



**STATE OF CALIFORNIA
COMMISSION ON JUDICIAL PERFORMANCE
455 Golden Gate Avenue, Suite 14400
San Francisco, California 94102
(415) 557-1200
Fax (415) 557-1266**

**REPORT CONCERNING ADOPTION OF AMENDMENT TO RULE 102 OF THE
COMMISSION ON JUDICIAL PERFORMANCE**

Pursuant to its rulemaking authority under article VI, section 18, subdivision (i) of the California Constitution and section 3.5 of the Policy Declarations of the Commission on Judicial Performance, on July 17, 2018, the Commission on Judicial Performance circulated for public comment a proposed amendment to Rules of the Commission on Judicial Performance, rule 102 (Confidentiality and Disclosure) to allow for release of confidential commission records to the State Auditor. Following consideration of the comments, on September 20, 2018, the commission adopted the proposed amendment. The text of the amendment is attached and the final version of the amendment may be found on the commission's website at <http://cjp.ca.gov>.

I. EXPLANATION OF RULE 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 rulemaking 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 rulemaking 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 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 the Auditor's employees with nonconfidential records and papers. Absent an exception to the rule of confidentiality, however, the commission was prohibited from releasing confidential records to the Auditor.

Prior to adopting the exception for release of records to the Auditor, the commission sought a legislative amendment to Government Code section 8545 to assure confidential records in the Auditor's possession are not subject to release under the California Public Records Act (CPRA). The amendment was signed by the Governor and enacted on September 17, 2018.

Government Code section 8545 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 previously did not include confidential records of the commission. The recent amendment adds the following exception to the records subject to the CPRA:

(e) In accordance with Section 8545.1 and subdivision (b) of Section 8545.2, any paper, correspondence, record, document, or information the disclosure of which is restricted from release to the public by a statutory or constitutional provision, a rule that is consistent with such a provision, or a rule adopted pursuant to subdivision (i) of Section 18 of Article VI of the California Constitution.

With the assurance that confidential records in the Auditor's possession may not be released to any person or entity other than the Auditor and the Auditor's employees, the commission is of the view that an amendment to rule 102 to allow release of confidential records to the Auditor best serves the public. The rule amendment allows 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.

II. DISCUSSION OF PUBLIC COMMENTS

Comments were received from the California Judges Association (CJA); Los Angeles Superior Court (LASC); the Alliance of California Judges; Retired Contra Costa County Judge David B. Flinn; Matthew Rich, Esq.; Patrick Evans, Esq.; Barbara A. Kauffman, Esq.; Long & Levit attorneys Joseph P. McMonigle, Kathleen M. Ewins, David S. McMonigle, and Sydney E. Allen; Connie Valentine, Board Member, California Protective Parents Association; Sharon Noonan Kramer; Kathleen Russell, Executive Director, Center for Judicial Excellence; Mari-Lynne Earls, M.A.; and Tamir Sukkary.

A number of the comments were in favor of the proposed rule amendment¹ (Mari-Lynne Earls, M.A.; Kathleen Russell; Sharon Noonan Kramer;² Tamir Sukkary; Barbara A. Kauffman, Esq.; Connie Valentine).

CJA and LASC had no objection to the proposed amendment so long as section 8545 was amended to preclude release of the records pursuant to a CPRA request. That has been done.

Attorneys from Long & Levit stated that implementation of a legislative amendment is critical to protecting confidentiality. They also suggested that records released to the Auditor should be redacted of any identifying information. In briefing in *CJP v. Elaine Howle, State Auditor*, both the Auditor and the commission objected to the use of redacted records for the audit. The Auditor asserted that redaction would compromise the integrity of the audit and the commission asserted that redaction would require undue amount of staff resources and would be impractical in most cases because the facts of the case would often identify the judge.

Retired Judge David B. Flinn opposed the proposed amendment without assurance of an amendment to section 8545. He also expressed concern there could be leaks from the Auditor's Office. The State Auditor and employees or former employees of the Auditor's Office are prohibited from divulging to the public any records, documents, or information made confidential by law, and violation of that prohibition constitutes a misdemeanor. (Gov. Code, §§ 8545.1, subds. (a), (c); 8545, subd. (e).)

Attorney Patrick Evans opposed the proposal on the grounds that it is unnecessary. He asserted that the Auditor has authority to review confidential records under existing law and

¹ Some of these comments also proposed other rule amendments, unrelated to an exception for the Auditor. Those proposals will be considered during the commission's 2018 biennial rules review period.

² Ms. Kramer suggested that the last sentence of the proposed amendment, which stated that the exception applies to confidential records in the commission's possession prior to the enactment of subsection (r), be prefaced with "Including, but not limited to." She expressed concern that the Auditor would not have access to records created while the audit is taking place. The amendment, as adopted, will give the Auditor access to confidential records created before and after the commencement of the audit. Thus, the additional language proposed by Ms. Kramer is not necessary.

believes the appellate process in *CJP v. Elaine Howle* should go forward. The commission recognizes that other Government Code sections prohibit release to the public of confidential records in the Auditor's possession. (See Gov. Code, §§ 8545.1, 8545.2, subd. (b).) In the commission's opinion, however, there was a conflict, or, at a minimum, ambiguity, in the statutory scheme related to public access to confidential records in the Auditor's possession. There is currently no case law interpreting the interplay between these different Government Code sections. The statutory amendment to section 8545, exempting confidential commission records from release under the CPRA, resolved any ambiguity.

The Alliance of California Judges³ opposed the rule amendment as a breach of promised confidentiality. The Alliance asserted that retroactive application of the amendment would deprive judges of due process because some judges agreed to private discipline, rather than demand formal proceedings, upon the assumption that the discipline would not be disclosed. They also stated that adopting the proposed amendment without an amendment to section 8545 would be premature and reckless.

While judges understandably relied on the fact that private discipline would not later be made available to the public, it is highly unlikely that a judge accepted private discipline in reliance on the fact that it would not be disclosed to the *Auditor*. There is no prejudice to a judge from release of private discipline to the Auditor's Office during an audit, so long as the Auditor and her employees are obliged to keep the information confidential and the information is protected from disclosure pursuant to a CPRA request.

The amendment to rule 102, in conjunction with the legislative amendment to section 8545, satisfies the concerns of most of those who submitted comments. Having carefully considered all comments, and for the reasons expressed in the preceding section, the commission has adopted the amendment to rule 102 to allow access to confidential records to the State Auditor.

³ The Alliance states that it is an organization of more than 500 judges.

TEXT OF AMENDED RULE

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.