May 27, 2004

CONFIDENTIAL ATTORNEY/CLIENT
PRIVILEGED COMMUNICATION

To: Schools Legal Service Clients

From: Dwaine Chambers, General Counsel
Schools Legal Service

Re: Public Disclosure of Employee Disciplinary Records

On May 20, 2004, the Fifth District Court of Appeal in Fresno ruled that certain types of employee "disciplinary records" must be made available for public inspection and photocopying under the California Public Records Act ("the CPRA"). (*Bakersfield City School Dist. v. Superior Court* (2004) 2004 WL 1120036, Cal.App. 5 Dist., May 20, 2004.)

In this case, *The Bakersfield Californian* had sought the "disciplinary records" of Vincent Brothers, a former administrator with the Bakersfield City School District ("the District") including an incident that allegedly occurred on February 20, 1996. While, in its decision, the appellate court described the documents in question as "disciplinary records," it appears that the phrase was used by the court to describe a variety of documents including one or more "complaints" as well as other documents, possibly investigative reports and/or memoranda, related to the alleged misconduct. It is also noteworthy that Mr. Brothers does not appear to have been disciplined for the incident in question.

The District refused to comply with *The Californian's* request relying, in part, on the provisions of Government Code section 6254(c) which provides, in effect, that "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy" are exempt from public disclosure under the CPRA.

The trial court (i.e., Kern County Superior Court) denied public disclosure of some of the records concluding that they were not substantial (i.e., either baseless or trivial) and there was no reasonable cause to believe that the complaints were well-founded. However, as to the February 20, 1996 incident, the court reached a different conclusion. It found that those "disciplinary records" were both substantial and there was, in fact, reasonable cause to believe that they were well-founded. As a result, the trial court determined that the "disciplinary records" related to the 1996 incident were subject to public disclosure under the CPRA. The District then sought review of the trial court's decision in the court of appeal.

In rendering its decision, the court of appeal observed that the " . . . burden of proof is on the **proponent of nondisclosure** to demonstrate a **'clear overbalance'** on the side of confidentiality." The court also concluded that, since the "personnel exemption" was enacted

CONFIDENTIAL

to protect ". . . intimate details of personal and family life, **not business judgments and relationships**," the exemption does not encompass all personnel records. In describing the legal test to be applied when weighing an individual's privacy rights against the public's right to know of "alleged wrongdoing," for purposes of the "personnel exemption," the court concluded:

> . . . where **complaints** of a public employee's wrongdoing and resulting disciplinary investigation reveal **allegations** of a **substantial nature**, as distinct from baseless or trivial, **and** there is **reasonable cause** to believe the complaint is **well-founded**, public **employee privacy must give way to the public's right to know.** (*Bakersfield City School District v. Superior Court of Kern County*, Case No. FO43967, May 20, 2004; emphasis added.)

In determining whether a complaint is "well-founded," the court concluded that the public agency must examine the records in question to ". . . determine whether they reveal **sufficient indicia of reliability** to support a reasonable conclusion that the complaint was well-founded." **The fact that the District may ultimately conclude that the complaint is not true and/or that disciplinary action is never taken against the employee is irrelevant.**

While the court did not clarify what it meant by the phrase "sufficient indicia of reliability," we can only surmise, based upon existing case law, that it includes such things as the **specificity of the factual allegations** contained in the records, whether the **complainant** is **identified**, the extent to which, if any, there are any **corroborating facts or evidence** to support the complaint/charges, the **timing** of the complaint, and the **surrounding circumstances** related to both the filing of the complaint and the substantive allegations.

To summarize the most critical part of its ruling, the court has developed a two-prong test for determining whether employee disciplinary records are subject to disclosure under the CPRA.

1. First Prong–Ask yourself, is the complaint or charge "substantial?"

If the complaint/charge is trivial (i.e., insignificant) or baseless (i.e., unsubstantiated or unfounded), no further analysis under the second prong is required and you may legitimately refuse to disclose the records. On the other hand, in the absence of a finding that the complaint is either trivial or baseless, you must then proceed to the second prong to determine if the records are discloseable.

CONFIDENTIAL

2. Second Prong–Ask yourself, could a reasonable person, after reviewing the employee's "disciplinary records," conclude that the complaint appears to be valid?

If you answer the question in the affirmative, you must disclose the disciplinary records to the requesting party. Otherwise, you may refuse to disclose the records.

The appellate court's decision in this case will not become final until on or about June 19, 2004. The district will then have ten calendar days (i.e., after the appellate court's decision is final) to seek review in the California Supreme Court. However, news reports indicate that the District will not seek review in the California Supreme Court.

If you receive a CPRA request for employee "disciplinary records," please call either Pat Castle or me immediately. Also, if you would like further clarification of or wish to discuss any issue discussed in this Alert, please do not hesitate to call me.

DLC/cp