BRAUNHAGEY & BORDEN LLP

San Francisco & New York

Ellen Leonida, Esq.
Partner
leonida@braunhagey.com

January 5, 2022

VIA EMAIL

Bryan C. Walters
Deputy County Counsel
Office of the County Counsel of Kern County
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
Email: bwalters@kerncounty.com

Re: California Public Records Act Request

Dear Mr. Walters,

Thank you for your August 16 letter ("Response Letter") responding to our July 23 request pursuant to the California Public Records Act ("CPRA") seeking records relevant to the implementation of the Racial Justice Act ("RJA"). In your Response Letter, you asserted various exemptions. Your asserted exemptions are overbroad and unsupported for the reasons elaborated below.[1] Further, as you know, exemptions are permissive and not mandatory. The CPRA also imposes an obligation on agencies to segregate non-exempt portions of records from exempt portions if the agency can reasonably do so. (Cal. Gov. Code, § 6253 subd. (a)). Thus, you have an obligation to produce nonexempt materials that can be reasonably segregated from exempt materials.

Upon reviewing these responses, please let us know what further documents you intend to produce. If there are responsive records for which you intend to continue asserting exemptions, please let us know to which records those exemptions apply. I'm sure we would both prefer to avoid litigating over exemptions that do not apply to any documents, or that apply to documents that are not particularly important to us. Please also contact our office with times you are available to speak on the phone so that we may collaborate to resolve any outstanding issues.

1. Prosecution Data (Sections 1-3 of your Response Letter)

In your Response Letter, you explain that your Criminal Justice Information System ("CJIS") database is shared by multiple departments and that, as a result, you do not have access to all the data we request. You further state that the District Attorney "does not track or maintain data related to diversion programs." You separately assert that County Information Technology

[1] "Since disclosure is favored, all exemptions are narrowly construed. The agency opposing disclosure bears the burden of proving that an exemption applies." (*County of Santa Clara v. Superior Court* (2019) 170 Cal.App.4th 1301, 1321 (citations omitted))

Services, which is responsible for your Office's IT Services, may need 16 hours to "run a query to extract some of the information [we] are seeking" and would charge $90 per hour of "programming time" to do so.

As an initial matter, please clarify the following regarding your Response Letter:

a. Please inform us which categories of data you do and do not have access to.
b. For records you assert you do not have access to through the CJIS database, please confirm that no one in your office has access to them. Please produce the data if your office does have access to that data outside of the CJIS database.
c. Please confirm that the District Attorney does not have individual case level data concerning diversion programming.
d. Please provide an explanation regarding what code needs to be written to run searches in your databases, and why this effort would require 16 hours of programming time.

Further, we have concerns regarding your proposed fee-shifting, which appears to extend beyond that permitted by statute.[2] The PRA requires your fee shifting for programming services to be necessary.[3] We do not find your estimate of 16 hours of programmer time at the rate of $90/hour to write code and conduct searches necessary or supported by the nature of the requests. We request a more reasonable cost estimate.

Inherent in the CPRA is a requirement that agencies bear some financial cost to ensure access to public information. Courts have recognized that financial costs to an agency do not eliminate the agency's obligation to disclose public information. (See, e.g., *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909 [$43,000 cost of compiling an accurate list of names not "a valid reason to proscribe disclosure of the identity of such individuals"].) Excessive programming costs would defeat the constitutional and statutory right to information and cannot be permissible. The California Supreme Court has affirmed that "Article I, section 3 of the state Constitution favors an interpretation that avoids erecting [] substantial financial barriers to access." (*Nat'l Laws. Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 507 [considering relevant that the nearly $3,000 of proposed redaction costs were "nontrivial" and "prohibitive" for "many requesters"]; *Id.* at p.508 ["Consideration of that right [of access to government information] favors a rule that avoids shifting routine redaction costs as a condition of gaining the access the PRA promises."].)

[2] Gov't Code §§ 6253, 6253.9. See also *Nat'l Laws. Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 607.

[3] Gov't Code Sec. 6253.9, subd. (b) [permitting fee-shifting for "the cost of programming and computer services necessary to produce a copy of the record when . . . [t]he request would require data compilation, extraction, or programming to produce the record"].

2. Office Policies (Sections 4 & 9 of your Response Letter & PRA Response Attachment A Policies) & Training Materials (Sections 7, 8 & 10 of your Response Letter & PRA Response Attachment B)

As to our request for certain specified office policies[4] and all training materials, you asserted the following exemptions for certain specified policies: attorney work product, deliberative process privilege exemption and the "catchall exemption." These exemptions are improperly asserted and do not justify the withholding of the identified responsive policy and training materials.

a. The Attorney Work Product Exemption Does Not Support the Withholding of the Identified Policy and Training Records.

Your use of the attorney work product exemption in response to many of our requests for policy records and all of our requests for training materials stretches the exemption beyond its breaking point. This exemption serves to protect from discovery a "writing that reflects an attorney's impressions, conclusions, opinions, legal research or theories." (Code Civ. Proc. § 2018.030(a).) It must be narrowly construed. (Cal. Const. art. I, § 3 ["A statute, court rule, or other authority . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."]. See also *Los Angeles Cnty. Bd. of Supervisors* (2016) 2 Cal.5th 282, 292 [emphasizing same].)

Public records such as the general policies, practices, and guidelines, as well as the training materials, requested here cannot be withheld on this basis. These documents are public records that lay out "general standards to guide the Government lawyers." (See *ACLU of N. Cal. v. United States Dep't of Justice* (9th Cir. 2018) 880 F.3d 473, 484-89 [affirming that agency manuals, guidance documents, and other materials conveying agency policy fall outside work product protection and thus are discoverable]. See also *Jordan v. Dep't of Justice* (D.D.C. 1978) 591 F.2d 753, 774 [concluding that instructions, guidelines, and effective policies "relating to the exercise of prosecutorial discretion by the United States Attorney for the District of Columbia and his assistants" not protected by work-product privilege]; *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.* (D. D.C. 2013) 926 F.Supp.2d 121, 142-44 [ruling that memoranda communicating policies, guidelines, and "general standards" to ICE staff attorneys not protected by work-product privilege].)[5]

[4] You asserted these exemptions for, among others, Memoranda Regarding Misdemeanor and Felony Guidelines, Felony Disposition Standards, the Death Penalty, and Complaint Requests Against Police Officers.

[5] As many courts have recognized, the CPRA is modeled after the federal Freedom of Information Act ("FOIA") and the "judicial construction of the FOIA thus 'serve[s] to illuminate the interpretation of its California counterpart.'" (*Times Mirror Co. v. Superior Ct.* (1991) 53 Cal.3d 1325, 1338, quoting *ACLU of N. Cal. v. Deukmejian* (1982) 32 Cal.3d 440, 447); see also *Cmty. Youth Athletic Ctr. v. City of Nat'l City* (2013) 220 Cal. App.4th 1385, 1400 n.6 ["Judicial interpretations of the FOIA in the federal courts may be used to construe the PRA."]).

b. The Deliberative Process Privilege Cannot Justify the Withholding of the Responsive Policy and Training Records Identified.

The deliberative process privilege also does not support the withholding of policy and training records requested. The deliberative process privilege is designed to protect the ability of policymakers "to test ideas and debate policy and personalities uninhibited by the danger that [their] tentative but rejected thoughts will become subjects of public discussion." (*ACLU of N. Cal. v. Superior Ct.* (2011) 202 Cal.App.4th 55, 76.) This privilege is inappropriately asserted here.

The California Supreme Court identified "the key question" in examining the applicability of the deliberative process privilege as "whether disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion with the agency and thereby undermine the agency's ability to perform its functions." (*Times Mirror Co. v. Superior Ct.* (1991) 53 Cal.3d 1325, 1342 [deliberative process exemption protects the ability of policymakers and public agencies "to test ideas and debate policy and personalities uninhibited by the danger that [their] tentative but rejected thoughts will become subjects of public discussion."].) Thus, the exemption applies only to "predecisional" and "deliberative" documents. A "policy cannot be properly. . . characterized as predecisional if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." (*ACLU of N. Cal. v. Superior Ct.* (2011) 202 Cal.App.4th 55, 76 (internal quotation marks omitted); see also *iIbid.* ["The deliberative process privilege does not justify nondisclosure of a document merely because it was the product of an agency's decision-making process; if that were the case, the PRA would not require much of government agencies."]; *Citizens for a Better Env't v. Dep't of Food & Agric.* (1985) 171 Cal.App.3d 704, 713 ["memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context" are not exempt from disclosure].)

Office policies, guidance documents, and training materials do not "expose an agency's decision-making process," but rather articulate finalized decisions after deliberations have concluded (See *Times Mirror Co.* (2011) 53 Cal.3d at p.1342.) These documents do not expose the ideas that were proposed, but ultimately rejected. There is simply no privilege for ideas once they have become office policy as elaborated in memoranda or incorporated into trainings.

c. The Catchall Exemption Cannot Justify the Withholding of the Responsive Policy and Training Records Identified.

Nor does the CPRA's "catchall exemption," Gov't Code § 6255 subd. (a), support the withholding of prosecutorial policies and training materials, particularly where such records are relevant to the RJA. The CPRA's catchall exemption permits an agency to withhold records if,

on the facts of a particular case, the agency can demonstrate that there is a weightier public interest in withholding the records than disclosing them.[6]

Withholding certain information based on this catchall public interest exemption requires an express elaboration of the public interest that is being protected by nondisclosure. (See, e.g., *ACLU of N. Cal.*, 202 Cal.App.4th at 74 [rejecting a governmental assertion that the public interest compelled withholding because "the record provide[d] no basis upon which to exempt the information at issue under . . . the catch-all exemption"].) The burden is not met, as here, where the agency simply asserts the exemption broadly without any explanation of the purported burden imposed.

The burden also falls on the agency to demonstrate the "clear overbalance" in favor of withholding the records sought. (*Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071 ["[T]his provision contemplates a case-by-case balancing process, with the burden of proof on the proponent of nondisclosure to demonstrate a clear overbalance on the side of confidentiality."].) You have not met this burden.

Further, Requesters believe the agency cannot meet the requirements of the catchall exemption for the records requested here. The RJA strengthens the case for disclosure in the face of an agency's assertion of the catchall exemption. In enacting the RJA, the Legislature expressed its intent "to eliminate racial bias from California's criminal justice system," "to remedy the harm to the defendant's case and to the integrity of the judicial system," "to actively work to eradicate" racial disparities in the judicial system, and "to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences." (AB 2542 §§ 2 subd. (i), (j).) The effective implementation of the RJA, and the realization of this legislative intent, requires that the public be able to *access* policies and training materials which inform decisions about how district attorneys prosecute cases and whether such prosecutions are or may be tainted by bias.[7] This goal substantially outweighs any theoretical burden to your office.

Finally, the caselaw you cite in support of asserting the catchall exemption, *Wilson v. Superior Court* (1997) 51 Cal.App.4th 1136, 1139-43, does not elaborate on the balancing test described above, but instead focuses on exemptions based on deliberative process for predecisional records where there is also an asserted public interest in withholding. The analysis is not relevant here because the requested records concern final policy and guidance to line attorneys on matters of great public interest. Indeed, other courts have recognized the great public interest in the disclosure of records which could shed light on selective prosecution or

---

[6] Gov't Code § 6255 subd. (a). See generally *ACLU of N. Cal. v. Deukmejian*, 32 Cal.3d 440, 453 ["Section 6255 speaks broadly of the 'public interest,' a phrase which encompasses public concern with the cost and efficiency of government."]; *Weaver v. Superior Ct.* (2014) 224 Cal.App.4th 746, 752.

[7] The RJA specifically provides that a defendant may present evidence of racial bias by showing "statistical evidence or aggregate data demonstrat[ing] a significant difference in seeking or obtaining convictions or in imposing sentences comparing individuals who have committed similar offenses and are similarly situated, and the prosecution cannot establish race-neutral reasons for the disparity." AB 2542 § 3 (establishing Cal. P.C. § 745 subd. (h)(1)). In recognizing that the disclosure of racial and ethnic disparities may depend on the statistical evidence or aggregate data, the Legislature has *presumed* public access to such information.

racial bias in prosecutions. (See *Weaver v. Superior Court* (2014) 224 Cal.App.4th 746 ["it is inconceivable to us that any countervailing interest the District Attorney could assert outweighs the magnitude of the public's interest" in the death penalty where a petitioner was seeking to find evidence of selective prosecution]; *Brodheim v. Cal. Dep't of Corrections & Rehabilitation* (Cal. Superior July 16, 2020) 2020 WL 4558319 [requiring the disclosure of individual data concerning race and ethnicity of all parole applicants over an extended period of time and rejecting an asserted public interest exemption by the California Department of Corrections and Rehabilitation].)[8]

3. Exemptions Asserted for Batson Wheeler Investigation Materials (Section 12 of your Response Letter)

As to our request for *Batson Wheeler* investigation materials, you asserted numerous blanket exemptions without explanation or even the confirmation that your office identified any responsive records. As an initial matter, a government agency may not invoke blanket objections and still satisfy its statutory obligations under the CPRA. Rather, an agency is required to "provide the requesting party 'adequate specificity to assure proper justification by the governmental agency.'" (*ACLU of N. Cal.*, 202 Cal.App.4th at 82, quoting *Vaughn v. Rosen* (D.C. Cir. 1973) 484 F.2d 820, 827.) You bear the burden of affirmatively showing that withheld materials need not be disclosed. (See *id.* ["[W]e do not believe an agency's bare conclusion that information is not responsive to a request is any more self-explanatory than its bare conclusion that information is exempt."].) And even where a portion of a record is exempt from production, you must still disclose any reasonably segregable non-exempt portion of that record. (Gov't Code § 6253 subd. (a), (c).)

Moreover, the asserted exemptions do not justify the wholesale withholding of records concerning investigations into *Batson Wheeler* motions. For the reasons elaborated above, the attorney work product, deliberative process privilege, and catchall exemptions are improperly asserted. These exemptions may be even less relevant here as the production of a list of motions filed, motions granted, and discipline outcomes confirms decisions made rather than exposing predecisional information; and there is a great public interest in the identification of racially biased jury selection and any resulting discipline, or lack thereof. Further, you have provided no elaboration at all of the public interest which must be protected in the withholding of these records, let alone a public interest which would demonstrate the "clear overbalance" in favor of withholding the records sought. (See *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071.) For the reasons elaborated below, your office's summarily asserted exemptions for investigatory files, personally identifying information, and summary criminal history to justify the withholding of these records are also improper.

---

[8] *Brodheim v. Cal. Dep't of Corrections & Rehabilitation* (Cal. Superior July 16, 2020) 2020 WL 4558319, *2 ["[T]his case unquestionably involves a weighty public interest in disclosure. . . The importance of that public interest is vividly highlighted by the current national focus on the role of race in the criminal justice system and in American society generally. . . . Disclosure insures that government activity is open to the sharp eye of public scrutiny. Requiring production of the information will contribute significantly to public understanding of government activity and reveal whether improper animus affects respondent's performance of its duty." (internal citations omitted)].

a. The Investigatory Files Exemption Neither Is Nor Can Be Justified for the Withholding Asserted Here.

You generally assert that "[i]nsofar as the Pending CPRA Requests seek information from the District Attorney's case files, those are investigatory files that are exempt from disclosure." As an initial matter, you have not asserted that the *Batson Wheeler* investigation records sought are indeed in the District Attorney's case files and are part of existing investigative files. We seek further information about the records identified as responsive and any justification for why the agency seeks to withhold these records as investigative files.

Further, the investigatory files exemption does not apply to all information, as you claim, "from the District Attorneys' case files." Indeed, this is confirmed by one of the cases you cite. (*Williams v. Superior Ct.* (1993) 5 Cal.4th 337, 346–47 ["It is clear that the exemption is not literally 'absolute.'"].) As recognized by the Supreme Court in *Williams*, even if the investigatory file exemption applies to any of the requested records, the agency must still disclose certain information.[9]

Lastly, the exemption applies to individual records rather than entire files; the existence of individual exempt records within a file does not render the entire file exempt. (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 291.) Moreover, you cannot invoke this exemption simply because the information is held in a file labelled as investigatory. (*Ibid*.) "[T]he content of the document at issue, not the location in which it is stored, [is] determinative." (*Ibid.* ["We consider it unlikely the Legislature intended to render documents confidential based on their location. . ."]. See also *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355 ["the law does not provide . . . that a public agency may shield a record from public disclosure, regardless of its nature, simply by placing it in a file labelled 'investigatory'"].) You must demonstrate why specific information contained in those files is exempt from disclosure. You have failed to do so here.

[9] "[E]ven when the CPRA's exemption for law enforcement investigatory files applies, the investigating agency ordinarily must still disclose to the public 'the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, [and] the time and date of the report, the name, age, and current address of the victim . . .'" (*Williams*, *supra*, at p. 361, citing Gov. Code, § 6254 subd. (f)(2).) "Agencies must also disclose to the public "[t]he full name, current address, and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds." (*Id.*, citing Gov. Code, § 6254 subd. (f)(1).)

b. You Have Not Provided Any Justification to Support Withholding of Batson Wheeler Records to Protect Privacy Interests.

The CPRA exempts personally identifying information only if disclosure would constitute "an unwarranted invasion of personal privacy." (Gov.Code, § 6254, subd. (c).) The agency has the burden of demonstrating that the records at issue are exempt. (Gov.Code, § 6255.) You have failed to do so here.

You generally assert that "[i]nsofar as the Pending CPRA Requests seek information from the District Attorney's case files, those files contain personally identifying information that is exempt from disclosure as an unwarranted invasion of personal privacy." As identified above, you have not asserted that the *Batson Wheeler* investigation records are indeed in the District Attorney's case files. You have also not asserted that the records constitute personally identifying information, or that there is not a way to segregate the exempt information and disclose non-exempt portions. You are obligated to redact exempt information from a nonexempt record when the exempt and nonexempt materials are not 'inextricably intertwined' and are 'otherwise reasonably segregable.'" (*Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 929.) We seek further information about the records identified as responsive and any justification for why the agency seeks to withhold these records in their entirety as personally identifying information. Moreover, we ask that you take all reasonable steps to segregate and disclose non-exempt materials.

Whether a record is properly subject to disclosure notwithstanding a generalized privacy interest requires balancing the asserted privacy interest with the public's legitimate interest in disclosure of the information sought. (See, e.g., *Commission on Peace Officer Standards & Training*, *supra*, at pp. 299–300 [balancing the interest of peace officers in the information sought against the public's "legitimate interest not only in the conduct of individual officers, but also how the Commission and local law enforcement agencies conduct the public's business"].) Here, the public has a weighty interest in the requested records. As elaborated above, in passing the RJA, the Legislature "expressed its intent "to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences." (See Stats. 2020, Ch. 317, § 2 subd. (j).) In contrast, the agency has provided no justification for the privacy interest asserted.

c. The Summary Criminal History Exemption Does Not Support the Withholding Asserted Here.

The summary criminal history exemption does not apply to this request. First, Penal Code § 13302 provides that "[n]othing in this section shall prohibit a public prosecutor from accessing and obtaining information from the public prosecutor's case management database to respond to a request for publicly disclosable information pursuant to the California Public Records Act." Courts have construed the exemption as designed to protect against "obtaining docket information on every person against whom criminal charges are pending in the municipal court." (*Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157, 161.) The exemption is properly asserted only when it is necessary to "protect sensitive information contained in

governmental records that does not, when separated from those records and compiled, contribute to the public's understanding of government operations." (*Int'l Fed'n of Pro. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 340.) As such, this definition does not apply to this section of our request, which seeks only information regarding *Batson Wheeler* motions. The information gathered is not "summary criminal history information." Further, our request does contribute to the public's understanding of government operations, particularly in regard to potential racial bias in criminal prosecutions.

***

Thank you for your careful reconsideration of your asserted exemptions. We would be happy to set up a time to speak on the phone as well if you think such discussion would be productive. We look forward to hearing from you.

Very truly yours,

Ellen V. Leonida