NS23k
08/31/87

Memorandum 87-76

Subject: Confidentiality of Communications to Commission

The Commission has requested the staff to research the possibility that communications to the Commission could be kept confidential in appropriate cases and to develop for Commission review a policy statement on confidentiality of communications to the Commission.

We had a summer law clerk research the exceptions to the Public Records Act that might be applicable to the Commission. See Exhibit 1, attached. The law clerk concludes that there are exceptions to the act that would clearly allow the Commission to keep communications to it confidential.

Because the exceptions involve a balancing test between the public's right to know and the government's need to maintain confidentiality, the staff does not believe the law is so clear. We would say, rather, that an argument can be made that the Commission may protect communications submitted to it in confidence, in cases where the information contained in the communication is necessary for a Commission study and might not reasonably be obtainable without providing confidentiality.

From this analysis grows the staff's suggested policy on confidentiality:

(1) The Commission does not ordinarily engage in communications on a confidential basis. The Commission will solicit a communication on a confidential basis only where the Commission has made a determination that the information contained in the communication is necessary for a Commission study and might not reasonably be obtainable without providing confidentiality.

(2) A communication received under a Commission assurance of confidentiality will be considered by the Commission without knowledge of the identity of the author of the communication. The Commission staff will summarize the contents of the communication, quote from the communication, reproduce the communication with identifying markings deleted, or handle the communication in another appropriate way to protect the identity of the author from disclosure.

(3) The staff will protect the identity of the author of a communication received under a Commission assurance of confidentiality from disclosure except on court order requiring disclosure. The staff will mark Commission files as confidential, segregate Commission files, destroy the communication, or take other appropriate action to preserve the author's identity from disclosure.

The Commission should decide how it wants to handle two rarely occurring situations:

(1) A communication is received that requests confidentiality but was not solicited under an assurance of confidentiality.

(2) A communication is received that does not request confidentiality but is of such a sensitive character that had the author known or suspected the communication might be disclosed to the public the author might either have not sent the communication or have requested confidentiality.

Possible responses in these cases include honoring the confidentiality of the communication, ignoring the confidentiality of the communication, returning the communication to the sender, or requesting that the sender rescind the request for confidentiality. The staff is divided on the appropriate policy here.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

MEMORANDUM

To: Nat Sterling
From: Jim Kowalski
Re: Confidentiality of correspondence to CLRC

Issue

1. May correspondence to the California Law Revision Commission be kept confidential based on:

a) Government Code Section 6255, or

b) Government Code Section 6245 (a), or

c) Government Code Section 6245 (k)/ Evidence Code Section 1040?

Analysis

1. Confidentiality. As noted in CLRC Memorandum 87-39, any letter sent to the Commission in the conduct of its business constitutes a public record under the California Public Records Act (CPRA), Gov't Code §§ 6250-6265. The Act "was enacted in 1968 to safeguard the accountability of government to the public , for secrecy is antithetical to a democratic system of 'government of the people, by the people and for the people.'". San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 771-772, 192 Cal. Rptr. 415 (2nd Dist. 1983). There are a number of provisions in the Act which allow a state agency to withhold such records from public inspection. However, "it is clear that the (Act) is intended to be construed liberally in order to further the goal of maximum disclosure in the conduct of government operations". 53 Ops. Cal. Att'y Gen. 136, 143.(1970) Provisions against disclosure are to be narrowly construed. 69 Ops. Cal. Att'y Gen. 131 (1986). The provisions which apply to the problem of confidentiality of CLRC correspondence are §§ 6255, 6254 (a), and 6254 (k).

a. 6255. This Section sets out a two part test for withholding information. The agency must demonstrate either: 1) an express exemption under the provisions of the Act, or 2) 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. The general policy is to favor disclosure, but individual privacy is to be protected. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (3rd Dist. 1974).

Information obtained in confidence, which, if disclosed, will damage the public interest, may fall under the provisions of this section. In Johnson v. Winter, 127 Cal. App. 3d 645, 179 Cal. Rptr. 585 (1st Dist. 1982), the court considered the plaintiff's request that he be allowed to inspect information acquired by the Santa Clara County Sheriff's Department pursuant to the plaintiff's application for special deputy status. The court, in noting that "assurances of confidentiality may be a prerequisite to obtaining candid information",stated that "the right of privacy of those who communicate such confidences, whether to private employers or to public agencies, is deserving of protection". Id, at 439. Denying disclosure was in the public interest, the court also stated, because the "public has an interest in encouraging cooperation with investigations made by public agencies". Id, at 439. The Johnson court agreed with the lower court that matters obtained with an understanding of confidentiality, whether or not this understanding was implicit or explicit, were subject to nondisclosure. The California Attorney General, in discussing the applicability of the CPRA to application and personel files of the Board of Pilot Commissioners, stated that those portions of the files which were "received in confidence from members of the public or as part of an investigation or which deal with the pilot or pilot-candidate's private, rather that professional life" were to remain confidential. 53 Ops. Cal. Att'y Gen. 136, 137. Protection of the agency's sources of information is a valid reason for denying disclosure. Id, at 143.

The public does have a great need to view records which may reflect how public funds are being spent. Candid disclosure of facts in a confidential evaluation process may be less important than the need for disclosure of such records. 68 Ops.Cal. Att'y Gen. 73 (1985) The Attorney General, in discussing records for performance awards (amount and reasons) granted to executive managers of a city, stated that

records of the awards should be made public, given that there was little expectation of damage to the evaluation process itself from the lack of confidentiality and a strong public need to know how city funds were being spent. The opinion noted that, in this particular situation, the reviewers would not be irresponsible merely because the public may become aware of the ultimate results of the evaluation. Id, at 74.

b. 6254 (a). This Section deals with the Records exemption of the Act. Preliminary drafts, notes, or intra-agency memoranda are included. They must be of a sort that is not retained by the agency in the ordinary course of business, and the public interest in withholding must outweigh the interest in disclosure. Although a recommendatory opinion may be withheld, memoranda consisting of filed factual material is not exempt from disclosure under this Section. Courts are generally strict in construing this section, and all three prongs of the test must be fulfilled. See Citizens for a Better Environment v. Department of Food & Agriculture, 171 Cal. App. 3d 704, 217 Cal. Rptr. 504 (3rd Dist. 1985).

c. 6254 (k)/ Evidence Code Section 1040. Section 6254 (k) includes Evidence Code Section 1040, which states that an agency has a privilege to refuse to disclose official information if, among other provisions, disclosure is against 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. If any person who is authorized to do so consents to the release of the information it may no longer be held confidential. The Section also states that the interest of the public entity may not be considered. The test under 1040 is similar to that under 6255, but is in fact somewhat broader. 7 Pacific L.J. 105, 121-125. "Subsection (k) is perhaps the most crucial and far-reaching exemption of the Public Records Act". Id, at 121-122. The Section contains a two-part test: 1) was the information aquired in confidence by the public employee in the course of his duty and not open to the public prior to the time nondisclosure is claimed, and 2) is nondisclosure in the public interest and in the interests of justice?

The second prong of the test under 1040 differs from 6255 in two respects. First, the court under 1040 is allowed to consider the specific needs of the requesting individual- under 6255, the court must not consider these specific needs, but must confine its examination to the interests of the public - a much broader interest than that of a single individual or group. Id, at 124. The requesting party under 1040 thus has a more difficult task, for their individual interest in disclosure must be considered against the interests of the public in nondisclosure. Second, the 6255 test requires that the interest in nondisclosure "clearly outweigh" the interest in disclosure; the 1040 test requires that the former "outweigh" the latter. Id, at 124. The 1040 test appears to be more loosely constructed and allows for wider control by the public agency. However, "mere allegations of future possible harm will not sustain the privilege; the government must demonstrate some plausible justification for protecting the information. The issue is whether disclosure will impair the government's ability to obtain similar information in the future". 69 Ops. Cal. Att'y Gen. 131, 134 (1986).

Conclusion

Correspondence to the CLRC may be kept confidential based on Gov't Code Sections 6255 and 6254 (k). The Records exemption under 6254 (a) does not appear to fit the situation, unless attorneys submitting material can be construed as advisory personnel of the Commission and their correspondence is regularly destroyed. Both 6255 and 6254 (k) do fit the situation. Correspondence that Commission attorneys receive in confidence may be kept from public inspection. The attorney may make the decision as to confidentiality on his or her own, supplementing any explicit request made by the corresponding party. If the correspondence is published unedited, however, it loses its exemption under the Act. As noted in CLRC Memorandum 87-39, it is unlikely that persons will be so interested in particular correspondence that they will request an inspection of the Commission's files; if this occurs, the Commission's (and the public's) need for open, frank discussion of proposed legislation clearly indicates that access to confidential materials may be denied.