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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RICHARD SANDER et al., Plaintiffs and Appellants, v. STATE BAR OF CALIFORNIA et al., Defendants and Respondents.	A128647 (City & County of San Francisco Super. Ct. No. CPF08508880)

Appellants Richard Sander, Joe Hicks and the California First Amendment Coalition seek access to admissions records from the State Bar of California (the Bar), subject to conditions designed to ensure the privacy of bar applicants, in order to conduct academic research on discrepancies in bar passage rates among racial and ethnic groups. After the Bar rejected Sander's request, appellants filed this action for a writ of mandate to compel the Bar to release the information. The trial court concluded that the common law right of access to public documents is no broader than the right of access to adjudicatory court records based in the First Amendment to the United States Constitution and, therefore, does not authorize public access to the Bar's records sought by appellants. The court further found article I, section 3(b) of the California Constitution inapplicable to the records request.

We hold this analysis was erroneous. The common law right of access to public documents is broader than the First Amendment right of access to adjudicatory court documents. We therefore reverse the judgment and remand the case to the superior court to determine whether the Bar must produce the requested information after balancing the

applicants' interest in confidentiality and the burden this request imposes on the Bar against the strong public policy favoring disclosure. The trial court is best suited to craft any qualifications to an order for production that can accommodate these concerns if possible.

BACKGROUND

The Bar collects and maintains records containing information regarding individuals who apply to take the bar exam. In addition to bar exam results and scores, the information pertaining to each individual often includes the applicant's undergraduate and law school records, standardized test scores, ethnic background, and gender.

Sander, an economist and professor of law at the University of California Los Angeles, conducts research on the scale and effects of admissions preferences in higher education. Sander approached the Bar to explore possible collaboration on research regarding a large and persistent gap in bar exam passage rates among racial and ethnic groups. The Bar rejected his proposal based, in part, on concerns about applicants' interests in the confidentiality of their personal information.

Sander then made a formal request for the records he needed to conduct his study. The Bar rejected his request, again citing privacy concerns, and subsequently rejected a revised request. The California First Amendment Coalition, a nonprofit corporation primarily concerned with open government issues, filed a separate request for the same data. That request was also rejected.

Appellants petitioned the San Francisco Superior Court for a writ of mandate to compel the Bar to disclose the requested records pursuant to the common law right of access to public records and article I, section 3(b) of the California Constitution (enacted into law in 2004 by the passage of Proposition 59).[1] The parties stipulated to bifurcate the proceedings into two phases. Phase One addressed whether the Bar has a legal duty

[1] Hereinafter "Proposition 59."

to provide the requested records and encompassed four sub-issues: "(a) Whether there is a public right of access to the requested records; [¶] (b) Whether providing the requested records in accordance with the protocols accompanying Petitioners' requests would entail the creation of a 'new record'; [¶] (c) Whether the right of public access requires the creation of a 'new record' or, in other words, whether the need to create a record relieves Respondents of the duty to provide access to the requested records; and [¶] (d) Whether the Court can order Respondents to provide the requested records in a manner other than that specified in the protocols accompanying Petitioners' requests."

Phase Two was to proceed only if the court found the Bar subject to a duty of disclosure, and was to address whether providing the records to petitioners would violate Bar applicants' privacy rights or impose an undue burden on the Bar that would justify limiting or denying Sander's request.

Phase One was tried on declarations and stipulated facts. The court ruled that neither constitutional principles nor the common law imposes a legal duty on the Bar to provide access to its records. The court looked first to the presumptive right of access to court documents that is grounded in the First Amendment right to open trials, exploring the distinction within that category between "adjudicatory" documents (i.e., official documents reflecting the work of the court), which are generally subject to public access, and others, such as preliminary drafts, personal notes and rough records, which are generally not. The court ruled that because the Bar's admission records are not adjudicatory, Sander has no right of access to them under the First Amendment.

The court also rejected Sander's position that the records are subject to a presumptive right of disclosure under the common law right of access to public records. In rejecting the common law right, the court reasoned: "[T]he foci in all these cases [on the common law right of access] are 'judicial records' as defined by C.C.P. § 1904, and the preliminary enquiry must be whether the documents sought so qualify. *E.g.*, *Copley*, 6 Cal.App.4th at 112. That is, this entirely general right of access is limited to judicial

records." Although the trial court recognized that the historic origins of the common law presumptive right of access to public documents predates the rule of access to court documents derived from the First Amendment, it concluded the common law right "has in effect been absorbed by the constitutional rule."

The court also declined to apply the common law presumptive right for another reason: a perceived lack of criteria governing its application. The court reasoned that most of the cases Sander cited in support of disclosure "simply assume that the records are 'public' and so by default ought to be disclosed. This does not help us here, because [neither the case authority] nor argument presented by Sander provides criteria by which I can determine whether the data sought in this case are 'public' records—except, as noted below in connection with Proposition 59, criteria which are so broad as to be self-defeating. [¶] Ultimately, Sander does not provide a coherent description of the common law scope of 'public records' which would authorize the relief he seeks here."

Finally, the court rejected Sander's position that Proposition 59 authorizes access to the Bar records. Proposition 59 provides that "[t]he people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." The court found that both its language and history demonstrate only the intention to constitutionalize, but not expand, existing law.[2]

In light of its rejection of Sander's request, the court declined to address whether or to what extent granting the petition would require the production of "new" records. The court found the record was insufficient to resolve this issue. It noted: "Whether a production involves the creation of a 'new' document likely implicates spectra of (i) efforts in making the production and (ii) relationship between extant data and that

[2] The court also found that rule 10.500 of the California Rules of Court is inapplicable to Bar records. Sander does not dispute this conclusion.

demanded. . . . [¶] Fundamentally, the issue is likely to devolve to the complexity of the tasks involved in generating the reports sought by Petitioners. Diagrams of the steps involved [citation] are not entirely useful in this regard. It appears that the relational database maintained by the State Bar [citation] includes the data sought by Sander [citation], and thus it is likely that a query can be formulated to extract the data sought. But without expert declarations on the matter, which do not beg the question of the extent to which 'new' data or its arrangement are involved, this issue is not ripe for adjudication."

The court excluded portions of petitioners' supporting declarations as irrelevant, apparently due to its conclusion that there is no public right of access to the Bar's records. "Whether the Bar has or has not previously released in [*sic*] information (Murphy Declaration), the reasons for Sander's work and his hypotheses (Sander Declaration), what various agency's practices are (LeClere Declaration), the Bar related correspondence proffered via the Chadwick Declaration, and the balance of the objected to evidence, are all irrelevant to the issue decided in the [statement of decision]."

Sander timely appealed from the ensuing judgment.

DISCUSSION

Sander asserts the public has a qualified right of access to the Bar's applicant records derived from two independent sources: the common law and Proposition 59. Since we should refrain from deciding an issue on constitutional grounds if it can be decided on a nonconstitutional basis (see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190), we will first address Sander's contention that the court erred when it found the Bar's records were not subject to disclosure under the common law presumption of access to public documents. We agree that the court erred.

A. *The Common Law Right of Access is Not Limited to Official Court Records*

The common law right of access to public documents originated long before, and independently of, the right of access to adjudicatory records grounded in the First

Amendment. (*United States v. Mitchell* (D.C. Cir. 1976) 551 F.2d 1252, 1257-1259; *Polillo v. Deane* (1977) 74 N.J. 562, 570 [tracing common law rule to English law dating back to first half of the 18th century].) As stated in *Polillo,* the policies underlying the common law right are deeply rooted in our democratic form of government. "The policy reasons for opening up government to the public have been expressed on numerous occasions throughout this nation's history. Foremost among them is the goal of fulfilling our cherished ideal of creating a 'government of the people.' James Madison wrote: 'A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' [Citations.] DeTocqueville felt that these same ideas were fundamental to the American tradition. In his perceptive commentaries about our system of government, he observed: 'It is by taking a share in legislation that the American learns to know the law; it is by governing that he becomes educated about the formalities of government. The great work of society is daily performed before his eyes, and so to say, under his hands.' " (*Polillo, supra,*74 N.J. at pp. 570-571.)

Similar sentiments are found in our state's legislative expressions of public policy as far back as 1953. In enacting the Brown Act, our state's open meeting law, "the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (Gov. Code, § 54950.) This expression of policy is repeated in the Bagley-Keene Open Meeting Act and its sentiment is captured in the Public Records Act, which has been interpreted to embody the strong public policy in

favor of disclosure of public records. (Gov. Code, §§ 11120 & 6250; *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1392.)[3]

Justice Powell echoed these expressions of the importance of open government in *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589 (*Nixon*), concerning media claims for access to the infamous Whitehouse tapes. Writing for the court, he addressed the scope of the common law right of access to public information—an "infrequent subject of litigation, [whose] contours have not been delineated with any precision." (*Id.* at p. 597.) He wrote, "*[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents*. In contrast to the English practice, [citation], American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies [citations], and in a newspaper publisher's intention to publish information concerning the operation of government, [citations.]" (*Id.* at pp. 597-598, fns. omitted, italics added.) The right of access is presumptive, not absolute, and the court observed that while its precise contours elude easy definition, "[t]he few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (*Id.* at 598-599.)

The Bar asserts that the common law right is circumscribed by the parameters of the parallel, but distinct, First Amendment right of access to *court* records, and therefore that it is limited to official adjudicatory records. We disagree. In contrast to the common law rule, the more recently developed right of access to court records grounded in the First Amendment derives from the United States Supreme Court's recognition of a First

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[3] These statements of policy are instructive even though the open meeting and public record acts do not apply to the Bar. (*Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 573.)

Amendment right to open trials (see *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 592), and has generally been limited to official court records of adjudicatory proceedings. (See, e.g., *NBC Subsidiary, supra*, 20 Cal.4th at pp. 1198-1209 & fn. 25; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 67-68.)

Almost 20 years after *Nixon*, the United States Court of Appeals for the District of Columbia rejected an interpretation that limited the scope of the common law right to official adjudicatory records in a markedly similar way as the Bar argues in this case. *Washington Legal Foundation v. United States Sentencing Commission* (D.C. Cir. 1996) 89 F.3d 897 concerned a request for access to the records of an advisory group to the United States Sentencing Commission. There, as here, the records sought were those of "a government entity . . . that is within the judicial branch *but is not a court*." (*Id*. at p. 903, italics added.) The district court concluded the documents were not public records within the meaning of the common law right of access because that right applies only to those documents which are " 'akin to court documents.' " (*Id*. at p. 900.)

The court of appeals rejected the district court's restrictive view. "Unlike the district court in the present case, we are not persuaded by the narrow focus of the federal cases that the common law right is limited to records that are 'similar . . . to court documents.' The Supreme Court's reference in *Nixon* to 'a general right to inspect and copy public records and documents, including judicial records and documents,' [citation], *clearly implies that judicial records are but a subset of the universe of documents to which the common law right applies*. [Citations.] Indeed, it has been said in this district that 'the general rule is that all three branches of government, legislative, executive and judicial, are subject to the common law right.' [Citation.] " (*Washington Legal Foundation v. United States Sentencing Commission, supra*, 89 F.3d at p. 903, italics added; see also *Schwartz v. United States Department of Justice* (D.D.C. 1977) 435 F.Supp. 1203 [common law right applies to all three branches of government].) Although there are few cases addressing this question, those that we have found demonstrate that California law has long recognized that right. (*Craemer v. Superior Court* (1968) 265

Cal.App.2d 216, 220 & fn. 3; *Mushet v. Dept. of Public Service* (1917) 35 Cal.App. 630, 636-638.)

We also disagree with the trial court's conclusion that the First Amendment right of access to court documents has "absorbed" the common law right to government information. None of the cases cited by the Bar so hold, and our independent research has failed to produce any precedent that suggests the more recently established First Amendment right has swallowed up the historically and analytically distinct right under the common law. To the contrary, cases decided well after the genesis of the First Amendment right have continued to recognize the separate and distinct common law right of access. (See, e.g., *KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1203; *Valley Broadcasting Co. v. United States District Court* (9th Cir. 1986) 798 F.2d 1289, 1293 [common law right of access furthers the same concerns protected by the First Amendment but is separate and distinct from the constitutional right]; *Stone v. University of Maryland Medical System Corp.* (4th Cir. 1988) 855 F.2d 178, 180 [distinct doctrines]; *In re Copley Press, Inc.* (9th Cir. 2008) 518 F.3d 1022, 1029; *Lugosch v. Pyramid Co.* (2nd Cir. 2006) 435 F.3d 110, 126 [different burdens under First Amendment and common law rights]; *In re Providence Journal Co.* (1st Cir. 2002) 293 F.3d 1, 10 [the two rights of access are not coterminous, although they overlap "because the jurisprudence discussing the First Amendment right of access . . . has been derived in large measure from the jurisprudence that has shaped the common-law right of access"].) The two rights of access to government information remain independently viable despite areas of overlap.

B. *Cases Addressing Access to Records of Adjudicatory Bodies Are Not Dispositive of Appellants' Request*

The issue presented here may not inevitably lead to production of the documents and information sought by appellants. That would only occur after further proceedings in the trial court. We only consider whether the common law rule of presumptive access to

public information extends to the Bar's admission records,[4] subject to balancing against the private interests implicated by disclosure.

The Bar provides no compelling reason that it does not. The Bar is a public corporation and the records sought relate to its official function of administering the bar exam, a matter of legitimate public interest. (See *Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 962; *Greene v. Zank* (1984) 158 Cal.App.3d 497, 504-507; Bus. & Prof. Code, §§ 6001, 6064.) Citing *Copley Press, Inc. v. Superior Court* (1992) 6 Cal. App. 4th 106, the Bar observes that *court* records subject to presumptive disclosure are limited to those " 'which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators[,]' " while other court documents "created or simply maintained by court personnel are internal documents to which the public has no right of inspection." Since the records Sander wishes to review are not in the former category, the Bar reasons they are not subject to public access. In other words, the Bar claims that because it is part of the judicial branch its records are immune from the common law presumption of access unless they are "adjudicatory" documents. As the argument goes, since the Bar is not in the business of adjudication, its records are not adjudicatory and need not be disclosed.

But the Bar's argument is premised on the implicit notion that the Bar, as the agency charged with overseeing attorney admission to the practice of law, is subject to the specific considerations that have shaped the parameters of the public right of access to *court* records. Those considerations are expressed neatly in *Copley Press, Inc.*: "The craft of the lawyer, judge and clerk involves important but elusive concepts, such as logic, justice, equity and the rule of law; however, the physical manifestation of these ideas is the written word. Courts may not produce much heat or light, and in fact not very much of a tangible nature at all, but they produce prodigious quantities of words.

[4] We clarify that we express no opinion as to the application of the law to records of Bar disciplinary matters.

The end product of all this effort is hopefully accurate, well conceived and generally beneficial. In order to reach that end result, however, an awful lot of defective words needs to be produced. . . . [¶] The very nature of preliminary drafts, personal notes and rough records is such as to argue against their inspection by third parties. Such inspection and possible use would in many cases be detrimental to the user, since the materials in [this category] are tentative, often wrong, and sometimes misleading. It is for this very reason that these materials are not regarded as official court records—they do not speak for the court and do not constitute court action. Perhaps more importantly, a requirement that [these] materials be made available for public view would severely hamper the users of the materials. The reason for preparation of a first draft is to extract raw and immature thoughts from the brain to paper, so that they can be refined and corrected. The judge's personal benchnotes are constructed so as to remind him, in his personal fashion and not in a form digestible by the public, of the aspects of the case he thought important. Much more harm would be done to the judicial process by requiring this [category of] material to be available to the public, than would ever be overborne by any benefit the public might derive thereby." (*Copley Press, Inc. v. Superior Court*, *supra*, 6 Cal. App. 4th at pp. 114-115.)

At oral argument, counsel for the Bar asserted that all of its records are judicial records, relying on the Bar's placement in article VI of the California Constitution. But the courts of record in this state are the Supreme Court, courts of appeal, and superior courts. (Cal. Const., art. VI, § 1.) The Bar is not a court. It is a public corporation. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6001.) Although it has been described as an administrative arm of the Supreme Court for purposes of assisting in matters of admission and discipline, the Bar also remains subject to control by the Legislature. (*Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 564.) The Bar has broad powers to investigate complaints and conduct formal disciplinary proceedings (*id.* at p. 565), and it may perform judicial functions in certain cases in connection with its responsibilities over discipline and admission. (See Rules of the State Bar, tit. V, Rules of Procedure, rules 5.1 et seq.; tit. IV, Admissions and Educational Standards., rule 4.6.)

But the Bar is not a court and does not function as a court for all purposes. The Bar is controlled by a board of governors, composed of a group of members and its president, that is vested with oversight of its executive functions. (Bus. & Prof. Code, §§ 6010, 6011, 6030.) It has many responsibilities that are more administrative than judicial. These include administration of the Bar exam, oversight of legal specialization and certification programs, the special masters program, the lawyer assistance program, foreign or out-of-state legal consultants, client security funds, lawyer referral services, and certification of legal education providers. (See Rules of the State Bar, tit. III, Programs and Services, div. 2, chs. 4-7, div. 3, chs. 1-4, div. 4, ch. 1, div. 5, chs. 1, 4; tit. IV, Admissions and Educational Standards, div. 1, ch. 5.)

Appellants are not seeking judicial records that pertain to the Bar's adjudicatory functions or preliminary notes, rough drafts or personal notes that may bear upon duties pertinent to admission to the Bar. Instead, they seek data obtained from Bar applicants. Disclosure of the Bar's admissions data does not necessarily raise the concerns peculiar to the courts that have driven the development of the rule shielding many preliminary, unofficial court documents from public access. We perceive no basis for holding the Bar's raw admission data immune from public scrutiny because they do not satisfy the test devised to distinguish between the official work product of the courts and their preliminary, nonadjudicative records. Moreover, applying the adjudicatory/nonadjudicatory test here, as the Bar urges us to do, would seemingly exempt all records of any administrative arm of the judicial branch of government from the longstanding common law presumption of access to public records[5] without the justification that exists for the particular protections afforded to nonadjudicative records produced by the courts. The Bar cites no persuasive authority for such an unwarranted exemption.

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[5] We are aware that the recent adoption of rule 10.500 of the California Rules of Court (effective Jan. 1, 2010) expressly affords public access to certain nondeliberative and nonadjudicative records of most judicial branch entities. (Rule 10.500(a)(1).) This rule, however, does not apply to the Bar. (See Cal. Rules of Court, rule 10.500(c)(3).)

C. *The Public Access Determination Requires Balancing Applicants' Privacy Concerns and the Burden Imposed on the Bar Against Public Policy Favoring Transparency*

Another basis for the trial court's ruling was its observation that "neither *Nixon* nor any other case nor argument provided by Sander provides criteria by which I can determine whether the data sought in this case are 'public' records . . . ." Here, too, we disagree with the analysis. In context, the criteria that govern application of the presumptive right of disclosure are stated in *Craemer:* "[W]here there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. *In this regard the term 'public policy' means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or public good*." (*Craemer v. Superior Court, supra*, 265 Cal.App.2d at p. 222, italics added; see also *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 662.) The trial courts are charged with exercising their discretion "in light of the relevant facts and circumstances" (*Nixon, supra,* 435 U.S. at pp. 598-599) to balance such policy factors against "the policy of this state that public records and documents be kept open for public inspection in order to prevent secrecy in public affairs." (*Craemer, supra,* at p. 222.) The Legislature has prescribed the same test when, as here, a public entity asserts a privilege to not disclose official information—i.e., "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) To invoke the privilege, the claimant (with exceptions not relevant here) must show that disclosure contravenes the public interest "because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ." (Evid. Code, § 1040, subd. (b)(2).)

Here, while the Bar's rules address the disclosure of documents pertaining to many of its administrative responsibilities, they state that: "Applicant records are confidential unless required to be disclosed by law . . . ." (State Bar Rules, tit. IV,

Admissions and Educational Standards, div. 1, rule 4.4.) Thus, even the Bar acknowledges that the confidentiality of applicant records is not absolute. Both case law and statute require the court to determine whether disclosure is required by balancing applicants' privacy concerns and the burden imposed on the Bar against the strong public policy favoring openness in public affairs.

We hold the court erred in ruling that the common law presumption of access to public information is limited to adjudicatory documents related to court proceedings and, to the extent the court acknowledged the common law presumptive right of access applies to public records generally, that it erred in declining to assess any countervailing public policy considerations against the public policy favoring access. Whether those considerations are such as to outweigh the presumptive right of access must therefore be addressed on remand, as must the relevance of the excluded declarations to those issues. The trial court is in the best position to weigh the competing interests and strike the appropriate balance.

In light of these conclusions, we do not reach the constitutional issues concerning the potential application of Proposition 59 to Sander's records request. We also decline to reach the question of whether Sander's request would impermissibly require the creation of a "new" record. The trial court considered this issue and, in addition to finding it mooted by its conclusion that Sander had no legal basis for access to the Bar's admission records, found the factual record was inadequately developed to resolve the issue. That latter determination was firmly within the court's discretion and we will not disturb it.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings.

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Siggins, J.

We concur:

_____
McGuiness, P.J.

_____
Pollak, J.

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