



COUNTY OF FRESNO

Lisa A. Smittcamp
District Attorney

March 16, 2022

BraunHagey & Borden
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Re.:Racial Justice Act implementation/ACLU

Dear Ms. Leonida,

This Office is in receipt of your California Public Records Act (the "Act") request dated February 18, 2022, and received by this Office via e-mail. This letter is a response to that request in which you identify and request 15 categories of records regarding Assembly Bill 2542, The Racial Justice Act ("RJA") and its implementation.

This response is intended to identify the portions of your request to which this Office may have responsive information; those categories or sub-categories that this Office does not have responsive records; and those categories or sub-categories as to which this Office maintains are exempt through privilege or other provision in the Act.

Preliminarily, I would like to apologize for any delay in sending this acknowledgment and response to your request. It is the policy of this Office to fully respond to requests for public records and in a timely fashion. Your request presented several challenges, because the information you are requesting is information derived from the investigative reports submitted to this Office, data entered into our case management system, but information that our case management system was not designed to retrieve, and certainly not in the format of a spread sheet or other data file. And, it is simply not the case that this Office maintains a record in the format you are seeking.

That said, I have consulted with the attorney assigned to maintain our records system. He informs me that it is possible to retrieve some of the information you have identified. It is not an easy process, because, as I mentioned, the e-Prosecutor case management system ("e-Pro"), our current case management system, was not designed to retrieve many of the categories you have listed. While the information may exist, it was intended to be viewed by the Office on a case by case basis rather than having a data field for collection and retrieval. However, he is able to design a query that will yield some of the information that you have identified.

To be clear, the broader the spectrum of information you seek, the more complex and time consuming the design of the query will become. To protect the public's economic

interest and avoid the perception that this Office may favor or disfavor any particular request, in circumstances such as this, where records are not readily available, this Office passes the cost of retrieval on to the requesting party without exception.

To proceed, in the following paragraphs I will outline those categories which are available in some fashion for retrieval; those which are not because they do not exist; and, those that will not be made available by this Office due to an exception or objection permitted under the Act. While I do not yet know the time it will take for our attorney to design the query, his billing rate for such efforts is \$56.18/hour. I will certainly advise you of the actual estimate when I receive it. That estimate will depend on what you ultimately decide you would like to attempt to retrieve, in that some queries will be much more difficult and time consuming than others, and some are estimated to be far less fruitful than others because of the manner in which it has been observed that attorneys enter information. I will endeavor to describe which of your categories will be particularly time consuming to prepare a program for retrieval and which are thought to be less likely to produce responsive data. In this way, you will be able to make an informed decision concerning which categories will be worthwhile for you to include. Please be aware, that I have seen circumstances in which the hours to develop a query have ranged considerably.

When the final estimated figure is calculated you will be requested to send payment in advance of designing and running the query. The estimate will be made with a most time consumptive period in mind. While any funds in excess of the actual time spent in design and execution will be refunded to you, this Office will not request additional funds should the hours exceed the estimate. This is because the estimate is intended to make you aware of the greatest amount of time it is foreseen that the task will take, and with that, your maximum obligation to receive the data you are requesting. It is my hope that you will contact me to refine and adjust your request to maximize the effective retrieval of information you are seeking after you have read the following response and explanations concerning the information you are requesting:

Under category "1," all four sub-categories are available. The additional unique identifier requested in (d) is a computer-generated number assigned to the suspect by the computer at the time of data entry.

Under category "2," all of the sub-categories are available with the exception of (c) and (f). "Country or origin or nationality" is not a data field available in our management system. "Prior criminal convictions of a defendant" is a request for privileged personal criminal history records, protected from disclosure under Penal Code section 11140, et seq. and incorporated into the Act under section 6254, subdivision (k). These two sub-categories, therefore, would have to be denied.

Under category "3," all three of the sub-categories present issues. The request for the "Zip code of arrest" under (a) is not available, as it is a data field that is not contained in the management system. Similarly, the "Date of arrest," although available in some instances, it is not available in many. This represents a data field that is not consistently available under the management system. The zip code of arrest may represent the zip code of the offense, if it is there, the zip code of the suspect's residence, or the zip code

of the place of arrest, unrelated to the offense or residence and simply representative of where a suspect happened to be at the time of arrest. Because there is not a specific data field for the zip code of arrest location as distinguished from the suspect's zip code of residence, this request would be denied. A response would call for records of an investigation exempted from disclosure by the Act under Section 6254, subdivision (f), and not made public by the filing of a complaint or other charging document in the course of prosecution.

Sub-category (c) requests the charges identified or requested by the referring (arresting) agency. This information is entered directly from the reports of the investigation, a document exempted from disclosure by the Act under Section 6254, subdivision (f). While information required for disclosure under subdivisions (f)(1) and (f)(2) are set out by the Act, the source of that information would be the referring (arresting) agency and not this Office, for whom the referring reports remain exempted under the Act as records of an investigation and request for a complaint and prosecution. Therefore, portions of this request would have to be denied.

Under category "4," you request the "ADA assigned to the case." First off, for clarity, this Office designates most of our line deputies as Deputy District Attorneys (DDA) or Senior Deputy District Attorneys (SDDA). Our ADAs, Assistant District Attorneys, are generally management/supervision level and are not usually the face seen in court with reference to a particular case. However, although the Office does have vertical prosecution on some specialty assignments, the vast majority of our cases are prosecuted by a team of prosecutors. Moreover, even as to those cases addressed vertically, even those cases are subject to reassignment and coverage by fellow team members at any level of prosecution, including trial. As a result, it would be misleading to identify a particular DDA or SDDA as the assigned attorney. We can discuss what you are seeking to determine with reference to the RJA in requesting an assigned prosecutor. Perhaps we can determine some less misleading data that will provide you with the information you are seeking.

Under category "5," "Decisions to decline to prosecute," there are several sub-categories that present issues with regard to compliance. Sub-category (a) requests the date of decision to decline to prosecute. To the extent that this is recorded within the management system, the date can be provided. Sub-category (b) requests the identity of the person that made the final decision to decline prosecution. Declination memoranda are not public records, themselves, within the meaning of Subdivision (k) of section 6254, which incorporates into the Act the traditional exemption for a prosecutor's work product privileged materials. The Act authorizes the prosecutor to exempt from public records production of those materials that reflect his or her "impressions, conclusions, opinions, or legal research or theories..." (Code of 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 non-litigation context].) And for this reason, the name of the prosecutor that generated and signed the declination memorandum is also exempted. However, as stated, the fact or conclusion that this Office did decline a prosecution is not exempted.

Sub-category (c) requests the charges declined to prosecute. As discussed above, the requested charges by a submitting (arresting) agency are not public records under the Act. Therefore, a determination to decline to prosecute a case is distinct from the charge(s) requested that are declined. It is worthy of mention that the information that is public record and available from an arresting agency pursuant to subdivisions (f)(1) and (f)(2) of Section 6254 of the Act, is distinct from that which is public record and available from this Office.

Finally, sub-category (d), requesting the reasons for declinations, and specifying several options in Roman numerals *i* through *vi*, requests records that are not available under the Act. The legal and practical reasoning of the prosecutor is traditional work product, as set forth above, and exempt from disclosure under the Act. For these reasons, the information requested under category 5 will be declined from production under the provisions of the Act.

Under category "6," requesting "Diversion offers and decisions," the e-Pro system does not contain this information. Because we have transitioned to a paperless system for prosecution, there is no practical way to retrieve information concerning diversion of criminal defendants. This Office does not maintain a separate list or gather statistics concerning diversion. Therefore, this request must be denied because the information sought is not retained by the Office. To the extent that a DDA or SDDA may have attended a hearing and recorded on a docket sheet a referral to diversion, a review of all case docket sheets would be overly burdensome and time consuming. (Government Code § 6255.) In addition, notations and docket entries of the events occurring in court as observed by our prosecutors and noted for the benefit of the Office and further action by the Office is traditional work product and exempt from disclosure by the Act.

Under category "7," requesting "Charges filed," sub-categories (a), (b), and (c), requesting the statute charged, its designation as a felony, misdemeanor, or infraction, and any enhancements charged, are available within the case management database. I would note that the hybrid or wobbler character of a particular charge will not be designated other than the level of the charges issued. However, sub-category (d), requesting the maximum sentence, seeks a calculation. This calculation is not recorded in the case management system as a data field. Moreover, to the extent that it may be calculated by individual deputies addressing a case on any particular occasion, that calculation is a privileged determination under attorney work product. As discussed above, because the Act incorporates traditional work product, even were such a calculation notated and available, this Office would decline to produce privileged information. However, should you wish the generalized charge sentencing exposure, that is included in e-Pro. However, providing that information would have to be accompanied by an understanding that such a listing is not a calculation of maximum exposure. But, to the extent included in e-Pro, the charge or enhancement exposure could be included in the query.

Under category "8," requesting factors considered in deciding charges to file, I would refer you to the discussion above as to category "5," sub-category (d). The factors considered and the "impressions, conclusions, opinions, or legal research or theories..."

of our deputies are all within the ambit of attorney work product and exempted from compulsory disclosure as a public record under the Act.

Under category "9," "Bail/custody information," the case management system does not contain this information in any of its data fields. The information is simply not available in this Office. To the extent that deputies may have made docket notations concerning bail, such notations are work product. And to any extent that seeking such bail information from individual case docket entries might be made, in so far as such entries exist, such an inquiry would be unduly time consuming and burdensome. Government Code § 6255. See *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588.

Under category "10," requesting "Plea offers," this request adds a complexity to the query. The case management system does have a field for offers. There is no doubt that in many cases, offers are determined, extended, and subsequently accepted or rejected in the course of criminal prosecutions. However, this is a field that is inconsistently used by prosecutors in this Office. I am informed that it would take approximately three additional hours to address this request. It is not known in advance of running the query the percentage of prosecutors that make use of the 'offer' data field, or in how many cases an offer would appear in that field.

If you choose, the offer recorded can be retrieved. However, the case management system does not maintain record of the overall process of extending an offer. The confidential notations entered by attorneys covering a particular case, if any, are protected by attorney work product privilege. While such notes might supplement the data field just mentioned and might contain reference to the overall settlement process and 'haggling' that occurred, if any, notes concerning the determination of an offer, records a mental process squarely within the work product privilege. Conclusions and opinions such as the value of a case, the maximum exposure, even the relative strength of evidence or credibility of a witness are all matters within the judgment of an attorney and exempt from public records disclosure by the Act. While the "offer" data field might record the charge offered and satisfy sub-category (a), the date of the plea offer (under sub-category (b)), a sentence, disposition, or "lid" offered, under sub-category (c), and records of the date of acceptance of an offer, may not be available in the same field. As a result, while record of an offer may be available, the remaining sub-categories within category "10" must be denied.

To the extent that the work product privilege might be waived, this Office does not choose to selectively waive a privilege and find itself precluded from exerting that privilege in the future. While it is always the intention of this Office to respond to requests for records the fullest extent required by law, exemptions and privileges are implicated by your request in category "10" and others, and militate against compliance by this Office. As stated, this Office is not choosing to waive any privilege or exercise a waiver of any exemption in that the public interest in maintaining the privileges and exemptions clearly outweighs any public interest in disclosure. (Cal. Gov. Code §6254(a).) Moreover, while local agencies, such as this Office, retain discretion to produce certain records for inspection or copying in the absence of other restrictions, once discretion is exercised in favor of producing a given record, it must be provided to all who request it, and this Office, as mentioned above, elects not to bind itself to such a

determination. (Cal. Gov. Code § 6254.5; see, e.g., *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018; *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 657; 86 Ops.Cal.Atty.Gen. 132, 137 (2003).)

Under category “11,” requesting “Case outcomes,” there is some information in the case management system. However, because the data entered varied by the attorney and the Office professional that undertook the task of data entry, the retrieval of this information will be very complex, and the reliability of the data retrieved will be questionable. As for sub-categories (a) and (b), the charges of conviction and those dismissed are not always clearly known from our case management record. Some interpretation is necessary to fully understand the entry. It is our own internal practice to compare that information in our own system with entries in the court record before we rely upon it.

Our inclination in responding to this category was to determine if a conviction or dismissal was entered. However, with respect to sub-categories (a), (b), and (c), to the extent that information can be retrieved from our case management system, it is estimated that designing the query would take an additional five hours. It would require retrieving various data fields and splicing them together. While the resulting information might be compliant with the sub-categories you have identified, a fully reliable result may not be possible. The formatting of the retrieval as well as the variability of the format of data entry may render the information difficult to interpret and potentially unreliable. While I am assured by the attorney that would design the query that he will make every effort to gather useful records, I am informed that there is no way to anticipate how successfully we can respond to your request. But I am also informed that some of the information requested is collected in various field within the case management system. The risk of proceeding in light of the expense will have to be yours. But I must note, it can not yet be determined whether retrieving the various fields alone will provide responsive information or if the information retrieved will require analysis and reconfiguring to be of use to you. If the latter is the case, this Office will decline to produce the retrieved data. While this Office is certainly willing to comply with the Act in retrieving data available, we decline to create a record that does not exist, particularly where doing so would require attorney analysis and input.

Under category “12,” “Counsel for defendant, whether public defender or private counsel,” I am informed that this information is not fully available. It is my understanding that the information of who represents a defendant at a given time may be available by firm under our predecessor case management system (STAR). Under e-Pro it is listed by counsel’s name (understanding that conflicts, retention, or appointment change such circumstances), and the firm name (potentially). But the default entry under both systems was the Public Defender. Consequently, because of changes of counsel over time, errors occasioned by the default setting, and some variability in consistency of entry, it is not clear that we would be able to synthesize the extent to which an attorney was acting in a private or appointed capacity. And, because the Public Defender and other appointed counsel often serve in either an individual (retained capacity) or as the agency, our attorney has explained, “I don’t believe I can comfortably provide defense information without spending hours sifting through the data, and even then, I may not be able to provide accurate information.”

He can spend approximately three hours setting up the query. The reliability of the information is unknown and will not be predictable until it is retrieved and reviewed. And again, while this Office is certainly willing to comply with the Act in retrieving data available, we decline to create a record that does not exist, particularly where doing so would require attorney analysis and input. (Cal. Gov. Code §6252(e)).

Under category "13," requesting "Demographic and other information concerning victims," I am informed that the case management system may have inconsistent and modest information that would satisfy this request. I am also informed that it will be difficult to retrieve this data, even to the extent that it does exist. This may be related to crimes that have a listed victim versus the many that do not designate a victim, and the related difficulty of designing a general query that can identify a field to retrieve and distinguish between the two types of cases. However, I am informed that there may be information to one degree or another that has been entered into the data system that might include one or more of the sub-categories you identify; (a) race, (b) ethnicity, and (c) Gender/sex.

However, although a query might be designed to retrieve some information, to the extent that the information has been entered into the management system, the data is directly derived from the records of investigation submitted by the arresting and investigative agencies. Because records of an investigation are exempted from the Act, and the demographic information of a victim or victims is not made public in any charging document, this request would have to be denied under Section 6254, subdivision (f) of the Act. Moreover, while it might take approximately two hours to design the query and retrieve what partial information we might have, should the release of a partial or incomplete record prove itself misleading or harmful to public understanding, this Office would deny the request rather than release a record that would harm or mislead the public. As a result, category "13" would have to be denied both due to privilege and practical considerations.

Finally, under categories "14" and "15," which address "Recommendations regarding parole" and "Recommendations regarding pardon and commutation," respectively, this Office does not maintain information concerning either of these within our case management system. To be clear, this Office does participate in Life Parole Suitability Hearings and does make comment and recommendation in response to gubernatorial pardon and commutation letters. But post-conviction litigation is not documented in the same way as prospective case prosecutions in this Office.

With regard to the position taken by our prosecutors at Lifer hearings, a closing statement announcing that position is certainly a matter of public record. However, this Office does not maintain a list or record documenting that position. To the extent that this Office does have access to some related information, we are under no obligation to create a record in order to respond to a public records request. (Cal. Gov. Code §6252(e).) Moreover, to the extent that a docket entry is made to assist prosecutors, and memorialize a position taken and the reasoning for such a conclusion, such a docket is work product. In addition, to determine what took place at any given hearing would require this Office to cull through each physical file to determine the position taken by a prosecutor as to a particular inmate's hearing. Such an effort by this Office

would take an inordinate amount of time on the part of our Office and as such the request is overboard and unduly burdensome and time consuming. Government Code § 6255. See *County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588. And because the record does not exist but would require creation, just because some extensive effort might locate desired information, this Office is under no obligation to create a record in order to respond to a public records request. (Cal. Gov. Code §6252(e).)

Moreover, as previously explained in our correspondence, this Office asserts that all records which involve parole, reprieve, pardon or commutation, are exempted under the Act by subdivision (f) of Government Code 6254. Our assessment and response to parole or clemency requests result from our investigative file, compiled for law enforcement purposes in the underlying case, and gathered through inquiry into the defendant's current circumstances. This Office's position with regard to a request for parole, reprieve, pardon, or commutation each rely upon investigative records as well as traditional work product. Furthermore, as to responsive letters to the Governor's Office concerning requests for commutation of sentence or pardon, these letters are exempted from the Act under subdivision (e) of Government Code section 6254. (*Calif. First Amend. Coalition v. Sup. Ct.* (1998) 67 Cal.App.4th 159, 166-67.) As a result, your request under categories "14" and "15" would have to be denied.

In many instances you will please notice that this Office is not rejecting the request, even though I am explaining and describing reservations as to whether the query will be fruitful. In the event you wish to proceed with some modified request, I will resubmit the request to our attorney and refine the estimated time to prepare the query. After I submit that estimate to you and we have received payment, I am informed that it will take approximately thirty (30) days to complete the query and its execution. You will note that some of the results will be potentially unreliable or misleading. Should that prove to be the case, I will advise you of each category or sub-category that is withheld from public disclosure due to its misleading and inaccurate character.

In conclusion, I hope you find this explanation complete and clear. I look forward to you contacting me and assisting me in setting out the basis and parameters for a query to be designed by this Office to facilitate a response to your request for records. Of course, feel free to call or e-mail with your follow-up, and should you have any questions or concerns with regard to that follow-up, feel free to contact me at your convenience.

Sincerely,

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By 
Douglas O. Treisman
Senior Deputy District Attorney, Ret.