NINTH CIRCUIT COURT OF APPEALS

McClellan Ecological Seepage Situation, et al. v. Carlucci,

835 F.2d 1282 (Dec. 31, 1987).

FOIA Can Require Reasons for Requesting Records If Requester Seeks Fee Waiver

Although a person requesting records under the federal Freedom of Information Act (FOIA) cannot be required to give a reason for the request, if the requester also applies for the "public interest" fee waiver, an explanation of the need for and purpose to which the records will be put may be required.

McClellan Ecological Seepage Situation (MESS) is a nonprofit organization which sought records regarding a local toxic waste site under the control of the U.S. Department of Defense. Plaintiffs were also involved in a tort action against the Air Force regarding the same site. In addition to requesting records, MESS also sought a waiver of search and copying fees, which would total in excess of $50,000. Before responding to the request, the FOIA officer requested answers to 23 questions about MESS' history, identity, and plans for the information. MESS refused to respond but, based upon subsequent discussions, the Department offered to reduce the fees by 25%.

MESS sued, seeking a full waiver. The District Court for the Eastern District of California affirmed the 25% waiver. One week after the district court's order, Congress amended the waiver section of the FOIA, 5 U.S.C. section 552(a)(4)(A). The new statute, explicitly made retroactive in impact, changed the test for waiver from "in the public interest because furnishing the information can be considered as primarily benefitting the general public" to "documents shall be furnished without any charge or at a charge reduced...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." The amendment also gave the courts *de novo* review power, limited to the record before the agency.

On appeal, the Ninth Circuit, per Judges Beezer, Tang, and Lynch, upheld the 25% waiver. The first test for fee waivers is that the disclosure of information not be primarily in the commercial interest of the requester. The court held that MESS passed this test because its tort claim did not relate to commerce, trade, or profit. However, on the revised "public interest" exception—that the information must be likely to contribute significantly to public understanding of the operations of government—the court held that plaintiffs had not submitted sufficient information to support the claim.

The court placed heavy emphasis on the word "significantly". The court held that MESS' request and intentions were vague in the record. The court further opined that "the request gives no indication of requester's ability to understand and process" the requested information, took specific aim at MESS' name, and suggested without determining that "[r]equester's credibility" was an issue and there was a "suspicion that requesters serve as a stalking horse for private claimants."

CALIFORNIA COURTS OF APPEAL

Citizens for Public Accountability, et al. v. Desert Health Systems, Inc., et al., Desert Hospital District, Real Party in Interest,

___Cal.App.3d___, 88 D.A.R. 2355, No. E004137 (4th Dist., Feb. 23, 1988).

Court Requires Application of Open Meeting Law to Private Corporation Operating Public Hospital

In direct conflict with the First District Court of Appeal, the Fourth District has held that private corporations which receive all of the assets, obligations, and duties of a public hospital district must comply with the Brown Act, Government Code section 54950 *et seq.*

In June 1986, the Desert Hospital District in Palm Springs completed a restructuring under which it oversaw the creation of new, nonprofit private corporations to run the district hospital. The District transferred all of its assets to the new corporations, leased the hospital for thirty years, and required that the new corporations take on all of the District's duties, obligations, and responsibilities "of every kind, character, or description." This restructuring was identical to one which had been orchestrated in northern California for the Marin General Hospital.

Petitioners, taxpayers and residents of the District, sought a writ of mandate and declaratory relief to compel the private corporations to comply with the California Open Meetings Law, the Ralph M. Brown Act, Government Code section 54950 *et seq.* Petitioners relied principally upon a section of the Brown Act making its requirements applicable to all multi-member entities which are "delegated any authority of" a public agency. The Riverside Superior Court denied the petition.

This action paralleled a case in Marin County challenging the Marin restructuring. That case came to final decision in favor of the hospital while the *Desert Hospital* appeal was pending. *See Yoffie, et al. v. Marin Hospital District, et al.*, ___Cal.App.3d___, 193 Cal.Rptr. 743 (1st Dist., Jul. 15, 1987) (see CRLR Vol. 7, No. 4 (Fall 1987) p. 112 for background information).

However, when the Fourth District examined the matter, it declined to follow the First District's *Yoffie* opinion, and held that the Brown Act applied to the private corporations. The primary difference between the two courts was in their analysis of Government Code section 54952.2. The First District held that section is superseded by other sections of the Act which specifically mention private corporations in defining what constitutes a "public agency" under the Act. However, in neither case had petitioners sought to make the private entities into "public agencies". Rather, they sought coverage under those sections of the Act which define the "legislative bodies" of public agencies. Section 54952.2 is one such section.

The Fourth District chided the First District for its "illogic" in failing to distinguish between these two types of covered entities, and held that section 54952.2 applied, since the public agency—the hospital district—had indeed delegated its authority (and all of its assets and real property) to another body. Accordingly, by operation of the statute, the private corporations became "legislative bodies" of the District, subject to the Brown Act, just as the District Board of Directors is a "legislative body" of the District subject to the Act.

The District and the private corporations have stated their intention to seek review in the Supreme Court.

Buckhart, et al. v. Board and Lynn McDonald, Real Party in Interest,

___Cal.App.3d___, 88 C.D.O.S. 437 (1st Dist., Jan. 21, 1988).

Party Seeking Section 1094.5 Review Must Create Record Even Where Agency Does Not

A party seeking judicial review of an administrative decision under Code of Civil Procedure section 1094.5 must prepare a complete record of the agency's written and oral proceedings, even where the agency itself does not routinely create such a record.

San Francisco's rent ordinance treats a decrease in housing services as an illegal rent increase. Petitioner (landlord Buckhart) discovered dry rot in a garage in a building he owned, and asked tenant McDonald to give up her parking space. When she refused, she was locked out of the garage, and complained to the San Francisco Rent Stabilization and Arbitration Board (Board) of a decrease in housing services.

The testimony of the rental dispute was heard before a hearing officer who entered judgment against petitioner Buckhart. As was the Board's custom, the proceedings were tape-recorded, but without a court reporter and the tapes were not transcribed. Petitioner filed for a writ of mandate under section 1094.5, and asked for the record of the proceedings. He was given some papers but no tapes of the hearings. The Board certified this as "the original and complete record or an exact copy of all such records."

The superior court granted the writ on that record. On appeal, the First District Court of Appeal reversed, holding that the record was insufficient. Where the court is required to review the record using either its independent judgment or to assess whether the findings are supported by the evidence, the court must have a complete record of the proceedings. That record must be produced by, and the cost borne by, the moving party. The case was remanded to the Board for preparation of the record.

CALIFORNIA ATTORNEY GENERAL OPINIONS

Individual May Serve on State and Local Boards Simultaneously

No. 87-1101 (Jan. 28, 1988).

An individual may be a member simultaneously of two public offices, one state and one local, if there is no incompatibility serving in both positions. Senator Dills requested an opinion on whether an individual could serve on both the Industrial Welfare Commission and the Los Angeles Superintendent of Schools Personnel Commission.

The common law doctrine of incompatible public offices prevents an individual from holding two public offices if either have an adverse effect upon the other. 68 Ops. Cal. Atty. Gen. 337, 338-39 (1985). Offices are incompatible if duties clash or if power of one position is held over another position. 66 Ops. Cal. Atty. Gen. 176, 177 (1983).

The statutes governing the Personnel Commission provide that one of its duties is to classify noncertified employees. The State Industrial Welfare Commission deals with conditions of any occupation, trade, or industry in which employees are employed in this state, Labor Code sections 1173 and 1182, including comfort, health, safety, wages, and hours of a job.

The Attorney General opined that the Personnel Commission position is concerned with public employees and the Industrial Welfare Commission position is concerned with private employees. Although both positions are public offices, the jurisdictions do not overlap and there is no conflict in serving in both.