

Comments

DISCOVERY PRIOR TO ADMINISTRATIVE ADJUDICATIONS— A STATUTORY PROPOSAL

California is an acknowledged leader in the development of civil and criminal discovery. In 1957 the legislature provided the civil litigant with a splendid array of discovery devices patterned after the federal rules.¹ The courts have liberally applied this legislation² and have, in addition, made radical innovations in criminal discovery.³ Yet little has been done to give discovery rights to the private litigant in an administrative adjudication.

This lacuna is, on the face of it, somewhat difficult to justify. The expressed rationale for discovery in civil adjudications—that it minimizes “gamesmanship” and surprise, identifies and simplifies the issues, and tends, in the long run, to expedite the adjudicatory process—seems also applicable to administrative adjudications.⁴ In addition, notions of fairness argue for discovery.⁵ While the agency’s investigatory powers are very broad,⁶ the private litigant generally lacks the right to get in-

¹ CAL. CODE CIV. PROC. §§ 2016-35. These provisions are similar to, but not identical with, Federal Rules of Civil Procedure §§ 26-37. For a comparison, see LOUISELL, *MODERN CALIFORNIA DISCOVERY* (1963). The legislature amended the discovery provisions in 1959, 1961, and 1963. Section 2036 was added by the last amendment.

² The leading case is *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961). Since then the supreme court has considered the discovery provisions on numerous occasions and has consistently maintained a “liberal” viewpoint. See, e.g., *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964); *Beesley v. Superior Court*, 58 Cal. 2d 205, 373 P.2d 454, 23 Cal. Rptr. 390 (1962); *San Diego Professional Ass’n v. Superior Court*, 58 Cal. 2d 194, 373 P.2d 448, 23 Cal. Rptr. 384 (1962); *Oceanside Union School Dist. v. Superior Court*, 58 Cal. 2d 180, 373 P.2d 439, 23 Cal. Rptr. 375 (1962); *Suezaki v. Superior Court*, 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962).

³ See Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Comment, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135 (1963).

⁴ On the rationale for discovery, generally, see: *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 376, 364 P.2d 266, 275, 15 Cal. Rptr. 90, 99 (1961); Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944-46 (1961).

Of course, discovery may be more useful in some kinds of adjudications than in others. To the extent that the issues are simple and each party knows the facts—as they are known to the other party—discovery becomes less useful. No detailed empirical study of these considerations is attempted in this Comment.

⁵ See Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch up with the Courts*, 46 A.B.A.J. 74 (1960).

⁶ CAL. GOV’T CODE §§ 11180-81 provide the basic investigatory powers for department heads of California agencies. Many specific statutes also give subpoena power to administrative officials. See, e.g., CAL. BUS. & PROF. CODE §§ 18627-28; CAL. GOV’T CODE §§ 13907-11;

formation he may need to prepare for the hearing. There are, of course, structural and functional differences between civil and administrative adjudications, and these differences may require special procedures for, and limitations on, administrative discovery. Still, the near total lack of discovery prior to administrative adjudications is anomalous.

Yet all has not been quiet. In 1962 the Supreme Court of California, in *Brotsky v. State Bar*,⁷ applied Sections 2016 to 2035 of the Code of Civil Procedure to disciplinary proceedings before the State Bar. The decision, however, does not seem to portend further extension of the civil rules to administrative adjudications, for the court was careful to point out that the State Bar was more than "an administrative board in the ordinary sense of the phrase. It is *sui generis*. . . ."⁸ The following year a bill was introduced in the state assembly which would have applied the civil discovery sections to all state Administrative Procedure Act adjudications.⁹ The bill was approved by the assembly but died in the Senate Judiciary Committee.¹⁰ That same year limited discovery rights were given to civil service employees involved in punitive proceedings.¹¹ In addition, state administrative officials and the legislature have shown significant concern with the problem.¹²

CAL. HEALTH & SAFETY CODE §§ 34317-18. United States Supreme Court decisions have given administrative officials broad investigatory power. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Shapiro v. United States*, 335 U.S. 1 (1948). The California courts have done likewise. See *Brovelli v. Superior Court*, 56 Cal. 2d 524, 364 P.2d 462, 15 Cal. Rptr. 630 (1961); *Redding Pine Mills v. State Board of Equalization*, 157 Cal. App. 2d 40, 320 P.2d 25 (1958).

⁷ 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962).

⁸ *Id.* at 300, 368 P.2d at 703, 19 Cal. Rptr. at 159.

⁹ A.B. 3067 would have enacted the following as CAL. GOV'T CODE § 11511.5: "In the period between the filing of the accusation and the commencement of the hearing, any party may take the testimony of any person by deposition or file and serve upon any adverse party written interrogatories to be answered by the party served pursuant to the provisions of Sections 2016, 2018, 2019, 2020, 2021, 2024, 2030, 2032, and 2034 of the Code of Civil Procedure."

¹⁰ STATE OF CAL., FINAL CALENDAR OF LEGISLATIVE BUSINESS 926 (1963).

¹¹ Cal. Stat. ch. 2138, § 1 (1963), enacted as CAL. GOV'T CODE § 19574.1 provides: "An employee who has been served with notice of punitive action, or an attorney admitted to the practice of law in this State and designated by him, shall have the right to inspect any documents in the possession of or under the control of the appointing power which are relevant to the punitive action taken and which would be admissible in evidence at a hearing of the employee's appeal from the punitive action. The employee, or his attorney, shall also have the right to interview other employees having knowledge of the acts or omissions upon which the punitive action was based. Interviews of other employees and inspection of documents shall be at times and places reasonable for the employee and for the appointing power." See also CAL. HEALTH & SAF. CODE § 35733.

¹² On April 3, 1964, a joint meeting of the Assembly Judiciary Committee and hearing officers of the Office of Administrative Procedure was held to discuss the problem. On June 24 and 25 the Assembly Judiciary Committee held hearings on the subject in San Diego. Among those testifying on the subject were representatives from the Attorney General's

In light of this incipient development,¹³ this Comment will explore the present scope of a private litigant's right to information prior to an administrative adjudication¹⁴ and will then propose and explain a statutory scheme for discovery.

I

ACCESS TO INFORMATION: A LIMITED RIGHT

A private litigant seeking to discover information from a state agency prior to an adjudication before the agency will find no ready answers to his problems. The present law is too uncertain and too limited to provide adequate discovery rights.

Little authority for allowing discovery can be found, for example, in California's Administrative Procedure Act. Section 11503, providing that the accusation shall be drawn so that "respondent will be able to prepare his defense," is a step in the right direction, but a rather limited step.¹⁵

Office, The Office of Administrative Procedure, the Division of Real Estate, and the Department of Investment.

The Office of Administrative Procedure, through its Presiding Officer, Mr. George R. Coan, and Special Counsel, Mr. Charles H. Bobby, went on record as opposing any broad extension of discovery with respect to APA hearings. This position was based on their view that broad discovery would: (1) result in additional cost to both the state and respondents; (2) complicate proceedings by adding technical steps to a procedure designed to be uncomplicated; (3) offer opportunity for unnecessary delay and maneuvering. Furthermore, in their experience they saw no need for "complicated discovery procedures."

The Office of Administrative Procedure did, however, see need for limited discovery. Therefore, it proposed three recommendations:

- (1) "That Govt. Code section 11513 be amended to permit the examination of the respondent at the hearing as if under section 2055 of the Code of Civil Procedure."
- (2) "That legislation be adopted establishing a right in the respondent to inspect, copy, or analyze all documentary evidence intended to be offered in evidence by the agency and any written statements of the respondent in the possession of the agency. This legislation should provide that in the event the agency fails or refuses to make such documentary evidence available for inspection, that such documents shall not be received into evidence unless upon good cause shown (*i.e.*, documents not in the possession of the agency at time of request or time of inspection, etc.)."
- (3) "Amendment of sections 11503 and 11504 of the Govt. Code to provide that accusatory pleadings should contain the last known address of all persons mentioned therein."

¹³ For a treatment of the problems of administrative discovery on the federal level see Comment, *Discovery in Federal Administrative Proceedings*, 16 STAN. L. REV. 1035 (1964).

¹⁴ While the primary focus of this comment is on the right to discovery of private litigants, the act proposed in Part H also gives rights to the agency. The proposed statute and the majority of the discussion deal with California state adjudications.

¹⁵ In many cases this section might provide the right to "discover" information that the respondent needs. The standard imposed requires a much more detailed statement than is required in civil pleadings. Yet it is admitted that more often than not the accusation does not measure up to the statutory standards. Furthermore, this section does not allow the respondent to depose third persons who might have given the agency information. Finally, it

The position of the private litigant is not materially improved by the provision of section 11505(a) that the agency "may include with the accusation any information it deems appropriate."¹⁶ Language in section 11510(a),¹⁷ if taken literally and out of context, could be read to permit discovery by use of a subpoena duces tecum. Yet the fact that notice of the subpoena right need only be given ten days prior to the hearing¹⁸ argues strongly against a legislative intent that section 11510(a) be applicable to pre-hearing discovery. Further, the time sequence structure of sections 11500 to 11538 indicates that section 11510 was meant to relate only to hearings.¹⁹ Section 11511, relating to depositions of "witnesses," seems also to be directed to the hearing.²⁰ The lack of provision for discovery in these sections is quite understandable since they were enacted in 1945, well before the full development of discovery in California; undoubtedly the legislature did not even consider the problem.²¹

Apart from the rights granted by these specific provisions of the Administrative Procedure Act, the private litigant has the right to inspect records and documents which administrative agencies are required to keep open to the public. Yet even within its limited operative area—inspection of writings—this right is unclear and limited. A great many statutes provide that the "records" of a particular agency are

does not allow the respondent to discover favorable information which the agency may have in its file.

¹⁶ CAL. GOV'T CODE § 11505(a) so provides.

¹⁷ CAL. GOV'T CODE § 11510(a) provides in part: "Before the hearing has commenced the agency, or the assigned hearing officer, shall issue subpoenas and subpoenas duces tecum at the request of any party"

¹⁸ CAL. GOV'T CODE § 11509.

¹⁹ The order of the procedural sections of the California Administrative Procedure Act seems to be chronological. Section 11505 deals with service of the accusation, notice of defense and request for hearing; § 11506 deals in more detail with the notice of defense; § 11507, with amending the pleadings; § 11508, with the time and place of the hearings; § 11509, with notice of hearing; § 11510, subpoenas; § 11511, depositions; § 11512, the hearing. It is arguable that if subpoenas and depositions were aimed at pre-hearing discovery they would have been treated earlier, at least before notice of hearing.

²⁰ In the case of *Labat v. Real Estate Comm'r*, Doc. # 525696 (Jan. 29, 1964) the Superior Court of San Francisco denied a private litigant the right to take a deposition. Since no memorandum opinion was written, it is not certain whether § 11511 was considered by the court.

²¹ The report of the Judicial Council relating to the California Administrative Procedure Act contained nothing to indicate an awareness of potential discovery problems. JUDICIAL COUNCIL OF CALIFORNIA, TENTH BIENNIAL REPORT 74-79 (1944).

For an argument that analogous sections of the Federal APA should be interpreted to allow for discovery see Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch up with the Courts*, 46 A.B.A.J. 74 (1960). It has been argued, however, that nothing in the legislative history of the Federal APA points to that result. See House Comm. on the Judiciary, *Confidential Records in Federal Administrative Agencies Voluntary Disclosure, and Discovery Proceedings*, H.R. Doc. No. 26, 87th Cong., 2d Sess. 2 (1962).

open to the public.²² Many of these statutes appear to be absolute,²³ others make the records public "except as otherwise provided by law."²⁴ Although these sections may help the private litigant, presumably he must first establish that the writing he wants is a "record."

If the agency involved in the adjudication is not covered by one of these specific statutes, or if the writing sought is not a "record," two general statutory provisions are available. Section 1892 of the Code of Civil Procedure gives a citizen inspection rights in "public writings," and Section 1227 of the Government Code gives similar rights in "public records and other matters."²⁵ An initial problem is one of definition. "Public writings" (which seems to be synonymous with "public records") includes recorded instruments such as deeds,²⁶ laws,²⁷ and judicial records.²⁸ More significantly it includes "other official documents" which are "written acts or records of the acts" of a public body or officer.²⁹ In giving meaning to this language both the courts and the attorney general's office seem to agree that: (1) a document does not become a public writing or record merely because it is in the possession of a public officer;³⁰ and (2) if the document requires later approval or is merely

²² It is stated that these statutes affected more than seventy state agencies. Comment, 50 CALIF. L. REV. 79, 83 (1962).

²³ See, e.g., CAL. BUS. & PROF. CODE §§ 3020 (Board of Optometry); 6715 (Board of Registration for Civil and Professional Engineers); CAL. GOV'T CODE § 15487 (Board of Investment); CAL. LABOR CODE § 3092 (Apprenticeship Council). The author of Comment, *Inspection of Public Records Under California Law*, 50 CALIF. L. REV. 79 (1962) states at page 83 that 47 agencies were subject to similar provisions.

²⁴ See, e.g., CAL. BUS. & PROF. CODE §§ 2122 (Board of Medical Examiners); 2713.5 (Board of Nursing Examiners); 5014 (Board of Accountancy); CAL. GOV'T CODE § 20137 (Board of Administration, State Employees' Retirement System). As of 1962, 25 agencies were subject to similar provisions. 50 CALIF. L. REV. 79 (1962).

²⁵ CAL. CODE CIV. PROC. § 1892 provides: "Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute."

CAL. GOV'T CODE § 1227 provides: "The public records and other matters in the office of any officer, except as otherwise provided, are at all times during office hours open to inspection by any citizen of the State."

²⁷ OPS. CAL. ATT'Y GEN. 30 (1956) stated that a citizen could make copies under § 1227.

²⁸ CAL. CODE CIV. PROC. §§ 1888(2), 1894(4). See 10 OPS. CAL. ATT'Y GEN. 111 (1947) (certified copy of will is open to public when filed).

²⁷ CAL. CODE CIV. PROC. § 1894(1).

²⁸ CAL. CODE CIV. PROC. § 1894(2).

²⁹ See CAL. CODE CIV. PROC. §§ 1881(1), 1894(3), and *Musher v. Department of Pub. Serv.*, 35 Cal. App. 630, 170 Pac. 653 (1917) which construed these two sections. For a discussion of that construction, see Comment, 50 CALIF. L. REV. 79, 80 (1962).

³⁰ See *Whelan v. Superior Court*, 114 Cal. 548, 46 Pac. 468 (1896); *City Council of Santa Monica v. Superior Court*, 204 Cal. App. 2d 68, 21 Cal. Rptr. 896 (1962); *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P.2d 546 (1959); *Miller v. Murphy*, 78 Cal. App. 751, 248 Pac. 934 (1926); 36 OPS. CAL. ATT'Y GEN. 2 (1960).

"preliminary" it is not a public writing.³¹ These limitations may be short-circuited because the desired document may be "other matters" within the meaning of section 1227.

"Other matters" has been construed to mean other public matters—other matters in which the whole public may have an interest.³² This interpretation raises a problem for the private litigant, since he has an interest in information which his fellow citizens may not share.

If the document in which the private litigant is interested is a "public writing" or "other matter" he still may not be able to inspect it. Two obstacles stand in his way. The first relates to the "exception clauses" of sections 1892 and 1227. Public writings are not open to inspection if "otherwise expressly provided by statute," and public records and other matters are not accessible if "otherwise provided." The legislature has enacted many specific statutes which provide that certain information shall be confidential.³³ Other statutes provide that records may be made confidential in the discretion of administrative officials.³⁴

The second obstacle to access is section 1881(5) of the Code of Civil Procedure, which provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." While this is an evidentiary privilege, it seems clear that its main purpose would be frustrated if the public officer could be compelled to give the information prior to the trial or hearing.³⁵

While this analysis demonstrates that the right to inspect documents

³¹ See *Coldwell v. Board of Pub. Works*, 187 Cal. 510, 202 Pac. 879 (1921) (documents not approved by city engineer characterized as mere preliminary matters); *City Council of Santa Monica v. Superior Court*, 204 Cal. App. 2d 68, 21 Cal. Rptr. 896 (1962). 36 Ops. CAL. ATT'Y GEN. 2 (1960).

³² This interpretation originated in the *Whelan* case decided in 1896. The *Whelan* court's rather broad statement has been used as recently as 1962 by the district court of appeals in *City Council of Santa Monica*.

³³ See, e.g., CAL. CIVIL CODE § 79.09 (reports of premarital examinations); CAL. HEALTH & SAFETY CODE §§ 10253, 10253.5, 10278, 10278.5 (birth certificates of adopted and legitimated children); CAL. INS. CODE §§ 1433 (records of reciprocal insurers), 12919 (communications regarding license holders and applicants); CAL. PEN. CODE § 11105 (records of Bureau of Criminal Identification); CAL. PUB. RES. CODE § 2207 (reports of mining operations filed with State Mineralogist); CAL. REV. & TAX. CODE § 833 (information relating to the property statement filed with the Board of Equalization), § 451 (information furnished assessor), § 7056 (information regarding sales and use taxes); CAL. VEH. CODE § 118 (applications for public assistance).

³⁴ See, e.g., CAL. CORP. CODE § 25314 (Commissioner of Corporations); CAL. GOV'T CODE § 10207 (Legislative Counsel); CAL. FIN. CODE §§ 8710, 8753, 8754 (Division of Savings & Loan).

³⁵ The California Administrative Procedure Act provides that rules of privilege shall apply to the same extent as in civil actions. CAL. GOV'T CODE § 11513(c). The practice in non-APA proceedings varies. JUDICIAL COUNCIL, TENTH BIENNIAL REPORT 98 (1944).

is at best uncertain, it by no means exhausts the problems facing the private litigant embroiled in an administrative adjudication. He may be interested in more than mere inspection of documents. He may want to examine an agency officer by deposition. He may desire an admission of fact to narrow the issues to be adjudicated. He may need documents or information which is not in the possession of the agency or its officers but rather in the possession of a private party involved in the adjudication. Yet the statutory provisions relating to inspection of documents give him no assistance. He is thus left to the good, or perhaps arbitrary will of the agency.

II

A STATUTORY SCHEME FOR DISCOVERY

The private litigant, then, has a very uncertain and limited right to information. The courts in the future may give him additional discovery rights through either a case by case analysis or a wholesale adoption of Sections 2016 to 2036 of the Code of Civil Procedure, as was done in *Brotsky v. State Bar*.³⁶ Either alternative has disadvantages. The uncertainty and delay produced by a case by case analysis should be avoided if possible. The adoption of the civil rules is, at best, dangerous. The administrative and civil adjudicative processes differ both structurally and procedurally. A hearing officer, not a judge, controls the hearing and pre-hearing proceedings in an administrative adjudication.³⁷ The hearing officer may not enforce a subpoena.³⁸ The administrative process may require at once a more expeditious and a more flexible set of discovery rules. Sanctions appropriate and effective in civil cases may not be in administrative cases.³⁹ Problems of judicial review may differ.⁴⁰ These differences can best be accommodated by statutory provisions designed for administrative proceedings.

³⁶ 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962).

³⁷ See CAL. GOV'T CODE § 11502 for APA proceedings.

³⁸ CAL. GOV'T CODE § 11525; Note, 34 CALIF. L. REV. 428 (1946). The hearing officer may, however, issue subpoenas. CAL. GOV'T CODE § 11510.

³⁹ In an ordinary civil case, only private interests are likely to be involved. Hence a decision in favor of the opposing party may be a proper sanction for refusal to comply with the relevant discovery provisions. See CAL. CODE CIV. PROC. § 2034. Administrative regulation, however, usually presupposes a public interest that the regulation is designed to promote. In view of this public interest, it seems clear that a decision against the agency might be inappropriate, even in cases involving willful noncompliance with the act. For example, the agency's noncompliance should not cause a license to issue if the applicant's fitness is not otherwise established. See § 11538(c) of the proposed act.

⁴⁰ A reviewing court is at least as competent to decide questions of law as the trial court. Most problems in "administrative law," on the other hand, are actually mixed questions of law and fact, often with a substantial admixture of political discretion. As a conse-

The rights and procedures provided by such a statute may be illustrated by a hypothetical example based on the statute proposed in the remainder of this Comment. Assume that *L*, holding a license granted by agency *A*, receives an accusation from *A* indicating that, because of unprofessional conduct during the past two years, the agency is contemplating revocation of *L*'s license. *L*'s attorney, after examining the accusation and discussing the matter with *L*, decides he must have more information to defend his client properly. Believing the information he seeks is discoverable (relevant and not privileged) he may informally request it or use any of the discovery devices commonly used in civil suits. If his demand is not complied with within a reasonable time, *L*'s attorney would notify the assigned hearing officer of the situation. The hearing officer would consider both sides of the discovery issue and would issue a discovery order. The order may be reviewed by the superior court upon application of a still disgruntled party. Appropriate sanctions may be imposed by the hearing officer or the court.

This general hypothetical, of course, leaves many questions posed but unanswered. The remainder of this Comment will propose and explain a statute which, it is hoped, will provide many of the answers. As proposed the statute would be codified as sections 11530 to 11541 of the California Government Code.

The People of the State of California do enact as follows:

Section 1, Chapter 5.5 of Part 1 of Division 3 of Title 2 of the Government Code is added to that code to read:

Chapter 5.5. Discovery in Administrative Adjudications

§ 11530. *Citation*

This chapter may be cited as the Administrative Discovery Act.

§ 11531. *Definitions*

In this chapter:

(a) "Person" includes any individual, State agency, officer, member or employee of any State agency, corporation, partnership, association or other group. "Person" includes "party."

(b) "Party" means the State agency and the respondent.

(c) "Respondent" means any person against whom proceedings are initiated in a State agency adjudication or any person who initiates a hearing before a State Agency to secure for himself the granting, issuance or renewal of a right, authority, license or privilege.

(d) "State agency" does not include an agency in the judicial or legislative departments of the State government.

quence, there is a widespread judicial tendency to defer to the "expertise" of the administrative agency. The federal standard of review is outlined in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The general California standard is codified in CAL. CODE CIV. PROC. § 1094.5.

(e) "Discover" means to obtain information for use in connection with a State agency adjudication by means of depositions upon oral examination, depositions upon written interrogatories, demands for admissions of fact or of the genuineness of documents, written interrogatories, physical, mental or blood examinations, or demands for inspection or production of documents or other things.

(f) "Hearing officer" means the individual charged with conducting the hearing. It includes, but is not limited to, individuals qualified under section 11502 of this code.

(g) "Discovery order" means an order made by the hearing officer determining whether information shall be discovered. The order may contain instructions as to when, where and how the information may be discovered.

(h) "Initiation of proceedings" means:

- (1) if the proceeding is brought against the respondent, service of an accusation or statement of issues upon the respondent;
- (2) if the proceeding is brought by the respondent, filing of a statement of issues with the agency.

Comment: The definitions in this section are commented on in connection with other sections of the act.

§ 11532. *Right to Discover*

(a) Subject to the limitations of sections 11533 and 11537(d), any party to an adjudication required to be determined on the record after opportunity for a State agency hearing may, at any time after the initiation of proceedings, discover from any person information, which is not privileged, relevant to the subject matter involved in the adjudication.

(b) Information is privileged if it would be privileged in civil discovery proceedings.

(c) For purposes of this act the work product rule, as set forth in section 2016(b) of the Code of Civil Procedure, shall be considered a privilege.

Comment: This section provides the basic right to discover information. It applies to all State agency adjudications which are required by law to be determined on the record after a hearing.⁴¹ Thus, it does not apply

⁴¹ The California Administrative Procedure Act applies only to specifically designated proceedings. CAL. GOV'T CODE § 11501(a). Since the need for discovery is likely to be at least as great in an administrative proceeding not subject to the APA as in a hearing that is subject to it, the proposed act has been drawn so as to encompass both APA and non-APA proceedings. Identical terms are employed in the federal Administrative Procedure Act. 5 U.S.C. § 1005 (1958). Section 1094.5 of the Code of Civil Procedure contains substantially equivalent language.

to rule making functions of State agencies⁴² or routine administrative decisions which do not require a determination on the record.

"State agency" is defined in section 11531(d) and does not include any branch of the judicial or legislative departments.⁴³ Implicit in "State agency" is the limitation that the act does not apply to county or other local adjudications.⁴⁴ The draftsmen did not think that enough was known about the myriad of local adjudicatory proceedings to frame a workable statute applicable to them.⁴⁵ The statute, however, does apply to *all* State agency adjudications whether or not covered by the Administrative Procedure Act.⁴⁶ Many of the most important adjudications are held by agencies not covered by the APA,⁴⁷ and the draftsmen saw no sound reason for exempting them from the discovery act.

Any "party" to the adjudication has the right to discover information. By definition (section 11531(b)) this includes the agency as well as the private litigant. While, at the present time, the agency has broad investigatory powers,⁴⁸ discovery techniques may be advantageous to it as well as to a private litigant. The agency's right under this section, however, is not meant to limit any of its present investigatory powers. See section 11541(a). Thus, for example, the agency need not wait until the proceedings are initiated to commence an investigation.⁴⁹

Discovery may be had against any person. The term "person" is broader than "party." See section 11531(a). The agency and the respondent may discover information not only from each other but from others

⁴² See *Security-First Nat'l Bank v. Franchise Tax Bd.*, 55 Cal. 2d 407, 359 P.2d 625, 11 Cal. Rptr. 289 (1961); *Franchise Tax Bd. v. Superior Court*, 36 Cal. 2d 538, 225 P.2d 905 (1950) (no requirement of hearing to determine tax rate on banks).

⁴³ An identical definition of state agency may be found in CAL. GOV'T CODE § 11371(a).

⁴⁴ Local agencies are excluded from the operation of the proposed act by CAL. GOV'T CODE § 11000.

⁴⁵ CAL. GOV'T CODE § 11000 may perhaps be presumed to reflect an informed legislative judgment that the conditions and problems facing local agencies are sufficiently diverse to preclude effective state regulation of local administrative practices.

⁴⁶ CAL. GOV'T CODE § 11501(a) provides that: "The procedure of any agency shall be conducted pursuant to the provisions of . . . [the Administrative Procedure Act] only as to those functions to which this chapter is made applicable by the statutes relating to the particular agency." "Agency" is defined in § 11500 to include "the state boards, commissions and officers enumerated in Section 11501 and those to which this chapter is made applicable by law. . . ." Subsection 11501(b) enumerates over 50 agencies to which the act may be applicable.

⁴⁷ While many agencies are covered by the APA, some of them are only partially subject to its provisions. See, e.g., *Hough v. McCarthy* 54 Cal. 2d 273, 353 P.2d 276, 5 Cal. Rptr. 668 (1960) (few functions of Department of Motor Vehicles subject to APA); *Bertch v. Social Welfare Dep't.*, 45 Cal. 2d 524, 289 P.2d 485 (1955) (determinations of eligibility for old age benefits not subject to APA). Other agencies, such as the Public Utilities Commission, are not at all subject to the act.

⁴⁸ See note 6 *supra*.

⁴⁹ The term "initiation of proceedings" is defined in proposed § 11531(h).

who may have relevant, non-privileged information. For example, the respondent might take the deposition of a person whose complaints led to the proceedings.

The proposed minimum requirements for administrative discovery are substantially identical to those in civil discovery. The relevancy requirement has been liberally interpreted by the courts. Discovery may not be refused because the information sought will be inadmissible at the hearing if it "appears to be reasonably calculated to lead to the discovery of admissible evidence."⁵⁰ Moreover, it is not relevancy to particular issues that is significant but relevancy to the "subject matter involved" in the pending hearing.⁵¹

The privilege requirement presents a more difficult problem.⁵² Section 1881 of the Code of Civil Procedure contains the statutory privileges that may be applicable. Two privileges set forth in that section are particularly important in administrative proceedings. Section 1881(5) contains the public officer privilege.⁵³ The expressed rationale of this privilege is to assure the agency an adequate flow of information from persons who would hesitate to give information they thought would be made public.⁵⁴ The privilege is not absolute but is applicable only if the "public interest" requires. No magic rules exist for determining what the public interest requires. What the courts should do is to balance the need of the person desiring the information against the impact on the agency's sources were it disclosed. This apparently is what they are doing.⁵⁵ The courts have also held that there is no need for an express promise of confidence to

⁵⁰ The same standard is used in the civil discovery rules. CAL. CODE CIV. PROC. § 2016(b). See, e.g., *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961). On the other hand limits on the scope of inquiry do exist. See *Chalco-California Corp. v. Superior Court*, 59 Cal. 2d 883, 382 P.2d 865, 31 Cal. Rptr. 593 (1963), where the supreme court refused to disturb the trial court's decision to deny discovery in a contract action.

⁵¹ Cf. CAL. CODE CIV. PROC. § 2016(b).

⁵² CAL. GOV'T CODE § 11513 provides that privileges shall be recognized to the same extent in APA proceedings as they are in civil proceedings.

⁵³ See text preceding note 34 *supra*.

⁵⁴ See *City & County of San Francisco v. Superior Court*, 38 Cal. 2d 156, 162, 238 P.2d 581, 584-85 (1951). Cf. *Chronicle Pub. Co. v. Superior Court*, 54 Cal. 2d 548, 570, 354 P.2d 637, 648, 7 Cal. Rptr. 109, 120 (1960).

⁵⁵ Moore, in discussing the federal governmental privilege and the federal rules for discovery, distinguishes between situations in which the government is not a party and those in which it is. He further distinguishes between cases in which the government is the plaintiff and those where it is the defendant. See MOORE, *FEDERAL PRACTICE* § 26.25, at 1544, 1561-1626. On the whole, the California cases, in result if not language, seem consistent with his thesis and with a balancing approach. For example, in cases where the state seeks to withhold the names of informers in criminal prosecutions, recent case law has required disclosure. See, e.g., *People v. Durazo*, 52 Cal. 2d 354, 340 P.2d 594 (1959); *People v. Williams*, 51 Cal. 2d 355, 333 P.2d 19 (1958).

be made to the informant.⁵⁶ It is not clear whether the agency may waive the privileges.⁵⁷ While no authoritative answer can be given the courts do not appear to have reversed an officer's determination to make the information public.

A second privilege contained in section 1881 is the attorney-client privilege. The primary purpose of this privilege is to encourage free disclosure of information by the client to the attorney.⁵⁸ For example, a defendant in a personal injury action should be encouraged to disclose all information to his attorney, no matter how damaging it may be. Serious questions have been raised regarding the extent to which this privilege should be available to corporate litigants.⁵⁹ The same problems arise with respect to public agencies for they too can "speak" only through their agents. While the courts have seen the problems, final answers on many questions have not yet been given.⁶⁰ At present it would seem, however, that the agency will not be able to claim the privilege with respect to statements made by complaining citizens to an attorney for the agency or to the Attorney General.⁶¹

The attorney-client privilege will be of particular significance to respondents and others against whom discovery is sought. If they are

⁵⁶ *City Council of Santa Monica v. Superior Court*, 204 Cal. App. 2d 68, 76, 21 Cal. Rptr. 896, 901 (1962); *Jessup v. Superior Court*, 151 Cal. App. 2d 102, 311 P.2d 177 (1957).

⁵⁷ No case has squarely faced the question whether the privilege could be waived or the more difficult question of who can waive it. *Brotsky v. State Bar*, 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962) and *Markwell v. Sykes*, 173 Cal. App. 2d 642, 343 P.2d 769 (1959) both hinted that the privilege could be waived. The better view would seem to be that the public officer could waive the privilege and that permission of the communicant is not necessary. Several cases have reached this result with respect to disclosure of the contents of probation reports by stating that the public interest required disclosure rather than non-disclosure. *People v. Quinn*, 223 A.C.A. 659, 36 Cal. Rptr. 233 (1963); *People v. Dunne*, 141 Cal. App. 2d 499, 297 P.2d 451 (1956); *People v. Curry*, 97 Cal. App. 2d 537, 218 P.2d 153 (1950).

⁵⁸ *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 396, 15 Cal. Rptr. 90, 112, 364 P.2d 266, 288 (1961). *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951).

⁵⁹ See the extensive discussion of the problem in *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964). The commentators, as well as the courts, have given the subject ample discussion. See Simon, *The Attorney Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956).

⁶⁰ See *D.I. Chadbourne, Inc. v. Superior Court*, *supra* note 59.

⁶¹ In an analogous area the California Supreme Court has held that statements of independent witnesses to an accident which were gathered by investigators employed by a party are not privileged under the attorney-client privilege. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 395-99, 364 P.2d 266, 287-90, 15 Cal. Rptr. 90, 111-14 (1961). This holding was reaffirmed in the *Chadbourne* case. 60 Cal. 2d 723, 388 P.2d 700, 36 Cal. Rptr. 468 (1964).

Of course, the public officer privilege, CAL. CODE CIV. PROC. § 1881(5), may still be available if non-disclosure is in the public interest.

corporations the hoary problems of "dominant purpose"⁶² and attorney capacity⁶³ will be as significant as in civil litigation.

Subsection (c) of the proposed section 11532 states that the work product rule, as set out in section 2016(b) of the Code of Civil Procedure, shall be considered a privilege. Material which is considered the work product of an attorney would thus be immune from discovery. The work product rule, as an express limitation on discovery, was first introduced to California in 1963,⁶⁴ although it has long been known to the federal system.⁶⁵ The rule serves a slightly different function from the attorney-client privilege. Rather than encouraging disclosure by the client it is aimed at protecting the "subjective" preparation of the attorney.⁶⁶ A memorandum of the attorney's trial tactics, or his impressions of witnesses he interviewed are illustrations of work product. The rule has an important function in the adversary system and no good reason exists for not permitting it in administrative adjudications.

Proposed section 11532 does not mention "confidential" information. Many statutes, however, make specific information "confidential."⁶⁷ A special procedure for handling this class of information is provided under section 11537(d). In short, this procedure allows the hearing officer to examine confidential matter *in camera* and to disclose only the part he believes warrants disclosure. This procedure has federal analogies.⁶⁸ Of course, if confidential information is also privileged it will not be dis-

⁶² In order to distinguish between non-privileged reports made in the ordinary course of business and those which should be privileged because made in anticipation of litigation, the California courts have looked to the "dominant purpose" for the report. *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954). See Comment, 10 U.C.L.A. L. Rev. 593, 603-05 (1963). Recently, however, the supreme court has indicated that it does not consider the dominant purpose rule as the delphic oracle, and that it will be reexamined in the future. *D.I. Chadbourne, Inc. v. Superior Court*, *supra* note 61.

⁶³ Attorneys often work for corporations and public agencies sometimes in administrative or management posts, and sometimes purely as lawyers. Certainly, merely because an employee happens to be an attorney is no reason to allow him to withhold information. On the other hand, house counsel should probably not be completely foreclosed from the privilege. See Simon, *supra* note 59, at 969-81.

⁶⁴ CAL. CODE CIV. PROC. § 2016(b) provides in part: "The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." Added, Cal. Stats. ch. 1744, § 1 (1963). While the work product rule never existed as a separate rule in California prior to 1963, the same notions might have been taken into consideration by the court when it determined whether a person showed good cause for discovery.

⁶⁵ See *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁶⁶ See LOUISELL, *MODERN CALIFORNIA DISCOVERY* § 10.05, at 290 (1963). Cf. *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 401, 364 P.2d 266, 291, 15 Cal. Rptr. 90, 115 (1961).

⁶⁷ See notes 33, 34 *supra*.

⁶⁸ See Jencks Act, 18 U.S.C. § 3500(c).

closed. There is no reason, however, to deny unconditionally the private litigant access to information merely because the legislature has declared it confidential, indicating only that it should not be made available to the general public. The private litigant is more than just a member of the general public.

The introductory proviso of proposed section 11532 indicates that the rights contained in that section are subject to the limitations imposed in section 11533. The latter section requires a showing of specific need to discover information in certain cases and provides for limitations of discovery in cases of harassment or delay.

§ 11533. *Limitations on Right to Discover*

(a) A party must show specific facts justifying discovery if he seeks information by:

- (1) Depositions upon oral examination;
- (2) Depositions upon written interrogatories;
- (3) Physical, mental or blood examinations;
- (4) Demand for inspection or production of documents or other things, other than documents open to public inspection by law.

(b) If a party's purpose in seeking discovery is to annoy, embarrass, or oppress any person, or to delay the commencement of the hearing, the hearing officer may terminate or limit discovery as the circumstances may warrant.

Comment: Proposed section 11533(a) imposes a higher standard of need if discovery is sought by certain discovery devices. The term "specific facts justifying discovery" is taken from the statutory definition of "good cause" in the civil discovery sections.⁶⁹ While "good cause" and its statutory definition have engendered some differences of opinion among those seeking to give specific meaning to the terms,⁷⁰ it is clear that more is required than mere relevancy. How much more is difficult to say, but it would seem that a proponent of discovery must give fairly specific and strong reasons for discovery. General reasons alone will not suffice.

In civil discovery the good cause requirement applies to demands for inspection or production of documents⁷¹ and requests for physical,

⁶⁹ CAL. CODE CIV. PROC. § 2036(a).

⁷⁰ LOUISELL, *MODERN CALIFORNIA DISCOVERY* § 6.05, at 188 (1963) sees § 2036(a) as not meaning much at all. In his view it "constitutes something of a mandate to the court to continue on the course it had previously charted." On the other hand in *Wolpe v. Camino-Poyales*, 5 CAL. DISCOVERY PROC. 97, 99 (1964), the Superior Court of Los Angeles took issue with this interpretation refusing to believe the legislature would have made an addition to the statute if it had not intended to change the law. For an extensive discussion of the good cause problem prior to the latest amendment, see Comment, 10 U.C.L.A. L. REV. 593 (1963).

⁷¹ CAL. CODE CIV. PROC. § 2031(a).

mental or blood examinations.⁷² In addition it is required for limited time periods after service of summons for depositions.⁷³ The proposed section would demand the higher standard of need for the first two types of discovery devices, except that public documents would be available, as they are now, at the demand of the citizen. In addition the proposed section would require the higher standard for depositions, both oral and written. The expense and time consumed in using these devices indicate that they should be available only when a specific need exists.

This subsection merely sets standards for discovery. It does not require a hearing to show good cause preliminary to an attempt to discover information.⁷⁴ For a discussion of the procedure involved see the comment on proposed section 11537.

Subsection (b) of 11533 is a general protective section. It recognizes that any system, no matter how well developed, is subject to abuse. It is not intended by the draftsmen that the discovery right unnecessarily prolong the time span from filing of the accusation to the hearing.⁷⁵ Thus it is expressly provided that if the hearing officer believes the proponent of discovery is seeking to delay the hearing he may terminate discovery.

§ 11534. *Use of Discovered Information*

(a) Subject to subsection (b) and applicable rules of evidence in administrative adjudications, information discovered pursuant to this chapter may be used for any purpose at the pending hearing.

(b) Depositions of persons other than parties may be used only for impeachment unless the persons will be unable, or cannot be compelled, to attend the hearing.

(c) Any admission of fact or of the genuineness of a document is for purposes of the pending hearing only and neither constitutes an admission for any other purposes nor may be used in any other proceeding.

Comment: Information discovered prior to an administrative adjudication may be used in much the same manner as information discovered prior to a civil proceeding. For counterparts of subsections (b) and (c) of proposed section 11534 see sections 2017(d) and 2033(b) of the California Code of Civil Procedure.

§ 11535. *Discovery Procedures*

(a) Depositions shall be taken before any officer qualified to take depositions under section 2018 of the Code of Civil Procedure.

⁷² CAL. CODE CIV. PROC. § 2032(a).

⁷³ CAL. CODE CIV. PROC. § 2016(a).

⁷⁴ It is thus a departure from the civil rules. See sections cited in notes 71-73 *supra*.

⁷⁵ It might be particularly important, for example, that a speedy hearing be held if the issue is whether a liquor license of an allegedly immoral bar should be revoked.

(b) Depositions shall be taken in the manner prescribed by the Code of Civil Procedure, except that in the case of depositions on written interrogatories only direct and cross interrogatories are permitted.

(c) The hearing officer may terminate or limit the examination in connection with a deposition as provided in section 2019(d) of the Code of Civil Procedure.

(d) All errors and irregularities in the notice relating to, and the taking of, depositions are waived unless prompt objection is made.

(e) Any person who has received due notice of a deposition hearing requiring his attendance may be required to pay the reasonable expenses incurred by the party seeking discovery caused by his unjustified failure to attend the deposition hearing.

(f) Each of the matters of which an admission is demanded shall be deemed admitted unless specifically denied or objected to or unless the person responding states that he is unable either to admit or deny the truth of the matter concerning which the inquiry is made. However, if the person to whom the demand is addressed does not respond and is not represented by counsel, the hearing officer may refuse to give effect to the implied admission if he finds the person was not aware of his rights or duties under this subsection.

(g) Written interrogatories must be answered separately, under oath, and the answers must be signed by the person making them.

(h) If the information sought by written interrogatories is contained in agency or business records, it is a sufficient answer to specify what records contain the information sought and to provide an opportunity to inspect them and copy, extract, or reproduce the information.

Comment: Proposed section 11535 sets forth several procedural rules applicable to specific discovery devices. Subsection (c) provides a protective feature to be used when a deposition is being conducted unfairly. A similar procedure is contained in the civil rules.⁷⁶ Here the hearing officer takes the place of the court in providing relief. This subsection supplements proposed section 11533(b). Subsection (f) states, in substance, the civil rule that a party may not remain silent or answer ambiguously in the face of a demand for admission of fact or of the genuineness of a document.⁷⁷ The use of this device, however, has produced inequitable results when the party to whom a demand was addressed was unrepresented by counsel. Unaware of his obligation and perhaps confused by the demand, an unrepresented litigant might not respond and summary judgment might be entered against him on the basis of the admission implied from his silence. Because many administrative ad-

⁷⁶ CAL. CODE CIV. PROC. § 2019(d).

⁷⁷ CAL. CODE CIV. PROC. § 2033(a).

judications involve unrepresented persons,⁷⁸ a provision was added to (f) which allows the hearing officer to refuse to give effect to the admission in these circumstances.

§ 11536. *Notice to Other Parties*

(a) Any party seeking to discover information shall give timely and appropriate notice to every other party.

(b) "Appropriate notice," means:

(1) copies of the questions asked together with the answers received; in the case of demands for admissions of fact or of the genuineness of documents, and written interrogatories;

(2) advance notice of the time and place of the deposition hearing and the officer before whom the deposition is to be taken, so that adequate opportunity is provided for cross-examination or service of cross-interrogatories; in the case of depositions upon either oral examination or written interrogatories;

(3) a true copy of the report describing the results of the examination; in the case of physical, mental or blood examinations;

(4) a list of the documents or things demanded and the names of the persons from whom they are demanded; in the case of demands for the inspection or production of documents or other things.

Comment: This section requires a party seeking discovery to give timely and appropriate notice to all other parties. "Appropriate notice" will vary with the discovery device involved. In general, notice is appropriate if given after the discovery device is used. With respect to depositions, however, notice must be prior to the deposition hearing so that all parties will have an opportunity to cross-examine the deponent or serve cross interrogatories.

§ 11537. *Enforcement of Right to Discover*

(a) In cases which are not required to be heard by Office of Administrative Procedure hearing officers, the agency shall assign a hearing officer upon initiation of proceedings. In cases required to be heard by Office of Administrative Procedure hearing officers, the agency shall, upon initiation of proceedings, immediately notify the Office which shall thereupon assign a hearing officer. All parties shall promptly be notified of the assignment.

(b) If a party's request to discover information is not complied with he shall notify the assigned hearing officer in writing of the information sought, the efforts made to obtain it and the justifications for discovery required by this chapter. The party shall send a copy of this writing

⁷⁸ At the Assembly Judiciary Committee hearing on discovery, Mr. George Coan, presiding officer of the Office of Administrative Procedure, estimated that approximately 50% of respondents in APA hearings were unrepresented by counsel.

to the person upon whom the demand was made, who within five days of receipt, shall notify the hearing officer in writing of his reasons for not supplying the information. A copy of this answer shall be sent by the person opposing discovery to the party seeking discovery who may reply to the hearing officer within three days, sending a copy to the person answering.

(c) The hearing officer shall decide the question of discovery on the written statements; he may also hear oral argument or request additional written statements from the persons concerned. He shall notify the proponent and opponent of discovery of his decision in writing within ten days of submission of the argument or last statement. His decision shall constitute the discovery order and shall be so phrased.

(d) If the information sought is otherwise discoverable but is included in, or consists of, documents which by law are inaccessible to the general public, the hearing officer may examine the documents *in camera* and may make extracts therefrom or grant or refuse discovery to the extent required by the public interest.

Comment: Section 11537 is central to the proposed act. It seeks to tailor the civil discovery rules to the administrative process. Two considerations must be emphasized: (1) discovery prior to an administrative adjudication, even more than civil discovery, should be speedy and inexpensive; (2) a hearing officer,⁷⁹ not a judge, conducts the hearing. Because of the second consideration the hearing officer has been given major responsibility for resolving disputes arising out of attempts to discover information. Therefore subsection (a) requires that a hearing officer be assigned to the case soon after the initiation of proceedings. "Initiation of proceedings" is defined in proposed section 11531(h). Generally it refers to the time when both the agency and the respondent are informed of the potential adjudication.

The hearing officer's role is to resolve disputes that the parties cannot. It is only after a request to discover information is not complied with that a party notifies the hearing officer. Thus, the proposed statute differs from the civil rules which require, in some instances, that an order be secured from the court before discovery.⁸⁰ The proposed procedure is designed to simplify discovery and to require minimum participation by the hearing officer.

Let us assume, however, that there is no agreement on whether the matters are discoverable. The proponent of discovery will then notify

⁷⁹ The hearing officer may sit alone or with the agency in APA proceedings. CAL. Gov't CODE § 11517. See Lakusta, *Operations in an Agency Not Subject to the APA: Public Utilities Commission*, 44 CALIF. L. REV. 218 (1956); tenBroek, *Operations Partially Subject to APA: Public Welfare Administration*, 44 CALIF. L. REV. 242 (1956).

⁸⁰ See sections of the Code of Civil Procedure cited at notes 71-73 *supra*.

the hearing officer by sending him a statement explaining the situation. The opponent is given an opportunity to give his reasons why discovery should not be allowed, and the proponent may reply to these arguments. The parties must act quickly, for the time limits for these statements are short. Speedy resolution of the dispute is important.⁸¹ The hearing officer is not required to hear oral arguments on the question of discovery, but he may do so if he deems it necessary. Again, speed and economy justify this procedure. When the hearing officer reaches the decision he notifies the parties in his discovery order. "Discovery order" is defined in proposed section 11531(g).

Subsection (d) provides a procedure for dealing with matters which have been classified confidential either by statute⁸² or by administrative determination pursuant to statute.⁸³ If the agency denies discovery on the ground that the records are confidential, the hearing officer may require that the documents be made available to him. He may allow discovery to the extent he believes the public interest requires. One way he may do this is to extract information which may be disclosed and to disallow discovery of the rest. An analogous procedure is provided in the federal Jencks Act.⁸⁴ In determining whether the public interest requires disclosure the hearing officer must use the same technique he uses in determining whether information is privileged under the public officer privilege, weighing the need for the information against the disruption that might occur were it disclosed.⁸⁵ Here, however, because of the legislative determination that the information is not the kind that should generally be made public the hearing officer should be cautious in allowing discovery. Yet because the litigant has an interest in

⁸¹ Mr. George Coan, the presiding officer of the Office of Administrative Procedure, for one, has expressed concern that a complicated discovery system might unduly delay APA adjudications. Rule 14.5 of the Rules of Procedure of the State Bar of California provides: "To avoid unnecessary delay in a State Bar disciplinary proceeding, a period of sixty (60) days from date of service of notice to show cause shall be allowed for initiation and completion of discovery; provided, for good cause, the local administrative committee may grant reasonable extensions of time for completion of discovery. If said sixty (60) day period is or will be exceeded, the local administrative committee may fix a date for completion of discovery."

One of the advantages of discovery, of course, is that it will expedite the hearings by simplifying the issues to be litigated and reducing the number of continuances that must be granted because of surprise. See, e.g., *Burako v. Munro*, 174 Cal. App. 2d 688, 690, 345 P.2d 124, 126 (1959), where a lack of specificity in the complaint apparently caused a three-day continuance during a license revocation proceeding. If discovery had been available there would have been no reason for the continuance.

⁸² See note 33 *supra*.

⁸³ See note 34 *supra*.

⁸⁴ See note 68 *supra*.

⁸⁵ See note 55 *supra*.

addition to that of the general public, the information should be made available if the demonstrated need is great.

At present a public officer may be guilty of a misdemeanor if he discloses confidential information.⁸⁶ Proposed section 11541(b) provides an immunity if the disclosure is made in compliance with this act.

§ 11538. *Sanctions for Refusal to Comply with the Discovery Order*
If any person refuses to comply with the discovery order:

(a) The hearing officer may certify the facts to the superior court in and for the county where the proceeding is pending. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished for contempt. This order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge himself of the contempt in the same way as in the case of a person who has committed contempt in the trial of a civil action before a superior court.

(b) The hearing officer may require him to pay the reasonable expenses incurred by the party seeking discovery caused by his failure to comply.

(c) If the person who refuses to comply is a party, or officer, member or employee of a party, acting within his authority, the hearing officer may stay the proceeding, find against the party or refuse to admit his evidence on any issue relating to the discovery order, or decide the entire case against him. However, no right, authority, license, or privilege may be issued or granted because of failure to comply with the discovery order.

Comment: In most instances the discovery order will be complied with. In those cases in which it is not sanctions will be imposed. In general, the same sanctions are available as in a civil action.⁸⁷ Several differences should be noted. First, while the hearing officer may impose most sanc-

⁸⁶ CAL. GOV'T CODE § 11183.

⁸⁷ CAL. CODE CIV. PROC. § 2034 sets out the sanctions which may be imposed in civil discovery proceedings. They include: orders to pay reasonable expenses including attorney fees; contempt for disobedience of court orders; establishment of facts against the party refusing to discover information; refusal to allow recalcitrant party to prove or introduce evidence on his claim or defense; stay of proceedings; striking of pleadings; dismissal of action or any part of it; arrest of disobedient party in certain situations.

To be contrasted with the broad array of sanctions available in civil proceedings are the Rules of Procedure of the State Bar of California. Rule 14.15 provides generally that the following sanctions are not available: arrest; dismissal; striking pleadings; imposition of monetary sanctions. Explicitly made applicable are: establishment of matters against the recalcitrant party, refusal to permit evidence, and stay of proceedings. A procedure for certification for contempt is provided in Rule 14.16.

tions he may not punish for contempt.⁸⁸ Therefore subsection (a) provides a certification procedure to the superior court which is similar to Government Code section 11525.⁸⁹ Second, proposed subsection (c) provides that no right, authority, license or privilege may be granted because of failure to comply with the discovery order. The public interest weighs strongly against that effect merely because of failure to comply with a discovery order. A hearing on the merits should be had. Because of important countervailing private interests involved, however, this policy does not apply to revocations or renewals.⁹⁰ Finally, as a practical matter some sanctions will not be effective against the agency. Thus, a finding of fact against the agency, or a determination of the entire case against the agency will be subject to the right of the agency to make the ultimate decision in the case.⁹¹

§ 11539. Review of the Hearing Officer's Decision

Upon certification in accordance with section 11538(a) or upon application for review by a person against whom a sanction was imposed under sections 11538(b) or (c), or by a party whose request for discovery was denied by the hearing officer, the superior court in and for the county where the proceeding is pending shall consider the validity of the discovery order and the propriety of any sanction imposed. Application for review must be within five days of notice of the hearing officer's decision. No discovery order or sanction shall be modified or reversed unless clearly erroneous.

Comment: Throughout the proposed act a great deal of discretion has been reposed in the hearing officer. While review of his decisions has

⁸⁸ See note 38 *supra*.

⁸⁹ CAL. GOV'T CODE § 11525 provides: "If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court."

⁹⁰ The public may have just as much an interest in revoking a license of one improperly conducting himself as it does in withholding a license from one who may improperly conduct himself; arguably more so. But the licensee has expended time and money and has, in a sense, relied on the license. There may be instances in which a person has expended time or effort prior to obtaining a license. On the whole, however, more reliance would be present in the person who already has the license.

⁹¹ CAL. GOV'T CODE § 11517.

been provided for, it is a limited review. It must be applied for within five days of the hearing officer's decision and that decision may be reversed only if clearly erroneous.⁹² Both these limitations are made in the interests of speed. The clearly erroneous standard will tend to discourage questionable appeals.

The proposed act does not provide for an intermediate review by the agency. Thus, review of the discovery order differs from review of the hearing officer's determination on the merits.⁹³ Two reasons justify this difference. First, when the interlocutory discovery order is involved, speed is more important; therefore, direct review is preferable. Second, the agency's adversary arbiter position is a bit different. With respect to the merits of the action, the agency, in effect, initially says, "We have reason to believe you have violated the law, come in and tell us why we are wrong." After the hearing the agency can reconsider its preliminary determination, and the hearing officer's determination, on the basis of the entire record. On the other hand, when discovery is in issue the agency has generally made its determination to grant or refuse discovery after considering the arguments pro and con. It is not likely to change its position very much.

§ 11540. *Fees, Mileage and Per Diem Allowances*

Any person whose deposition is to be taken pursuant to this chapter, other than the parties or officers or employees of the State or any political subdivision thereof, shall receive fees, and any such person except the parties shall receive mileage and per diem subsistence allowances in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Fees, mileage and expenses of subsistence shall be paid by the party taking the deposition.

§ 11541. *Effect of Act*

(a) Nothing in this act shall be construed to limit the lawful investigatory powers of any state agency.

(b) Notwithstanding any provision of law no officer, member, or employee of any state agency shall be subject to any penalty or liability for complying with this act.

(c) This act shall not affect any proceeding which has been initiated prior to its effective date.

⁹² The term "clearly erroneous" is used as a standard for review of facts in certain federal and state adjudications. In *McAllister v. United States* 348 U.S. 19, 20 (1954) the Supreme Court explained the standard: "although there is evidence to support [the trial court] . . . the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed." See also *United States v. United States Gypsum Co.*, 333 U.S. 364 (1947).

⁹³ See text accompanying note 91 *supra*.

CONCLUSION

Those who favor discovery prior to administrative adjudications point out that the private litigant has only a very limited right to information. This is unfair, they insist, when considered in light of the broad investigatory powers of the agency. They also argue that discovery will, on the whole, make the administrative process more efficient. It will simplify and clarify the issues, thus minimizing surprise and shortening the hearings. On the other hand, those who oppose discovery stress that the administrative process is supposed to be speedier and less costly than the judicial process. They believe that introducing discovery will complicate things unnecessarily, and they fear that it will provide an instrument for harrassment and delay prior to the hearing. In addition there seems to be a notion that discovery will allow the private litigant to defend too effectively.

What the proposed act attempts to do is to accommodate the valid points on both sides. Initially it provides a very broad right to discover information in section 11532. The information must be relevant and non-privileged. But the act clearly recognizes the need for rapid, inexpensive discovery. Thus, section 11533(a) imposes a higher standard of "need to use" depositions. The hearing officer may, in accordance with section 11533(b), limit or terminate discovery if it is used to annoy, embarrass, or oppress. That section also gives him similar power if discovery is being used to delay the commencement of the hearing. Under section 11537 the hearing officer is brought in to the discovery machinery only if the parties cannot agree. His decision may be made informally after written arguments. The proposed sections require the parties to act with haste if they are to act at all. The judiciary only enters the process to review the hearing officer's decision, and the standard for review is stringent.

The arguments against discovery are, in effect, the same arguments that have been made against the administrative process itself—that men can abuse the rights given them by law. The solution is not to deny those rights to all, but to tailor the law so that the abuses will be minimized. That is what the proposed act is designed to accomplish.

*David H. Melnick**

*Paul M. Little***

*Minot W. Tripp, Jr.****

* LL.B., 1964, University of California, Berkeley.

** LL.B., 1964, University of California, Berkeley.

*** LL.B., 1964, University of California, Berkeley.