



County of San Bernardino
Office of the District Attorney
JASON ANDERSON, District Attorney
Appellate Services Unit

November 22, 2023

Via U.S. Mail and Email

American Civil Liberties Union Foundation
Northern California
Attn: Emi MacLean
39 Drumm Street
San Francisco, California 94111

emaclean@aclunc.org

Re: Your California Public Records Act Request
Racial Justice Act

Ms. MacLean:

The San Bernardino County District Attorney has received your California Public Records Act (CPRA) request. Specifically, two were received, via email, on November 17, 2023. As one was addressed to the San Bernardino County District Attorney, while the latter was to the Santa Barbara County District Attorney, we are assuming that only the first was directed to us, and that the latter was sent in error.¹

CPRA Request

You have requested six categories of records:

- a.) data from cases from 2015 to the present;
- b.) policies, memoranda, or guidance documents;
- c.) training agendas, training materials, and recorded trainings;
- d.) records concerning the implementation of and compliance with the Racial Justice Act;
- e.) communications concerning the Racial Justice Act; and
- f.) all investigations into *Batson-Wheeler* motions (including motions filed and/or granted, internal discipline, and/or State Bar reports).

Each is addressed in turn.

¹ The address in the second letter is a mishmash of the two District Attorneys' offices, addressed to Santa Barbara and located there, but with San Bernardino's street address and zip code.

Page 2

A. Prosecutorial Data

You have requested a large amount of case data from 2015 to the present. Under the CPRA, you would bear the cost of the labor required to harvest and assemble that data. (Gov. Code, § 7922.575, subd. (b)(2).) The cost to produce the data you have requested would exceed the \$100 that you have listed as your limit. We decline to waive reimbursement for the cost of producing this data.

We could provide an estimate of the cost, along with a more thorough accounting of what data would and would not be produced, and the reasons for each data point that would not be included. In the past, however, the ACLU's has not been interested in paying for such data harvests, as the costs can reach thousands or tens of thousands of dollars.

If there is a reasonable possibility that the ACLU is prepared to pay the cost of producing such data, certain to be in the thousands of dollars, kindly let us know, and we will provide an estimate as described in the preceding paragraph.

B. Prosecutorial Policies, Memoranda, or Guidance Documents

You have requested policies, memoranda, or guidance documents in fourteen different areas: a) diversion eligibility and/or programming; b) custody and/or bail recommendations; c) charging recommendations and/or decisions; d) compliance with *Brady v. Maryland* (1963) 373 U.S. 83; 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; l) referral of cases for federal prosecution; m) training; and n) compliance with the RJA.

The District Attorney's Office generally does not release its internal policies,² practices, communications, or training materials to the public, although individual exceptions may be made on a case-by-case basis. Broadly, our policies fall under numerous exemptions under the CPRA. The District Attorney's Office's policies are the product of attorneys' legal research, opinions, conclusions, impressions, and theories, and are therefore privileged work product. (Gov. Code, § 7927.705; Code Civ. Proc., § 2018.030.) Such policies provide guidance to attorneys handling cases and are privileged work product related to reasonably foreseeable litigation. (Gov. Code, § 7927.705; Code Civ. Proc., § 2018.030; Gov. Code, § 7927.200; see *National Assoc. of Criminal Defense Lawyers v. Dept. of Justice Exec. Office for United States Attorneys* (D.C. Cir. 2016) 844 F.3d 246 [construing FOIA].) Training materials, memoranda, and guidance are similarly privileged; they are work product and work product that is related to reasonably foreseeable litigation. Some of the

² Policies governing the District Attorney's Bureau of Investigation are posted publicly on the District Attorney's web site, sbcountyda.org.

Page 3

records you have requested could also fall under the deliberative process privilege. (Gov. Code, § 7927.705; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1342–1344.)

The requested records are exempt from release under the CPRA.

C. All Training Agendas, Materials, and Recordings

You have requested all training agendas, materials, and recordings that are mandatory or optional for prosecutors.

Such materials are exempt from release under the CPRA for the reasons stated in the preceding section (request B).

In addition, this request potentially covers an enormous number of records; it would require an extraordinarily extensive search for records. It would require each attorney in the office to search for training materials in their possession.³ It is unduly burdensome. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 627 (*San Jose*).

The requested records are exempt from release under the CPRA.

D. Records Concerning Implementation of, and Compliance with, the Racial Justice Act

You have requested “all records concerning the Office’s implementation of and compliance with the RJA.”

This request is vague and does not adequately identify specific records. In addition to being vague and ill-defined, it is unduly burdensome, as it would require an extraordinarily extensive search for records. (*San Jose, supra*, 2 Cal.5th at p. 627.) It necessarily requests records that are exempt as attorney work product, and under the litigation and deliberative process privileges. (See fuller discussion under request B.) The need to sort between records that are privileged and those that are not would add to the tremendous burden this request imposes.

The requested records are exempt from release under the CPRA.

E. Communications Concerning the RJA

You have requested “all communications concerning the RJA, including but not limited to email correspondence, and both internal and external communications.”

³ As you note at pp. 4–5 of your request, we would be required to search not only for training materials produced by the District Attorney’s Office, but also any training materials in our possession, even if created by another agency or entity.

Page 4

This request is vague and does not adequately identify specific records. In addition to being vague and ill-defined, it is unduly burdensome, as it would require an extraordinarily extensive search for records. (*San Jose, supra*, 2 Cal.5th at p. 627.) It necessarily requests records that are exempt as attorney work product, and under the litigation and deliberative process privileges. (See fuller discussion under request B.) The need to sort between records that are privileged and those that are not would add to the tremendous burden this request imposes.

The requested records are exempt from release under the CPRA.

F. All Investigations into Batson-Wheeler Motions, etc.

You have requested “[a]ll investigations into *Batson-Wheeler* motions, including, but not limited to motions filed and/or granted, internal discipline, and/or reports to the State Bar.”

This request is vague and does not adequately identify specific records. In addition to being vague and ill-defined, it is unduly burdensome, as it would require an extraordinarily extensive search for records. (*San Jose, supra*, 2 Cal.5th at p. 627.) It necessarily requests records that are exempt as attorney work product, and under the litigation and deliberative process privileges. (See fuller discussion under request B.) The need to sort between records that are privileged and those that are not would add to the tremendous burden this request imposes.

Additionally, internal discipline is a personnel matter, and separately exempt from disclosure under the CPRA. (Gov. Code, § 7927.700.)

Furthermore, State Bar investigations are generally confidential and are expressly exempted from disclosure under the CPRA. (Bus. & Prof. Code, § 6086.1, subd. (b); see also §§ 6044.5; 6232, subd. (d); 6234, subd. (a).)

The requested records are exempt from release under the CPRA.

ACLU of Northern California, Emi MacLean
CPRA: RJA
November 22, 2023

Page 5

Disposition

If you are prepared to pay the cost of producing some of the data you have requested (request A), kindly let us know and we will provide additional information about what would be provided and the estimated cost.

The other records requested will not be provided for the reasons stated.

If we have misunderstood any or all of your requests, kindly provide clarification. If you have contrary legal authority for any of the exemptions listed, please let us know.

Cordially,



Brent J. Schultze
Lead Deputy District Attorney
Appellate Services Unit

cc: Public Affairs