

**S194951**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**RICHARD SANDER, JOE HICKS,  
CALIFORNIA FIRST AMENDMENT COALITION**

**SUPREME COURT  
FILED**

*Plaintiffs and Appellants,*

JUL 19 2011

v.

Frederick K. Ohirich Clerk

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**THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS Deputy  
OF THE STATE BAR OF CALIFORNIA,**

*Defendants and Respondents.*

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After a Published Decision by the Court of Appeal First Appellate District,  
Division Three Case No. A128647, Reversing a Judgment Entered by the  
Superior Court for the County of San Francisco, Case No. CPF-08-508880,  
The Honorable Curtis E.A. Karnow presiding

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**PETITION FOR REVIEW**

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STARR BABCOCK (63473)  
LAWRENCE C. YEE (84208)  
RACHEL S. GRUNBERG (197080)  
**OFFICE OF GENERAL COUNSEL  
THE STATE BAR OF CALIFORNIA**  
180 Howard Street  
San Francisco, CA 94105-1639  
(415) 538-2000 Telephone  
(415) 538-2321 Facsimile

JAMES M. WAGSTAFFE (95535)  
MICHAEL VON LOEWENFELDT (178665)  
**KERR & WAGSTAFFE LLP**  
100 Spear Street, Suite 1800  
San Francisco, CA 94105  
(415) 371-8500 Telephone  
(415) 371-0500 Facsimile

*Attorneys for Defendants and Respondents*  
**THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS  
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100 Spear Street, Suite 1800  
San Francisco, CA 94105  
(415) 371-8500 Telephone  
(415) 371-0500 Facsimile

*Attorneys for Defendants and Respondents*  
**THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS**  
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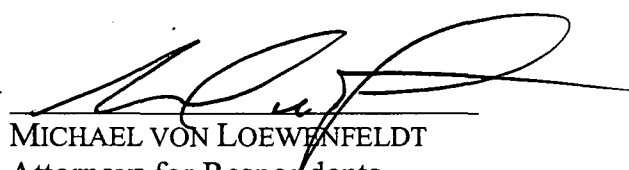
**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Pursuant to California Rule of Court, rule 8.208, Respondents, to the best of their knowledge, are unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

DATED: July 19, 2011

**KERR & WAGSTAFFE LLP**

By

  
MICHAEL VON LOEWENFELDT  
Attorneys for Respondents  
The State Bar of California, and  
the Board of Governors of the  
State Bar of California

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

The State Bar of California and the Board of Governors of the State Bar of California (collectively “the State Bar”) petition for review of the decision of the Court of Appeal, First Appellate District, Division Three filed for publication on June 10, 2011. This case involves an action to force public disclosure of confidential raw data on the race, academic records, and bar scores of all applicants to the California Bar Examination between 1972 and 2007 (the “admissions database”). That data is collected and maintained by the State Bar in administering the requirements for bar admission on behalf of this Court as its administrative arm.

The Court of Appeal fundamentally misunderstood the State Bar’s *sui generis* role as a constitutional arm and integral part of the judicial function of this Court in the area of attorney admissions. Despite clear case authority and the express language of Article VI, section 9 of the California Constitution, establishing the State Bar as a judicial branch entity, the Court of Appeal declined to apply the deep-rooted common law limitations on public access to judicial branch records. Instead, the Court of Appeal found that the standards germane to the judiciary do not apply to the State Bar, ruling simply that the Bar “is not a court.” The Court of Appeal’s misinterpretation of the State Bar’s relationship to this Court resulted in an erroneous holding that State Bar admissions records should not be treated

like other judicial branch records. Further, the Opinion establishes an unprecedented and overly broad “common law” rule that subjects all records in the possession of the State Bar — and other judicial branch agencies that are “not courts” — to presumptive public disclosure.

Contrary to the Court of Appeal’s reasoning, while there is a presumptive right of access to open court proceedings and adjudicative documents, there is no such presumptive right of public access to all documents in the hands of the judiciary. The Court of Appeal’s overly expansive view of the common law is not only unsupported by case law, but is also inconsistent with the history of the Public Records Act, which exempts by definition all Article VI agencies. The Opinion, if left to stand, improperly subjects the State Bar and several other judicial branch entities to broad, undefined public disclosure requirements.

The Court of Appeal’s decision has already spawned a host of wide-ranging “public records” requests seeking confidential admissions and discipline records, including a new lawsuit in Los Angeles. Review by this Court is essential to correct these errors and to control access to the confidential records generated as part of the attorney admissions and discipline processes. Indeed, because of this Court’s exclusive and plenary jurisdiction over bar admissions, only this Court should be making the policy decisions governing disclosure of the State Bar’s records.

This petition is timely filed pursuant to California Rules of Court, rule 8.500(e)(1). A copy of the Court of Appeal's published Opinion is attached hereto. The State Bar filed a petition for rehearing, which was denied on July 11, 2011.

**I. ISSUES PRESENTED**

1. Given the State Bar's role as the "administrative assistant to or adjunct of" this Court in attorney admissions, must this Court exercise its exclusive and plenary jurisdiction in this area and make the policy decision regarding public disclosure requirements of State Bar admissions records?

2. Should State Bar admissions records be subject to the well-established limits regarding public access to judicial branch records?

3. If not, does California common law create a presumptive right of public access to all information in the possession of the State Bar despite: (a) the traditional common law test limiting presumptive access to records of official acts of government; and (b) the Legislature's decision to exempt all Article VI agencies (including the State Bar) from the Public Records Act?

4. If the admissions database is not a public record under the common law, does Evidence Code section 1040 nonetheless establish a standard for public access to that database?

5. If the admissions database is not a public record under the common law, does Article I section 3 of the California Constitution

(hereinafter "Proposition 59") nonetheless make that database subject to presumptive public disclosure?

## **II. REVIEW IS NECESSARY TO CLARIFY IMPORTANT JURISDICTIONAL AND SUBSTANTIVE LEGAL ISSUES**

Appellants originally brought their petition in this Court pursuant to this Court's original and exclusive jurisdiction over matters concerning the admission of applicants. (*Sander v. State Bar*, S165765.) While opposing the petition, the State Bar concurred that it was a matter within this Court's original and exclusive jurisdiction. This Court, however, denied that earlier petition "without prejudice to re-filing in an appropriate court." The petition was then re-filed in Superior Court, appealed to the Court of Appeal, and the same issue is now again before this Court.

The State Bar respectfully suggests that the proceedings below, and particularly the Court of Appeal's misunderstanding of the State Bar's *sui generis* role as an arm of this Court, and erroneous assertion that the State Bar's admissions records are not court records, demonstrate the necessity of this Court maintaining its primary jurisdiction over the disposition of records obtained by the State Bar in the course of assisting this Court in its exclusive and plenary control over admission to the practice of law in California. Thus, pursuant to California Rules of Court, rule 8.500(b)(2), review should be granted to clarify jurisdiction over requests for and access to State Bar admissions records.

In addition, this case presents several important and unsettled questions regarding public access to the admissions records of the State Bar (and by extension, to the records of similar judicial branch entities such as the Commission on Judicial Performance and the Commission on Judicial Appointments). First, reversing the trial court, the Court of Appeal concluded, without citation to authority, that the substantial line of cases establishing parameters for the public's right of access to records held by the judicial branch does not apply to the State Bar because "[t]he Bar is not a court." This assertion fundamentally misunderstands the nature of attorney admissions and the State Bar's constitutional function. Admission to the bar is a judicial function of this Court's inherent and primary regulatory powers. The State Bar, as a judicial branch agency under Article VI of the Constitution, is an integral part of that judicial function. (*In re Rose* (2000) 22 Cal.4th 430, 438 [93 Cal.Rptr.2d 298] ["The State Bar is a constitutional entity, placed within the judicial article of the California Constitution, and thus expressly acknowledged as an integral part of the judicial function."]; *In Re Attorney Discipline System* (1998) 19 Cal.4th 582, 593, 599 [79 Cal.Rptr.2d 836].)

The Court of Appeal failed to recognize that the action of the State Bar in admissions matters cannot be divorced from the action of this Court, and that the State Bar's sole function with respect to admissions is as this Court's administrative arm. Thus, the State Bar is as much part of this

Court for purpose of admissions as a court clerk, jury commissioner, or other administrative adjunct to a court. Like the records of those other administrative arms of courts, the State Bar's records are judicial records subject to a relatively narrow common law right of access as compared to the records of the executive and legislative branches.

Second, having rejected application of the standards for judicial branch records, the Court of Appeals did not replace them with any recognized common law standard for determining which State Bar documents are "public records." Even under the common law applicable to non-judicial branch entities, not all documents in the possession of a public agency are common law "public records" subject to presumptive access. As the United States Court of Appeals held after surveying jurisdictions nationwide, the common law definition of a public record is generally held to be "a government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived." (*Washington Legal Foundation v. U.S. Sentencing Com'n* (D.C. Cir. 1996) 89 F.3d 897, 905.) The admissions database simply does not meet this definition, or any other accepted common law definition of public record.

Instead, the Court of Appeals implicitly accepted Appellants' errant argument that the common law right of access is equivalent to the much broader access created by the Public Records Act. That view is

unsupported by case authority and is inconsistent with the reason for enactment of freedom of information statutes. The Public Records Act was not enacted merely to enshrine the common law right, but “for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies.” (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425 [121 Cal.Rptr.2d 844].)

However, the judicial branch (including the State Bar) was expressly exempted from this expanded right of access. (Gov. Code, § 6252, subd. (f).) Judicially creating “common law” to include as broad a right of access as provided by the Public Records Act is totally inconsistent with that exemption. Indeed, if the common law already provided a presumptive right to all information in the possession of the government, there would have been no need for FOIA, the Public Records Act, the Brown Act, or the many other examples of statutory *expansion* of the right to access government documents or information.

In addition, although not even suggested by Appellants, the Court of Appeal opined that Evidence Code section 1040 somehow establishes a test for production of records to the public. That is also plain error. The Evidence Code controls the discovery and admission of evidence in litigation. It has no bearing whatsoever on the public’s right to make public records requests.

By asserting that the admissions database is a public record without any definition or standard, the Court of Appeal's Opinion subjects the State Bar to innumerable standard-less requests for access to heretofore confidential records. Essentially, the Court of Appeal has created a virgin field for records lawsuits against the State Bar and similar judicial branch entities.<sup>1</sup> Each new records request will have to be litigated on a document-by-document basis, subjecting the State Bar and the other judicial branch entities like it to an explosion of expensive litigation and concomitant attorneys' fee awards. The whole point of the common law test is to avoid such expensive "balancing" with respect to documents, like the admissions database, that do not memorialize or record any official government action.

Finally, Appellants also argued that even if the common law did not presume public access to the State Bar's admissions database, Proposition 59 created a new presumptive right to such data. The Court of Appeal did not reach this issue. This Court should not only reverse the Court of Appeal's erroneous interpretation of the common law, but also hold that Proposition 59 does not create a new right of public access to these admissions records.

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<sup>1</sup> The first such lawsuit, seeking non-public disciplinary records of two district attorney candidates, was filed on July 12, 2011. (*Metropolitan News-Enterprise v. Matsumoto, State Bar of California* (Super. Ct. L.A. County No. BS132821).)

Each of these presents an important question of law. Clarity concerning these issues is important not only to resolve the right of access to the State Bar's admissions database, but to the State Bar's and similar judicial branch entities' ability to respond to future public access requests and avoid unnecessary and unguided litigation on a request-by-request basis. Review is thus also appropriate under California Rules of Court, rule 8.500(b)(1).

### **III. BACKGROUND AND STATEMENT OF THE CASE**

Beginning in 2006, Appellants asked the State Bar to provide them with 16 fields of data (including race, academic record, and Bar Exam scores) for every person who applied to take the Bar Examination from 1972-2007. (Appendix of Exhibits of Appellants ["AA"] tabs 6-7 [pp. 43-52], 13 [pp. 148-151], and 16-17 [pp. 165-202].) Appellants seek this data for their study of admissions practices of "elite" law schools,<sup>2</sup> and claim that the data can be "clustered" so that individual applicants are not

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<sup>2</sup> Professor Sander is a proponent of what he calls the "mis-match" theory, wherein he argues that "aggressive racial preferences that many law schools use in admissions" lead "[u]pper-and-middle tier law schools ... to admit black students whose LSAT scores and undergraduate grades are significantly lower than those of their non-Hispanic white classmates" such that "blacks and Hispanics are likely to struggle to keep up with the instruction aimed at the majority of the students who were admitted with higher academic credentials" and thus "blacks and Hispanics get lower grades and actually learn less than they would at a less elite school." (Sander's "Proposal for analyses of state bar data", A.A. tab 6, pp. 43-45.)

identifiable.<sup>3</sup> (*Ibid.*) Of course, the purpose for which the data is sought is irrelevant to determining whether the data is a public record, because once a public record is produced it must be given to any member of the public who wants it. (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018 [88 Cal.Rptr.2d 552].) The State Bar therefore declined to provide the requested data, which had been collected confidentially. (AA tabs 44 [pp. 384-85], 45 [p. 396], 46 [p. 404], 47 [p. 408], and tab 103 [p. 1259].)

Appellants petitioned this Court for access to these records. That petition was denied “without prejudice to re-filing in an appropriate court.” (*Sander v. State Bar*, S165765.) Appellants then re-filed their petition in the San Francisco Superior Court. (AA tab 3.)

The parties agreed to a bifurcated trial in two phases: first, a determination of whether the admissions database is a public record subject to presumptive disclosure, and second, if so, whether there is any countervailing policy or fact that prevented disclosure. (AA tab 38, pp. 335-36) After a bench trial on the first phase, Judge Karnow of the San Francisco Superior Court determined that the admissions database is: (1)

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<sup>3</sup> Appellants assume a lack of identifiability will eliminate any privacy concern. (AA tab 16, p. 167.) However, this Court has recognized one of the principal “mischiefs” the right to privacy is intended to protect against is “the improper use of information properly obtained for a specific purpose, for example ... the disclosure of it to some third party...” (*White v. Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94]; see Cal. Const., art. I, § 1.)

not a public record subject to presumptive disclosure under the common law; and also (2) not subject to presumptive disclosure under Proposition 59. (AA tab 124.)

The Court of Appeal reversed, finding that access to State Bar documents is not governed by the common law principles applicable to the judicial branch, but instead finding that the State Bar is subject to an undefined “long standing common law presumption of access.” The Court of Appeal ordered that the matter be remanded for determination of the phase two questions of whether some countervailing policy or fact prevents disclosure. The State Bar unsuccessfully sought rehearing. The State Bar now respectfully requests this Court to review the matter which, at its core, concerns whether the public has a right to review the admissions data maintained by the State Bar for this Court as the Court’s administrative arm.

#### **IV. ARGUMENT**

##### **A. THE POLICY DETERMINATION REGARDING THE RECORDS AT ISSUE BELONGS TO THIS COURT**

This case presents an issue of particular importance to this Court because the records at issue are subject to the ultimate control and policy determinations of this Court. Although the State Bar is a separate legal entity, in its role in the attorney admissions process it is not to act

independently, but as an arm of this Court. The records at issue are created and maintained solely in that capacity.

The Court of Appeal mistakenly refers to the State Bar as “overseeing attorney admission to the practice of law.” (Slip Op. p. 10.) Only this Court has the power to admit attorneys in California. This Court retains its “preexisting powers to regulate and control the attorney admission and disciplinary system ... at every step.” (*O'Brien v. Jones* (2000) 23 Cal.4th 40, 48 [96 Cal.Rptr.2d 205].) The State Bar’s sole role in admissions is that of “an administrative assistant to or adjunct of” this Court. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557 [216 Cal.Rptr. 367].)

The State Bar thus acts as “an arm or a branch of the Supreme Court” in connection with admissions. (*Greene v. Zank* (1984) 158 Cal.App.3d 497, 504 [204 Cal.Rptr. 770].) “Admission to the bar is a *judicial function*, and members of the bar are *officers of the court*, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent and *primary regulatory power*. (*In Re Attorney Discipline System, supra*, 19 Cal.4th at p. 593 [original italics].) The State Bar is “acknowledged as an integral part of the judicial function” of this Court. (*Id.*, at p. 599.)<sup>4</sup> The State Bar’s admissions

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<sup>4</sup> Other courts have recognized that the functions of a state bar in administering bar admissions cannot be divorced from the state supreme

activity is thus conducted on behalf of, and controlled by, this Court. (*Id.* at pp. 599-600 [“We have described the bar as a ‘public corporation created ... as an administrative arm of this court for the purpose of assisting in matters of admission and discipline of attorneys.’”].)

Consistent with the State Bar’s role as this Court’s arm, this Court has exclusive and original jurisdiction over any claims against the State Bar that involve the admissions process or admissions policies. (*Smith v. State Bar* (1989) 212 Cal.App.3d 971, 978 [261 Cal.Rptr. 24] [challenges to admissions policies must be made to the Supreme Court in the first instance]; see *In Re Attorney Discipline System*, *supra*, 19 Cal.4th at p. 602 [reaffirming the Court’s “primary policy-making role and its responsibility” in matters concerning admissions and lawyer discipline].)<sup>5</sup> More generally, the superior courts have no power over this Court or, by extension, its arms. (Cf *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 116 [7

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court’s exercise of its inherent power to license attorneys. (*Hoover v. Ronwin* (1994) 466 U.S. 558, 570-574 [104 S.Ct. 1989] [actions of the Bar in admissions cannot be separated from the Supreme Court’s exercise of its sovereign judicial powers]; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 360-61 [97 S.Ct. 2691]; see also *Levanti v. Tippen* (S.D. Cal. 1984) 585 F. Supp. 499, 504 [State Bar functioning as an arm of the California Supreme Court in attorney admissions is protected by the same cloak of absolute judicial immunity worn by that tribunal.”].)

<sup>5</sup> This Court acknowledged in *In Re Attorney Discipline System*, *supra*, 19 Cal. 4th at 603, that the sound policy is not “to fragment the authority to discipline lawyers.” This applies equally to its authority over admissions policies.

Cal.Rptr.2d 841] (hereinafter *Copley Press I*) [“One superior court judge has no power to require another to perform a judicial act....”]; cf. *Jacobs v. State Bar* (1977) 20 Cal.3d 191, 197-98 [141 Cal.Rptr. 812] [superior court had no jurisdiction over determining what records must be disclosed to an attorney under investigation by the State Bar except in the very limited situation where the State Bar seeks to enforce a subpoena under the narrow statutory authority provided by Business and Professions Code section 6051].)

The claims in this case seek production of records that are functionally the records of this Court, and which relate to the attorney admissions process over which this Court has plenary and exclusive jurisdiction. Although this case does not involve a decision affecting the admission to practice law of an individual applicant, Appellants’ demand for data directly calls into question the State Bar’s admissions policies designating information collected from applicants as confidential.<sup>6</sup> Moreover, a right to compel the State Bar to produce admissions records directly calls into question the State Bar’s admissions policies limiting what information people, including applicants, can review concerning the

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<sup>6</sup> (Rules of State Bar, rule 4.4.)

admissions process.<sup>7</sup> That determination is a policy decision that only this Court can make under its primary and inherent authority over attorney admissions. (See *Bester v. Louisiana Supreme Court Committee on Bar Admissions* (La. 2001) 779 So.2d 715, 721-22 [Bar admissions records are records of the state supreme court and only that court has inherent, sovereign authority to determine whether such records are subject to public review].) The State Bar respectfully suggests that this Court confirm that it is the only court with jurisdiction over records concerning attorney admissions.

**B. THE STATE BAR'S ADMISSIONS DATABASE IS NOT A PUBLIC RECORD UNDER THE COMMON LAW**

**1. *The Court of Appeal's Opinion Erroneously Subjects The State Bar And Several Other Judicial Branch Agencies To A Broad, Undefined Presumption Of Disclosure Without Any Of The Limits Applied To The Rest Of Government***

The Court of Appeal appeared to assume that all State Bar records are public records subject to a presumptive common law right of public access. Before discussing the fundamental errors in the Court of Appeal's common law analysis, it is important to recognize the sweeping effect of the Court of Appeal's broad, unprecedented assumption.

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<sup>7</sup> "Applicants who pass the California Bar Examination are not entitled to receive their examination answers or to see their scores." (Rules of State Bar, rule 4.62(B).)

The judicial branch has always been subject to a different, and more limited, definition of “public records” than the more political executive and legislative branches. This difference is reflected in all of the major public access statutes. Thus the Public Records Act expressly excludes *all* Article VI (judicial branch) agencies from its scope. (Gov. Code, § 6252, subd. (f).) The Bagley-Keene Open Meeting Act also expressly excludes *all* Article VI agencies from its scope. (Gov. Code, § 11121.1, subd.(a).) At the federal level, the Freedom of Information Act (hereinafter “FOIA”) similarly does not apply to the federal courts. (5 U.S.C. § 551(1)(B).)

The California Constitution provides that the State Bar is part of the judicial branch. (Cal. Const., art. VI, § 9.) As a judicial branch entity, the State Bar is thus not subject to the statutory rules for disclosure that apply to the non-judicial branches of California government.

Nor is the State Bar subject to California Rules of Court, rule 10.500, which sets forth the rules and limits on disclosure of judicial branch administrative documents. The State Bar, the Commission on Judicial Performance, and the Commission on Judicial Appointments were not included within the scope of Rule 10.500 because they are not subject to the jurisdiction of the Judicial Council. (AA tab 118, p. 1497.) Instead, as discussed above, as it relates to admissions the State Bar is subject to the exclusive and plenary control of this Court. (*In re Attorney Discipline System, supra*, 19 Cal.4th at p. 601.) This Court, by Rule, could adopt

disclosure requirements for the State Bar, but the lower courts should not be formulating law regarding public access requirements for the documents of this Court's administrative arm.

The resulting effect of the exclusion of the State Bar and other administrative judicial branch entities from Rule 10.500 was to leave in place for these entities the more limited common law standards applicable to records of the judicial branch. Under the Court of Appeal's Opinion, however, the State Bar, and similarly the Commission on Judicial Performance and the Commission on Judicial Appointments, are left with unique vulnerability to public records lawsuits with no clear standard for what they should, or should not, produce.

For example, California Rules of Court, rule 10.500 provides that a judicial branch entity is not required to "compile or assemble data in response to a request..." (Cal. Rules of Court, rule 10.500, subd. (e)(1)(B); accord Gov. Code, § 68106.2, subd. (e).) If this rule applied to the State Bar, it would defeat the request in question, which clearly seeks data compiled or assembled in a form in which the State Bar does not presently compile or assemble it. It is wholly illogical for the State Bar to be subject to greater disclosure obligations over its internal data than the rest of the judicial branch.

Similarly, the Public Records Act exempts testing materials from disclosure. (Gov. Code, § 6254, subd. (g).) Does the fact that the State Bar

is not subject to the Public Records Act mean that, unlike all other testing agencies in the state, the State Bar must publicly disclose such materials? Such analysis turns the legislative intent on its head, subjecting the State Bar to broader disclosure obligations than executive branch agencies despite the legislative intent to exclude judicial branch agencies from the heightened duty to disclose created by the Public Records Act. (See *Copley Press I, supra*, 6 Cal.App.4th at p. 113.)

The mere specter of having the admissions database subject to public disclosure has already caused the Law School Admissions Council (LSAC) to refuse to provide further LSAT scores to the State Bar. In 2008, the State Bar was informed by the LSAC that it would no longer provide LSAT scores to the State Bar “[i]n light of recent litigation related to data held by the Bar Examiners and because we are concerned about protecting the confidentiality of these sensitive data...” (AA tab 44, p. 387-88 ¶ 35.) The broad, seemingly standardless analysis utilized by the Court of Appeal will no doubt aggravate this concern, hampering efforts by the State Bar to collect data, and making the State Bar unable to promise that data sought by it will not be made public.

In conclusion, the State Bar is not subject to statutory disclosure requirements because it is part of the judicial branch, and it is not subject to the Judicial Council’s new Rule of Court governing judicial branch administrative documents because only *this Court* has jurisdiction to make

rules governing State Bar records, not the Judicial Council. It is wholly inconsistent with these authorities for the State Bar to nonetheless be subject to unprecedented, undefined, broad “common law” disclosure obligations that do not apply to the rest of the judicial branch, the parameters of which must be determined through litigation. Any disclosure obligation concerning the State Bar’s admissions records should come from this Court, not from lower courts through the creation of common law obligations not imposed on any other judicial branch agency.

**2. *The Court of Appeal’s Opinion Reflects A Fundamental Misunderstanding Of The Common Law***

The common law does *not* presume that *all* records in the hands of the government are open to public inspection, and then look for exceptions to disclosure. Whether or not a particular requested record is subject to disclosure involves a two-step process (which is why the proceedings below were bifurcated):

In “the courts of this country” - including the federal courts - the common law bestows upon the public a right of access to public records and documents. ... [T]he decision whether a document must be disclosed pursuant to the common law right of access involves a two-step inquiry. First, the court must decide “whether the document sought is a ‘public record.’ If the answer is yes, then the court should proceed to balance the government’s interest in keeping the document secret against the public’s interest in disclosure.”

(*Washington Legal Foundation v. U.S. Sentencing Com’n*, *supra*, 89 F.3d at p. 902.) Here, the answer to the first step is no, the State Bar’s admissions

database is *not* a public record subject to presumptive public access. While the trial court properly reached that conclusion and entered judgment, its judgment was erroneously vacated by the Court of Appeal which opined that the State Bar is not subject to the common law definition applicable to other judicial branch entities. It then wrongly decided that the admissions database is a public record subject to second-stage balancing without explaining why or how it reached that result.

a) *The Court of Appeal Failed To Apply  
Established Limits On Access To Judicial  
Branch Records*

The common law right to access to judicial branch documents is circumscribed. The right of public access to judicial records primarily applies to *adjudicatory records* and flows directly from the public's right to attend open court proceedings. "Substantive courtroom proceedings in ordinary civil cases, and the transcripts and records pertaining to those proceedings, are 'presumptively open.'" (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597 [57 Cal.Rptr.3d 215].) In discussing the right of access to court records, this Court has emphasized the important public function that open trials have in a democracy. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1197-1212 [86 Cal.Rptr.2d 778] (hereinafter "*NBC Subsidiary*").) "A trial is a public event. What transpires in the court room is public property...." (*Copley*

*Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 373 [74 Cal.Rptr.2d 69] (hereinafter “*Copley Press II*”) [citation omitted].)

In addition to the right to physically attend a session of court, common law and constitutional case law has long recognized a concomitant right “of access to civil litigation documents filed in court as a basis for adjudication.” (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1208 n. 25 [citing cases]; *Savaglio v. Wal-Mart Stores, Inc., supra*, 149 Cal.App.4th at p. 596 [“The public has a First Amendment right of access to civil litigation documents filed in court and used at trial or submitted as a basis for adjudication.”].)

This primary limitation of access to adjudicatory materials is not confined to the First Amendment, as the Court of Appeal incorrectly implied, but is broadly recognized under the common law test as well. “In general, the common law right attaches to any document that is considered a ‘judicial record,’ which ‘depends on whether [the] document has been filed with the court, or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings.’” (*United States v. Wecht* (3d Cir. 2007) 484 F.3d 194, 208.) Put more simply, “what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process.” (*United States v. El-Sayegh* (D.C. Cir. 1997) 131 F.3d 158, 163; accord *Lugosch v. Pyramid Co. of Onondaga* (2d

Cir. 2006) 435 F.3d 110, 119; *In re Providence Journal Co., Inc.* (1st Cir. 2002) 293 F.3d 1, 9-10.)

Thus, the common law right of access to court documents does not provide that any document or piece of information in the possession of judicial personnel is presumed to be a public record. Such a notion was directly rejected in *Copley Press I, supra*, 6 Cal.App.4th 106:

Petitioner contends that all writings created within the court premises by court personnel in connection with public business must be public records available for inspection by the press. Were this view to be adopted, access to court documents would be virtually the same as access to any other governmental documents... which would make the exclusion of court records set forth in subdivision (a) of section 6252 [of the Government Code (CPRA)] inoperative. We do not accept petitioner's broad argument.

(*Id.* at p. 113.)

Instead, *Copley Press I* held that public "court records" are "documentation which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators." (*Copley Press I, supra*, 6 Cal.App.4th at p. 113.) Such documents "represent and reflect the official work of the court, in which the public and press have a justifiable interest." (*Ibid.*) On the other hand, other documents created or simply maintained by court personnel are internal documents to which the public has no right of inspection. (*Id.* at p. 114.)

Perhaps the most pertinent example is *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258 [198 Cal.Rptr. 489]. Two types of documents were at issue in *Pantos*: (1) a master list of potential qualified jurors developed by the court; and (2) questionnaires filled out by prospective jurors. (*Id.* at pp. 260-61.) The questionnaires included information on name, age, residence, occupation and “all matters concerning their qualifications for jury duty.” (*Id.* at p. 263.) The *Pantos* court found that the questionnaires are *not* public records:

Juror questionnaires ... are used to assist the jury commissioner to determine the qualifications of a citizen for possible inclusion on the master jury list. The jury commissioner represents to prospective jurors that all information provided is confidential. These questionnaires are not judicial records open to the public, but are informational sources gathered to determine qualification for prospective jury service. ...

... [T]here is no requirement of general disclosure of the questionnaire under the Act or under any other applicable law.

(*Ibid.*)<sup>8</sup>

The data at issue in this case is directly analogous to the jury commissioner’s questionnaires in *Pantos*. Like the questionnaires in

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<sup>8</sup> *Pantos* concerns questionnaires gathered by the jury commissioner pursuant to what is now Code of Civil Procedure section 196. Questionnaires provided by jurors in individual cases follow the well established rule: they are public *only* if the “prospective juror is actually called to the jury box.” (*Leshar Communications v. Superior Court* (1990) 224 Cal.App.3d 774, 779 [274 Cal.Rptr. 154].)

*Pantos*, the academic data in question is merely used to determine the qualifications of an applicant to take the Bar Examination. (AA tab 102, p. 1257.) The ethnicity data is not even used for that purpose, but merely for internal State Bar research. (*Ibid.*) None of this raw data reflects decisions by the State Bar, or the bases for those decisions. It falls outside of the definition of judicial branch public records under California common law. (See *Copley Press I, supra*, 6 Cal.App.4th at p. 113.)

The Court of Appeal did not question the trial court's finding that the admissions database is not a judicial branch public record within the meaning of the above cases. Instead, the Court of Appeal sidestepped this entire line of case law by asserting that it does not apply to the State Bar because the State Bar "is not a court." (Slip Op. pp. 11-12.) That conclusion fundamentally misunderstands both the State Bar's role in the admissions process and the common law of access to judicial branch documents.

As discussed above, when it comes to attorney admissions, the State Bar is functioning as an integral part of *this Court's* judicial process. (*In re Attorney Discipline System, supra*, 19 Cal.4th at p. 599; *Saleeby v. State Bar, supra*, 39 Cal.3d at p. 557.) The database maintained by the Office of Admissions relates solely to this aspect of the State Bar's work, and in turn to the work of this Court.

It is true, as the Court of Appeal noted, that for some other purposes the State Bar may not act as an arm of this Court. That is the nature of an integrated bar. But this case did not involve any records of such activities. The *only* records at issue in this case are the data in the admissions database. Given this Court's exclusive and plenary control over attorney admissions, and the State Bar's sole, *sui generis* role in that context as this Court's administrative assistant, the Court of Appeal's assertion that the State Bar "is not a court" represents a fundamental misunderstanding of the relationship between the State Bar's Office of Admissions and this Court. The State Bar is "an arm or branch of the Supreme Court" in this context. (*Greene v. Zank, supra*, 158 Cal.App.3d at p. 504.)

Moreover, the limits on the common law right of access to judicial branch documents have never been applied solely to the records of judges, but also include judicial administrative personnel. *Pantos*, for example, involved the San Francisco County jury commissioner. The jury commissioner is not, of course, itself a court, but only an administrative arm of a court. Yet requests for its records are handled under the common law dealing with access to judicial records. (*Pantos v. City and County of San Francisco, supra*, 151 Cal.App.3d at pp. 262-65.)

The Court of Appeal also asserted that "[a]pplying the adjudicatory/nonadjudicatory test here ... would seemingly exempt all records of any administrative arm of the judicial branch of government

from the longstanding common law presumption of access to public records without the justification that exists for the particular protections afforded to nonadjudicative records produced by the courts.” (Slip Op. p.12.) The Court of Appeal cites no case law ever applying the “longstanding common law presumption” it refers to against an administrative arm of a judicial branch of government. Nor do Appellants cite any case applying a broad presumptive right of access to the administrative records of judicial branch agencies. We believe no such authority exists. When the Court of Appeal refers to the lack of a presumption of access to judicial branch administrative records as an “unwarranted exception” to the common law right of access, it has the situation exactly backwards. The very reason the Judicial Council adopted Rule 10.500 of the California Rules of Court was the fact that there *was no* pre-existing right to court administrative records, much less a right to all information in the possession of an administrative arm of the court. The purpose of Rule 10.500 was to “provide public access” to the material covered by the rule (AA tab 118, p. 1393), clearly indicating that none existed before.<sup>9</sup> Indeed, the whole approach of the

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<sup>9</sup> Similarly, see Bus. & Prof. Code, § 6026.5; Rules of State Bar, rule 6.54. Business and Professions Code section 6026.5 provides, with specific exceptions, that meetings of the State Bar’s Board of Governors shall be open to the public. Because the statute is silent regarding access to records of the Board, the Board adopted rule 6.54 of the Rules of the State Bar, which provides, “Agendas, minutes of open meetings, and written materials considered in any discussion or action by the board or board committees during open sessions, are public records.”

Court of Appeals – assuming that common law access exists to everything unless proven otherwise – is inconsistent with the history of public access statutes, all of which were enacted to expand upon the common law so that members of the public could have access to documents they would not otherwise be able to see. (*Filarsky v. Superior Court, supra*, 28 Cal.4th at p. 425 [“The CPRA was modeled on the federal Freedom of Information Act (FOIA) ... and was enacted for the purpose of *increasing* freedom of information by *giving* members of the public access to information in the possession of public agencies.”] [emphasis added].) If the common law were as broad as the Court of Appeal posits, there would have been no need for FOIA, the Public Records Act, the Brown Act, Bagley-Keene, or Rule of Court, rule 10.500 because the common law would already have required the access those statutes and rules create.

Thus, there is simply no authority for the Court of Appeal’s assertion that only some judicial branch agencies are entitled to rely on the well established body of case law concerning which judicial branch records are, and are not, subject to presumptive disclosure. In cases like this one dealing with public access to admissions records, the State Bar is as much part of a court for the purpose of selecting the correct disclosure rule as a jury commissioner.<sup>10</sup> The same rule that applies to a jury commissioner’s

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<sup>10</sup> If this Court does not grant review, the State Bar requests that the Court of Appeal Opinion be depublished, at least at a minimum, the section

records should therefore apply to the State Bar's Office of Admissions records. The Court of Appeal erred when it concluded that the admissions database was not subject to this standard.

b) *The Court of Appeal Then Failed To Apply Any Accepted Common Law Definition Of Public Record*

The Court of Appeal compounded its error by concluding that the admissions database is a public record under the common law without ever identifying or applying any common law test that would make it so.

Having concluded that the substantial body of case law establishing rules for access to judicial branch records does not apply to the State Bar, the Court of Appeal turned immediately to "the criteria that govern application of the presumptive right of disclosure" – "[W]here there is no contrary or countervailing public policy, the right to inspect public records must be freely allowed..." (Slip Op. p. 13.) Although the Court of Appeal cited *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 222 [71 Cal.Rptr. 193] for this proposition, the cited language is *not* the standard set forth in *Craemer* for whether something *is* a public record. What the Opinion quotes is the standard for the *second step* in the inquiry: whether a public record has to be disclosed. In other words, like Appellants, the Court of

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stating that "the Bar is not a court." The State Bar is frequently in litigation with disgruntled applicants and attorneys, and the "not a court" statement is now being cited for the proposition that the State Bar is not entitled to established immunities, or that the records of the Bar are not court records.

Appeal begged the question of whether the database is a public record subject to a presumptive right of disclosure.

No California court has held, as Appellants have argued and as the Court of Appeal apparently concluded, that under the common law all data in possession of a government agency is a public record subject to presumptive inspection. The common law test for whether a document in the possession of the government is a public record turns on whether the document is an official record of government action. As described in *Craemer*, “A public writing ... is ... the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive.” (*Craemer v. Superior Court*, *supra*, 265 Cal.App.2d at p. 220.)

That is consistent with the prevailing common law definition of public records adopted in *Washington Legal Foundation*. The threshold question, as that court explains, is whether the requested document is a public record. “The way to determine whether the public has a right of access to a document, we explained, is to decide first ‘whether the document sought is a ‘public record.’” (*Washington Legal Foundation v. U.S. Sentencing Com’n*, *supra*, 89 F.3d at p. 899.) The court then, after surveying the common law across the country, found the following definition of a public record:

a “public record”-that is, a record to which the public has a right of access, subject to the balance of public and governmental interests-is a government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived.

(*Id.* at p. 905 [citations omitted]; 76 C.J.S. (2010) Records, § 76 [“Public records, to which the public has a common-law right of access, subject to the balance of public and governmental interests, are government documents created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived.”].)

The Court of Appeal’s Opinion makes no reference to this or any other common law test in deciding that the admissions database is subject to presumptive public access. Indeed, although the Opinion cites *Washington Legal Foundation* with approval at page 8, it disregards the actual holding of that case, which *rejects* a broad definition that *all* information in the possession of the government is presumptively public.<sup>11</sup>

As explained in *Washington Legal Foundation*, the widely accepted common law definition set forth above is “narrow enough to avoid the necessity for judicial application of the second-step balancing test to

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<sup>11</sup> The Court of Appeal appears to have presumed that California should “embrace[] the broadest imaginable definition of public or ‘common law’ records” which the federal Court of Appeals concluded was an “imprudent” rule “implicitly rejected by most of the states.” (*Washington Legal Foundation v. U.S. Sentencing Com’n*, *supra*, 89 F.3d at pp. 904-05.)

documents that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken.” (*Washington Legal Foundation v. U.S. Sentencing Com’n*, *supra*, 89 F.3d at p. 905.)

*Washington Legal Foundation* presents the common law rule, which should have been applied by the Court of Appeal.

Under this test too, it is clear that the raw data sought by Appellants from the State Bar’s admissions database is not a public record. That data, which includes individual and personal grades, LSAT scores, bar scores, and demographic information, does not memorialize or record any official action, decision, statement, or other matter of legal significance. Like the non-public juror questionnaires in *Pantos*, the data is merely preliminary qualification data used by the State Bar. It is patently not public information; indeed, successful applicants do not even have the right to see *their own* scores. (Rules of State Bar, rule 4.62(B).) It makes little sense to argue that Bar Exam scores are public records when successful applicants are specifically prohibited from seeing their own scores. The State Bar’s rules also provide that all applicant records are confidential. (Rules of State Bar, rule 4.4.)

Contrary to the Court of Appeal’s unstated assumption, *all* records in the possession of the government are *not* common law “public records” to which a presumption of access attaches. The Court of Appeal provides no definition or test whatsoever for determining which documents in the

possession of the State Bar are public records, but instead only discusses the test for when public records must be disclosed. Review is necessary to correct this error and confirm that the admissions database is not a public record.

3. ***Evidence Code Section 1040 Does Not Create A Standard For Public Access To Information In The Possession Of The Government***

Evidence Code section 1040 establishes an “official information” privilege for certain government information in discovery and trial testimony. (Evid. Code, § 1040.) It provides a test whereby “[a] public entity has a privilege to refuse to disclose official information” under certain circumstances. (*Ibid.*) The Court of Appeal reasoned, despite no party having raised this issue, that this statute somehow establishes a test to be used in connection with requests by the public for information in the possession of the government. That unprecedented reasoning is plainly erroneous.

The Evidence Code does not create any obligation for the government to permit public access to its records. It establishes rules for the entirely separate question of what relevant evidence is discoverable or admissible *by litigants* in a civil or criminal proceeding.<sup>12</sup> (Evid. Code, § 300.) No case has ever suggested that the rules for admitting or

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<sup>12</sup> A litigant’s broad right to discovery is created by Code of Civil Procedure section 2017.010, not the common law.

compelling testimony in litigation have any bearing on the right of *public* access to government records. To the contrary, it is well established that these are separate issues entirely. (See *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 123-24 [130 Cal.Rptr. 257] [exemption from disclosure under Public Records Act is irrelevant to analysis of whether litigant has a right to information under Evidence Code § 1040], overruled in part on another ground in *People v. Holloway* (2004) 33 Cal.4th 96, 131 [14 Cal.Rptr.3d 212]; accord *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125 [97 Cal.Rptr.2d 439].) The Court of Appeal simply erred when it asserted that Evidence Code section 1040 somehow prescribes the test when a public entity does not disclose material information in its possession in response to a public records request.

**C. PROPOSITION 59 DID NOT MAKE THE STATE BAR'S ADMISSIONS DATABASE A PUBLIC RECORD**

The trial court correctly found *both* that the common law does not require presumptive disclosure of the admissions database, *and* that Proposition 59 did not change that rule. The Court of Appeal did not reach the Proposition 59 issue given its common law ruling. If review is granted, as we believe it should be, the Court should also decide whether Proposition 59 changes that result.

Below, Appellants took the radical position that Proposition 59 dramatically changed the law in California such that *all* documents in the

possession of a judicial agency are now presumptively subject to public review. This simplistic assertion contradicts all post-Proposition 59 case law.

Although this Court has not weighed in on the subject, the Court of Appeal has uniformly held that Proposition 59 constitutionalized the pre-existing rules. (*Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370, 1382 [75 Cal.Rptr.3d 9]; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 101 [70 Cal.Rptr.3d 88] ["Absent a clear directive from the Judicial Council that the rules are intended to create a presumption of access to a larger class of court-filed documents than the class enunciated in *NBC Subsidiary* and in the rules themselves, we will not so construe them."].)

Appellants have not cited any case, in any context, where a court held that Proposition 59 required disclosure of any documents that were not already subject to disclosure before its enactment. All of the relevant cases reason otherwise.<sup>13</sup> In addition to granting review on the issues reached by the Court of Appeal, this Court should also address the application of Proposition 59 to this case given the purely legal nature of this question.

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<sup>13</sup> (See also *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 657 [64 Cal.Rptr.3d 854]; *Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th at 597; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750-51 [49 Cal.Rptr.3d 519]; *Shapiro v. Board of Directors of Centre City Development Corp.* (2005) 134 Cal.App.4th 170, 181, fn. 14 [35 Cal.Rptr.3d 826].)

**V. CONCLUSION**

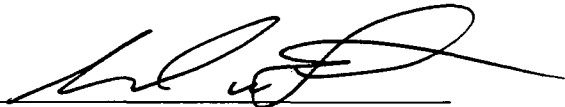
At bottom, the records sought in this action, as with all State Bar records related to the admission of attorneys, are in fact the records of this Court. The Court should grant this petition to clarify that jurisdiction over such records lies only with this Court. Under its inherent and plenary authority, it is this Court that should determine whether the State Bar's admissions database, and similar admissions records held by the State Bar in its capacity as this Court's administrative arm, are subject to a presumptive public right of access.

DATED: July 19, 2011

Respectfully submitted,

**KERR & WAGSTAFFE LLP**

By



Michael von Loewenfeldt  
*Attorneys for Respondents*  
**THE STATE BAR OF  
CALIFORNIA and THE BOARD  
OF GOVERNORS OF THE  
STATE BAR OF CALIFORNIA**

73806

**CERTIFICATION OF COMPLIANCE WITH WORD LIMIT**

Pursuant to Rules of Court, rules 8.204(c)(1) and 8.504(d)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 8,399 words.

DATED: July 19, 2011

**KERR & WAGSTAFFE LLP**

By



MICHAEL VON LOEWENFELDT  
*Attorneys for Respondents*  
**THE STATE BAR OF  
CALIFORNIA and THE BOARD  
OF GOVERNORS OF THE  
STATE BAR OF CALIFORNIA**

## CERTIFICATE OF SERVICE

I, Andrew Hanna, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 100 Spear Street, Suite 1800, San Francisco, California 94105.

On July 19, 2011, I served the following document(s):

### **PETITION FOR REVIEW**

on the parties listed below as follows:

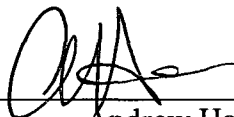
<p>James M. Chadwick, Esq. Guylen R. Cummins, Esq. Evgenia N. Fkiaras, Esq. SHEPPARD MULLIN RICHTER &amp; HAMPTON LLP Four Embarcadero Center, 17th Floor San Francisco, CA 94111-4109</p> <p>Attorneys for Appellant California First Amendment Coalition</p>	<p>Gary L Bostwick, Esq. Jean-Paul Jassy, Esq. BOSTWICK &amp; JASSY LLP 12400 Wilshire Blvd., Suite 400 Los Angeles, CA 90025</p> <p>Attorneys for Appellants Richard Sander and Joe Hicks</p>
<p>Judy Alexander, Esq. LAW OFFICE OF JUDY ALEXANDER 2302 Bobcat Trail Soquel, CA 95073</p> <p>Attorney for Amici Curiae Vikram Amar, Jane Yakowitz, and Mark Grady</p>	<p>Duffy Carolan, Esq. John Eastburg, Esq. DAVIS WRIGHT TREMAINE LLP 505 Montgomery Street Suite 800 San Francisco, CA 94111</p> <p>Attorneys for Amici Curiae News Media Organizations</p>
<p>Sharon L. Brown, Esq. Joshua P. Thompson, Esq. PACIFIC LEGAL FOUNDATION 3900 Lennane Drive, Ste. 200 Sacramento, CA 95834</p> <p>Attorney for Amicus Curiae Pacific Legal Foundation</p>	<p>The Honorable Curtis Karnow SAN FRANCISCO SUPERIOR COURT 400 McAllister Street San Francisco, CA 94102</p>

<p>John Eastman, Esq. Anthony T. Caso, Esq. Karen Lugo, Esq. David Llewellyn, Esq. CENTER FOR CONSTITUTIONAL JURISPRUDENCE c/o Chapam Univ. Sch. Of Law One University Drive Orange, CA 92886 Attorneys for Amici Curiae Gerald Reynolds, Todd Gaziano, Gail Heriot, Peter Kirsanow, and Ashley Taylor, Jr.</p>	<p>Clerk of the Court, Division Three CALIFORNIA COURT OF APPEALS 350 McAllister Street San Francisco, CA 94102</p>
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**By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 19, 2011, at San Francisco, California.

  
\_\_\_\_\_  
Andrew Hanna

**CERTIFIED FOR PUBLICATION**  
**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**  
**FIRST APPELLATE DISTRICT**  
**DIVISION THREE**

RICHARD SANDER et al.,  
Plaintiffs and Appellants,

v.

STATE BAR OF CALIFORNIA et al.,  
Defendants and Respondents.

A128647

(City & County of San Francisco  
Super. Ct. No. CPF08508880)

Appellants Richard Sander, Joe Hicks and the California First Amendment Coalition seek access to admissions records from the State Bar of California (the Bar), subject to conditions designed to ensure the privacy of bar applicants, in order to conduct academic research on discrepancies in bar passage rates among racial and ethnic groups. After the Bar rejected Sander's request, appellants filed this action for a writ of mandate to compel the Bar to release the information. The trial court concluded that the common law right of access to public documents is no broader than the right of access to adjudicatory court records based in the First Amendment to the United States Constitution and, therefore, does not authorize public access to the Bar's records sought by appellants. The court further found article I, section 3(b) of the California Constitution inapplicable to the records request.

We hold this analysis was erroneous. The common law right of access to public documents is broader than the First Amendment right of access to adjudicatory court documents. We therefore reverse the judgment and remand the case to the superior court to determine whether the Bar must produce the requested information after balancing the

applicants' interest in confidentiality and the burden this request imposes on the Bar against the strong public policy favoring disclosure. The trial court is best suited to craft any qualifications to an order for production that can accommodate these concerns if possible.

### **BACKGROUND**

The Bar collects and maintains records containing information regarding individuals who apply to take the bar exam. In addition to bar exam results and scores, the information pertaining to each individual often includes the applicant's undergraduate and law school records, standardized test scores, ethnic background, and gender.

Sander, an economist and professor of law at the University of California Los Angeles, conducts research on the scale and effects of admissions preferences in higher education. Sander approached the Bar to explore possible collaboration on research regarding a large and persistent gap in bar exam passage rates among racial and ethnic groups. The Bar rejected his proposal based, in part, on concerns about applicants' interests in the confidentiality of their personal information.

Sander then made a formal request for the records he needed to conduct his study. The Bar rejected his request, again citing privacy concerns, and subsequently rejected a revised request. The California First Amendment Coalition, a nonprofit corporation primarily concerned with open government issues, filed a separate request for the same data. That request was also rejected.

Appellants petitioned the San Francisco Superior Court for a writ of mandate to compel the Bar to disclose the requested records pursuant to the common law right of access to public records and article I, section 3(b) of the California Constitution (enacted into law in 2004 by the passage of Proposition 59).<sup>1</sup> The parties stipulated to bifurcate the proceedings into two phases. Phase One addressed whether the Bar has a legal duty

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<sup>1</sup> Hereinafter "Proposition 59."

to provide the requested records and encompassed four sub-issues: “(a) Whether there is a public right of access to the requested records; [¶] (b) Whether providing the requested records in accordance with the protocols accompanying Petitioners’ requests would entail the creation of a ‘new record’; [¶] (c) Whether the right of public access requires the creation of a ‘new record’ or, in other words, whether the need to create a record relieves Respondents of the duty to provide access to the requested records; and [¶] (d) Whether the Court can order Respondents to provide the requested records in a manner other than that specified in the protocols accompanying Petitioners’ requests.”

Phase Two was to proceed only if the court found the Bar subject to a duty of disclosure, and was to address whether providing the records to petitioners would violate Bar applicants’ privacy rights or impose an undue burden on the Bar that would justify limiting or denying Sander’s request.

Phase One was tried on declarations and stipulated facts. The court ruled that neither constitutional principles nor the common law imposes a legal duty on the Bar to provide access to its records. The court looked first to the presumptive right of access to court documents that is grounded in the First Amendment right to open trials, exploring the distinction within that category between “adjudicatory” documents (i.e., official documents reflecting the work of the court), which are generally subject to public access, and others, such as preliminary drafts, personal notes and rough records, which are generally not. The court ruled that because the Bar’s admission records are not adjudicatory, Sander has no right of access to them under the First Amendment.

The court also rejected Sander’s position that the records are subject to a presumptive right of disclosure under the common law right of access to public records. In rejecting the common law right, the court reasoned: “[T]he foci in all these cases [on the common law right of access] are ‘judicial records’ as defined by C.C.P. § 1904, and the preliminary enquiry must be whether the documents sought so qualify. *E.g.*, *Copley*, 6 Cal.App.4th at 112. That is, this entirely general right of access is limited to judicial

records.” Although the trial court recognized that the historic origins of the common law presumptive right of access to public documents predates the rule of access to court documents derived from the First Amendment, it concluded the common law right “has in effect been absorbed by the constitutional rule.”

The court also declined to apply the common law presumptive right for another reason: a perceived lack of criteria governing its application. The court reasoned that most of the cases Sander cited in support of disclosure “simply assume that the records are ‘public’ and so by default ought to be disclosed. This does not help us here, because [neither the case authority] nor argument presented by Sander provides criteria by which I can determine whether the data sought in this case are ‘public’ records—except, as noted below in connection with Proposition 59, criteria which are so broad as to be self-defeating. [¶] Ultimately, Sander does not provide a coherent description of the common law scope of ‘public records’ which would authorize the relief he seeks here.”

Finally, the court rejected Sander’s position that Proposition 59 authorizes access to the Bar records. Proposition 59 provides that “[t]he people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” The court found that both its language and history demonstrate only the intention to constitutionalize, but not expand, existing law.<sup>2</sup>

In light of its rejection of Sander’s request, the court declined to address whether or to what extent granting the petition would require the production of “new” records. The court found the record was insufficient to resolve this issue. It noted: “Whether a production involves the creation of a ‘new’ document likely implicates spectra of (i) efforts in making the production and (ii) relationship between extant data and that

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<sup>2</sup> The court also found that rule 10.500 of the California Rules of Court is inapplicable to Bar records. Sander does not dispute this conclusion.

demanded. . . . [¶] Fundamentally, the issue is likely to devolve to the complexity of the tasks involved in generating the reports sought by Petitioners. Diagrams of the steps involved [citation] are not entirely useful in this regard. It appears that the relational database maintained by the State Bar [citation] includes the data sought by Sander [citation], and thus it is likely that a query can be formulated to extract the data sought. But without expert declarations on the matter, which do not beg the question of the extent to which ‘new’ data or its arrangement are involved, this issue is not ripe for adjudication.”

The court excluded portions of petitioners’ supporting declarations as irrelevant, apparently due to its conclusion that there is no public right of access to the Bar’s records. “Whether the Bar has or has not previously released in [sic] information (Murphy Declaration), the reasons for Sander’s work and his hypotheses (Sander Declaration), what various agency’s practices are (LeClere Declaration), the Bar related correspondence proffered via the Chadwick Declaration, and the balance of the objected to evidence, are all irrelevant to the issue decided in the [statement of decision].”

Sander timely appealed from the ensuing judgment.

## DISCUSSION

Sander asserts the public has a qualified right of access to the Bar’s applicant records derived from two independent sources: the common law and Proposition 59. Since we should refrain from deciding an issue on constitutional grounds if it can be decided on a nonconstitutional basis (see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190), we will first address Sander’s contention that the court erred when it found the Bar’s records were not subject to disclosure under the common law presumption of access to public documents. We agree that the court erred.

### ***A. The Common Law Right of Access is Not Limited to Official Court Records***

The common law right of access to public documents originated long before, and independently of, the right of access to adjudicatory records grounded in the First

Amendment. (*United States v. Mitchell* (D.C. Cir. 1976) 551 F.2d 1252, 1257-1259; *Polillo v. Deane* (1977) 74 N.J. 562, 570 [tracing common law rule to English law dating back to first half of the 18th century].) As stated in *Polillo*, the policies underlying the common law right are deeply rooted in our democratic form of government. “The policy reasons for opening up government to the public have been expressed on numerous occasions throughout this nation’s history. Foremost among them is the goal of fulfilling our cherished ideal of creating a ‘government of the people.’ James Madison wrote: ‘A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.’ [Citations.] DeTocqueville felt that these same ideas were fundamental to the American tradition. In his perceptive commentaries about our system of government, he observed: ‘It is by taking a share in legislation that the American learns to know the law; it is by governing that he becomes educated about the formalities of government. The great work of society is daily performed before his eyes, and so to say, under his hands.’ ” (*Polillo, supra*, 74 N.J. at pp. 570-571.)

Similar sentiments are found in our state’s legislative expressions of public policy as far back as 1953. In enacting the Brown Act, our state’s open meeting law, “the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” (Gov. Code, § 54950.) This expression of policy is repeated in the Bagley-Keene Open Meeting Act and its sentiment is captured in the Public Records Act, which has been interpreted to embody the strong public policy in

favor of disclosure of public records. (Gov. Code, §§ 11120 & 6250; *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1392.)<sup>3</sup>

Justice Powell echoed these expressions of the importance of open government in *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589 (*Nixon*), concerning media claims for access to the infamous Whitehouse tapes. Writing for the court, he addressed the scope of the common law right of access to public information—an “infrequent subject of litigation, [whose] contours have not been delineated with any precision.” (*Id.* at p. 597.) He wrote, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, [citation], American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen’s desire to keep a watchful eye on the workings of public agencies [citations], and in a newspaper publisher’s intention to publish information concerning the operation of government, [citations.]” (*Id.* at pp. 597-598, fns. omitted, italics added.) The right of access is presumptive, not absolute, and the court observed that while its precise contours elude easy definition, “[t]he few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” (*Id.* at 598-599.)

The Bar asserts that the common law right is circumscribed by the parameters of the parallel, but distinct, First Amendment right of access to *court* records, and therefore that it is limited to official adjudicatory records. We disagree. In contrast to the common law rule, the more recently developed right of access to court records grounded in the First Amendment derives from the United States Supreme Court’s recognition of a First

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<sup>3</sup> These statements of policy are instructive even though the open meeting and public record acts do not apply to the Bar. (*Chronicle Pub. Co. v. Superior Court* (1960) 54 Cal.2d 548, 573.)

Amendment right to open trials (see *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 592), and has generally been limited to official court records of adjudicatory proceedings. (See, e.g., *NBC Subsidiary, supra*, 20 Cal.4th at pp. 1198-1209 & fn. 25; *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 67-68.)

Almost 20 years after *Nixon*, the United States Court of Appeals for the District of Columbia rejected an interpretation that limited the scope of the common law right to official adjudicatory records in a markedly similar way as the Bar argues in this case. *Washington Legal Foundation v. United States Sentencing Commission* (D.C. Cir. 1996) 89 F.3d 897 concerned a request for access to the records of an advisory group to the United States Sentencing Commission. There, as here, the records sought were those of “a government entity . . . that is within the judicial branch *but is not a court.*” (*Id.* at p. 903, italics added.) The district court concluded the documents were not public records within the meaning of the common law right of access because that right applies only to those documents which are “‘akin to court documents.’ ” (*Id.* at p. 900.)

The court of appeals rejected the district court’s restrictive view. “Unlike the district court in the present case, we are not persuaded by the narrow focus of the federal cases that the common law right is limited to records that are ‘similar . . . to court documents.’ The Supreme Court’s reference in *Nixon* to ‘a general right to inspect and copy public records and documents, including judicial records and documents,’ [citation], *clearly implies that judicial records are but a subset of the universe of documents to which the common law right applies.* [Citations.] Indeed, it has been said in this district that ‘the general rule is that all three branches of government, legislative, executive and judicial, are subject to the common law right.’ [Citation.] ” (*Washington Legal Foundation v. United States Sentencing Commission, supra*, 89 F.3d at p. 903, italics added; see also *Schwartz v. United States Department of Justice* (D.D.C. 1977) 435 F.Supp. 1203 [common law right applies to all three branches of government].) Although there are few cases addressing this question, those that we have found demonstrate that California law has long recognized that right. (*Craemer v. Superior Court* (1968) 265

Cal.App.2d 216, 220 & fn. 3; *Musket v. Dept. of Public Service* (1917) 35 Cal.App. 630, 636-638.)

We also disagree with the trial court's conclusion that the First Amendment right of access to court documents has "absorbed" the common law right to government information. None of the cases cited by the Bar so hold, and our independent research has failed to produce any precedent that suggests the more recently established First Amendment right has swallowed up the historically and analytically distinct right under the common law. To the contrary, cases decided well after the genesis of the First Amendment right have continued to recognize the separate and distinct common law right of access. (See, e.g., *KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1203; *Valley Broadcasting Co. v. United States District Court* (9th Cir. 1986) 798 F.2d 1289, 1293 [common law right of access furthers the same concerns protected by the First Amendment but is separate and distinct from the constitutional right]; *Stone v. University of Maryland Medical System Corp.* (4th Cir. 1988) 855 F.2d 178, 180 [distinct doctrines]; *In re Copley Press, Inc.* (9th Cir. 2008) 518 F.3d 1022, 1029; *Lugosch v. Pyramid Co.* (2nd Cir. 2006) 435 F.3d 110, 126 [different burdens under First Amendment and common law rights]; *In re Providence Journal Co.* (1st Cir. 2002) 293 F.3d 1, 10 [the two rights of access are not coterminous, although they overlap "because the jurisprudence discussing the First Amendment right of access . . . has been derived in large measure from the jurisprudence that has shaped the common-law right of access"].) The two rights of access to government information remain independently viable despite areas of overlap.

***B. Cases Addressing Access to Records of Adjudicatory Bodies Are Not Dispositive of Appellants' Request***

The issue presented here may not inevitably lead to production of the documents and information sought by appellants. That would only occur after further proceedings in the trial court. We only consider whether the common law rule of presumptive access to

public information extends to the Bar's admission records,<sup>4</sup> subject to balancing against the private interests implicated by disclosure.

The Bar provides no compelling reason that it does not. The Bar is a public corporation and the records sought relate to its official function of administering the bar exam, a matter of legitimate public interest. (See *Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 962; *Greene v. Zank* (1984) 158 Cal.App.3d 497, 504-507; Bus. & Prof. Code, §§ 6001, 6064.) Citing *Copley Press, Inc. v. Superior Court* (1992) 6 Cal. App. 4th 106, the Bar observes that *court* records subject to presumptive disclosure are limited to those “ ‘which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators[,]’ ” while other court documents “created or simply maintained by court personnel are internal documents to which the public has no right of inspection.” Since the records Sander wishes to review are not in the former category, the Bar reasons they are not subject to public access. In other words, the Bar claims that because it is part of the judicial branch its records are immune from the common law presumption of access unless they are “adjudicatory” documents. As the argument goes, since the Bar is not in the business of adjudication, its records are not adjudicatory and need not be disclosed.

But the Bar's argument is premised on the implicit notion that the Bar, as the agency charged with overseeing attorney admission to the practice of law, is subject to the specific considerations that have shaped the parameters of the public right of access to *court* records. Those considerations are expressed neatly in *Copley Press, Inc.*: “The craft of the lawyer, judge and clerk involves important but elusive concepts, such as logic, justice, equity and the rule of law; however, the physical manifestation of these ideas is the written word. Courts may not produce much heat or light, and in fact not very much of a tangible nature at all, but they produce prodigious quantities of words.

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<sup>4</sup> We clarify that we express no opinion as to the application of the law to records of Bar disciplinary matters.

The end product of all this effort is hopefully accurate, well conceived and generally beneficial. In order to reach that end result, however, an awful lot of defective words needs to be produced. . . . [¶] The very nature of preliminary drafts, personal notes and rough records is such as to argue against their inspection by third parties. Such inspection and possible use would in many cases be detrimental to the user, since the materials in [this category] are tentative, often wrong, and sometimes misleading. It is for this very reason that these materials are not regarded as official court records—they do not speak for the court and do not constitute court action. Perhaps more importantly, a requirement that [these] materials be made available for public view would severely hamper the users of the materials. The reason for preparation of a first draft is to extract raw and immature thoughts from the brain to paper, so that they can be refined and corrected. The judge's personal benchnotes are constructed so as to remind him, in his personal fashion and not in a form digestible by the public, of the aspects of the case he thought important. Much more harm would be done to the judicial process by requiring this [category of] material to be available to the public, than would ever be overborne by any benefit the public might derive thereby." (*Copley Press, Inc. v. Superior Court*, *supra*, 6 Cal. App. 4th at pp. 114-115.)

At oral argument, counsel for the Bar asserted that all of its records are judicial records, relying on the Bar's placement in article VI of the California Constitution. But the courts of record in this state are the Supreme Court, courts of appeal, and superior courts. (Cal. Const., art. VI, § 1.) The Bar is not a court. It is a public corporation. (Cal. Const., art. VI, § 9; Bus. & Prof. Code, § 6001.) Although it has been described as an administrative arm of the Supreme Court for purposes of assisting in matters of admission and discipline, the Bar also remains subject to control by the Legislature. (*Chronicle Publishing Co. v. Superior Court* (1960) 54 Cal.2d 548, 564.) The Bar has broad powers to investigate complaints and conduct formal disciplinary proceedings (*id.* at p. 565), and it may perform judicial functions in certain cases in connection with its responsibilities over discipline and admission. (See Rules of the State Bar, tit. V, Rules of Procedure, rules 5.1 et seq.; tit. IV, Admissions and Educational Standards., rule 4.6.)

But the Bar is not a court and does not function as a court for all purposes. The Bar is controlled by a board of governors, composed of a group of members and its president, that is vested with oversight of its executive functions. (Bus. & Prof. Code, §§ 6010, 6011, 6030.) It has many responsibilities that are more administrative than judicial. These include administration of the Bar exam, oversight of legal specialization and certification programs, the special masters program, the lawyer assistance program, foreign or out-of-state legal consultants, client security funds, lawyer referral services, and certification of legal education providers. (See Rules of the State Bar, tit. III, Programs and Services, div. 2, chs. 4-7, div. 3, chs. 1-4, div. 4, ch. 1, div. 5, chs. 1, 4; tit. IV, Admissions and Educational Standards, div. 1, ch. 5.)

Appellants are not seeking judicial records that pertain to the Bar's adjudicatory functions or preliminary notes, rough drafts or personal notes that may bear upon duties pertinent to admission to the Bar. Instead, they seek data obtained from Bar applicants. Disclosure of the Bar's admissions data does not necessarily raise the concerns peculiar to the courts that have driven the development of the rule shielding many preliminary, unofficial court documents from public access. We perceive no basis for holding the Bar's raw admission data immune from public scrutiny because they do not satisfy the test devised to distinguish between the official work product of the courts and their preliminary, nonadjudicative records. Moreover, applying the adjudicatory/nonadjudicatory test here, as the Bar urges us to do, would seemingly exempt all records of any administrative arm of the judicial branch of government from the longstanding common law presumption of access to public records<sup>5</sup> without the justification that exists for the particular protections afforded to nonadjudicative records produced by the courts. The Bar cites no persuasive authority for such an unwarranted exemption.

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<sup>5</sup> We are aware that the recent adoption of rule 10.500 of the California Rules of Court (effective Jan. 1, 2010) expressly affords public access to certain nondeliberative and nonadjudicative records of most judicial branch entities. (Rule 10.500(a)(1).) This rule, however, does not apply to the Bar. (See Cal. Rules of Court, rule 10.500(c)(3).)

***C. The Public Access Determination Requires Balancing Applicants' Privacy Concerns and the Burden Imposed on the Bar Against Public Policy Favoring Transparency***

Another basis for the trial court's ruling was its observation that "neither *Nixon* nor any other case nor argument provided by Sander provides criteria by which I can determine whether the data sought in this case are 'public' records . . . ." Here, too, we disagree with the analysis. In context, the criteria that govern application of the presumptive right of disclosure are stated in *Craemer*: "[W]here there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. *In this regard the term 'public policy' means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or public good.*" (*Craemer v. Superior Court, supra*, 265 Cal.App.2d at p. 222, italics added; see also *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 662.) The trial courts are charged with exercising their discretion "in light of the relevant facts and circumstances" (*Nixon, supra*, 435 U.S. at pp. 598-599) to balance such policy factors against "the policy of this state that public records and documents be kept open for public inspection in order to prevent secrecy in public affairs." (*Craemer, supra*, at p. 222.) The Legislature has prescribed the same test when, as here, a public entity asserts a privilege to not disclose official information—i.e., "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) To invoke the privilege, the claimant (with exceptions not relevant here) must show that disclosure contravenes 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 . . . ." (Evid. Code, § 1040, subd. (b)(2).)

Here, while the Bar's rules address the disclosure of documents pertaining to many of its administrative responsibilities, they state that: "Applicant records are confidential unless required to be disclosed by law . . . ." (State Bar Rules, tit. IV,

Admissions and Educational Standards, div. 1, rule 4.4.) Thus, even the Bar acknowledges that the confidentiality of applicant records is not absolute. Both case law and statute require the court to determine whether disclosure is required by balancing applicants' privacy concerns and the burden imposed on the Bar against the strong public policy favoring openness in public affairs.

We hold the court erred in ruling that the common law presumption of access to public information is limited to adjudicatory documents related to court proceedings and, to the extent the court acknowledged the common law presumptive right of access applies to public records generally, that it erred in declining to assess any countervailing public policy considerations against the public policy favoring access. Whether those considerations are such as to outweigh the presumptive right of access must therefore be addressed on remand, as must the relevance of the excluded declarations to those issues. The trial court is in the best position to weigh the competing interests and strike the appropriate balance.

In light of these conclusions, we do not reach the constitutional issues concerning the potential application of Proposition 59 to Sander's records request. We also decline to reach the question of whether Sander's request would impermissibly require the creation of a "new" record. The trial court considered this issue and, in addition to finding it mooted by its conclusion that Sander had no legal basis for access to the Bar's admission records, found the factual record was inadequately developed to resolve the issue. That latter determination was firmly within the court's discretion and we will not disturb it.

#### **DISPOSITION**

The judgment is reversed and the matter is remanded for further proceedings.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Pollak, J.

Trial Court: Superior Court of the City and County of San Francisco

Trial Judge: Honorable Curtis E.A. Karnow

Attorney for Appellants: UCLA School of Law  
Jane Robert Yakowitz

Sheppard, Mullin, Richter & Hampton  
James M. Chadwick  
Evgenia N. Fkiaras  
David E. Snyder  
Guylyn R. Cummins

Bostwick & Jassy LLP  
Gary L. Bostwick  
Jean-Paul Jassy  
Kevin L. Vick

Attorney for Respondent: Kerr & Wagstaffe LLP  
James M. Wagstaffe  
Michael John Von Loewenfeldt

Office of General Counsel,  
The State Bar of California  
Starr Babcock  
Lawrence C. Yee  
Rachel S. Grunberg

Amici Curiae News Media Organizations Davis Wright Tremaine LLP  
Duffy Carolan  
John Eastburg

Amici Curiae Vikram Amar, Jane Yakoqitz, and Mark Grady Law Office of Judy Alexander  
Judy Alexander

Amicus Curiae Pacific Legal Foundation

Pacific Legal Foundation  
Sharon L. Browne  
Joshua P. Thompson

Amici Curiae Gerald Reynolds, Todd  
Gaziano, Gail Heriot, Peter Kirsanow, and  
Ashley Taylor, Jr.

Center for Constitutional Jurisprudence  
John Eastman  
Anthony T. Caso  
Karen J. Lugo  
David Llewellyn