

## Section 2: The Public Right of Access

This section addresses the following points:

- The request for public information that is at the center of litigation differs from Prof. Sander's previous proposal for a joint research venture with the state bar.
- State Courts have created a common law right to access records held by the judicial branch.
- The citizens of California voted by overwhelming majority to amend the California Constitution to broaden the public's right to access records and information held by a state agency.
- The Bar's denial of access to the records contradicts its past behavior..

### A Request for Information Held by a Public Institution

Unlike the proposal for collaborative research, the request submitted this May co-signed by Professor Sander and Mr. Hicks and the identical request submitted by the California First Amendment Coalition ask the California State Bar to prepare and release anonymized records for public use. The requests are predicated on the State Bar's obligation, as a public entity, to release information in its possession. Unlike the research proposal, which requested the Bar to make the discretionary choice to engage in a significant research undertaking, the request for public information asks the Bar to comply with its *nondiscretionary* duties as a public entity.

While the public information request suggests to the Bar precautions to protect the privacy of bar-takers—a step that would be unnecessary if the Bar performed the research itself with the advice and consultation of Professor Sander's research team—the production of a public database has many advantages. First, it's democratic; all researchers (including vehement critics of the mismatch theory) will have the same level of access to the records. Second, it will allow the State Bar to benefit from the fruits of the entire research community's labor instead of relying exclusively on its own research. And finally, a public dataset of this sort will reconfirm California's commitment to open governance.

## **The Legal Basis for a Right to Access Bar Records: Common Law Right**

When citizens of California seek access to public documents, they traditionally make a Public Records Act request. The Public Records Act (California Government Code Sections 6250 et seq.) is modeled after the Federal Freedom of Information Act and has the similar goal of opening agency action to public light. However, the Public Records Act excludes the judicial branch from its scope, so the Bar, being an administrative arm of the judiciary, probably falls outside of the scope of the Public Records Act. However, there is an independent right of access under the common law to records in the judicial branch.. For example, in *Copley Press, Inc. v. Superior Court*, the appellate court for the fourth district ordered the minute notes of court clerks to be released to a journalist who hoped to substantiate a bribery rumor.

The fact that there is no specific statutory requirement for access to court documents does not, of course, permit exclusion of the public from same. Both the federal and the state Constitutions provide broad rights to judicial hearings and records. . .

[N]otwithstanding the statutory exception in the California Public Records Act court records are public records open to inspection. While the courts have an inherent right to control their own records, preclusion from public inspection should be permitted only upon a showing that revelation would “tend to undermine individual security, personal liberty, or private property, or injure the public or the public good.

*Copley Press*, 6 Cal.App.4<sup>th</sup> 106, 111-112 (1992)(citations removed)

Judicial entities may resist disclosure only when there is a compelling, countervailing interest because “[j]udicial records are historically and presumptively open to the public.” *Pantos v. City of San Francisco*, 151 Cal.App.3d 258, 263 (1984)(ordering the disclosure of master lists of qualified jurors).

## **The Legal Basis for a Right to Access Bar Records: Constitutional Right**

In addition to the common law right of access created by the courts, we believe the public has a constitutional right to the requested State Bar records. Proposition 59, approved by 83% of the electorate, amended Article I of the California Constitution to include a new, strongly-worded declaration of a public right to government records:

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.

Cal. Const. Art. I §3(b)(1). The California courts have not had an opportunity to give the constitutional amendment the definition and depth that litigation will bring, but we hope

this case, of landmark importance, will give the court an opportunity to assert the public's constitutional right of access to information held by the government.

Excepting the issue of bar-taker privacy (discussed at length in Section 3), the California Bar has not articulated a principled reason for resisting the disclosure of the requested records.

### **Precedent for Access**

The Bar's resistance to conducting a cooperative study with the team of qualified scholars, and its subsequent refusal to provide de-identified public records to the research community contrasts with the Bar's history of providing records and support to the Law School Admissions Council (LSAC) for their mid-nineties Bar Passage Study (BPS). The Bar provided LSAC with identifiable data for cohorts of bar-takers that had signed releases allowing for their personal information to be released as part of the BPS study. But prior to the BPS study, LSAC had sought data regarding earlier cohorts of bar-takers who had *not* signed waivers, and for which the bar data would be identified by the bar-takers' names. Rather than rejecting the request on privacy grounds, the Bar sent a letter to the Supreme Court communicating their eagerness to participate in the research study and requesting permission to release the information, despite their concerns about privacy. (This letter is available on our website, at [www.seaphe.org/state-bar-petition.php](http://www.seaphe.org/state-bar-petition.php))

The Bar's flat rejection of Sander's, Hicks', and CFAC's public information request contradicts the precedent it had set with the LSAC study.

### **For More Information:**

... about the Bar's obligation to protect the privacy of its bar-takers, see **Section 3: Privacy Issues**

... about Project SEAPHE, visit our website at **[www.seaphe.org](http://www.seaphe.org)**