CALIFORNIA SUPREME COURT

Williams v. Superior Court, Freedom Newspapers, Inc., Real Party in Interest,

5 Cal. 4th 337, 93 D.A.R. 7114, No. S022639 (June 7, 1993).

Statutory Exemption From Public Disclosure for Law Enforcement Investigatory Files is Strictly Construed

In this proceeding, the California Supreme Court interpreted the California Public Records Act, Government Code section 6250 et seq.; the particular provision at issue, Government Code section 6254(f), exempts law enforcement investigatory files from the Act's general requirement of public disclosure. The underlying dispute arose out of a newspaper's request for access to a county sheriff's records of disciplinary proceedings against two deputies. The disciplinary proceedings arose out of two separate investigations of the deputies' conduct—an administrative investigation and a criminal investigation. Among other things, the sheriff refused the request by asserting that the requested criminal investigation records were expressly exempt from disclosure under section 6254(f). Eventually, the matter reached the Fourth District Court of Appeal, which, in attempting to set standards for determining whether particular records would be exempt from disclosure, articulated two limitations on the section 6254(f) exemption that do not appear on the face of the statute. *[12:2&3 CRLR 277]*

The first such limitation resulted from the appellate court's decision to incorporate into California law certain evaluative criteria set out in the federal Freedom of Information Act (FOIA), 5 U.S.C. section 552, which, like the Public Records Act, permits the withholding of records or information compiled for law enforcement purposes. In contrast to the Public Records Act, however, the FOIA permits withholding of these records only under six specified conditions. By incorporating the FOIA criteria into the Public Records Act, the appellate court in effect held that the sheriff's law enforcement records are not exempt from disclosure, despite the express exemption set out in section 6254(f), unless the sheriff could satisfy one or more of the FOIA criteria.

The second nonstatutory limitation that the appellate court imposed on the section 6254(f) exemption affects records which are not exempt from disclosure on their face but become exempt because of their inclusion in an investigatory file; the appellate court appeared to have held that such records remain exempt only so long as they continue to relate to a "pending" investigation.

On appeal, the California Supreme Court clarified that the only two issues properly before it were the sheriff's objection to the appellate court's holding that the trial court must apply the FOIA criteria in deciding whether the criminal investigation file must be produced under the Public Records Act, and the sheriff's objection to the court of appeal's holding that the exemption for investigatory files terminates when the investigation terminates. The court first addressed the appellate court's holding that section 6254(f) is limited by the FOIA criteria, and concluded that the holding must be rejected as inconsistent with the language, history, and intent of the statute. The court explained that, without the FOIA criteria, section 6254(f) "articulates a broad exemption from disclosure for law enforcement investigatory records." A portion of the section which requires disclosure of certain information derived from the records about incidents, arrests, and complaints does not, in most cases, entail disclosure of the records themselves. In contrast, section 6254(f), as the Fourth District interpreted it, would exempt investigatory records only to the extent that disclosure of the information would trigger one of the six FOIA criteria.

According to the Supreme Court, the most obvious and important objection to the Fourth District's interpretation of section 6254(f) is that it finds no support in the statutory language. In drafting section 6254(f), the legislature expressly imposed several precise limitations on the confidentiality of law enforcement investigatory records. The court commented that the legislature is capable of articulating additional limitations if that is what it intends; further, the legislature has already enacted statutory provisions to address some of the concerns articulated in the FOIA criteria. In view of the legislature's painstaking efforts to articulate appropriate limitations on the mandatory disclosure of public records, the court found that the argument in favor of incorporating the FOIA criteria into the Public Records Act is "extremely weak."

The court also stated that the legislature's careful efforts to provide access to selected information from law enforcement investigatory records would be largely a waste of time if, as the court of appeal held, the records themselves are subject to disclosure when none of the FOIA criteria apply. The Supreme Court cautioned that a court should not lightly adopt an interpretation of statutory language that renders the language useless in many of the cases it is intended to govern. Accordingly, the Supreme Court concluded that section 6254(f) should not be interpreted to incorporate the FOIA criteria.

The court then considered whether the exemption for law enforcement investigatory files ends when the investigation ends; while the parties agreed that otherwise nonexempt materials may become exempt through their inclusion in an investigatory file, they disagreed about the duration of that exemption. The newspaper argued that the exemption terminates when the investigation terminates. On the other hand, the sheriff asserted that the statute on its face contains no time limitation and that the exemption serves interests that outlive the investigation for which the file was originally created, such as the safety of informants and undercover officers, the integrity of related investigations, and the privacy of persons whose affairs have been investigated but who have not been charged with crimes.

In considering the scope of the exemption, the court reviewed the language of the statute, noting that nothing therein purports to place a time limit on the exemption for investigatory files. According to the court, if the legislature had wished to limit the exemption to files related to pending investigations, words to achieve that result are available; the court noted that it is not the province of courts "to insert what has been omitted." Therefore, the court held that, while there may be reasons of policy that would support a time limitation on the exemption for investigatory files, such a limitation is virtually impossible to reconcile with the language and history of section 6254(f). After an exhaustive review of state and federal caselaw on the matter, the court stated in a footnote that "the matter does appear to deserve legislative attention."

Roberts v. Palmdale, et al.,

5 Cal. 4th 363, 93 D.A.R. 8030, No. S028100 (June 24, 1993).

Legal Opinion Directed to Council Members Is Protected by Attorney-Client Privilege From Public Disclosure

In this case, the California Supreme Court considered whether the California Public Records Act, Government Code

section 6250 *et seq.*, requires public disclosure of a letter from the city attorney distributed to members of the city council, expressing the legal opinion of the city attorney regarding a matter pending before the council; whether the transmission of the written legal opinion at issue in this case was a "meeting" within the terms of the Ralph M. Brown Act, Government Code section 54950 *et seq.*; and whether a 1987 amendment to the Brown Act intended to abrogate the attorney-client privilege as it applies to the communication of written legal advice by a city attorney to a city council. By way of background, the court explained that after the City of Palmdale's planning commission approved a parcel map application, appellant Charmaine Roberts, a resident and taxpayer of the city affected by the proposed development, appealed the matter to the Palmdale City Council. The city council took up the appeal at a public meeting. Appellant's attorney wrote an eight-page letter to the city council, arguing that the approval of the parcel map was subject to legal challenge in several respects and concluding that, unless it reversed the approval of the parcel map, the city council was "a willing party to this flagrant effort to undermine its own laws and will be vulnerable to a court action to overturn its decision."

The city council referred the letter to the city attorney and continued the hearing on the matter. The city attorney prepared a confidential written response that was distributed to the members of the city council. A public meeting ensued, at which the issues raised in the letter by appellant's counsel were discussed. At the hearing, appellant did not ask to see the letter from the city attorney to the city council, though the letter was referred to at that hearing. The city council denied the appeal and approved the map. Five days later, appellant's counsel demanded a copy of the city attorney's letter, arguing that the denial of the appeal and approval of the map were void if the city council had acted on the basis of secret communications. The city council refused to provide appellant with a copy of the letter from the city attorney. Appellant then petitioned for administrative mandamus, seeking injunctive and declaratory relief to void the action of the city council and require the city council to make the disputed letter public. The superior court denied her petition, but the court of appeal reversed. *[12:4 CRLR 241]*

The first question addressed by the Supreme Court is whether the city council may assert the attorney-client privilege as to the letter at issue in this case under the Public Records Act, even though the letter did not relate to pending litigation. The court explained that the Public Records Act provides that "every person has a right to inspect any public record, except as hereafter provided." The Act then exempts certain records from disclosure; for example, section 6254(k) exempts "[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." The court concluded that, by its reference to the privileges contained in the Evidence Code, the Public Records Act makes the attorney-client privilege applicable to public records. The court also explained that Evidence Code section 950 *et seq.* defines the attorney-client privilege, and found that the letter at issue in this case meets the definition of the term "confidential communication" as used in the Evidence Code. Further, the court stated that "under the Evidence Code, the attorney-client privilege applies to confidential communications within the scope of the attorney-client relationship even if the communication does not relate to pending litigation; the privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." The court also rejected appellant's claim that Government Code section 6254(b) limits the attorney-client privilege in the context of public records to matters that are actually in litigation, finding that section 6254(b) refers to litigation records generally, while section 6254(k) specifically refers to matters of privilege, including the attorney-client privilege.

Appellant next contended that under Government Code section 54956.9 (part of the Brown Act, which generally requires local government bodies to deliberate in public), any communication of any nature with counsel may only occur between a local governing body and its attorney as provided by the section, and since no litigation was pending or threatened in this case, and no notice of a closed session was given, no closed session with counsel could be permitted. According to the court, the appellant assumed that the transmission of a legal opinion is a "closed-session meeting" or "closed session" of the city council within the terms of section 54956.9. The court rejected this argument, finding that the terms "meeting" and "session" "obviously imply collective action...and not...the passive receipt by individuals of their mail."

Finally, the court addressed appellant's claim that recent amendments to the Brown Act require the abrogation of the attorney-client privilege except to the extent specifically provided in Government Code section 54956. In dismissing this claim, the court explained that "the language of section 54956.9 abrogates the attorney-client privilege for the purpose of the *open meeting* requirements of the Brown Act, except as provided by the section itself, but it does not purport to regulate the transmission of documents such as are at issue in this case. In fact, the section acknowledges that written matter sent from attorney to governmental client is regulated by the *Public Records Act* and not this section, by providing that the attorney's written memorandum of reasons for requesting a closed session required by the section is 'exempt from disclosure pursuant to section 6254.1' of the Public Records Act" (emphasis original).

CALIFORNIA COURTS OF APPEAL

Funeral Security Plans, Inc. v. Board of Funeral Directors and Embalmers,

16 Cal. App. 4th 1672, 93 D.A.R. 8597, No. C011460 (July 1, 1993).

Pending Litigation Exception to Open Meeting Act Protects Funeral Board's Investigation Before Initiation of Suit

In this proceeding, Funeral Security Plans, Inc. (FSP) challenged the trial court's rejection of its allegations that the Board repeatedly violated the Bagley-Keene Open Meeting Act, Government Code section 11120 *et seq.*; the Board cross-appealed, seeking a reversal of the trial court's denial of its request for court costs and attorneys' fees. On March 25, the Third District Court of Appeal issued a opinion which affirms in part and reverses in part the trial court's decision. Following the court's decision, the Board filed a petition for rehearing; on April 26, the court granted the Board's motion. On July 1, the Third District released a modified opinion which still affirms in part and reverses in part the trial court's decision; however, that opinion contained no substantial changes to the court's original decision summarized in the last issue of the *Reporter. [13:2&3 CRLR 70–71, 225–26]*

Among other things, the Third District interpreted the scope of Government Code section 11126(q), the "pending litigation" exception to the public meeting requirement of the Bagley-Keene Open Meeting Act, and concluded that the presentation

of facts by legal counsel, deliberation, and decisionmaking are necessary components of "conferring with" and "receiving advice from" legal counsel for purposes of the "pending litigation" exception to the Act. The court also held that the Board did not comply with the Act's requirement that "legal counsel of the state body shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session" whenever the Board meets in private under the "pending litigation" exception. Third, the court interpreted Government Code section 11126(d) to permit the Board to deliberate on an adjudicative matter in closed session only if evidence introduced in a public Administrative Procedure Act (APA) proceeding is being considered by the Board in rendering its decision. However, section 11126(d) does not allow the Board to go into closed session to receive new evidence and/or deliberate on petitions for termination of probation, reinstatement of a license, or reduction of a penalty not based on evidence introduced at a public administrative proceeding. Finally, the court held that the Board's two-member advisory committees are state bodies which must meet in public, pursuant to Government Code section 11121.7.

On behalf of the Board, the Attorney General's Office (AG) filed a petition for review with the California Supreme Court in early August. Among other things, the AG's petition disputes the Third District's finding that the Board's two-member advisory committees are state bodies which must meet in public under the Bagley-Keene Act and the court's interpretations of both Government Code section 11126(d) and the scope of the "pending litigation" exception to the Act. At this writing, the Supreme Court has not issued a ruling on the Board's petition for review.

Buhl, et al., v. Hannigan, et al.,

16 Cal. App. 4th 1612, 93 D.A.R. 8501, No. G012245 (June 30, 1993).

Mandatory Motorcycle Helmet Law's Relationship to Public Safety Concerns Satisfies Constitutional Standards

In this proceeding, the Fourth District Court of Appeal upheld the constitutionality of California's Mandatory Motorcycle Helmet Law, Vehicle Code section 27802 *et seq.*, which requires motorcyclists and their passengers, when riding on the highways, to wear helmets complying with section 27802, and makes it unlawful for them to fail to do so. Among other things, the court held that the law is rationally related to a legitimate state concern; it is not impermissibly vague; it does not violate the Americans with Disabilities Act (42 U.S.C. sections 12132–12213) or the Unruh Civil Rights Act (California Civil Code section 51 *et seq.*); and it does not impermissibly infringe on freedom of religion, freedom of expression, or the right of privacy.

Dibb v. County of San Diego, et al.,

18 Cal. App. 4th 1520, 93 D.A.R. 12221, No. D016569 (Sept. 24, 1993).

Board of Supervisors Can Create A Citizens' Review Panel With the Power to Subpoena Witnesses

In 1990, the San Diego County Board of Supervisors proposed an amendment to the County Charter, adding section 606 requiring the Board to create the Citizens Law Enforcement Review Board (CLERB); county voters approved the amendment in November 1990. Accordingly, the Board adopted section 606 which provides—among other things—that CLERB's duties include the review and investigation of citizen complaints and any deaths of individuals arising out of or in connection with actions of peace officers, and that CLERB shall have the power to subpoena and require attendance of witnesses and the production of books and papers pertinent to its investigations and to administer oaths. Pursuant to Code of Civil Procedure section 526a, plaintiff brought this action as a county taxpayer seeking to enjoin the County from spending funds in order to implement CLERB, arguing that the County may not constitutionally grant CLERB the subpoena power.

In considering whether a charter county may amend its charter to provide for the creation of a citizens' panel to review citizen complaints about the county sheriff's and probation departments and, more specifically, grant to that panel the power to subpoena witnesses and evidence, the Fourth District Court of Appeal initially noted that Government Code section 25303 requires a county board of supervisors to "supervise the official conduct of all county officers...and particularly insofar as the functions and duties of such county officers...relate to the assessing, collecting, safekeeping, management, or disbursement of public funds." Further, Government Code section 31000.1 provides that the "board of supervisors may appoint commissions or committees of citizens to study problems of general or special interest to the board and to make reports and recommendations to the board"; according to the court, "[c]learly CLERB is a citizens' commission which falls within this broad definition."

After finding that the board created an authorized entity to study issues within the legitimate scope of the Board's responsibilities, the court then considered whether the County charter may grant to this entity the power to subpoena witnesses and documents to assist in its investigations. The Fourth District noted that article 11, section 4, of the California Constitution authorizes charter counties to legislate on a variety of local topics and specifies that the county charter shall provide for the powers and duties of all county officers. Because CLERB members perform a public function, are appointed to a fixed "term of office," and serve without compensation, the court found that they qualify as "county officers" within the meaning of section 4; accordingly, the County is authorized to specify in the charter or by ordinance their powers.

The court explained that the intent behind section 4 is to extend to counties the option of "home rule"—the right of self-government over local and county affairs. According to the court, "[u]tilization of the subpoena power is not in any sense inconsistent with the function of local government"; moreover, "as a practical matter, eliminating the subpoena power would frustrate CLERB's salutary purposes...because it is likely many peace officers and other critical witnesses would not appear voluntarily." The court therefore concluded that the provisions of the California Constitution which authorize "home rule" by charter counties permit such a county, in delineating the powers of county officers and employees, to confer on a citizens; review board the authority to subpoena witnesses and documents in furtherance of its investigations.

CALIFORNIA SUPERIOR COURTS

Planning and Conservation League v. Lungren,

No. C-93 373836 (July 2, 1993).

Court Invalidates Election Law Prohibiting Ballot Initiative Sponsors From Including Projects in the Initiative That Benefit Them

Sacramento County Superior Court Judge James Ford has ruled that Elections Code section 5358, which provides that no

person shall include an appropriation for a particular project within the text of an initiative petition in exchange for a campaign contribution or a pledge for a campaign contribution for purposes of qualifying the petition for the ballot, violates the First Amendment and is therefore invalid. The Planning and Conservation League (PCL) brought this action in March after Attorney General Dan Lungren refused to process a PCL-backed initiative called the California Safe Drinking Water and Fish and Wildlife Protection Act of 1994; according to Lungren, he refused to approve the initiative because the backers failed to sign a required affidavit indicating compliance with section 5358. PCL contended that section 5358 infringes on their rights to freedom of speech and association.

Ford agreed with PCL, stating that section 5358 "seems to be a severe infringement on the initiative process itself and has a chilling effect on the initiative process and would prevent people from going forward and presenting legislation that they thought was perfectly suitable, good for the public weal, and beneficial to the people of the State of California as a whole." Ford further noted that "[i]t seems almost that the objection here really is a form of new political correctness in a way that no one must have a base motive to promote legislation in the initiative process, that one must have a pure and sweet heart before one can be a proponent of legislation."

The Attorney General is expected to appeal the decision; at this writing, however, no notice of appeal has been filed.