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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD SANDER, JOE HICKS,
CALIFORNIA FIRST AMENDMENT COALITION

Plaintiffs and Appellants

v.

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

Defendants and Respondents.

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

**OPENING BRIEF OF DEFENDANTS AND RESPONDENTS
(The Petitioners in this Court)**

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I. ISSUES FOR REVIEW

The Court's Order granting review directed the following issues to be briefed and argued:

(1) What ground, if any, exists for finding that the information sought by plaintiffs is information that is subject to public disclosure?

(2) What is the effect, if any, of the representation of confidentiality made by the State Bar to the individuals from whom the information was collected?

(3) Does the form in which the requested information is regularly maintained affect whether the State Bar must provide the requested information?

II. SUMMARY OF ARGUMENT

Plaintiffs Richard Sander, Joe Hicks, and the California First Amendment Coalition [collectively referred to herein as "Plaintiffs"] insist that the State Bar of California's admissions database containing the Bar Exam scores, academic records, and ethnicity of individuals who have taken the California Bar Exam is a public record, so that they, and anyone else in the public, are entitled to review that data. Plaintiffs sued the State Bar of California and the Board of Governors of the State Bar of California (collectively referred to herein as "State Bar") for declining to provide them with this information. The trial court properly found that the State Bar's

admissions database is not subject to public disclosure, but the Court of Appeal reversed that finding, necessitating review by this Court.

The State Bar is a judicial branch entity, placed by the voters within Article VI of the California Constitution. It serves as the administrative arm or adjunct to this Court with respect to the admission and discipline of attorneys in California. In these areas, the State Bar's role is expressly acknowledged as an integral part of this Court's judicial function, and its records are essentially the records of this Court.

Like all judicial branch entities, the State Bar is expressly exempted from the wide array of "freedom of information" statutes that apply to the executive and legislative branches of government. This statutory exemption represents a fundamental public policy that, unlike records of the political and partisan branches of government, records held by the judicial branch are not subject to public review beyond the public's historical common law right to access court records. The common law right is far narrower than the widesweeping access created by modern freedom of information statutes. It only applies to the adjudicatory records of open court proceedings and to other official documentation of the judiciary's actions.

This limited right of public access to records held by the judicial branch is recognized as the common law throughout the United States, and is entirely consistent with the difference between the roles of the executive and legislative branches and that of the judicial branch.

The State Bar’s admissions database does not officially memorialize or record actions or decisions of the State Bar¹ or of this Court. The scores, academic history, and ethnicity data contained in that database are not subject to public disclosure under either the statutory or common law of this State. Nor did Proposition 59 create any new right for the public to review this data. Proposition 59 “constitutionalized” the pre-existing laws governing access to public records; it did not wipe away all pre-existing common law and replace it with a boundless commandment that every government meeting is open and every document in the possession of government is subject to presumptive public disclosure. The State Bar’s admissions database is not a public record under the well established common law right of access to judicial branch records or any other right of public access.

The Court has also inquired as to how the fact this data is collected under a promise of confidentiality affects this analysis. The promise of confidentiality confirms the non-public nature of this data in at least three ways. First, the very fact that confidentiality was promised demonstrates

¹ In point of fact, the State Bar does not make any decisions with respect to admissions or discipline; it merely makes recommendations to this Court. The power to admit a person to practice law, or to discipline or remove a person from practice, belongs solely to this Court. (See *Preston v. State Bar of Cal.* (1946) 28 Cal.2d 643, 650 [171 P.2d 435] [“The recommendation of the Board of Bar Governors is advisory only ... the final determination in all these matters rests with this court, and its powers in that regard are plenary and its judgment conclusive.”].)

that this data was never intended to be a matter of public record. Second, the promise of confidentiality and concomitant explanation for why the data is being requested create a right to privacy that would be violated by public disclosure of this data. That is true whether or not the Court accepts Plaintiffs' dubious claim – which contemporary computer science refutes – that data can safely be “de-identified” so that individual applicants' information is not exposed to the public. Third, like all government entities, but especially judicial branch entities, the State Bar has an institutional need to honor its promises. Applicants provided this information after being told the data would be kept confidential, and the State Bar's credibility with the public and future applicants will be deeply harmed if it is forced to break those promises.

Finally, this Court's question about the requested form of the information sought raises another important issue under public records law. Even if the raw data maintained in the State Bar's admissions computers was otherwise a “document” and public record of an official act, which it plainly is not, neither the common law nor any freedom of information statute requires the government to create “anonymized” data for production to the public. To the contrary, it is well established that the right to access public records, whatever its origin, only provides access to records that already exist, and a government agency cannot be required to create new records suitable for production. Because the State Bar does not already

have a compilation of the requested data in the form in which it was requested (i.e. de-identified, recoded, and clustered for anonymity), it cannot be required to make such a record under the guise of a public records request.

Accordingly, as discussed in more detail below, the Court should affirm the trial court's judgment, find that the State Bar admissions database is not a public record, and deny Plaintiffs' request for data from that database.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. THE STATE BAR OF CALIFORNIA'S ROLE IN THE JUDICIAL BRANCH

“The State Bar of California was created by the State Bar Act of 1927. In 1966, the electorate adopted a provision placing the State Bar in the *judicial article* of the state Constitution [Article VI, § 9].” (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 590 [79 Cal.Rptr.2d 836] [citations omitted] [original italics].) The State Bar acts as “an arm or a branch of the Supreme Court” in connection with attorney admissions. (*Greene v. Zank* (1984) 158 Cal.App.3d 497, 504 [204 Cal.Rptr. 770].)

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 the admissions process 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].) “Admission to the bar is a *judicial function*....” (*In re Attorney Discipline System, supra*, 19 Cal.4th at p. 593 [original italics].) The State Bar is “an integral part of the judicial function” of this Court. (*Id.* at p. 599.) The State Bar’s admissions 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.’”].)²

B. COLLECTION OF ADMISSIONS DATA FROM APPLICANTS FOR THE CALIFORNIA BAR EXAMINATION

In order to take the California Bar Examination (the “Bar Exam” or the “Exam”), an applicant must first register with the Committee of Bar Examiners, and then apply to take the Exam. (Appendix of Exhibits of Appellants [“AA”] tab 44, p. 382 ¶¶ 8-9.) When registering with the Committee of Bar Examiners, an applicant signs a broad authorization for

² Other courts have recognized that the functions of a state bar in administering bar admissions cannot be divorced from the state supreme court’s exercise of its inherent power to license attorneys. (*Hoover v. Ronwin* (1984) 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.”] [emphasis added].)

the State Bar to collect “any information, files, or records requested” about him or her. This data is provided “in connection with the processing of this registration”:

I hereby authorize educational or other institutions or agencies to release to the Committee of Bar Examiners and the Office of Admissions of the State Bar of California any information, files or records requested in connection with the processing of this registration.

(AA tab 45 [p. 396] (emphasis added).) The Bar Exam application requires a similar authorization, and includes a grant of limited permission to republish certain data to the applicant’s law school:

I hereby authorize educational or other institutions or agencies to release to the Committee of Bar Examiners (Committee) any information, files, transcripts or records requested by the Committee in connection with the processing of this application.

I further authorize the Committee to release information regarding my application to take the bar examination and my bar examination scores and pass/fail status to the law school to which I have been or will be allocated for purposes of qualifying to take the California Bar Examination.

(AA tab 46 [p. 404] (emphasis added).)

Each applicant also submits a moral character application. The moral character application requires an authorization, which provides, in relevant part:

I further authorize all educational institutions and testing organizations to release to the Committee any information, files or records pertaining to me requested by the Committee in connection with any studies conducted by the Committee regarding the admission process.

(AA tab 103 [p. 1259] (emphasis added).)

Finally, applicants are requested, but not required, to fill out a confidential survey of gender and ethnicity which contains a representation regarding the limited purpose for collecting that information:

The following information is to be furnished by each applicant as part of the application process. The Committee of Bar Examiners is gathering this data to assist in the continuing evaluation of the examination. This information will be treated in a confidential manner and will be used only for research purposes. It will not be retained by the Committee as part of your application.

(AA tab 47 [p. 408] (emphasis added).)

C. THE REQUEST AT ISSUE

Beginning in 2006, Plaintiffs asked the State Bar to provide them with 16 fields of data, including ethnicity, academic record, and raw, scaled and total Bar Exam scores, for every person who applied to take the Bar Examination from 1972-2007. (AA tabs 6-7 [pp. 43-52], 13 [pp. 148-151], and 16-17 [pp. 165-202].) Plaintiffs seek this data for Sander's study of admissions practices of "elite" law schools,³ and claim that the data can be

³ 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", AA tab 6 [pp. 43-45].)

“clustered” so that individual applicants are not identifiable. (*Ibid.*) As Plaintiffs explain in their most recent request, they believe such manipulation of the data is a “key step[] that will ensure that individual identities are not jeopardized.” (AA tab 53 [pp. 530-31].) The request provides detailed instructions for the substantial manipulation and re-coding required to cluster the data, including:

Ethnicity: The State Bar maintains self-reported ethnicity data in eight categories for 67% of the applicants in question. (AA tab 44 [p. 386 ¶ 29].) Plaintiffs require the data to be re-coded to four categories (White, Black, Latino, and Other). (AA tab 53 [p. 534].)

Law School: The State Bar maintains text fields stating the law schools where each student was reported to attend. Some records have more than one such field. (AA tab 44 [p. 386 ¶ 30].) Plaintiffs request this data be substantially re-coded to help hide the identity of individuals from small schools, out of state schools, and non-traditional paths to the Bar. Plaintiffs proposed 14 different categories of schools to be re-coded in this fashion. (AA tab 53 [pp. 536-41].)

Transfer Student: The State Bar does not maintain data on whether someone is a transfer student. (AA tab 44 [p. 386 ¶ 31].) Plaintiffs want the State Bar to create new data based on the number of law schools attended to indicate whether someone is a transfer student. (AA tab 53 [pp. 534, 536-37].)

Year of Law School Graduation: The State Bar maintains this data as a numeric field for 86% of the applicants in question. (AA tab 44 [p. 387 ¶ 32].) Plaintiffs requested it re-coded and clustered into eight bands (1972-1981, 1982-1986, 1987-1990, 1991-1993, 1994-1996, 1997-1999, 2000-2002, and 2003-2007). (AA tab 53 [p. 534].)

Bar Passage: The State Bar maintains data for each exam taken indicating whether a person took, failed, or passed the examination. (AA tab 44 [p. 387 ¶ 33].) Plaintiffs requested the State Bar to analyze this data and create a “bar passage” code to show that an applicant never passed the bar (0), passed on the first attempt (1), or passed on a later attempt (2). (AA tab 53 [p. 534].)

Most importantly, once analysis, calculation and coding has been done on these five factors, *Plaintiffs’ request requires the overall data to be analyzed again* to determine whether there are any “cells” of four people or less, i.e. whether any four or fewer people share all the same data with respect to the above categories. If such cells exist, Plaintiffs proposed a range of possible additional clustering techniques *for changing the data until no such small cells exist.*⁴ (AA tab 53 [pp. 531-32, 536-41].)

Plaintiffs’ request therefore demanded that the State Bar select fields from its general database, analyze them, and re-code and manipulate them

⁴ Plaintiffs’ clustering theory is that if five or more people share the same information, it cannot be inferred who is who. (AA tab 53 [p. 531].)

to create new data that is “clustered” in a way that Plaintiffs claim⁵ will prevent the identification of any individual persons.

In June 2007, the Committee of Bar Examiners denied Sander’s 2006 request. (AA tab 44 [p. 385 ¶ 20].) The State Bar’s Board of Governors concurred after receiving public comment on the proposal.⁶ (AA tab 44 [p. 384 ¶ 21].) Plaintiffs simply asked for the data again. (AA tab 44 [p. 384 ¶ 22].) The State Bar denied those renewed requests in June 2008. (AA tab 44 [p. 384 ¶ 25].)

D. PROCEEDINGS BELOW

Plaintiffs filed their petition to compel production of the admissions data in the San Francisco Superior Court. (AA tab 3.) After a bench trial, Judge Curtis Karnow determined that the admissions database is: (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.)

⁵ As discussed below, recent research has disproven the prevailing assumption that data can be “anonymized” in this fashion while still remaining useful for research purposes. (Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization* (2010) 57 UCLA L. Rev. 1701.)

⁶ Numerous persons opposed the provision of this confidential applicant information to Sander and other researchers. While all of the comments are not in the record below, some of the more substantive are included at AA tab 51 pages 490-512. The same concerns were expressed by groups filing amicus curiae letters in support of this review being granted in this matter.

The Court of Appeal reversed, finding that access to State Bar documents is not governed by the established common law principles applicable to the judicial branch, but instead finding, without citing authority or specifying the test it was applying, that the State Bar admissions database 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 whether some countervailing policy or fact prevents disclosure. This Court granted the State Bar’s Petition for Review on August 25, 2011.

IV. ARGUMENT

A. NO GROUND EXISTS FOR FINDING THAT THE INFORMATION SOUGHT BY PLAINTIFFS IS SUBJECT TO PUBLIC DISCLOSURE

1. No statutory right of public access applies to the State Bar

Inspired by the 1966 federal Freedom of Information Act (“FOIA”), California has enacted numerous statutes in the last half-century to provide members of the public with access to a wide array of documents in the possession of the executive and legislative branches of government. None of these statutes, however, apply to the judicial branch of government. This exemption of the judiciary from modern “freedom of information” statutes recognizes a fundamental difference between the judicial branch and the other two branches of government.

The executive and legislative branches are political, policy making branches of government. They act on their own initiative, create and change the laws and regulations for society, and make discretionary policy choices among the wide array of constitutionally permissible government actions, which in our democratic form of government may sometimes be based on partisanship and the interests of particular constituent groups. These two branches of government need to be transparent so that voters can hold their elected representatives responsible for their policy choices. As this Court has recognized, the California Public Records Act (“CPRA”) is designed to promote such accountability in government because “access permits checks against the arbitrary exercise of official power and secrecy in the political process.” (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [230 Cal.Rptr. 362].)⁷

In contrast, the judicial branch does not make political decisions or advance the partisan agendas of judges or constituent groups. It does not interject itself into controversies, or initiate review of matters on its own

⁷ A similar policy of executive transparency for the sake of accountability is found in the California Environmental Quality Act, which requires an Environmental Impact Report that acts as “a document of accountability” so that “the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 [253 Cal.Rptr. 426].)

initiative. Instead, it provides a neutral forum for all persons equally to seek adjudication of disputes (civil or criminal), and administers the law in an even handed, unbiased manner. In this way, it is the exact opposite of the other two branches.⁸

Thus the CPRA, which creates a broad presumptive right of access to “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency” (Gov. Code, § 6252, subd. (e)), expressly excludes *all* Article VI (judicial branch) agencies from its scope. (Gov. Code, § 6252, subd. (f).) The Legislative Open Records Act applies only to the legislative branch. (Gov. Code, §§ 9072-9073.) The Brown Act, which provides the primary right of public access to the proceedings and records of local governments, has no application to the judicial branch. (Gov. Code, § 54951.) This is also

⁸ As Alexander Hamilton put it, “Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment...” (Hamilton, The Federalist Papers No. 78 (1788).)

true at the federal level, where FOIA does not apply to the federal courts.
(5 U.S.C. § 551(1)(B).)

All of these statutes reflect a consistent public policy that judicial branch agencies should not be subject to the same public access requirements as the other branches of government. That distinction is not limited to access to records, but also applies to public access to deliberative proceedings. The legislative and executive branches are required to conduct substantive deliberations, and to reach their decisions, in open public meetings. (See Gov. Code, §§ 9027, 11123, 54953.) The judicial branch, by contrast, conducts most of its deliberations, and reaches most of its decisions, behind closed doors. Jury deliberations are so secret that not even court personnel are allowed to observe them. (See *People v. Russell* (2010) 50 Cal.4th 1228, 1251 [117 Cal.Rptr.3d 615] [“[t]he secrecy of deliberations is the cornerstone of the modern Anglo–American jury system.”].) Other than oral argument sessions, all of the work of the Courts of Appeal and this Court occurs outside of public view, including all meetings where the Justices deliberate over their decisions. Thus, there is a fundamental difference between the limited scope of public access to the activities and documents of the judicial branch and the wide open public access established by statute for the other two branches of government.

As discussed above, the California Constitution places the State Bar within the judicial branch of government. (Cal. Const., art. VI, § 9.) As a

judicial branch entity, the State Bar is not subject to the statutory rules for disclosure that apply to the non-judicial branches of California government.⁹

The judicial branch has adopted its own rules for disclosure of some administrative documents, as expressed in Rules of Court, rule 10.500. The State Bar, however, like the Commission on Judicial Performance and the Commission on Judicial Appointments, is not included within the scope of Rule 10.500 because these entities are not subject to the jurisdiction of the Judicial Council. (AA tab 118 [p. 1497].) Instead, 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.)

⁹ The Legislature has imposed an open meeting requirement on the State Bar's Board of Governors – the State Bar's governing body invested with executive and rule-making functions. The Board has quasi-judicial authority that has largely been delegated to the State Bar Court and other sub-entities. (Bus. & Prof. Code, §§ 6010, 6025, 6076; Rules of Court, rule 9.10 [authority of State Bar Court]; see also, *Obrien v. Jones, supra*, 23 Cal.4th at p. 45 [on delegation in discipline matters to the State Bar Court]; Bus. & Prof. Code, § 6046 [establishing the Committee of Bar Examiners].) 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. (Bus. & Prof. Code, § 6026.5.)

The Legislature did not, however, include any requirement that the Board of Governor's records (much less those of the State Bar generally or its Office of Admissions) be available to the public. The Board of Governors voluntarily made some records of its meetings public in rule 6.56 of the Rules of the State Bar, which provides that "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." (Rules of State Bar, rule 6.56, subd. (A).)

Thus, only this Court has the power to make rules requiring public access to State Bar admissions records.¹⁰ It has not done so; to the contrary, it has left undisturbed the State Bar's clear rule designating all such records as confidential. (See Rules of State Bar, rule 4.4.)

Accordingly, no statute or Rule of Court provides a public right of access to the admissions records of the State Bar.¹¹

2. *The common law right of access to government records does not apply to the State Bar admissions database*

Because the California Legislature has chosen to exempt the State Bar and other judicial branch agencies from all statutory rights of access,

¹⁰ (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].)

¹¹ The Court of Appeal suggested that Evidence Code section 1040 might provide a right of public access to information in the possession of judicial branch agencies. It clearly does not. 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. (Evid. Code, § 300.) No case has ever suggested that the rules for admitting or 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].)

any public right of access to State Bar records would have to be found in the common law. Application of the common law, of course, is a matter of established historical rights; it is not an invitation for courts to invent new, amorphous rules to reach particular results. In addition to prior California cases, in applying the common law the courts of this State look to the English common law and the developed common law rule in sister-states. (See Civ. Code, § 22.2; *Callet v. Alioto* (1930) 210 Cal. 65, 69 [290 P. 438].)

- a) *The common law provides a limited right of access to official records of government action*

Throughout this case, Plaintiffs have argued that the common law provides the same, or even broader, access as the numerous modern freedom of information statutes that have supplanted it. That revisionist view is belied by both history and common sense. In fact, prior to the twentieth century, comparatively few public records existed. Both English and early American cases only recognized a narrow right of access to those records.¹² That was, of course, the very reason why statutes like FOIA and

¹² (E.g., *Nowack v. Fuller* (Mich. 1928) 219 N.W. 749, 750-51 [243 Mich. 200] [discussing limited access under English common law]; *Brewer v. Watson* (Ala. 1882) 71 Ala. 299, 305 [“The individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative will not entitle him to demand an examination of such writings.”]; see generally Solove, *Access*

the CPRA were adopted beginning in the 1960s – to expand the narrow common law rules and provide *more* access to the growing body of public records than the common law allowed.¹³

The legislative history of the CPRA confirms that the CPRA is substantially broader than California’s common law right of access to public records. A 1964 letter from the State of California Office of Legislative Counsel to then-California State Assemblyman Milton Marks explains that “before questioned documents can be denominated as public writings they must not only be ‘official records’ but must also be the ‘written acts or records of the acts’ of public officials or bodies. In other words, it is not enough that they be written acts or records of acts or official documents – they must be both.” (Request for Judicial Notice, Ex. A [emphasis in original] [citing *Mushet v. Department of Public Service of City of Los Angeles* (1917) 35 Cal.App. 630, 634 [170 P. 653] (hereinafter

and Aggregation: Public Records, Privacy and the Constitution (2002) 86 Minn. L. Rev. 1137, 1142-49, 1154-60 (hereinafter Solove).)

¹³ (See *Renegotiation Bd. v. Bannerkraft Clothing Co., Inc.* (1974) 415 U.S. 1, 10-11 [94 S.Ct. 1028] [“in the FOIA, Congress gave the general public an express right of access to all Federal Government information not within the exempted categories...”]; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1335 [283 Cal.Rptr. 893] [CPRA has an “express purpose of broadening the public’s access to public records.”]; *CBS, Inc. v. Block, supra*, 42 Cal.3d at 651 [“[California’s] PRA was modeled on the federal Freedom of Information Act ... and was passed for the explicit purpose of ‘increasing freedom of information’ by giving the public ‘access to information in possession of public agencies’”].)

Mushet]).) A January 1966 staff report regarding public records statutes begins with the following background:

California's present statutes defining public records and granting inspection were enacted in 1872. Essentially, they are derived from the primary rule advanced by the English courts that there is no common law right in all persons to inspect public records. The courts generally recognized, however, that there was a right of inspection where a record was sought for use as evidence or information in pending litigation.

(California's Public Records Law and Proposed Revision (1966) p. 1, Request for Judicial Notice Ex. B [emphasis in original].)

Plaintiffs' insistence that there was a historically recognized common law presumption that all records in the hands of the government are open to public inspection is thus patently wrong. Instead, the common law right is generally restricted to records that officially memorialize or record government action. (*Mushet, supra*, 35 Cal.App. at 634.) Only those documents are common law "public records" subject to disclosure, and then only if their disclosure is not outweighed by other considerations. That remains the prevailing common law rule, as explained in detail by the United States Court of Appeal in *Washington Legal Foundation v. U.S. Sentencing Comm'n* (D.C. Cir. 1996) 89 F.3d 897 (hereinafter *Washington Legal Foundation*). After surveying common law cases nationwide, that court held:

[W]e conclude, as a matter of federal common law, that 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. This definition adequately protects the public's interest in keeping "a watchful eye on the workings of public agencies," an interest we regard as "fundamental to a democratic state," and is yet narrow enough to avoid the necessity for judicial application of the second-step balancing test to documents that are preliminary, advisory, or, for one reason or another, do not eventuate in any official action or decision being taken.

(*Id.* at pp. 905¹⁴ [citations omitted] [emphasis added]; accord 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."]; *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220 [71 Cal.Rptr. 193] ["A 'public writing' ... is ... 'the written acts or records of the acts of the sovereign

¹⁴ The court then applied this rule to hold that the internal documents and memoranda of the United States Sentencing Commission Advisory Working Group on Environmental Sanctions developed or relied upon in formulating recommendations to the Sentencing Commission are *not* public records under the common law because they "were not created or kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance." (*Washington Legal Foundation, supra*, 89 F.3d at p. 906-07.) "They are therefore beyond the scope of the common law right of access, and it is not necessary to balance the public's interest in disclosure against the Government's interest in confidentiality as provided in the second step of the analysis [under the common law]." (*Id.* at p. 907.)

authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive.”].)

Thus, while certain modern freedom of information statutes provide a right of access to documents merely because they are in the possession of executive or legislative branches of the government, there is no such right under the common law.

b) *As applied to judicial branch agencies, the common law right of access primarily applies to records of adjudicatory proceedings*

The common law right of access is more highly refined with respect to the judicial branch. Recognizing that public access to court proceedings is a basic democratic right, early case law provided a right of public access to the records of adjudicatory proceedings.¹⁵ Some cases discuss this as a constitutional rule, while others treat it as a common law rule, but the result is the same: because court proceedings are open to the public, the official adjudicatory acts of courts, as well as the court filings and testimony that formed the basis for those decisions, are presumptively open to the public.

Open trials have an important public function in a democracy. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178,

¹⁵ (Solove, *supra*, 86 Minn. L. Rev. at p. 1156.) For a more detailed historical overview of the right to attend court proceedings and view adjudicatory judicial records at both the federal level and across the various states, see Peltz et al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms* (2006) 59 Ark. L. Rev. 555, 561-602.

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].)

“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 addition to the right to physically attend a session of court, common law and constitutional case law has developed to recognize a concomitant right “of access to civil litigation documents filed in court as a basis for adjudication.” (*NBC Subsidiary, supra*, 20 Cal.4th at 1208 fn. 25 [citing cases].)¹⁶

Just as the general common law does *not* presume that all documents in the hands of the government are subject to public inspection, the common law right of access to judicial branch records also 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 rule was directly rejected in *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106,

¹⁶ Case law recognizes, however, that even some pleadings, for example discovery motions, are *not* subject to public review; it is only documents submitted as the basis for merits adjudication that are presumptively public. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 96-100 [70 Cal.Rptr.3d 88].)

113 [7 Cal.Rptr.2d 841] (hereinafter *Copley Press I*) as inconsistent with the Legislature's decision to exempt the judicial branch from the CPRA. "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." (*Ibid.*)

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 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.)

Copley Press I's test for which judicial documents are, and are not, public records was cited with approval by this Court in *People v. Lewis* (2006) 39 Cal.4th 970, 1065 [47 Cal.Rptr.3d 467], and has been the

unquestioned rule in this state for nearly twenty years. (See also Code Civ. Proc., § 1904 [“A judicial record is the record or official entry of the proceedings in a Court of justice, or of the official act of a judicial officer, in an action or special proceeding.”].) The limitation of public access to adjudicatory judicial branch records is also the widely accepted common law test across the United States. “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.)

The primary limitation of common law access to *adjudicatory* documents is also confirmed by Rule of Court 10.500 (which does not apply to the State Bar but accurately reflects the background common law). The Advisory Committee notes to Rule 10.500(b)(1) and (2) make it clear that only adjudicatory judicial materials are subject to the right of public access created by case law (and therefore Rule 10.500 is intended to apply

to other materials). If the common law applied to judicial branch administrative documents, as Plaintiffs contended, there would have been no need for Rule 10.500. Similarly, Rules of Court 2.550 *et seq.* govern sealing of records in a court file. Those rules do not apply to discovery motions unless the material is used at trial or submitted as a basis for adjudication. (Rules of Court, rule 2.550(a)(3).) As the Advisory Committee Comment to Rule 2.550 makes clear, this distinction is drawn because case law does *not* presume public access to non-adjudicatory records. (Advisory Com. Com., Rules of Court, rule 2.550.)

The recognition in *Copley Press I* that a few official administrative records, such as official records assigning judicial administrators, could also be public records is also wholly consistent with the general common law rule granting access to “public records” that accurately *and officially* reflect government actions. (*Washington Legal Foundation, supra*, 89 F.3d at p. 905; *Musket, supra*, 35 Cal.App. at p. 634.) This Court should confirm the rule announced by the Court of Appeal in *Copley Press I*, which was applied consistently by other courts in this state for nearly two decades until the Court of Appeal decision under review.

c) *The State Bar admissions database is not a public record under any common law test*

The State Bar admissions database is simply not a “public record” under the common law. This Court has emphasized, quoting Justice

Brennan, that finding a right of public access to a particular record requires both historical tradition of access and the specific public value of access to the particular record at issue:

First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entrée to particular proceedings or information. ... Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

(*NBC Subsidiary, supra*, 20 Cal.4th at 1201 [quoting *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 589 [100 S.Ct. 2814] (conc. opn. of Brennan, J.)].)¹⁷

Basically two types of information are at issue: Bar Exam scores, and academic history and ethnicity data provided by applicants. All of these

¹⁷ The importance of access “in terms of that very process” means the need for public review of an official document as it relates to public understanding of the government process that it documents. (See *Mercury Interactive Corp. v. Klein, supra*, 158 Cal.App.4th at 97-98.) The fact that government databases could be a rich source of data for academic research, such as Sander wants to conduct, is *not* a public interest supporting access to records collected by the government. “[I]t was never suggested that the FOIA would be a boon to academic researchers, by eliminating their need to assemble on their own data which the government has already collected.” (*U.S. Dept. of Justice v. Reporters Committee* (1989), 489 U.S. 749, 772 n.20 [109 S.Ct. 1468] [quoted in *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1018 [88 Cal.Rptr.2d 552]] [“Nor is the convenience of researchers a factor to be considered.”].)

applicant records are expressly made confidential by the Rules of the State Bar of California.¹⁸

Bar Exam scores are *not* public information. An individual's scores are highly confidential; indeed, successful applicants do not even have the right to see *their own* scores.¹⁹ It makes little sense to argue that Bar Exam scores are public records when successful applicants are specifically prohibited from seeing their own scores. Nor are the scores evidence of the Supreme Court's admissions decisions. The Bar Exam is a pass/fail test, the State Bar publishes a pass list for each examination, and the identity of California lawyers is a matter of public record. The identity of persons who took the examination but did not pass is not published in any way. (AA tab 102, p. 1257.) There is no history or tradition whatsoever of providing public access to Bar Exam scores.

¹⁸ "Applicant records are confidential unless required to be disclosed by law; required by the State Bar's Executive Director, Chief Trial Counsel, or General Counsel to fulfill their responsibilities for regulation of the practice of law; or authorized by the applicant in writing for release to others." (Rules of the State Bar, rule 4.4; see and compare, Gov. Code, § 6254, subd. (g) [excepting from the public disclosure under the California Public Records Act] ["[t]est questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination"].)

¹⁹ "Applicants who pass the California Bar Examination are not entitled to receive their examination answers or to see their scores." (Rules of the State Bar, rule 4.62(B).)

As for the academic history and ethnicity of individual applicants, those are also not public records. These background facts are not “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 113.) Data concerning the academic and testing history and ethnicity of bar applicants simply does not “represent and reflect the official work of the court, in which the public and press have a justifiable interest.” (*Ibid.*) There is no history or tradition of providing public access to this information either.

There is no case, from any jurisdiction, finding that the common law creates a right of access to similar attorney admissions records, much less recognizing any type of “enduring and vital tradition” of access to them. (See *NBC Subsidiary, supra*, 20 Cal.4th at 1201.) Indeed, the only analogous case confirms that this type of data collected by court agencies is not a public record. In *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258 [198 Cal.Rptr. 489] (hereinafter *Pantos*), a commercial jury investigation service sought access to a master list of potential qualified jurors developed by the court, as well as to questionnaires filled out by individual 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 correctly found that the jury commissioner's questionnaires are *not* public records under the common law.²⁰ As the court explained, these preliminary questionnaires were gathered under a promise of confidentiality, and are used only as sources of information for the jury commissioner to determine qualification for prospective jury service:

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.

(*Pantos, supra*, 151 Cal.App.3d at p. 263.)

The State Bar admissions data is analogous to the jury commissioner's questionnaires in *Pantos*. Like those questionnaires, the data in question is collected in the process of determining the qualifications of an applicant for bar admissions. (AA tab 102 [p. 1257].) The ethnicity data is not even used for that purpose, but merely for State Bar research. (*Ibid.*) None of this data reflects official acts or decisions by the State Bar.

²⁰ The master jury list compiled by the jury commissioner, which does officially document the work of the Court, is a public record. (*Pantos, supra*, 151 Cal.App.3d at p. 262.)

The data in the admissions database thus clearly falls outside the limited universe of non-adjudicatory judicial documents that the common law recognizes as public records. The data is also obviously not an adjudicatory record, and Plaintiffs have never argued otherwise. The State Bar's admissions database is *not* a public record subject to presumptive public inspection under any recognized common law test, and this Court should affirm the trial court's ruling that the database is not subject to public review.

3. *Proposition 59 did not create a right of public access to the State Bar's admissions database*

In 2004, Proposition 59 added section 3(b) to Article 1 of the California Constitution. That provision reads, in relevant part:

(b) (1) The 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.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(Cal. Const., art. I, § 3 subd. (b)(1) and (2).)

Plaintiffs have argued 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.²¹ The trial court properly rejected that argument, holding – as have all other courts to address the issue – that Proposition 59 constitutionalized then-existing law, but did not create access to records that were not subject to public access under the common law or existing statutory access laws. (AA tab 124 [pp. 1636-40].)

This Court has not previously ruled on the effect of Proposition 59, but it has described Proposition 59 as “reaffirming a principle long ago established by the California Public Records Act that the people have a right to access to information concerning the conduct of the people’s business.” (*Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 305 [64 Cal.Rptr.3d 661].) The Courts of Appeal have uniformly held that Proposition 59 “constitutionalized” or “enshrined” pre-existing law, but did not create a substantive right of access to documents theretofore not subject to public access. In *Mercury Interactive Corp.*, the Court of Appeal held that Proposition 59 did not alter the pre-existing common law and statutory sealing rules for judicial documents distinguishing public adjudicatory

²¹ Notably, plaintiff California First Amendment Coalition’s website provides a more transparent assessment than its litigation counsel: “Prop 59 does not explicitly create new access rights. Any substantive enhancement of access rights under Prop 59 will have to come about through litigation ...” <<http://www.firstamendmentcoalition.org/category/resources/prop-59>> (as of Sept. 22, 2011).

documents from discovery documents not subject to public disclosure. (*Mercury Interactive Corp.*, *supra*, 158 Cal.App.4th at p. 101 [“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.”].)

In *Sutter’s Place v. Superior Court* (2008) 161 Cal.App.4th 1370 [75 Cal.Rptr.3d 9], the Court of Appeal surveyed the sparse Proposition 59 case law and concluded that “Proposition 59 is simply a constitutionalization of the [California Public Records Act].” (*Id.* at p. 1382 [finding that Proposition 59 did not alter the pre-existing mental processes privilege prohibiting examination of the motives of legislatures].) Similarly, in *Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th 588, the Court of Appeal recognized that Proposition 59 gave constitutional stature to existing law. “With the passage of Proposition 59 effective November 3, 2004, the people’s right of access to information in public settings now has state constitutional stature, grounding the presumption of openness in civil court proceedings with state constitutional roots.” (*Id.* at p. 597 [applying pre-existing rules for sealed documents in light of Proposition 59] [quoted by *State Office of Inspector General v. Superior Court* (2010) 189 Cal.App.4th 695, 703-04 [117 Cal.Rptr.3d 388]]; see also *Sacramento County Employees’ Retirement System v. Superior Court* (2011) 195

Cal.App.4th 440, 454 [125 Cal.Rptr.3d 655] [“Proposition 59 continued the presumptive right of access”]; Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability* (2005) 32 J.C. & U.L. 149, 203-04 [Proposition 59 “is largely a policy statement and a positioning of the newly declared access right relative to other constitutional rights, rather than a guarantee of particular rights and responsibilities”].)

No case has ever held that Proposition 59 requires public disclosure of any document that was not already subject to public disclosure before its enactment. Indeed, all of the relevant cases reason otherwise.²²

As discussed above, none of California’s statutory rights of access apply to the State Bar or other judicial branch agencies. Nor did the common law provide any right of access to all documents held by judicial branch agencies – it provided only a limited right of access to adjudicatory records and certain other official records of acts by the judicial branch.

²² (See also *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 657 [64 Cal.Rptr.3d 854] [Proposition 59 did not alter rules for access to grand jury transcripts]; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750-51 [49 Cal.Rptr.3d 519] [recognizing that Proposition 59’s requirement to broadly construe the right of access “was the law prior to the amendment’s enactment.”]; *Shapiro v. Board of Directors of Centre City Development Corp.* (2005) 134 Cal.App.4th 170, 181, fn. 14 [36 Cal.Rptr.3d 826] [“even if the language added by Proposition 59 did apply, it would merely be duplicative of the already-established principle that exceptions to the Brown Act are to be narrowly construed ... and thus it would not substantively add to the principles guiding our analysis.”].)

Proposition 59 did not sweep away all of those pre-existing rules; it confirmed them. Accordingly, as have all of the Courts of Appeal to address the issue, this Court should hold that Proposition 59 does not create a new, freestanding presumptive right of access to all records held by the judicial branch. Accordingly, the Court should hold that Proposition 59 does not create a right of public access to the State Bar's admissions database.

B. THE PROMISES OF CONFIDENTIALITY MADE BY THE STATE BAR ARE FURTHER REASONS NOT TO ORDER DISCLOSURE

The data in question is all collected under promises of confidentiality and limited use by the State Bar. (AA tabs 45-47, 103.) The need to keep those promises is a further basis not to order disclosure of this data for three reasons: confidential collection is inconsistent with public record status; public disclosure of the data would violate the privacy rights of applicants; and the State Bar has a fundamental institutional interest in keeping its promises to applicants.

1. Information collected confidentiality is necessarily not intended to become public

As the Court of Appeal noted in *Pantos*, confidential collection of data weighs against any finding that it is a matter of public record. "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.” (*Pantos, supra*, 151 Cal.App.3d at 263.) The same reasoning applies here with equal force. The demographic and academic history data in question are simply information gathered in the process of administering the Bar Exam for this Court. The very fact that the information was collected under a promise of confidentiality negates any suggestion that these records are the type of “public records” that have historically or traditionally been made available to the public.

2. *Public disclosure of this data would violate the privacy rights of applicants*

In addition, provision of the data to the public would violate the applicants’ rights of privacy. Article I section 1 of the California Constitution guarantees the “inalienable right” of “pursuing and obtaining ... privacy.” (Cal. Const. art. I, § 1.) As this Court has recognized, that right to privacy is aimed at preventing particular government mischiefs including “the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose *or the disclosure of it to some third party...*” (*White v. Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94] [emphasis added].) Thus, case law recognizes a claim for invasion of privacy for “the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the

disclosure of it to some third party.” (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 830 [134 Cal.Rptr. 839]; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1138 [277 Cal.Rptr. 354].)

As discussed above, the admissions data in question was all collected confidentially for a specific purpose – as part of the application for the bar examination for research by the State Bar. (AA tabs 45-47, 103.) Under *White, Porten*, and their progeny, those representations create an expectation of privacy that prohibits, without the consent of applicants, disclosure of the data to the public. That expectation of privacy exists whether or not the data can be manipulated, as Plaintiffs insist, in a manner such that specific individuals are not identifiable, because it is the misuse of the data itself that violates the right of privacy. In other words, because the data was collected confidentially for a specific purpose by the State Bar, provision of the data to the public violates the right of privacy. (*White v. Davis, supra*, 13 Cal.3d at p. 775; *Porten v. University of San Francisco, supra*, 64 Cal.App.3d at p. 830.)

Moreover, the commonly held assumption that any data can be successfully “anonymized” as suggested by Plaintiffs, so that it can be made available to the public without risk that individual people’s information be revealed, has proved to be false. There is a growing body of computer science research demonstrating that supposedly anonymized data can readily be made identifiable. “Clever adversaries can often reidentify

or deanonymize the people hidden in an anonymized database. ... This research unearths a tension that shakes a foundational belief about data privacy: **Data can be either useful or perfectly anonymous but never both.**” (*Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, *supra*, 57 UCLA L. Rev. at 1703-04 [emphasis added]; see also Gellman, *The Deidentification Dilemma: A Legislative and Contractual Proposal* (2010) 21 Fordham Intell. Prop. Media & Ent. L.J. 33, 34-35 [“No matter how many identifiers have been removed or encrypted and no matter how much data has been coded or masked, the remaining data may still be reidentified.”].) Several people objecting to the provision of this data expressed concern to the State Bar’s Board of Governors that applicants’ identities could be exposed irrespective of Plaintiffs’ proposed protocols.²³ (E.g., AA tab 51 [pp. 498-500].)

The question is *not* whether *these Plaintiffs* intend to re-identify or otherwise misuse the data. Plaintiffs’ motives and intentions are irrelevant. “The purpose of the requesting party in seeking disclosure cannot be considered ... because once a public record is disclosed to the requesting party, it must be made available for inspection by the public in general.”

²³ The same concerns are addressed in detail in the amicus curiae letters supporting review filed by the Equal Justice Society, the Philippine American Bar Association, the Asian Pacific American Bar Association of Los Angeles County, various alumni from California law schools, and the California Association of Black Lawyers.

(*City of San Jose v. Superior Court*, *supra*, 74 Cal.App.4th at p. 1018.)

Once data becomes publicly available, there is simply no way to limit the uses to which it can be put. While that may not have been much of a problem in prior centuries, in the current “Information Age” the aggregation of computerized public records and other uncontrolled data, and the worldwide access to data through the internet, poses a substantial risk to privacy.²⁴ All of these privacy concerns further counsel against any public disclosure of the data in the State Bar’s admissions database.

3. *The State Bar has an institutional interest in keeping its promises to applicants*

Finally, and perhaps most fundamentally, the State Bar has an institutional interest in keeping its promises. Applicants who are being asked to provide information should be able to rely on the promise that the information will be kept confidential. This is particularly true for the race/ethnicity and gender information, which is *optional* for applicants.

(AA tab 44 [p. 382 ¶ 10]; AA tab 47 [p. 408].) There is every reason to believe that applicants providing optional demographic information under

²⁴ (See *Pantos*, *supra*, 151 Cal.App.3d at p. 265 [“In this informational age, commercial misuse of this stored data has potential for unintended harm to which the judiciary may not wish to contribute. There is a risk of unreasonable intrusion into the juror’s privacy by extensive dissemination of the questionnaire answers with the ubiquitous availability of integrated computer information circulating freely. Importantly, the court does not have the power to contain the extent to which this data may be used to yield information about a juror’s life.”]; Solove, *supra*, 86 Minn. L. Rev. at pp. 1152-54, 1173-95.)

an express promise of confidentiality would not have done so if they knew the information would be made public.

Again, a similar concept was discussed in *Pantos*, where the Court of Appeal noted that public disclosure of the type of information contained in jury questionnaires could “negatively impact[] the prospective juror’s willingness to serve and thus interfere with efficient court administration. . . . [I]t cannot be said that this information would normally be volunteered by many persons without the promise of confidentiality honored by the court.” (*Pantos, supra*, 151 Cal.App.3d at 264.)

This is not a hypothetical problem; the State Bar has already been impaired in its ability to collect data simply by virtue of this lawsuit having been brought. Prior to this suit being filed, the Law School Admissions Council (“LSAC”) provided the State Bar with the LSAT scores of potential applicants. After learning of this lawsuit, however, the LSAC has refused to provide any further data to the State Bar because of concerns that such data might be disclosed to Plaintiffs or others in the future. (AA tab 44, pp. 387-88 ¶ 35.) Nor is there any reason to believe this problem will be limited to the LSAC. To paraphrase *Pantos*, it requires little imagination to conceive of a situation where applicants become unwilling to provide ethnicity data, and perhaps even some academic record data, if the State Bar is forced to provide this sensitive information to anyone in the public who wants it. (See *Pantos, supra*, 151 Cal.App.3d at 264-65.)

Even if the Court were to decide that, on a going forward basis, data collected from applicants should be made part of the public record despite the potential impact on applicants' willingness to provide the information, applicants have a right to know that *before* providing the data. This is especially true for the *optional*, and highly personal, ethnicity data. It would be wholly unjust for the State Bar to collect data from applicants for over forty years under a promise the data would be kept confidential, but then to turn that data over to any member of the public who demands it. Doing so would not only violate the rights of applicants, it would undermine confidence in the State Bar and, by extension, in the ability of any judicial branch agency to keep its promises.

C. THE STATE BAR DOES NOT MAINTAIN THE INFORMATION AT ISSUE IN THE REQUESTED FORM AND SHOULD NOT BE COMPELLED TO CREATE IT FOR PRODUCTION

As discussed above, the data in question is plainly not a matter of public record. Thus, it is not necessary to reach questions about the format of the data. If reached, however, the Court should confirm that the State Bar (like all other government entities) has no obligation to create new records in response to a public records request.

1. No public records law requires the creation or alteration of data or documents

Although no California case has specifically addressed the issue, it has been long and universally accepted in this country that public access

laws *do not* require the government to create or alter records upon someone's request. "It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request. ... A requester is entitled only to records that an agency has in fact chosen to create and retain." (*Yeager v. Drug Enforcement Administration* (D.C. Cir. 1982) 678 F.2d 315, 321 [citing *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 161-62 [95 S.Ct. 1504]]; *Forsham v. Califano* (D.C. Cir. 1978) 587 F.2d 1128, 1136 ["The Freedom of Information Act ... does not confer a right to have the government generate agency records, either by creation, subpoena or contract demand."]; *Kerner v. State Teachers Retirement Bd.* (Ohio 1998) 695 N.E.2d 256, 274 [82 Ohio St. 3d 273][state agency "has no duty to create a new document by searching for and compiling information from its existing records. ... In other words, a compilation of information must already exist in the public records before access to it will be ordered."].) Nor did the common law recognize such a right. The State Bar is unaware of any common law case, and certainly Plaintiffs have never cited one in the briefing below, that would require any government agency to create a document that did not already exist merely in order to disclose it.

Of course, where a document does exist, the need to redact it before production does not defeat an otherwise existing right of access. In the context of a public record computer database, that means that the requestor

can demand that only some data be extracted, or that most of the data be deleted. (*Yeager, supra*, 678 F.2d at 321 [citation omitted].) Such redaction does not, however, include changing any of the data or creating any new data. Such requests for “masked” or “clustered” data have universally been held to seek the creation of new records *not* required by public records laws.

Center for Public Integrity v. Federal Communications Comm’n (Dist. D.C. 2007) 505 F. Supp. 2d 106, is directly on point. The plaintiff sought 35,000 computerized records relating to the use of different internet and telephone services. Just like Plaintiffs here, the plaintiff suggested that private data be changed to avoid disclosure problems: “[Plaintiff] proposes instead that the FCC replace filers’ numerical responses with either ranges . . . or an indication of whether the deleted responses were ‘zero or greater than zero.’” (*Id.* at p. 114.) The court found that such a request impermissibly required the creation of a new record.

The Court agrees that ordering the FCC to produce data in either of the forms proposed by plaintiff would amount to requiring the creation of new records which, as plaintiff concedes, is not authorized by FOIA. . . [P]laintiff’s proposal would require the FCC to do more than simply redact portions of the numbers contained in Parts I-III. The FCC would have to replace the redacted numbers with new numbers, which the FCC itself would have to select. Because agencies are not required to create new records to satisfy FOIA requests, the Court is without authority to require the FCC to adopt plaintiff’s proposal for the disclosure of modified data...

(*Ibid.*)

Similarly, in *Yeager*, the plaintiff made a FOIA request for Drug Enforcement Agency computer records. Making precisely the argument Plaintiffs make here, *Yeager* insisted that “compacting” and “collapsing” records so that potentially identifying data was masked is a form of “redaction” or “segregation” required by FOIA. (*Yeager, supra*, 678 F.2d at 322.) The court flatly rejected this argument, finding that altering data is *not* the same thing as redaction.

The interpretation suggested by *Yeager* may be desirable in terms of full disclosure policy and it may be feasible in terms of computer technology; these factors notwithstanding, however, we are not persuaded that Congress intended any manipulation or restructuring of the substantive content of a record when it commanded agencies to ‘delete’ exempt information. . . . The Act “deals with ‘agency records,’ not information in the abstract.” A requester must take the agency records as he finds them.

(*Id.* at p. 323; see also *Flightsafety Services Corp. v. Dept. of Labor* (5th Cir. 2003) 326 F.3d 607, 613 [“FSSC’s requests that the BLS be required to simply insert new information in place of the redacted information requires the creation of new agency records, a task that the FOIA does not require the government to perform.”]; *Students Against Genocide v. Dept. of State* (D.C. Cir. 2001) 257 F.3d 828, 837 [agency was not required to re-produce classified high resolution reconnaissance photographs at a lower, non-classified resolution]; *American Friends Service Comm. v. U.S. Dept. of*

Defense (E.D. Pa. Aug. 4, 1988) 1988 WL 82852 * 4 [court could not order production of “segregable” portion of classified documents where “defendant would have to take extensive steps beyond mere deletion, including, according to plaintiff, cutting apart the individual entries and shuffling them. ... No case ... suggests that a government agency must prepare a new and different document that requires more than mere deletions.”].)

California Rule of Court 10.500 follows this well established rule:

Nothing in this rule requires a judicial branch entity to create any record or to compile or assemble data in response to a request for judicial administrative records if the judicial branch entity does not compile or assemble the data in the requested form for its own use or for provision to other agencies. For purposes of this rule, selecting data from extractable fields in a single database using software already owned or licensed by the judicial branch entity does not constitute creating a record or compiling or assembling data.

(Rules of Court, rule 10.500, subd. (e)(1)(B).)²⁵

Rule of Court 10.500 is not applicable to the State Bar because the State Bar is under the direct jurisdiction of this Court, not the Judicial Council. There is no reason, however, why the State Bar should be subject to any greater disclosure obligation than the rest of the judicial branch, or

²⁵ Government Code section 68106.2 recognized the same lack of any obligation to create new data: “Subdivision (a) ... does not require a court to produce or create any new document or data format to comply with its provisions.” (Gov. Code, § 68106.2 subd. (e).)

that applicable by CPRA, FOIA, and other statutes to the executive and legislative branches.

Thus, where a request is made for data that is a “public record,” a government entity holding the record can be required to extract or delete certain fields from the data, but it cannot be required to change the data or to compile or assemble any collections of data solely for the purpose of producing it.

2. *The request clearly calls for new data in a form in which the records are not presently maintained*

Plaintiffs’ request undeniably calls for the creation of a new set of data in a format in which it is not presently maintained by the State Bar. Plaintiffs’ request instructs in very clear terms that, in addition to redaction of primary identifying information such as someone’s name, any production of the type of records at issue here *requires modification* of “publicly known category” variables so that an individual’s identity cannot be deduced. (AA tab 53, p. 531.) Plaintiffs admit this is a “key step” to “ensure that individual identities are not jeopardized.” (AA tab 53, p. 530.) They propose detailed clustering protocols to achieve this “key step.” (AA tab 53, pp. 531-41.) Such clustering goes well beyond redaction and requires the manipulation of data and the creation of a new record. The State Bar does not currently possess this data in the compilation and format

demanded by Plaintiffs. (AA tab 44 [pp. 385-88 ¶¶ 27-36].) It is not required to manufacture that data simply to produce it to Plaintiffs.


V. CONCLUSION

As discussed above, no statute requires the State Bar to provide public access to the data in its admissions database, there is no history or tradition of such public access being provided (indeed the Rules of the State Bar designate this material as confidential), and the State Bar's admissions database falls well outside the type of judicial branch documents open to public inspection at common law. Moreover, the data was collected confidentially, and is not maintained in the form in which Plaintiffs seek it. For each of these reasons, the State Bar respectfully requests that this Court hold that the State Bar's admissions database is not subject to public disclosure and affirm the judgment in favor of the State Bar previously entered by the Superior Court.

DATED: September 23, 2011

Respectfully submitted,

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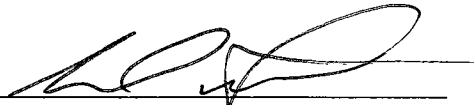
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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204(c)(1) and 8.520(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 12,109 words including all footnotes but excluding the table of contents, table of authorities, and signatures, as counted by the computer program used to generate this brief.

DATED: September 23, 2011

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CERTIFICATE OF SERVICE

I, Sarah Smoot, 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 September 23, I served the following document(s):

OPENING BRIEF OF DEFENDANTS AND RESPONDENTS

(The Petitioners in this Court)

on the parties listed below as follows:

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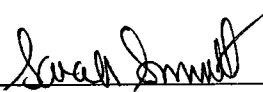
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By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

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

Executed on September 23, 2011, at San Francisco, California.



Sarah Smoot