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CFA Coalition v. Superior Court (Pete Wilson)

An overextension of the deliberative process privilege

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The "deliberative process" privilege was adopted by the California Supreme Court in *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991), to protect a public agency's decision-making process from unnecessary public exposure. Unfortunately, the sound legal and policy reasoning of that case has been unjustifiably expanded by the 2nd Appellate District in *Wilson v. Superior Court*, 51 Cal. App. 4th 1136 (1996), and this past October by the 3rd Appellate District in *California First Amendment Coalition v. Superior Court (Pete Wilson)*, 67 Cal. App. 4th 159 (1998).

In *CFA Coalition*, the court professed to examine "the delicate balance in a democracy between knowledge and power, accountability and quality decision-making." Id. at 163. In holding that the deliberative process privilege prevents disclosure of unsolicited written applications submitted to the governor in connection with his filling a vacancy on a county board of supervisors, the court determined that considerations of "power" and "quality decision-making" should prevail over "knowledge" and "accountability." In sum, the court extended the deliberative process privilege beyond its intended scope by applying it to documents that do not expose an agency's decision-making process.

Case Background

When a member of the Plumas County Board of Supervisors died in 1995, Gov. Pete Wilson was charged with filling the vacancy with a temporary appointment. The California First Amendment Coalition (CFAC), a press group, requested that the governor disclose all written applications for appointment submitted by applicants for the vacancy.[1] The governor denied the request, asserting that the applications were protected from disclosure under the California Public Records Act (Government Code § 6250 et seq.). The governor specifically asserted the deliberative process privilege, which falls within the general exemption contained in section 6255 of the act and was recognized by the California Supreme Court in *Times Mirror*. CFAC filed a petition for writ of mandate which was denied by the trial court.[2]

CFAC then filed a petition for writ of mandate in the court of appeal, asking that the court reverse the trial court and direct it to compel the governor to produce the requested applications. Id. at 165.

In response, the governor acknowledged that the applications were "public records" under section 6252(d) of the act, but claimed they were protected from disclosure by the deliberative process privilege. The appellate court agreed and held that the applications need not be produced.[3]

The Public Records Act

The Public Records Act is modeled after the federal Freedom of Information Act (FOIA), and was enacted in 1968 "for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies.'" *CBS, Inc. v. Block*, 42 Cal. 3d 646, 651 (1986) (citation omitted). "The Act was intended to safeguard the accountability of government to the public, and it makes public access to governmental records a fundamental right of citizenship." *Wilson*, 51 Cal. App. 4th 1136, 1141 (1996) (citation omitted). Generally, public records must be disclosed unless they fall within one of the categories of documents specifically exempted from disclosure under section 6254 of the act.

In addition to these specific exemptions, section 6255 "provides a means by which an agency may withhold a public record which would not be exempt under any of the specific exemptions delineated in section 6254 if the agency makes a showing that 'on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.'" *Wilson*, 51 Cal. App. 4th at 1141 (quoting § 6255). Section 6255 is commonly referred to as the "public interest" exemption. *Times Mirror*, 53 Cal. 3d at 1337-38. Section 6255 is also considered a "catchall" exemption because "[n]othing in the text or the history of section 6255 limits its scope to specific categories of information or established exemptions or privileges." Id. at 1338, 1339. The deliberative process privilege is subsumed under the public interest exemption of section 6255. Id. at 1336. The Supreme Court addressed the contours of section 6255 in *Times Mirror Co. v. Superior Court.*

The Supreme Court Analysis in *Times Mirror*

In *Times Mirror*, the *Los Angeles Times* sought the disclosure of the governor's appointment schedules and calendars. The governor claimed the records came within the correspondence exemption of section 6254(l) and the public interest exemption of section 6255. Specifically, the governor claimed that releasing his appointment calendars and schedules would (1) create a risk to his personal safety and (2) inhibit the free and candid exchange of ideas necessary to his decision-making process. Id. at 1329. The trial court agreed with the governor but the appellate court reversed, holding (1) the records were not "correspondence," (2) disclosure would not implicate the deliberative process of government, and (3) any security risk to the governor could not be evaluated without examining the documents. Id. at 1332.

The Supreme Court then reversed, holding that the records were protected by the deliberative process privilege. The high court reached its conclusion after adopting a two-step analysis. First, it held that "the public interest in withholding disclosure of the governor's appointment calendars and schedules is considerable." Id. at 1344. Second, it held that the public interest in nondisclosure "clearly outweighs" the public interest in disclosure, as required by section 6255. Id. Both steps of the *Times Mirror* analysis are discussed below.

Public Interest in Nondisclosure. The court looked to federal cases interpreting an analogous exemption of the FOIA, declaring that the "key question in every case is 'whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is 'actually ... related to the process by which policies are formulated' or 'inextricably intertwined' with 'policy-making processes.'" Id. at 1342 (citations omitted).

Applying these principles, the court concluded that revealing the governor's appointment information would intrude upon his deliberative processes because it would "indicate which interests or individuals he deemed to be of significance with respect to critical is-

sues of the moment." Id. at 1343. As a practical matter, "[i]f the law required disclosure of a private meeting between the governor and a politically unpopular or controversial group, the meeting might never occur. Compelled disclosure could thus devalue or eliminate altogether a particular viewpoint from the governor's consideration." Id. at 1344. Not only would the governor be reluctant to meet with unpopular persons or groups, those uncomfortable with the glare of the public spotlight might be driven from the political process. Thus, the governor's ability to perform his functions would be undermined.

Balancing the Interests. The court rejected the *Times Mirror*'s argument that disclosure was necessary for an open and democratic society, recognizing that the "deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the governor were entitled to precisely the same information, neither would likely receive it." Id. at 1345. The court also noted, however, that a governor's appointment information is not absolutely immune from disclosure and that a more focused and compelling request could pass muster under the appropriate circumstances. Id. at 1345-46.

The Court of Appeal Analysis in *Wilson*

Five years after *Times Mirror*, the 2nd Appellate District decided *Wilson*, which is based on similar facts to *CFA Coalition*. In *Wilson*, the *Los Angeles Times* sought disclosure of applications submitted to the governor by persons seeking appointment to a vacancy on the Orange County Board of Supervisors after one supervisor retired. 51 Cal. App. 4th at 1139. The 2nd Appellate District held that the applications were subject to the deliberative process privilege and thus exempt from disclosure under section 6255. Id. The court determined that the "applications are predecisional documents whose sole purpose is to aid the governor in selecting gubernatorial appointees, a process which depends upon comparison of the qualifications of the candidates as shown in the applications and confidential, candid discussion of the candidates' professional competence, political views and private conduct." Id. at 1143.

Wilson pushed the application of the deliberative process privilege further than the Supreme Court was willing to go in *Times Mirror*. The court in *Wilson* found that applications in and of themselves are "predecisional documents" that are "inextricably intertwined" with the policy-making process thus exempting them from disclosure under *Times Mirror*.

The rationale for protecting the predecisional deliberative process is to give the governor "the freedom to 'think out loud,' which enables him to test ideas and debate policy and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion." *Times Mirror*, 53 Cal. 3d at 1341; *Wilson*, 51 Cal. App. 4th at 1142 (citation omitted). While the governor's notes and discussions concerning applicants may fall within the deliberative process privilege, *Times Mirror* does not support the notion that disclosing unsolicited applications — and doing nothing more — would hinder the governor's "freedom to think out loud." This is exactly what *Wilson* reasoned and held.

The Court of Appeal Analysis in *CFA Coalition*

The *CFA Coalition* court adopted the same two-step approach used in *Times Mirror* and *Wilson*, and held that (1) the public interest in maintaining the confidentiality of unsolicited applications is great because disclosing them would impair administrative efficiency, and (2) the governor met his burden of showing that public interest in nondisclosure clearly outweighs the public interest in disclosure.

Public Interest in Nondisclosure. CFAC argued that although appointment books (which were at issue in *Times Mirror*) may provide clues into the governor's thought processes, unsolicited applications from others (which were at issue in *Wilson* and *CFA Coalition*) reveal none of his thought processes. Thus, argued CFAC, disclosing the applications would not impair the governor's decision-making process. *CFA Coalition*, 67 Cal. App. 4th at 171.[4]

In responding to CFAC's argument, the court misapplied *Times Mirror* and determined that the deliberative process may be impaired even if the thought processes of the decision-maker are not in danger of being revealed. Id. As discussed above, *Times Mirror* held that disclosure of the governor's appointment books would intrude upon his decision-making process. *Times Mirror* also discussed *Brockway v. Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975), in which the

8th Circuit held that nondisclosure of confidential witness statements concerning an airplane crash was necessary to prevent "inhibition of the free flow of information" to the U.S. Air Force. 518 F.2d at 1193. But *Times Mirror* did so in dicta simply to "illuminate another pertinent facet of the issue," which is that disclosure could chill outsiders from providing information. *Times Mirror*, 53 Cal. 3d at 1343.

While *Times Mirror* merely mentions *Brockway* in passing, *CFA Coalition* uses *Brockway* as a springboard. Rather than address the critical issue of whether disclosure would impair the governor's deliberative processes, *CFA Coalition* focuses instead on the need for effective administration: "The selection process is enhanced by a large applicant pool and by detailed information regarding each applicant, in the same manner that decision making in other contexts is enhanced by access to information and opinions from a variety of sources." 67 Cal. App. 4th at 172. Therefore, according to the court, public disclosure of the applications could reduce the pool of qualified applicants and the candor of those who apply. Id.

Putting aside whether this is true, it is doubtful that promoting administrative efficiency is a sufficient reason by itself for applying the deliberative process privilege. This is particularly true since "administrative efficiency" does not fall into any of the three general policy bases for the deliberative process privilege the court articulated: "First, it protects creative debate and candid consideration of alternatives within an agency, and thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that 'officials should be judged by what they decided[,] not for matters they considered before making up their minds.'" *CFA Coalition*, 67 Cal. App. 4th at 170 (citation omitted).

Of course, *CFA Coalition* could have simply relied upon *Wilson* since both cases involved almost identical facts. Instead, *CFA Coalition* declares that *Wilson* did not go far enough because it simply "appeared to resolve the issue on evidentiary grounds." Id. at 174. And even if *CFA Coalition* had held, like *Wilson*, that the applications were "predecisional documents," the reasoning would suffer from the same flaw inherent in *Wilson*: Disclosing applications does not unduly expose the governor's decision-making process or his ability to "think out loud."

Under both *Wilson* and *CFA Coalition*, virtually any document that passes before the governor relating to an upcoming decision would be protected by the deliberative process privilege, regardless of whether it would divulge his or her thought processes. This is wrong. As explained above, the key question is "whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Times Mirror* at 1342 (citation omitted). An appointment book may reveal which interests or individuals the governor considers important. Similarly, if the governor requested applications from specific individuals, disclosing those applications might reveal the governor's thought processes. Disclosing unsolicited applications, on the other hand, would not reveal the governor's thought process and therefore should not be protected by the deliberative process privilege.

Balancing the Interests. The *CFA Coalition* court also erred in its balancing of the public interests. The court offered three explanations for why the need for nondisclosure outweighed the need for disclosure. First, it stated that the governor would likely be "extremely sensitive to the views of voters in the affected district" and therefore would be careful in his selection. 67 Cal. App. 4th at 173. Second, the court opined that "timidity is not a common characteristic of those seeking the office of county supervisors"; thus once applicants' identities became known, public input from supporters and detractors of those applicants would naturally follow. Id.

Third, the court declared that "the ballot box, not public disclosure of applications, provides the ultimate check on the governor's appointment authority." Id. Thus, reasoned the court, once appointed the supervisor is subject to intense public scrutiny and if the appointee is found to be substandard, the appointee will not survive the next election. Since a successful candidate must ultimately face the voters, the court found no compelling reason to disclose confidential information provided by unsuccessful candidates. Id. at 174.

Of course, the court never really addressed CFAC's argument that there is an overwhelming public interest in scrutinizing the qualifications of applicants before they obtain a position normally decided by the voters. *CFA Coalition*, 67 Cal. App. 4th at 173. In the normal course, candidates for a position are subjected to intense public scrutiny from the beginning of their election campaigns. Withholding applications for a vacant position necessarily delays and diminishes the amount of public scrutiny before an appointment is made. Furthermore, the remedial measures suggested by the court — voting for another candidate in the next election — ignores the facts that the appointee will serve during the interim period and will have, as incumbents ordinarily do, an advantage over his or her challengers.

Conclusion

Times Mirror established a rational and logical standard for applying the deliberative process privilege. *Wilson* and *CFA Coalition* take the privilege at least one step too far. Unless the courts begin restricting the application of the privilege, public agencies will be able to restrict public access to virtually any document relating to an upcoming decision, regardless of whether disclosing the document would truly hinder the decision-making process.

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NOTES

1 CFAC also sought written material concerning the suitability of each applicant. On appeal, CFAC conceded that this material is protected from disclosure. Id. at 169.

2 The trial court held that the applications were exempt from disclosure based on the "correspondence" exemption set forth in section 6254(l) of the Act, and not on the "deliberative process" exemption under section 6255.

3 As in the trial court, the governor also asserted that the requested documents were "correspondence" within the meaning of section 6254(l). The appellate court held that the correspondence exemption applied to the letters and application forms received by the Governor's office. Id. at 169. This alternative holding is not the subject of this article.

4 CFAC conceded that documents discussing the applicants' suitability for appointment were subject to the deliberative process privilege. *CFA Coalition*, 67 Cal.App. 4th at 169.