



## COUNTY OF FRESNO

Lisa A. Smittcamp  
District Attorney

September 19, 2022

**VIA E-MAIL**

Ellen Leonida, Esq.  
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RE: *Public Records Act Request, received July 23, 2021*

Dear Ms. Leonida:

This letter follows up on the County of Fresno (County) District Attorney's Office (Department) letters, dated August 2, 2021, August 13, 2021, September 16, 2021, October 15, 2021, March 18, 2022, April 14, 2022, July 9, 2022, and a phone conversation March 29, 2022, all in response to your Public Records Act request, dated July 23, 2021 and received by the Department that same date (the July 23, 2021 Letter Request), along with your follow-up emails dated April 22, 2022 and May 9, 2022.

The County of Fresno has run an ISD email search for "all [district Attorney Office] emails" "from January 1, 2018 to Present" regarding "Racial Justice Act," the "RJA," and "AB 2542."

The Department will not produce records that are exempt from disclosure by federal or state law. (Gov Code, § 6254, subd. (k).) To the extent your request seeks records that have been created by the Department that have been prepared by our attorneys to provide legal guidance on issues facing prosecutors and/or to prepare prosecutors for trial, these are protected from disclosure by the attorney work product doctrine. (Ibid.; Code Civ.Proc., § 2018.030, subd. (c) ["A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances."].) Such records reflect an attorney's impressions, conclusions, opinions, or legal research or theories, and are considered core work product, and as such they are protected and privileged writings whether created by the Department in anticipation of litigation or for legal advice when no litigation is threatened. (See *League of California Cities v. Superior Court* (2015) 41 Cal.App.4th 976; 71 Ops.Cal.Atty.Gen. 5; 7.)

Many of these records are protected by the common-interest doctrine as it allows disclosure between parties, without waiver of privileges, in securing legal advice related to the same matter, when the communications were made to advance their shared interest in securing privileged legal advice on the common matter. (*OXY Resources California LLC v. Superior Court* (2004) Cal.App.4th 874, 891; *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 915 and *Insurance Company of North America v. The Superior Court of Los Angeles County* (198) 108 Cal.App.3d 758.) Accordingly, under the common interest doctrine, the attorney work product privilege was not waived. (*Teresa Meza v. H. Muehlstein & Co.* (2009) 176 Cal.App.4th 969, 982.)

Many of these records are also exempt from disclosure under Section 6254(k) pursuant to the deliberative process privilege, and pursuant to Gov. Code section 6255 on the grounds that the public interest served by not disclosing these records outweighs the public interest served by disclosing them. (Code of Civil Procedure §2018.02, Government Code §6255; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136).

The deliberative process privilege protects materials reflecting deliberative or decision-making processes (*Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136). Disclosure of these emails would expose the decision-making process of the District Attorney's Office in such a way as to discourage candid discussion in District Attorney staff, and thereby undermine the ability of the District Attorney's Office to perform its function of ensuring the fair administration of justice by effectively selecting juries (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325).

It appears to the Department that the purpose of your request is to indirectly discover the tools and the legal strategy that the Department uses to prosecute crime. The Department has determined that the public interest served in not disclosing these records outweighs the public interest served by disclosing them, because of the potential detrimental effects of disclosure on the Department's ability to candidly and effectively train its members, effectively prosecute crime, and perform its function of ensuring the fair administration of justice (Gov Code § 6255).

That determination notwithstanding, the District Attorney is aware of your serious concerns, as expressed in your communications to the Department, surrounding the role of unconscious and conscious bias on prosecutors, including the issues addressed by the Racial Justice Act, and other areas in our employment and discretion. It is the goal of the Department to provide responsive public records, to the extent that materials are not privileged or exempt from the Act.

Therefore, the District Attorney has directed that she will waive the core work product privilege as well as the deliberative process exemption for the portions of the responsive records that will be provided to you. These records consist of 17 emails, which Department staff has compiled and redacted. These records highlight that, although the Department has discussed creating a protocol and/or approach and/or training to the Racial Justice Act, the Department has not implemented any protocols or trainings as of the date of this letter. Additionally, it is worth noting, that this Office has yet to receive any motions under the Racial Justice Act.

As to your third point in your follow up requests, dated April 22, and May 9, 2022, in which requested “legal authority for your position that your office may withhold trainings developed by individual members of your staff,” the following case law is provided in addition to the previous case law and exemptions stated in correspondence authored by Ms. Peterson or myself: *Rumac, Inc v. Bottomley* (1983) 143 Cal.App.3d 810, CA Civ. Pro. Section 2018.020, *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4<sup>th</sup> 807, and *People v. Zamudio* (2008) 43 Cal.4<sup>th</sup> 327.

The Department endeavors to provide access to information concerning the conduct of the People's business. The Department reserves the right, however, to maintain the lawful confidentiality of its records, and to claim, enforce, and apply any and all applicable exemptions, privileges, and proscriptions against public disclosure of records, and to claim, enforce, and apply any and all applicable exemptions, privileges, and proscriptions against public disclosure of records, including, but not limited to, those listed in Article 2 of Government Code, Title 1, Division 7, Chapter 3.5, the California Evidence, Civil Procedure and Penal Codes, the Federal Rules of Evidence, and those established by case law.

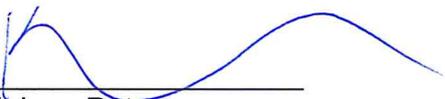
You have also sent a separate Public Record Request to the Department, dated February 18, 2022, titled “Racial Justice Act implementation.” The Department has communicated with you previously regarding that February 18, 2022 request, and that request is now being handled separately. It is my understanding that Senior Deputy District Attorney Douglas Treisman is currently reviewing records for that request. The Department had given the reasonable estimation of August 31, 2022, but the records have proven more voluminous, and more time is necessary. The Department’s new estimation is by September 30, 2022 but likely sooner.

We believe we have responded to your July 23, 2021 Letter Request, but if you disagree with any of the legal authorities cited, please let us know. If you have any questions regarding the foregoing, please contact me.

Sincerely,

LISA A. SMITTCAMP  
DISTRICT ATTORNEY

By

  
Kelsey Peterson  
Deputy District Attorney