

# Memorandum

To : Ted, Bob B., Roger, Tom S.,  
Bob S., Tom H.

Date : Nov. 5, 1980

M-80-131

From : **FAIR POLITICAL PRACTICES COMMISSION**  
Barbara Milman

Subject: Requests under the Public Records Act

The Commission has received a request under the Public Records Act for release of all formal complaints and all related investigatory and other material from our files for inspection and copying. This request has raised the question of whether this information should or can be released under our own regulations, under the Public Records Act, or under the Information Practices Act.

The Commission's regulations require disclosure of all formal complaints, 2 Cal. Adm. Code Section 18362(a), and prohibit disclosure of all related investigatory files and other materials except in certain limited circumstances. 2 Cal. Adm. Code Section 18362(b). Subsections (b)(1)-(9) of Section 18362 specify a number of particular situations in which disclosure of investigatory files is permissible. None of these subsections authorizes release of our files in response to a general request for inspection and copying.

Disclosure could be authorized, however, under subsection (b)(10) of Section 18362, if such disclosure were found to be in the public interest:

. . . .

(10) When the Executive Director determines that the public interest in disclosure of information clearly outweighs the interest in non-disclosure of the information.

2 Cal. Adm. Code Section 18362(b)(10)

Since Section 18362(b)(10) leaves open the possibility of disclosure, without answering the policy question of whether or not the requested disclosure is in the public interest, we must turn to other sources for guidance on this issue. The relevant sources are the Public Records Act (Government Code Section 62500 et seq.) which may compel or permit disclosure, the constitutional guarantee

of the right to privacy (California Constitution, Article I, Section 1), and the Information Practices Act (Civil Code Section 1798 et seq.) which is designed to effectuate the constitutional right to privacy.

1. The Public Records Act

Both formal and informal complaints and related investigatory files are public records within the meaning of the Public Records Act.

"Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

Government Code Section 6252(d)

Section 6253 and 6256 provide that all public records must be made available upon request for inspection and copying, unless the records are included within one of the specific exceptions contained in Sections 6254 of the Act, or in the general exception contained in Section 6255.

(a) Section 6254

Section 6254(f) exempts from disclosure under the Public Records Act:

Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes, . . . (emphasis added)

The first question this raises is whether or not the Commission's investigatory files are "compiled" for "law enforcement" purposes within the meaning of 6254(f). So long as the information in the files has been collected for the primary purpose of law enforcement -- that is enforcement which is penal in nature -- and the "prospect of enforcement proceedings is concrete and definite," the Commission's

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investigatory files are covered by the exception in 6254(f). State of California ex rel Division of Industrial Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 783-785; Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212-213; Bristol-Meyers Co. v. F.T.C. (1970) 424 F. 2d 935, 939-940 (D.C. Cir.). Since the sole purpose for which investigatory files are prepared is for administrative enforcement proceedings, the investigatory files requested come within the exception of 6254(f) and need not be disclosed. Of course, the original complaints, as well as the files prepared on the basis of the complaints, are covered by Section 6254(f). Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 650-654.

The exemption from disclosure in Section 6254(f) does not preclude disclosure, however. Section 6254 provides that:

Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law.

As this section has been read by the courts, it "endows the agency with discretionary authority to override any of the 14 statutory exemptions [of Section 6254] when some dominating public interest favors disclosure. The 14 exemptions, then, are permissive, not mandatory; they permit nondisclosure but do not prohibit disclosure." Black Panther Party v. Kehoe, supra, 42 Cal. App. 3d at 656.

(b) Section 6255 and the Right to Privacy

In addition to the reasons listed in Section 6254, Section 6255 permits an agency to withhold a public record.

. . . by demonstrating that . . . on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

In interpreting Section 6255, courts have held that the interests of both the complainant and of the agency in protecting the identity of the complainant from discovery, and in preventing possible retaliation, lawsuits, or harassment against the complainant, may outweigh the public's interest in disclosure. In a case involving complaints to a licensing agency, the court pointed out that:

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Both complaining citizens and the public have an interest in the confidentiality of complaints of wrongdoing prior to the inception of formal enforcement or disciplinary proceedings. Effective enforcement of penal laws depends to no small extent upon the readiness of citizens to complain of alleged crime. Complainants often demand anonymity. The prospect of public exposure discourages complaints and inhibits effective enforcement. Similarly, effective policing of licensed occupations depends heavily on citizens' readiness to complain of wrongdoing by licensees.

Black Panther Party v. Kehoe, supra,  
42 Cal. App. 3d at 653.

See also State of California ex rel Division of Industrial Safety v. Superior Court, supra, 43 Cal. App. 3d at 785-786 (complaints of unsafe working conditions). Following this line of reasoning, the Commission records of complaints and its investigatory files should be kept confidential under Section 6255 to protect the sources of the information prior to a finding of probable cause and the inception of formal enforcement proceedings.

Another way of looking at the question of confidentiality is from the point of view of the person being charged with possible misconduct.

In the formulation of a statutory policy governing disclosure of citizen complaints, public concern extends to the alleged wrongdoer as well as the alleged victim. Many a reputation has been lost, many a life damaged, by unfounded accusations of wrongdoing. The public has an ethical interest in protecting private reputations against notoriety emanating from "crank" or malicious accusations.

Black Panther Party v. Kehoe, supra,  
42 Cal. App. 3d at 653.

Case law prior to the enactment of the Public Records Act recognized the privacy right of an individual not to have groundless charges against him made public. In upholding the right of the State Bar to keep confidential those complaints against attorneys which were found to be without merit, the California Supreme Court said:

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The procedure and its confidential character is a great protection to the lawyer. He is not exposed to publicity where groundless charges are made. In some of the cases, the charges are so meritless that the attorney is not contacted for his explanation. The fact that a charge has been made against an attorney, no matter how guiltless the attorney might be, if generally known, would do the attorney irreparable harm even though he be cleared by the State Bar.

Chronicle Pub. Co. v. Superior  
Court (1960) 54 Cal. 2d 548, 569.

The interest of a candidate or a public official in not having groundless charges revealed is at least as great as the interests protected in the Black Panther and the Chronicle Pub. Co. case discussed above. Following the reasoning of these cases, it seems that complaints and investigatory files into complaints which are found to be without merit should be exempt from disclosure under Section 6255 as well as under 6254(f).

However, there is not the same interest in preventing disclosure of charges which have been found, after a completed enforcement proceeding to be valid. The California Supreme Court in the Chronicle Pub. Co. case ordered disclosure of charges which were found by the State Bar to merit action, even if that action was only private reproof. Chronicle Pub. Co. v. Superior Court, supra, 54 Cal. 2d at 564, 574-575. Similar considerations led the court in Amer. Federation of State Etc. Employees v. Regents of the University of California (1978) 80 Cal. App. 3d 913, to uphold in part a request under the Public Records Act for disclosure of a completed University "audit investigation" of charges of financial irregularities by a University employee.

We are further of the opinion that a proper reconciliation of the Act and the constitutional right of privacy mandates that, in situations such as that before us, the recorded complaint be of a substantial nature before public access is permitted. And patently, it is in keeping with the rationale of Chronicle Pub. Co. and the express purpose of the Act that where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists. Courts should not be bound by a contrary

determination of the public agency, for if that were so the Act's decree that -- "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" -- would be largely frustrated.

Id. at 918-919.

Following the reasoning of these cases, it would appear that under Section 6255, the Commission could (and perhaps must) release complaints and investigatory files in cases where the charges were found after an enforcement proceeding to be meritorious, even though a refusal to disclose these records would technically be justified under Section 6254(f). For the most part, such disclosure would involve cases in which the information was already public. Cases in which charges had been found to be meritorious, but in which enforcement proceedings were not initiated, would be rare. Such cases would most likely involve only "minor violations," and the public interest in disclosure would not outweigh privacy interests in nondisclosure. Amer. Fed. of State Etc. Employees v. Regents, supra, 80 Ca. 3d at 918-919. Finally, charges which were found after investigation to be groundless or incapable of proof should never be disclosed under Section 6255. The privacy rights of the individuals involved in such complaints or investigations clearly outweigh the public interest served by disclosure.

## 2. The Information Practices Act of 1977

Another source for determining how an individual's right of privacy should be balanced against the public's right of access to public records is the Information Practices Act of 1977, Civil Code Section 1798 et seq. The Information Practices Act is designed to enforce and regulate the constitutional guarantee of privacy. While the Information Practices Act can not prevent disclosure of any information under the Public Records Act, Civil Code Section 1798.24(g), it may serve as a guideline for interpreting Section 6255 of the Public Records Act. See Atkisson v. Kern County Housing Auth. (1976) 59 Cal. App. 3d 89, 99-100.

The Information Practices Act classifies administrative complaints and investigatory files as "confidential" documents until such time as administrative enforcement proceedings are completed. Civil Code Section 1798.3(a)(4). Once the proceeding is complete, any material in the investigatory

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file which could reasonably "reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges or qualifications" is still classified as "personal" information. Civil Code Section 1798.3(b) and (c)(1). While the information is classified as "confidential" or "personal" disclosure to persons other than those directly affected is severely limited (unless it is disclosed under the Public Records Act) Civil Code Section 1798.24. This can be taken as a policy determination that there are substantial privacy interests which suggest caution in revealing complaints and investigatory files, even when the information has been found to be true and disclosure is permissible (but not mandatory) under the Public Records Act.

### 3. The Political Reform Act

Another source for policy in this area is, of course, the Political Reform Act itself. Government Code Section 83115.5 provides that:

... A proceeding held for the purpose of determining probable cause shall be private unless the alleged violator files with the Commission a written request that the proceeding be public.

This section implies that no information about enforcement proceedings prior to a finding of probable cause can be disclosed unless disclosure is requested by the alleged violator. If this is read as a statutory prohibition against disclosure of information in complaints or investigatory files prior to a finding of probable cause, it provides another reason for declining to disclose any information pursuant to a request under the Public Records Act. The Public Records Act, Government Code Section 6254(k), specifically exempts from (mandatory) disclosure:

Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law....

### Conclusion

After reviewing the relevant law, it appears that the Commission is not required by the Public Records Act to disclose to the public any complaints (formal or informal), or any investigatory files compiled by the Enforcement Division. However it may, in its discretion, release these records

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under the Public Records Act so long as their release does not conflict with the constitutional right to privacy or with any other laws. Applying these standards to complaints and investigatory files, disclosure under the Public Records Act is probably justified in the following circumstances only:

a) Complaints. Although the Commission regulations, Section 18362(a), provide that all formal complaints must be released publicly, this policy should probably be reconsidered in light of the preceding discussion. A better policy might be to disclose complaints (both formal and informal) only after completion of enforcement proceedings, and then only if the charges were substantiated. In any case, disclosure should not be made before a finding of probable cause based on the complaint. The only exception to this may be when the complainant or the person charged makes the complaint public prior to the probable cause hearing. In such a situation, fairness may require the Commission to confirm that the complaint has been filed, possibly to comment on it, and to make public a decision to dismiss the complaint if there is no finding of probable cause.

b) Investigatory files. These files should be disclosed only after completion of enforcement proceedings, and even then only if, on a case-by-case basis, it has been established that information in the file is true. The cases indicate that privacy interests will not necessarily outweigh the public interest in disclosure of information which has been found to be reliable after completion of the administrative enforcement proceeding.

c) Disclosure in the Course of Enforcement Proceedings. The preceding discussion applies only to disclosure under the Public Records Act. It in no way affects the right of the Commission to disclose information in the course of any judicial or quasi-judicial proceeding, or in preparation for such a proceeding, to the parties, to the Commission, in a public hearing or in any document prepared in connection with any such proceeding. See Civil Code Section 1798.24(d), (e).

BM:plh