When Government Cover-ups are a Good Thing: Preventing Exposure of Your Agency’s Decisionmaking Via the Deliberative Process Privilege

By David H. King*

At a recent meeting of an agency governing board, a scene familiar to many public agency counsel quickly unfolded. A disgruntled group of citizens attended the meeting, questioning a particular project that would soon be decided by the governing board. The group threatened to file a lawsuit, alleging that the board had made backroom deals on the project and that the agency’s officials had engaged in other nefarious activities. The group, not content to wait until the decision was made before raising their protest, repeated the all-too-familiar mantra of “the people have a right to know” among their allegations of a government conspiracy.

Such scenes play out over and over again in chambers and hearing rooms throughout the Golden State. And while it is true that California law recognizes the public’s right to know, that right is balanced against the agency’s right to protect its decision-making process — a balancing act that is the heart of the deliberative process privilege. This article examines the privilege, its scope and application, and provides six helpful facets that public agency counsel should know about the privilege.

I. OVERVIEW OF THE PRIVILEGE

Under the deliberative process privilege, governmental officials may not be examined concerning their “mental processes by which a given decision was reached” and need not disclose “the substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated.” California courts have traced the origins of the privilege to U.S. v. Morgan, a 1941 U.S. Supreme Court case, and its California progeny, including City of Fairfield v. Superior Court.2

The privilege protects the agency, its officials and the public all at the same time. It guards the agency by encouraging “creative debate and candid consideration of alternatives within an agency”; if an examination or the disclosure of materials would “expose the agency’s decision making process and undermine the agency’s ability to perform its functions,” then the privilege applies.3 The privilege also safeguards the public “from the confusion that would result from premature disclosure of discussions occurring before the policies affecting it had actually been settled upon.”4 Lastly, the privilege protects officials by making the focus of the public’s attention on the decision, rather than “matters [the officials] considered before making up their minds.”5 This rationale for the privilege underscores our democratic system of government, making the ballot box, not public disclosure of deliberative materials, the “ultimate check” on the officials’ decision.6

The deliberative process privilege is a hybrid of both the executive privilege and legislator’s mental process privilege.7 The executive privilege is established by federal law and shields executive branch decisions from public scrutiny.8 This privilege is codified in the federal Freedom of Information Act, as exemption 5.9 On the other hand, the mental processes privilege (also referred to as
the legislative process privilege) prevents inquiries as to the reasons a legislator made a particular decision when the decision is undergoing direct review by a court.¹⁰

II. THE APPLICATION OF THE PRIVILEGE

In California, for purposes of the Public Records Act (“PRA”),¹¹ courts have construed Government Code Section 6255 — the catchall exemption from disclosure — to include the deliberative process privilege.¹² But whether the privilege applies to other contexts beyond the PRA, such as civil discovery, is subject to debate. Despite the fact that the privilege exists for purposes of the PRA, by its terms, the exemptions in the PRA do not “affect ... the rights of litigants ... under the laws of discovery of this state.”¹³ The deliberative process privilege is not found in the Evidence Code; rather, the privilege is established by common law.¹⁴

The general rule is that the deliberative process privilege applies in litigation when a governmental decision is “undergoing direct review by a court.”¹⁵ For example, on at least two occasions, courts have held that the privilege prevented inquiry into the deliberations of government officials when their respective agencies’ decision was being challenged. In City of Fairfield, the California Supreme Court prevented inquiry into the thought processes of two council members.¹⁶ And in San Joaquin LAFCO v. Superior Court (“San Joaquin”), the Court of Appeal, Third District, applied the deliberative process privilege to notices of deposition propounded to the San Joaquin Local Agency Formation Committee (LAFCO) executive officer and commissioners.

In both City of Fairfield and San Joaquin, the underlying case was brought as a petition for writ of administrative mandamus, challenging the agency’s decision. If the underlying case does not challenge an agency’s decision, courts have held that the deliberative process privilege does not apply.¹⁷ For instance, the Court of Appeal, Second District, acknowledged the deliberative process privilege is found in the PRA, but declined to apply the privilege to discovery in the context of civil litigation.¹⁸ In Marylander v. Superior Court (“Marylander”), a chapter 11 trustee had sued the officer and director of a nonprofit corporation, alleging misrepresentation, concealment and breach of fiduciary duty.¹⁹ The trustee named the State of California Office of Statewide Health Planning and Development (OSHPD) as a real party in interest of written communications known as Governor Action Requests (GAR’s).²⁰ OSHPD asserted the deliberative process privilege and refused to produce the GAR’s. When the defendant moved to compel production of the GAR’s, the trial court denied the motion to compel, finding that the deliberative process privilege applied to the GAR’s.²¹

The court of appeal disagreed, however, finding that the only applicable privilege that could be asserted by the OSHPD under the facts of the case was Evidence Code Section 1040(b), the official information privilege. According to the court, the official information privilege “represents the exclusive means by which a public agency may assert a claim of governmental privilege based on the necessity for secrecy.”²² The official information privilege requires that the agency prove that the “information [was] acquired in confidence by a public employee.”²³ If this threshold showing is made, then the agency must demonstrate that “[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.” ²⁴

Importantly, the Marylander court acknowledged that courts will occasionally allow for non-statutory, common law privileges “compelled by constitutional considerations.”²⁵ If constitutional considerations require judicial declaration of a privilege not based on a statute, the courts will balance the interests, comparable to the balancing test in Evidence Code section 1040(b) (2). This means that any non-statutory privilege is qualified and not absolute.²⁶

Arguably, the deliberative process privilege is based on similar constitutional considerations, namely, the separation of powers doctrine.²⁷ The doctrine prohibits
the courts from exercising the core functions of either the executive or legislative branches. Although the Marylander court did not recognize the deliberative process privilege under the facts of the case before it, other courts — including the San Joaquin court — have held that the separation of powers doctrine prevented administrative officers from testifying as to their mental processes in performing quasi-judicial functions.

In sum, while counsel can rest assured that the deliberative process privilege applies to PRA requests, whether the privilege applies in the context of civil litigation depends on the underlying case. If the government’s decision is undergoing direct review by a court, then the privilege has been held to apply to inquiries into the officials’ thought processes. If the government’s decision is not being challenged in the context of general civil litigation, counsel’s best bet at protecting the deliberations of officials is either the separation of powers doctrine or the official information privilege. Indeed, the official information privilege was successfully asserted to protect officials’ deliberations in at least one case before the court of appeal (albeit a case that pre-dates Marylander).

**III. SIX FACETS OF THE PRIVILEGE**

With the foregoing as an overview of the privilege, there are six facets of the privilege that counsel should keep in mind:

1. **The privilege applies to both testimony and materials.**

   The privilege safeguards officials from “be[ing] examined concerning not only 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.” As discussed above, the privilege has been successfully asserted to shield local officials from being deposed about their deliberations. Additionally, the privilege has safeguarded the following documents: transcripts and other memoranda of discussions by members of a committee created by a county to review applications of hospitals desiring designation as trauma centers; appointment calendars and schedules of the Governor; records of telephone numbers of persons with whom city council members have spoken; and applications for a board of supervisor’s seat submitted to the Governor.

2. **The materials must be both predecisional and deliberative.**

   A document is predecisional if it was “prepared in order to assist an agency decision-maker in arriving at his decision, rather than to support a decision already made.” Stated otherwise, a document is not predecisional if there is no underlying substantive policy decision or if it merely reflects the implementation of a policy. For example, while the state’s lethal injection protocol constitutes policy, documents reflecting the California Department of Corrections and Rehabilitation’s attempts to purchase a legal drug did not constitute the formulation of policy, and the deliberative process privilege was held to apply to such documents.

   Due to the agency’s strong interest in preventing exposure of its decision making process, the privilege continues to apply to predecisional documents and testimony even after the decision has been made. At least one court, however, has noted that the passage of time may “reduce the concern that disclosure now would impair the deliberative process.”

3. **The privilege may apply to factual materials.**

   “Deliberative” materials generally refer to “advice, opinions, and recommendations by which government policy is processed and formulated.” Although factual materials are typically not considered deliberative, courts have extended the privilege to factual materials that are “actually related to the process by which policies are formulated” or “inextricably intertwined with ‘policy-making processes.’”

   For instance, in *Times Mirror Co. v. Superior Court (“Times Mirror Co.”),* the California Supreme Court rejected the L.A. Times’ request for names of the applicants for a board of supervisor’s seat, finding that releasing the material would compromise the deliberative process. According to the high court, disclosing names is the “functional equivalent” of revealing the substance or direction of the Governor’s judgment and mental processes.
4. The privilege applies to local officials.

The definition of the privilege sometimes cited in case law suggests that it applies to “senior officials of all three branches of government,” which seemingly would not include local officials. The courts, however, have extended the privilege to city council members and LAFCO commissioners. The privilege is akin to the executive privilege and the legislative/mental processes privilege, and local officials often exercise both executive and legislative powers. Indeed, the privilege has been applied to legislative, quasi-legislative, and quasi-judicial contexts.

5. The privilege is not limited to “internal” discussions.

Many cases define the privilege as applying to “internal” agency deliberations, which leads some to think that the privilege only applies to discussions among agency officials. But the underlying facts to which the courts have applied the privilege suggest otherwise. In Rogers v. Superior Court, for example, the court held that telephone records reflecting “calls made and received by City Council members” were exempt from disclosure. The court did not distinguish between calls made by the councilmembers to other city officials, and those calls made to third parties. Rather, the court followed the precedent set in Times Mirror Co. and held that “disclosure of the records sought will disclose the identity of persons with whom the government official has consulted, thereby disclosing the official’s mental processes.” Because the privilege is concerned with securing the flow of information to the official to ensure effective decisionmaking, application of the privilege should not depend on whether the speaker is affiliated with the agency.

6. The public interest in nondisclosure must outweigh the public interest in disclosure.

If counsel are successful in arguing that the privilege applies to the documents or testimony in question, that is, of course, only half the battle. Counsel must also carry the burden under the balancing test articulated in Government Code section 6255 and case law, that the public interest in nondisclosure “clearly outweighs” the public interest in disclosure. In arguing for the public’s interest in nondisclosure, counsel must articulate the agency’s specific interest in nondisclosure, and not rely solely on invoking general policy statements. Counsel should consider submitting declarations of agency officials that explain how disclosure of the deliberations or materials constitute a detriment to the public.

In evaluating the pro-disclosure arguments, counsel should assess the nature of the information being sought “and how disclosure of that information contributes to the public’s understanding of government.” Because there is an inherent public interest in any public record, public agency counsel will need to think carefully about which “governmental tasks” the documents shed light on and “the directness with which the disclosure [of the documents] will serve to illuminate” such tasks.

IV. THE PRIVILEGE IN THE CONTEXT OF WRITS OF MANDATE

If a petitioner seeks discovery of deliberative materials and testimony in the context of a writ of mandamus, counsel may not need to rely on the deliberative process privilege to protect the materials or the testimony. Instead, counsel may have an even stronger argument that such discovery is beyond the scope of permissible discovery and therefore irrelevant. For example, if the writ is sought under CCP section 1094.5, such cases are typically focused on evaluating the agency’s decision or the findings made in support of that decision, and not the process. In an ordinary administrative mandamus review of a legislative or quasi-legislative decision, petitioners are generally prevented from inquiring outside the administrative record, including any inquiry into individual decision makers’ thought processes.

With regard to cases filed under CCP section 1085 (traditional mandamus), because a petitioner must prove that an agency’s decision was arbitrary and capricious, or that the agency’s procedure tainted in some way, by bias, corruption, or impermissible considerations, courts may allow petitioners some access to an agency’s deliberation, to avoid prejudice to the petitioner. However, if the petition does not challenge the agency’s process, then public agency counsel may be able to successfully prevent discovery of the deliberative process on grounds of relevance.
VI. CONCLUSION

While the deliberative process privilege applies to PRA requests, whether the privilege applies in the context of civil litigation depends on whether the governmental decision is being challenged. If the deliberations of agency officials are sought in the context of a petition for writ of mandate, especially a petition filed pursuant to CCP Section 1094.5, agency counsel may be able to successfully argue that any discovery into the agency’s deliberations is irrelevant and therefore not within the scope of permissible discovery.

Endnotes

5. Id.
8. Times Mirror Co., supra, 53 Cal.3d at 1340.
12. Wilson, supra, at 1141.
16. City of Fairfield, supra, 14 Cal.3d at 776
19. Marylander, supra, at 1122.
20. Id. at 1121.
21. Id. at 1122.
22. Id. at 1123.
23. Id. at 1125 (italics in original).
24. Id. at 1126.
25. Id.
26. Id.
27. Id. at 1127.
28. CAL CONST. art. 3, §3.
32. See County of San Diego, supra, 176 Cal.App.3d 1009, 1024-27. In County of San Diego, the court relied on Evidence Code section 1040(b)(2) in deciding that the “the public interest in maintaining the [Proposal Review] Committee’s deliberative process prohibits production of materials which would disclose the Committee’s thought processes.” In reaching its decision, the court found that the public had an interest in insuring that qualified professionals will not be discouraged from serving on trauma care proposal review committees. The court stated that disclosure of “informal notes and recorded deliberations ... would deter some and, perhaps, most” qualified persons from participating in the evaluation process, especially if the professionals believed that the deliberations would remain confidential. Id. at 1026.

* David King, an attorney with the Hensley Law Group, is currently Assistant City Attorney to the City of El Segundo. Mr. King works closely with governmental agencies, officials, and staff members, and has counseled officials and staff members on matters including the California Public Records Act, the Ralph M. Brown Act, and California Election Law.
33 Regents of University of California, supra, 20 Cal.4th at 540.
34 City of Fairfield, supra, 14 Cal.3d at 768; San Joaquin, supra, 162 Cal. App.4th at 171.
35 County of San Diego, supra, 176 Cal. App.3d at 1016.
36 Times Mirror Co., supra, 53 Cal.3d at 1329, 1347.
37 Rogers, supra, 19 Cal.App.4th at 474-75.
38 Wilson, supra, 51 Cal.App.4th at 1139-41; California First Amendment Coalition, supra, 67 Cal.App.4th at 164, 174-75.
40 Id.
41 Id.
42 Id.
43 See, e.g., California First Amendment Coalition, supra, at 164 (case was decided on October 9, 1998, even though Governor made the appointment to fill the vacancy on the Plumas County Board of Supervisors three years prior, on November 29, 1995).
44 Maryland, supra, at 1130.
45 ACLU, supra, 202 Cal.App.4th at 75.
46 ACLU, supra, 202 Cal.App.4th at 76.
47 Id.; California First Amendment Coalition, supra, 67 Cal.App.4th at 171-72.
48 Times Mirror Co., supra, at 1347.
49 Times Mirror Co., supra, at 1343.
50 City of Fairfield, supra, 14 Cal.3d at 776-77; Rogers, supra, 19 Cal. App.4th at 481; San Joaquin Local Agency Formation Comm’n, supra, at 171.
51 Rogers, supra, 19 Cal.App.4th at fn.8; San Joaquin Local Agency Formation Comm’n, supra, 162 Cal. App.4th at 171.
53 Times Mirror Co., supra, at 1351 (Kennard, J., dissenting).
54 Rogers, supra, at 479-80.
55 Wilson, supra, at 1144.
56 Maryland, supra, at 1127-28; Times Mirror Co., supra, at 1344.
57 See Citizens for Open Government v. City of Lodi (2012) 205 Cal. App.4th 296, 304, 307 (finding that the city’s explanation of why the deliberative process privilege applied – “to foster candid dialogue and a testing and challenging of the approaches to be taken” – was “simply a policy statement,” and that “invoking the policy is not sufficient to explain the public’s specific interest in nondisclosure of the documents in this case.”).
58 See Humane Society of the United States v. Superior Court (2013) 214 Cal.App.4th 1233 (finding that a declaration submitted on behalf of the Regents “explained specific interests in nondisclosure, including preventing a diminution in the quantity and quality of studies from which the public benefits,” so that “[t]he evidence here supports a conclusion that disclosure of prepublication research communications would fundamentally impair the academic research process to the detriment of the public”).
59 Id. at 1268.
60 City of Fairfield, supra, at 774-75, 778-79; San Joaquin Local Agency Formation Comm’n, supra, at 171.
61 City of Fairfield, supra, at 779.
62 County of San Diego, supra, at 1024-25.