



Supreme Court of California

JORGE E. NAVARRETE
CLERK AND EXECUTIVE OFFICER
OF THE SUPREME COURT

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SENT VIA EMAIL

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**RE: Motion to Seal the Record in *Application of Burton (Susan) for Clemency (S255392)* /
Confidentiality of Clemency Records**

Dear Counsel,

The court invites the Governor and the First Amendment Coalition to file and serve letter briefs no later than January 13, 2021, regarding the proposed administrative order concerning clemency records, set forth below, that is presently under consideration for adoption by the court. Any other interested person also may electronically file a response to the proposed administrative order on or before that date, with service upon the Governor and the First Amendment Coalition. The court will consider all timely responses prior to making a final decision whether to adopt the proposed administrative order, or some variation thereof.

Sincerely,


JORGE E. NAVARRETE
Clerk and

Executive Officer of the Supreme Court

Enclosure: [1] Proposed Administrative Order

cc: Eliza Hersh, Deputy Legal Affairs Secretary, Office of the Governor
David E. Snyder, Attorney at Law
Selina Maclaren, Attorney at Law
Glen A. Smith, Attorney at Law
Rec.

PROPOSED ADMINISTRATIVE ORDER

Pursuant to article V, section 8, subdivision (a) of the state Constitution (article V, section 8(a)), “Subject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in case of impeachment.” The power to grant clemency is subject to the condition that “[t]he Governor may not grant a pardon or commutation to a person twice convicted of a felony except on recommendation of the Supreme Court, 4 judges concurring.” (*Ibid.*)

This court recently issued an administrative order that “provide[s] a comprehensive explanation of our understanding of the nature of our article V, section 8 function.” (Cal. Supreme Ct., Admin. Order No. 2018-03-28, reprinted at Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation (2018) 4 Cal.5th 897.) As explained in that order, “The role of this court under article V, section 8, is not to express a substantive view on the merits of an application; the court takes no position on whether the Governor should, as an act of mercy or otherwise, extend clemency to a particular applicant. It is, rather, to perform a more traditional judicial function: to determine whether the applicant’s claim has sufficient support that an act of executive clemency, should the Governor choose to grant it, would not represent an abuse of that power.” (*Ibid.*)

In light of this clarification, we have reassessed whether clemency files that come before the court incident to the exercise of our responsibilities under article V, section 8(a) should be regarded as confidential and withheld from public inspection. As a step in the clemency process for twice-convicted felons, an application for clemency “together with all papers and documents relied upon in support of and in opposition to the application, including prison records and recommendation of the Board of Prison Terms, shall be forwarded [by the Governor] to the Clerk/Executive Officer of the Supreme Court for consideration of the justices.” (Pen. Code, § 4851.) If the court issues a positive recommendation regarding clemency, these materials are returned to the Governor; if not, they remain with the court. (*Id.*, § 4852.) Since 1999, this court’s published Internal Operating Practices and Procedures have provided that the court treats clemency files as “confidential and does not make them available to the public.” (Cal. Supreme Ct., Internal Operating Practices and Proc., XIV.A.)

We conclude that this policy of confidentiality must be revised to account for the public’s legitimate interest in understanding how the court exercises its responsibilities under article V, section 8(a). Regardless of whether the Governor may properly refuse requests for access to clemency files when they are in his possession, an issue upon which we express no view, we conclude that the records that are forwarded to the court pursuant to Penal Code section 4851 and supply the basis for a recommendation decision should be available for public inspection as follows. Upon the receipt of a motion to unseal a clemency record before the court pursuant to article V, section 8(a) and Penal Code section 4851, the Clerk and Executive Officer shall return the record for

resubmission in conformity with this order and the rules of court pertaining to filings under seal. (Cal. Rules of Court, rules 2.550(d), 8.45, 8.46.) The court will not entertain such a motion if filed after a record has been returned to the Governor pursuant to section 4852 of the Penal Code.

With regard to the contents of a clemency record that may properly be filed under seal, the court perceives no rationale for nondisclosure that would justify a rigid rule shielding from public inspection the entire contents of documents such as parole or commutation investigation reports, rap sheets, probation reports, letters received by the Governor supporting or opposing a grant of clemency, and prison records, whenever they appear within a clemency file. Whether the public may be denied access to information contained within these and other documents must instead be determined on a more specific and case-by-case basis, with the court considering factors such as:

- Whether disclosure of specific information would infringe upon the legitimate privacy expectations of the clemency applicant or others, with relevant considerations including whether the information already has been disclosed to or is available to the public, or may be revealed to the public if clemency is granted; whether the information was obtained under an express or implied promise of confidentiality; and whether the information is of a highly personal or sensitive nature;
- Whether public disclosure of the information could imperil the safety of the clemency applicant or another person;
- Whether the information appears within preliminary notes, communications, or work product that has been superseded by or is incidental to the preparation of reports or other documents appearing within the file;
- Whether public disclosure of the information realistically would inhibit the flow of information relevant to the clemency process; and
- The extent to which disclosure of the information would provide insight into the court's exercise of its responsibilities under article V, section 8(a).

Consistent with the foregoing, part XIV.A of this court's published Internal Operating Practices and Procedures is hereby amended to provide, in full, as follows:

An application for a recommendation for executive clemency comes before this court pursuant to article V, section 8, subdivision (a) of the California Constitution and Penal Code section 4851. When such applications are received by the Clerk's Office, they are given a file number, and the fact that they have been filed is a matter of public record. The papers and documents transmitted to the court by the Governor with the application often contain sensitive material. When a clemency record is before the court, a person seeking access to its contents must file a motion

to unseal the record. The extent to which the contents of the record will be made available to the public is evaluated on a case-by-case basis.

Applications are denied unless four or more justices vote to recommend that clemency be granted. The Chief Justice informs the Governor by letter of the court's recommendation, and a copy of such letter is included in the court's file and considered a matter of public record. Pursuant to the provisions of Penal Code section 4852, the Clerk transmits the record to the office of the Governor if the court's recommendation is favorable to the applicant. Otherwise, the documents remain in the files of the court. (See Pen. Code, § 4852.)