

# Access to Government in the Computer Age

An Examination of State Public Records Laws

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# Litigants' Rights Under State Public Records Acts: The Use of Public Records Requests as an Alternative to Discovery

# 3

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A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.<sup>1</sup>

This chapter addresses citizen access to governmental records when the requesting citizen is a party to pending or threatened litigation. Recent decisions have pointed to a majority and minority approach, as one might expect, when considering access to and compelled disclosure of allegedly sensitive governmental records and other documents during the course of or just shortly before the commencement of litigation. The decision-making process insofar as

public records access is concerned is somewhat more complex when there is a showing that those records or documents were generated in anticipation of litigation, were otherwise prepared by a governmental entity facing an imminent threat of litigation, or would otherwise be unavailable to the litigant through discovery. The Official Comments to the Federal Rules of Civil Procedure, coupled with the various iterations of the legislatively described fundamental purpose of state public records acts—which have quite a bit to say about the decisionmaking process of government—appear to hold the key to understanding why most of the courts addressing the issue have sided with disclosure of and citizen access to public records<sup>2</sup> and have turned away from any suggestion of official stonewalling. Indeed, most courts recognize that parties to civil litigation are routinely able to obtain documents and other evidentiary materials relevant to a pending action by methods that are beyond the routine discovery process.<sup>3</sup> That a document or other information has been obtained by a party through a nondiscovery process does not mean that party is not entitled to it, and in most instances, the opposing party is not even in a position to prevent it.<sup>4</sup>

A number of courts have had an opportunity to address attempts by civil litigants to circumvent “adverse” discovery rulings by seeking substantially the same information in a request pursuant to a state public records act. The results have been anything but uniform, but a clear majority approach has emerged.

## THE MINORITY VIEW

### ***Kusar*: Circumvention of Discovery**

In *County of Los Angeles v. Superior Court (Kusar)*,<sup>5</sup> Kusar sued deputy sheriffs for assault and battery, and in the course of those proceedings filed a motion to compel discovery of records of prior arrests by two named defendants. The motion was denied, and after exhausting appellate review of the discovery ruling, the litigant sought the same records, this time by having a legal secretary employed by the litigant’s attorney file a CPRA (California Public Records Act) request. The court thwarted this maneuver, holding that to the extent that disclosure of investigatory files was permitted by the CPRA, such disclosure was limited to contemporaneous records of current police activities. Further, the various provisions of the CPRA, state penal code, and state evidence code imposed “rather careful restrictions upon the disclo-



sure of information from records of citizen complaints against police officers,"<sup>6</sup> and these statutes

[s]et forth detailed and careful procedures to assure that the sensitive information contained in records relating to allegations of police misconduct will be disclosed only upon a showing of manifest necessity. Such procedures would be nullified if, as [the legal secretary] argues, the same information, or information leading to it, could be obtained as a matter of right through the Public Records Act.<sup>7</sup>

The court in *Kusar* concluded that the CPRA could not be construed to authorize "the circumvention of rulings of a court made pursuant to important discovery statutes protecting the confidentiality of law enforcement information."<sup>8</sup> The court also specifically rejected the arguments by the legal secretary that access to such records was a fundamental right of citizenship protected by the CPRA and that the court had the discretion to order preparation of an index for in camera review before determining the validity of the exemptions from disclosure as claimed by the county.

#### ***City of Richmond: Distinction Between Litigants and Nonlitigants***

A circumvention argument similar to that which prevailed in *County of Los Angeles* was apparently raised but found inapplicable in *City of Richmond v. Superior Court*.<sup>9</sup> There, a newspaper made a CPRA request through one of its investigative reporters, seeking from the city police department the entire citizen complaint file for each complaint involving excessive force or racially abusive treatment, as well as numerous documents from personnel files. The trial court ordered the police department to produce the records for in camera review, and the city appealed. The court of appeals held that the CPRA exemption for information privileged from disclosure pursuant to federal or state law protected the requested police records from disclosure, because those records were considered confidential under the state penal code and could not be disclosed except in limited circumstances. Despite setting aside the trial court's disclosure order, the court of appeals emphasized that the state penal code provisions construed in *Kusar* described procedures for litigants in criminal and civil proceedings but "not procedures for nonlitigants seeking public records."<sup>10</sup>

The *City of Richmond* court reiterated the conclusion reached in *Kusar* that the law enforcement records at issue in that case would not be subject to disclosure under the CPRA, because "there is little point in protecting information from disclosure in connection with criminal and civil proceedings if the same information can be obtained routinely under CPRA."<sup>11</sup> However, faced with what appeared to be a legitimate public records request made by a newspaper through its investigative reporter, the *City of Richmond* court distinguished between a litigant's and a non-litigant's right to make use of the CPRA, suggesting that, had the person seeking disclosure been a litigant, access would have been denied.<sup>12</sup>

### THE MAJORITY VIEW

#### ***Axelrad*: Motive Is Not Important, But Discovery Rulings May Be**

A different view was adopted in *County of Los Angeles v. Superior Court (Axelrad)*.<sup>13</sup> In that case, a law firm represented former inmates in three civil actions alleging false imprisonment, each claiming that they had been overdetailed in the county jail. The law firm filed motions in each civil action seeking disclosure of certain documents, and the motions were denied. Axelrad, an attorney employed by the law firm, then filed two CPRA requests with the county, seeking disclosure of the county sheriff's department inmate reception center manual, a task force report, and paper logs and overdetention reports. When the county refused to disclose the requested records, the attorney filed suit to enforce his right to obtain and inspect copies of the records requested pursuant to the CPRA. The trial court ruled that nothing in the CPRA prohibited a litigant from filing such a request as an alternative to civil discovery and, following in camera review, ordered the county to produce most of the records except for certain exempt portions involving security procedures for running the inmate reception center.

The county argued that the CPRA should not be used by Axelrad to circumvent the effect of prior civil discovery rulings that related to the public records sought, but the court of appeals affirmed the trial court, stating:

We have no difficulty, on this record, concluding that Axelrad filed his CPRA request in an attempt to obtain documents for use in the over-detention cases filed by his employer. However,



he was permitted to do so under the CPRA, which provides that there are no "limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." The reason for such a rule, we believe, is that "[t]here is no practical way of limiting the use of the information, once it is disclosed, to the purpose asserted by the requestor." Indeed, there is no way of assuring that the information will not be used by the requestor for other purposes, or, for that measure, will not be used by third parties who manage to obtain the information once it has been disclosed to [the requestor].<sup>14</sup>

The court of appeals in *Axelrad* took note of the county's reliance on the earlier *County of Los Angeles* decision and federal cases interpreting the FOIA (Freedom of Information Act), but rejected its claim that *Axelrad* was attempting to circumvent adverse discovery rulings rendered against the false imprisonment plaintiffs in the overdetention cases prosecuted by his employer.<sup>15</sup> The court did not directly rule on the issue of whether a plaintiff who sues a government agency can only obtain through the CPRA those documents that are relevant to his or her cause of action. It did observe, however, that the documents sought by *Axelrad* appeared to be relevant to the overdetention cases handled by the law firm that employed him.

The *Axelrad* court also rejected the county's argument, based on collateral estoppel, that the court hearing *Axelrad*'s CPRA request was bound by prior discovery rulings issued in the three civil actions. However, although finding that the necessary elements of collateral estoppel had not been established by the county, the court nonetheless noted that previous discovery rulings made in the parallel litigation could have relevance.

We do not mean to suggest that we condone abuse of discovery. A claim that a plaintiff has abused discovery, however, should be made to the court assigned to the civil action, not to the court hearing the CPRA petition. . . . While we agree that a court hearing a CPRA request should be made aware of any prior discovery rulings issued with respect to the documents being requested in connection with a CPRA petition, the court is not bound by these rulings unless all of the collateral estoppel factors set forth above are present.<sup>16</sup>

The *Axelrad* court remanded the case for an in camera review of the documents, directing the trial court to focus on whether the over-detention reports, logs, and IRC Task Force Report were specifically prepared by the county for use in litigation. If so, the records would be protected from disclosure under the CPRA's pending litigation exemption.<sup>17</sup>

### ***Bolm*: Relevance Is Irrelevant**

The Arizona Supreme Court has also weighed in on the issue in *Bolm v. Custodian of Records*.<sup>18</sup> In that case, the Arizona court focused on the interplay between Arizona's Public Records Law<sup>19</sup> and state common law relative to discovery of police records in the course of litigation.<sup>20</sup>

*Bolm* filed three separate civil suits against the City of Tucson and two of its police officers. *Bolm* then filed a request under Arizona's Public Records Law seeking disclosure and production of the police department's personnel records and internal affairs investigation documents for the two officers, including the officers' hiring and training records, any evaluations, commendations, reprimands, compliments, and complaints. After the city made a partial disclosure and declined to produce the officers' personnel files and IAD (Internal Affairs Division) files, *Bolm* filed a special action seeking judicial enforcement of the public records law request, to which the city responded by asserting that the plaintiff "should not be permitted to circumvent the disclosure rules through the illegitimate use of the public records process."<sup>21</sup> The trial court allowed the city to withhold the personnel evaluations and the IAD documents, but ordered the city to disclose hiring records, official commendations, and official reprimands of the two officers, without conducting an in camera inspection of those records. The court of appeals, in upholding the disclosure order, held that the trial court correctly applied the balancing test mandated under state law in determining that disclosure of the personnel evaluations and IAD documents was not required.

The Arizona Court of Appeals began its analysis by quoting from the preamble to Arizona's Public Records Law, which provides in part that "public records and other matters . . . shall be open to inspection by any person. . . ."<sup>22</sup> The court then addressed the city's argument that withholding official records was proper because "case law denied disclosure to criminal defendants and civil litigants unless there is an



*in camera* review and a finding of relevance."<sup>23</sup> This argument was rejected, the court noting that

[a] person's right to public records under the Public Records Law is not conditioned on his or her showing, or a court finding, that the documents are relevant to anything. Rather, a public records request may be made in the absence or in advance of any litigation or anticipated claims. In such a situation, there is no issue, claim or defense against which to measure relevance. Thus, although relevance is an important factor in evaluating and determining the discoverability of police records in a litigation context, . . . the Public Records Law contains no relevancy requirement, and we are not inclined to judicially engraft one.<sup>24</sup>

The *Bolm* court then turned to the city's argument that it could deny access to public records in light of the fact that there was pending litigation.

Moreover, that litigation was pending between the City and Bolm's client when Bolm made his public records request does not affect the City's obligation to comply with the Public Records Law. . . . Nor does the fact of pending litigation automatically negate a finding of arbitrary and capricious conduct in withholding documents.<sup>25</sup>

Thus, the Arizona court reached the same conclusion as the California court in *Axelrad*—that being a litigant in a pending lawsuit against a government agency did not affect the litigant's right of access to public records.

#### **Agreement by Other States**

A similar conclusion has been reached by courts in New York and Wisconsin. In *Matter of M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.*,<sup>26</sup> the New York court tackled the issue of whether the access of a company in litigation with a local government agency to the records of that agency was limited to those materials available under New York's discovery rules. Although noting a concern for potential abuse of New York's public records law by litigants, the court deemed that potential to be "a price of open government . . . [that] should not be invoked to undermine the [public records] statute."<sup>27</sup>



In *State ex rel. Lank v. Rzentkowski*,<sup>28</sup> a Wisconsin court considered whether a quasi-public agency that was in litigation with several municipalities could use the state's public records law to obtain documents relevant to the pending litigation after the discovery cutoff deadline in the litigation. Finding no statutory support for "carv[ing] out an exception to the requirement of disclosure when the public records sought are germane to pending litigation between the requestor and the public entity,"<sup>29</sup> the court concluded that the public records request was not the equivalent of discovery and, therefore, was not subject to the discovery deadline in the pending litigation.<sup>30</sup>

#### ***Mid-Atlantic Recycling Technologies: No Override by Rule 26***

In *Mid-Atlantic Recycling Technologies, Inc. v. City of Vineland*,<sup>31</sup> a federal court considered the issue in light of New Jersey's public records law and the discovery provisions of the Federal Rules of Civil Procedure. A recycling facility, Mid-Atlantic Recycling Technologies ("MART"), sued the City of Vineland, New Jersey, its mayor, and Department of Health, asserting constitutional claims under 42 U.S.C. 1983 and libel, based on allegations that the city had selectively enforced environmental compliance policies in order to deprive the recycling facility of its business. During the course of the federal civil litigation, MART filed a number of requests under the state public records act, the New Jersey Open Public Records Act ("OPRA"),<sup>32</sup> seeking documents from the city related to issues in the litigation. MART also filed an action under the OPRA in state court to compel disclosure of the requested documents, seeking an order compelling the city to provide access to all government records implicated by the request, to prepare a proper privilege log concerning documents claimed to be protected by the attorney-client privilege, and to produce to the state court for in camera review all government records claimed by the city to be privileged. The city defendants moved for a protective order in the federal action, on the ground that MART, which had made "regular and continuous piecemeal requests" for information, was precluded from requesting documents under the OPRA, because those efforts circumvented the Federal Rules of Civil Procedure and subjected the city defendants to an undue burden and harassment. The city defendants asked the court to enter a protective order precluding MART from conducting discovery outside the limitations imposed by the Federal Rules of Civil Procedure. The city defendants contended that because MART had filed a civil

action in federal district court, it "must pursue all discovery through the parameters and procedures delineated under the Federal Rules of Civil Procedure."<sup>33</sup>

The issue before the court was whether a citizen's right to obtain government documents through the OPRA, when that citizen is a party in litigation against the government agency holding the records, could be overridden by Federal Rule of Civil Procedure 26 ("Rule 26"). Noting that there was no federal case directly on point, the court addressed the assertion of the city defendants that the court's authority to oversee the discovery process permitted the court to prohibit the use of the OPRA as a vehicle for MART to obtain documents related to the case.

The city argued that federal interests could preempt<sup>34</sup> the applicability of the OPRA and that the purpose of the OPRA was the same as the purpose underlying the FOIA; hence, the court should follow the reasoning set forth in FOIA case law.<sup>35</sup> MART asserted the contrary position that a citizen has an unbridged right to access public documents under the New Jersey statute and that right should not be affected simply because the citizen, as a requester of documents under the OPRA, has also filed federal litigation against the governmental entity.

MART contended that

the overriding public policy behind OPRA favors access to public documents [and] the statutory language and analogous case law suggest that OPRA requests are generally not affected by either the requester's motive for seeking the documents or the fact that the requester happens to be in simultaneous litigation with the holder of the documents.<sup>36</sup>

MART based its legal argument on *Axelrad*, contending that MART, as a citizen, was free to pursue its OPRA requests for documents even if those documents were related to the instant federal litigation.

The court focused on the discovery parameters of the Federal Rules of Civil Procedure and their effect on a citizen's right to request government records under the OPRA. First, the court noted that the discovery process in federal civil litigation is governed by Rule 26, and that Rule 26 did provide certain limitations and restrictions that a federal court could impose upon the scope of discovery, such as a protective order under Rule 26(c) to protect a party from annoyance, embarrassment, oppression, or undue burden or expense.<sup>37</sup> Second, the court observed that Rule 26(c) placed the burden of persuasion on the party who seeks



the protective order, requiring the party as movant to show good cause by demonstrating a particular need for protection. Finally, the court analyzed the legislative history of the OPRA, its purpose, and the interpretation placed upon it by the New Jersey courts.

New Jersey's long-standing public policy favors ready access to most public records, and this policy was the basis for the OPRA, legislation designed to permit any citizen to obtain government records pursuant to a statutory procedure and subject to specific exceptions. The court underscored the purpose of the OPRA, the preamble of which provided that it was the public policy of the state that "[g]overnment records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access."<sup>38</sup>

The city defendants' argument was that the OPRA permitted a plaintiff to receive documents earlier than the time those documents would be discoverable under Rule 26 and the core disclosure provisions of Rule 26(a)(1). The court found this position unavailing. Concluding that there was neither a direct nor an operational conflict, the court held that there was no preemption.

Defendants have not asserted that under OPRA, plaintiff will be obtaining documents otherwise unobtainable under the Federal Rules. Additionally, plaintiff agreed at oral argument that even if plaintiff obtained documents under OPRA, the Federal Rules of Evidence govern the admissibility of those documents in federal litigation. In this regard, there is no reason that, in this case, OPRA and the Federal Rules cannot coincide. The fact that a party is able to avail itself of a state statute and obtain public documents that are related to a simultaneous litigation does not conflict with Rule 26. Indeed, documents that are governmental records and subject to public access under OPRA are no less subject to public access because the requester filed a lawsuit against the governmental entity. The fact that a party may obtain documents through OPRA at an earlier time or that OPRA provides for a shorter time period to respond than the time when document requests are permitted to be served under Rule 26 does not create a conflict so as to deny a citizen of legal



right to seek governmental records under OPRA. Moreover, . . . the federal rules include self-executing disclosures that require a party, without awaiting a discovery request, to provide, among other disclosures, copies or descriptions of documents, data compilations, and tangible things that are in that party's possession, custody, or control, and that the party may use to support claims and defenses. Fed. R. Civ. P. 26(a)(1)(B). Thus, there is neither a direct nor operational conflict. Moreover, defendants do not claim that Rule 26 was intended to preempt a state's right to permit public access to government records.<sup>39</sup>

Finally, the court rejected the city defendants' argument that New Jersey's OPRA was similar to the FOIA and that decisions rendered by the Third Circuit and Eleventh Circuit required a ruling that the litigants were required to obtain the documents sought through Rule 26 requests. As to the Third Circuit's *Metex Corporation v. ASC Industries*<sup>40</sup> decision, the court carefully analyzed its conclusions, including the Third Circuit's finding that the FOIA is "not intended to replace or supplement the discovery of private litigants." The *MART* court concluded that *Metex* "does not in any way hold that FOIA requests are precluded or stayed because of pending civil litigation."<sup>41</sup>

The court also found that the city defendants' reliance on the Eleventh Circuit's *L & C Marine Transport, Ltd. v. United States*<sup>42</sup> decision missed the mark. The lower court order under review in *L & C Marine* directed OSHA to disclose the names of persons, which information had been redacted by the agency in a response to a FOIA request. The issue was simply whether as a litigant, a party could obtain unredacted records, or whether they were exempt from disclosure under the FOIA. The Eleventh Circuit said that the "private needs of the companies for documents in connection with litigation, however, play no part in whether disclosure is warranted."<sup>43</sup> In short, the issue in *L & C Marine Transport* was not whether the pendency of litigation restricted access under the FOIA but, instead, whether such pending litigation broadened the scope of the FOIA by negating a FOIA exemption. The court in *MART* accordingly concluded that, just as "a party's status as a litigant does not improve or increase that party's rights to gain access [to] documents under FOIA," neither is access "decreased or limited by such status."<sup>44</sup>

## CONCLUSION

Although many courts have looked to federal court decisions interpreting the FOIA as persuasive authority for interpreting a state's public records act, a different mix of federalism and context-dependent analysis is called for when addressing the effect of the Federal Rules of Civil Procedure upon a litigant's access to documents and other materials under a particular state's public records act. *Vineland* and the precedential framework upon which it is based provide us with a principled and well-supported basis for rejecting the notion that a litigant should face any greater obstacle or different requirement than any other person seeking access to documents under a public records act merely because the request for such public records has been made during the pendency of federal civil litigation. *Vineland* and the well-reasoned precedent that has emerged from California find broad support in public access decisions from New York, Wisconsin, Arizona, and other states.

These cases teach us that the mere filing of federal civil litigation should never impede a party's access to documents under a public records statute. Nor should it provide a rational basis for a court to impose a relevancy requirement upon a public records request when such a requirement is not otherwise called for by the specific language of the state public records act at issue.

Accordingly, when a court is confronted with a request for public records by a requester who happens to be a litigant in pending federal civil litigation, Rule 26 of the Federal Rules of Civil Procedure should have no impact upon that request, and the requester/litigant should be accorded full access to such public records to the same extent as an individual who is a stranger to the litigation. The Federal Rules of Civil Procedure should not preempt state public records acts or a citizen's right of access to government records absent a clear and unambiguous expression of state legislative intent supporting such preemption. Fundamental notions of our federalism and even-handed adjudication of issues of disclosure and public access under a specific state public records act should require nothing more and nothing less.

## NOTES

1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 WRITINGS OF JAMES MADISON at 103 (G. Hunt ed., 1910).



2. For a comprehensive discussion of public records access in the context of privacy interests and constitutional limitations on government efforts to preclude citizen access, see C. Sheinkopf, *Balancing Free Speech, Privacy and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 44 UCLA L. REV. 1567, 1569 (1997) ("Public records document the activities of the government. They also contain valuable personal information about individuals. The federal government, the fifty states, and the District of Columbia all have public records statutes that permit the public to inspect information that concerns them, their neighbors, and the functioning of government. Although public records statutes differ from state to state, all allow access in varying degrees to records of law enforcement agencies (including police reports, accident reports, and arrest records), government spending matters, land transfers, tax assessments, and government economic development activities. Records of the judiciary are also public records. While most states rely on common law principles to maintain access to the records of the judiciary, some states have mandated access to judicial records.").

3. The public records laws of some states include specific exemptions for documents that are also protected from disclosure under discovery rules. *E.g.*, ARK. CODE ANN. § 25-19-105(b)(8) (2005) (exempting "[d]ocuments that are protected from disclosure by order or rule of court"); DEL. CODE ANN. tit. 29, § 10002(g)(9) (2005) (defining "public record" to exclude "[a]ny records pertaining to pending or potential litigation that are not records of any court"); HAW. REV. STAT. § 92F-13(2) (2004) (exempting "[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable"); KAN. STAT. ANN. § 45-221(11) (2004) (exempting "[r]ecords of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent"); OR. REV. STAT. § 192.501(1) (2003) (exempting "[r]ecords of a public body pertaining to litigation to which the public body is a party . . ."); TEX. GOV'T CODE ANN. § 552.103 (2003) (exempting "[i]nformation relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party"). *See also* 5 U.S.C. § 552(b)(5) (creating an exemption for the federal Freedom of Information Act for interagency or intraagency correspondence that would not be available to a party through discovery).

4. *State ex rel. Lank v. Rzentkowski*, 416 N.W.2d 635, 638 (Wis. Ct. App. 1987).

5. 22 Cal. Rptr. 2d 409 (Cal. Ct. App. 1993).

6. *Id.* at 417.



7. *Id.*

8. *Id.*

9. 38 Cal. Rptr. 632 (Cal. Ct. App. 1995).

10. *Id.* at 638.

11. *Id.*

12. The *City of Richmond* court nonetheless held that the newspaper's CPRA request was not narrowly enough drawn and sought confidential records that were not subject to disclosure. *Id.* at 638-40.

13. 98 Cal. Rptr. 2d 564 (Cal. Ct. App. 2000).

14. *Id.* at 569 (quoting *Hughes Salaried Retirees v. Adm'r of Hughes*, 72 F.3d 686, 693 (9th Cir. 1995)).

15. A similar issue was raised in *MAG Entm't, LLC v. Division of Alcoholic Beverage Control*, 868 A.2d 1067 (N.J. 2005). However, although emphasizing that "[d]ocuments that are 'governmental records' and subject to public access under OPRA [New Jersey's public records act] are no less subject to public access because the requesting party is opposing the public entity in possession of material sought in collateral litigation," the New Jersey court refused to permit the OPRA to be expanded to require government agencies to conduct research and analysis needed by a private litigant. *Id.* at 1073.

16. *Axelrad*, 98 Cal. Rptr. 2d at 572.

17. *Cf. Davis v. City of San Diego*, 131 Cal. Rptr. 2d 266 (Cal. Ct. App. 4th Dist. 2003). Basing its decision on the CPRA's confidentiality exemption, the court ruled in favor of peace officers and their association in preventing public release of the Citizens' Review Board's narrative report on a police shooting, holding that the report was a confidential personnel record that neither the city nor the city manager had discretion to voluntarily disclose. The court rejected the city's argument that the narrative report on the shooting had not been requested in discovery in a civil or criminal proceeding, that the report could only be considered a confidential personnel record in a civil or criminal proceeding not present in this case, and that the exercise of discretion to release the report to the public was justified by the need to improve police-community relations.

18. 969 P.2d 200 (Ariz. Ct. App. 1998).

19. ARIZ. REV. STAT. §§ 39-121 to 39-125.

20. See generally K. Karnezis, *Validity, Construction, and Application of Statutory Provisions Relating to Public Access to Police Records*, 82 A.L.R. 3d 19 (1978). In *MAG Entm't*, 868 A.2d at 1073, the New Jersey Supreme Court cited *Bolm* in support of the proposition that "there is no blanket exception carved out to the requirement of disclosure when the public records sought are germane to pending litigation between the requestor and the public entity."

21. *Bolm*, 969 P.2d at 202.

22. *Id.* at 203 (quoting *Scottsdale Unified School Dist. v. KPNX Broadcasting Co.*, 955 P.2d 534, 537 (1998)).

23. *Bolm*, 969 P.2d at 203.

24. *Id.* at 204.

25. *Id.* at 205. The court cited an opinion of the Arizona Attorney General in support of its conclusion; *see* 1989 Ariz. Op. Atty. Gen. 41 ("nothing in [Arizona cases on public records disclosure] suggests that officials may deny access to public records simply because the records might be used to establish tort liability on the part of the state").

26. 464 N.E. 437 (N.Y. 1984).

27. *Id.* at 82.

28. 416 N.W. 635 (Wis. Ct. App. 1987).

29. *Id.* at 637.

30. *Id.* at 638.

31. 222 F.R.D. 81 (N.J. 2004) [hereinafter *MART v. Vineland*].

32. N.J. STAT. ANN. § 47:1A-1 through 13.

33. *MART v. Vineland*, 222 F.R.D. at 82.

34. The preemption argument was based on *ACLU of New Jersey v. County of Hudson*, 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), which held that regulations of the Immigration and Naturalization Service (INS) preempted New Jersey's Right-to-Know law. *MART* distinguished *County of Hudson* as inapplicable because the decision in that case turned on a conflict between state law and a federal regulation, a conflict that did not exist in the instant case.

35. Federal cases cited to the court addressing FOIA requests included *Metex Corp. v. ACS Indus.*, 748 F.2d 150 (3d Cir. 1984) and *L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919 (11th Cir. 1984). *MART* argued that *Metex* was inapplicable because the court of appeals in that case had concluded that it did not have jurisdiction to hear the issue. *MART* also distinguished *L & C Marine* as inapplicable because it dealt with a FOIA exemption regarding a privacy issue.

36. *Id.* at 84.

37. Rule 26(c) authorizes a court in its discretion to order:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

38. N.J. STAT. ANN. § 47:1A-1.

39. *Id.* at 85–86.

40. *Metex*, 748 F.2d.

41. *MART v. Vineland*, 222 F.R.D. at 86.

42. *Metex*, 748 F.2d at 155.

43. *L & C Marine Transport*, 740 F.2d at 923, *quoted in MART v. Vineland*, 222 F.R.D. at 86.

44. *MART v. Vineland*, 222 F.R.D. at 86. *Accord MAG Entm't*, 868 A.2d at 1073–74 (the scope of New Jersey's open records law is not expanded merely because the materials sought are necessary to resolve pending litigation with an agency).