

March 29, 2022

**SENT VIA U.S. MAIL AND EMAIL**

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**Re: California Public Records Act Request**

Dear Kimberley Roth:

Thank you for your February 25, 2022 response (“February 25 Letter”) to our July 23, 2021 CPRA request seeking policies, training materials, and communications related to the Racial Justice Act (“Request”). We appreciate you providing greater clarity about the exemptions you are asserting. Nonetheless, we remain concerned about your use of these exemptions to withhold all internal policies and training materials responsive to the Request. For the reasons elaborated below, we believe the exemptions you assert are not applicable and cannot be used to withhold the documents we seek. We ask for a formal appeal of your asserted exemptions and an answer in writing as soon as possible, but in no event later than April 13, 2022. Please note that if, after your response, we believe we are entitled to documents which have not been disclosed, we will litigate at your expense to obtain them.<sup>1</sup>

This letter concerns categories 1 and 2 of our Request. Specifically, we requested:

- 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/or decisions, including, but not limited to:*
    - i. Charging recommendations and/or decisions regarding enhancements;*
    - ii. Charging recommendations and/or decisions regarding special circumstances; or*
    - iii. Charging recommendations and/or decisions regarding wobblers;*
  - d. Compliance with Brady v. Maryland, 373 U.S. 83 (1963);*

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<sup>1</sup> We note that courts have awarded costs and fees if even a single document was improperly withheld. See, e.g., *Los Angeles Times v. Alameda Corridor Transp. Auth.* (2001) 88 Cal.App.4th 1381, 1391.

- e. *Jury selection;*
  - f. *Sentencing recommendations;*
  - g. *Prosecution of minors;*
  - h. *Parole recommendations;*
  - i. *Pardon and commutation recommendations;*
  - 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.*
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).*

In your February 25 Letter, you generally respond to our request for Internal Policies, Memoranda, Guidance Documents, and Training Materials by writing:

*Internal policies, memoranda, guidance documents, and training materials are protected by numerous exemptions under the CPRA: the deliberative process exemption, the core work product privilege, the doctrines of confidentiality and/or privacy, and provisions of law prohibiting disclosure of particular types of information such as copyrighted materials, criminal history information, and personal identifying information.*

You additionally provided:

*Making public any internal guidelines on charging or sentencing would encourage some members of the public to commit crime, believing they would not be prosecuted by this office. Any charging and sentencing guidelines were created to aid and assist in the investigation and prosecution of criminal activity. As such, providing these records to the public would seriously inhibit and compromise this office's ability to successfully investigate and prosecute criminal offenses, and thus, are exempt under the deliberative process exemption and core work product privilege.*

(Response at 4.)

Lastly, you asserted that the request for some of the training materials, the request was "overbroad." (Response at 5.)

Our response is as follows.

### **I. Deliberative Process**

As an initial matter, when responding to a CPRA request, “disclosure is favored,” so “all exemptions are narrowly construed.” (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321 [citations omitted].) “In enacting the CPRA, the Legislature sought to provide the public broad access to documents regarding how government agencies carry out their responsibilities.” (*Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 750.) Moreover, by “constitutional mandate,” statutes like the CPRA that further the right of access to information must be broadly construed, while those that limit the right of access must be narrowly construed. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617, 629 [citing Cal. Const., art. I, § 3, subd. (b), par. (2)]; *see also Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 913 [emphasizing same].) Asserting blanket exemptions to withhold all office policies and training materials does not satisfy this requirement.

You cannot withhold policies, guidance documents and training material under the deliberative process privilege. That privilege exists to allow 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 Court* (2011) 202 Cal.App.4th 55, 76 [quoting *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1341].) The “key question,” as the California Supreme Court has explained, is “whether disclosure of the materials would expose an agency’s decisionmaking 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 Court, supra*, 53 Cal.3d at p. 1342.) The exemption applies, in other words, only to “predecisional” and “deliberative” documents. (*ACLU of N. Cal. v. Superior Court, supra*, 202 Cal.App.4th at p. 76.)

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 Court, supra*, 202 Cal.App.4th at p. 76 [internal quotation marks omitted]; *see also ibid.* [“The deliberative process privilege does not justify nondisclosure of a document merely because it was the product of an agency’s decisionmaking process; if that were the case, the PRA would not require much of government agencies.”]; *Citizens for a Better Environment v. Department of Food & Agriculture* (1985) 171 Cal.App.3d 704, 713 [ruling that “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 decisionmaking process,” but rather articulate finalized decisions after deliberations have concluded. (*Times Mirror Co. v. Superior Court, supra*, 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 policy.

Another reason the deliberative process does not justify withholding the requested documents is that the strong public interest in enforcing the Racial Justice Act outweighs any

public interest in nondisclosure. The deliberative process exemption is recognized under Government Code sec. 6255, known as the “catchall” exemption (*Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d at p. 1340.) The CPRA’s catchall exemption permits an agency to withhold records only 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. (Gov. Code, § 6255, subd. (a); *see generally* *ACLU of N. Cal. v. Deukmejian* (1982) 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 Court* (2014) 224 Cal.App.4th 746, 752.) The burden 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. (*See, e.g., ACLU of N. Cal. v. Superior Court*, *supra*, 202 Cal.App.4th at p.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”].) Your broad assertion that public oversight of activities of the District Attorney’s Office will “encourage some members of the public to commit crime, believing they would not be prosecuted by this office” is merely speculative and is not supported by any factual information. Further, the idea that you can operate without public oversight simply because your office serves a law enforcement function is not supported by the CPRA.

We also believe you cannot meet the requirements of the catchall exemption for the records requested here. The RJA strengthens the case for disclosure. 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. (Stats. 2020, ch. 317, § 2, subd. 2(i)-(j).) The implementation of the RJA therefore requires that the public be able to *access* policies and data concerning decisions about whether and how California prosecutes cases and whether such prosecutions are tainted by bias.<sup>2</sup> This goal substantially outweighs any theoretical burden to your office.

Recently, the San Francisco Superior Court held that the public has a right to access race and ethnicity data of all parole applicants over an extended period of time, rejecting an asserted

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<sup>2</sup> 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.” (Stats. 2020, ch. 317, § 3 [establishing Pen. Code, § 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.

public interest exemption by the California Department of Corrections and Rehabilitation. (*Brodheim v. Cal. Department of Corrections & Rehabilitation* (Cal. Superior, July 16, 2020, No. CPF-20-516978) 2020 WL 4558319.) As the court held:

[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.

(*Id.* at p. \*2 [internal citations omitted]. The court’s reasoning—which recognized a heightened public interest in information concerning the race and ethnicity of people in custody, and the extraordinarily limited public interest in the withholding of such information—clearly applies here, too. (*Id.* at pp. \*1-\*3; *see also Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 752 [concluding that “it is inconceivable to us that any countervailing interest that 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].)

## II. Core Work Product

Your assertion of the attorney work product exemption to withhold policies, memoranda, guidance documents, and training materials stretches the exemption beyond its breaking point. The work product exemption protects from discovery a “writing that reflects an attorney’s impressions, conclusions, opinions, legal research or theories.” (Code Civ. Proc., § 2018.030, subd. (a).) It must be narrowly construed.<sup>3</sup> (*See Coastal States Gas Corp. v. Department of Energy* (D.D.C. 1980) 617 F.2d 854, 864 [“The work-product rule does not extend to every written document generated by an attorney.”]<sup>4</sup>; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 994 [denying work-product exemption where work was not performed on behalf of client].)

The general policies, memoranda, and training materials requested here cannot be withheld as protected or privileged work product. These documents are public records that lay out “general standards to guide the Government lawyers.” (*ACLU of N. Cal. v. United States Department of Justice* (9th Cir. 2018) 880 F.3d 473, 484-89 [affirming that agency manuals,

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<sup>3</sup> *See* 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).

<sup>4</sup> As many courts have recognized, the CPRA is modeled after the federal Freedom of Information Act (“FOIA”) and the “legislative history and judicial construction of the FOIA thus ‘serve to illuminate the interpretation of its California counterpart.’” (*Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at p. 1338 [quoting *ACLU of N. Cal. v. Deukmejian* (1982) 32 Cal.3d 440, 447]; *see also Community Youth Athletic Ctr. v. City of Nat’l City* (2013) 220 Cal.App.4th 1385, 1400, fn.6 [“Judicial interpretations of the FOIA in the federal courts may be used to construe the PRA.”].)

guidance documents, and other materials conveying agency policy fall outside work product protection and thus are discoverable]; *Judicial Watch, Inc. v. United States Department of Homeland Security* (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].)

Your office exists to prosecute criminal cases. “In fulfilling that responsibility, agency attorneys almost always anticipate litigation in some general sense.” (*Am. C.L. Union of N. California v. United States Dep’t of Just.*, *supra*, 880 F.3d at p. 487.) If the public was barred from accessing any documents created by an attorney with litigation in mind, the intent of the CPRA “would be defeated.” (*Coastal States Gas Corp. v. Department of Energy*, *supra*, 617 F.2d at p. 865; *Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 750 [“In enacting the CPRA, the Legislature sought to provide the public broad access to documents regarding how government agencies carry out their responsibilities.”].) To ensure the public is not barred from such access, only documents containing “detailed legal analysis” may be withheld. (*Am. C.L. Union of N. California v. United States Dep’t of Just.*, *supra*, 880 F.3d at p. 487.) The trainings we request contain only “objective descriptions of cases and so more closely resemble continuing legal education resources for [your] attorneys than attorney work product.” (*Ibid.* at 488.) Further, work product only applies to attorneys in their role as an attorney for your office. (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 994.) Material from trainings produced or presented by someone outside your office does not apply.

### **III. Doctrines of Confidentiality and Privacy**

We request office-wide policies and training materials from trainings available to all prosecutors at your office. In our experience, these documents do not contain information falling within the doctrines of confidentiality or privacy. Please explain why these doctrines specifically defeat a CPRA request and suggest a practical solution to overcome nondisclosure if you believe they apply to a specific document we request.

### **IV. Undue Burden**

You have not articulated any undue burden. Our request is clearly framed and seeks public records created during a finite time. The CPRA by its nature imposes burdens on government agencies. (*See State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1190, fn.14; *see also Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 614.) There is nothing in the CPRA to suggest that a records request must impose no burden to the government agency. (*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”].) The relevant question is whether compliance would be *unduly* burdensome. (*County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588.) An undue burden requires more than noting that a request includes many documents over a span of years. You have not articulated why the time and expense to fulfill your legal duty to disclose public records is “excessive,” instead merely stating that if the time and expense is excessive that you could make an objection. (Response at 5.)

Moreover, a government agency must offer an opportunity to cure any asserted overbreadth or undue burden. You have not done so here. Where a county labels a request overbroad, it must (1) “[a]ssist’ in the identification of records or refining of the request,” (2) “[p]rovide suggestions for overcoming any practical basis for denying access to the records or information sought,” and (3) “mak[e] a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records.” (Gov. Code, § 6253.1, subds. (a)-(b).) Thus, even if compliance with the request *would* impose an undue burden, you still have an obligation to “provide suggestions for overcoming any practical basis for denying access to the records or information” we seek. (Gov. Code, § 6253.1, subd. (a)(3).) Thus, if you continue to contend that compliance with the original requests would be unduly burdensome, please provide practical alternatives that would be less burdensome.

Finally, the public interest in the disclosure of the records is a relevant consideration in identifying whether the burden to search and produce is justifiable. (*Weaver v. Superior Court*, *supra*, 224 Cal.App.4th at p. 752 [concluding that “[t]he approximately \$3,400 expense of generating the list of cases at issue here is substantially less of a reason and pales in comparison to the interests of [the requester] and the public in disclosure” where the requester seeks information to show selective prosecution].) As articulated in section II, the public interest in enforcing the Racial Justice Act weighs strongly against any theoretical burden to your office.

#### V. Other Provisions of Law

We request office-wide policies and training materials from trainings available to all prosecutors at your office. We do not believe these materials contain criminal history information. If we are mistaken about this, please inform us which specific documents contain this information. To the extent these documents contain personal identifying information, we ask that you redact such information and inform us which types of information you redacted. We presume many of the copyrighted materials you are referring to are produced by CDAA. We note that CDAA has allowed the production of their training materials in response to this request by other counties. We ask that you contact CDAA and ask for permission to do the same. For all other copyrighted materials, please provide a list of the title and author of each document.

Thank you for reconsidering your asserted exemptions and for assisting with our request generally. We ask that you respond in writing by April 13, 2022 explaining whether you intend to produce the documents we request or deny our appeal. After receiving your answer, we would be happy to speak on the phone to discuss any remaining issues.

Sincerely,



Ellen Leonida