the records you request in sections 5, 6, 8 and 10 are not disclosable as public records because they are privileged as attorney work product. (Code Civ. Proc. Sec. 2018.030 (a) and (b), made operative by Gov. Code sec. 6254(k).) We are a litigation firm and materials prepared, maintained, and constantly updated by attorneys for attorneys in preparation for ongoing and future litigation, exempt many of our records. These factors would also make these records exempt as privileged attorney work product.

Section 6254(k) contains within its ambit 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, or legal research or theories..." (Code Civ. Proc. Sec. 2018.030, subd. (a); Pena. Code sec. 1054.6 [specifically protecting work product]; *Rumac, Inc. v. Bottomley* (1983) 143 Cal.App.3d 810, 816 [work product also includes materials prepared in non-litigation context].) Accordingly, attorney work product divulged by disclosing the materials you seek would be exempt from release.

I have attempted to provide for you a full explanation for the denial of your request. We reserve the right to present in the future additional theories and authorities 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,

A handwritten signature in black ink, appearing to read "Todd D. Riebe". The signature is fluid and cursive, with the first name "Todd" being the most prominent.

Todd D. Riebe
District Attorney