App. 2

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 5

DATE: December 4, 2020

(Filed Dec. 4, 2020)

CARL GORDON,
Petitioner and Appellant,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondent.

B301623
Los Angeles County Super. Ct. No. BS165809

THE COURT:

Appellant's motion to vacate and set aside dismissal order issued November 10, 2020, is denied.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARL GORDON, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendant and Respondent.	B301623 (Los Angeles County Super. Ct. No. BS165809) ORDER (Filed Nov. 10, 2020)

The Court:

Respondent's motion to dismiss the appeal is granted. Appellant purports to appeal from a nonappealable order. (Gov. Code, § 6259, subd. (c).) We decline appellant's request to treat the appeal as a petition for writ relief. (*Min Cal Consumer Law Group v. Carlsbad Police Dept.* (2013) 214 Cal.App.4th 259, 265.)

/s/ Rubin	/s/ Baker	/s/ Kim
RUBIN, P. J	BAKER, J.	KIM, J.

GORDON v. REGENTS OF THE UNIVERSITY OF CALIFORNIA
Case Number: BS165809
Hearing Date: September 4, 2019

ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR WRIT OF MANDATE

(Filed Sep. 4, 2019)

Petitioner Carl Gordon seeks a writ of mandate under Code of Civil Procedure section 1085, subdivision (a), and the California Public Records Act (CPRA) (Government Code sections 6250 *et seq.*) requiring Respondent Regent of the University of California to produce documents and unredacted documents concerning four separate CPRA requests.

Respondent opposes the petition. Petitioner did not file a reply.

The Petition is DENIED in part and GRANTED in part.

STATEMENT OF THE CASE[1]

On various dates in 2016, Petitioner made several CPRA requests of Respondent.

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[1] The court ordered Petitioner to lodge the record with the court when he filed his Reply Brief. Petitioner did not file a Reply Brief. He also did not lodge the record. The underlying facts are not disputed. The court has set forth the undisputed facts as it discerned them from the briefs. Therefore, the court has not set forth any citations to the record. [MISSTATEMENT OF FACTS. Please see **Apps. 25, 30, 31,** and **39**]

On March 29, 2016, Petitioner requested the "donor agreement between Lowell Milken and UCLA" and "any communications relating to Mr. Milken's $10 million gift to UCLA for the establishment of the Lowell Milken Institute for Business Law and Policy at the UCLA School of Law in 2011" (Milken Request).

On April 4, 2016, Petitioner requested the "Donor agreement between Donald T. Sterling Charitable Foundation/the Los Angeles Clippers Foundation and UCLA" and "any [communications] relating to Mr. Sterling's gifts of $3 million to UCLA in 2013 or 2014" (Sterling Request).

On April 5, 2016, Petitioner requested the "donor agreement between Dr. Sharon Baradaran, Mr. Younes Nazarian, Mrs. Soraya Nazarian, David Nazarian, members and representatives of the Y&S Nazarian Family Foundation" and any communications relating to donations made by the Nazarians (Nazarian Request).

Finally, on April 6, 2016, Petitioner requested copies of communications between various high-ranking UCLA and UC Regents officials related to Petitioner's proposals on behalf of the organization he controls, University of the 'Hood (Communications Request).

Respondent's Records Management and Information Practices Office (IP Office) acknowledged receipt of Petitioner's CPRA requests. (Baldridge Decl., ¶ 3.) The IP Office indicated it would need additional time to respond to the CPRA requests. (Baldridge Decl., ¶ 4.)

Respondent produced some records in response to Petitioner's requests. Some of the documents Respondent produced, however, were redacted prior to production. Finally, Respondent withheld some documents based on privacy claims as well as statutory exemptions.

Specifically, the IP Office provided the following responses to Petitioner's CPRA requests:

As to the Milken Requests, the IP Office produced 84 pages of documents and withheld the remaining documents on the grounds the release would constitute an unwarranted invasion of personal privacy, the materials were considered proprietary as well as confidential, and disclosure was protected under the deliberative process exemption. (Amended Pet., ¶ 17.)

As to the Sterling Request, the IP Office produced 48 pages of documents and withheld the remaining responsive documents on the grounds the release would constitute an unwarranted invasion of personal privacy and it would require the disclosure of protected student information. (Amended Pet., ¶ 18.)

As to the Nazarian Request, the IP Office produced 11 pages of documents and informed Petitioner it was withholding exempt material on the grounds release would constitute an unwarranted invasion of personal privacy and certain documents were ordinarily not retained by the agency in the ordinary course of business. (Amended Pet., ¶ 19.)

Finally, as to the Communications Request, the IP Office produced 54 pages of documents and informed

Petitioner it was withholding exempt material on the grounds release would constitute an unwarranted invasion of personal privacy, and disclosure was protected by the deliberative process as well as the attorney-client and attorney-work product privileges. (Amended Pet., ¶ 20.)

Thereafter, on October 11, 2016, this writ petition ensued.

STANDARD OF REVIEW

Code of Civil Procedure section 1085, subdivision (a) provides in relevant part:

> "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person."

"There are two essential requirements to the issuance of a traditional writ of mandate: (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (*California Ass'n for Health Services at Home v. Department of Health Services* (2007) 148 Cal.App.4th 696, 704.) "Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy. . . ."

(*Pomona Police Officers' Ass'n v. City of Pomona* (1997) 58 Cal.App.4th 578, 583-84.)

"When there is review of an administrative decision pursuant to Code of Civil Procedure section 1085, courts apply the following standard of review: '[J]udicial review is limited to an examination of the proceedings before the [agency] to determine whether [its] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law.' [Citations.]" (*Id.* at 584)

Pursuant to the CPRA, individual citizens have a right to access government records. In enacting the CPRA, the California Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code § 6250; see also *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 63.) Government Code section 6253, subdivision (b) states:

> "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."

(Gov. Code § 6253, subd. (b).)

ANALYSIS

Respondent Properly Withheld/Redacted Records Based on Privacy Interests:

In response to Petitioner's CPRA request, Respondent, as demonstrated through its fairly detailed privilege log and explanation, only withheld or redacted the following information based on privacy: (i) the personal cell phone numbers of two UCLA employees, (ii) the home address of one of the donors, and (iiii) Milken's personal financial details.

First, as to the employees' personal cell phone numbers, Respondent argues this information was properly withheld pursuant to Government Code section 6254.3. This section provides: "The home addresses, home telephone numbers, personal cellular telephone numbers, and birth dates of all employees of a public agency shall not be deemed public records and shall not be open to public inspection. . . ." (Gov. Code, § 6254.3, subd. (a) [emphasis added].) Respondent's redaction of this information was proper.

Second, as to the home address of a donor, Respondent argues, under the Information Practices Act of 1977 (IPA), such disclosure would be improper. Respondent cites no legal authority suggesting the IPA informs on disclosures under the CPRA.

In any event, the court agrees that withholding this home address information through a redaction under the CPRA is proper. "[C]ourts closely scrutinize any proposed disclosure of names and home addresses

contained in public records because individuals have a substantial privacy interest in their home addresses." (*Lorig v. Medical Board* (2000) 78 Cal.App.4th 462, 468 [citing *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1019-1020].) Petitioner does not dispute Respondent's position. Here, the court finds the public interest in not disclosing this very private information is outweighed by the public interest in disclosure. (Gov. Code § 6252, subd. (a).)

Finally, in conjunction with the Milken Request, Respondent produced a privilege log indicating the documents it withheld related to Milken's personal financial details, such as banking information and stock information. It also withheld communications by Respondent involving its decision-making process when considering Milken's donation. (Baldrige Decl., 9, Ex. A.)

Although not substantively addressed by Respondent, the court finds the public interest in not disclosing this information outweighs the public interest in disclosure based on the facts in this case. (Gov. Code § 6255, subd, (a).)

The underlying reason for the petition and the CPRA requests was Petitioner's work through his community-based advocacy organization, University of the 'Hood, whose mission is to "disseminate the truth about America's history, particularly emphasizing the African and African American experiences." As part of his work with this organization, Petitioner has been lobbying UCLA to support various proposals, including the

posthumous award from UCLA to Jackie Robinson, the designation of a degree program at the Anderson School of Management in Mr. Robinson's honor as the "Jackie Robinson Program in Sports Management," and renaming "Le Conte Way" to "Jackie Robinson Way." Petitioner's "purpose was to encourage UCLA to distance itself from its association with individuals or legacies that, in the past, had supported discrimination, and instead honor individuals, such as Jackie Robinson, considered heroes and pioneers of diversity and civic values." (Opening Brief 2:15-18.)

Based on these issues, other than the importance of complete governmental transparency, the court is unable to determine any public interest in either the donor's home address or Milken's private financial information—information not about a governmental entity but about a private individual unrelated to the entity. The court acknowledges, however, a lack of public interest alone does not justify withholding public records absent a public interest in nondisclosure. The court finds there is a strong public interest and policy in encouraging charitable donations. If the court allowed the release of donor's private information (e.g., home addresses and banking or financial information) through a generalized CPRA request, other potential donors may be discouraged from making donations based on concern their private information may be publicly released. (See *California State University v. Superior Court* (2001) 90 Cal.App.4th 810, 834.)

Given the substantial privacy in an individual's home address and Milken's financial information and the

absence of any argument in favor of disclosure of this information, the court finds the redactions from the Nazarian Request and Milken Request were proper. While every case is different, here, the circumstances do not warrant release.

Additionally, contrary to Petitioner's argument (Opening Brief 5), Respondent was not withholding donor names or amounts already within the public domain. Rather, Respondent specifically produced the donor name and amount in response to the Milken Request, the Sterling Request and the Nazarian Request.

Respondent Failed to Justify Withholding Records based on the Deliberative Process and Draft Exemptions:

Respondent also acknowledges it withheld certain documents based on the "deliberative process privilege."

"The right of access to public records under the CPRA is not absolute." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1283.) The CPRA makes clear that "every person" has a right to inspect any public record (Gov. Code § 6253, subd. (a)), for any purpose (Gov. Code § 6257.5), subject to certain exemptions, including those found in Government Code section 6255. Section 6255 exempts from disclosure documents which are protected by the deliberative process privilege. (*Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1142.)

"[I]t is the public agency's burden to prove a basis for nondisclosure of a public record." (*Sander v. Superior*

Court (2018) 26 Cal.App.5th 651, 670.) "The exemptions are to be construed narrowly." (*Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1254.) "The burden of proof as to the application of an exemption is on the proponent of nondisclosure, who must demonstrate 'that on the facts of the particular case the public interest served by not disclosing the record *clearly outweighs* the public interest served by disclosure of the record." (*Id.* at 1255 [quoting Gov. Code § 5255].)

"Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 305; *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 225.)

Importantly, "[n]ot every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence. The burden is on the [one claiming the privilege] to establish the conditions for creation of the privilege. The trial court's determination is subject to de novo review by this court, although we defer to any express or implied factual findings of the superior

court." (*California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172-173; *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 306.)

In reviewing the privilege log the court notes several documents were withheld based on the deliberative process exemption. The court finds the following document was properly withheld based on the deliberative process exemption:

(1) Dean Moran's notes on telephone conversation with Lowell Milken

(Baldridge Decl., ¶ 9, Ex. A, p. 1, 10 [Privilege Log].) These notes appear to be, based on their description, private notes used to deliberate on the on the various donations.

According to the privilege log, Talking Points for Chancellor Block Nazarian Reception were withheld based on Government Code section 6254, subdivision (a). (Baldridge Decl., ¶ 9, Ex. A, p. 10 [Privilege Log].) That provision provides an exemption to a CPRA request when the documents fall into the category of "[p]reliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."

Respondent has provided no information to support this exemption. Nothing in the declarations filed in support of Respondent's opposition factually supports

this claimed exemption. The court cannot find these notes "are not retained by the public agency in the ordinary course of business." (Gov. Code § 6254, subd. (a).) That the document exists suggests otherwise. Without some factual basis to support the exemption, Respondent has not justified the exemption.

Correspondence between Dean Moran and Lowell Milken,[2] are also not subject to a deliberative process exemption. Respondent, the party with the burden, has failed to show how these records and communications by Respondent *with a third party*, would disclose "the mental processes by which a given decision was reached, . . . [or] the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (*Citizens for Open Government v. City of Lodi, supra*, 205 Cal.App.4th at 305.) Certainly, Respondent's position that these are private *internal* discussions is mistaken—the occurred with a third party outside of the governmental entity. (Opposition 11:3-6.) Respondent's justification for withholding the documents is insufficient. Respondent provides only conclusory and vague evidence to support a finding these records are subject to deliberative process exemption. (Sina Decl., ¶¶ 3-4.)

Respondent's justification for withholding the documents is nothing more than a general statement of

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[2] Dated 3/16/2011, 6/21/2011, 6/21/2011, 2/17/2011, 3/21/2011, 3/25/2011, 3/6/2012, 7/26/2012, 3/25/2013, 7/14/2011, 10/7/2011, 11/16/2011, 7/26/2012, 5/7/2013, 7/15/2011.

why the privilege in general is necessary. Respondent's position here is very similar to the one taken by the municipality in *Citizens for Open Government v. City of Lodi, supra*, 205 Cal.App.4th at 296 where the appellate court found the municipality had not met its burden of establishing the deliberative process privilege.

Citizens for Open Government v. City of Lodi concerned a city's certification of an Environmental Impact Report (EIR) for a large commercial development. Opponents of the development sought city staff emails concerning the preparation of the EIR through a CPRA request. The city withheld emails claiming deliberative process privilege. On the development opponent's writ petition seeking the withheld documents, the city claimed "that disclosing staff communications would hamper candid dialogue and a testing and challenging of the approaches to be taken. . . ." (*Id.* at 307 [internal quotations omitted].) The development opponent argued the justification "is not sufficient to demonstrate the public interest in nondisclosure clearly outweighs the public interest in disclosure." (*Ibid.*)

Under such facts, the Court of Appeal found "the city never established the conditions for creation of the privilege. The city's explanation . . . of why the privilege applies, i.e., to 'foster candid dialogue and a testing and challenging of the approaches to be taken,' was simply a policy statement about why the privilege in general is necessary." (*Ibid.*) The Court of Appeal continued, "Indeed, the city's explanation was similar to one of the policy reasons for the deliberative process

privilege enunciated by this court: the privilege 'protects creative debate and candid conversation of alternatives within an agency, and, thereby, improves the quality of agency policy decisions.'" (*Ibid.* [quoting *California First Amendment Coalition v. Superior Court, supra*, 67 Cal.App.4th at 170].)

The Court of Appeal further explained "invoking the privilege is not sufficient to explain the public's specific interest in nondisclosure of the documents in this case. That policy could apply to almost any decisionmaking process." (*Ibid.*) The Court of Appeal concluded the city had not met its burden of establishing the deliberative process exception, or why the public's interest in nondisclosure was clearly outweighed by the public's interest in disclosure. (*Ibid.*)

In a footnote, *Citizens for Open Government v. City of Lodi* explained its decision was informed by two cases where the public entities' explanations were sufficient—Times *Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 and *California First Amendment Coalition v. Superior Court, supra*, 67 Cal.App.4th at 159.

In *Times Mirror Co. v. Superior Court*, our Supreme Court found the deliberative process privilege was properly invoked as to a request for five years of the governor's appointment calendars and schedules. The governor believed releasing the information would discourage persons from attending meetings or lead to unwarranted inferences about the subjects under discussion. Disclosure would reveal persons, issues and events deemed worthy of the governor's time. The

Supreme Court agreed disclosure of such materials implicated the privilege and disclosure "would inhibit access to the broad spectrum of persons and viewpoints which [the governor] requires to govern effectively." (*Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at 1339.) The Supreme Court recognized the public interest in disclosure but found that interest was outweighed because the "massive weight" of the request—five years of calendars—undermined the public interest in the disclosure. (*Id.* at 1345.)

California First Amendment Coalition v. Superior Court concerned a CPRA request to the governor's office seeking letters and applications submitted for a vacant Plumas County supervisor position. The Court of Appeal found disclosing the applications would have an adverse impact on the number of applicants as it "would likely reduce the applicant pool and the candor of those who apply." (*California First Amendment Coalition v. Superior Court, supra*, 67 Cal.App.4th at 172.)

In a more recently decided case, *Humane Society of U.S. v. Superior Court, supra*, 214 Cal.App.4th at 1233, the governmental entity, the University of California, presented expert testimony concerning the specific interests in nondisclosure. In the context of agricultural research, disclosure would lead to less raw data provided from farmers who had been assured of the information they provided would remain confidential. (*Id.* at 1241.) The expert opined other information reflected in the records was incomplete based on the sometimes incomplete manner in which researchers communicated. (*Id.* at 1242.) The expert believed incomplete

information would lead to misinterpretation that would ultimately negate the quality of the research and/or the investigators. (*Ibid.*) On such a specific showing, after balancing the public interest in nondisclosure against that of the public in disclosure, the court found the deliberative privilege applied.

Respondent's justification here is simply inadequate as to this category of documents: "Based on my 7 years of experience soliciting donations for UCLA, it is my opinion that the disclosure of these materials would expose UCLA and The Regents of the University of California's decision process in a way that would discourage candid discussion, under the UCLA's ability to perform its functions, and/or significantly impact the donor at issue or other potential donors' decisions of whether to give to UCLA." (Sina Decl., ¶ 4.)

Respondent also withheld the following documents:

(1) Letter from Dean Moran to Chancellor Block (3/15/2011)

(2) Email chain between Mick Deluca and Dan Guerrero (1/20/2016)

(Baldridge Decl., ¶ 9, Ex. A, p. 9, 11 [Privilege Log].)

Again, Respondent provides no evidence of the nature or general content contained within these records to support the deliberative process exemption. (Sina Decl., 114.) In fact, with respect to the email between Mick Deluca and Dan Guerrero, it is not even clear that these individuals are employees of Respondent.

Petitioner Fails to Challenge the Nondisclosure based on Attorney Client Privilege:

Subdivision (k) of Government Code section 6254, provides an exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Pursuant to this subdivision, documents protected by the attorney-client privilege are not subject to CPRA disclosure. (*County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 64; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370 ["By its reference to the privileges contained in the Evidence Code . . . the Public Records Act has made the attorney-client privilege applicable to public records"]; *Sanchez v. County of San Bernardino* (2009) 176 Cal.App.4th 516, 527 ["The Public Records Act does not require the disclosure of a document that is subject to the attorney-client privilege"].)

Here, Respondent redacted three records based on attorney-client privilege/work product:

(1) 1/20/2016 email with Bill Cormier, Scot Waugh, Steve Olsen and Attorney Amy Blum

(2) 1/20/2016 email with Bill Cormier, Scot Waugh, Steve Olsen and Attorney Amy Blum

(3) 1/20/2016 email with Bill Cormier, Scot Waugh, Steve Olsen and Attorney Amy Blum

(Baldridge Decl., ¶ 9, Ex. A, p. 10, 12 [Privilege Log].)

Petitioner's brief does not challenge Respondent's nondisclosure of these records. Based on the information

provided, it appears the documents were properly withheld on the basis of attorney-client privilege.

CONCLUSION

Based on the foregoing, the petition is GRANTED in part.

The correspondence between (1) Dean Moran and Lowell Milken[3] as well as the (2) Letter from Dean Moran to Chancellor Block dated 3/15/2011, (3) Talking Points for Chancellor Nazarian Reception, and (4) the email chain between Mick Deluca and Dan Guerrero dated 1/20/16 shall be produced and provided to Petitioner within 10 days.

The petition is otherwise denied.

IT IS SO ORDERED.

September 4, 2019

Hon. Mitchell Beckloff
Judge of the Superior Court

[3] Dated 3/16/2011, 6/21/2011, 6/21/2011, 2/17/2011, 3/21/2011, 3/25/2011, 3/6/2012, 7/26/2012, 3/25/2013, 7/14/2011, 10/7/2011, 11/16/2011, 7/26/2012, 5/7/2013, 7/15/2011.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT CE-86
DEPARTMENT CE-86

HON. AMY D. HOGUE, JUDGE
HON. MITCHELL L. BECKLOFF, JUDGE

CARL GORDON, PETITIONER, **vs.** REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., RESPONDENT.	)	Case No.: BS165809

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APPEARANCES:

FOR PETITIONER:

BY: Carl Gordon
In Propria Persona

LAW OFFICES OF KELLY A. AVILES
BY: Kelly A. Aviles, Attorney at Law
1502 Foothill Boulevard, Suite 103-140
La Verne, California 91750
909.991.7560
Kaviles@opengovlaw.com

GLASER WEIL
BY: Felton T. Newell, Attorney at Law
10250 Constellation Boulevard, 19th Floor
Los Angeles, California 90067
310.533.3000
fnewell@glaserweil.com

FOR RESPONDENT:

BEST BEST AND KRIEGER
BY: Thomas M. O'Connell, Attorney at Law
(appearing telephonically)
BY: Howard Golds, Attorney at Law
(appearing telephonically)
3390 University Avenue, Fifth Floor
Riverside, California 92501
951.686.1450
Thomas.oconnell@bbklaw.com
Howard.Golds@bbklaw.com

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ALPHABETICAL and
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(none)

EXHIBITS

(none offered)

[1] CASE NUMBER:	BS165809
CASE NAME:	CARL GORDON VS. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.
LOS ANGELES, CA	JUNE 14, 2017
DEPARTMENT CE-86	HON. AMY D. HOGUE, JUDGE
REPORTER:	J.HOLLIFIELD, CSR 12564
TIME:	9:37 a.m.
APPEARANCES:	(As indicated on title page.)

(The following telephonic hearing was reported in open court pursuant to CRC 3.670. The record will reflect proceedings that were telephonically transmitted. Failures in transmission will be noted.)

THE COURT: Court calls Number 2, please, Gordon.

MR. GOLDS: Good morning, Your Honor. Howard Golds, Best Best and Krieger, on behalf of the Regents of the University of California.

THE COURT: Okay. Good morning, sir.

MR. NEWELL: Good morning, Your Honor. Felton Newell on behalf of the petitioner, Mr. Gordon.

THE COURT: Okay. Hi. Have a seat. Okay. So this is also a trial setting conference, and I see there was a verified first amended petition. Are we ready to set it for trial? Is there an issue about the record?

MR. NEWELL: We're ready to set it for trial.

THE COURT: Is the administrative record [2] prepared?

MR. GOLDS: It is not, Your Honor.

THE COURT: Okay. I can't set it for trial until I **know** the administrative record is prepared. Have you requested the record?

MR. NEWELL: I've not finalized that process yet.

THE COURT: Okay. So you need to take the laboring oar because I won't set it for trial until the record is complete. So I will just put this also over until August 25th if that's okay with everybody as a date at 9:30 continued trial setting conference.

MR. NEWELL: That's fine.

MR. GOLDS: That's fine, Your Honor.

THE COURT: Okay. Mr. Newell, please do what you have to do to get the case moving.

MR. NEWELL: I will do that.

THE COURT: Thanks. Is notice waived, gentleman?

MR. NEWELL: Notice waived.

MR. GOLDS: Notice is waived, Your Honor.

THE COURT: All right. Thanks a lot.

(The proceedings concluded for the day at 9:38 a.m.)

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Ill//

(The next page number is 301.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 08/25/17	DEPT. 86
HONORABLE AMY D. HOGUE **JUDGE**	F. BECERRA **DEPUTY CLERK**
HONORABLE **JUDGE PRO TEM** 2 **Deputy Sheriff**	B. HALL, COURTROOM ASST. **ELECTRONIC RECORDING MONITOR**
	J HOLLIFIELD CSR #12564 **Reporter**

9:30 am	BS165809	**Plaintiff**
	CARL GORDON **VS**	**Counsel** FELTON T. NEWELL (X)
	REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL	**Defendant** **Counsel** HOWARD GOLDS (CC)

NATURE OF PROCEEDINGS:

TRIAL SETTING CONFERENCE

The matter is called for hearing.

The Court and counsel confer regarding the status of the record. Counsel for petitioner has not requested the preparation of the record.

Trial Setting Conference is continued to August 25, 2017 at 9:30 a.m. in this department.

Notice is waiv.ed.

[301] CASE NUMBER:	BS165809
CASE NAME:	CARL GORDON VS. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.
LOS ANGELES, CA	AUGUST 25, 2017
DEPARTMENT CE-86	HON. AMY D. HOGUE, JUDGE
REPORTER:	J.HOLLIFIELD, CSR 12564
TIME:	9:48 a.m.
APPEARANCES:	(As indicated on title page.)

(The following telephonic hearing was reported in open court pursuant to CRC 3.670. The record will reflect proceedings that were telephonically transmitted. Failures in transmission will be noted.)

THE COURT: Number 3, Gordon.

MR. O'CONNELL: Good morning, Your Honor. Tom O'Connell on behalf of the Regents, University of California.

THE COURT: Hi.

MR. NEWELL: Good morning, Your Honor. Felton Newell on behalf of petitioner, Mr. Gordon.

THE COURT: Okay. So last time, the petitioner hadn't asked for a record, and so I had to read the trial setting. Is the record getting prepared now?

MR. NEWELL: It's been prepared, and I believe lodged with the Court.

THE COURT: All right. Terrific. So shall I set it for trial then?

[302] MR. NEWELL: Yes, please.

THE COURT: Okay. Terrific. Then our next trial date is –

THE CLERK: March 7th.

THE COURT: – March 7th at 9:30, please. Is that okay with everybody? 2018. March 7th.

MR. NEWELL: Give me one second. Yes, that's fine, Your Honor.

THE COURT: Good.

MR. NEWELL: What time is it?

THE COURT: 9:30.

MR. NEWELL: 9:30.

THE COURT: Okay. So opening briefs are due 60 court days before the hearing; opposition, 30 court days before the hearing; reply, 15. Make sure I have the record at least 15 court days before the hearing and I'll look forward to seeing you then.

Notice waived? Somebody want to give notice?

MR. O'CONNELL: Notice waived, Your Honor.

MR. NEWELL: Just wanted to clarify, Your Honor. So you need the record 15 court days. The other dates – were they all court dates or just –

THE COURT: They're all court days.

MR. O'CONNELL: All court days.

THE COURT: Yes. All court days just to make it tricky. Thank you.

MR. NEWELL: Thank you, Your Honor.

[303] MR. O'CONNELL: And, Your Honor, just very quickly, we attempted to lodge the administrative record yesterday; and we were told that we could not lodge the record until a trial was set. We will try to re-lodge the record here in the next couple of days.

THE COURT: Okay. That's great.

MR. O'CONNELL: Petitioner already has the record. We've sent a courtesy copy already.

THE COURT: Sounds good.

THE CLERK: Counsel, do not lodge the record until it's ready. We don't have room to store it.

THE COURT: Yes. I think he said it's going to be ready.

THE CLERK: Yeah. But he wants to submit it now; we don't have room to store it.

THE COURT: Call Fernando and talk to him. don't know if we have storage for it so early. Okay.

MR. NEWELL: Thank you very much.

MR. O'CONNELL: Okay, not a problem.

THE COURT: Thank you.

(The proceedings concluded for the day at 9:50 a.m.)

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(The next page number is 601.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 08/25/17	DEPT. 86
HONORABLE AMY D. HOGUE **JUDGE**	F. BECERRA **DEPUTY CLERK**
HONORABLE **JUDGE PRO TEM** #3 **Deputy Sheriff**	**ELECTRONIC RECORDING MONITOR** **J.** HOLLIFIELD CSR #12564 **Reporter**

9:30 am	BS165809 CARL GORDON VS REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL	**Plaintiff Counsel** FELTON T. NEWELL **(X)** **Defendant Counsel** THOMAS M. O'CONNELL (CC)

NATURE OF PROCEEDINGS:

TRIAL SETTING CONFERENCE

The matter is called for hearing.

The Court and counsel confer regarding the status of the record.

Hearing on writ of mandate is set for March 7, 2018 at 9:30 a.m. in this department.

Briefing schedule is ordered as follows:

– Petitioner's opening brief is to be served and filed sixty court days prior to the hearing.
– Respondent's opposition brief is to be served and filed thirty court days prior to die. hearing.
– Petitioner's reply brief is to be served and filed fifteen court days prior to the hearing.

Administrative record is to be lodged fifteen< court days prior to the hearing.

All papers are to be filed directly in Department 86.

Notice is waived.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 09/05/18	DEPT. 86
HONORABLE MITCHELL L. BECKLOFF **JUDGE**	F. BECERRA B. BYERS, C/A **DEPUTY CLERK**
HONORABLE JUDGE PRO TEM 1 **Deputy Sheriff**	**ELECTRONIC RECORDING MONITOR** J. HOLLIFIELD CSR #12564 **Reporter**

9:31 am	BS165809 **CARL GORDON (X)** VS **REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL**	**Plaintiff Counsel** KELLY A. AVILES **(X)** **Defendant Counsel** THOMAS M. O'CONNELL (CC)

NATURE OF PROCEEDINGS:

PETITIONER MOTION TO BE RELIEVED AS COUNSEL

The matter is called for hearing.

After argument, the motion to be relieved as counsel is granted.

Order is signed and filed this date.

Hearing on petition for writ of mandate set for September 28, 2019 is advanced and

continued to March 27, 2019 at 9:30 a.m. in Department 86.

Petitioner's reply brief is to be served and filed fifteen days prior to the hearing.

Administrative record is to be lodged fifteen days prior to the hearing.

All papers are to be filed directly in Department 86.

Notice is deemed waived.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 09/05/18	**DEPT.** 86
HONORABLE MITCHELL L. BECKLOFF **JUDGE**	F. BECERRA B. BYERS, C/A **DEPUTY CLERK**
HONORABLE **JUDGE PRO TEM**	
1 **Deputy Sheriff**	**ELECTRONIC RECORDING MONITOR**
	J. HOLLIFIELD CSR #12564 **Reporter**

9:31 am	BS165809	Plaintiff
	CARL GORDON (X) VS	Counsel KELLY A. AVILES (X)
	REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL	Defendant Counsel THOMAS M. O'CONNELL (CC)

NATURE OF PROCEEDINGS:

PETITIONER MOTION TO BE RELIEVED AS COUNSEL

The matter is called for hearing.

After argument, the motion to be relieved as counsel is granted.

Order is signed and filed this date.

Hearing on petition for writ of mandate set for September 28, 2019 is advanced and

continued to March 27, 2019 at 9:30 a.m. in Department 86.

Petitioner's reply brief is to be served and filed fifteen days prior to the hearing.

Administrative record is to be lodged fifteen days prior to the hearing.

All papers are to be filed directly in Department 86.

Notice is deemed waived.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT CE-86

HON. MITCHELL L. BECKLOFF, JUDGE

CARL GORDON, PETITIONER, vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., RESPONDENT.	)	Case No.: BS165809

REPORTERS' TRANSCRIPT OF PROCEEDINGS

TELEPHONIC HEARING

September 5, 2018

APPEARANCES:

FOR PETITIONER:

LAW OFFICES OF KELLY A. AVILES
BY: Kelly A. Aviles, Attorney at Law
1502 Foothill Boulevard, Suite 103-140
La Verne, California 91750
909.991.7560
Kaviles@opengovlaw.com

BY: Carl Gordon, In Propria Persona

FOR RESPONDENT:

BEST BEST AND KRIEGER
BY: Thomas M. O'Connell, Attorney at Law
(appearing telephonically)
3390 University Avenue, Fifth Floor
Riverside, California 92501
951.686.1450
Thomas.oconnell@bbklaw.com
Howard.Golds@bbklaw.com

Reported by:
J.Hollifield, RPR, CSR 12564
Official Reporter

INDEX

September 5, 2018

September 4 and 27, 2019

Volume 1 of 1

ALPHABETICAL and
CHRONOLOGICAL INDEX of WITNESSES

(none)

EXHIBITS

(none offered)

[1] CASE NUMBER:	BS165809
CASE NAME:	CARL GORDON vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.
LOS ANGELES, CA	SEPTEMBER 5, 2018
DEPARTMENT CE-86	HON. MITCHELL L. BECKLOFF, JUDGE
REPORTER:	J.HOLLIFIELD, CSR 12564
TIME:	9:31 a.m.
APPEARANCES:	(As indicated on title page.)

(The following telephonic hearing was reported in open court pursuant to CRC 3.670. The record will reflect proceedings that were telephonically transmitted. Failures in transmission will be noted.)

THE COURT: Parties on Gordon versus U.C. Regents. It's Number 1.

MR. O'CONNELL: Good morning, Your Honor. Tom O'Connell on behalf of the Regents of California, appearing by CourtCall.

MS. AVILES: Good morning, Your Honor. Kelly Aviles, appearing on behalf of petitioner and moving party on the motion to be withdrawn.

THE COURT: Thank you very much.

And you're Mr. Gordon.

MR. GORDON: I am Mr. Gordon.

* * *

[23] THE COURT: . . .

There's no record; correct?

MS. AVILES: They have – I mean, there generally isn't in a traditional case, but they have put together what they deem the administrative record, which is all the communications about the P.R.A. request.

THE COURT: So the administrative record, whatever that might be, would be lodged at the same time that the reply brief is filed.

MR. GORDON: Okay.

THE COURT: Do you follow me on that, Mr. Gordon?

MR. GORDON: Yes. Am I required to file the administrative record even though it is from them? Shouldn't they file it?

MS. AVILES: They – Tom, can you file the administrative record on the date of the reply?

MR. O'CONNELL: That's fine.

THE COURT: So that's not an unusual procedure. So the Regents will lodge the administrative record on March 12th, 2019.

The reply will be filed and served no later than March 12, 2019.

And I'm sure it will be Judge Hogue. We'll see you on March 27th, 2019. But if you want to be sure it's not me, Mr. Gordon, you might – you're representing yourself. I don't want to give you any advice –

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT CE-86

HON. MITCHELL L. BECKLOFF, JUDGE

CARL GORDON, PETITIONER, vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., RESPONDENT.	Case No.: BS165809 Reporter's Certificate

I, J.Hollifield, Official Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that I reported in machine shorthand, to the best of my ability, the telephonically transmitted proceedings in the above case, pursuant to California Rule of Court 3.670 and that the foregoing Pages 1 through 26 comprise a full, true, and

correct transcript of the proceedings telephonically transmitted before me in the above entitled cause on September 5, 2018.

Dated this 26th of September, 2018.

/s/ J.Hollifield
J.Hollifield, RPR, CSR 12564
Official Reporter

GORDON v. REGENTS OF THE UNIVERSITY OF CALIFORNIA
Case Number: BS165809
Hearing Date: September 4, 2019

ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR WRIT OF MANDATE

(Filed Sep. 4, 2019)

Petitioner Carl Gordon seeks a writ of mandate under Code of Civil Procedure section 1085, subdivision (a), and the California Public Records Act (CPRA) (Government Code sections 6250 *et seq.*) requiring Respondent Regent of the University of California to produce documents and unredacted documents concerning four separate CPRA requests.

Respondent opposes the petition. Petitioner did not file a reply.

The Petition is DENIED in part and GRANTED in part.

STATEMENT OF THE CASE[1]

On various dates in 2016, Petitioner made several CPRA requests of Respondent.

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[1] **The court ordered Petitioner to lodge the record with the court when he filed his Reply Brief. Petitioner did not file a Reply Brief. He also did not lodge the record. The underlying facts are not disputed. The court has set forth the undisputed facts as it discerned them from the briefs. Therefore, the court has not set forth any citations to the record.** [MISSTATEMENT OF FACTS. Please see **Apps. 25, 30, 31,** and **39**]

On March 29, 2016, Petitioner requested the "donor agreement between Lowell Milken and UCLA" and "any communications relating to Mr. Milken's $10 million gift to UCLA for the establishment of the Lowell Milken Institute for Business Law and Policy at the UCLA School of Law in 2011" (Milken Request).

On April 4, 2016, Petitioner requested the "Donor agreement between Donald T. Sterling Charitable Foundation/the Los Angeles Clippers Foundation and UCLA" and "any [communications] relating to Mr. Sterling's gifts of $3 million to UCLA in 2013 or 2014" (Sterling Request).

On April 5, 2016, Petitioner requested the "donor agreement between Dr. Sharon Baradaran, Mr. Younes Nazarian, Mrs. Soraya Nazarian, David Nazarian, members and representatives of the Y&S Nazarian Family Foundation" and any communications relating to donations made by the Nazarians (Nazarian Request).

THE ADMINISTRATIVE RECORD

Presented by
Joel D. Kuperber[1]
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LEAGUE OF CALIFORNIA CITIES
2001 Annual Conference
Joint City Attorneys/City Clerks Session

Challenges to the validity of local government decisions are normally brought by means of mandamus, either as traditional writs of mandate under Code of Civil Procedure Section 1085, *et seq.*, or as writs of administrative mandate under Code of Civil Procedure Sections 1094.5 and 1094.6. Invariably with respect to administrative mandate, and increasingly with regard to traditional writs of mandate, the administrative record is central to the judicial determination whether the challenged governmental action will be upheld or invalidated.

This paper will discuss the purpose and function of the administrative record in the context of local governmental decision-making, and judicial review of those decisions. In addition, this paper will describe the procedures for preparing and filing or lodging the administrative record when litigation has been filed to challenge governmental action. Finally, this paper will discuss some practical steps that will facilitate the

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[1] I wish to thank Ms. Natalie Edwards, a summer associate at Rutan & Tucker for her assistance in preparing the paper.

preparation of a complete, accurate administrative record.

A. THE PURPOSE OF THE ADMINISTRATIVE RECORD

The purpose and function of the administrative record is perhaps best understood by analogy to civil litigation. Writs of mandate involve a trial court sitting in an *appellate* capacity to review the legality of legislative, administrative and quasi-judicial decisions of a local governmental entity. The administrative record, which consists of the entire body of evidence presented to the local decision-making body, is presented to the trial court to assist in its review of the agency's action. In this sense, the administrative record is analogous to the record on appeal and the clerk's transcript of the trial court proceedings that are presented to an appellate court when it reviews the propriety of a trial court decision.

With specific reference to governmental decision-making, the administrative record provides the basis upon which to judge whether sufficient evidence supports the findings and decision of the governmental agency. The process of rendering an administrative decision can be compared to a three-layer pyramid. The final decision of a governmental agency represents the pinnacle of the pyramid, and constitutes a determination with respect to the underlying application or case based upon required findings. The pinnacle of the pyramid rests upon a middle layer comprising the findings

that must be made to support the decision. The findings, in turn, are based upon the evidence presented with respect to the application or case, and serve to "bridge the analytic gap between the raw evidence and the ultimate decision or order," *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974). The administrative record represents the compilation and organization of all of the evidence presented to the governmental entity for consideration in connection with the application or case.

The relationship between the evidence comprising the administrative record, the agency's findings and its ultimate decision, is analyzed at length in the Supreme Court's published decision in *Topanga Association, supra.* The *Topanga* court invalidated the granting of a variance by the Los Angeles Board of Supervisors because the administrative record did not support the findings required for granting a variance. Analyzing the relationship between the governmental decision, findings, and the supporting evidence, the *Topanga* court held that a governmental entity "must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis of the board's decision." (*Id.* at 514.) Further, the reviewing court must "scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision." (*Id.*)

Applying this test, the *Topanga* court concluded that the evidence in the administrative record was insufficient to support the requisite findings. Government Code Section 65906, which governs the grant of variances, authorizes a governmental entity to grant a variance "only when, because of special circumstances applicable to the property . . . the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classifications." (*Id.* at 520.) The evidence presented to the county, and set forth in the administrative record, focused almost exclusively on the qualities of the property for which the variance was sought, rather than examining the difference between that property and the neighboring parcels. The *Topanga* court reasoned that, in the absence of comparative data on surrounding properties, information regarding the qualities of the subject property in the abstract lacked legal significance with regard to the finding of "special circumstances applicable to the property." In addition, evidence in the administrative record suggesting that development of the subject property in conformance with the general zoning requirements would require substantial additional expenditures likewise was not relevant to determining whether the finding of "special circumstances applicable to the property" could be made. (*Id.* at 521.)

Thus, in *Topanga*, the court determined that the administrative record contained insufficient evidence from which the governmental entity could make the requisite finding in order to grant the variance. To

sustain the validity of the governmental action, the administrative record must contain evidence sufficient to support the findings made by the agency, and those findings must be sufficient to support the final decision reached by the agency.

B. PROCEDURE FOR PREPARING AND FILING THE ADMINISTRATIVE RECORD

California law sets forth two principal statutory procedures for the judicial review of administrative and quasi-judicial decisions. The California Administrative Procedures Act, Government Code Section 11500, *et seq.* governs administrative proceedings of state agencies (*e.g.*, Air Resources Board, Fair Political Practices Commission, Department of Motor Vehicles), and judicial review of those proceedings. With respect to proceedings under the Administrative Procedures Act, the administrative record includes the following types of documents:

1. The pleadings filed with the administrative law judge.
2. All notices and orders issued by the agency.
3. Any proposed decision by the administrative law judge.
4. The final decision or the administrative law judge.
5. A transcript of all proceedings before the administrative law judge.
6. The exhibits admitted or rejected.

7. The written evidence.
8. Any other papers in the case.

(Government Code Section 11523.)

Judicial review of most local governmental decisions that are administrative or quasi-judicial in character are governed by Sections 1094.5 and 1094.6 of the Code of Civil Procedure. Similar to Government Code Section 11523, Code of Civil Procedure Section 1094.6(c) defines the scope of the administrative record as follows:

> Such record shall include the transcript of the proceedings, all pleadings, all notices and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent, all written evidence, and any other papers in the case.

In addition to the general provisions of Code of Civil Procedure Section 1094.6(c), the California Environmental Quality Act, Public Resources Code Section 21000, *et seq.* ("CEQA") establishes special procedures and requirements for administrative records in CEQA litigation. Public Resources Code Section 21167.6(e) provides that the "record of proceedings" shall include, but is not limited to, all of the following items:

1. All project application materials.
2. All staff reports and related documents prepared by the public agency with respect to its compliance with the substantive and

procedural requirements of CEQA and with respect to the action on the project.

3. All staff reports and related documents prepared by the public agency and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the agency pursuant to CEQA.

4. Any transcript or minutes of the proceedings at which the decision-making body of the public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the public agency which were presented to the decision-making body prior to action on the environmental documents or on the project.

5. All notices issued by the public agency to comply with CEQA or with any other log governing the processing and approval of the project.

6. All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.

7. All written evidence or correspondence submitted to, or transferred from, the public agency with respect to compliance with CEQA or with respect to the project.

8. Any proposed decisions or findings submitted to the decision-making body of the public agency by its staff, or the project proponent, project opponents, or other persons.

9. The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in paragraph (3) cited or relied on in findings or in a statement of overriding considerations adopted pursuant to CEQA.

10. Any other written materials relevant to the public agency's compliance with CEQA or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, which have been released for public review, or other copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the public agency's files on the project, and all internal agency communications, including staff notes and memoranda relating to the project or in compliance with CEQA.

11. The full written record before any inferior administrative decision-making body whose decision was appealed to a superior administrative decision-making body prior to the filing of litigation.

Given the analytical process that agencies must follow in making governmental decisions – by which governmental decision must be based upon sufficient findings, which findings in turn must be based upon evidence in the administrative record – the completeness

of the administrative record is critical. Courts conducting judicial review of administrative or quasi-judicial governmental decisions will limit their evidentiary review only to those matters set forth in the administrative record. See, *Western States Petroleum Association v. Superior Court*, 9 Cal. 4th 559, 570 (1995); *Friends of the Old Trees v. Department of Forestry*, 52 Cal. App. 4th 1383, 1392 (1997). As a result, a person challenging the propriety of the governmental decision is entitled to have the entire record of the administrative proceedings presented to the court for review. When the administrative record is incomplete, the court may compel the parties to reconstruct the record. However, if they were unable or refuse to do so, courts have ordered new administrative hearings for the specific purpose of providing an adequate record to permit judicial review. See, *Chavez v. Civil Service Commission*, 86 Cal. App. 3d 324, 332, (1978); *Hadley v. City of Ontario*, 43 Cal. App. 3d 121, 127 (1974).

C. PROCEDURES FOR PREPARING AND FILING THE ADMINISTRATIVE RECORD

Governmental officials and employees frequently will become aware during the pendency of an administrative hearing that the decision likely will be the subject of a court challenge, and that the agency will be required to prepare an administrative record to facilitate judicial review of its action. In these cases, agency staff, working in conjunction with the clerk and counsel, may commence preparation of the administrative record prior to the formal commencement of litigation.

Indeed, this advance knowledge provides legal counsel the opportunity to ensure the completeness of the administrative record, and the inclusion of all evidence necessary to support any required findings for the decision.

In this instance, legal counsel should work with the agency staff to determine what findings must be made in order for the agency to take the proposed action. Then, a careful analysis should be undertaken of the type and nature of evidence necessary to provide a sufficient evidentiary basis for each of the required findings. Efforts should then be undertaken to gather this evidence and include it in the administrative record, in the form of staff analyses, memoranda to the governmental decision-makers or the advisory bodies or, in the case of technical studies and background works, appendices to staff reports or memoranda. Advance knowledge of the likelihood of litigation also permits legal counsel the opportunity to include in the administrative record resumes or curricula vitae of the staff employees or consultants providing analysis of the application or case, in order to establish evidence of their expertise and knowledge.

In most cases, however, efforts to compile the administrative record will not commence until litigation is formally instituted against the agency challenging the governmental decision. The following sets forth a general procedure for the preparation and filing or lodging of the administrative record subsequent to the initiation of litigation.

1. Request For Administrative Record

The preparation of the administrative record is typically triggered by a formal request served upon the agency by the petitioner (*i.e.*, the plaintiff or challenger). Under both the Administrative Procedures Act and the Code of Civil Procedure provisions for administrative mandate, there is no formal deadline by which the petitioner must request the administrative record. (See, Government Code § 11523, Code of Civil Procedure § 1094.6). However, with respect to CEQA challenges, the petitioner must file with the court his or her request that the public agency prepare the record of proceedings relating to the subject of the action or proceeding, and serve that request upon the public agency no later than 10 business days from the date that the litigation was filed. Public Resources Code 21167.6(a).

2. Payment for Administrative Record

The various procedures for judicial review of governmental actions are consistent in requiring that the petitioner pay the cost of preparing the administrative record. The Administrative Procedures Act provides that the petitioner is responsible for paying a statutory fee for the preparation of any transcripts, as well as the cost of preparation of the other portions of the record and its certification (Government Code § 11523). Code of Civil Procedure section 1094.5(a) provides that, "[e]xcept when otherwise prescribed by statute, the cost of preparing the record shall be borne by the

petitioner." Code of Civil Procedure section 1094.6(c) further provides that the local agency "may recover from the petitioner its actual cost for transcribing or otherwise preparing the record." Under section 1094.5(a), if the party paying the cost of preparing the administrative record ultimately prevails in the litigation, that prevailing party may recover the costs paid for the preparation of the record as court costs.

3. Completion of the Administrative Record

California law establishes very different deadlines for completing the administrative record, depending upon the statute that governs the litigation. Under the Administrative Procedures Act, the agency must complete and deliver to the petitioner the administrative record within 30 days after the petitioner makes a request for the administrative record, provided that the petitioner has paid the requisite fees for the transcript and other portions of the record and its certification. This time period may be extended by the administrative law judge for good cause shown (Government Code § 11523). Further, under the Administrative Procedures Act, if the petitioner prevails in overturning the governmental decision, the agency shall reimburse the petitioner for all costs paid to the agency for transcript preparation, compilation of the record and its certification. By contrast, Code of Civil Procedure section 1094.6(c) requires that the administrative record shall be prepared by the agency that made the decision, and delivered to the petitioner within 190 days following

the date that the petitioner files his or her written request for the administrative record.

The CEQA procedure governing administrative records is somewhat different. Under Public Resources Code section 21167.6(b)(1), the respondent public agency shall prepare and certify the administrative record no later than 60 days from the date that the petitioner serves upon the agency the request for preparation of the record. This time limit may only be extended upon the stipulation of all of the served parties, or by court order. While "[e]xtensions shall be liberally granted by the court when the size of the record of proceedings renders infeasible compliance with that time limit," and "[t]here is no limit on the number of extensions which may be granted by the court," the court may not grant any single extension for more than 60 days unless the court makes a finding that a longer extension is in the public interest (§ 21167.6(c)). If the respondent public agency fails to prepare and certify the record within the time limit established by the statute, subject to any continuances, the petitioner may move for sanctions; and Public Resources Code section 21167.6(d) provides that the court may grant "appropriate" sanctions against the public agency for failure to timely prepare the administrative record.

4. Lodging the Administrative with the Court

The Administrative Procedures Act does not specifically provide for the lodging or filing of the administrative record with the court reviewing the agency's

action. Code of Civil Procedure section 1094.5(a), by contrast, provides that "all or part of the record proceedings . . . may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court." In this regard, Rule 347 of the California Rules of Court provides that any party intending to use part of the Administrative Record in a case brought under section 1094.5 must lodge that part of the record with the court at least 5 days before the hearing. In CEQA cases, Public Resources Code section 21167.6(b)(1) provides that, upon certifying the administrative record, the governmental agency must lodge a copy of the administrative record with the court, and serve upon the parties a written notice that the record has been certified and lodged.

D. PRACTICAL POINTERS FOR PREPARING THE ADMINISTRATIVE RECORD

Administrative records vary considerably in size, depending upon the nature of the application or case, the extent of public agency review and analysis, and the level of public controversy and input. For example, a governmental decision to grant a conditional use permit for the construction of a car wash, based upon the adoption of a negative declaration, will likely generate a much smaller administrative record than a decision to certify an environmental impact report and approve a general plan amendment, zone change and subdivision map to accommodate the development of 2,000 residential units and 1 million square feet of retail commercial uses. Regardless of the size of the

administrative record, however, the agency should act with care to ensure that the administrative record includes all required and relevant documents, and is organized in a way that will facilitate judicial review of the governmental decision.

The following is a proposed chronological procedure for the preparation of a relatively large administrative record. While it may be possible to forego some of the detailed suggestions in connection with a relatively small administrative record, it is recommended that all of the following steps be taken to ensure completeness and accuracy of the record.

1. Defining the Scope of Administrative Record. Upon receiving a request for the administrative record, or upon determining the need to prepare the administrative record, the clerk or legal counsel should convene a meeting of all individuals who will have responsibility for participating in the preparation of the record. This group will normally include a representative from the clerk's office, legal counsel, the staff employee who served as the project manager or responsible staff member for the application or case, and any other staff employees who played a significant role in processing the application or case for which the administrative record is sought. The purpose of the meeting is to define the scope of the administrative record, identify the major components to be included within the record, and assign responsibility for the compilation of various portions of the administrative record under the ultimate supervision and control of the clerk and/or legal counsel. With regard to assignment of

roles, in a case involving a challenge to a conditional use permit, for example, the clerk (or legal counsel) would normally be responsible for collecting the public hearing notices and preparing the transcripts of the public hearing leading up to the conditional use permit decision, while the staff planner assigned to oversee the application would be responsible for collecting and organizing the staff reports, environmental documents, and all correspondence or other transmittals relating to the project.

In defining the scope of the administrative records, it is first necessary to identify the major components of the record. Staff employees familiar with application or case should explain to the others at the meeting the general chronology leading up to the governmental decision, including the dates of each hearing or meeting before the decision making body, before each advisory body (*e.g.*, planning commission). This definition will assist all members of the group in understanding the types of evidence that must be included in the administrative record.

In the land use context, development approvals are frequently granted in the form of concurrent agency approvals of a various different land use entitlements or regulations. For example, a large development project may entail certification of an environmental impact report, approval of a general plan amendment and zone change, and the approval of a subdivision map and development agreement. Even if the legal challenge is directed only to one of the governmental approvals for the development (*i.e.*, the litigation

challenges only the subdivision map for the project), it may be important to define the scope of the administrative record to include all of the land use entitlements and regulations that were concurrently approved by the agency because of the overlapping relevance of the evidence relating to each of the approvals.

2. Designating the Documents to Be Included in the Record. After defining the scope of the administrative record, the next step is a careful review of all of the documents relating to the application or case for which the record is sought, and the preparation of a preliminary index or table of contents based upon those documents. During this process, numerous documents will be identified that seemingly do not belong in the administrative record. These documents normally include preliminary drafts of staff reports, memos and other analyses; internal memos that relate only to procedural matters such as the scheduling of staff meetings or the internal circulation of documents; and copies of otherwise relevant documents. Although not included in the initial risk of documents for the administrative record, these other documents should be retained in the agency's files for later review and to assist in a final review of record to ensure its completeness.

In defining the components of the administrative record, the agency should not overlook documents that may not have been physically presented to the decision-makers in connection with the challenged decision, but which are referred to or incorporated by reference in staff reports, environmental documents

and other materials provided to the governmental decision-makers. In the CEQA context, it is important that the administrative record include all technical studies and reports (*e.g.*, traffic studies, noise studies, biological surveys, archaeological reports) which provide the foundation for the analyses and conclusions in the environmental impact report or negative declaration. Similarly, where the application or case involves findings relating to the general plan, or the decision relates in some manner to one or more provisions of the municipal code, general plan or municipal code excerpts should be included in the administrative record. Finally, a review should be undertaken of e-mail correspondence between staff members and consultants participating on the project, as the e-mails may be appropriate for inclusion in the administrative record.

3. Preparing the Hearing Transcripts. Because public hearings play such an important role in evaluating the propriety of governmental decisions, the agency must take particular care in preparing the evidence relating to those public hearings. In most agencies, meetings and hearings are audio tape recorded; in some cases, where either the agency or a challenger anticipates the litigation, a certified shorthand reporter ("CSR") will transcribe the proceedings, either in addition or to or as a substitute to the audio recording. Where a written transcription of the proceeding has been prepared, it may be used if it was prepared in a professional manner by a neutral preparer. Courts have excluded transcriptions of hearings prepared by persons deemed to have an interest in the litigation

(see *Watts v. Civil Service Board*, 59 Cal. App. 4th 939 (1997)).

Where the agency's record of the proceedings is based upon audio tapes, either the clerk or legal counsel should oversee the retention of a CSR to prepare a transcription of the audio tapes. As difficult as it may be for a CSR to attend a public hearing and transcribe all of the proceedings, it is considerably more difficult for a CSR to transcribe the proceedings from an audio tape. This results from the fact that, in a typical public hearing, numerous staff employees and members of the public speak (many without identifying themselves), in addition to frequent questions and comments from the members of the decision making body. If the agency videotapes its meetings, a copy of the videotape should be provided to the CSR to assist in identifying the person speaking at any given time during the hearing. In addition, the staff employee most familiar with the application or case for which the record is being prepared should assist the CSR at the outset by identifying from the tape the various members of the decision making body, as well as the staff employees.

Once the CSR completes the draft transcription of the proceedings, the draft should be circulated for review by the clerk, legal counsel and the staff employee most familiar with the application or case, with particular emphasis on verifying the correct identification of each speaker and the transcription of names and technical terms and phrases. Through this process, the final transcription of the proceedings should accurately reflect what each participant said during the hearing.

4. Organizing the Administrative Record. After the hearing transcripts are complete, and all of the relevant notices, staff reports, memoranda and correspondence regarding the application or case have been gathered, the agency should copy and organize the documents. (Copies of the documents should be made at this point, in order to maintain the integrity of the agency's original documents.) Typically, administrative records are assembled in chronological order. However, depending upon the nature of the challenge, a different organization of the record should be considered. For example, if the principal issues in dispute relates to the adequacy of notice of the public hearing on the application or case, the agency may wish to aggregate all of the public notices, mailing lists and similar documents in the first volume of the administrative record. However, in most cases, particularly those in which the agency's action is challenged because of the claim that insufficient evidence supports the findings made by the agency to support its decision, a chronological ordering of the administrative record is preferred.

Upon assembling and organizing the administrative record, the record should be marked to permit quick, easy access to the portions sought to be reviewed. The older, less common method of marking the administrative record involves a numerical or alphabetical designation for each component of the record but without marking each page of every document. For example, each separate document might be chronologically marked by number or letter. The modern, more

common method of marking the administrative record is to chronologically paginate each page of the administrative record using a "bate stamp" or similar device. Litigants and the court prefer the "bate stamp" method of marking the administrative record, because it allows them to easily and specifically identify where relevant information or evidence is located.

5. Assembling the Administrative Record. Once the administrative record is organized and marked, the agency should prepare the index or table of contents to it. Based upon the size of the administrative record, the agency should determine whether the record may be assembled in a single volume, or whether it should be divided into multiple volumes. The division of the record into volumes affects the format of the table of contents to the record.

The table of contents should separately designate each document in the administrative record by title, date and, if applicable, author, as well as note where in the administrative record (*i.e.*, at what page) the document may be found. Where the administrative record consists of more than one volume, the complete table of contents should precede the first volume of the record. With regard to subsequent volumes of the record, either the complete table of contents (if it reflects the division of the record by volume), or that portion of the table of contents relating to the specific volume, should be included at the beginning of each subsequent volume of the administrative record.

6. Final Review and Certification. After the administrative record is fully assembled with the table of contents, the individual most familiar with the record should carefully review it to ensure its accuracy and completeness. Upon determining the completeness and accuracy of the administrative record, the clerk should prepare and execute a certification, to be placed at the front of the first volume of the record. While administrative record certifications vary considerably by form, and no specific statutory language is required, the following is one possible form of certification:

CERTIFICATION OF ADMINISTRATIVE RECORD

> I hereby certify that the following documents, consisting of _____ bound volumes, consecutively paginated as pages ___ through ___ inclusive, constitute the full, true and correct Administrative Record relating to _____ [*name of application or case*]. These volumes comprise the Administrative Record for _____ [*title of lawsuit*] Superior Court Case No. _____.
>
> I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
>
> Executed at _____, California on _____, 2001.
>
> _____
> [*name and title*]

Copies of the completed administrative record should be made for each of the parties to the litigation, as well

as the court. Further, it is common in many jurisdictions to provide an additional, "courtesy" copy of the administrative record, or the most relevant excerpts of the administrative record, to the court for quick and easy review by the judge hearing the matter.

E. CONCLUSION

As stated at the outset, the administrative record plays a crucial role in the judicial review of governmental decision-making, because the record constitutes the entirety of the evidence which the court will review in determining whether the agency acted appropriately. For this reason, and because each party to the litigation should have the full opportunity to represent its interests before the court, the agency must expend the time, effort and resources necessary to ensure that the administrative record includes all of the documents relevant to a review of the governmental decision under challenge. By preparing a complete, full, accurate, and well-organized administrative record, the agency helps to ensure that its challenged decision will be fully and fairly adjudicated.