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MCLE SELF-STUDY

Summary: California Public Records Act

Government Code Section[1] 6250 Et Seq.

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OVERVIEW

Legislation enacting the California Public Records Act (hereinafter, "CPRA") was signed in 1968, culminating a 15-year-long effort to create a general records law for California. Previously, one was required to look at the law governing the specific type of record in question in order to determine its disclosability. When the CPRA was enacted, an attempt was made to remove a number of these specific laws from the books. However, preexisting privileges such as the attorney-client privilege have been incorporated by reference into the provisions of the CPRA.

The fundamental precept of the CPRA is that governmental records shall be disclosed to the public, upon request, unless there is a specific reason not to do so. Most of the reasons for withholding disclosure of a record are set forth in specific exemptions contained in the CPRA. However, some confidentiality provisions are incorporated by reference from other laws. Also, there is a general balancing test by which an agency may withhold records from disclosure, if it can establish that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

There are two recurring interests that justify most of the exemptions from disclosure. First, several CPRA exemptions are based on a recognition of the individual's right to privacy (e.g., privacy in certain personnel, medical or similar records). Second, a number of disclosure exemptions are based on the government's need to perform its assigned functions in a reasonably efficient manner (e.g., maintaining confidentiality of investigative records, official information, records in connection with pending litigation, and preliminary notes or memoranda).

If a record contains exempt information, the agency generally must segregate the exempt information and disclose the remainder of the record. If an agency improperly withholds records, a member of the public may enforce, in court, his or her right to inspect or copy the record and receive payment for court costs and attorney's fees.

II PUBLIC ACCESS v. RIGHTS OF PRIVACY

A. Right To Monitor Government

In enacting the CPRA, the Legislature stated that access to information concerning the conduct of the people's business is a fundamental and necessary right for every person in the state.[2] Cases interpreting the CPRA also have emphasized that its primary

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purpose is to give the public an opportunity to monitor the functioning of their government.[3] The public's interest in monitoring the government's action increases in importance as a public official's power increases or becomes more unfettered.[4]

B. The Right Of Privacy

Privacy is a constitutional right and a fundamental interest recognized by the CPRA.[5] Although there is no general right to privacy articulated in the CPRA, the Legislature recognized the individual right to privacy in crafting a number of its exemptions. Thus, in administering the provisions of the CPRA, agencies must sometimes balance the right of public access against the right of privacy. If personal or intimate information is extracted from a person (e.g., a government employee or appointee, or an applicant for government employment/appointment, as a precondition for the employment or appointment), a privacy interest in such information is likely to be recognized.[6] However, if information is provided voluntarily in order to acquire a benefit, a privacy right is less likely to be recognized.[7] Sometimes, the question of disclosure depends upon whether the invasion of an individual's privacy is sufficiently onerous so as to outweigh the public interest in disclosure.

III SCOPE OF COVERAGE

A. Public Record Defined

1. Identifiable Information

The public may inspect or obtain a copy of identifiable public records.[8] Writings held by state or local government are public records.[9] A writing includes any form of recorded information, including hard copy print, computer or electronic data, etc., whether invented now or in the future.[10] The essence of the CPRA is to provide access to information, not merely documents and files.[11] On the other hand, the document, not just extracted information, must be provided to the requester. In order to invoke the CPRA, the request for records must be both specific and focused. The requirement of clarity must be tempered by the reality that a requester, having no access to agency files or their scheme of organization, may be unable to precisely identify the documents sought. Thus, writings may be described by their content.[12]

To the extent reasonable, agencies are generally required to assist members of the public in making focused and effective requests for identifiable records.[13] One legislatively-approved method of providing assistance is to make available an index of the agency's records.[14] A request for records may be made orally or in writing.[15] When an oral request is received, the agency may wish to consider confirming the request in writing in order to eliminate any confusion regarding the request.

2. Computer Information

When a person seeks a record in an electronic format, the agency shall make the information available in any electronic format in which it holds the information.[16] Computer software developed by the government is exempt from disclosure.[17]

B. Agencies Covered

All state and local government agencies are covered except for the Legislature and those in the judicial branch.[18] Non-profit and for-profit entities subject to the Ralph M. Brown Act are covered as well.[19] The Legislative Open Records Act covers the Legislature. Most court records are disclosable as a matter of public rights of access to courts under the First Amendment to the United States Constitution. The Federal Freedom of Information Act covers federal government agencies.[20]

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C. Member Of The Public

The CPRA entitles natural persons and business entities as members of the public to inspect public records in the possession of government agencies.[21] Persons who have filed claims or litigation against the government, or who are investigating the possibility of so doing, generally retain their identity as members of the public.[22] Representatives of the news media have no greater rights than members of the public.[23] Government employees acting in their official capacity are not considered to be members of the public.[24] Individuals may have greater access to records about themselves than would other members of the public.[25]

D. Right To Inspect And Copy Public Records

Records may be inspected at an agency during its regular office hours.[26] The CPRA contains no provision for a charge to be imposed in connection with the mere inspection of records. Copies of records may be obtained for the direct cost of duplication, unless the Legislature has established a statutory fee.[27] The direct cost of duplication includes the pro rata expense of the duplicating equipment utilized in making a copy of a record and, conceivably, the pro rata expense of the person operating the equipment.[28] A staff person's time in researching, retrieving and mailing the record is not included in the direct cost of duplication. By contrast, when an agency must compile records or extract information from an electronic record or undertake programming to satisfy a request, the requestor must bear the cost.[29] The right to inspect and copy records does not extend to records that are exempt.

IV REQUEST FOR RECORDS AND AGENCY RESPONSE

A. Procedures

A person need not give notice in order to inspect public records at an agency's offices during normal working hours. However, if the records are not readily accessible or if portions of the records must be redacted in order to protect exempt material, the agency must be given a reasonable period of time to perform these functions.

When a copy of a record is requested, the agency shall determine within ten days whether to comply with the request, and shall promptly inform the requester of its decision and the reasons therefor.[30] Where necessary, the initial ten-day period to make a determination may be extended for up to fourteen days where either records or personnel which must be consulted are not readily available.[31] If possible, the record should be provided at the time the determination is made. If it cannot do so, the agency has a reasonable period of time to provide the copy of the record. When an agency determines that disclosable records cannot be provided immediately, it must provide an estimated date when the records will be available. The Public Records Act does not permit an agency to delay or obstruct the inspection or copying of public records.[32] Finally, when a written request is denied, the agency must place the denial in writing as well.[33]

B. Claim Of Exemption

Under specified circumstances, the CPRA affords agencies a variety of discretionary exemptions which they may utilize as a basis for withholding records from disclosure. These exemptions generally include personnel records, investigative records, drafts, and material made confidential by other state or federal statutes. In addition, a record may be withheld whenever the public interest in nondisclosure clearly outweighs the public interest in disclosure. When an agency withholds a record because it is exempt from disclosure, the agency must notify the requester of the reasons for withholding the record. However, the agency is not required to provide a list of each record withheld and the specific reason therefor.[34]

C. Segregation Of Exempt From Nonexempt Material

When a record contains exempt material, it does not necessarily mean that the entire record may be withheld from disclosure. Rather, the general rule is that the exempt material may be withheld but the remainder of the record must be disclosed.[35] The fact that it is time consuming to segregate exempt material does not obviate the requirement to do it, unless the burden is so onerous as to clearly outweigh the public interest in disclosure.[36] If the information which would remain after exempt material has been redacted would be of little or no value to the requester, the agency may refuse to disclose the record on the grounds that the segregation process is unduly burdensome.[37]

The difficulty in segregating exempt from nonexempt information is relevant in determining the amount of time which is reasonable for producing the records in question.

D. Waiver Of Exemption

Exempt material must not be disclosed to any member of the public if the material is to remain exempt from disclosure.[38] Once material has been disclosed to a member of the public, it generally is available upon request to any and all members of the public. Confidential disclosures to another governmental agency in connection with the performance of its official duties, or disclosures in a legal proceeding are not disclosures to members of the public under the CPRA and do not constitute a waiver of exempt material.[39]

V EXEMPTION FOR PERSONNEL, MEDICAL OR SIMILAR RECORDS (Cal. Gov. Code § 6254(c))

A. Records Covered

A personnel, medical or similar record generally refers to intimate or personal information which an individual is required to provide to a government agency frequently in connection with employment.[40] The fact that information is in a personnel file does not necessarily make it exempt information.[41] Information such as an individual's qualifications, training, or employment background, which are generally public in nature, ordinarily are not exempt.[42]

Information submitted by license applicants is not covered by section 6254(c) but is protected under section 6254(n) and, under special circumstances, may be withheld under the balancing test in section 6255.[43]

B. Disclosure Would Constitute An Unwarranted Invasion Of Privacy

If information is intimate or personal in nature and has not been provided to a government agency as part of an attempt to acquire a benefit, disclosure of the information probably would constitute a violation of the individual's privacy. However, the

invasion to the individual's privacy must be balanced against the public's need for the information. Only where the invasion of privacy is unwarranted as compared to the public interest in the information does the exemption permit the agency to withhold the record from disclosure. If this balancing test indicates that the privacy interest outweighs the public interest in disclosure, disclosure of the record by the government would appear to constitute an unwarranted invasion of privacy.

Courts have reached different conclusions regarding whether the investigation or audit of a public employee's performance is disclosable.[44] The gross salary and benefits of state and local employees are a matter of public record.[45]

VI EXEMPTION FOR PRELIMINARY NOTES, DRAFTS AND MEMORANDA (Cal. Gov. Code, § 6254(a))

Under this exemption, materials must be (1) notes, drafts or memoranda (2) which are not retained in the ordinary course of business (3) where the public interest in nondisclosure clearly outweighs the public interest in disclosure. This exemption has little or no effect since the deliberative process privilege was clearly established under the balancing test in section 6255 in 1991, but is mentioned here because it is in the Act.[46]

VII EXEMPTION FOR INVESTIGATIVE RECORDS AND INTELLIGENCE INFORMATION (Cal. Gov. Code, § 6254(f))

A. Investigative Records

Records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations are investigative records. In addition, records that are not inherently investigatory in nature may be covered by the exemption only where they pertain to an enforcement proceeding that has become concrete and definite.[47] Investigative and security records created for law enforcement, correctional or licensing purposes also are covered by the exemption from disclosure. The term "law enforcement" agency refers to traditional criminal law enforcement agencies.[48] Records created in connection with administrative investigations unrelated to licensing are not subject to the exemption.

Even though investigative records themselves may be withheld, section 6254(f) mandates that law enforcement agencies disclose specified information about investigative activities.[49] This framework is fundamentally different from the approach followed by other exemptions in the Public Records Act and in federal law, in which the records themselves are disclosable once confidential information has been redacted.

The exemption is permanent and does not terminate once the investigation has been completed.[50] In addition, the agency's duty to disclose information pursuant to section 6254(f) only applies if the request is made contemporaneously with the creation of the record in which the requested information is contained.[51]

Section 6254(f) requires that basic information must be disclosed by law enforcement agencies in connection with calls for assistance or arrests, unless to do so would endanger the safety of an individual or interfere with an investigation. In addition, section 6254(f) expressly permits agencies to withhold the analysis and conclusions of investigative personnel. Thus, specified facts may be disclosable pursuant to the statutory directive, but the analysis and recommendations of investigative personnel concerning such facts are exempt.

With respect to public disclosures concerning calls for assistance and the identification of arrestees, the law restricts disclosure of address information to specified persons.[52]

B. Intelligence Information

Records of intelligence information collected by the Attorney General and state and local police agencies are exempt from disclosure. Intelligence information is related to criminal activity but is not focused on a concrete prospect of enforcement.

VIII EXEMPTIONS FOR LITIGATION AND ATTORNEY RECORDS (Cal. Gov. Code § 6254 (b), (k))

A. Pending Claims And Litigation

Section 6254(b) permits documents specifically prepared in connection with filed litigation to be withheld from disclosure.[53] The exemption has been interpreted to apply only to documents created after the commencement of the litigation.[54] For example, it does not apply to the claim that initiates the administrative or court process. Once litigation is resolved, this exemption no longer protects records from disclosure, although other exemptions (e.g., attorney-client privilege) may be ongoing.[55] Other records pertaining to the litigation may be disclosable. This is the case even if the request is from a prospective or actual party seeking to acquire information related to prospective or current litigation.[56] Generally, such a request can only be barred where an independent statutory prohibition or collateral estoppel applies. If the agency believes that providing the record would violate a discovery order, it should bring the matter to the attention of the court that issued the order.[57]

In discovery during civil litigation unrelated to the Public Records Act, Evidence Code section 1040 determines whether records are privileged from disclosure, not the Act's exemptions.[58]

B. Attorney-Client Privilege

The attorney-client privilege covers confidential communications between an attorney and his or her client. The privilege applies to litigation and nonlitigation situations.[59] The privilege appears in section 954 of the Evidence Code and is incorporated into the CPRA through section 6254(k). The privilege lasts forever unless waived. However, the privilege is not waived when a confidential communication is provided to an opposing party where to do so is reasonably necessary to assist the parties in finalizing their negotiations.[60]

C. Attorney Work Product

The attorney work product rule covers research, analysis, impressions and conclusions of an attorney. This confidentiality rule appears in section 2018 of the Code of Civil Procedure and is incorporated into the CPRA through section 6254(k). Records subject to the rule are confidential forever. The rule applies in litigation and nonlitigation circumstances alike.[61]

IX OTHER EXEMPTIONS

A. Official Information

Information gathered by a government agency under assurances of confidentiality may be withheld if it is in the public interest to do so. The official information privilege appears in Evidence Code section 1040 and is incorporated into the CPRA through section 6254(k). The analysis and balancing of competing interests in withholding versus disclosure is the same under Evidence Code section 1040 as it is under section 6255.[62] When an agency is in litigation, it may not resist discovery by asserting exemptions under the CPRA; rather, it must utilize the official information privilege.[63]

B. Trade Secrets

Agencies may withhold confidential trade secret information pursuant to Evidence Code section 1060 which is incorporated into the CPRA through section 6254(k). However, with respect to state contracts, bids and their resulting contracts generally are disclosable after bids have been opened or the contracts awarded.[64] Although the agency has the obligation to initially determine when records are exempt as trade secrets, a person or entity disclosing trade secret information to an agency may be required to assist in the identification of the information to be protected and may be required to litigate any claim of trade secret which exceeds that which the agency has asserted.

C. Other Express Exemptions

Other express exemptions include records relating to: securities and financial institutions;[65] utility, market and crop reports;[66] testing information;[67] appraisals and feasibility reports;[68] gubernatorial correspondence;[69] legislative counsel records;[70] personal financial data used to establish a license applicant's personal qualifications;[71] home addresses;[72] and election petitions.[73]

The exemptions for testing information and personal financial data are of particular interest to licensing boards which must determine the competence and character of applicants in order to protect the public welfare.

X THE PUBLIC INTEREST EXEMPTION (Cal. Gov. Code § 6255)

A. The Deliberative Process Privilege

The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to receive recommendatory information from and engage in general discussions with their advisors without the fear of publicity. As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made.[74] Records which reflect a final decision and the reasoning which supports that decision are not covered by the deliberative process privilege. If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed. Under section 6255, a balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.[75]

B. Other Applications Of The Public Interest Exemption

In order to withhold a record under section 6255, an agency must demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. A particular agency's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the agency's that is weighed. This "public interest balancing test" has been the subject of several court decisions.

In a case involving the licensing of concealed weapons, the permits and applications were found to be disclosable in order for the public to properly monitor the government's administration of concealed weapons permits.[76] The court carved out a narrow exemption where disclosure would render an individual vulnerable to attack at a specific time and place. The court also permitted withholding of psychiatric information on privacy grounds.

In another case, a city sought to maintain the confidentiality of names and addresses of water users who violated the city's water rationing program. The court concluded that the public's interest in disclosure outweighed the public's interest in nondisclosure since disclosure would assist in enforcing the water rationing program.[77] The court rejected arguments that the water users' interests in privacy and maintaining freedom from intimidation justified nondisclosure.

The names, addresses, and telephone numbers of persons who have filed noise complaints concerning the operation of a city airport are protected from disclosure where under the particular facts involved, the court found that there were less burdensome alternatives available to serve the public interest.[78]

In a case involving a request for the names of persons who, as a result of gifts to a public university, had obtained licenses for the use of seats at an athletic arena, and the terms of those licenses, the court found that the university failed to establish its claim of confidentiality by a "clear overbalance." The court found the university's claims that disclosure would chill donations to be unsubstantiated. It further found a substantial public interest in such disclosure to permit public monitoring and avoid favoritism or discrimination in the operation of the arena.[79]

XI LITIGATION UNDER THE ACT

A requester, but not a public agency, may bring an action seeking mandamus, injunctive relief or declaratory relief under sections 6258 or 6259.[80] To assist the court in making a decision, the documents in question may be inspected at an in-camera hearing (i.e. a private hearing with a judge). An in-camera hearing is held at the court's discretion, and the parties have no right to such a hearing. Prevailing plaintiffs shall be awarded court costs and attorney's fees. A plaintiff need not obtain all of the requested records in order to be the prevailing party in litigation.[81] A plaintiff is also considered the prevailing party if the lawsuit ultimately motivated the agency to provide the requested records.[82] Prevailing defendants may be awarded court costs and attorney fees only if the requestor's claim is clearly frivolous. There is no right of appeal, but the losing party may bring a petition for extraordinary relief to the court of appeal.

Endnotes

1. All section references are to the California Government Code unless otherwise indicated.
2 California Government Code section 6250.
3 U.S. Dept. of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989); CBS, Inc. v. Block, 42 Cal.3d 646 (1986); Times Mirror Co. v. Superior Court, 53 Cal.3d 1325 (1991).
4 CBS, Inc. v. Block, 42 Cal.3d 646 (1986), involving public's right to monitor Sheriff's unfettered power to award concealed weapons permits; New York Times Co. v. Superior Court, 52 Cal.App.4th 97 (1997), involving public's rights to acquire names of officers using deadly force.
5 Article 1, section 1 of the California Constitution; California Government Code sections 6254(c), 6254(k), and 6255; New York Times Co. v. Superior Court, 218 Cal.App.3d 1579 (1990).
6 San Gabriel Tribune v. Superior Court, 143 Cal.App.3d 762, 777 (1983); Braun v. City of Taft, 154 Cal.App.3d 332 (1984), but see Braun v. City of Taft, 154 Cal.App.3d at 344, where disclosure of personal information was not found to constitute invasion of privacy; Wilson v. Superior Court, 51 Cal.App.4th 1136 (1996); California First Amendment Coalition v. Superior Court, 67 Cal.App.4th 159 (1998).
7 San Gabriel Tribune v. Superior Court, 143 Cal.App.3d 762, 781 (1983), where contractor sought to modify existing contract; Register Div. Freedom Newspapers, Inc. v. County of Orange, 158 Cal.App.3d 893, 902 (1984), where litigant submitted medical information to induce settlement of law suit; CBS, Inc. v. Block, 42 Cal.3d 646 (1986), where information provided to government in order to obtain concealed weapon permit.
8 California Government Code section 6253.
9 California Government Code section 6252(e).
10 California Government Code section 6252(f); 71 Ops.Cal.Atty.Gen. 235, 236 (1988).
11 San Gabriel Tribune v. Superior Court, 143 Cal.App.3d 762, 774 (1983); Cook v. Craig, 55 Cal.App.3d 773, 782 (1976).
12 Rogers v. Superior Court, 19 Cal.App.4th 469 (1993); California First Amendment Coalition v. Superior Court,67 Cal.App.4th 159 (1998).
13 California Government Code section 6253.1.
14 California Government Code section 6253.1(d)(3).
15 Los Angeles Times v. Alameda Corridor Transp. Auth., 88 Cal.App.4th 1381, 1392 (2001).
16 California Government Code section 6253.9.
17 California Government Code section 6254.9.
18 California Government Code section 6252(a) and (b); Michael J. Mack v. State Bar of California, 92 Cal.App.4th 957, 962 (2001), CPRA inapplicable to State Bar.
19 California Government Code section 6252(b) as amended by AB 2937, Stats. 2002, Ch. 1073. A nongovernmental auxiliary association is not a state agency. California State University, Fresno Assn., Inc. v. Superior Court (2001) 90 Cal.App.4th 810, 829.
20 5 U.S.C. 552.
21 California Government Code sections 6252(c), (e) and 6253; Connell v. Superior Court, 56 Cal.App.4th 601 (1997).
22 Wilder v. Superior Court, 66 Cal.App.4th 77 (1998); Fairley v. Superior Court, 66 Cal.App.4th 1414 (1998).
23 San Gabriel Tribune v. Superior Court, 143 Cal.App.3d 762, 774 (1983).
24 California Government Code section 6252(g).
25 California Civil Code section 1798 (Information Practices Act), which applies to persons referenced in state government records.
26 California Government Code section 6253(a).
27 California Government Code section 6253(b).
28 North County Parents Organization v. Department of Education,23 Cal.App.4th 144, 148 (1994) ; Informal opinion from Attorney General to Senator Gary K. Hart, dated April 11, 1991.
29 California Government Code section 6253.9(b)(2).
30 California Government Code section 6253(c).
31 California Government Code section 6253(c).
32 California Government Code section 6253(c).
33 California Government Code section 6255(b).
34 Haynie v. Superior Court, 26 Cal.4th 1061, 1074-1075 (2001).
35 California Government Code section 6253(a); American Civil Liberties Union Foundation v. Deukmejian, 32 Cal.3d 440, 447 (1982); State Bd. of Equalization v. Superior Court, 10 Cal.App.4th 1177, 1187 (1992); Connell v. Superior Court,56 Cal.App.4th 601 (1997).
36 State Bd. of Equalization v. Superior Court, 10 Cal.App.4th 1177, 1190 (1992), n. 14.
37 American Civil Liberties Union Foundation v. Deukmejian,32 Cal.3d 440, 447 (1982).
38 California Government Code section 6254.5; Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974).
39 California Government Code section 6254.5(b) and (e).
40 Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal.App.3d, 893 (1984); San Gabriel Tribune v. Superior Court, 143 Cal.App.3d 762 (1983).
41 New York Times Co. v. Superior Court, 52 Cal.App.4th 97, 103 (1997).
42 Eskaton Monterey Hospital v. Myers,134 Cal.App.3d 788 (1982).
43 CBS, Inc. v. Block, 42 Cal.3d 646 (1986), applied the balancing test to protect certain privacy information in concealed weapons permits from disclosure. Protection for the particular information exempted by the Court in that decision was later codified in section 6254 subdivision (u).
44 AFSCME v. Regents of University of California, 80 Cal.App.3d 913 (1978), performance audit was disclosable unless charges were found to be groundless; Payton v. City of Santa Clara, 132 Cal.App.3d 152 (1982), disciplinary records were not disclosable unless the state could demonstrate a compelling interest in disclosure.
45 California Government Code section 6254.8; 68 Ops.Cal.Atty.Gen.73 (1985).
46 Times Mirror Co. v. Superior Court, 53 Cal.3d 1325 (1991).
47 Haynie v. Superior Court,26 Cal.4th 1061, 1068-1072 (2001).

48 State of California ex rel. Division of Industrial Safety v. Superior Court, 43 Cal.App.3d 778 (1974).
49 Dick Williams v. Superior Court, 5 Cal.4th 337, 348-354 (1993).
50 Dick Williams v. Superior Court, 5 Cal.4th 337, 354-362 (1993).
51 County of Los Angeles v. Superior Court (Kusar),18 Cal.App.4th 588 (1993).
52 Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999).
53 City of Hemet v. Superior Court (Press-Enterprise), 37 Cal.App.4th 1411 (1995); Fairley v. Superior Court, 66 Cal.App.4th 1414 (1998).
54 71 Ops.Cal.Atty.Gen. 235 (1988); Fairley v. Superior Court, 66 Cal.App.4th 1414 (1998).
55 City of Los Angeles v. Superior Court (Axelrad), 41 Cal.App.4th 1083 (1996) .
56 County of Los Angeles v. Superior Court (Axelrad II), 82 Cal.App.4th 819, 826 (2000); Wilder v. Superior Court, 66 Cal.App.4th 77 (1998); Fairley v. Superior Court, 66 Cal.App.4th 1414 (1998); City of Hemet v. Superior Court (Press-Enterprise), 37 Cal.App.4th 1411, 1420-1421 (1995), n. 11; but see dicta in Roberts v. City of Palmdale, 5 Cal.4th 363, 372 (1993).
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63 Michael P. v. Superior Court, 92 Cal.App.4th 1036, 1042 (2001); Marylander v. Superior Court, 81 Cal.App.4th 1119, 1125 (2000).
64 California Public Contract Code sections 10305 and 10342.
65 California Government Code section 6254(d).
66 California Government Code section 6254(e).
67 California Government Code section 6254(g).
68 California Government Code section 6254(h).
69 California Government Code section 6254(l); California First Amendment Coalition v. Superior Court, 67 Cal.App.4th 159 (1998); Times Mirror Co. v. Superior Court, 53 Cal.3d 1325 (1991).
70 California Government Code section 6254(m).
71 California Government Code section 6254(n).
72 State employees, California Government Code section 6254.3; Registered voters, California Government Code section 6254.4; Persons appearing in records of DMV, California Government Code section 6254.1(b).
73 California Government Code section 6253.5.
74 Times Mirror and First Amendment Coalition established this general principle but, in light of special circumstances, an agency may withhold information that is essentially factual in nature.
75 The California Supreme Court's decision in Times Mirror Co. v. Superior Court, 53 Cal.3d 1325 i (1991) s the source of the above information concerning deliberative process privilege. See also Rogers v. Superior Court, 19 Cal.App.4th 469 (1993).
76 CBS, Inc. v. Block, 42 Cal.3d 646 (1986).
77 New York Times Co. v. Superior Court, 218 Cal.App.3d 1579 (1990).
78 City of San Jose v. Superior Court, 74 Cal.App.4th 1008 (1999); but see California Government Code section 6254.16 adopted subsequently.
79 California State University, Fresno Assn., Inc. v. Superior Court, 90 Cal.App.4th 810, 834-835.(2001)
80 Filarsky v. Superior Court, 28 Cal.4th 419, 423 (2002).
81 Los Angeles Times v. Alameda Corridor Transp. Auth., 88 Cal.App.4th 1381, 1391-1392 (2001).
82 Roberts v. City of Palmdale, 19 Cal.App.4th 469, 482 (1993); Belth v. Garamendi, 232 Cal.App.3d 896, 898 (1991).

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* This article was prepared by a coalition of public and media law attorneys. The contributors include Ted Prim, Deputy Attorney General, Attorney General's Office, Neil Gould, Senior Staff Counsel, Department of Water Resources, Tom Newton, General Counsel, California Newspaper Association, and Charity Kenyon, Riegels, Campos & Kenyon, L.L.P.

MCLE SELF-ASSESSMENT TEST

1. In administering the Public Records Act, public agencies often must balance the right of public access and the right to privacy.

   ❑ True ❑ False

2. The term "writing" is limited to paper records and does not include videotapes.

   ❑ True ❑ False

3. When a request is denied because it is not specific and focused, the agency must attempt to assist the requestor to formulate an effective request.

   ❑ True ❑ False

4. An agency has the discretion to disclose electronic records in any form in which they are held by the agency.

   ❑ True ❑ False

5. Public agencies may recover the costs of duplicating records, but may not recover the costs of searching for them.

   ❑ True ❑ False

6. The requestor may be required to bear the cost of providing an electronic record if data compilation, extraction or programming is required to produce the record.

   ❑ True ❑ False

7. When a record cannot be provided immediately, the agency must provide an estimate of the time when the record will be available.

   ❑ True ❑ False

8. When an agency determines that records are exempt from disclosure, it need not provide reasons for withholding the records so long as it cites to statutory authority.

   ❑ True ❑ False

9. The exemptions contained within the Act are mandatory; an agency has no discretion to withhold records that fit within an exemption.

   ❑ True ❑ False

10. As a general rule, when a record contains both exempt and nonexempt information, the agency may withhold the exempt material but must disclose the remainder of the record.

    ❑ True ❑ False

11. An agency may disclose an otherwise exempt record pursuant to a subpoena without waiving the exemption as to the public.

    ❑ True ❑ False

12. Personnel records may be withheld if their disclosure would violate an individual's right to privacy.

    ❑ True ❑ False

13. If a record was created for purposes of an administrative investigation, it may be withheld from disclosure as an investigative record under section 6254, subdivision (f).

    ❑ True ❑ False

14. An agency may deny a request for records made by a person who has filed a civil action for damages against the agency, requiring them instead to use the civil discovery process.

    ❑ True ❑ False

15. When a government agency is involved in general civil litigation, it may assert the exemptions contained in the Public Records Act to prevent disclosure of records in discovery.

    ❑ True ❑ False

16. During contract negotiations, the city attorney sends a memo to the contractor's attorney to help resolve several issues that have been raised during the negotiations. The memo is outside of the scope of the attorney client privilege and must be disclosed.

    ❑ True ❑ False

17. The "deliberative process" privilege under section 6255 applies equally to recommendations and the facts underlying them.

    ❑ True ❑ False

18. In an action filed by a requester, the court is required to conduct an in camera inspection of the contested records.

    ❑ True ❑ False

19. In an action filed by a requester, both parties are entitled to an award of attorney fees if they prevail.

    ❑ True ❑ False

20. A public agency may file suit to obtain declaratory relief as to whether records must be disclosed.

    ❑ True ❑ False

FALSE CLAIM LITIGATION

*By David B. Casselman, Esq., John R. Herrig, Esq., & David Polinsky, Esq.**

The recent case of Tutor-Saliba-Perini, J.V. v. Los Angeles County Metropolitan Transportation Authority, Case no. BC123559, tried to a jury in Los Angeles Superior Court, has raised the level of awareness of the construction bar as well as Public Transportation Agencies throughout the country. The jury awarded the MTA $32.0 million on an MTA cross-complaint, which alleged breach of contract, false claims violations, licensing and listing violations, unfair business practices and prejudgment interest under the relevant California statutes.

The initial TSP complaint for construction claims on four subway projects sought $20.0 million, including interest. The projects consisted of the tunnels and subway stations on the MTA Redline, including the Wilshire/Normandie Station (Contract B221), Wilshire/Vermont Station (Contract B211), Wilshire/Western Station (Contract B231) and the 7th and Flower Station (Contract A167). $13.0 million of these claims were dismissed via motions for summary adjudication prior to trial. The balance were resolved against TSP during the trial.

The court also directed a verdict finding that TSP had violated the False Claim and Unfair Competition Statutes as well as Subletting, Listing, Licensing Statutes and various breaches of contract. The jury heard 12 weeks of evidence, including evidence on damages. Their award included actual damages, penalties, treble damages and disgorgement of profits. Issues regarding MTA costs and attorneys' fees are now pending before the court.

From apparent garden variety, close-out claims, on four adjacent Subway projects totaling over $236,000,000.00, some have called the jury verdict a complete shock and an unforseen reversal of traditional outcomes in public works disputes. TSP was found liable for over 1000 violations of California Government Code Section 12650 et seq., the False Claim Act , as well as a like number of Unfair Business Practices under Business & Professions Code Section 17200 et seq.

The nature of the False Claim Act violations should be carefully evaluated by the construction bar regardless of jurisdiction or representation.

1. Front Loading

In violation of contract bid and balanced schedule of values requirements, TSP billed excessive costs not yet incurred , i.e. "front-loading." The MTA was awarded loss of use of capital damages (interest at the Government rate) following pre-payment of progress billings under the front loaded schedule of values. On the grounds that TSP misrepresented that the front loaded items were its "actual costs," these damages were trebled under the provisions of the California False Claim Act, California Government Code section 12651(a). Pre-judgment interest was awarded thereafter from project completion to judgment.

In submitting its monthly progress pay applications, TSP certified that it had complied with all contract provisions and all applicable laws of the state of California. The MTA argued that such certifications were knowingly false since its "actual costs" were admittedly much lower than as billed. Accordingly, each progress bill containing a front loaded item was determined to be a "False Claim" under section 12651(a)(1) subject to a separate penalty of up to $10,000.00. The schedule of values submittals that were front loaded were found to be false documents under sectin 12651(a)(2) Further, each violation was also found to be an example of unfair competition under California's Unfair Business Practices Act, California Business and Professions Code section 17200 et seq.

2. Subcontractor Listing and Substitution Violations.

TSP was also found to have violated the California Sublisting and Subletting Fair Practices Act under California Public Contracts Code section 4110. It improperly failed to list or improperly listed subcontractors in the bid disclosures requiring a listing of all subcontractors performing more than _ of 1% of the contract work. Later substitutions of alternate subcontractors without notice and approval, were also found to be violative of the Act. A penalty of 10% of the violative subcontract amounts were assessed in accordance with the statute. Under the same theories, the false monthly certifications of full contract compliance in the TSP progress billings included the improperly listed and/or substituted subcontractors. Each was found to be a false claim under the False Claim Act with a corresponding penalty of $10,000 per billing. The improper listings on the bid form also constituted false documents resulting in an additional penalty of up to $10,000. Lastly, each violative document was as example of unfair competition resulting in an additional penalty of $2,500.00 per violation.

3. Subcontractor Licensing Violations.

Certain subcontractors were; i) unlicensed for some portion during the period of performance; ii) licensed outside of the work actually performed; or iii) never licensed. These violations of the California licensing requirements were concealed by false certifications on the payment requests, rendering each progress billing for their services a false claim under the act. The sworn certifications of license compliance were each found to be false documents and each false claim and documents was found to be unfair competition as well.

4. Disadvantaged Business Enterprise (DBE) Violations

TSP was found to have knowingly

employed fronts and false disadvantaged business enterprises (DBE's) in prosecuting the work. Each monthly statement of full DBE compliance in the progress payment requests was found to be a false claim as well as a false document, giving rise to false claim and false document penalties. Unfair business practice penalties were also assessed.

5. Quality Assurance/Quality Control Misrepresentations

TSP representations of an established and competent quality control program, including periodic certification of compliance, was also found to be false. The actual services provided were shown to be totally inadequate and substantially less than promised and required. Each progress bill certifying contract compliance in the face of total disregard for quality control was found to be a false claim. False document and unfair business practice penalties were also assessed.

6. Buy America Violations

TSP violations of Buy America Requirements were also found to be false claims due to the false certifications in each progress bill assuring the MTA that the contractor was in compliance with the contract and the law. In fact, known, off-shore goods were delivered and installed in the project. False document and unfair competition penalties were found as a result.

7. Specific False TSP Construction Claims

TSP presented numerous claims during the course of the project. Although many were ultimately denied by the MTA, nine of the claims which were included by TSP in its lawsuit against the MTA were found to be false.1 Examples of the claims found to be false include:

A. The TSP Pile Interference Claim.

TSP argued, without merit, that it had encountered differing site conditions when pre-existing sub-surface telephone ducting interfered with its soldier pile placement locations. The plans clearly showed the ducts , but TSP claimed it was an unknown sub-surface condition not contemplated at time of bid. Pre-bid documents and the initial excavation support system design belied the TSP claim. These documents were concealed when the claim was made. After the claim was denied, TSP waited three years to resurrect the claim, stating that it had been approved by the MTA, not denied. During trial, the claim was found to be false, supported by false documents and constituted an unfair business practice.

B. The Subcontractor Pile Interference Claims.

In addition to its own claim, TSP sought separate and distinct payments on behalf of its five subcontractors. Each related to interference with the placement of soldier piles, allegedly caused by the underground telephone utility ducts. As with the TSP claims, the MTA refused to pay these claims. However, TSP submitted costing documentation in support of these subcontractor claims, in an effort to bolster its allegations. Review of the documentation revealed that the data either duplicated payments made under previous change orders, or pertained to base contract work unrelated, either in scope, geography or chronology, to the work described in the pile interference claim. As with the TSP claim for this issue, the related claims of the TSP subcontractors were also found to be false claims with similar penalties awarded to the MTA.

C. The Bridging Beam Claim.

TSP and its rebar installer defectively constructed the bridging beams, a concrete buffer slab between the rail tunnel and station slab, contrary to the contract drawings. The MTA directed TSP to perform the necessary corrective work. Four and a half months after completing the repairs, TSP claimed, for the first time, that the MTA contract drawings were in error. TSP then sought extra payment for the cost of the repairs to meet the design it claimed it did not recognize would be required in the original plans. Not only did TSP falsely claim that the work necessary to correct the problem should be paid for by the MTA, it fabricated documentation tallying those costs, which inflated the actual costs by over 500%. False claim, false document and unfair business practice penalties were assessed against TSP.

D. TSP Night Restriction Station Box Inefficiency Claim.

Under the B221 Contract, TSP was allowed to perform specific activities at night (deck placement and deck removal) and any other work, subject to specific noise limitations set forth in the contract. TSP was repeatedly cited for failure to stay within the required noise limitations. Ultimately, the Los Angeles Noise Police indicated that the TSP night time work activities would be suspended. Although this suspension resulted from its own excessive noise, TSP responded by submitting a series of multi-million dollar claims against the MTA, including one for inefficiency. The claims asserted that the MTA owed TSP damages because it could no longer work at night as planned due to the night work suspension. The TSP claim was based upon the key representation that at the time of bid TSP and its subcontractors planned to perform various, specific items of work at night. Due to the night work suspension, it claimed that it suffered damage because it was forced to complete those items of work during the day. However, review of withheld TSP bid documents confirmed that TSP had not, at the time of bid, planned to work at night. This claim was found to violate both the false claim and unfair business practice statutes. TSP generated over one hundred false statements and/or documents to get these claims paid.

E. TSP Night Restriction Station Box Delay Claim.

This claim was submitted together with the TSP Night Restriction Box Structure Inefficiency Claim. Specifically, TSP alleged that the night restrictions also delayed its ability to construct the box structure, by 112 days. This claim involved a separate demand for millions of dollars. When the MTA rejected the claim, TSP sued the MTA. In its attempts to convince the MTA to pay this claim, TSP incorporated all of the false claims it had made to support its box structure inefficiency claims. Similar false claim and unfair business practice findings were made as to this claim.

F. Subcontractor Night Restriction Station Box Claims.

In addition to the TSP Box Structure Inefficiency and Delay claims, TSP also presented 10 separate and distinct claims on behalf of several subcontractors. These claims also alleged inefficiency and delay costs due to the night work suspension. TSP again falsely alleged that its subcontractors had the same pre-bid intent to work at night. The records and testimony of both TSP and its subcontractors belied these assertions. As

with the TSP claims for inefficiency and delay, these subcontractor claims were also deemed to be false.

G. STATION COMPLETION DELAY CLAIM.

TSP demanded extra money for "Station Completion Delays" on Contract B221. These delays were identified and paid via bilateral Change Order during the project in the amount of $1,882.49. Nonetheless, TSP filed suit seeking "not less than $4,751" for the same alleged delays. Thereafter, during the litigation, the same alleged delays were claimed to have caused $316,000 in damages. The Court summarily adjudicated the "Station Completion Delay," finding that the claim had been settled by the parties during construction. However, despite this order which eliminated the claim in its entirety, TSP shifted the $316,000 in delay damages to a separate delay claim, thereby seeking to resuscitate the dismissed false claim. False claim and false document penalties were awarded.

H. WILSHIRE STREET RESTORATION DELAY CLAIM.

The contracts between the MTA and TSP required TSP to repair, restore and beautify Wilshire Boulevard after each underground station was substantially completed. TSP was directed to suspend its upcoming street restoration duties for a five month period. TSP then claimed 144 days of delay to the project. However, it relied on a construction schedule update which departed significantly from the schedule which existed for two years preceding the Wilshire Restoration suspension. TSP originally represented a particular would be used to sequence the Wilshire Street Restoration activities. That method planned various restoration activities concurrently and would not have caused delay to the project. After the suspension occurred, TSP resequenced the activities so that they would be performed sequentially. This change placed the curb, gutter, sidewalk section and street paving seam on the critical path, creating tail to head relationships. This had the effect of negating the float, pushing non critical activities onto the critical path, thereby artificially converting the MTA caused suspension into a delaying activity. This manipulation of the schedule to create a delay when none previously existed, was found to be a violation of the False Claims Act. Again, false claim, false document and unfair business practice penalties were assessed.

I. UNRESOLVED PROJECT COMPLETION DELAY.

This claim was set forth in the TSP Second Amended Complaint as follows: "Unresolved Project Completion Delays, as reflected in [Change Notice] 400 and [Change Notice] 386 in the amount of not less than approximately $800,000. . ." TSP advanced this claim for over three years without providing any information as to its basis. Nowhere in project correspondence nor in its complaint did TSP identify i) what facts or events gave rise to this claim; ii) what delay period or time frames were associated with the delay claim events; or iii) how the $800,000 claim amount was tallied. Further, the identified change notices had been resolved via other settlements and bilateral change orders. Finally, after considerable time had been spent trying to analyze this unsubstantiated claim, TSP finally admitted that the claim never existed. As a result, penalties were awarded to the MTA

8. Executed Change Orders

TSP presented numerous claims during the course of the project, many of which were converted into change orders. TSP then received payments. During investigation for the litigation, material was unearthed which confirmed that several such change orders had been falsely presented. Examples of the change orders found to be false included:

A. THE TUNNEL HANDRAIL CHANGE ORDER.

TSP submitted a sponsored claim of a DBE miscellaneous metal subcontractor for handrails. The rails were required by the MTA, to be supplied and installed along the walkway in the tunnel on the B221 project. During a Disputes Review Board (DRB) proceeding, TSP produced a pre-bid estimate recap sheet "proving" that neither TSP nor its subcontractor had recognized the need for these handrails when bidding the project. The DRB found entitlement to compensation for the claim. The MTA, relying on the DRB finding of entitlement, issued a change order to TSP for the tunnel handrail in the amount of $111,651.00. In trial, the DBE subcontractor admitted that i) he had lied to the DRB; ii) he had recognized and bid the handrail; but iii) he had been instructed by TSP to delete them from his bid. The MTA also demonstrated that the recap sheet submitted to the DRB by TSP was a false document. The actual TSP pre-bid recap sheet, finally produced after protracted discovery disputes, disclosed an accurate take-off and estimate by TSP and all bidding subcontractors. All included the disputed handrail. The MTA was awarded treble damages for the paid change order, false claim penalties for the claim, false document penalties, unfair business practice penalties and pre-judgement interest.

B. THE ESCALATOR CLADDING CHANGE ORDER.

TSP demanded extra money for installation of stainless steel escalator cladding on certain escalators in the B221 station. This payment was based upon a joint demand from TSP and its escalator cladding installation subcontractor. TSP claimed that neither it nor its subcontractor realized from the MTA plans that escalator cladding was required on certain escalators. After dispute over this issue, the MTA accepted these representations and agreed to pay more to add this stainless steel cladding. However, both entities knew from the time they bid on the B221 contract, that this escalator cladding had been properly included in the scope of their work. As with the Tunnel Handrail issue, review of TSP and subcontractor pre-bid takeoffs confirmed that these materials had been included in their respective bids. Again, false claim and unfair business practice laws had been violated.

C. STAIR NOSING CHANGE ORDER

TSP submitted a change order request, ultimately granted, for stair nosings TSP alleged were not included in its subcontractor's bid due to ambiguous plans. Actual pre-bid estimate documents belied the assertion, proving that the change was based upon false representations. As with the Tunnel Handrail and Escalator cladding change orders, treble damages, penalties and prejudgment interest was awarded.

D. NIGHT RESTRICTION SLAB ON GRADE ACCELERATION CHANGE ORDER.

Separate and apart from the Box Structure claims previously discussed, TSP submitted a change request for acceleration costs to mitigate the damage it envisioned would occur to its slab on grade concrete placement efforts, due to the MTA imposition of changed noise restrictions. TSP argued that the MTA prevented them from following their

"bid day" plan to work extensively at night. An $89,000 change order was then issued for acceleration costs. However, upon production of their pre-bid estimates during litigation, it was revealed that TSP did not plan to work at night as claimed. The MTA was thus awarded treble damages for the amount paid, false claim penalties and pre-judgement interest.

D. TSP Night Restriction Side Structure Change Order.

The various side structures to the main station box, specifically emergency exits, under platform exhaust vents, entrance and utility structures, were allegedly impacted by the night time work restriction change. A $2.5 million acceleration change was negotiated and issued (unilaterally for the majority of the claim, but reserving claim preparation costs and concrete finishing subcontractor costs). This change was found to be based upon the same false representations made by TSP with respect to its slab on grade and box structure claims. Again, treble damages, penalties and prejudgment interest was awarded to the MTA.

E. Subcontractor Night Restriction Side Structure Change Order.

The concrete finishing subcontractor received a change for his portion of the side structure change. This change was also found to be based upon the same false representations discussed above. TSP knowingly passed the false claim through to the MTA. The court and the jury treated it the same as all the others.

All of the contracts required TSP to swear under penalty of perjury that all contract provisions had been satisfied as a condition of each payment. Hence, all of the statutory violations were in breach of the contract promise to comply with all governing statutes and laws. These contract breaches also triggered the surety bonds and associated legal fee provisions.

All of these issues were vigorously contested. The legal arguments of the parties will be fully briefed in the pending appeal.

Endnotes

1 Other TSP claims included in the lawsuit were dismissed via motion for partial summary adjudication, but were not claimed by the MTA, and thus not found by the Court to be false.

* David B. Casselman, Esq., and David Polinsky, Esq., of Wasserman Comden & Casselman, practice public law. John R. Herrig, Esq., of Herrig Vogt & Stoll, also practices public law.

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The Public Law Section is looking for a few good lawyers to serve on its governing board, the Executive Committee. Interested applicants should have experience in the area of public law, and a proven track record of commitment to volunteer service. The Committee includes representatives from the public sector and private sector in all levels of government practice.

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Herschel Elkins, Pioneer of Consumer Protection Law, Awarded Public Lawyer Of The Year By State Bar

By Phyllis W. Cheng, Esq., Special Events Committee Chair

Herschel T. Elkins
2002 Public Lawyer of the Year

Herschel Elkins, Senior Assistant Attorney General, Consumer Law Section of the California Attorney General's Office, was awarded 2002 Public Lawyer of the Year by the State Bar of California. The most senior attorney and the longest serving employee in the Attorney General's Office, Mr. Elkins has devoted nearly his entire 45-year career to public service and the betterment of consumer protection in California. A driving force in protecting consumer rights and a mentor to attorneys statewide, he has headed the Consumer Law Section since 1965, after former Attorney General Stanley Mosk first launched the unit.

Through litigation, legislation and education, Mr. Elkins has made legendary strides in protecting the rights of consumers statewide and in pushing California to the forefront in consumer protection nationally. He is the leader on consumer protection laws in credit, housing, retail sales, telecommunications, automobile sales, leasing and repairs, dance studio and health studio contracts, door-to-door sales, seller assisted marketing plans, and endless chain schemes. His name appears in over 120 appellate cases regarding consumer protection. Mr. Elkins' consumer law and civil injunction manual, now in its 17th edition, provides guidance for law enforcement attorneys nationally.

Admired by all who have worked with him, Mr. Elkins' staff describes him to be "the father, if not the grandfather, of consumer protection in California." Attorney General Bill Lockyer attests that "without Herschel Elkins, California consumer law would not be recognized as the gold standard among states as it is today." Former Attorney General John Van de Kamp recalls that Mr. Elkins developed a team which is "a leader of consumer protection not just in California but throughout the country, working on multi-state investigative teams." Former Attorney General George Deukmejian adds that "Herschel Elkins has had an extraordinary career in serving the public with dedication, integrity and a high degree of professionalism."

Chief Justice Ronald George presented the Public Lawyer of the Year Award to Mr. Elkins at this year's State Bar Annual Meeting on October 11 in Monterey. In his acceptance speech, Mr. Elkins stated with enthusiasm that for the last forty-five years, he has looked forward everyday to going to work to press for the rights of California consumers.

The Public Lawyer of the Year Award is given annually by the State Bar of California, Public Law Section, at its Annual Meeting. The award is given to a public law practitioner who deserves special recognition because of outstanding public service.

Remarks by

Chief Justice Ronald M. George at the 2002 Public Lawyer of the Year Reception

Annual Meeting of the State Bar, Monterey, California, October 11, 2002

Good evening. I am pleased to participate in these ceremonies conferring the public lawyer award on Herschel T. Elkins. As a public lawyer for my entire career,Iconsistently have derived great satisfaction from providing public service, and I am honored to take part in this occasion recognizing the contributions of an exemplary public servant.

While I have served more than 30 years on the bench, my first job out of law school found me working for the attorney general of california in los angeles as a trial and appellate lawyer in the criminal division. It was there that I had the pleasure of meeting today's honoree. I did not have an opportunity to directly practice with him because he had moved on to head the new consumer law section, but his intelligence, skill, and dedication were already well-known and well-appreciated throughout the office.

Being a public lawyer is not for the faint of heart or the easily discouraged. Public legal service certainly is not the most remunerative practice in which one may engage, and may not garner the biggest headlines. But in my view, it can be a source of the greatest satisfaction. The work of the public lawyer is essential to our society because of its focus on ensuring that government, at whatever level, does its job well for the public as a whole.

The broad range of subjects addressed by public lawyers makes for exciting practice opportunities. Public lawyers are employed at every level of government, and their practice specializes in criminal prosecution, utilities law, anti-trust, licensing and regulation, environmental, civil rights, tax, municipal law, and enforcement of local ordinances, to name a few. Public lawyers often encounter unique legal problems that enable them to make important contributions both to the community and to the development of the law.

Herschel, by conferring upon you the public lawyer award, your peers have recognized your truly exceptional achievements.

Herschel T. Elkins is an excellent example of a public lawyer who took the challenge and made a difference. He has had a 45-year career in the attorney general's office, leading the consumer law section since 1965 — after its creation by the attorney general, my late former colleague stanley mosk, shortly before he took the bench.

Herschel Elkins receiving 2002 Public Lawyer of the Year Award from Chief Justice Ronald George.

Herschel has been involved in and has led numerous statewide groups and committees addressing consumer protection matters, and has participated in drafting many of california's consumer protection statutes. And he has been generous with his time and expertise in encouraging others to actively engage in consumer protection.

He has lectured law enforcement and other agencies on consumer protection law and its practical implications, and authored the "consumer protection & civil injunctions points and authorities manual," which is widely used by prosecutors across the state and is now in its 17th edition.

Every day, consumers who deal with obtaining credit, who seek housing, purchase automobiles or other retail goods, enter into health club and dance studio contracts, hire contractors to do home repair work, or encounter door-to-door salesmen, have herschel elkins to thank for increasing consumer protection and ensuring california's leadership role in this area of the law.

Top Photo
Members of the Consumer Law Section, Office of the California Attorney General: Ian Sweedler, Michele Van Gelderen, Public Lawyer of the Year Herschel Elkins, Albert Sheldon, Gayle Weller, Ted Mermin.

Middle Photo
Oakland City Attorney John Russo, Chief Justice Ronald George, and Public Law Section Chair Joyce Hicks.

Bottom Photo
Chief Justice Ronald George, State Bar Board of Governors Member and former Attorney General John Van de Kamp, and Public Lawyer of the Year Herschel Elkins.

Too frequently of late, we hear of lawyers _ who serve as officers of the court, and are expected to adhere to a stringent ethical code _ being accused of forgetting their roots as professionals. During his entire career, herschel elkins has demonstrated through his extraordinary accomplishments that an individual dedicated to the highest principles of the practice of law can make both government and the law work to the great benefit of the public whom they are intended to serve.

Herschel, by conferring upon you the public lawyer award, your peers have recognized your truly exceptional achievements. On behalf of the entire judicial system, and as a former colleague in the attorney general's office, it gives me great pleasure to extend my warmest congratulations.

Top Photo
State Bar Board of Governors Member and former Attorney General John Van de Kamp and 2002 Public Lawyer of the Year Herschel Elkins.

Middle Photo
Amy Von Haam, Chief Justice Ronald George, and Public Law Section Treasurer Peter Von Haam.

Bottom Photo
Chief Justice Ronald George and Public Law Journal Editor Phyllis Cheng.

Targeting California's Minority Communities

State Laws Draw A Line For Businesses Between Strategy And Discrimination

By Araceli Campos*

Arguably, California's most prominent characteristic is its racial and ethnic diversity. The 2000 Census revealed that almost 40% of the state's population falls into 'minority' classification.[1]

Interestingly, however, a closer look at the composition of individual communities illuminates the distinction that, while the state's population may be diverse as a whole, much of the populace thrives in smaller communities comprised of people with shared racial or ethnic identities. Theorists in critical race studies coin communities entrenched in this phenomenon "ethnic enclaves."[2]

For California's numerous immigrant communities, ethnic enclaves serve as the cornerstone of cultural adaptation in the United States. In these communities, especially, most business interactions occur within the ethnic enclave, often in the language of the populace's country of origin, and with members of the same community.

Exacerbated by policies already leading to de facto segregation, ethnic enclaves are especially difficult to branch out of for those immigrants who face additional language and educational barriers. As a result, the ethnic enclave becomes the only reality of some of its members and thus takes on another feature, that of a unique internal legal culture.

Very often, the 'legal enclave' evolves in a manner that departs from the mainstream legal culture of the state. The departure may form a schism between the particular community and the governmental protections to which everyone in the state is entitled. Unfortunately, this sometimes exposes members of various ethnic enclaves, usually immigrants, to types of discrimination thought long-since eradicated.

Of interest to legal practitioners is that the civil rights violators are sometimes mainstream businesses that alter their practices when working within these communities. As a result, it is common for companies—arguably, the most progressive of companies even—to serve ethnic markets by way of a "Chinese Distributor," "African American Liaison" or "Manager of Latino Community Affairs," etc.

Most people do not recognize such practices as discriminatory. After all, it makes sense to target different communities—ethnic or otherwise—with different marketing tactics. These practices often benefit both businesses and the communities they serve through the provision of more efficient transactions. The practices also reflect a desire to serve minority communities in a culturally emphatic manner that will in turn align a business' product line to their target market.

However, the California Constitution, state Civil Code and Cartwright Act all forewarn against companies taking these ethnic-based distinctions too far when targeting minority communities.

Easily, serving different markets differently leads to disparate benefits amongst the various communities companies serve. But under California law, when companies distinguish how they target various markets based solely on the ethnic or racial composition of the community, such disparate benefits become illegal.

Because a legal enclave is by definition more vulnerable to illegal practices than the majority culture, governmental agencies are increasingly mindful of complaints against businesses whose tactics discriminate within California's minority, and especially, immigrant, communities. No longer arming themselves with only the state Constitution against such practices, state prosecutors may increasingly invoke lesser-used statutes, such as Civil Code, section 51.5, and Business and Professions Code, section 16721, subdivision (b), against racial and ethnic market exploiters.[3]

The Unruh Civil Rights Act (Cal. Civ. Code § 51 et seq.) prohibits discrimination against persons by a business establishment based on, among other things, a person's race. Cal. Civ. Code § 51.5 states, "[n]o business establishment of any kind whatsoever shall discriminate against . . . any person . . . because of the race, . . . color [or] national origin . . . of the person." The statute brings to mind the traditional case of a restaurant or hotel refusing service to someone based on his or her race.

But statutory invocation of section 51.5 takes a new significance in minority communities because of the manner in which corporations do business in ethnic enclaves. In these cases, discrimination occurs where businesses try to use ethnic marketing not to exclude minorities, but rather to restrict their market to minorities in vulnerable legal enclaves, usually those comprised of immigrants.

The incentive is high for many international corporations, especially, to

conduct all their business in ethnic enclaves. First, immigrant communities are clear targets, as they are comprised of individuals who probably became loyal to many companies' products in their country of origin. Second, the kinds of products to which customers stay loyal frequently comprise consumables that are of a more private nature, such as ethnically targeted make-up, hair restoration and dietary products. Moreover, these products are not major purchases, and so, are less detectable by government agencies monitoring business practices.

In such circumstances, "Manager of Latino Community Affairs," for example, merely serves as a proxy for delineating a company's only targeted market. When this is done to the intentional exclusion of other, more mainstream and outspoken markets, section 51.5 comes into play. Unfortunately, such a situation usually only comes to the attention of state agencies when a potential retailer of these products—one outside of the designated ethnic market—is denied market entry and files a complaint suspecting ethnic discrimination.

Similarly, the Cartwright Act (Cal. Bus. & Prof. Code § 16700 et seq.) states, "[n]o person . . . shall require another person to be excluded, or be required to exclude another person, from a business transaction on the basis of that person's . . . race, color, . . . ancestry or national origin . . . or on the basis that the person conducts business in a particular location."

Though not generally known for offering civil rights protections, the Cartwright Act protects consumers against businesses that segment their market on the basis of race to the detriment of any one else trying to reach that minority community.[4] In ethnic enclaves, such practices run rampant.

Manufacturers frequently entertain agreements with local distributors to require retailers of Chinese origin, or those serving a Chinese community, for example, to go through their local "Chinese Distributor."

Often, this results in egregious civil rights violations where the local "Chinese Distributor" decides to corner that specific ethnic market by charging retailers a rate superseding that charged by the local "African American Liaison" in a neighboring community. Because the manufacturer allows potential retailers no choice but to pay disparate rates for its products depending on the race and ethnicity of their target market, Cal. Bus. & Prof. Code §16721(b) of the Cartwright Act deems the practice unlawful.

Complaints to government agencies, brought both by members of ethnic enclaves and persons trying to conduct fair business in these minority communities, reveal growing recognition and intolerance for this unique form of discrimination.

Because there are real economic benefits to both companies and consumers in delineating markets along racial and ethnic lines, the invocation of statutes in both business and civil law becomes a critical component in keeping sound economic strategy from becoming discriminatory and exploitative practice.

Endnotes

1 U.S. Census Bureau, Census 2000 Summary File 1, Matrices P1, P3, P4, P8, P9, P12, P13, P17, P18, P19, P20, P23, P27, P28, P33, PCT5, PCT8, PCT11, PCT15, H1, H3, H4, H5, H11, and H12.

2 Jensen, Leif and Portes, Alejandro, "The Enclave and the Entrants: Patterns of Ethnic Enterprise in Miami Before and After Mariel," American Sociological Review (December, 1989); The Economy of the Urban Ethnic Enclave: A Report, Lyndon B. Johnson School of Public Affairs Policy Research Project Report, No. 97 (1992).

3 Amended and ratified by California voters in 1974, article I, section 8 of the California Constitution extended the protection against discrimination based on sex, provided by article XX, section 18, to discrimination based on "race, creed, color, or national or ethnic origin." The legislative history of the provision's adoption refers to the statute as a "new section" designed to prohibit "discrimination in economic opportunities for reasons of sex or race." California Constitution Revision Commission, Proposed Revision of Article I, Article XX, Article XXII of the California Constitution, Part 5 (1971), p. 30.

4 Legal practitioners generally invoke the Cartwright Act for its purposes as an antitrust statute. Presently, no published decision exists involving such a Cal. Bus.& Prof. Code § 16721(b) claim; however, section 16720, n. 2, explains that the Cartwright Act was designed to prevent any restrictions on trade which destroy competition, including "every contract, combination or trust which is formed for the purpose of restraining trade or commerce." Thus, the anti-competitive aspect of restricting business opportunities along lines of racial discrimination serves that aim and explicates the creation of section 16721(b).

* Araceli Campos anticipates receiving her J.D. from Yale Law School in 2004. She was a 2002 Summer Honors Clerk for the California Department of Justice, Office of the Attorney General, Civil Rights Enforcement Section. The statements and opinions in the article are those of Ms. Campos and not necessarily those of the Attorney General or the California Department of Justice.

2002

SUMMARY OF NEW LAWS

Fazle-Rab Quadri, Esq., Chair; Brenda Aguilar-Guerrero, Esq., and Mark Sellers, Esq. *

AB 138, Nation

Topic: Bidding procedures: alternative bids.

Last Action: Chapter 455, Statutes of 2002

Summary: This bill would add to the procedures for determining the lowest bidder for specified public agencies to also require that any information that would identify any of the proposed subcontractors or suppliers is not revealed to the public entity before the ranking of all bidders from lowest to highest has been determined.

AB 168, Nation

Topic: Charter schools: funding.

Last Action: Chapter 36, Statutes of 2002.

Summary: This bill would, until July 1, 2005, specify that a charter school shall be treated as a school district for purposes of the State School Fund.

AB 255, Zettel

Topic: Elder abuse.

Last Action: Chapter 54, Statutes of 2002.

Summary: Existing law, the Elder Abuse and Dependent Adult Civil Protection Act, establishes various procedures for the reporting, investigation, and prosecution of elder and dependent adult abuse. This bill revises the provisions setting forth the purposes of the act, would revise the definition of mandated reporter by including a "clergy member," as defined, and would redefine "care custodian" to include certain employees of humane societies, animal control agencies, fire departments, and offices of environmental health and code enforcement.

AB 374, Matthews

Topic: Rural Crime Prevention Program.

Last Action: Chapter 719, Statutes of 2002

Summary: This bill would extend the authorization to conduct Rural Crime Prevention Programs to July 1, 2007.

AB 467, Strom

Topic: Integrated waste management: landfill closure program.

Last Action: Chapter 587, Statutes of 2002.

Summary: This bill would establish the Landfill Closure Loan Program, to be implemented by the Integrated Waste Management Board for the purpose of providing loans to operators of unlined, older-technology landfills, who are interested in early closure of their landfills.

AB 690, Wesson

Topic: Political Reform Act of 1974: campaign expenditures: telephone advocacy.

Last Action: Chapter 939, Statutes of 2002.

Summary: This bill would revise specified definition to include instead 200 substantially similar pieces of any item delivered, by any means, to the recipient residence, place of employment or business, or post office box, and would require the item delivered to the recipient to be a tangible item, including, but not limited to, a videotape, audio tape, computer diskette, compact disc, or a written document.

AB 749, Calderon

Topic: Workers' compensation: administration and benefits.

Last Action: Chapter 6, Statutes of 2002.

Summary: Existing law provides for an annual assessment of employers by the Department of Industrial Relations for the purpose of funding increased investigation and prosecution of workers' compensation fraud by the Bureau of Fraudulent Claims of the Department of Insurance and by district attorneys. This bill would also authorize use of these funds for investigation and prosecution of an employer's willful failure to secure payment of workers' compensation.

AB 1448, Maddox

Topic: Prevailing wage laws: violations.

Last Action: Chapter 28, Statutes of 2002.

Summary: This bill would delete the repeal date of January 1, 2003 of the existing law requiring contractors and subcontractors involved in public works projects to pay their employees the "prevailing wage" and keep accurate payroll records, thus keep these provisions in effect indefinitely.

AB 1752, Migden

Topic: Public records.

Last Action: Chapter 156, Statutes of 2002.

Summary: This bill would make specified requirements of the Bagley-Keene Open Meeting Act, imposed on the Franchise Tax Board, also applicable to the State Board of Equalization with respect to writings pertaining to any item that does not involve a named tax or fee payer.

AB 1797, Harman

Topic: Conflicts of interest: disqualification.

Last Action: Chapter 233, Statutes of 2002.

Summary: This bill would require a public official and specified office holders who have a financial interest in a decision within the meaning of the Political Reform Act of 1974 to state publicly the specific nature of the conflict of interest, excuse himself or herself from discussing and voting on the matter, and leave the room until after the discussion, vote, and other disposition of the matter is concluded, as specified.

AB 1962, Hollingsworth

Topic: Electronic communication.

Last Action: Chapter 945, Statutes of 2002.

Summary: Existing law relating to evidence in court actions and specified administrative proceedings defines evidence

as including a writing, which is defined as handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof. This bill would define writing under these provisions to include electronic mail, electronic correspondence, and facsimile transmissions.

AB 2351, Canciamilla.

Topic: Water quality: civil liability.

Last Action: Chapter 995, Statutes of 2002.

Summary: Existing law, the Porter-Cologne Water Quality Control Act, with certain exceptions, subjects persons who violate provisions of the act or the federal Clean Water Act to certain civil penalties, including a mandatory minimum penalty of $3000 for the first serious violation, as defined, and each additional serious violation in any 6-month period. The act, under certain circumstances, authorizes the State Water Resources Control Board or a California regional water quality control board, in lieu of assessing the penalty applicable to the first serious violation, to elect to require the discharger to spend an amount equal to the penalty for a supplemental environmental project in accordance with the enforcement policy of the state board and any applicable guidance document or to develop a pollution prevention plan. This bill, instead, with certain exceptions, would require the imposition of the $3000 minimum penalty for each serous violation. This bill would authorize the state board or a regional board, in lieu of assessing that mandatory minimum penalty and with the concurrence of the discharger, to direct a portion of the penalty amount to be expended on a supplemental environmental project. This bill would require those agencies, for the purposes of imposing certain mandatory minimum penalties, to treat a single operational upset in a wastewater treatment unit that treats wastewater using a biological treatment process as a single violation, if certain requirements are met. This bill would also make mandatory minimum penalties inapplicable to violations caused by the operation of a new or reconstructed wastewater treatment unit during a defined period of adjusting or testing.

SB 33, Soto

Topic: School-parent compacts: Nell Soto Parent/Teacher Involvement Program.

Last Action: Chapter 25. Statutes of 2002.

Summary: Existing law establishes the Nell Soto Parent/Teacher Involvement Program, pursuant to which the Superintendent of Public Instruction allocates one-time grants to schools in accordance with prescribed criteria, for the purpose of strengthening communication between schools and parents. The bill would delete the limitation that the grants be one-time grants and would authorize the California School for the Blind and the California School for the Deaf to participate in the program.

SB 170, Escutia

Topic: Insurers: data call: enforcement.

Last Action: Chapter 1076. Statutes of 2002.

Summary: Existing law requires insurers issuing certain types of insurance policies to provide data to the Department of Insurance on request. This bill would authorize the department to impose a civil penalty on any person subject to these data call provisions that fails to comply with the data call request.

SB 247, Speier

Topic: Birth certificates: certified copies: access.

Last Action: Chapter 914. Statutes of 2002.

Summary: This bill would provide that a certified copy of a birth or death record may be provided to a person who submits a statement sworn under penalty of perjury that the requester is an authorized person. If a requester does not meet the requirements of an authorized person, this bill would require the public official to issue the certified copy of a birth or death record with a legend stating "INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY." This bill would provide for security measures to protect against fraudulent use of birth and death records. This bill increase the fee for the certificates by $2 to be reduced to $1 on January 1, 2006. This bill would require the appointment of a vital records protection advisory committee to recommend measures to protect individual privacy, inhibit identity theft, and prevent fraud while permitting legitimate use of birth and death certificates.

SB 1240,Figueroa

Topic: Advertising.

Last Action: Chapter 319. Statutes of 2002.

Summary: (1) Existing law makes it unlawful for any person, firm, corporation, or association that is a nongovernmental entity to solicit funds or information by means of a mailing that contains a seal, insignia, trade or brand name, or any other term or symbol that reasonably could be interpreted or construed as implying any state or local government connection, approval, or endorsement, unless the nongovernmental entity has an expressed connection with a state or local entity or unless the solicitation contains a specified disclosure. This bill would extend the application of these provisions to solicitations made by nongovernmental entities by electronic message or over an Internet Web site.

SB 1244,Figueroa

Topic: Professions and vocations.

Last Action: Chapter 1079 with Item Veto. Statutes of 2002.

Summary: (1) Existing law provides for the licensing and regulation of various professions and vocations by specified boards within the Department of Consumer Affairs. This bill would authorize the Director of Consumer Affairs to appoint an interim executive officer if a new board replaces an existing or previous board, and makes related changes.

SB 1661, Kuehl

Topic: Disability compensation: family temporary disability insurance.

Last Action: Chapter 901. Statutes of 2002.

Summary: This bill would provide disability compensation for any individual who is unable to work due to the employee's own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child. This bill would establish, within the state disability insurance program, a family temporary disability insurance program to provide up to 6 weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. This bill would provide the additional benefits through additional employee contributions. This bill would also authorize employers to require that employees utilize up to 2 weeks of earned but unused vacation leave prior to that employee's receipt of these additional benefits, as provided, and specify that these provisions may not be construed to relieve an employer of any collective bargaining duties. These benefits would be payable for family temporary

disability leaves that begin on and after July 1, 2004.

SB 2011, Burton

Topic: Worker's compensation coverage: judicial branch employees.

Last Action: Chapter 905. Statutes of 2002.

Summary: The bill would revise existing provisions regarding trial court employees, employee transfers between trial courts and counties, agency shop provisions between a trial court and an employee organization, and trial court procedures concerning employee organizations. This bill would require a trial court to administer salary pay deductions for certain employees who join an employee organization and to provide certain personal information to the employee organization. Existing law requires every employer, except the state, to secure the payment of workers' compensation as provided by law. Existing law authorizes an employer, pursuant to this provision, to insure against liability in insurers duly authorized to write compensation insurance in the state or to secure from the Director of Industrial Relations a certificate of consent to self-insure. This bill would provide that the state shall include the superior courts of the state for purposes of this provision. The bill would thereby except superior courts from the requirement to secure the payment of workers' compensation under these provisions. This bill would create beginning July 1, 2003, the Judicial Branch Workers' Compensation Fund for the purpose of funding workers' compensation claims for judicial branch employees. The bill would provide for continuous appropriation.

* Fazle-Rab Quadri, Esq., Brenda Aguilar, Esq., and Mark Sellers, Esq., are members of the Public Law Section's Executive Committee and comprise its Legislative Subcommittee. Mr. Quadri is the Public Law Section's Vice Chair and District Counsel for the Mohave Desert and the Antelope Valley Air Quality Management Districts. Mr. Aguilar is a member of Erickson Beasley, et al. Mr. Sellers is Assistant City Attorney of the City of Thousand Oaks.

PUBLIC LAWYER OF THE YEAR AWARD 2003

Do you know a public law practitioner who deserves special recognition because of outstanding services to the public?

If so, that person could be the recipient of the Public Law Section's "2003 Outstanding Public Law Practitioner" award because of your nomination.

Each year the Public Law Section honors a public lawyer selected by the Public Law Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in public law
2. An exemplary record and reputation in the legal community
3. The highest ethical standards

Rather than a political figure or headliner, the ideal recipient would be a public law practitioner who has quietly excelled in his or her public service. Just as the Public Law Executive Committee supports the goal of ethnic diversity in the membership and leadership of the State Bar, a goal in selecting the 2003 Outstanding Public Law Practitioner will be to ensure that the achievements of all outstanding members of the Bar who practice Public law, especially women and people of color, are carefully considered.

Nominations are now being accepted. The 2003 Outstanding Public Law Practitioner award will be presented at the Annual State Bar Convention in Anahein in September 2003.

Send nominations, no later than 12:00 midnight, June 1, 2003, to:
Tricia Horan, Public Law Section, State Bar of California, 180 Howard Street, San Francisco, CA 94102-4498.

To nominate an individual for this award, fill out the official nomination form below.

Nominee's Name: _____

Nominator's Name: _____ **Place of Business:** _____

Telephone Number: _____ **Years of Public Law Practice:** _____

Brief Statement why Nominee deserves recognition: _____

_____

_____

_____

The Health Insurance Portability And Accountability Act (HIPAA)

By Jeremy March, Esq.*

OVERVIEW

I. Introduction: What is HIPAA?

On August 21, 1996, the Health Insurance Portability and Accountability Act (HIPAA) became law. It was codified as Public Law 104-191 and can be found beginning at Section 201 of Title 42 of the United States Code. HIPAA amended the 1986 Internal Revenue Code to improve portability and continuity of group and individual health insurance coverage; to combat waste, fraud, and abuse in health insurance and health care delivery; to promote the use of medical savings accounts; to improve access to long-term care services and coverage; and to simplify the administration of health insurance. HIPAA became a complete legislative and regulatory reform package nearly five years later, when comprehensive regulations dealing with the privacy of patients' medical records and health care information took effect on April 14, 2001.

Primary goals of HIPAA

Insurance Reform (portability) and Administrative Simplification (database and privacy). HIPAA is intended to serve two major goals. One is protecting "portability," or continued insurance coverage, through insurance reform. The other is simplifying health care administration by creating a comprehensive, protected database of medical insurance information.

Protecting Portability

Insurance Reform provisions. Title I of HIPAA seeks to protect health insurance coverage for workers and their families when they change or lose their jobs. Title I does this in many ways. First, it increases employees' ability to get health coverage for themselves and their dependents if they start a new job. Second, it reduces employees' chance of losing existing health care coverage obtained through a job or through individual health insurance. Third, Title I helps employees maintain continuous health care coverage for themselves and for their dependents when they change jobs. Next, it helps employees to buy health insurance coverage on their own in situations where they have lost coverage under an employer's group health plan and have no other health coverage available. Fifth, it limits insurers' ability to exclude persons based on pre-existing health conditions. Sixth, it prohibits group health plans from discriminating against employees by denying them coverage, or charging them more for coverage, because of the past or present poor health of the employee or of a family member. Seventh, it guarantees certain small employers, and certain individuals who lose job-related coverage, the right to purchase health insurance. Finally, in most cases, Title I guarantees than employers or individuals who purchase health insurance can renew their coverage, regardless of any health conditions of individuals who are covered under the policy.

Administrative Simplification

Establishment of comprehensive health care database with privacy protections. Subtitle F of Title II of HIPAA amends the Social Security Act to mandate development of a comprehensive electronic system and database for processing health care information. This system is intended to improve the operation of the overall health care system while reducing administrative costs. Subtitle F requires the Department of Health and Human Services (HHS) to help develop the system by establishing uniform standards for matters such as administrative transactions (including enrollment, disenrollment, claims attachments and referral certification and authorization) and for the collection and reporting of data on such transactions.

Forestalling Big Brother

Protection of privacy. As noted by HHS Secretary Tommy Thompson, the assembly of any electronic database composed of information about individuals – whether legal, financial, or medical - raises valid citizen concerns about privacy. Without proper privacy protections, this information is just a keystroke away from being accessed by bureaucrats, law enforcement, or private businesses. Thus, HIPAA also charged HHS with establishing regulations protecting the security and privacy of patients' medical information in the electronic database. These regulations can be found at Part 160 of Title 45 of the Code of Federal Regulations. They impose requirements on both public and private health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions - such as electronic billing and funds transfers - electronically. The regulations protect all medical records and other individually identifiable health information used or disclosed by a covered entity in any form, be it electronic, written, or oral. Essentially, the regulations require that each entity adopt and enforce written privacy procedures; that patients be educated as to their privacy rights; that patient consent be given before information is released; that a minimum of information be released, and then only for health-care purposes. They also impose strict monetary and criminal penalties for privacy violations. The privacy protections may, however, be waived in certain emergency situations. Existing state laws that afford individuals greater privacy protection are not preempted by HIPAA.

The privacy regulations, enforced by the HHS Office for Civil Rights, took effect on April 14, 2001. Covered public and private entities must comply with them by April 14, 2003.

II. Portability Provisions of HIPPA

Introduction

Title I of HIPAA improves "portability" (continuity) of employee health insurance coverage. A primary goal of HIPPA is to improve the "portability" of health insurance

coverage; that is, to protect health insurance coverage for employees and their families if the employee changes jobs or loses a job.

It does this through a series of provisions in Subtitles A and B of its Title I. These deal respectively with group and individual market rules. They are subject to mixed State and Federal enforcement.

Subtitle A

Reform of group market rules. Subtitle A adds group health plan portability, access, and renewability requirements to the Employee Retirement Income Security Act of 1974 (ERISA).

LIMITS ON PREEXISTING CONDITION EXCLUSIONS.

Subtitle A first provides for increased portability by limiting exclusions from coverage based on preexisting health conditions. It does this by limiting the preexisting condition exclusion period; requiring that periods of previous coverage be credited; making preexisting condition exclusions inapplicable to certain newborns, adopted children, and pregnancies; and by requiring special enrollment periods for certain individuals losing other coverage, as well as for dependent beneficiaries.

HMO Coverage Reform.

Under Subtitle A, group insurance plans may impose an affiliation period for HMO coverage only if there is no previous condition exclusion and if the affiliation is applied uniformly and only for a specified, limited period.

No discrimination based on health status of participants or beneficiaries.

Subtitle A further prohibits discrimination – in enrollment eligibility or in premium contributions - against individual participants and beneficiaries based on their health status. Similarly, it prohibits group health plans or insurance issuer offering coverage in connection with group plans from discriminating based on factors such as health status or genetic information.

Guaranteed renewability in certain plans.

Moreover, Subtitle A guarantees renewability in group health plans that are multiemployer plans or multiple employer welfare arrangements (MEWAs).

Other requirements.

Among its other provisions, Subtitle A requires each issuer offering coverage in the small group market to accept every applying small employer and individual. It also requires reports on large employer health insurance access. Additionally, issuers in the small or large group market must renew or continue their coverage at the option of the plan sponsor, except in cases of premium nonpayment, fraud, or other such circumstances.

Relationship to existing State laws.

Subtitle A does, however, provide for continued applicability of State law regarding health insurance issuers, as well as continued preemption with respect to group health plans under other specified provisions of ERISA.

Subtitle B

Reform of Individual market rules.

Subtitle B institutes several important reforms of individual insurance coverage, including the following:

First, it prohibits any issuer offering individual market health coverage from imposing a preexisting condition exclusion, or from refusing to offer or denying enrollment to any eligible individual. (These provisions do not, however, apply in a state with an alternative mechanism meeting certain conditions.)

Second, it requires an issuer providing coverage to an individual renew or continue that coverage the option of the individual, except in cases of premium nonpayment, fraud, or other such events.

Third, it requires issuers in the individual market to credit periods of previous coverage.

III. Electronic Database and Privacy Provisions of the Health Insurance Portability and Accountability Act

HIPAA's second main goal – simplifying health care administration through creation of a master electronic system for processing health care information – is implemented by its Title II and by accompanying regulations.

General Requirement

Creation of electronic system for storing and processing health-care information – and for protecting its privacy. Subtitle F of Title II adds Part C to Title XI of the Social Security Act. Part C provides for development of an electronic system for processing health care information. This system must improve the operation of the overall health care system. It must also reduce related administrative costs through the adoption, by the U.S. Department of Health and Human Services (HHS), of certain standards for health-care information transactions (including enrollment in and disenrollment from health care plans, attachments to claims, and certification and authorization of referrals); the data elements for these transactions; and standards relating to the security of this information. Protection of individual privacy is a is a priority for HIPAA's authors. Section 264 of HIPAA thu s specifically requires the HHS to submit to Congress detailed recommendations on standards for the privacy of individually identifiable health information.

PRIVACY PROTECTION REGULATIONS

Widespread individual concern with system's impact on privacy. In November 1999, HHS published its proposed regulations guaranteeing patients new rights and protections against the misuse or disclosure of their health records. The proposed regulations drew more than 52,000 comments from the public. Many of these were from citizens concerned that putting their medical histories and records on an electronic database would threaten their privacy by placing this information, in HHS Secretary Tommy Thompson's words, "only a keystroke away" from government bureaucrats, law enforcement agents, or private companies who might seek to exploit it.

The Final Privacy Rule

Scope and protections.

The final rule on privacy took effect on April 14, 2001. It can be found at Part 160 of Title 45 of the Code of Federal Regulations.

Who is subject to the rule?

The privacy rule covers both public and private health plans, health care clearinghouses, and health care providers who conduct certain financial and administrative transactions (such as billing or fund transfers) electronically.

What information is protected?

The rule covers all medical records and other individually-identifiable health information used or disclosed by a covered entity in any form, whether electronically, on paper, or orally.

How does it protect patients' privacy?

The regulations set forth, among others, the following specific mechanisms for protecting health information privacy.

Limits on use and release of information.

Generally, a patient's health information may only be released for health purposes. Information usually may not be used for purposes unrelated to health care, such as release to employers for personnel purposes or to financial institutions, without the express consent of the patient. The regulations also generally require that, in a disclosure, no more information be revealed than is necessary to meet the purposes of the disclosure.

WRITTEN POLICIES; EMPLOYEE TRAINING.

First, they require each covered entity to design written policies and procedures consistent with the privacy rule. These policies and procedures must set forth who has access to protected information; how this information can be used within the entity; when and to whom it may be disclosed; and how business associates will protect the privacy of health information. These procedures must be communicated to patients so that they know how their information is protected. Covered entities must train their employees in these policies and procedures, and designate a "privacy officer" responsible for compliance.

PATIENT CONTROL OVER USE AND RELEASE OF INFORMATION.

Under the rule, patients must give consent to their health-care providers before the providers share patient information for treatment, payment, or health care operations. Patients must also authorize any non-routing disclosures and disclosures for non-health-care purposes. Additionally, a patient may request restrictions on the uses and disclosures of their particular information.

Exceptions.

The Rule allows covered entities to continue certain existing disclosed of health information without individual authorization where the disclosures are necessary to fulfill an overriding public interest. Circumstances allowing such disclosures include emergency situations, certain law enforcement activities or judicial or administrative proceedings, and activities related to national defense and security.

ENFORCEMENT AND PENALTIES.

The privacy regulations are enforced by the HHS Office of Civil Rights (OCR). Severe penalties await violators. With respect to civil penalties, health plans, providers and clearinghouses violating the privacy standards are subject to civil liability. Monetary penalties are $100 per violation, up to $25,000 per person, per year for each provision violated. Criminal penalties are also imposed on knowing violations of patient privacy. These are up to $50,000 and one year in prison for obtaining or disclosing protected health information; up to $100,000 and up to five years in prison for obtaining protected health information under false pretenses; and up to 10 years in prison for obtaining or disclosing protected health information with the intent to sell, transfer, or use it for commercial advantage, personal gain, or malicious harm.

RELATIONSHIP TO STATE LAWS.

The final privacy rule represents the minimum protection of health information privacy in this country. As required by HIPAA, state laws providing greater privacy protections (as some do with regard to mental health, HIV infection, and AIDS information) continue to apply.

EFFECTIVE DATES.

HIPAA gives most covered entities until April 14, 2003 to comply with the privacy regulations. In the meantime, HHS is authorized to clarify the requirements and to correct potential problems in the rule.

IV. SANCTIONS FOR HEALTH CARE PROVIDER FRAUD AND ABUSE UNDER HIPPA

Title II of HIPAA imposes detailed fraud, abuse, and privacy requirements on health-care providers. Privacy requirements were addressed in detail in the preceding article. Thus article focuses on the new enforcement programs, civil and criminal sanctions, and information-collecting procedures created by HIPAA for health care fraud and abuse.

Generally: Title II tackles Health Care Fraud and Abuse.

FRAUD AND ABUSE CONTROL PROGRAM.

Subtitle A Title II amends the Social Security Act to require the Secretary of Health and Human Services (HHS), acting through the HHS Inspector General, to work with the Attorney General to establish a Fraud and Abuse Control Program. This program must coordinate federal, state, and local law enforcement programs to control health care fraud and abuse. It is also responsible for conducting investigations, audits, and inspections relating to the delivery of and payment for health care. Third, the program must facilitate enforcement of provisions of the Social Security Act and other Federal laws relating to health care fraud and abuse. The program must additionally provide for the modification and establishment of safe harbors for payment practices, and issue advisory opinions and fraud alerts. Finally, the program must arrange for the reporting and disclosure of final actions taken against health care providers, suppliers, or practitioners.

STRENGTHENS EXISTING SANCTIONS FOR FRAUD AND ABUSE.

Several other sections of Title II toughen existing penalties for health care fraud and abuse:

Exclusion from participation in Medicare or State health care programs.

Subtitle B of Title II clarifies and tightens existing sanctions against health care providers and others for fraud and abuse. To wit, it excludes from participation in Medicare and State health care programs any individual or entity convicted of a felony related to fraud in connection with the delivery of a health care item or service, or related to a controlled substance. Title B also revises certain current sanctions excluding such parties from Medicare and State health care programs, adding minimum periods of exclusion for certain individuals and entities subject to permissive exclusion from Medicare and State health care programs, and for practitioners and persons failing to meet certain statutory obligations with regard to services or items. Additionally, Title B allows the permissive exclusion of individuals with direct or indirect ownership or control of sanctioned entities. It repeals the current prerequisite that a health care practitioner or person be determined to be unwilling or unable to substantially comply with a corrective action plan before sanctions may be imposed. Separately, it permits intermediate sanctions on Medicare health maintenance organizations in addition to the current option of termination.

CIVIL PENALTIES STRENGTHENED.

Subtitle D of Title II strengthens, in several ways, civil monetary penalties for health care fraud and abuse. First, it excludes from participation in Federal and State health care programs persons subject to penalties and

assessments for applicable program violations. Second, it changes the amounts of penalties and assessments, including sanctions against health care practitioners violating their statutory obligations with regard to services or items ordered or provided to them by a covered beneficiary or recipient. Third, Subtitle D prohibits anyone from offering inducements to individuals enrolled under Medicare or a State health care program. Next, it imposes monetary penalties on excluded individuals retaining ownership or controlling interests in a participating entity if they knew, or should have known, of the action that was the basis for excluding the entity at the time the violation occurred. It also specifically defines "remuneration," for penalty purposes, as including the waiver of coinsurance and deductible amounts and transfers of items or services for free or for other than fair market value. Finally, it imposes a penalty for false certification for home health services.

Revises criminal penalties.

Subtitle E of HIPAA's Title II amends Federal criminal law to establish penalties for committing health care fraud, theft or embezzlement in connection with health care, false statements relating to health-care matters, obstruction of criminal investigations of Federal health care offenses, and for money-laundering in connection with such offenses. Subtitle B, discussed above, also imposes criminal penalties for fraudulent disposition of assets to obtain Medicaid benefits.

Mandatory reporting of health care fraud and abuse information.

Subtitle C requires the HHS to establish a national health care fraud and abuse data collection program for reporting final adverse actions taken against health care providers, suppliers, or practitioners. HHS must also maintain a national database of this information. Each government agency and health plan must report to the HHS any final adverse action taken against such providers, suppliers, or practitioners. The HHS may establish reasonable fees for disclosure of the information in the database.

* Jeremy March is Senior Associate Attorney at Thever & Associates, which specializes in representing public entities on matters including municipal law, medical malpractice, and use-of-force cases. The firm currently represents, among other clients, the County of Los Angeles, the City of Los Angeles, and the City of South Gate on specific matters, and formerly served as City Attorneys for the City of Lynwood. Mr. March is also an advisor to the Public Law Section's Executive Committee.

Public Law Section
Section Education Institute

Friday, January 17, to Monday, January 20, 2003
Time: Various
MCLE Credit: Various
Location: Claremont Resort & Spa
41 Tunnel Road, Berkeley, CA
Contact: 415-538-2508

Understanding and Drafting Legislative and Regulatory Language

Learn to effectively draft and quickly research and understand the plain meaning and purpose of, complex Federal and State bills, statutes and regulations. Good for lawyers, lobbyists, activists and others.
Speaker: Jeremy March.

Great Western Gun Shows v. County of Los Angeles and Nordyke v. King (Local Regulation of Firearms)

In recent cases involving the scope of local authority to regulate gun shows in the face of substantial regulation by the state, the California Supreme Court has provided local governments with significant insights on how the Court views matters of local concern and when state law and local law conflict for purposes of preemption analysis.
This program will discuss the importance of these recent cases for local regulation of firearms and local police power regulations generally.
Speaker: Sayre Weaver.

Current Developments in the Regulation of Adult Entertainment Businesses

The proposed paper and presentation will cover developments in First Amendment law and the regulation of "live" adult entertainment businesses, with particular emphasis on recent legal developments involving "secondary effects" studies.
Speaker: Patrick Bobko.

Message from the Chair

*By Stephen Millich, Esq.**

What have you people on the Executive Committee of the Public Law Section of the State Bar of California done lately to benefit the practicing public lawyer?

In the past year,your executive committee has published three (3) issues of the Public Law Journal containing articles of interest to public lawyers and put on five (5) MCLE credit programs at the last two Section Education Institute Meetings and five (5) additional MCLE credit programs at the Annual Meeting in Monterey. While there are other valuable services we provide our members, such as the Public Lawyer of the Year Award presented by Chief Justice Ronald George at the Annual Meeting, website links, and legislative analyses, to name a few, your input shows you value most highly the Public Law Journal and the MCLE credit programs.

The Public Law Journal is *sui generis* and the MCLE programs we offer are also unique. From two of the consistently well attended classes, namely Tina Rasnow's " Elimination of Bias In The Legal Profession" to Jeremy March's "Understanding and Drafting Legislative and Regulatory Language" and all points in between (namely programs on racial and ethnic profiling, local regulation of gun shows, Tort Claims Act procedures, and regulation of adult entertainment businesses), our section continues to provide valuable services to the State Bar of California and its members.

It will be my mission as your chair this year to continue the quality of the Public Law Journal under Terence Boga who replaces Phyllis Cheng, our outgoing and outstanding editor, and to stress the quality and quantity of MCLE programs under Bill Seligmann who has graciously consented to chair our Education Committee for another year.

We are an executive committee currently consisting of fifteen (15) diverse individuals who represent our eleven hundred plus (1,100+) public lawyer members. Our terms are for three (3) years and we are constantly looking for dedicated section members who are willing to serve. If you are interested in being a member of the executive committee, putting on an MCLE credit program, or otherwise participating in our other activities, please e-mail me at: smillich@simivalley.org.

Last year was a truly outstanding one for us under the leadership of Joyce Hicks. With your help we can keep the ball rolling.

Cordially,
Stephen Millich

* Stephen Millich, Esq., is Chair of the Public Law Section's Executive Committee. He is Assistant City Attorney to Simi Valley.

Message from the Former Chair

*By Joyce M. Hicks, Esq. Immediate Past Chair**

This is my last message to you, as my term as Chairperson of the Public Law Section Executive Committee expired in October. My first message to you, published in our fall 2001 journal, followed closely on the heels of the September 11 attacks. Our nation is still on the defensive as it sorts through information on possible future attacks and as terrorist attacks throughout the world receive front-page coverage on almost a daily basis.

In providing legal advice, balancing civil liberties with national security is an issue of which public lawyers have become more acutely aware since September 11. Our winter journal contained an article on racial and ethnic profiling and the Public Law Section sponsored a course on racial and ethnic profiling at the State Bar Annual Conference in October.

The Public Law Section will sponsor five MCLE courses at the State Bar Annual Conference, which will be held in Monterey from October 10 through October 13. In addition to Racial and Ethic Profiling Since September 11, the following courses were also offered: 1) Government Tort Claims Act - Substance and Procedure, 2) Disclosure Requirements Under the Political Reform Act, 3) Understanding and Drafting Legislative and Regulatory Language and 4) Celebrating Strength in Diversity: Elimination of Bias in the Legal Profession.

Each year the Public Law Section honors the Public Lawyer of the Year at a reception at the State Bar Conference. We were privileged to have Chief Justice Ronald George as the presenter of this award at our October 11 reception at Hotel Pacific.

In closing, I will take this opportunity to acknowledge the hard work of Executive Committee members and advisors, who among other things, have edited the Public Law Journal, thank you Editor Phyllis Cheng, provided Internet services, analyzed legislation, advocated for government lawyer whistle blowers and for revision of the Rules of Professional Conduct as they pertain to public lawyers, attended meetings throughout the state and provided invaluable MCLE courses on public law. I also thank our growing Public Law Section membership, without whom we could not provide these services. And a thank you goes to State Bar staff members Mitch Wood and Tricia Horan.

Finally, I offer a thank you to my husband, Eric Behrens, another public lawyer, for his support and my two wonderful college-age children, Philip and Michelle, who think their mom can do anything and never made her feel guilty about working outside the home.

* Joyce Hicks, Esq., is Immediate Past Chair of the Public Law Section's Executive Committee. She is the Deputy Executive Director of the Oakland Community and Economic Development Agency.

CEB Gold Passport

CEB is pleased to announce a new benefit for members of participating sections of the State Bar of California. For those who are currently section members, CEB will apply the cost of the section dues, subject to verification of section membership, towards te purchase of a Gold Passport or a single full-price program ticket. For attorneys who are not current members of one of the participating sections and want to join, CEB will pay the 2003 section membership dues when they purchase a single ticket to a CEB program or a CEB Gold Passport.

These are the participating State Bar of California Sections:

Business Law
Environmental Law
Estate Planning, Trust & Probate Law
Family Law
Workers' Compensation Law
Real Property Law
Public Law
Intellectual Property Law

Only one approved 2003 section membership pre program or Gold Passport purchase is permitted. Participant will receive CEB credit only; no refunds are allowed. This section rebate/credit cannot be combined with any other discount. Visit us at www.ceb.com for an updated list of participating State Bar sections, or call 1-800-232-3444 for more information.

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