UNITED STATES COURT OF APPEALS

Dirksen v. Department of Health and Human Services,

___F.2d___ , No. 85-2771, 86 D.A.R. 3708 (9th Cir. Nov. 4, 1986).

Medicare Payment Guidelines Exempt from FOIA.

Guidelines used by the U.S. Department of Health and Human Services (HHS) for auditing and paying Medicare claims are exempt from disclosure under the Freedom of Information Act.

Plaintiff Dirksen, a doctor, sought disclosure of the "Medicare Policy Guidelines" used by HHS and its contractors for processing Medicare claims. The guidelines are used to determine which claims will be paid without further review, which are immediately denied, and which are held for further study. Dirksen sought the guidelines to assist him in completing Medicare reimbursement forms. The request was denied by HHS, and the decision affirmed by the district court.

On appeal, Judges Sneed and Farris upheld the government's refusal to disclose the guidelines. The Freedom of Information Act (FOIA) exempts "matters that are...related solely to the internal rules and practices of the agency." Although the Supreme Court has held that the exception is to be narrowly construed, it does apply to law enforcement materials where disclosure "may risk circumvention of agency regulations." The Ninth Circuit drew a distinction between law enforcement methods, which are exempt, and administrative materials, which might define "secret" crimes and so are subject to disclosure. The court found that the Medicare rules for payment might conceivably be circumvented by physicians who would fashion their claims to fit the "automatically grant" category and so defeat the purpose of the guidelines.

Judge Ferguson, in a vigorous dissent, would have required disclosure. He noted the broad purpose of the FOIA in favoring disclosure, and that the narrowness of the exception for internal materials precludes its application here. The exception actually draws a distinction between internal materials of a purely trivial nature, and those of public interest. When the latter are involved, the exception should only be used where the materials are truly used for law enforcement purposes and disclosures would provide potential criminals with a blueprint for committing the crime or avoiding detection. Since that was not the case here, Judge Ferguson concluded that the guidelines should be discosed.

CALIFORNIA SUPREME COURT

Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association,

___Cal. 3d___, No. L.A. 32144, 86 D.A.R. 3917 (Dec. 1, 1986).

Time to Challenge EIR Tolled Until Unannounced Changes Discovered.

The California Supreme Court held that changes in a planned stadium after an environmental impact report (EIR) was filed and approved, but not announced or discovered by the affected neighborhood until after the time had run for suit, could still be challenged. The time for filing suit for noncompliance with the California Environmental Quality Act (CEQA) did not accrue until the changes were discovered.

CEQA requires that an EIR be filed by a public agency for any project that will have a significant impact on the environment. A subsequent or supplemental EIR is required for any substantial changes in the project. Failure to file the EIR or supplemental EIR must be challenged within 180 days after the project is commenced.

In 1977 the defendant, which maintains the Orange County Fairgrounds, proposed improvements to the grounds, including a theater. An EIR was filed and approved after hearing. Construction began in February 1983 and the first concert was held on July 27, 1983. The plaintiffs alleged that only then did they discover substantial changes in the original plan, including increased seating from 5,000 to 7,000; enlargement of the site from six to ten acres; a repositioning of the amphitheater such that it faced into rather than away from the residential area; and failure to implement noise mitigation measures. Plaintiffs, residents of the area, filed suit on January 20, 1984. Upon stipulation, the Orange County Superior Court sustained a demurrer without leave to amend and dismissed the complaint, on the basis that the complaint was filed after the 180-day period.

The Supreme Court, Justices Reynoso, Bird, Broussard and Grodin, reversed. After noting the importance of public notice and active participation in the environmental review process, the court took as granted two propositions: that the changes were substantial enough to require a subsequent EIR, and that the case was filed outside the 180-day period.

The court held that failure to file any public notice of the proposed changes, as required by CEQA, effectively prevented the residents from having the information needed to challenge the failure to the file a subsequent EIR. In brief, the agency cannot use its own failure to inform the public as the basis for asserting that the public was too late to challenge the failure to notify the public through an EIR.

The court did note that commencement of a project acts as constructive notice of intent, so that normally the time to challenge the failure to file any EIR will begin to run upon commencement of construction. However, where an EIR has been filed and accepted, commencement of construction will only act as constructive notice of intent to build the project *as described.* Thus, the time to file an action "challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff knew or reasonably should have known that the project under way differs substantially from the one described in the EIR."

Justices Mosk, Lucas, and Panelli dissented. Although agreeing with the general holding as quoted above, they disputed the reading of the facts in the case. In brief, they found it untenable that plaintiffs did not learn of the changes until the date of the first concert. Rather, given their proximity to the site, they must have been aware of at least the changes in the site size and orientation well before that date. Therefore, their complaint, filed on the 180th day after the first concert, was untimely even under the late discovery rule.

CBS, Inc. v. Block

___Cal. 3d___, No. L.A. 32029, 86 D.A.R. 3505 (Oct. 9, 1986).

Concealed Gun Records Available Under Public Records Act.

The California Supreme Court has held that applications and licenses for concealed weapons must be disclosed under the California Public Records Act (PRA).

In July 1983, CBS filed a request under the PRA for applications for concealed weapons and permits granted by the Los Angeles County Sheriff. The information was sought in connection with an investigation into whether public

officials were granting permits to campaign contributors. The request was refused. The trial court required disclosure of the licenses, with the addresses deleted. Both sides appealed.

The Supreme Court, Justices Bird, Broussard, Reynoso, Grodin, and McCloskey (by designation), granted full disclosure of all records, and allowed copying of the applications. The court noted the general policy in favor of full disclosure of all governmental records, with certain narrowly-drawn exceptions. Protecting personal privacy is an interest that will be afforded consideration in permitting an exception. However, the only statutory exception applicable here is the "catchall" exception in the PRA, which applies if the agency can demonstrate that "on the facts of a particular case the public interest served by not making the records public clearly outweighs the public interest served by disclosure of the record."

The court dismissed the two rationales supplies by the defendent for concealing the records. The court called the potential threat to or vulnerability of the licenees "conjectural at best." As one observer noted, a potential criminal is likely to be interested in knowing who carries concealed weapons for reasons of avoidance, not stalking. The potential discouragement of applicants was also held to be "unpersuasive" since the public's right to know cannot be circumscribed because disclosure might cause those who prefer secrecy to violate the law by carrying a weapon without a license.

The court also distinguished earlier cases involving police records, where privacy interests were held to outweigh disclosure interests. Those cases involved disclosure of police records of those who associate with organized crime figures and of intelligence dossiers collected on professors and students. In those cases, the private individuals had a constitutional right to privacy in their affairs and associations, and the information might be damaging without any certainty of accuracy or voluntariness of disclosure. Applicants for concealed weapon permits do not acquire any stigma from the records of the application or license, voluntarily disclose the information, and certify it to be true.

The court did, however, allow deletion of any material that might disclose key information about the applicant's lives that might indicate times or places of attack or vulnerability, and any information of a highly personal nature, such as medical or psychological history.

Justices Mosk and Panelli dissented, and adopted verbatim much of the opinion of the court of appeal which affirmed the trial court judgment, largely on the ground that there was a substantial increased risk to the applicants if their names were disclosed.

CALIFORNIA COURTS OF APPEAL

McKee v. Bell-Carter Olive Co.,

___Cal. App. 3d___, 86 D.A.R. 3811, 5th Dist., No. 97464 (Nov. 5, 1986).

No 'Exhaustion' Requirement Where Administrative Remedy Cumulative to Common Law Remedies.

Although a plaintiff must normally exhaust administrative remedies before resorting to judicial process, exhaustion is not required where the administrative remedy is cumulative or parallel to a common law remedy that preexists the administrative process.

Plaintiff, an olive grower, filed suit against defendant, an olive processor. The amended complaint was a class action for breach of contract, fraud, conversion, and breach of good faith and fair dealing. He sought compensatory and punitive damages. Defendant moved for and was granted summary judgment on the grounds that statutory provisions giving the Director of the Bureau of Marketing Enforcement (Director) power to investigate complaint by producers against processors for failure to make contract payments provide an administrative remedy which must be exhausted before filing suit. His/her enforcement powers do not include awarding damages—compensatory or punitive—on behalf of an individual; but the Director may impose conditions on the retention of the processor's license, including restitution to the complaining producer.

On appeal, the Fifth District Court of Appeal, Justices Azenedo, Hanson, and Best, held that summary judgment was improperly granted. The court first addressed whether there was an administrative remedy and if so, whether it could provide adequate relief to plaintiff. That the Director's powers were essentially punitive in nature, rather than compensatory to the aggrieved individual, was held to be incorrect, in that the Director was empowered to effect a resolution of the dispute that would encompass compensation to the complainant. Although in other cases of enforcement the powers granted the agency are prospective in nature, here retroactive relief to the specific individual could be awarded. Thus plaintiff did have an administrative remedy that was both capable of exhaustion and capable of providing him the relief he sought.

However, the court also held that the remedy was not exclusive, and therefore the exhaustion doctrine's jurisdictional preclusion of judicial action did not apply. In making this finding, the court relied heavily on the fact that a relevant statutory provision states that the procedures therein are "in addition to other rights, remedies and penalties which are provided by law...." In particular, the court found that the administrative procedure was not intended to codify or provide for enforcement of a preexisting common law right, and therefore was not exclusive. In addition, policy reasons for exhaustion—deference to agency expertise, need for factual development, capacity of the agency to resolve the matter without judicial involvement, protection of agency processes, and conservation of judicial resources—did not apply.

Hothem v. San Francisco

___Cal. App. 3d___, 86 D.A.R. 3575, 1st Dist., Div. 1, No. A025359 (Oct. 22, 1986).

Administrative Mandate Requires Review of Entire Record with Burden On Agency to Create Record and Petitioner to Produce It.

In a dispute with San Francisco over the designation of his hotel, petitioner received an adverse ruling in an administrative hearing. He sought a writ of mandate under Code of Civil Procedure section 1094.5. In the trial court, petitioner did not produce the oral proceedings (which may not have been recorded or transcribed), nor any of the documents presented. Instead he relied solely on three of his own declarations which supported his position. The writ was denied.

The First District Court of Appeal, Justices Elkington, Racanelli, and Holmdahl, reversed and remanded. The court held that the record in the trial court was not sufficient to determine the key issue: whether, looking at the whole administrative record, the findings are supported by substantial evidence. The petitioner bears sole responsibility for producing the record, and failure to do so merits automatic denial of the writ. An "adequate" record will not suffice, nor is the respondent responsible for producing the record for the trial court.

However, the agency must make an

entire, usable record available to the petitioner. Failure to do so requires setting aside the findings. Because the availability and comprehensiveness of the record was in dispute, the matter was remanded for further proceedings on the point.