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OPINION	:	
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THE FRAUD ASSESSMENT COMMISSION has requested an opinion on the following question:

Are the applications for funds and annual reports submitted by district attorneys with respect to the allocation of money for the prosecution of workers' compensation insurance fraud cases by the Fraud Assessment Commission subject to public disclosure?

CONCLUSION

The applications for funds and annual reports submitted by district attorneys with respect to the allocation of money for the prosecution of workers' compensation insurance fraud cases by the Fraud Assessment Commission are subject to public disclosure unless it can be established that the public interest served by not making the information public clearly outweighs the public interest served by disclosure.

ANALYSIS

The Legislature recently enacted a comprehensive statutory scheme, the Insurance Frauds Prevention Act (Ins. Code, §§ 1871-1879.8; "Act"),¹ to provide resources to the Insurance Commissioner ("Commissioner") and the Department of Insurance ("Department") to "investigate and

¹All section references hereafter are to the Insurance Code unless otherwise specified.

discover insurance frauds, halt fraudulent activities, and assist and receive assistance from federal, state, local, and administrative law enforcement agencies in the prosecution of persons who are parties in insurance frauds." (§ 1871, subd. (a).) The Act establishes within the Department a Bureau of Fraudulent Claims, now known as the Fraud Division ("Division"), to enforce workers' compensation fraud statutes. The Commissioner is charged with insuring that the Division "aggressively pursues all reported incidents of probable workers' compensation fraud . . ." (§ 1872.83, subd. (a).)

The Act also establishes the Fraud Assessment Commission ("Commission") specifically to administer a program supporting the investigation and prosecution of workers' compensation fraud. (§ 1872.83.) The Commission is "composed of five members consisting of two representatives of self-insured employers, one representative of insured employers, one representative of workers' compensation insurers, and the President of the State Compensation Insurance Fund, or his or her designee." (§ 1872.83, subd. (b)(1).) The program is funded by assessments levied upon employers throughout the state. (§ 1872.83, subd. (b); Lab. Code, §§ 62.5, 62.6.)

We are asked to determine whether the applications for funds and reports submitted by district attorneys with respect to the special prosecutions program are subject to disclosure to members of the general public upon request. We conclude generally that the information must be disclosed.

The key statute requiring our analysis is section 1872.83, subdivision (d), which provides:

"After incidental expenses, 50 percent of the funds to be used for the purposes of this section shall be provided to the Bureau of Fraudulent Claims of the Department of Insurance for enhanced investigative efforts and 50 percent of the funds shall be distributed to district attorneys, pursuant to a determination by the commissioner with the advice and consent of the bureau and the Fraud Assessment Commission, as to the most effective distribution of moneys for purposes of the investigation and prosecution of workers' compensation insurance fraud cases. Each district attorney seeking a portion of the funds shall submit to the commissioner an application setting forth in detail the proposed use of any funds provided. A district attorney receiving funds pursuant to this subdivision shall submit an annual report to the commissioner with respect to the success of his or her efforts. Upon receipt, the commissioner shall provide copies to the bureau and the Fraud Assessment Commission of any application, annual report, or other documents with respect to the allocation of money pursuant to this subdivision. These documents shall be public records." (Italics added.)

Although the district attorneys' funds applications and reports constitute "public records," we must examine the provisions of the California Public Records Act (Gov. Code, §§ 6250-6270) to determine whether such records must be disclosed to the public.

The Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.) Government Code section 6253, subdivision (a) states that "every person has a right to inspect any public record, except as hereafter provided." Government Code sections 6254 and 6255 set forth a

variety of exemptions from the general disclosure rule, which exemptions are narrowly construed. (*City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1425; *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476.)

We know of no specific exemption that would be applicable here. The annual reports submitted by district attorneys are largely compilations of statistics and economic data. The applications for funding contain information as specified in the administrative regulations governing the program. (Cal. Code Regs., tit. 10, §§ 2698.50-2698.59.)² An application is to include a "county plan," described in Regulation 2698.55 as follows:

".....

"The County Plan shall include but need not be limited to the following elements detailing the county's qualifications and the manner in which the district attorney will use the funds to investigate and prosecute workers' compensation insurance fraud.

".....

"(b) Plan. The district attorney's plan for investigation and prosecution of workers' compensation fraud, including, at a minimum, the following elements:

"(1) Problem Statement. A description of the extent and nature of the problem in the county, including its sources and causes, its economic and social impact, its unique aspects, if any, and what is needed to resolve the problem. Supporting data, evidence, or indicators of fraudulent activity related to workers' compensation insurance should be included. The data and information may be derived from third party administrators, self-insured employers, other local law enforcement entities, insurers or the Fraud Division or the Investigation Bureau of the California Department of Insurance.

"(2) Program Strategy. This section shall specify how the district attorney will use program funds to address the problem defined above including:

"(A) Outreach. A description of the manner in which the district attorney will develop his or her caseload, the source(s) for referrals of cases for investigation and/or prosecution, whether directly from the Division and/or directly from self-insured employers, third-party administrators and insurers or a combination;

"(B) Personnel. The number, position titles and position justification of personnel to be funded fully or in part through grant funds, including descriptions of the

²All regulation references hereafter are to title 10 of the California Code of Regulations.

qualifications of personnel to be assigned to the program and an organization chart identifying positions to be funded;

"(C) Program Coordination. A description of the manner in which the district attorney plans to coordinate involved sectors, including employers, insurers, medical and legal provider communities, the Fraud Division and the Investigation Bureau of the California Department of Insurance;

"(D) Management Plan. The detailed plan and schedule of the steps the district attorney will complete in achieving the objectives of the program and a discussion of how the program will be organized and what internal quality control and budget monitoring procedures will be employed. This part should also include how this program will be integrated with any other anti-fraud program(s) maintained within the district attorney's office;

"(E) Staff Development. The plan for ongoing training of personnel on the workers' compensation system and the investigation and prosecution of fraud. Staff development may be addressed through coordination with the Division insurers or other entities;

"(3) Objectives. This section shall outline the district attorney's anticipated achievements in the following areas:

"(A) Estimated number of investigations to be initiated during the grant period, including a separate estimate of the number resulting from carry-over investigations; and

"(B) Estimated number of prosecutions to be initiated during the grant period."

While the information contained in a district attorney's application for program funds and in his annual report are designated "public records" by the Legislature, information pertaining to individual acts of fraud detected by workers' compensation insurers and reported to governmental agencies "shall not be part of the public record" and shall not be released to unauthorized persons. Section 1877.4 provides:

"(a) Any information acquired pursuant to [sections 1877-1877.5] shall not be a part of the public record. Except as otherwise provided by law, any authorized governmental agency, an insurer, or an agent authorized to act on its behalf, which receives any information furnished pursuant to [sections 1877-1877.5] shall not release that information to any person not authorized to receive the information under [sections 1877-1877.5]. Any person who violates the prohibition of this subdivision is guilty of a misdemeanor.

"(b) The evidence or information described in this section shall be privileged and shall not be subject to subpoena or subpoena duces tecum in a civil or criminal

proceeding, unless, after reasonable notice to any insurer, an agent authorized by an insurer to act on its behalf, or an authorized governmental agency which has an interest in the information, and a hearing, the court determines that the public interest and any ongoing investigation by the authorized governmental agency, insurer, or an agent authorized by the insurer to act on its behalf will not be jeopardized by its disclosure, or by the issuance of and compliance with a subpoena or subpoena duces tecum."³

It is thus apparent that the Legislature was cognizant of confidentiality concerns when the Act was enacted, but nevertheless specifically chose to exempt from disclosure only that information which was acquired, received, or furnished in connection with a particular workers' compensation insurance fraud investigation. A district attorney's funding application and annual report, on the other hand, are not intended to contain such information.

We believe that the only possible basis for withholding disclosure of a district attorney's funding application or annual report would be the "catch-all" provision of Government Code section 6255. It allows the withholding of a document from disclosure when the public interest so requires:

"The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter *or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.*" (Italics added.)

The balancing test of this statute has been applied in a variety of circumstances. (See, e.g., *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 467 [Department of Justice index cards withheld as too burdensome]; *Register Div. of Freedom Newspaper, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 908-910 [county case settlement documents ordered disclosed]; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 345-346 [city employee's employment records ordered disclosed]; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 780 [city contractor's financial data ordered disclosed]; *Eskaton Monterey Hospital v. Myers* (1982) 134

³Consistent with this treatment of a governmental agency's investigatory files, Government Code section 6254, subdivision (f) exempts from public disclosure:

"Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local police agency for correctional, law enforcement, or licensing purposes. . . ."

It should be noted that under this statutory provision, a public agency may not shield a document from disclosure with the bare assertion that it relates to an investigation. (*Williams v. Superior Court (Freedom Newspapers, Inc.)* (1993) 5 Cal.4th 337, 343.) "[T]he 'intelligence information' exemption bars disclosure of information that might identify [crime suspects], that might identify confidential sources, or that was supplied in confidence by its original source." (*American Civil Liberties Union Foundation v. Deukmejian, supra*, 32 Cal.3d at p. 450.)

Cal.App.3d 788, 792-794 [Medi-Cal audit manual withheld]; *Johnson v. Winter* (1982) 127 Cal.App.3d 435, 438-439 [employee applicants' personnel data given with assurance of confidentiality withheld]; *American Federation of State etc. Employees v. Regent of University of California* (1978) 80 Cal.App.3d 913, 915-919 [university audit report withheld]; *Proconier v. Superior Court* (1973) 35 Cal.App.3d 211 [prison building plans and security information withheld]; *Yarish v. Nelson* (1972) 27 Cal.App.3d 893, 902 [certain prison records of inmates withheld]; *Uribe v. Howie, supra*, 19 Cal.App.3d at 205-206 [pesticide applicator's spray reports ordered disclosed].)

While we need not speculate on what particular information in a district attorney's funding application or annual report might merit the balancing test of Government Code section 6255, we point out that "[t]he burden of demonstrating a need for nondisclosure is upon the agency claiming the right to withhold the information" (*Braun v. City of Taft, supra*, 154 Cal.App.3d at p. 345.) "Each case must undergo an individual weighing process." (*Id.*, at p. 346.) Upon appellate review, the court will determine whether there is substantial evidence to uphold the trial court's findings. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 650-651.)

Similar to the balancing test of section 6255 is the test for withholding "official information" under the terms of Evidence Code section 1040, subdivision (b)(2). This statute provides:

"(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and:

"(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

"(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 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.*

"....." (Italics added.)

The balancing test of subdivision (b)(2) of Evidence Code section 1040 is essentially equivalent to that set forth in Government Code section 6255 discussed above. (*CBS, Inc. v. Block, supra*, 42 Cal.3d at p. 656; see *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at p. 1339, fn. 9.)⁴

Finally we note that although a public record may contain some confidential information, such fact may not justify withholding the entire document. (*State Bd. of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177, 1187.) "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law." (Gov. Code, § 6257; see *Northern Cal. Police Practices Project v. Craig* (1979) 90 Cal.App.3d 116, 123-124.) "[W]here nonexempt materials are not inextricably intertwined with exempt materials and are otherwise reasonably segregable therefrom, segregation is required to serve the objective of the [California Public Records Act] to make public records available for public inspection and copying unless a particular statute makes them exempt." (*American Civil Liberties Union Foundation v. Deukmejian, supra*, 32 Cal.3d at 453, fn. 13.)

We conclude that the applications for funds and annual reports submitted by district attorneys with respect to the allocation of money for the prosecution of workers' compensation insurance fraud cases by the Commission are subject to public disclosure unless it can be established that the public interest served by not making the information public clearly outweighs the public interest served by disclosure.

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⁴ It should be noted that when invoked in a criminal proceeding, the official information privilege exacts a toll. Evidence Code section 1042, subdivision (a) provides:

"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."

The terms of Evidence Code section 1040 would control whether a Commission member would be required to disclose the information in question in response to a subpoena, a subpoena duces tecum, or a direct question at a deposition, hearing, or trial.