



State of California
Commission on Judicial Performance
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Date: July 17, 2018

To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance

From: Commission on Judicial Performance
Gregory Dresser, Director-Chief Counsel

Subject: Invitation to Comment on Proposed Amendment to Rules of the Commission on Judicial Performance

Pursuant to Policy Declaration 3.5, the commission seeks public comment on an amendment to rule 102, which would add an exception to the general rule of confidentiality in subdivision (a) of rule 102 to allow disclosure of confidential records to the California State Auditor.

The proposed amendment being circulated for public comment with a brief explanation of the changes and a form for submission of comments can be found on the commission's website at <http://cjp.ca.gov> under "Announcements" on the Home page and under "Legal Authority." For good cause, the deadline for comments is shortened to 30 days, August 16, 2018, and the time for submitting responses to comments is shortened to ten days, August 27, 2018. Good cause is based on the Auditor's request to commence the audit by September 4, 2018.

Copies of rule proposals, comments, and responses to comments are available to the public upon request. (See Policy Declaration 3.5 for the commission's rules review procedures.)

Comments and responses to comments should be submitted in writing by mail or facsimile to:

Commission on Judicial Performance
Attn: Janice M. Brickley, Legal Advisor to Commissioners
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102
FAX: (415) 557-1266

PROPOSED AMEMENDMENT

The proposed amendment is as follows:

Rule 102. Confidentiality and Disclosure

(r) (Disclosure to California State Auditor) The commission shall provide to the California State Auditor, or an authorized employee of the Auditor, access to confidential commission records pursuant to the provisions of Government Code sections 8545.1 and 8545.2 in connection with an audit mandated by statute or requested by the California State Legislature. This subdivision applies to confidential records in the commission's possession prior to the enactment of subdivision (r) of rule 102.

Explanation of Proposed Amendment

In 1995, through an amendment to the California Constitution, California voters entrusted the Commission on Judicial Performance with making rules of confidentiality, with the exception that confidentiality ceases once a judge is formally charged with misconduct. In the exercise of its rule-making authority, the commission adopted rule 102(a), which makes all papers and records in commission proceedings confidential, other than in formal proceedings and other specified circumstances. The commission's rules of confidentiality are intended to protect the confidentiality of complainants and witnesses and to protect judges from unwarranted damage to their reputation based on unfounded complaints. Both the California and United States Supreme Courts have recognized that confidentiality serves important public policy purposes. (See *Landmark Communications Inc. v. Virginia* (1978) 435 U.S. 829, 834-835; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 527-528; *Mosk v. Superior Court* (1979) 25 Cal.3d 474.) Such confidentiality encourages the filing of valid complaints and provides protection against possible retaliation or recrimination. Many complainants and witnesses, particularly court employees and attorneys, are reluctant to file complaints or cooperate with the commission without assurances of confidentiality out of fear of retaliation. When the state of Alabama amended its rules in 2001 to require disclosure of the identity of complainants, among other things, complaints dropped significantly. (American Bar Association Standing Committee on Professional Discipline, Alabama: Report on the Judicial Discipline System (March 2009).)

For these important public policy reasons, the commission has remained steadfast in protecting the confidentiality of commission records, prior to the filing of formal charges. The commission recognizes, however, that there are circumstances that warrant limited release of confidential records. Thus, the commission has created certain exceptions to confidentiality through its rule-making authority. Those exceptions include allowing the commission to disclose limited information to complainants, authorities responsible for making judicial appointments, prosecuting authorities, and regulatory authorities.

On August 10, 2016, the Joint Legislative Audit Committee authorized the State Auditor to conduct an audit of the commission. As this is the first time an audit of the commission has been authorized, the commission has not previously been presented with the issue of adopting an exception to confidentiality for the Auditor. Without an exception to rule 102(a), the commission is precluded by law from releasing confidential records.

The commission recognizes that the public has a legitimate interest in an independent and impartial audit of publicly-funded state agencies and commissions, including the Commission on Judicial Performance. The commission has never opposed being audited and providing the Auditor and her employees with non-confidential records and papers. The commission, however, is prohibited by law from releasing confidential records to the Auditor, absent an exception to the rule of confidentiality. The proposed rule would allow the commission to provide those records to the Auditor.

In addition to soliciting comments on this proposed rule amendment, the commission will promptly seek a legislative amendment to Government Code section 8545 to assure that confidential records in the Auditor's possession are not subject to release under the California Public Records Act (CPRA). That statute states that all books, papers, records and correspondence pertaining to the work of the auditor are public records subject to the CPRA, with limited exceptions that do not include confidential records of the commission. The Auditor's Office maintains that it is prohibited by other Government Code sections from releasing to the public confidential records in the Auditor's possession and that it will not release confidential commission records to the public. (See Gov. Code §§ 8545.1, 8545.2(b).) The commission, however, is concerned that the conflict, or, at a minimum, ambiguity, in the statutory scheme related to public access to confidential records in the Auditor's possession could result in a court challenge to the Auditor's refusal to release confidential commission records. There is currently no case law interpreting the interplay between these different Government Code sections. A statutory amendment to section 8545, exempting confidential records from release under the CPRA, would resolve any ambiguity.

Subject to public comment, the commission is of the view that an amendment to rule 102 to allow release of confidential records to the Auditor and an amendment to section 8545 would best serve the public by providing confidential information for public oversight of the commission by the Auditor, while preserving the public's interest in preventing public release of confidential commission records, including complaints and witness statements.