# California's Evidence Code Section 1040: Discovery of Governmental Information After *Shepherd v. Superior Court*

*Much of the data collected by local government is acquired in confidence from members of the public or from other entities of government. California Evidence Code section 1040 recognizes a limited evidentiary privilege for information acquired by government in confidence. This article explores the substantive limitations of section 1040 and the procedural application of the privilege to civil and criminal discovery.*

Agencies of local government—like those of state and federal governments—collect, evaluate, and retain vast quantities of information. The contents of this governmental information are as diverse as the activities of government itself, and as comprehensive as data gathering technology permits. Private parties to civil and criminal proceedings sometimes find that the information collected by government agencies may be useful or even necessary for a fair adjudication of their cases. Indeed, as the regulatory power of government expands, and as the sophistication of data collection systems develops, the frequency of such need for governmental information will continue to increase.

In most cases, agencies comply with private requests for governmental information.[1] In some cases, however, the government may have an interest in preserving the secrecy of its information. The

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[1]The California Public Records Act (CAL. GOV'T CODE §§ 6250-6261 (West Supp. 1977)) provides that every citizen has the right to inspect the public records of state and local governmental agencies. CAL. GOV'T CODE §§ 6252-6253 (West Supp. 1977). The Act exempts from this mandatory disclosure provision fourteen categories of governmental records. For example, members of the public do not have the right under the Act to inspect agency personnel records or police investigatory records. CAL. GOV'T CODE § 6254(c) & (f) (West Supp. 1977). These exemptions do not limit discovery, however; the Act provides that none of its provisions affects the rights of litigants under the laws of discovery. CAL. GOV'T CODE § 6260 (West Supp. 1977). Therefore, if the private party cannot obtain the desired materials pursuant to the Public Records Act, he still may seek them through discovery. *See* Shepherd v. Superior Court, 17 Cal. 3d 107, 124, 550 P.2d 161, 170, 130 Cal. Rptr. 257, 266 (1976). *See also* Freedom of Information Act, 5 U.S.C. § 552(1970 & Supp. IV 1974). *See generally* Comment, *The California Public Records Act: The Public's Right of Access to Governmental Information*, 7 PAC. L.J. 105, 116-44 (1976).

common law protects this interest by recognizing three evidentiary privileges for governmental information.[2] The first privilege safeguards "secrets of state": items of confidential information relating to military, diplomatic, and national security matters.[3] The second privilege authorizes the government to withhold the identities of those who inform on the criminal activities of others.[4] In California, this "informer's privilege" has been codified in California Evidence Code section 1041.

The third governmental privilege, and the subject of this article, protects "official information": confidential communications to government officials not amounting to secrets of state.[5] The privilege encourages the free flow of information both to and within government. It is thought that unless confidentiality is assured, such communications will be stifled.[6] California Evidence Code section 1040[7] codifies the official information privilege by recognizing two distinct privileges. If an act of Congress or a California statute for-

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[2] *See generally* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2367 (rev. 1961 McNaughton); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. REV. 1288, 1293-1309 (1965); Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 176-91 (1958); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1407-19 (1974); Note, *Evidence—Three Nonpersonal Privileges*, 29 N.Y.U. L. REV. 194 (1954).

[3] *See generally* 8 WIGMORE, note 2 *supra*, §§ 2378-79; 2 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE § 509[01]-[04] (1975); Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

California has not separately codified the state secrets privilege. The California Law Revision Commission recognized that federal law adequately protects state secrets, and that such law prevails over similar state law. The Commission further noted that the secrets of California state and local government are adequately protected by the statutory privileges for informers' identities (CAL. EVID. CODE § 1041 (West 1966)) and official information (CAL. EVID. CODE § 1040 (West 1966)). 6 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 252-53 (1964).

[4] *See generally* 8 WIGMORE, note 2 *supra*, § 2374; 4 J. MOORE, FEDERAL PRACTICE § 26.61[6.-2] (2d ed. 1976).

[5] *See generally* 8 WIGMORE, note 2 *supra*, at §§ 2378-79; Comment, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142 (1976) (examining the federal official information privilege).

[6] B. WITKIN, CALIFORNIA EVIDENCE § 865 (1966).

[7] CAL. EVID. CODE § 1040 (West 1966) provides:

> (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
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> (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
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> (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
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> (2) Disclosure 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; but no privilege may be claimed under this paragraph if

bids disclosure of a particular item of information, the privilege against disclosure is absolute.[8] For official information that is not absolutely privileged, there exists a conditional privilege. It operates only on a finding by the trial judge that in the particular case, the necessity for preserving the information's confidentiality outweighs the necessity of its disclosure in the interests of justice.[9]

In *Shepherd v. Superior Court*,[10] the California Supreme Court established a procedural framework for applying the privileges of section 1040. In that case, a boy died of gunshot wounds inflicted during an altercation with police officers. The District Attorney conducted an investigation of the incident, but filed no criminal charges against the officers. The boy's parents sued both the city and the individual officers for the wrongful death of their son. Prior to trial, the plaintiffs obtained a subpoena duces tecum directing the District Attorney to produce materials accumulated during the investigation.[11] The District Attorney opposed the subpoena on two grounds. First, he asserted that the material was privileged under both section 1040 and other statutes.[12] Second, he asserted that the plaintiffs had failed to establish a sufficient foundation for the subpoena as required by statute.[13] Without ruling on the latter assertion, the trial

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> any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

[8] CAL. EVID. CODE § 1040(b)(1) (West 1966). See discussion in text accompanying notes 57-68 *infra*.

[9] CAL. EVID. CODE § 1040(b)(2) (West 1966). See discussion in text accompanying notes 69-99 *infra*.

[10] 17 Cal. 3d 107, 550 P.2d 161, 130 Cal. Rptr. 257 (1976).

[11] The plaintiffs sought production of seven categories of governmental information: (1) names and addresses of all witnesses to the incident; (2) all correspondence pertaining to scientific, medical, chemical, ballistic, and neutron activation tests concerning the shooting; (3) all bills and records of payments for the tests; (4) all photographs and negatives of the scene, witnesses, and evidence; (5) scene diagrams; (6) all criminal records, personnel files, and other documents relating to the personality, habits, and propensity for violence of the defendant police officers, police chief, and decedent; (7) all weapons, projectiles, and cartridge cases involved in the shooting. *Id.* at 120-21, 550 P.2d at 168, 130 Cal. Rptr. at 264.

[12] The District Attorney claimed that the materials sought were privileged as attorney work-product (CAL. CODE CIV. PROC. § 2016(b)), grand jury proceedings (CAL. PENAL CODE § 924.1) and official information (CAL. EVID. CODE § 1040). 17 Cal. 3d at 121-28, 550 P.2d at 168-73, 130 Cal. Rptr. at 264-69).

[13] CAL. CODE CIV. PROC. § 1985 (West Supp. 1977) provides in part:

> . . . A copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in such subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control. . . .

judge denied the plaintiffs' motion for enforcement of the subpoena on the ground that the material sought was privileged.[14] Plaintiffs petitioned for a writ of mandate.

In remanding the case, the California Supreme Court defined a three-step procedure for evaluating motions to discover governmental information. First, the trial judge must determine whether the plaintiffs have met the statutory foundation requirements for discovery. Second, the judge must ascertain whether the governmental information was "acquired in confidence" within the meaning of section 1040. Third, if the two preconditions are met, and if the information is not absolutely privileged, the judge must weigh the competing interests to determine if the conditional privilege applies.[15]

To illustrate the issues raised by section 1040, this article refers principally to one type of governmental information: the "internal affairs" records of local police agencies. Internal affairs units of police departments receive and investigate citizen complaints against police personnel.[16] Both civil litigants[17] and criminal defendants[18] may believe that the records of these complaints and investigations are relevant to the issues of their cases, and therefore they may seek to discover that information.[19] The local police agency, however,

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[14] 17 Cal. 3d 107, 119, 550 P.2d 161, 167, 130 Cal. Rptr. 257, 263 (1976).

[15] *Id.* at 127-28, 550 P.2d at 173, 130 Cal. Rptr. at 269.

[16] CAL. PENAL CODE § 832.5 (West Supp. 1977) provides:

> Each sheriff's department and each city police department in this state shall establish a procedure to investigate citizens' complaints against the personnel of such departments, and shall make a written description of the procedure available to the public.

In addition, internal affairs units conduct investigations of complaints that originate within the department. Interview with Sergeant Nolan Darnell, Internal Affairs Unit, Oakland Police Department, in Oakland, California (Sep. 29, 1976).

[17] *E.g.*, Shepherd v. Superior Court, 17 Cal. 3d 107, 550 P.2d 161, 130 Cal. Rptr. 257 (1976) (discussed in text accompanying notes 10-15 *supra*); City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 109 Cal. Rptr. 365 (2d Dist. 1973) (discussed in note 26 *infra*). For a civil case involving the federal common law official information privilege, *see* Wood v. Breier, 54 F.R.D. 7 (E.D. Wisc. 1972).

[18] *E.g.*, Pitchess v. Superior Court, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974) (discussed in text accompanying notes 32-37 *infra*). *See also* the court of appeal cases cited in note 35 *infra*.

[19] Internal affairs records typically include the following information: the name, address, and statement of the citizen-complainant; the names, addresses, and statements of citizen-witnesses; the names and statements of police witnesses; the statement of the officer complained of; a summary of the investigating officer's findings; and the final disposition of the complaint by the agency.

Typically, the investigator may arrive at one of four conclusions. If the investigation disclosed information sufficient to clearly prove the allegation, the complaint is "sustained." If the investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation, the complaint is "not sustained." If the investigation discloses that the act complained of did not in fact occur, the complaint is "unfounded." If the investigation discloses that the act complained of did in fact occur, but that the act was justified, lawful, and proper, then the officer is "exonerated." Interview with Sergeant Nolan Darnell, Internal Affairs

may wish to preserve the confidentiality of the records by claiming the official information privilege. To resolve this conflict, the trial judge must follow the three-step procedure set out in *Shepherd v. Superior Court.*

## I. ESTABLISHING A FOUNDATION FOR DISCOVERY

The first step of the *Shepherd* procedure focuses on the foundation requirements of the private party's discovery motion. Whether the party has met those requirements lies within the sound discretion of the trial judge who must make that determination prior to and exclusive of any considerations of potential privilege.[20]

### *A. Civil Discovery*

The scope of discovery in civil cases is controlled by statute.[21] The Legislature's purpose in creating the laws of discovery was pragmatic: to expedite civil trials by enabling litigants to obtain an informed picture of their case quickly and at reasonable expense.[22] In order to limit the imposition on parties opponent and witnesses, however, the Legislature provided threshold foundation requirements for each method of discovery.[23] The trial judge's first responsibility is to de-

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Unit, Oakland Police Department, in Oakland, California (Sep. 29, 1976). For a criticism of internal affairs investigations, *see* Schwarz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office,* 118 U. PA. L. REV. 1023 (1970).

[20] Shepherd v. Superior Court, 17 Cal. 3d 107, 127, 550 P.2d 161, 173, 130 Cal. Rptr. 257, 269 (1976).

[21] The six methods of civil discovery are defined in CAL. CODE OF CIV. PROC. §§ 1985 (subpoena duces tecum), 2016 (deposition), 2020 and 2030 (written interrogatory), 2031 (production of documents and things), 2032 (physical, mental, and blood examinations), and 2033 (admission of fact) (West Supp. 1977).

[22] Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 371, 364 P.2d 266, 272, 15 Cal. Rptr. 90, 96 (1961); D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY 1 (2d ed. 1972).

[23] In order to enforce a subpoena duces tecum, the litigant must specify the exact matters or things desired, set forth in full detail the materiality of the items sought to the issues of the case, state that the witness possesses the items sought, and show good cause for the production of the items. CAL. CODE CIV. PROC. §§ 1985 & 2034 (West Supp. 1977). In order to compel a response to a deposition question, written interrogatory, or request for an admission, the litigant must show only that the information sought is relevant to the subject matter involved in the pending action. Such information may relate to a claim or defense of any party, or to the existence of any person or thing having relevant information. CAL. CODE CIV. PROC. §§ 2016(b), 2030(c), 2031(a), 2034 (West Supp. 1977). Under these statutes, the litigant can show "relevance to the subject matter" by demonstrating a reasonable possibility that the questioning will lead to the discovery of admissible evidence, or that it will be helpful in preparing for trial. *See* Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal. 3d 161, 173, 465 P.2d 854, 863, 84 Cal. Rptr. 718, 727 (1970). In order to compel the production of documents, or to compel a medical examination, the litigant must demonstrate good cause. CAL. CODE CIV. PROC. §§ 2031, 2032, 2034 (West Supp. 1977).

termine whether the litigant has met these requirements.

In *Shepherd v. Superior Court*, for example, the plaintiff moved to enforce a subpoena duces tecum against the District Attorney. The supreme court directed the trial judge to evaluate initially whether the plaintiff had satisfied the statutory requirements of specificity, materiality, and good cause.[24] Failure to meet these prerequisites renders the subpoena ineffective[25] and thereby makes moot the subsequent question of privilege. The court reiterated, however, that the "liberal policies" underlying the laws of discovery require the trial judge to resolve doubtful questions of compliance in favor of permitting discovery.[26]

### *B. Criminal Discovery*

In contrast to civil discovery, criminal discovery is controlled by case law.[27] It rests on the constitutional tenet that an accused is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.[28] Consequently, the foundation requirements for criminal discovery are even more liberal than those for civil discovery.[29] An accused may compel discovery by

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[24] *See* notes 13 & 23 *supra*.

[25] Johnson v. Superior Court, 258 Cal. App. 2d 829, 835, 66 Cal. Rptr. 134, 138 (2d Dist. 1968).

[26] Shepherd v. Superior Court, 17 Cal. 3d 107, 120 n.9, 550 P.2d 161, 168 n.9, 130 Cal. Rptr. 257, 264 n.9 (1976), citing Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal. 3d 161, 172-73, 465 P.2d 854, 862-63, 84 Cal. Rptr. 718, 726-27 (1970). For a case applying these liberal policies to a motion to discover the contents of police internal affairs files, *see* City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 109 Cal. Rptr. 365 (2d Dist. 1973). In that case, plaintiff sued the city, alleging that one of its policemen had assaulted her. Plaintiff propounded written interrogatories seeking information within the policeman's internal affairs file and personnel file. The city objected, claiming that the interrogatories were irrelevant and that the information sought was privileged. After the trial judge directed the city to answer the interrogatories, the city sought a writ of prohibition.

The court of appeal noted that the foundation requirement for interrogatories is that they must be relevant to the subject matter of the case; they may be relevant to any potential issue in the case, not just to the actual issues. The court found that one such potential issue was the liability of the city as the officer's employer. The court held that any interrogatory that was relevant to any applicable theory of employer liability (i.e., respondeat superior, willful retention of an employee with known violent tendencies, negligent supervision) met the foundation test of relevance. The court of appeal granted the city's petition in part, denying access to materials that it deemed either irrelevant or privileged.

[27] Pitchess v. Superior Court, 11 Cal. 3d 531, 535, 522 P.2d 305, 308, 113 Cal. Rptr. 897, 900 (1974). *See generally* LOUISELL, note 22 *supra*, at 777 et seq.; 4 J. DEMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE § 16.01 et seq. (1975); Shatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on Defendants*, 9 U.S.F.L. REV. 259 (1974).

[28] Pitchess v. Superior Court, 11 Cal. 3d 531, 535, 522 P.2d 305, 308, 113 Cal. Rptr. 897, 900 (1974).

[29] *See* McCartney v. Comm'n on Judicial Qualifications, 12 Cal. 3d 512, 520, 526 P.2d 268, 274, 116 Cal. Rptr. 260, 266 (1974).

showing that the sought information will facilitate the ascertainment of facts and a fair trial.[30] It is sufficient that the accused make only general allegations that establish some cause for discovery beyond a mere desire for all the information in the prosecution's possession.[31]

*Pitchess v. Superior Court*[32] illustrates the application of this standard to a motion to discover internal affairs records held by a police agency. In *Pitchess*, the defendant was charged with the criminal battery of three deputy sheriffs. The defendant obtained a subpoena duces tecum directing the county sheriff to produce internal affairs records relating to complaints of excessive force previously filed by other citizens against the deputies. As a foundation for the subpoena, the defendant alleged that he intended to establish at trial that he had acted in self-defense and that the internal affairs records were material to the issue of the deputies' propensity for violence. After the lower court denied the county's motion to quash, the county petitioned for a writ of mandate.

The California Supreme Court held that the defendant had alleged a foundation sufficient to compel discovery and therefore the trial court had not abused its discretion in issuing the subpoena. The court reasoned that, in criminal cases, evidence of a crime victim's prior conduct is admissible to prove that the victim had acted in conformity with that prior conduct.[33] Therefore evidence of prior instances of police brutality would be admissible to prove that the deputies had used excessive force against the defendant. Production of the actual internal affairs documents would be necessary to refresh the memories of witnesses and to cross-examine the deputies effectively. In addition, the court noted that records of departmental disciplinary sanctions—which were imposed on the deputies as a consequence of the internal affairs investigations—were also admissible as character evidence in support of the defendant's theory of self-defense.[34] The court concluded that the internal affairs records

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[30] Pitchess v. Superior Court, 11 Cal. 3d 531, 536-37, 522 P.2d 305, 309, 113 Cal. Rptr. 897, 901 (1974).

[31] *Id.* at 537, 522 P.2d at 309, 113 Cal. Rptr. at 901.

[32] 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974). *See generally* Comment, *The California Supreme Court 1973-1974: Criminal Procedure: Discovery of Complaints Alleging Police Brutality*, 63 CAL. L. REV. 11, 181-97 (1975) [hereinafter cited as Comment, *Discovery of Complaints Alleging Police Brutality*].

[33] CAL. EVID. CODE § 1103 (West 1966) provides:

> In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:
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> (a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.
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> . . . .

[34] 11 Cal. 3d 531, 537, 522 P.2d 305, 309, 113 Cal. Rptr. 897, 901 (1974).

could facilitate the ascertainment of facts and therefore were discoverable.[35]

The California Supreme Court cautioned, however, that even if an accused adequately demonstrates a foundation for discovery, his right to obtain information is not absolute. The trial judge retains wide discretion to limit discovery that will unduly hamper the prosecution or violate some other legitimate governmental interest.[36] The county in *Pitchess* urged that one such interest was the preservation of the confidentiality of governmental records. In response, the supreme court held that section 1040 represents the exclusive means by which a public entity may assert a claim of privilege based on the

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One commentator has noted that the admissibility of the internal affairs records in *Pitchess* could have been based on two additional grounds: (1) as character evidence to prove a "plan of conduct" pursuant to CAL. EVID. CODE § 1101(b); and (2) as circumstantial evidence to attack the deputies' credibility and to support the defendant's credibility pursuant to California Evidence Code sections 780(f) and (i). *See* Comment, *Discovery of Complaints Alleging Police Brutality*, note 32 *supra*, at 186 n.24.

[35] Pursuant to the California Supreme Court's decision in *Pitchess v. Superior Court*, criminal defendants accused of assault on a police officer or resisting arrest routinely file *"Pitchess"* motions to discover information in the officer's internal affairs file relevant to the officer's violent or prejudiced character traits. *See* Dell M. v. Superior Court, 70 Cal. App. 3d 782, 139 Cal. Rptr. 149 (2d Dist. 1977) (suppression of evidence of defendant's fight with officers ordered when city refused court order to disclose officer's internal affairs records); Gonzales v. Superior Court, 67 Cal. App. 3d 111, 136 Cal. Rptr. 475 (2d Dist. 1977) (police officer against whom internal affairs complaints have been filed may not raise attorney-client privilege to protect his own statements to the internal affairs unit); People v. Municipal Court (Runyan), 63 Cal. App. 3d 815, 134 Cal. Rptr. 106 (2d Dist. 1976) (motion to discover records of complaints relating to officers' brutality and truthfulness); People v. Superior Court (McKunes), 62 Cal. App. 3d 853, 133 Cal. Rptr. 440 (1st Dist. 1976) (prior complaints of excessive force are relevant even when officer-victim was assaulted while off-duty); Kelvin L. v. Superior Court, 62 Cal. App. 3d 823, 133 Cal. Rptr. 325 (2d Dist. 1976) (adequacy of adverse order pursuant to Cal. Evid. Code § 1042; *see* text accompanying notes 100-113 *infra*); Long v. Municipal Court, 58 Cal. App. 3d 382, 128 Cal. Rptr. 918 (1st Dist. 1976) (improper for trial court to inspect internal affairs files in camera absent a claim of official information privilege by the public entity; *see* text accompanying notes 70-82 *infra*); Caldwell v. Municipal Court, 58 Cal. App. 3d 377, 129 Cal. Rptr. 834 (1st Dist. 1976) (declaration in support of subpoena duces tecum for internal affairs records not required to include allegation based on personal knowledge that officers used excessive force; defendant not required to state that he will rely on the defense of self-defense); Hinojosa v. Superior Court, 55 Cal. App. 3d 692, 127 Cal. Rptr. 664 (4th Dist. 1976) (defendant authorized to discover internal affairs records relating to both use of excessive force and ethnic prejudice); *In re* Valerie E., 50 Cal. App. 3d 213, 123 Cal. Rptr. 242 (2d Dist. 1975) (defendant not required to allege personal knowledge or belief that specific internal affairs complaints have been filed in the past); People v. Woolman, 40 Cal. App. 3d 652, 115 Cal. Rptr. 324 (2d Dist. 1974) (officer's internal affairs file examined to review trial court holding that nothing within the file was material to the accused's defense).

[36] Pitchess v. Superior Court, 11 Cal. 3d 531, 538, 522 P.2d 305, 310, 113 Cal. Rptr. 897, 902 (1974).

necessity of secrecy.[37] Thus, the procedure followed by the *Pitchess* court in evaluating motions to discover official information essentially parallels that set out in *Shepherd v. Superior Court.* The trial judge should first evaluate the discoverant's showing of foundation without regard to potential claims of privilege. The judge should proceed to consider claims of privilege only for those items which pass this initial test.

## II. WAS THE MATERIAL ACQUIRED IN CONFIDENCE?

In response to a claim of official information privilege by the public entity,[38] *Shepherd v. Superior Court* directs the trial judge to determine if the item sought was acquired in confidence.[39] This second step reflects the fact that section 1040 does not protect all governmental information. On the contrary, the section applies only to "official information," which it defines as ". . . information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, prior to the time the claim of

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[37] *Id.* at 540, 522 P.2d at 311, 113 Cal. Rptr. at 903.

[38] Any public entity may claim the official information privilege to protect its official information. CAL. EVID. CODE § 1040(b) (West 1966). The term "public entity" includes nations, states, cities, counties, districts, public authorities, public agencies, or any other political subdivision or public corporation, whether domestic or foreign. CAL. EVID. CODE § 200 (West 1966). The privilege may be asserted to prevent testimony by anyone who has official information, although the privilege does not preclude the information source from revealing his knowledge merely because he communicated that knowledge to the government. CAL. EVID. CODE §1040, Assembly Comm. on Judiciary Comment (West 1966).

Any person authorized by the public entity may claim the privilege. CAL. EVID. CODE § 1040(b) (West 1966). Generally, the public entity's counsel or custodian of records serves as its representative. The prosecutor in a criminal case should not be authorized to claim the privilege where such an authorization creates conflicts of interest. In a *"Pitchess"* motion, for example, the city or county may have an intense interest in preserving the confidentiality of the internal affairs files. At the same time, the prosecutor may wish to divulge the records in order to avoid a dismissal of the case pursuant to Evidence Code section 1042(a). (*See* text accompanying notes 100-13 *infra.*) Such a conflict is most likely to arise in cities like Los Angeles, where the City Attorney not only acts as counsel to the city, but also prosecutes misdemeanor criminal violations. In response to this conflict, Los Angeles City Attorney Burt Pines recently withdrew from all criminal cases involving police internal affairs records and other conflicts of interest. *See* Los Angeles Times, May 10, 1977, § 2, at 1, col. 4; *id.*, May 11, 1977, § 2, at 1, col. 4. *See also* note 88 *infra.*

Since section 1040 safeguards government secrets, in the absence of another statute's specific authorization, private parties may not claim the privilege. CAL. EVID. CODE §1040, Assembly Comm. on Judiciary Comment (West 1966). This incapacity to raise the privilege extends not only to members of the public at large, but also to the source of the information (Markwell v. Sykes, 173 Cal. App. 2d 642, 648, 343 P.2d 769, 773 (2d Dist. 1959)) and to any persons to whom the information relates (*see* Gonzales v. Superior Court, 67 Cal. App. 3d 111, 118 n.8, 136 Cal. Rptr. 475, 480 n.8 (2d Dist. 1977).

[39] 17 Cal. 3d 107, 128, 550 P.2d 161, 173, 130 Cal. Rptr. 257, 269 (1976).

privilege is made."[40] If the item does not meet this definition, it cannot be privileged and must be produced.[41]

Official information cases prior to *Shepherd* generally have not required an objective showing that the governmental material was acquired in confidence.[42] Unlike the communications protected by the professional and marital privileges, however, communications to and within government are not statutorily presumed to be confidential.[43] Therefore, the public entity claiming the privilege should bear the burden of proving this preliminary fact.[44] In *Shepherd*, the California Supreme Court noted that a statement made by a criminal suspect to an investigating District Attorney could not be considered to have been acquired in confidence.[45] The court did not articulate, however, how a public entity might discharge its burden of proof.

The clearest evidence of confidentiality would come from the parties to the communication themselves. The information source or recipient may testify, for example, that the communication was predicated upon an express promise of confidentiality, or that he understood the communication to have been made and received in confidence.[46] With much governmental information, however, direct

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[40] CAL. EVID. CODE § 1040 (West 1966). This requirement is patterned on the language of section 1040's predecessor, former Code of Civil Procedure section 1881(5) (Ch. 1961, § 1, 1957 Cal. Stat. 3505 (repealed 1965)): "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by disclosure." In contrast, Uniform Rule of Evidence 34 (upon which section 1040 was also patterned) defines an official information privilege without reference to confidential acquisition. *See* 6 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 253, 467 (1964). *See also* PROPOSED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183, 251 (1972). Rule 509 of the Proposed Rules of Evidence also defined an official information privilege without reference to confidential acquisition. (Along with the other proposed evidentiary privileges, Rule 509 was subsequently not adopted by Congress as part of the Federal Rules of Evidence. *See* 28 U.S.C. FED. R. EVID. § 501 (1975)).

[41] Shepherd v. Superior Court, 17 Cal. 3d 107, 128, 550 P.2d 161, 173, 130 Cal. Rptr. 257, 269 (1976).

[42] *See, e.g.*, Pitchess v. Superior Court, 11 Cal. 3d 531, 539, 522 P.2d 305, 310, 113 Cal. Rptr. 257, 269 (1974) (police internal affairs complaints); Chronicle Publishing Co. v. Superior Court, 54 Cal. 2d 548, 566, 354 P.2d 637, 646, 7 Cal. Rptr. 109, 118 (1960) (State Bar complaints).

[43] CAL. EVID. CODE § 917 (West 1966) provides:

> Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

[44] *See In re* Olson, 37 Cal. App. 3d 783, 790, 112 Cal. Rptr. 579, 584 (1st Dist. 1974); CAL. EVID. CODE §405, Assembly Comm. on Judiciary Comment (West 1966).

[45] 17 Cal. 3d 107, 124, 550 P.2d 161, 171, 130 Cal. Rptr. 257, 267 (1976).

[46] *See* Chronicle Publishing Co. v. Superior Court, 54 Cal. 2d 548, 354 P.2d

testimony of this type may be impractical or impossible to obtain. Therefore, the public entity may have to rely on other evidence of confidentiality, such as a memorandum executed by the parties to the communication,[47] the customary procedures of the agency in receiving similar information,[48] or the sensitivity of the information itself.[49] None of these factors is dispositive, however. The trial judge should consider them only as circumstantial evidence tending to show that the information was acquired in confidence.

Even though the trial judge finds that the information was acquired in confidence, the public entity by its actions may have waived the privilege. By statutory definition, government records cannot be "official information" if they are open or officially disclosed to the public.[50] Therefore, disclosure of information at a public proceeding[51] or to individual members of the pub-

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637, 646, 7 Cal. Rptr. 109, 118 (1960) (State Bar secured a report from the National Conference of Bar Examiners on the express understanding that the information contained therein was confidential); City and County of San Francisco v. Superior Court, 38 Cal. 2d 156, 159, 238 P.2d 581, 583 (1951) (Civil Service Commission obtained salary information from private employers only on the written promise and agreement that the information would be held in confidence).

[47]The internal affairs unit of the Oakland Police Department routinely provides to complainants and witnesses forms that purport to memorialize the citizens' requests for confidentiality. Interview with Sergeant Nolan Darnell, Internal Affairs Unit, Oakland Police Department, in Oakland, California (Sep. 29, 1976).

[48]*See* CAL. EVID. CODE § 1105 (West 1966) (evidence of habit or custom admissible to conduct in conformity with that habit or custom). Although an agency's customary procedures are circumstantial evidence of the manner in which the information was received, they are less probative of the manner in which the information was given. If the information source did not intend the communication to be confidential, the communication is not privileged, regardless of the agency's intent. *See* CAL. EVID. CODE § 917, Assembly Comm. on Judiciary Comment (West 1966).

[49]The sensitivity of a communication's contents may be circumstantial evidence that the communication was given and received in confidence. That sensitivity alone, however, cannot support a claim of privilege without a finding that the parties actually intended the communication to remain confidential. Brotsky v. State Bar, 57 Cal. 2d 287, 302-03, 368 P.2d 697, 705, 19 Cal. Rptr. 153, 161 (1962). *But cf. In re* Muszalski, 52 Cal. App. 3d 475, 479-81, 125 Cal. Rptr. 281, 283-84 (4th Dist. 1975) (Department of Corrections judgment that disclosure of prison documents would endanger other persons held to constitute a sufficient basis both for classifying the documents as confidential and for precluding their inspection). Also, the fact that an item of information is exempted from mandatory public disclosure pursuant to the Public Records Act (*see* note 1 *supra*) does not necessitate the conclusion that the item was acquired in confidence. Such an exemption reflects the Legislature's decision that the public is not entitled to unrestricted access to sensitive public records; it says nothing about the nature of the information's acquisition. *Contra*, City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 784-85, 109 Cal. Rptr. 365, 369 (2d Dist. 1973).

[50]CAL. EVID. CODE § 1040(a) (West 1966).

[51]*E.g.*, Markwell v. Sykes, 173 Cal. App. 2d 642, 648, 343 P.2d 769, 773 (2d Dist. 1959) (county employee's disclosure of official information pursuant to a court order waived the privilege). *But cf.* United States v. Lopez, 328 F. Supp.

lic[52] may operate as a waiver of the privilege. The courts may also deem the public entity to have waived the privilege if it uses the official information to injure the interests of a private party. In *People ex rel. Department of Public Works v. McNamara Corp. Ltd.*,[53] for example, the Department submitted official information to a state officer adjudicating a contract dispute between the Department and the private corporation. The court of appeal held that when a governmental action seriously injures an individual, and the reasonableness of that action depends on a finding of fact, the evidence used to prove the government's case must be disclosed to that individual so that he has the opportunity to prove it untrue.[54] In addition, commentators have suggested that the governmental entity may waive applicable official information privileges if it brings litigation as a party plaintiff.[55]

The confidentiality requirement of section 1040(a) represents a significant, but often overlooked, limitation upon the availability of the official information privilege. The trial judge should not assume that a document or record is "official information" merely because it is held by the government. Rather, the judge should require the public entity claiming the privilege to present evidence sufficient to meet its statutory burden of proof.

## III. APPLYING THE PRIVILEGE

*Shepherd v. Superior Court* authorizes the trial judge to consider the merits of a claim of official information privilege only after the litigant has met the foundation requirements for discovery, and after the public entity has demonstrated that the information was acquired in confidence.[56] If these two preliminary conditions are met, the judge must determine whether the information is protected by either the absolute or the conditional official information privilege.

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1077 (E.D. N.Y. 1971) (District Court protected confidentiality of airport antihijacking procedures by excluding the public and defendant from the courtroom and enjoining defense counsel not to reveal the information out of court).

[52] Section 1040(a) provides that information disclosed to the public at large cannot thereafter be characterized as "official information." Disclosures to small numbers of private persons may also act as a waiver of the privilege. *Cf.* Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 656-57, 117 Cal. Rptr. 106, 113 (3d Dist. 1974) (investigating agency's disclosure of consumer complaints to the company complained of deemed a waiver of the exemption from mandatory disclosure that is accorded to investigatory files by the California Public Records Act (*see* note 1 *supra*)).

[53] 28 Cal. App. 3d 641, 104 Cal. Rptr. 822 (3d Dist. 1973).

[54] *Id.* at 651, 104 Cal. Rptr. at 828, citing Greene v. McElroy, 360 U.S. 474, 496 (1958), and Endler v. Schutzbank, 68 Cal. 2d 162, 172, 436 P.2d 297, 304, 65 Cal. Rptr. 297, 304 (1968).

[55] *See* E. CLEARY, *et al*, MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 233-34 (2d ed. 1972); 8 WIGMORE, note 2 *supra*, § 2379, at 812.

[56] 11 Cal. 3d 107, 128, 550 P.2d 161, 273, 130 Cal. Rptr. 257, 269 (1974).

### A. The Absolute Privilege

Section 1040(b)(1) recognizes that official information is privileged if disclosure is forbidden by an act of Congress[57] or another California statute.[58] Most of the California statutes purporting to forbid disclosure protect information held by state agencies.[59] A few protect information held by agencies of local government.[60] No nondisclosure statute forbids the disclosure of police internal affairs records.[61]

Commentators[62] have characterized section 1040(b)(1) as conferring an "absolute" privilege because, unlike the conditional privilege,[63] its protection is not predicated upon an ad hoc weighing of interests by the trial court. This "absolute" label is misleading, however, because a particular nondisclosure statute will not necessarily privilege a specified category of information in all circumstances. The trial judge must still inquire whether the items sought to be discovered fall within the coverage of the statute on the facts of the particular case.

Some nondisclosure statutes prohibit general public access to the

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[57] *E.g.*, 49 U.S.C. § 1441(e) (1970) (preserving the confidentiality of Civil Aeronautics Board aircraft accident investigations); 42 U.S.C. § 1306(a) (1970) (preserving the confidentiality of returns filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act); 13 U.S.C. § 9 (1970) (preserving the confidentiality of census reports). *See generally* Comment, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 149-55 (1976).

[58] Privilege may be created only by statute; administrative regulations cannot privilege otherwise unprivileged information. McKillop v. Regents of Univ. of Cal., 386 F. Supp. 1270, 1274-75 (N.D. Cal. 1975) (applying CAL. EVID. CODE § 1040). For a partial list of California statutes restricting access to governmental information, *see* LOUISELL, note 22 *supra*, at 66-70. *See generally* Comment, *Governmental Privileges: Roadblock to Effective Discovery*, 7 U.S.F.L. REV. 282 (1973); Comment, *Access to Governmental Information in California*, 54 CAL. L. REV. 1650 (1966).

[59] *E.g.*, CAL. VEH. CODE § 1808.5 (West Supp. 1977) (disclosure of Department of Motor Vehicles records relating to physical or mental condition of licensees proscribed); CAL. REV. & TAX. CODE § 19282 (West 1970) (disclosure of information submitted by taxpayers proscribed); CAL. PENAL CODE § 3046 (West 1970) (disclosure of recommendations by private citizens to the State parole board proscribed).

[60] *E.g.*, CAL. WELF. & INST. CODE § 781 (West Supp. 1977) and CAL. PENAL CODE § 1203.45 (West Supp. 1977) (disclosure of juvenile criminal records proscribed); CAL. PENAL CODE § 290 (West Supp. 1977) (disclosure of sex-offender files maintained by local police agencies proscribed).

[61] Police investigation records are exempted from the mandatory disclosure requirement of the California Public Records Act. CAL. GOV'T CODE § 6254(f) (West Supp. 1977). The effect of this exemption, however, is limited to the disclosure requirements of the Act; the exemption has no application to the laws of discovery. Therefore, it does not create an absolute privilege within the meaning of section 1040(b)(1). Shepherd v. Superior Court, 17 Cal. 3d 107, 123-24, 550 P.2d 161, 170, 130 Cal. Rptr. 257, 266 (1976).

[62] *See, e.g.*, WITKIN, note 6 *supra*, at 801.

[63] *See* text accompanying notes 69-99 *infra*.

protected records, but allow inspection by litigants or other parties. The trial judge must determine whether the discoverant qualifies as a party exempt from the privilege. Under California Vehicle Code section 20012, for example, mandatory automobile accident reports are deemed confidential, except that they may be disclosed to persons with a "proper interest." In *People ex rel. Department of Transportation v. Superior Court*,[64] a wrongful death plaintiff sought all reports of accidents that had occurred on a particular stretch of highway in order to prove the negligent design of the highway. The Court of Appeal held that the plaintiff was not an "interested party" within the meaning of the statute, and therefore the reports were absolutely privileged as to her.[65]

Moreover, one case has suggested that even though a statute expressly forbids any disclosure of a category of governmental information, production of a particular item may be required if the public agency has no real interest in preserving its secrecy. In *Richards v. Superior Court*,[66] a personal injury plaintiff was injured in an automobile accident. She subsequently was examined by a state physician as part of her application for state disability insurance. The defendant in the personal injury action sought discovery of the records of the physical examination. Despite the plaintiff's consent, the Department refused to release the records on the ground that disclosure was forbidden by statute.[67] The court of appeal held that the Department's refusal was proper; disclosure of the information was expressly forbidden by statute. Furthermore, the Department had a "real interest" in preventing disclosure: it sought to insure complete candor in an applicant's medical examination by removing the fear that records of the examination could be used against the applicant in subsequent litigation. The court suggested, however, that if the plaintiff had consented to the release of the records for her own

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[64] 60 Cal. App. 3d 352, 131 Cal. Rptr. 476 (3d Dist. 1976).

[65] For a result favoring disclosure in the construction of another nondisclosure statute, *see* 57 OP. ATT'Y GEN. OF CAL. 362 (1974), which interprets CAL. WELF. & INST. CODE § 10850. That statute forbids disclosure of lists of recipients of public social services except for "purposes directly connected with the administration of the public social services." The Attorney General reasoned that prosecutions for welfare fraud are directly connected with the administration of social services; therefore the statute does not bar the use of the recipient lists for such prosecutions.

*See also* State Div. of Indus. Safety v. Superior Court, 43 Cal. App. 3d 778, 117 Cal. Rptr. 726 (2d Dist. 1974) (California Labor Code section 6322, which makes industrial accident investigation reports confidential, held not to create an absolute evidentiary privilege); Terzian v. Superior Court, 10 Cal. App. 3d 286, 88 Cal. Rptr. 806 (1st Dist. 1970) (CAL. CIV. CODE § 227, which restricts public access to records of adoption proceedings, held not to create an absolute evidentiary privilege).

[66] 258 Cal. App. 2d 635, 65 Cal. Rptr. 917 (2d Dist. 1968).

[67] Two statutes forbade disclosure: CAL. UNEMP. INS. CODE §§ 2111 and 2714.

benefit, the requisite Department "real interest" in nondisclosure might not exist. Consequently, the privilege would not apply.[68]

### *B. The Conditional Privilege*

If the trial judge determines that disclosure of the official information is not expressly prohibited by a federal or California statute, he must determine if the information is conditionally privileged pursuant to section 1040(b)(2). That section requires the judge to apply a weighing test with respect to each item of official information. Sustaining a claim of privilege is authorized only when

> [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 interests of justice. . . .[69]

#### 1. In Camera Inspection

To weigh these competing interests intelligently, the trial judge may need to examine the official information for which the privilege is claimed.[70] In order to preserve the confidentiality of the materials, Evidence Code section 915 grants the trial judge the discretion to order an in camera inspection.[71] In camera inspection is not mandatory; in a particular case, the judge may have information sufficient to rule on the claim of privilege without inspection.[72]

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[68] 258 Cal. App. 2d 638 n.2, 65 Cal. Rptr. 920 n.2. The California Attorney General appears to have accepted the "real interest" limitation on the absolute governmental privilege suggested by the *Richards* court. *See* 55 OPS. ATT'Y GEN. 122, 123 (1972).

[69] CAL. EVID. CODE § 1040(b)(2) (West 1966).

[70] CAL. EVID. CODE § 915, Law Revision Comm'n Comment (West 1966).

[71] The general rule is that the trial judge may not require the disclosure of material claimed to be privileged in order to rule on the claim of privilege. CAL. EVID. CODE § 915(a) (West 1966). An exception to this rule is made by EVID. CODE § 915(b) for the conditional privileges, since the granting of privilege may depend upon the nature of the information itself. *See* CAL. EVID. CODE §§ 1040 (official information), 1041 (informer's identity), 1060 (trade secret).

[72] The language of EVID. CODE § 915 is permissive. It provides that when a claim of privilege is made under EVID. CODE §§ 1040, 1041, or 1060, and the judge cannot rule on the claim without examining the material claimed to be privileged, he may order an in camera inspection. CAL. EVID. CODE § 915(b) (West 1966). If the judge is able to rule on the privilege claim without examining the materials, however, an in camera inspection is not justified. *See, e.g.*, McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270 (N.D. Cal. 1975) (applying CAL. EVID. CODE § 1040). In *McKillop*, the plaintiff in a sex discrimination lawsuit sought to discover confidential tenure evaluations of her performance as a teacher. The district court evaluated the competing interests and sustained the University's claim of privilege without examining the documents in question. *Accord*, Cirale v. 80 Pine St. Corp., 35 N.Y. 2d 113, 119, 316 N.E.2d 301, 304, 359 N.Y.S. 2d 1, 6 (1974) (applying New York common law official information privilege). The *Cirale* court stated:

> [I]t will be the rare case that in camera determinations will be necessary. A description of the material sought, the purpose for

Section 915 expressly limits those who may attend the in camera hearing to the judge, the public entity's representative, and others that the representative is willing to have present.[73] Other persons are barred from the proceedings, since their presence would compromise the confidentiality that the in camera proceedings were designed to protect.[74] The judge should have the court reporter present, however, to transcribe the proceedings and to prepare a sealed record for possible appellate review.[75]

In protecting the government's official information from disclosure, the in camera hearing may create substantial disadvantages for the private party. One court has criticized the in camera inspection as "far too constricted to permit an enlightened determination" of the official information privilege.[76] In *People v. Superior Court (Biggs)*,[77] the defendant, charged with the sale of methedrine, sought to discover the business records of the Bureau of Narcotics Enforcement to prove that he had been an employee of the Bureau at the time of his arrest. The trial judge inspected the records in camera, and ultimately ordered their disclosure. In dicta, the court of appeal observed that:

> Deprived of the three-way communication habitual to an adversary setting, the judge cannot simultaneously perform the tasks of inspecting and identifying the material, measuring the government's claim to withhold it, and assessing the defendant's need to get it.

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> which it is gathered and other similar considerations will provide a sufficient basis upon which the court may determine whether the assertion of governmental privilege is warranted.

*Accord*, Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401 (Ct. Cl. 1972) (applying federal common law official information privilege). *But cf. In re* Muszalski, 52 Cal. App. 3d 475, 482-83, 125 Cal. Rptr. 281, 285 (4th Dist. 1975) (when public entity needs an in camera inspection to support its claim of official information privilege, it is an abuse of discretion for the trial judge to refuse a request for such hearing).

[73] CAL. EVID. CODE § 915(b) (West 1966).

[74] People v. Woolman, 40 Cal. App. 3d 652, 655, 115 Cal. Rptr. 324, 326 (2d Dist. 1974). *But cf.* United States v. Lopez, 328 F. Supp. 1077 (E.D. N.Y. 1971), discussed in note 51 *supra*.

One commentator has criticized the exclusion of the criminal defendant and his counsel from in camera proceedings held to evaluate claims of the informer's privilege (CAL. EVID. CODE § 1041) as a denial of the accused's constitutional right of public trial, confrontation, and compulsory process. *See* Brenner, *In Camera Hearings on Informant Disclosure: A Criticism*, 15 SANTA CLARA LAW. 326 (1975).

[75] Interview with the Honorable Edward E. Garcia, Presiding Judge of the Municipal Court, Sacramento Judicial District, in Sacramento, California (Oct. 14, 1976).

[76] People v. Superior Court (Biggs), 19 Cal. App. 3d 522, 530, 97 Cal. Rptr. 118, 124 (3d Dist. 1971). *But see* Kerr v. United States District Court, 426 U.S. 394, 405-06 (1976) (in camera inspection characterized as "highly appropriate and useful means of dealing with claims of governmental privilege.")

[77] 19 Cal. App. 3d 522, 530, 97 Cal. Rptr. 118, 124 (3d Dist. 1971).

> The ex parte process places too much confidence in judicial prescience and invites error, even unfairness.[78]

Exclusive reliance on in camera inspection also inhibits the opportunity for compromise between the parties; it leads to all-or-nothing rulings rather than to alternative discovery orders that serve the interests of both the government and the private party.[79]

To ameliorate the shortcomings of the in camera procedure, the *Biggs* court suggested that in camera inspection should be used only as a preliminary inquiry. After a "guarded look" at the official information, the judge should return to open court to probe the litigant's need for the material in light of that inspection.[80]

The in camera inspection of official information also limits the private party's ability to appeal effectively a trial court order sustaining a claim of conditional privilege.[81] Because the private party is not present in camera, he has little knowledge of the contents of the inspected records. The private party must therefore base his challenge either on procedural error or on "blind" allegations of error in the trial court's substantive determination of privilege. Because the private party has no ability to isolate particular instances of the trial judge's substantive error, a "blind" allegation of error requires the court of appeal to re-evaluate the public entity's claim of privilege for every item sought.[82]

### 2. The Weighing Process

After the judge has determined sufficient facts on which to base a decision, he must consider with respect to each item whether disclosure is "against the public interest."[83] In each case, he must evaluate the adverse and beneficial consequences to the public of disclosure, and the consequences to the private party of nondisclosure. The judge must then determine which consequences predominate.[84] In

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[78] *Id.*

[79] *Id.* at 531, 97 Cal. Rptr. at 124.

[80] *Id.*, contrasting the explicit procedural directions for the use of in camera proceedings in determining claims of the informer's privilege (CAL. EVID. CODE § 1041) set out in CAL. EVID. CODE § 1042(d) (West. Supp. 1977).

[81] A party may challenge an order sustaining a claim of privilege through interlocutory review by extraordinary writ or through appeal from final judgment. *See* LOUISELL, note 22 *supra*, §§ 5.22, 14.03.

[82] *See, e.g.*, People v. Woolman, 40 Cal. App. 3d 652, 654, 115 Cal. Rptr. 324, 326 (2d Dist. 1974) (police officer's entire internal affairs file examined by the Court of Appeal to review trial judge's finding that none of the file's contents were material to the accused's defense).

[83] CAL. EVID. CODE § 1040(b)(2) (West 1966).

[84] Evidence Code section 1040(b)(2) requires the trial judge to weigh "the necessity for preserving the confidentiality of the information" and "the necessity for disclosure in the interests of justice." CAL. EVID. CODE § 1040(b)(2) (West 1966). The legislative comment to § 1040 characterizes the same test in slightly different terms: the judge must weigh "the consequences to the public

ascertaining whether disclosure of the information is against the public interest, the judge may not consider the interest of the public entity as a party in the outcome of the proceeding.[85] The following discussion of police internal affairs records illustrates the factors involved in this balancing process.

*a. Consequences to the Public of Disclosure*

The trial court must first evaluate the consequences that disclosure of the official information will have upon the public. Such consequences may militate both for and against disclosure.

One potential consequence to the public is the general deleterious effect that disclosure may have upon the integrity of governmental operations.[86] The knowledge that internal affairs records are discoverable may have a chilling effect upon their use within the department.[87] The quality of internal affairs investigations and records may decline, and police agencies may choose to destroy old records rather than to risk their future discovery.[88] The knowledge that the records

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of disclosure" and "the consequences to the litigant of nondisclosure." For ease of analysis, this article focuses on the latter formulation of the test.

[85] CAL. EVID. CODE § 1040(b)(2) (West 1966).

[86] Shepherd v. Superior Court, 17 Cal. 3d 107, 126, 550 P.2d 161, 172, 130 Cal. Rptr. 257, 268 (1976). *See also* Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (applying federal common law official information privilege to police investigation records in a civil rights suit).

[87] City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 785, 109 Cal. Rptr. 365, 369 (2d Dist. 1973). *See also* Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

[88] Although CAL. PENAL CODE § 832.5 (West Supp. 1977) requires local police agencies to receive and to investigate citizen complaints, it does not prescribe minimum standards of investigation and record-keeping. City police records that are made, however, are protected from destruction for a period of two years. CAL. GOV'T CODE § 34090 (West Supp. 1977). After two years, the records may be destroyed with the approval of the city council and city attorney. *Id.*

Following the California Supreme Court's decision in Pitchess v. Superior Court, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974), discussed in text accompanying notes 30-41 *supra*, several California cities authorized the destruction of internal affairs files which were over two years old. In September, 1976, the City of Santa Ana authorized the destruction of all internal affairs records over two years old in which the complaints were "unfounded" or the officer's conduct was "exonerated." The city's action "was greeted by members of the Santa Ana Police Department with applause and a feeling of relief at all levels." Cooper, *Protecting Police Personnel Files: Expunging*, 11 CAL. LAW ENFORCEMENT 125, 128 (1977).

Similarly, in May, 1976, the city council of the City of Los Angeles approved the destruction of "Internal Affairs Division Miscellaneous Records" which were over five years old. In response, the Los Angeles Police Department internal affairs unit shredded all internal affairs complaints over eighteen months old that were not "sustained." Five and a half million pages of records relating to twenty-five years of complaints were destroyed. The Internal Affairs Division justified the destruction of the records on three grounds: (1) criminal defendants were gaining access to the files through discovery; (2) police manpower was being

are discoverable may also inhibit members of the public from complaining to or cooperating with internal affairs units.[89] Police officers may become reluctant to provide information critical of fellow officers if they know that their statements may be disclosed to private parties.[90]

Beyond these general consequences to the public of disclosure, the judge may identify consequences that are unique to a particular item of information. Disclosure of a fact or identity may have an adverse impact on the persons who gave the information[91] or may jeopardize an on-going investigation.[92] Such a consequence would weigh against disclosure and in favor of privilege.

The trial judge should also consider the consequences to the public that are beneficial. The public has an interest in seeing that justice is done in a particular case, as well as in protecting confidential information.[93] That interest militates in favor of disclosure and against a claim of privilege; the official information privilege is not a shield behind which police officers and other government officials may seek refuge from possible wrongdoing.[94]

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diverted to process the discovery requests; and (3) examination of the complaints was having an adverse effect on the morale of the police department. Municipal Court Judge George W. Trammel criticized the action: "The search for truth is not served by authorizing the destruction of what may be relevant and material evidence for defendants in cases [which the city attorney] prosecutes." People v. Roberts *et al*, No. 3155527 (Municipal Court of the Los Angeles Judicial District, Jan. 24, 1977). *See* Los Angeles Times, Jan. 25, 1977, § 1, at 1, col. 2; *id.*, May 10, 1977, § 2, at 1, col. 4; *id.*, May 11, 1977, § 2, at 1, col. 4.

Such destruction of internal affairs records may arguably require an adverse order or dismissal of charges pursuant to People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). *See, e.g.*, People v. Murdoch, 3 Crim. ___ (3d Dist., Notice of Appeal filed July 12, 1977).

[89] *See* Kerr v. United States District Court, 426 U.S. 394, 404-05 (1976) (construing federal common law official information privilege); Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973); Chronicle Publishing Co. v. Superior Court, 54 Cal. 2d 548, 570, 354 P.2d 637, 648, 7 Cal. Rptr. 109, 120 (1960).

[90] *See* Kerr v. United States District Court, 426 U.S. 394, 404-05 (1976); City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 785, 109 Cal. Rptr. 365, 369-70 (2d Dist. 1973). *But see* Wood v. Breier, 54 F.R.D. 7, 13 (E.D. Wisc. 1972), a civil rights suit in which the federal common law official information privilege was applied to internal affairs records:

> The officers who reported to the internal affairs investigators did so under threat of administrative sanctions, knowing that their reports might be used against themselves or their fellow officers in either criminal or departmental discriplinary actions. It is doubtful that the addition of possible civil sanctions to criminal and departmental ones would end candor or result in refusal to make reports.

[91] Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

[92] *See* People v. Superior Court (Lyons Buick-Opel-GMC, Inc.), 70 Cal. App. 3d 341, 344, 138 Cal. Rptr. 791 (2d Dist. 1977); Wood v. Breier, 54 F.R.D. 7, 11-12 (E.D. Wisc. 1972).

[93] CAL. EVID. CODE § 1040, Assembly Comm. on Judiciary Comment (West 1966).

[94] Gill v. Manuel, 488 F.2d 799, 803 (9th Cir. 1973) (construing CAL. EVID. CODE § 1040(b)(2)).

*b. Consequences to the Litigant of Nondisclosure*

Having identified the interests of the public that would be affected by the disclosure of an item of official information, the trial judge must next ascertain what impact nondisclosure will have on the litigant's case. This evaluation involves a reconsideration of matters that were in issue when the judge initially evaluated the litigant's foundation for discovery, including the importance of the evidence to the litigant's case, the availability of substitute evidence, and the adequacy of substitute evidence.[95] The liberal policies of discovery no longer control the judge's discretion, however.[96] Instead, the judge must balance the consequences to the litigant against a demonstrated public interest in preserving the confidentiality of the information. The greater the public's need for confidentiality, the greater must be the litigant's need for the information in order to defeat a claim of privilege. Conversely, if the litigant can demonstrate only a slight need for the information, a small showing of public need for secrecy should sustain the claim of privilege. In making these considerations, the trial judge should recognize that expansive construction of the official information privilege, like that of other privileges, is disfavored.[97] Close cases should be resolved in favor of disclosure and against privilege.

Although *Shepherd v. Superior Court* characterizes the weighing process as involving "precise statutory standards,"[98] section 1040 necessarily delegates broad discretion to the trial judge. In civil cases, this discretion is largely unfettered.[99] In criminal cases, however, considerations of constitutional due process strictly limit the extent to which a public entity can successfully withhold official information from a defendant.

## IV. ADVERSE ORDER IN CRIMINAL PROCEEDINGS

Constitutional demands of due process prohibit the prosecution from initiating criminal proceedings and then invoking its governmental privileges to deprive the accused of anything that might be relevant to his defense.[100] Although the government may have an

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[95] Shepherd v. Superior Court, 17 Cal. 3d 107, 126, 550 P.2d 161, 171-72, 130 Cal. Rptr. 257, 267-68 (1976). *See also* McKillop v. Regents of the Univ. of Cal. 386 F. Supp. 1270 (N.D. Cal. 1975) (applying CAL. EVID. CODE § 1040; City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 109 Cal. Rptr. 365 (2d Dist. 1973).

[96] *See* text accompanying note 26 *supra.*

[97] *See* United States v. Nixon, 418 U.S. 683, 709-10 (1973).

[98] 17 Cal. 3d 107, 123, 550 P.2d 161, 170, 130 Cal. Rptr. 266, 275 (1976).

[99] For a discussion of the constraints on the protection of official information in civil cases, *see* text accompanying notes 53-55 *supra.*

[100] Pitchess v. Superior Court, 11 Cal. 3d 531, 540, 522 P.2d 305, 311, 113 Cal. Rptr. 897, 903 (1974), citing dicta in United States v. Reynolds, 345 U.S.

interest in preserving the confidentiality of particular records, it cannot force the criminal defendant to bear the burden of vindicating that interest.[101] Often it is not the prosecutor who withholds rele-

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1, 12 (1953)(civil case construing the federal common law state secrets privilege). *See also* Jencks v. United States, 353 U.S. 657 (1957). In that case, the accused sought to obtain written reports previously written by government informers who were serving as prosecution witnesses. The accused needed the reports to cross-examine the witnesses about information in the reports. Reversing the District Court's denial of discovery, the United States Supreme Court held:

> We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, Roviaro v. United States, 353 U.S. 53, 60-61. The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

353 U.S. at 672.

*Accord,* United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944):

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other.

[101] Davis v. Alaska, 415 U.S. 308 (1974). In that case, the prosecution's key witness was a juvenile named Green who was on probation for prior acts of juvenile delinquency. A state statute, designed to protect the anonymity of juvenile offenders, made the witness's probationer status inadmissible as evidence. Nonetheless, the defendant sought to proffer the witness's status as impeachment evidence of bias. In reversing the trial court's granting of privilege under the statute the United States Supreme Court held:

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

415 U.S. at 320. *See generally,* Note, *Constitutional Restraints on Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska,* 73 MICH. L. REV. 1465 (1975).

vant information from the accused, but rather another agency of federal, state, or local government. Evidence Code section 1042(a)[102] provides that when a California state or local agency successfully claims the official information privilege, the trial judge must make an order or finding of fact that is adverse to the prosecution "as is required by law" upon any issue to which the information is material. This language codifies the constitutional mandate of due process;[103] the scope of a section 1042(a) adverse order is coextensive with that of due process.

Except for dicta in a few recent decisions,[104] the cases construing the mandate of section 1042(a) have dealt primarily with successful claims of the informer's privilege[105] rather than the official information privilege. Under the informer cases, the severity of the section 1042(a) adverse order varies with the nature of the issues to which the privileged information is material. If the informer is a witness whose testimony is material to the issue of the accused's guilt or innocence, due process requires the trial judge to dismiss the case if the government refuses to reveal the information.[106] An accused is

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[102] CAL. EVID. CODE § 1042 (West Supp. 1977) provides in part:

> (a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.
>
> (b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

Section 1042(a) requires an adverse order or finding of fact only when the official information privilege is successfully claimed by an agency of the State of California or a political subdivision thereof. If the privilege is raised by an agency of the federal government or a sister state, § 1042(a) does not require an adverse order. CAL. EVID. CODE § 1042, Assembly Comm. on Judiciary Comment (West 1966); People v. Parham, 60 Cal. 2d 378, 381-82, 384 P.2d 1001, 1003, 33 Cal. Rptr. 497, 499 (1963) (F.B.I. refused to disclose confidential documents to a defendant prosecuted in state court; the state prosecution could utilize the testimony of witnesses even though their prior statements were unavailable).

[103] Pitchess v. Superior Court, 11 Cal. 3d 531, 540, 522 P.2d 305, 311, 113 Cal. Rptr. 897, 903 (1974).

[104] *See* Pitchess v. Superior Court, 11 Cal. 3d 531, 539 n.5, 522 P.2d 305, 311 n.5, 113 Cal. Rptr. 897, 903 n.5; *Id.* at 541, 522 P.2d at 311-12, 113 Cal. Rptr. 903-04 (concurring opinion); Kelvin L. v. Superior Court, 62 Cal. App. 3d 823, 831, 133 Cal. Rptr. 325, 331 (2d Dist. 1976).

[105] *See* CAL. EVID. CODE § 1041 (West Supp. 1977). The adverse sanction required by EVID. CODE § 1041(a) applies to successful claims of privilege for both official information and informer identity.

[106] CAL. EVID. CODE § 1042, Assembly Comm. on Judiciary (West 1966), citing People v. McShann, 50 Cal. 2d 802, 330 P.2d 33 (1958).

entitled to a dismissal if he can demonstrate a reasonable possibility that the informer might provide information that would result in the accused's exoneration.[107] Dismissal is not required, however, if the withheld information is not material to the issue of guilt or innocence. If the accused can demonstrate only that an informer might reveal information material to a collateral issue, such as the validity of a warrantless search, due process requires only that the judge make a finding of fact adverse to the prosecution or that he disallow a prosecution witness from testifying.[108]

Most of the decisions applying the official information privilege to criminal cases have not reached the issue of the scope of the adverse order. Instead, they have dealt primarily with the sufficiency of the accused's initial showing of foundation for discovery.[109] Dicta in two cases that have construed section 1042(a), however, suggest that the trial judge need not adhere to the tests for dismissal developed in the informer identity cases.

In his concurring opinion in *Pitchess v. Superior Court*, Mr. Justice Clark noted that on the facts of that case, dismissal of charges against the accused was not the price for a successful claim of official information privilege by the county sheriff. Justice Clark reasoned:

> As the information sought here is material solely to the issue of use of excessive force on specified previous occasions, sustaining a claim of privilege should result in a finding of fact adverse to the People on that collateral issue.[110]

On facts similar to those of *Pitchess*, the court in *Kelvin L. v. Superior Court*[111] similarly suggested a finding of fact adverse to the

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[107] California courts have articulated two tests to determine whether dismissal is necessary upon a successful claim of privilege for an informer's identity. The first test suggests that if the informer is shown to be a witness whose testimony is material to the defendant's guilt or innocence, dismissal of the case automatically follows a refusal by the public entity to disclose his identity. *See, e.g.*, People v. McShann, 50 Cal. 2d 802, 808, 330 P.2d 33, 37 (1958). The second test requires a two-pronged showing: dismissal is required if the informer's testimony might be material to the accused's guilt or innocence, and nondisclosure of the informer's identity would deprive the defendant of a fair trial. *See, e.g.*, People v. Williams, 51 Cal. 2d 355, 359, 333 P.2d 19, 22 (1958). The California Supreme Court has largely reconciled these two tests by holding that both prongs of the latter test are satisfied if, based upon some evidence, the defendant demonstrates a reasonable possibility that the anonymous informer could give some evidence on the issue of guilt or innocence which might result in the defendant's exoneration, dismissal is required. People v. Garcia, 67 Cal. 2d 830, 840, 434 P.2d 366, 372, 64 Cal. Rptr. 110, 116 (1967). *See generally* the discussion in William v. Superior Court, 38 Cal. App. 3d 412, 112 Cal. Rptr. 485 (3d Dist. 1974).

[108] CAL. EVID. CODE § 1042, Assembly Comm. on Judiciary Comment (West 1966), cited Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958).

[109] *See* cases cited note 35 *supra*.

[110] 11 Cal. 3d 531, 541, 522 P.2d 305, 311-12, 113 Cal. Rptr. 897, 903-04 (1974).

[111] 62 Cal. App. 3d 823, 133 Cal. Rptr. 325 (2d Dist. 1976).

prosecution, but short of dismissal. In that case, the defendant made a "*Pitchess*" motion to discover the internal affairs records relating to two officers' use of excessive force. The trial judge determined that the files contained three complaints of excessive force. In two of the complaints, the departmental investigation concluded that the allegations were "not sustained." In the third, the officer's conduct was "exonerated." The judge ruled that because the departmental investigations had established no wrongdoing by the officers, the complaints were irrelevant and immaterial to the issues presented in the defendant's case. Although this ruling on the issue of relevance made it unnecessary for the trial judge to consider the question of privilege, he also sustained the city's claim of official information privilege. Pursuant to section 1042(a), the defendant requested an adverse finding of fact that the officers had used excessive force against the defendant, and that the defendant had acted in self-defense. Such findings, of course, would have been tantamount to a dismissal. The trial judge denied the request.

The court of appeal reversed on the issue of relevance. It held that even though the complaints were not verified, they were material to the accused's defense, and therefore they were discoverable. The court remanded the case to the trial court with instructions to reconsider the city's claim of official information privilege if it chose to reassert it. In dicta, the court of appeal suggested that if the trial judge sustained the claim of privilege again, he would have to formulate an adverse order or finding of fact pursuant to section 1042(a). The court rejected, however, the defendant's suggested finding of fact that the officers had used excessive force on the defendant. The court observed that so broad an order gave the defendant more than he was entitled to. Instead, the court suggested the more limited finding of fact that on three prior occasions, the two officers had actually used excessive force against citizens.[112]

The adequacy of the Court of Appeal's proposed finding of fact in *Kelvin L.* is questionable for two reasons. First, the Court of Appeal's suggestion cannot be considered equivalent to actual disclosure of the records themselves. Without disclosure of the records, the defendant is prevented from establishing parallels between past incidents of excessive force and his own case. He is precluded from using the records to cross-examine the officers effectively about their use of excessive force. Moreover, a defendant cannot utilize the privileged records to develop other evidence, such as additional witnesses to the prior incidents or witnesses to similar unreported incidents. Without further background and development, a plain adverse finding of fact, such as that suggested by the court of appeal in *Kelvin L.*,

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[112] *Id* at 831, 133 Cal. Rptr. at 331.

has little probative value and is not equivalent to disclosure of the records.

Second, *Kelvin L.* and Justice Clark's concurrence in *Pitchess* under-value the importance of the issue to which internal affairs records are material. The defendants in *Pitchess* and *Kelvin L.* sought the internal affairs records as character evidence of the officers' propensity for excessive violence. From this evidence, the triers of fact might have inferred that, as a matter of fact, the officers had used excessive force against the defendant and that the defendant had acted only in self-defense. Such character evidence would be material not only to the issue of whether the officers used excessive force in the past—as pointed out in Justice Clark's concurrence in *Pitchess*—but also to the issue of whether the officers used excessive force against the defendant. Therefore the evidence is material to the issue of a "*Pitchess*" defendant's guilt or innocence. Because there exists a reasonable possibility that such evidence might exculpate the defendant, the case law construing the constitutional mandate of due process suggests that the accused in a "*Pitchess*" case is entitled either to discovery of the internal affairs records or a dismissal of charges.[113]

Section 1042(a) provides that upon a successful claim of the official information privilege, the trial judge must make an adverse order or finding of fact, as is required by law, upon any issue to which the information is material. Thus, the judge's critical responsibility is to ascertain to what issues an item of privileged information is material. If it is material only to a collateral issue such as witness bias, due process requires only an adverse finding of fact or order not amounting to a dismissal. If the information is material to the defendant's guilt or innocence, however, even if its probative value is minimal, the judge should either require disclosure or dismiss the charges.

## CONCLUSION

*Shepherd v. Superior Court* defines the procedural framework for applying California's official information privilege to motions to discover governmental information. *Shepherd* requires the trial judge: (1) to evaluate the sufficiency of the discoverant's compliance with the foundation requirements for the discovery motion; (2) to ascer-

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[113]This analysis is supported by dicta in Pitchess v. Superior Court, *id.* at 539 n.5, 522 P.2d at 311 n.5, 113 Cal. Rptr. at 903 n.5. In that case, the sheriff attempted to claim a common law official information privilege, rather than the statutory privilege under § 1040, in order to avoid the adverse findings mandated by § 1042(a). The court noted:

> Petitioner's rationale for not claiming the statutory privilege is ironic in view of the fact that the trial court is equally compelled to dismiss a prosecution when material evidence is withheld from a defendant on a common law claim of governmental privilege. . . .

tain whether the governmental information was acquired in confidence; and (3) to balance the public and private interests affected by disclosure of the information.

The *Shepherd* procedure highlights the substantive limitations of the official information privilege. First, although the courts often overlook this requirement, the public entity must demonstrate that the information was acquired in confidence. Second, the trial judge must balance the public and private interests affected by the disclosure. Although *Shepherd* does not mandate any particular resolution of this balancing test, expansive construction of evidentiary privileges is not favored.

In addition, considerations of constitutional due process limit the government's ability to withhold its information when it initiates a proceeding against a private party. In criminal cases, due process should require the disclosure of information shown to be material to the accused's guilt or innocence or a dismissal of the case. Even when the information sought has minimal probative value in relation to the issue of guilt or innocence, the trial judge should not substitute a limited adverse order or finding of fact for complete disclosure or dismissal.

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