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August 24, 2016

Honorable Charles Margines, Presiding Judge
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, California 92701

Re: Responses to Orange County Grand Jury Report

Dear Judge Margines:

Enclosed please find the Office of the District Attorney-Public Administrator's responses to Findings F1, F4, F5, F7, F10 through F11 and Recommendations R6, R8 of the 2015-2016 Orange County Grand Jury Report, "Office of Independent Review: What's Next?"

Sincerely,

A handwritten signature in blue ink that reads "Tony Rackauckas". The signature is fluid and cursive, with the first name "Tony" being particularly prominent.

Tony Rackauckas
District Attorney-Public Administrator

TR:vlb
Enclosure

**2015-2016 Orange County Grand Jury Report:
“Office of Independent Review: What’s Next?”**

SUMMARY RESPONSE STATEMENT

On June 30, 2016, the Grand Jury released a report entitled, “*Office of Independent Review: What’s Next?*” This report directed a response from the District Attorney/Public Administrator to certain findings and recommendations which are included below.

The Orange County District Attorney (OCDA) is committed to continuing accountability and building public trust in law enforcement. Policy, procedures, and personnel adjustments have already been put in place to address these concerns.

At the same time, district attorneys’ offices throughout the state are mandated to protect due process requirements, the integrity of law enforcement investigations, privacy of those involved, and public safety concerns. The legal rights of all parties will need to be balanced against the Board of Supervisors’ role of directing the Office of Independent Review (OIR).

FINDINGS AND RESPONSES

Finding F1

“By changing the employment relationship for the revised OIR’s Executive Director and professional staff from independent contractor to County employee, the Board of Supervisors appears to have made the 2015 version of the Office of Independent Review less independent of the Board and more vulnerable to the Board exerting politically-motivated influence on the five covered agencies and/or their leadership through the OIR.”

Response: Agree with the finding.

Finding F4

“The OIR could easily cost upwards of \$3 million/year due to expansion to five agencies plus jail monitors.”

Response: Agree with the finding.

This response is based upon the Grand Jury staffing assumptions, but the OCDA has not been asked to provide any input as to the staffing/personnel needs of the newly created OIR.

Finding F5

“It will be a challenge to find and retain a permanent staff with the qualifications and sufficient subject matter expertise to identify best practices and to review the broad range of services provided by the five agencies identified in the 2015 ordinance.”

Response: Agree with the finding.

The creation of a single OIR, directed solely by the Board of Supervisors, that will oversee five large, diverse agencies presents enormous challenges. Additionally, two of the agencies are attorneys’ offices that cannot legally share confidential information. Being that the law offices are in an adversarial relationship, each bound by attorney-client privilege, it further complicates any single oversight.

Finding F7

“The strenuous opposition of the OCDA to its inclusion in the OIR’s purview could pose a serious threat to the ability of the OIR to provide an effective review of the OCDA as required by the 2015 ordinance.”

Response: Disagree with the finding.

The ability of the OIR to review/oversee the OCDA is limited by statutory and case law.

The Board of Supervisors in winter 2015, received opinion letters from both the Orange County Public Defender and the OCDA. The Grand Jury was given a copy of the OCDA legal memorandum (Attachment A). In those letters, each agency outlines their legally mandated duties and responsibilities. Even though each agency represents different interests in the legal system, they are similar in their legal analysis. This is not surprising. Our positions articulate both statutory and case law, which limits the ability of both offices to share information.

Finding F10

“With the OIR’s newly-expanded role to review the policies and practices of the OCDA and recommend reforms consistent with evolving best practices, the OCDA has an opportunity to take advantage of the new OIR to assist the OCDA in recovering from the current jailhouse informant controversy, and in particular, implementing IPPEC recommendation #2. This would require the voluntary cooperation of the OCDA with the new OIR.”

Response: Partially Implemented.

In May 2016, a former Orange County Superior Court judge joined the Confidential Informant Review Committee (CIRC) as a neutral party.

Finding F11

“The assurance of confidentiality, through attorney-client privilege between the five relevant County agencies and the OIR, is essential to the effective implementation of the 2015 OIR ordinance. Still, even attorney-client privilege may be insufficient for allowing access to some confidential documents, like juvenile records and personnel files that are very tightly controlled by the courts.”

Response: Agree with the finding.

Please refer to Attachment A, which outlines some of the legal issues concerning a single attorney-client relationship shared with five diverse agencies directed by the Board of Supervisors.

RECOMMENDATIONS AND RESPONSES

Recommendation R6

“The Board of Supervisors should direct the OIR Executive Director to work with each of the five agencies to negotiate specific, and possible narrow, initial scopes for OIR involvement with each agency, all to be completed within three months of the Executive Director being hired. (F4,F5,F6,F7,F8,F9,F10,F11)”

Response: The recommendation requires further analysis.

Since the Board of Supervisors has sole authority to direct the OIR, we are unable to provide a response at this time. No structure or staffing has been provided to review.

Recommendation R8

“The OCDA should add an OIR staff attorney as an ‘outside’ or independent member of the OCDA’s Confidential Informant Review Committee, in keeping with IPPEC Recommendation 2, given the following prerequisites: The Board of Supervisors should direct the OIR Executive Director to hire, with OCDA approval, and within six months of the hiring of the Executive Director, an OIR staff attorney with legal expertise in the use of informants in trials. Within one

month after hiring the OIR staff attorney, the OCDA should enter into an attorney-client relationship, with OCDA as client and the OIR staff attorney as attorney, and add the OIR staff attorney to the CIRC. With confidentiality protected by attorney-client privileges, the OCDA should provide the OIR staff attorney with confidential access to all of OCDA's processes, policies, procedures, practices, protocols, records, documents, and staff related to OCDA's use of informants. (F7,F8,F10,F11)"

Response: Partially Implemented.

The Cooperating Informant Review Committee (CIRC) was created to provide an effective and efficient process for reviewing informant related issues within the OCDA and to serve as a resource for prosecutors and law enforcement agencies so that proper legal standards are maintained and followed throughout the criminal justice process. The permanent members of the committee include the District Attorney, the Senior Assistant in charge of Vertical Prosecutions and Violent Crimes, the Assistant District Attorney of the Homicide Unit, the Assistant District Attorneys of the Gangs/Target Units, the Assistant District Attorney of the Narcotics Enforcement Team, the Deputy District Attorney in charge of the OCII and an appointee from outside the OCDA office.

The OCDA has moved forward with finding a neutral retired magistrate to be part of the CIRC committee. In May 2016, a former Orange County Superior Court judge joined CIRC as a neutral party.

ATTACHMENT A



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November 9, 2015

HAND DELIVERED

THE HON. TODD SPITZER, Chairman
Board of Supervisors - Third District
Hall of Administration, Bldg. 10
3333 Santa Ana Boulevard
Santa Ana, CA

Dear Chairman Spitzer:

On November 10, 2015, this Board will be called upon to consider whether it should become the only county in the state of California to adopt an oversight model that would purport to examine and report upon the conduct of a variety of Orange County law enforcement agencies, including the Office of the District Attorney. Respectfully, I am authoring this letter to each of you to advise you that the proposed inclusion of the Office of the District Attorney in such an oversight scheme is both legally impractical and wholly unwarranted. A county oversight committee cannot legally exercise any supervisory control over the manner in which the District Attorney executes its prosecutorial function. The District Attorney also cannot legally nor prudently share the vast majority of investigative and prosecutorial material within its possession to a third-party oversight committee. Without authority to control the functioning of the District Attorney nor access to the majority of materials within its possession, an oversight committee could not fulfill any meaningful supervisory role over the Office of the District Attorney. Moreover, such an oversight scheme is not necessary. The law already provides for comprehensive supervision and oversight of the District Attorney's Office and its prosecutors through the Office of the Attorney General, the grand jury, state and federal courts and the California State Bar. These points are summarily addressed below.

An Oversight Committee Cannot Supervise the Manner in Which the District Attorney Exercises its Prosecutorial Function.

The role of the District Attorney is to investigate and prosecute crime. The District Attorney "is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county." (Gov. Code, § 26500; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240.) Subject to supervision by the Attorney General, the District Attorney "independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387.) His discretion broadly extends to the investigation and gathering of evidence. The "[i]nvestigation and [] gathering of evidence relating to criminal offenses is a responsibility which is inseparable from the district attorney's prosecutorial function." (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d 228, 241.) His discretion also extends "through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Ibid.*)

The Hon. Todd Spitzer, Chairman
Page 2 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

In fulfilling this role, it is imperative that the District Attorney exercise impartial discretion and function independent of any unauthorized influence. "The importance to the public as well as to individuals suspected or accused of crimes, that [the District Attorney's discretion] be exercised with the highest degree of integrity and impartiality, and with the appearance thereof cannot easily be overstated." (*People v. Dehle, supra*, 166 Cal.App.4th 1380, 1387.) "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People." (*Id.* at p. 1388.) He "is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual." (*Ibid.*)

Thus, while the Board supervises "the official conduct of all county officers," the Legislature explicitly limits the Board's role concerning the District Attorney. (Gov. Code, § 25303.) The Board cannot influence, affect, or obstruct the District Attorney's "independent and constitutionally and statutorily designated investigative and prosecutorial functions . . ." (*Ibid.*) "A county district attorney prosecuting a criminal action within a county, acts as a *state* officer, exercising ultimately powers which may not be abridged by a county board of supervisors." (*Graham v. Municipal Court* (1981) 123 Cal.App.3d 1018, 1022, original italics.) The Board "does not have the power to perform the county officers' statutory duties for them or direct the manner in which the duties are performed." (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1209; see also *People v. Langdon* (1976) 54 Cal.App.3d 384, 390 [county ordinance requiring jury selection from geographic subdivision of judicial district wherein crime committed was invalid as being beyond power of county board of supervisors].) As the court stated in *Hicks*, "[t]he board of supervisors has no power to control the district attorney in the performance of his investigative and prosecutorial functions . . ." (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d 228, 241.)

The limitation on the Board's authority includes not only when the District Attorney prepares to prosecute and prosecutes crime, but also when he trains and develops policy in these areas. The District Attorney "represents the state, and not the county, when training and developing policy [related to preparing to prosecute and prosecuting crimes]." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 362.)

The limitation on the Board also includes indirect attempts to influence the District Attorney's performance. In *Hicks*, the court held that the board of supervisors exceeded its jurisdiction in attempting to transfer 22 investigative positions from the District Attorney to the sheriff. The Board could not indirectly control the District Attorney's prosecutorial discretion "by requiring that he perform his essential duties through investigators who are subject to the control of another county officer." (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d 228, 241.) In reaching that conclusion, the *Hicks* court observed:

The Hon. Todd Spitzer, Chairman
Page 3 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

The situation here is not unlike that considered by the court in *County of Modoc v. Spencer*, ...wherein the board of supervisors had ordered that a private law firm be employed as assistant counsel with the district attorney to aid in the prosecution of criminal cases. The Supreme Court held that the board's action was void and created no legal claim against the county, stating: "[I]t never was intended that the board of supervisors should be permitted to control or interfere with criminal prosecutions or with the district attorney in their management."

(*Id.* at 241-242, quoting *County of Modoc v. Spencer*, (1894) 103 Cal. 498, 501.)

The creation of an oversight model that included the District Attorney would also be an empty redundancy; an entity devoid of supervisory power over the prosecutorial function of the District Attorney amidst a class of pre-existing mechanisms with actual authority to oversee the office and its prosecutors. For example, in contrast to the Board's limited authority, the Attorney General is charged with broad constitutional and statutory responsibility to oversee the District Attorney. (Cal. Const., art. V, § 13; Gov. Code, § 12550.) "It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney . . . in all matters pertaining to the duties of their . . . office" (Cal. Const., art. V, § 13.) The Attorney General may require the District Attorney "to make reports concerning the investigation, detection, prosecution, and punishment of crime" (*Ibid.*) The Attorney General assists all district attorneys "in the discharge of [their] duties" (*Ibid.*) Penal Code section 923 authorizes the Attorney General to convene the grand jury "with or without the concurrence of the district attorney...for the investigation and consideration of such matters of a criminal nature as he desires to submit to it." (Pen. Code, § 923.) Government Code section 12524 authorizes the Attorney General to "conference" with district attorneys to discuss their duties "with the view of uniform and adequate enforcement of state law." (Gov. Code, § 12524.)

In addition to the Attorney General, the grand jury has a role in overseeing the District Attorney. The grand jury is authorized to "investigate and report on the operations, accounts, and records of the officers, departments, or functions of the county." (Pen. Code, § 925.) "One of the basic functions of the grand jury is to act as the public's 'watchdog' by investigating and reporting upon the affairs of local government" (*City of Woodlake v. Tulare County Grand Jury* (2011) 197 Cal.App.4th 1293, 1300.) Grand juries are "charged and sworn to investigate or inquire into county matters of civil concern" (Pen. Code, § 888.) "The grand jury may investigate citizen complaints, but it may also simply elect to review the operations of an agency of local government within its jurisdiction, unrelated to any particular complaint." (*City of Woodlake v. Tulare County Grand Jury, supra*, 197 Cal.App.4th 1293, 1300.) The grand jury may also "investigate and report upon the needs of all county officers" (Pen. Code, § 928.)

The Hon. Todd Spitzer, Chairman
Page 4 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

Of course trial and appellate courts serve an important prosecutorial oversight function as well, exercising the authority to review and remedy allegations of prosecutorial error or misconduct with a wide variety of sanctions while the State Bar of California also fulfills the role of investigating complaints of attorney misconduct and disciplining offenders.

In sum, the law provides for comprehensive supervision and oversight of the District Attorney and his prosecutors. The Attorney General has broad supervision over the District Attorney in the performance of his duties. The grand jury can investigate and report on the operations of the District Attorney's Office. Judicial and professional oversight also operate to investigate allegations of wrong-doing, remedy errors and discipline offenders. There is simply no role for a county-created, citizen committee to supervise or oversee the District Attorney. This is particularly true because most of the District Attorney's activities involve the investigation and prosecution of crime, which are matters exclusively within the District Attorney's discretion.

The Citizen Committee Would Not Have Access To District Attorney Files

A citizen oversight committee is equally unworkable because it would not have access to the vast majority of investigative and prosecutorial materials within the District Attorney's possession. In fact, the disclosure of most of the material within the District Attorney's case files is either statutorily prohibited or shielded by a privilege of confidentiality that would thereafter be waived against requests for access by anyone if disclosed. These restrictions encompass the vast majority of records, reports, files, memoranda and other documents within the District Attorney's Office. Simply put, no citizen committee would have access to any of these documents. While a comprehensive list of confidentiality provisions is beyond the scope of this letter, several examples are set forth here to illustrate the breadth of these protections against third party review.

Work Product. Attorney work product is confidential and not discoverable under any circumstances. The work-product doctrine is codified in California Code of Civil Procedure §2018.030. Under that statute, any writing "that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is **not discoverable under any circumstances.**" (Code Civ. Proc., § 2018.030, subd. (a) [emphasis added]; Pen. Code, § 1054.6 [applying the work product privilege to criminal cases].) Prior to the enactment of section 2018.030, the work-product privilege had previously been codified with identical language in section 2016 of the Code of Civil Procedure. Interpreting the absolute privilege for such materials under section 2016, the California Court of Appeal characterized the language of this statute as "clear and explicit" and that "[i]t offer[ed] no opportunity for compromise or variation." (*Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 68). The District Attorney's files are replete with attorney work product.

The Hon. Todd Spitzer, Chairman
Page 5 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

Deliberative Process Privilege. The deliberative process privilege similarly immunizes many internal processes of the executive branch of the government against disclosure. “Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated.” (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540, superseded by statute on another point in *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 915.) (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 305.) Disclosure of information and materials otherwise protected by this privilege would undermine the very goal of effective governance. Indeed, one of the recognized rationales for the privilege is that it “protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions.” [Citation]” (*Citizens for Open Government v. City of Lodi, supra*, 205 Cal.App.4th 296, 307.)

Official Information. The District Attorney's files are also replete with official information. “[O]fficial information means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public” (Evid. Code, § 1040, subd. (a).) This information includes reports by police, investigators and other law enforcement personnel discussing the nature of ongoing investigations in which disclosure may compromise the investigation and/or place individuals in danger. Evidence Code section 1040, subdivision (b), grants a public entity the “privilege to refuse to disclose official information, and to prevent another from disclosing official information...” in such instances. (Evid. Code, § 1040, subd. (b).)

Confidential Informants. Under enumerated circumstances, Evidence Code section 1041 similarly grants a public entity the “privilege to refuse to disclose the identity of a person who has furnished information [to law enforcement] purporting to disclose a violation of a law...and to prevent another from disclosing the person's identity....” (Evid. Code, § 1041, subd. (a).) Numerous case files include information concerning the identity of individuals who have provided information to law enforcement in confidence. This information is privileged from disclosure under Evidence Code section 1041 to protect the safety of those individuals.

Confidential Personal Information. The District Attorney has a statutory obligation to protect the confidential personal information of witnesses and victims in police reports, arrest reports or investigative reports against disclosure. (Pen. Code, § 964, subd. (a).) Confidential personal information encompasses a host of information about individuals identified in District Attorney case files “includ[ing], but not limited to an address, telephone number, driver's license or California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number...” of such individuals. (Pen. Code, §

The Hon. Todd Spitzer, Chairman
Page 6 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

964, subd. (b).) Both Penal Code sections 841.5 and 964 indicate confidential personal information should not be disclosed to unauthorized third parties. (Pen. Code, §§ 964, 841.5.)

Juvenile Case Files and Information. Any information relating to the arrest or detention of juveniles located within any of the District Attorney's case files, regardless of whether they involve the current prosecution of a minor or not is confidential and cannot be disclosed. (Welf. & Inst. Code, § 827.) Law enforcement officials cannot disclose information relating to the arrest or detention of juveniles to third parties without a juvenile court order, regardless of whether that arrest or detention ever resulted in juvenile court proceedings. "[T]he Juvenile Court Law and particularly Welfare and Institutions Code sections 625, 676, 781, and 827 establish the confidentiality of juvenile proceedings and vest the juvenile court with exclusive authority to determine the extent to which juvenile records may be released to third parties." (*T.N.G. v. Superior Court of San Francisco* (1971) 4 Cal. 3d 767, 778.) Welfare and Institutions Code section 827, for example, expressly governs the confidentiality of a juvenile case file and strictly limits its release to third parties. Section 827 provides, in pertinent part, that a juvenile case file may only be inspected by a restricted group of enumerated individuals and to "[a]ny other person who may be designated by court order of the judge of the juvenile court upon filing a petition." (Welf. & Inst. Code, § 827.)

Although section 827 discusses confidentiality in terms of the juvenile "case file," the California Supreme Court has held that the confidentiality requirements of this section extend to investigative reports pertaining to minors who were never even involved in juvenile court proceedings. In *T.N.G. v. Superior Court of San Francisco*, *supra*, 4 Cal.3d 767, the California Supreme Court held that the scope of section 827's confidentiality requirement includes police reports pertaining to minors who were not involved in juvenile court proceedings but had merely been temporarily detained. According to the Court, juvenile court law and section 827 "vest the juvenile court with exclusive authority to determine the extent to which juvenile records may be released to third parties." (*Id.* at 778.) "Welfare and Institutions Code section 827 reposes in the juvenile court control of juvenile records and requires the permission of the court before any information about juveniles is disclosed to third parties by any law enforcement official." (*Id.* at 780-781). This includes police records of juvenile detentions, even if they did not result in juvenile court proceedings, because they are the "equivalents to court records and remain within the control of the juvenile court." (*Id.*; see also, *In re Elijah S.* (2005) 125 Cal.App.4th 1532, 1549.)

The appellate court in *Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103 similarly upheld the juvenile court's authority and exclusive jurisdiction under section 827 to control the release or disclosure of all records of juvenile arrests or detentions, even where no juvenile petition had ever been filed and no juvenile court proceedings were pending. (*Wescott v. County of Yuba* (1980) 104 Cal.App.3d 103, 106-109.) "[T]he strictures of section 827 require a [juvenile] court order before any reports relating to the juveniles can be released to third parties." (*Id.* at 109; see also, *In re Elijah S.* (2005) 125 Cal.App.4th 1532, 1549-1550.)

The Hon. Todd Spitzer, Chairman

Page 7 of 14

November 9, 2015

Re: Oversight Committee/ District Attorney's Office

The Public Records Act. The Public Records Act exempts from disclosure the vast majority of records within the District Attorney's Office. Government Code section 6254, subdivision (f) authorizes a District Attorney to withhold "[r]ecords of complaints to, or investigations conducted by, or records of intelligence information or security procedures of . . . any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes..." (Gov. Code, § 6254, subd. (f).) Under this provision, such "records of complaints to, or investigations conducted by" state or local police agencies includes "investigations undertaken for the purpose of determining whether a violation of the law may occur or has occurred." (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1071.) Additionally, under this provision, exempt "investigatory...files compiled by" a local agency for law enforcement purposes includes such investigative files compiled by the District Attorney. (See, Gov. Code § 6252, subd. (a) [local agencies defined].) The scope of these exemptions includes not only those records generated by the law enforcement agency itself but also materials gathered from victims, witnesses, and other evidentiary sources for the purpose of investigating allegations of crime. (*Haynie, supra*, 26 Cal.4th at pp. 1069-1070.) And, significantly, the statutory exemption explicitly includes protection for "that portion of [] investigative files that reflects the analysis or conclusions of the investigating officer" as well. (Gov. Code, § 6254, subd. (f).)

This disclosure exemption does not terminate when the investigation concludes nor does it depend upon the outcome of the investigation. (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 355; see also *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174-175.) "[T]he exemption for law enforcement investigatory files does not end when the investigation ends." (*Williams v. Superior Court, supra*, 5 Cal.4th 337, 361-362; *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174.) "Once an investigation...has come into being because there is a concrete and definite prospect of enforcement proceedings at that time, materials that relate to the investigation and, thus, properly belong in the file, remain exempt subject to the terms of the statute." (*Id.* at 362.) "Indeed, a file 'compiled by ... [a] police agency' or a file 'compiled by any other state or local agency for ... law enforcement ... purposes' continues to meet that definition after the investigation has concluded." (*Id.* at 357.) Even where an investigation concludes without the initiation of a criminal prosecution, the investigatory file remains exempt from disclosure. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169.) This exemption may also extend to letters or memoranda authored by the District Attorney's Office to law enforcement agencies explaining why a prosecution was not warranted following a particular investigation. (*Id.*) "If anything, public policy encourages a frank and outspoken closing report unimpaired by a concern for appearances. " 'Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decision making process.' " (*Id.* at 177 [internal citation omitted].)

The Hon. Todd Spitzer, Chairman
Page 8 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

The scrupulous invocation of these disclosure exemptions by the District Attorney is imperative. Pursuant to Government Code section 6254.5, any disclosure where the District Attorney could properly claim an exemption may constitute a waiver of confidentiality against any future claim for the same information by any member of the public. (Gov. Code § 6254.5)

The disclosure exemptions provided by Government Code section 6254, subdivision (f), may not be overcome with the enactment of a local ordinance. In *Rivero v. Superior Court*, (1997) 54 Cal.App.4th 1048, the Court of Appeal held that the compelled disclosure of the District Attorney's closed files pursuant to a municipal "sunshine" ordinance necessarily obstructed the investigatory function of the District Attorney and thus contravened Government Code section 25303. The court explained:

Very few activities performed by public officials are more important to the public and to the individuals most directly involved than the full and proper investigation of criminal complaints. Every effort must be made to ensure that investigators can gather all evidence that is available and legally obtainable. Without the assurance of continuing confidentiality, potential witnesses could easily be dissuaded from coming forward. Even if they knew that sensitive information would not automatically be turned over, publicity-shy witnesses would still have reason to be wary.

It is not a complete answer that publicity-shy witnesses may already be deterred from coming forward by the prospect of being subpoenaed for a criminal trial. Sometimes anonymous sources, well known to the targets of investigations, provide important information. That information, though not usable itself, may help focus the inquiry and lead to the acquisition of admissible evidence. These sources' anonymity would be compromised and their willingness to provide information hindered if the subjects could easily review investigation files. (*Id.* at pp. 1058-1059.)

The court reasoned that although the county was autonomous with respect to all municipal affairs, the investigation and prosecution of state criminal law are statewide concerns, not municipal affairs, and conflicting local ordinances must yield. The court further concluded that Government Code section 6253.1, which allows local agencies to permit greater access to records than offered by the Public Records Act, did not compel a different conclusion; it does not authorize a local board of supervisors to violate section 23503. Similarly, the court found, the fact that the District Attorney could voluntarily disclose records of his investigations did not mean that the board of supervisors could compel him to do so. (*Rivero v. Superior Court, supra*, 54 Cal.App.4th 1048, 1059.)

The Hon. Todd Spitzer, Chairman
Page 9 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

Grand Jury Proceedings. Files of the District Attorney's Office may also include information relating to grand jury proceedings which may not be disclosed. "[G]rand jury secrecy is the rule and openness the exception, permitted only when specifically authorized by statute." (*McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1180; see also, *Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247). Unless and until a transcript of a grand jury proceeding is made public, the proceeding must remain secret. (See, e.g., Pen. Code, §§ 924.1, 924.2, 938.1, subd. (b), 939).

Criminal Offender Records and Criminal History Information. The District Attorney's case files are also replete with criminal history information regarding defendants, witnesses, and victims. The Penal Code expressly prohibits the dissemination of criminal history information from state or local sources to individuals who are not specifically authorized by law to receive it. (Pen. Code §§ 11105 and 11140-11142, 13301-13303; and 11076).

Peace Officer Personnel Records. By virtue of Penal Code §832.7, peace officer personnel records are confidential. Section 832.7, subdivision (a), provides, in pertinent part, as follows:

(a) Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code.

(Pen. Code, §832.7, subd. (a).) This provision of the Penal Code has the effect of creating a privilege for peace officer personnel records against their disclosure. (*Fletcher v. Superior Court* (2002) 100 Cal.App. 4th 386, 394; *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1440; *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401.) That privilege is jointly held by both the law enforcement agency in possession of those records and the individual officer to whom they pertain. (*Davis v. City of Sacramento, supra*, 24 Cal.App.4th 393; *San Francisco Police Officers' Ass'n v. Superior Court* (1988) 202 Cal.App. 3d 183, 189.) Although Penal Code section 832.7 affords the District Attorney the ability to obtain and review peace officer personnel files when investigating police misconduct, the District Attorney is required to maintain the confidentiality of those materials absent prior judicial review and authorization for disclosure. (*Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 618.)

Wiretap Evidence. Penal Code section 629.74 *et seq.* prohibits the District Attorney from disclosing the content of intercepted telecommunications, or any evidence derived therefrom, except when permitted under the limited circumstances enumerated in Penal Code section 629.82. Penal Code section 629.74 provides, in relevant part, that the:

The Hon. Todd Spitzer, Chairman
Page 10 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

district attorney...who, by means authorized by this chapter, has obtained knowledge of the contents of any...cellular telephone communication, or evidence derived therefrom, may disclose the contents to one of the individuals referred to in this section and to any investigative or law enforcement officer...**to the extent that the disclosure is permitted pursuant to Section 629.82.... No other disclosure, except to a grand jury, is permitted** prior to a public court hearing by any person regardless of how the person may have come into possession thereof.

(Pen. Code, §629.74, emphasis added).

Section 629.78 of the Penal Code similarly provides that:

Any person who has received, by any means authorized by this chapter, any information concerning a...cellular telephone communication, or evidence derived therefrom, intercepted in accordance with the provisions of this chapter, may, **pursuant to Section 629.82**, disclose the contents of that communication or derivative evidence while giving testimony under oath or affirmation in any criminal court proceeding or in any grand jury proceeding.

(Pen. Code, §629.78, emphasis added).

Penal Code section 629.82 enumerates the limited circumstances under which the contents of an intercepted communication, or evidence derived therefrom, may be disclosed. None of those circumstances would authorize the release of such communications or evidence derived therefrom to a third-party oversight committee. (See, Pen. Code, §629.82, subd. (a)-(c).)

Probation Reports. Penal Code section 1203.05 restricts access by third-parties to particular information contained within probation reports. (Pen. Code, § 1203.05; *People v. Connor* (2004) 115 Cal.App.4th 669, 696). The District Attorney could not disclose statutorily protected information within probation reports to a third-party oversight committee.

Child Abuse Reports. Under Penal Code section 11167.5, specific reports of suspected child abuse or neglect or investigations thereof are confidential and may not be disclosed except as provided for by law. In pertinent part, Penal Code section 11167.5, subdivision (a), provides that:

[t]he reports required by Sections 11166 and 11166.2, or authorized by Section 11166.05, and child abuse or neglect investigative reports that result in a summary report being filed with the Department of Justice pursuant to subdivision (a) of Section 11169 shall be confidential and may be disclosed only as provided in subdivision (b).

The Hon. Todd Spitzer, Chairman
Page 11 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

(Pen. Code, §11167.5, subd. (a).) Unauthorized disclosure of confidential child abuse or neglect information constitutes a misdemeanor. (*Id.*)

Similarly, the identity of particular individuals who report child abuse or neglect is confidential and may not be disclosed except as provided for by law. Penal Code section 11167, subdivision (d), provides, in pertinent part, that "the identity of all persons who report [child abuse or neglect] under this article shall be confidential and disclosed only..." as provided therein. (Pen. Code, §11167, subd. (d).)

Elder/Dependent Abuse Reports. Welfare and Institutions Code section 15633 similarly shields reports of suspected elder or dependent adult abuse or neglect from disclosure. Such reports are confidential, and may only be disclosed as permitted by state law. (Welf. & Inst. Code, §15633, subd. (a).) Unauthorized disclosure of this information constitutes a misdemeanor. (*Id.*) Similarly, the identity of particular individuals who report elder or dependent adult abuse or neglect is confidential and may not be disclosed except as provided for by law. (Welf. & Inst. Code, §15633.5, subd. (b).)

Child Abduction Records. Particular records relating to child abductions are also confidential and their disclosure statutorily prohibited except as provided for by law. (Fam. Code §17514.) Family Code section 17514, subdivision (b)(1) provides, in relevant part that, except as otherwise provided by law:

all files, applications, papers, documents, and records, established or maintained by any public entity for the purpose of locating an abducted child, locating a person who has abducted a child, or prosecution of a person who has abducted a child shall be confidential, and shall not be open to examination or released for disclosure for any purpose not directly connected with locating or recovering the abducted child or abducting person or prosecution of the abducting person.

(Fam. Code, § 17514, subd. (b)(1).) The District Attorney would be prohibited from disclosing records in violation of this statute.

Mental Health Records. The case files of the District Attorney's Office commonly contain information and records obtained in the course of providing various services to mentally disordered individuals. Welfare and Institutions Code section 5328 renders these records confidential.

The Hon. Todd Spitzer, Chairman
Page 12 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

All information and records obtained in the course of providing services under Division 4 (commencing with Section 4000), Division 4.1 (commencing with Section 4400), Division 4.5 (commencing with Section 4500), Division 5 (commencing with Section 5000), Division 6 (commencing with Section 6000), or Division 7 (commencing with Section 7100), to either voluntary or involuntary recipients of services shall be confidential. Information and records obtained in the course of providing similar services to either voluntary or involuntary recipients prior to 1969 shall also be confidential. Information and records shall be disclosed only [as provided by law].

(Welf. & Inst. Code, §5328). Moreover, their unauthorized disclosure can constitute a basis for civil liability. (See, Welf. & Inst. Code §5330 [providing that “[a]ny person may bring an action against an individual who has willfully and knowingly released confidential information or records concerning him or her in violation of this chapter.”])

Reporters' Transcripts. The Government Code prohibits the District Attorney from duplicating reporters' transcripts of any proceedings for the benefit of any third party. Government Code section 69954 provides that any “party or person who has purchased a transcript may...reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but shall not otherwise provide or sell a copy or copies to any other party or person.” (Gov. Code, § 69954, subd. (d).) Accordingly, the District Attorney would be precluded from providing copies of any transcripts of any proceedings prosecuted to a third-party oversight committee.

Materials Subject to Protective Orders. A wide variety of materials in the possession of the District Attorney's Office are often the subject of varying court-issued protective orders prohibiting their dissemination by the parties to the criminal prosecution. The District Attorney would be incapable of providing third-party access such materials.

Non-Exhaustive List. As stated, the District Attorney's files contain a host of confidential records, the enumeration of which is well beyond the scope of this letter. In addition, these confidentiality provisions also include, but are not limited to, the following: (1) information contained in sealed search warrant affidavits (*People v. Hobbs* (1994) 7 Cal.4th 948); (2) the identity of a victim of any crime defined by Penal Code sections 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 or the address of a victim of any crime defined by Penal Code sections 220, 236.1, 261, 261.5, 262, 264, 264.1, 265, 266, 266a, 266b, 266c, 266e, 266f, 266j, 267, 269, 273a, 273d, 273.5, 285, 286, 288, 288a, 288.2, 288.3, 288.5, 288.7, 289, 422.6, 422.7, 422.75, 646.9 or 647.6; (3) specific accident reports (Veh. Code §20012); (4) spousal and child welfare enforcement records (Welf. & Inst. Code section 11478.1, subdivision (b)(1)); and (5) autopsy and death scene images, among others. (See, *Catsouras v. California Highway Patrol* (2010) 181 Cal.App.4th 856, 864 and *Nat'l Archives and Records Admin. v. Favish* (2004) 541 U.S. 157, 167-168.)

The Hon. Todd Spitzer, Chairman
Page 13 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

There Is No Reason To Create An Attorney-Client Relationship With an Oversight Committee

In his November 3, 2015 report to this Board, Special Counsel Michael Gennaco proposed, without explanation, that the myriad concerns regarding the sharing of confidential information in the possession of county agencies with an oversight committee could be "facilely overcome" with the establishment of an attorney/client relationship between the agency and committee. Not true. The District Attorney neither needs nor would be served by the creation of an attorney-client relationship with an oversight committee.

The District Attorney already has an attorney within the county counsel's office to provide appropriate counsel and advice when necessary. (See Gov. Code, § 26529, subd. (a) [county counsel shall defend or prosecute all civil actions and proceedings concerning county officers].) The District Attorney also has the resources of the Attorney General to assist him in the discharge of his duties. There is no need for the District Attorney to have additional counsel. An attorney-client relationship with the citizen committee would only create an unnecessary redundancy.

An attorney-client relationship between the District Attorney and an entity with similar relationships with other county agencies would also create unworkable conflicts of interest and fail to fulfill the attorney's duty of loyalty to its purported client, the District Attorney. "An attorney's duty of loyalty to a client is not one that is capable of being divided...." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282.) Joint representation of parties with conflicting interests impairs each client's legitimate expectation of loyalty that his or her attorneys will devote their "entire energies to [their] client's interests." (*Id.* at 289.) This principle of "undivided loyalty" is embraced in the rules of professional conduct governing potential and actual conflicts in joint representation cases. (*Great Lakes Const., Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1355). In what respect would an oversight committee, as the attorney for the District Attorney, be fulfilling its undivided duty of loyalty to the District Attorney? Moreover, how could such an entity resolve the inherent conflicts of interests it has in the simultaneous pursuit of its various clients' interests? The mere statement of such a proposal reveals its absurdity. How would the District Attorney engage in a relationship with an entity ethically required to pursue its interests that is simultaneously ethically bound to pursue the interests of the Public Defender's Office, the Sheriff's Department, the Probation Department, the Social Services Department, and the Department of Child Custody Services? The interests of these agencies are often adverse to the interests of the District Attorney to investigate and prosecute crime. Additionally, in the context of an attorney-client relationship, such an oversight committee, whose purported purpose is transparency, would be precluded from disclosing the confidential communications it would have had with its District Attorney client to anyone outside of that limited attorney-client relationship. (Evid. Code § 952).

The Hon. Todd Spitzer, Chairman
Page 14 of 14
November 9, 2015
Re: Oversight Committee/ District Attorney's Office

An attorney-client relationship would also fail to confer any authority on the citizen committee to oversee the District Attorney in core job duties. As discussed above, by statute and subject to Attorney General oversight, the District Attorney is charged with exclusive discretion in the investigation and prosecution of crime within the County. He cannot divest his discretion and the Board cannot affect or obstruct it. Neither the District Attorney, nor the Board, can upset the statutory structure governing the District Attorney's performance of his duties and the Attorney General's supervisory responsibility. Thus, there is no reason for the District Attorney to create an attorney-client relationship with a county-created citizen committee. There is also no reason for the District Attorney's Office to be included in any citizen committee oversight model.

Simply put, the inclusion of the Office of the District Attorney in a county-created oversight scheme is neither feasible nor practical. Moreover, it is wholly unnecessary given the host of safeguards and comprehensive structure of oversight already provided by state and federal law.

Respectfully,


Tony Rackauckas
District Attorney

KB/TR:vlb