SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

RICHARD SANDER, JOE HICKS, and the CALIFORNIA FIRST AMENDMENT COALITION,

Petitioners,

vs.

THE STATE BAR OF CALIFORNIA and the BOARD OF GOVERNORS OF THE STATE BAR OF CALIFORNIA,

Respondents,

DWIGHT AARONS, CHARLENE P. BELLINGER HONIG, PETER L. CARR, IV, EUGENE CLARK-HERRERA, FRANCISCO CORTES, REBECCA HALL, ANGEL HORACEK, SARA JACKSON, ANDREA LUQUETTA, XOCHITL CARRION, LETITIA D. MOORE, ANTHONY J. TOLBERT, ERIKA K. WOODS; ANGEL HORACEK; BLACK WOMEN LAWYERS ASSOCIATION OF LOS ANGELES, INC.; JOHN M. LANGSTON BAR ASSOCIATION OF LOS ANGELES; AND DOE 1,

Intervenors.

Case No. CPF-08-508880

ORDER DENYING PETITION FOR WRIT OF MANDATE

The Phase II trial on the Petition for Writ of Mandate filed by Petitioners Richard Sander, Joe Hicks, and the First Amendment Coalition (collectively, "Petitioners") against Respondents The State Bar of California and The Board of Governors of the State Bar of California (collectively, "the State Bar") commenced on July 11, 2016. David E. Snyder, James M. Chadwick, and Andrea N. Feathers appeared for Petitioner California First Amended Coalition. Jean-Paul Jassy appeared for Petitioners Sander and Hicks. James M. Wagstaffe, Michael Von Loewenfeldt, and Melissa Perry appeared for the State Bar. Intervenors Dwight Aarons, Charlene Bellinger Honig, Peter L. Carr, IV, Eugene Clark-Herrera, Francisco Cortes, Rebecca Hall, Angel Horacek, Sara Jackson, Andrea Luquetta, Xochitil Marquez, Letitia D. Moore, Anthony J. Tolbert, Erika K. Woods, Black Women Lawyers Association of Los Angeles, Inc., and John M. Langston Bar Association of Los Angeles appeared by David H. Kwasniewski and Margaret P. Kammerud.

The operative pleadings are the Verified Petition for Writ of Mandate, or in the Alternative, Complaint for Declaratory and Injunctive Relief filed October 3, 2008 and the amendment thereto filed July 8, 2016; the Respondents' Answer filed November 17, 2008 and the amendment thereto filed July 20, 2016; and the Intervenors' First Amended Complaint in Intervention for Declaratory and Injunctive Relief filed Match 21, 2016.

Exhibits were received into evidence, and the following witnesses were called: a) Petitioners' expert witnesses, Luk Arbuckle and Peter Arcidiacano, Ph.D.; b) the State Bar's expert witness, Latanya Sweeney, Ph.D.; c) the State Bar's witnesses, Gayle Murphy, the State Bar's Senior Director for Admissions, and a summer intern who authenticated some documents; and d) Intervenors' witnesses, Professor Erika Wilson of the University of North Carolina School of Law, Nicole Husband, President of the Black Women Lawyers Association of Los Angeles, Kimberly Willis, President of the John M. Langston Bar Association of Los Angeles, and Andrea Luquetta-Kern. Deposition testimony was also received from two of Petitioners' witnesses, Samuel Canas, Ph.D. and Felicia LeClere, Ph.D.

On August 26, 2016, the parties submitted their opening post-trial briefs. And, on September 16, 2016, the parties submitted their reply post-trial briefs. The matter was deemed submitted on that date. Being fully advised in the matter, with good cause appearing, and for the reasons set forth in this Order,

the Court denies the Petition for Writ of Mandate.

FACTUAL BACKGROUND

I. The Parties

Petitioner Dr. Richard Sander is an economist and professor of law at the University of California Los Angeles. He collaborates with a team of over a dozen scholars studying the scale and effects of admissions preferences in higher education. Dr. Sander and his colleagues conduct empirical research on the effects that preferential admission programs in higher education (including college, law school, and other graduate programs) have on their intended beneficiaries. Stipulated Facts For Trial Phase II ("SF") ¶ 12.

Petitioner Joe Hicks was a former governor of the State Bar and a former Vice President of Community Advocates, Inc., a nonprofit organization that advocates innovative approaches to human relations and race relations in Los Angeles City and County.[1] SF ¶ 13.

Petitioner First Amendment Coalition is a nonprofit public benefit corporation organized under the laws of California. One of its primary purposes is the advancement of the public's right to participate in government and to have access to information regarding the conduct of the people's business. SF ¶ 14.

The State Bar is a constitutional agency of the State of California established in California's judicial branch by Article VI, section 9 of the California Constitution. The State Bar develops and administers the California bar exam, and oversees admission to the practice of law in California. The State Bar maintains an admissions database that contains information concerning over 246,000 applicants from 1972 to 2008. SF ¶¶ 3, 27.

Intervenors Dwight Aarons, Charlene P. Bellinger Honig, Peter L. Carr, IV, Eugene Clark-Herrera, Francisco Cortes, Rebecca Hall, Angel Horacek, Sara Jackson, Andrea Luquetta-Kern, Xochitil Carrion, Letitia D. Moore, Anthony J. Tolbert, Erika K. Woods and Angel Horacek are California licensed attorneys or were applicants. Intervenors Black Women Lawyers Association of Los Angeles, Inc. and John M. Langston Bar Association of Los Angeles are associations of attorneys.

[1] Petitioner Joe Hicks passed away on August 28, 2016.

II. Petitioners' 2008 Records Requests and Petition for Writ of Mandate

On May 29, 2008, Petitioners Sander and Hicks made a request for information to the State Bar. Ex. 5, Letter from Richard Sander and Joe Hicks to Judy Johnson at State Bar Requesting Records dated May 29, 2008. On June 3, 2008, Petitioner First Amendment Coalition made a request for the same information sought by Petitioners Sander and Hicks. Ex. 18, Letter from Peter Scheer to Judy Johnson at State Bar dated June 3, 2008. Petitioners requested "individual-level" data concerning all applicants for the California Bar Examination from 1972 to 2008[2] that contains the following categories of information: race, law school, whether an applicant was a "transfer student," year of law school graduation, law school grade point average ("GPA"), undergraduate GPA, Law School Admission Test ("LSAT") score, whether an applicant passed the bar, and raw and scaled scores for each component of each California bar exam taken. SF ¶ 24, Ex. 5, Appendix A. Petitioners' request was made pursuant to the common law; Article I, section 3, of the California Constitution (Proposition 59); and Government Code section 6250 *et seq.* (California Public Records Act, or CPRA).

According to Petitioners, the data requested is to be utilized in researching "the effect that attending particular law schools has upon students who have been admitted to those schools with the use of significant preferences." Ex. 5. Petitioners proposed various methods by which to redact and organize records in a manner they believe would protect the privacy of applicants. SF ¶ 25, Ex. 5. Petitioners also offered to pay all reasonable costs incurred by the State Bar in the process of providing the requested records. *Id.* On June 12, 2008, the State Bar denied Petitioners' request on the grounds that the State Bar was not subject to information requests under the CPRA, and that Proposition 59 does not independently require the State Bar to produce the requested records. SF ¶ 26, Ex. 19, Letter from Richard Zanassi on Behalf of the State Bar to Richard Sander dated June 12, 2008. The instant Petition for Writ of Mandate ensued.

Petitioners' original Petition for Writ of Mandate was filed on October 3, 2008. It seeks an order from the Court directing the State Bar to provide to Petitioners the records they requested in their May 29, 2008 request. Petition for Writ of Mandate, filed 10/03/08 ("Petition"), Prayer ¶ 1. The Petition was first

[2] Petitioners' 2008 letters and the Petition for Writ of Mandate filed on October 3, 2008 sought data from 1972-2007. The parties have stipulated that Petitioners' request seeks data from 1972-2008.

brought pursuant to the common law and Proposition 59.

The parties stipulated to proceed in two phases as follows: a) Phase I would address whether the State Bar has any legal duty to produce the requested records; b) Phase II would address whether the provision of the requested records to Petitioners would violate the privacy of any person, and whether the cost or burden of manipulation, reproduction, or disclosure of the requested records provides a basis for denying or limiting disclosure. On April 13, 2010, following a trial on Phase I, the Honorable Curtis E. A. Karnow concluded that no law required the State Bar to disclose the records in the Admissions Database, and denied petitioners' writ without reaching the privacy issues that had been reserved for Phase II. Petitioners appealed.

III. The Supreme Court's Ruling in *Sander*

The California Supreme Court reversed the denial of the Petition, holding that under a common law right of public access, there is sufficient public interest in the information such that the State Bar is required to provide access to it, so long as (1) the information can be provided in a form that protects the privacy of applicants, and (2) no countervailing interest outweighs the public's interest in disclosure. *Sander v. State Bar ("Sander")* (2013) 58 Cal.4th 300, 304. With regard to the privacy issues, the Supreme Court stated that "the State Bar may choose to implement [Petitioners' proposals for de-identifying the requested records] or may propose other measures that will satisfy the public's right of access while protecting applicants' privacy." *Id.* at 327. The case was remanded to this Court for further proceedings on these two issues.

IV. The Legislature Makes the State Bar Subject of the CPRA and Enacts Business and Professions Code § 6060.25

On January 1, 2016, the State Bar was made subject to the California Public Records Act ("CPRA") by urgency legislation Senate Bill 387. Gov't. Code §§ 6252(f)(2). The parties stipulated to amendments to the pleadings to clarify that Petitioners' claims are also brought pursuant to the CPRA. *See* Amendment to Verified Petition for Writ of Mandate, filed 07/08/16 ("Amendment to Petition"), ¶ 1.

Senate Bill 387 also added Business and Professions Code section 6060.25, which provides that any identifying information submitted by an applicant to the State Bar for admission, including, but not limited to, bar examination scores, law school GPA, undergraduate GPA, LSAT scores, race and

ethnicity, *shall* be confidential and *shall* not be disclosed pursuant to any law, including the CPRA.

V. The Admissions Database

Following remand from the Supreme Court, the State Bar provided to Petitioners' experts, subject to a Protective Order entered on June 26, 2015, the State Bar's confidential "Admissions Databases" for the limited purpose of facilitating expert analysis concerning the issues to be addressed in Phase II. Tr. Ex. 17, Stipulation and Protective Order Regarding Production of Confidential Data for Use by Expert Witnesses ("Stipulation Re Production of Confidential Data"). The stipulation specifically provides that the State Bar produced the Admissions Database solely to counsel for the parties and experts as a highly confidential document. *Id.* ¶ 2. The stipulation provides that by producing the Database for expert analysis, no party waived any position concerning whether the requested data is a public record, or whether the data creates a new document, or any other issue. *Id.* ¶ 8.

The Admissions Databases consists of five separate files containing the following information regarding persons who took the Bar Exam between 1977 and 2008: a) the number of times each person took the bar exam, and whether the person passed or failed the exam; b) the date each person graduated from law school and a code for any law school attended; c) a record of each person's reported LSAT score and Law School GPA; d) a record of each person's reported race and ethnicity; and e) a file linking the school codes with actual law school names. Ex. 2, Expert Report of Luk Arbuckle, Felicia LeClere, Ph.D., Peter Arcidiacono, Ph.D., and Samuel Canas dated March 25, 2006 ("Arbuckle Report"), at pp. 18-19; Ex. 38, Expert Report of Latanya Sweeney, Ph.D., dated May 6, 2016 ("Second Sweeney Report"). The State Bar made a number of alterations and deletions from the Admissions Database prior to producing it to Petitioners, i.e. replacing social security numbers with file numbers. *See* SF Ex. 17, ¶¶ 2-5. Using this data, Petitioners' experts proposed four "de-identification protocols" that they contend adequately protect the privacy of State Bar applicants. *See* Ex. 1, Expert Report of Felicia LeClere, Ph.D., dated November 2, 2015 ("LeClere Report"); Arbuckle Report.

VI. Phase II Trial

Trial on Phase II commenced on July 11, 2016 before the Honorable Mary E. Wiss, and continued on July 12, 13, 14, 15, and 18, 2016. Petitioners' evidence includes several pages of computer coding

utilized under each of the four data de-identification protocols proposed; detailed descriptions of the methods and mechanics of each protocol; and expert testimony in support of their claim that each of the protocols adequately protect the applicants' privacy. Respondents and Intervenors proffered evidence demonstrating that production of the requested data would require creation of new documents; expert testimony relating to the risks and adverse effects of identification and/or misidentification associated with all of Petitioners' protocols; and evidence of the burden imposed on the State Bar by the production of the requested data. Intervenors presented witness testimony that disclosure of the requested data, as well as the associated risks of identification and/or misidentification, would lead to real and personal consequences for applicants and would violate their expectation of privacy. The parties submitted further argument following the conclusion of trial by way of post-trial briefs.

APPLICABLE LEGAL STANDARD

Petitioners' claims are based upon the common law, CPRA, and Proposition 59. Respondents and Intervenors assert that the State Bar is prohibited from releasing the requested data under these provisions and under Business and Professions Code section 6060.25. As discussed below, the Court concludes that the CPRA supersedes the common law, and must be construed in this instance along with Business & Professions Code section 6060.25. The Court of Appeal has held that Proposition 59 constitutionalizes the CPRA, and thus to the extent Proposition 59 requires the Court to construe statutes either broadly or narrowly, depending on whether they further or restrict the public's right of access, the Court does so in conjunction with its analysis of the CPRA.

Prior to the adoption of the CPRA, the common law recognized a "qualified right of public access" to public records. *Sander*, *supra*, 58 Cal.4th at 313-16. This right applies to matters "of sufficient public interest to justify requiring public access, taking into account the facts of the particular case, unless other interests, including a need for confidentiality, weighed in favor of nondisclosure." *Id.*

The CPRA, enacted in 1968 and modeled after the federal Freedom of Information Act (5 U.S.C. § 552 *et seq.*), "ensures public access to vital information about the government's conduct of its business." *City of San Jose v. Sup. Ct.* (1999) 74 Cal.App.4th 1008, 1016. "The CPRA establishes a presumptive right of access to any record created or maintained by a public agency that relates in any way

to the business of the public agency, and the record must be disclosed unless a statutory exception is shown." *Sander, supra*, 58 Cal.4th at 323. "Under the common law, on the other hand, no such presumption exists." *Id.*

In this case, the CPRA superseded the common law when the State Bar became subject to the CPRA on January 1, 2016. Finding that no statute applied to the case, the Supreme Court's decision in *Sander* was based solely on the common law. *Sander, supra*, 58 Cal.4th at 309 ("[N]o statute or rule resolves the question before us. We conclude...under the common law principles there is a public interest in access to the State Bar's admissions database..."). Because the State Bar became subject to the CPRA approximately two years following the *Sander* decision, the common law no longer applies. *See Copley Press, Inc. v. Sup. Ct.* (2006) 39 Cal.4th 1272, 1300. The Court notes that both the common law (as interpreted in *Sander*), were it still applicable, and the CPRA would require this Court to weigh the competing interests served by disclosure and non-disclosure of the requested records. Also, neither the common law nor the CPRA requires public agencies to create new records in order to respond to a request for public records. Thus, it appears that the only legal significance of the application of the CPRA to this case as opposed to the common law is the creation of a presumption in favor of disclosure, subject to exemptions provided by the CPRA. *See Sander, supra*, 58 Cal.4th at 323.

Proposition 59, passed in 2004, provides that the public has a right to access to "information concerning the conduct of the people's business, and, therefore, the meetings of the public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. Art. I, § 3, subd. (b)(1). Because Proposition 59 simply constitutionalized the CPRA, it does not limit or expand the right of access beyond the reach of the CPRA. *Sutter's Place, supra*, 161 Cal.App.4th at 1382. The only legal significance of Proposition 59 to this case is the requirement that statutes be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access. Cal. Const. Art. I, § 3, subd. (b)(2).

Finally, because Business and Professions Code section 6060.25 provides that, notwithstanding any other law, information about an applicant that *may* identify the applicant shall not be released, the Court must also consider and reconcile this statute. Accordingly, the Court's task is to analyze

Petitioners' records request under the CPRA and Business and Professions Code section 6060.25.

ANALYSIS

The Court denies the instant Petition based on five independently sufficient grounds: a) the disclosure of the requested records requires creation of a new record which is not required by the CPRA; b) the records requested are barred from disclosure pursuant to Business and Professions Code section 6060.25; c) the records are exempt from disclosure pursuant to Government Code section 6254(k) (disclosure prohibited by state law); d) the records requested are exempt from disclosure pursuant to Government Code section 6254(c) (unwarranted invasion of privacy); and e) the records requested are exempt from disclosure pursuant to Government Code section 6255(a) (catch-all exemption).

I. The Disclosure of the Requested Records Requires Creation of New Records

The CPRA does not require public agencies to create new records in order to respond to a records request. *Fredericks v. Sup. Ct.* (2015) 233 Cal.App.4th 209, 227 (citing *Haynie v. Sup. Ct.* (2001) 26 Cal.4th 1061, 1075). This is a well-established rule under the federal Freedom of Information Act, upon which the CPRA is based. *See NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 162 (FOIA does not require agencies to create new documents, it requires only disclosure of certain documents which the law requires agencies to prepare or which agencies have decided for their own reasons to create). In the FOIA context, the "manipulation" or "restructuring" of electronic data amounts to the creation of a new record. *Yeager v. Drug Enforcement Admin.* (D.C. Cir. 1982) 678 F.2d 315, 323. Because federal judicial construction of FOIA is useful in construing the CPRA, the rule that public agencies are not required to create new records, as well as the rule against manipulation or restructuring of data, applies to records requests made under the CPRA.

The State Bar argues that the instant petition should be denied because disclosure of the State Bar's data pursuant to any of the protocols proposed by Petitioners requires substantial changes to the State Bar's existing data and the creation of new records. As discussed below, the Court agrees.

All of the protocols require the State Bar to recode its original data into new values.[3] *See* Phase II Trial Transcript ("TT") 599:10-22 ["All of the protocols require the Bar to give out under its name data

[3] Each of Petitioners' proposed protocols is discussed in greater detail in Part VI of this Order.

that was computed from other fields but not necessarily the fields that it maintained or had originally"] [Sweeney]. For example, the protocols group law schools into three classes, designating a "school class" code, which is not present in the original bar Admissions Database. Canas Depo. p. 54:19-23; TT 575:19-576:1, 581:22-582:17 [Sweeney]; TT 1286:1-20 [Murphy]. The protocols also involve recoding race/ethnicity values to reflect four categories (Asian, Hispanic, Black, or White) instead of the State Bar's original eight race categories. Similar codes are created with respect to year of graduation. Canas Depo. 53:1-16, 94:11-25; TT 574:25-575:7, 576:2-11 [Sweeney]; TT 1284:19-1285:9 [Murphy].

In addition, Protocol One would also require the State Bar to create a physical data enclave which would provide restricted access to the State Bar's Admissions Database. Petitioners, however, failed to present any authority in support of their position that the CPRA allows this Court to order the State Bar to create this type of data enclave. The type of data enclave proposed under Protocol One is simply not a valid remedy under the CPRA.

Protocols Two, Three, and Four require the creation of even more new data. For example, Protocol Two involves replacing some applicants' actual LSAT scores with a calculated median, as well as possibly creating a new "underrepresented minority" or "URM" category that does not exist in the original Admissions Database. *See* Tr. Ex. 3, Summary of Protocol Dataset Creation ("Protocol Summary") at pp. 5-6. Protocol Four involves rounding off actual law school GPAs to two significant digits. *Id.* at p. 12. Finally, Protocol Three, which both the State Bar's and Petitioners' experts agree requires drastic changes to the State Bar's original data, requires calculating new values for GPAs and LSAT scores, as well as creating a variable indicating whether an applicant's law school is located in California or out-of-state. *Id.* at p. 11; *see also* TT 598:23-599-4 [Dr. Sweeney testified that none of the variables in Protocol Three exist in the raw Bar data, and that every variable would have to be calculated or recoded or both]; TT 249:10-13 ["[S]o much information has been changed or removed entirely from the data, law school name, the exact GPA, LSAT, all the data cleaning steps, they do a lot to change the structure of the data"] [Arbuckle].

The Court finds that requiring the State Bar to recode its existing data in the manner described above would require the State Bar to create new records. The Court rejects Petitioners' argument that the

protocols merely involve the redaction or manipulation of existing data and computer programming, which Petitioners contend do not amount to the creation of a new record. Petitioners' Opening Phase Two Post-Trial Brief ("Pet-PTB") p. 36. It is clear that the various steps outlined do more than simply redact or omit existing data. In order to achieve the "manipulated" data contemplated under each of the protocols, Petitioners had to produce a "Stata" software that applied a code specifically created to generate new data. *See* Tr. Exs. 4, 95, 96, and 97. Indeed, this case is vastly distinct from the two Illinois district court cases cited by Petitioners, in which the public agencies were ordered to produce a computer program that could *delete* certain information. *See e.g., Family Life League v. Dept. of Pub. Aid* (1986) 112 Ill.2d 449; *Hamer v. Lentz* (1989) 132 Ill.2d 49.

For the reasons stated above, the Court concludes that disclosure of the records requested by Petitioners pursuant to any of Protocols One, Two, Three, and Four requires the creation of new records. Accordingly, the petition must be denied.

II. The Records Requested are Barred from Disclosure Pursuant to Business and Professions Code Section 6060.25

As an additional ground for denying the petition, the State Bar argues that Business and Professions Code section 6060.25 ("section 6060.25") absolutely prohibits the disclosure of the data requested by Petitioners because individual applicants may be identified from the data. Respondents' and Intervenors' Trial Brief ("Resp-TB") p. 9. Section 6060.25 provides as follows:

> § 6060.25. Confidentiality of information provided by applicant to the State Bar for admission and license to practice law
>
> *Notwithstanding any other law*, any identifying information submitted by an applicant to the State Bar for admission and a license to practice law and all State Bar admission records, including, but not limited to, bar examination scores, law school grade point average (GPA), undergraduate GPA, Law School Admission Test scores, race or ethnicity, and any information contained within the State Bar Admissions database or any file or other data created by the State Bar with information submitted by the applicant that *may identify an individual applicant*, shall be confidential and shall not be disclosed pursuant to any state law, including, but not limited to, the California Public Records Act. (Emphasis added).

Bus. & Prof. Code § 6060.25. As discussed in Part VI below, disclosure of the data pursuant to Petitioners' Protocols One, Two, and Four presents the risk that individual applicants may be re-identified from the data, while disclosure pursuant to Protocol Three renders the data of minimal or no value and

thus disclosure under this protocol would be unwarranted in any event. Because section 6060.25 prohibits the State Bar from disclosing data that "may identify an individual applicant," notwithstanding any other law, the Court concludes that the State Bar is prohibited from disclosing the data in the form requested by Petitioners in this case. Such an outcome pursuant section 6060.25 is not subject to a balancing analysis.

The Court rejects Petitioners' argument that the State Bar may not invoke section 6060.25 because it failed to plead as an affirmative defense Government Code section 6254(k), which exempts from mandatory disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law." Pet-PTB p. 7. The State Bar specifically pled section 6060.25 in its Amended Answer. Unlike statutory exemptions under the CPRA, the State Bar has no ability to waive section 6060.25, which is a statute outside of the CPRA that prohibits the State Bar from disclosing the records requested in this case. For these additional reasons, the instant petition is denied.

III. The Records are Exempt from Disclosure Pursuant to Government Code Section 6254(k) (Disclosure Prohibited by State Law)

As stated previously, Government Code section 6254(k) ("section 6254(k)") exempts from mandatory disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law." Gov't Code § 6254(k). As discussed in Part II of this Order, the State Bar has demonstrated that disclosure of the requested records is prohibited by Business and Professions Code section 6060.25 because individual applicants may be identified from the data resulting from application of any of Petitioners' protocols. Accordingly, the Court finds that the State Bar has met its burden.

The Court rejects Petitioners' argument that the State Bar waived section 6254(k) by failing to plead it as an affirmative defense. Even if the State Bar were required to plead section 6254(k), the Court would have granted the State Bar leave to amend for this limited purpose.

IV. The Records Requested are Exempt from Disclosure Pursuant to Government Code Section 6254(c) (Unwarranted Invasion of Privacy)

The State Bar argues that the records requested in this case are also exempt from disclosure pursuant to Government Code section 6254(c), which exempts from disclosure "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Gov't Code § 6254(c). Under this exemption, the court must balance the public's interest in disclosure

against the private interests in non-disclosure. *See Los Angeles Unified School District v. Sup. Ct.* ("*LAUSD*") (2014) 228 Cal.App.4th 222, 239. For the reasons stated below, the Court concludes that disclosure of the records requested in this case would constitute an unwarranted invasion of personal privacy, and the petition is denied on this additional ground.

A. The public interest served by disclosure of the records

In determining whether the public interest would be served by disclosure of the requested records in the form proposed by Petitioners, the Supreme Court in *Sander* focused on whether disclosure would contribute significantly to public understanding of the activities of the State Bar, not on Petitioner Sander's motive in seeking the information in order to facilitate his research regarding law school admissions practices. *Sander, supra*, 58 Cal.4th at 324 ("[W]e focus on whether disclosure would contribute significantly to public understanding of government activities") (internal citation omitted). The analysis is the same under the CPRA. *See LAUSD, supra*, 228 Cal.App.4th at 242.

The Supreme Court ultimately found that disclosure of the records requested would contribute to the public's understanding of the State Bar's activities. *Id.* The court stated:

> The public does have a legitimate interest in the activities of the State Bar in administering the bar exam and the admissions process. In particular, it seems beyond dispute that the public has a legitimate interest in whether different groups of applicants, based on race, sex or ethnicity, perform differently on the bar examination and whether any disparities in performance are the result of the admissions process or of other factors. Indeed, the State Bar uses the database to prepare a statistical analysis of the bar exam that reports the bar passage rates for various categories of applicants. Public access to the admissions database used by the State Bar to evaluate its admissions process would allow the public to independently ascertain and evaluate that process. Therefore, the public's interest in the information in the database would contribute to the public's understanding of the State Bar's admissions activities, and is sufficient to warrant further consideration of whether any countervailing consideration weighs against public access.

Id. at 324-25. Thus, pursuant to *Sander*, there is a public interest in the activities of the State Bar in administering the bar exam and in the admissions process.

B. The private interests served by non-disclosure

The evidence demonstrates that disclosure of the State Bar's data pursuant to Petitioners' protocols, which fail to protect against the risk of re-identification (*see* Part VI), will have real, personal consequences for State Bar applicants.

Professor Erika Wilson of the University of North Carolina School of Law testified that she fears

being re-identified from the State Bar's data in view of the fact that she is one of just four black women to graduate from UCLA Law School in her class year. TT 788:3-11 [Wilson]. She also testified that disclosure of her private data might affect her ability to become a tenured professor, whether or not she is correctly re-identified. TT 793:1-25 [Wilson] She testified regarding the group stigmatization she fears will result if her and other applicants' data is used to draw broad conclusions about the abilities of black lawyers. TT 795:19-24 [Wilson]. According to Ms. Wilson, she provided her personal information to the State Bar with the understanding it would be kept confidential. TT 786:14-19 [Wilson]. She testified that she probably would not have provided such information had she known that the information would be publicly disclosed. TT 786:20-23 [Wilson].

Andrea Luquetta-Kern, member of the California Bar and a policy advocate at the California Reinvestment Coalition, testified that she believes her professional reputation may be marred by disclosure of her data. TT 987:11-20 [Luquetta-Kern]. She further testified regarding the group stigmatization she fears will result if her and other applicants' data is used to draw broad conclusions about the abilities of Latina lawyers. TT 987:21-988:16 [Luquetta-Kern].

Nicole Husband is the president of Black Women Lawyers of Los Angeles, Inc. She testified that the organization and its members are especially concerned that its members' private data will be used to draw negative generalizations about the relative abilities of black lawyers. TT 841:13-842:6 [Husband].

Kimberly Willis is the president of the John M. Langston Bar Association. She testified that the organization believes its members provided their personal information to the State Bar with the assurance that the information would be kept confidential, and the disclosure of such would harm its members' expectations of privacy. TT 885:14-20 [Willis].

As discussed below in Part VI, a significant number of State Bar applicants would face the same risks of re-identification and stigmatization if the requested records were disclosed pursuant to Petitioners' protocols.

C. The private interests in non-disclosure clearly outweigh the public interest served by disclosure of the records requested

The Intervenors' witnesses presented compelling testimony that attests to the human consequences posed by disclosure of the records requested in this case. Specifically, State Bar applicants have a strong

interest in preserving their expectation of privacy relating to information they provide to the State Bar. They also have a strong interest in avoiding any adverse consequences that may flow from disclosure of their data. Although Petitioners spent much time arguing that their protocols adequately protect the applicants' privacy interests, Petitioners failed to address Respondents' and Intervenors' evidence regarding the real-world consequences public disclosure of the State Bar's data could have on individual applicants. The strong private interest in nondisclosure leads the Court to conclude that disclosure of the records requested in this case would constitute an unwarranted invasion of personal privacy, and the petition is denied on this additional ground.

V. The Records Requested are Exempt from Disclosure Pursuant to Government Code Section 6255(a) (the "Catch-all" Exemption)

The CPRA provides that a public agency is justified in withholding records if it demonstrates that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Gov't Code § 6255(a). Under this exemption, the Court must balance the public interest in disclosure against the public interest in non-disclosure. *LAUSD, supra*, 228 Cal.App.4th at 243. If the public interest in non-disclosure does not clearly outweigh the public interest served by disclosure, the records shall be disclosed. *Id.* For the reasons stated below, the Court concludes that the public interest in non-disclosure clearly outweighs the public interest served by disclosure, and the petition is denied on this additional ground.

A. The public interest is served by non-disclosure of the records

The evidence presented demonstrates that non-disclosure of the State Bar's data in the form requested by Petitioners serves the public interest because it a) protects the general public from the adverse consequences resulting from public disclosure of the data; b) protects the State Bar's ability to collect data in the future; c) protects the State Bar's ability to release data in the future; and d) protects the State Bar from the burdens imposed by disclosure of the records.

1. Non-disclosure of the data protects the general public from the adverse consequences of disclosure

The testimony proffered by the Intervenors' witnesses, discussed in Part IV.B. above, attests to the *private* interests in non-disclosure of the records requested in this case. But public disclosure of the

records requested in this case could harm not only private individuals, but the general public as well. Indeed, the State Bar's data could generate unhealthy comparisons among lawyers, law students, and other professionals, and impede the goal of achieving greater diversity in the legal profession. The public certainly has an interest in avoiding these and other consequences. *See LAUSD, supra*, 228 Cal.App.4th at 245 (court found that disclosing teachers' test scores could "spur unhealthy comparisons among teachers and breed discord in the workplace," and that the public had an interest in avoiding these consequences).

2. Non-disclosure of the data protects the State Bar's ability to collect data in the future

Ms. Murphy testified that the Law School Admission Council stopped providing applicants' LSAT scores to the State Bar in 2008 as a result of the instant litigation. TT 1296:3-9 [Murphy]; Tr. Ex. 4. Indeed, the risk that information in the State Bar's possession could be publicly disclosed impacts the State Bar's ability to collect data from third parties, such as law schools and applicants to the State Bar.[4] As stated above, Professor Erika Wilson testified that she would not have provided her personal information to the State Bar had she known that her information would be publicly disclosed. TT 786:20-23 [Wilson]. The public has an interest in preserving the State Bar's ability to collect information necessary, or otherwise helpful, to the performance of its functions as a public agency. Non-disclosure of the particular records sought in this case preserves that ability.

3. Non-disclosure of the data protects the State Bar's ability to release data in the future

Ms. Murphy testified that the State Bar stopped its longstanding practice of publishing the names of successful bar applicants after the passage of Business and Professions Code section 6060.25. TT 1291:12-1292:11. The State Bar also stopped publishing its statistical reports, which reported passage rates by type of school and by school, with breakdowns of passage rates by race and gender by category of school, as well as information on first-time and repeat takers of the bar exam. The information contained in these reports is valuable to the public's understanding of bar passage rates and other matters.

[4] Ms. Murphy testified that the State Bar requests confirmation from law schools whether the applicant has successfully completed the required course of study. The State Bar does not request grades or GPAs. Instead, the law schools provide transcripts which include GPA and other information to the State Bar. TT 1268 3:1269:8 [Murphy].

Although the instant petition seeks past records, the State Bar asserted that disclosure of the requested records will likely result in similar requests in the future. Based on the evidence presented at trial, the Court finds that disclosure of records of the same type and scope as that requested by Petitioners in this case, which would involve public disclosure of significantly more information than what the State Bar has customarily released, presents significant risks that any other data the State Bar releases in the future could be used to re-identify applicants. Consequently, non-disclosure of the requested records in this case would protect the State Bar's ability to release valuable, non-identifying data in the future.

4. Non-disclosure of the data protects the State Bar from the burdens imposed by disclosure of the data

Finally, non-disclosure of the requested records protects the State Bar from the burdens imposed by disclosure of the data. Although Petitioners have offered to pay reasonable costs for the production of the records requested in this case, this does not shield the State Bar from the burden of having to implement Petitioners' protocols.

As stated above, disclosure of the requested records could subject the State Bar to similar requests in the future, which would impose further burdens. Ms. Murphy testified that any such future requests would need to be analyzed by the State Bar on a case-by-case basis. TT 1299:7-10 [Murphy]. The State Bar is not equipped to perform, in response to every CPRA request, the expert analysis undertaken in this case in order to ascertain whether the type of information sought will result in identifying individual applicants. TT 1298:19-23 [Murphy]. Such analysis would involve a determination of whether past releases of data, when considered in conjunction with the new data sought, would allow applicants to be re-identified from the data. TT 1299:11-16 [Murphy]. In order to perform this type of analysis, the State Bar would have to hire data privacy experts. TT 1298:19-23 [Murphy]. She further testified that having to respond to such requests, especially in view of the tight deadlines set by the CPRA, would consume a substantial amount of time, effort and expense on the part of State Bar staff, and take away from their other tasks. TT 1300:23-1302:10 [Murphy].

B. There is a public interest served by disclosure of the records

The Supreme Court in *Sander* stated that the public has a legitimate interest in the activities of the State Bar in administering the bar exam and the admissions process, whether different groups of

applicants, based on race, sex or ethnicity, perform differently on the bar examination, and whether any disparities in performance are the result of the admissions process or other factors. *Sander* at 324-25. Indeed, the State Bar previously published statistical analyses of its bar passage rates at schools which included statistical information on gender and race.

C. The public interest in non-disclosure clearly outweighs the public interest served by disclosure of the records requested

The Court concludes, based on all the evidence presented, that the public interest in nondisclosure clearly outweighs the public interest served by disclosure of the records requested in this case. The general public has a strong interest in avoiding the adverse consequences that could result from public disclosure of the records requested in this case. In particular, the public has a strong interest in avoiding unhealthy and unwarranted comparisons among legal professionals, including attorneys who are public figures, candidates for office, or those who serve in elected or appointed positions. Additionally, the public has a strong interest in maintaining and encouraging diversity in the legal profession, and in avoiding the stigmatization of individuals or groups of individuals. The release of the information requested here including, GPA, LSAT scores, bar exam scores for both successful and unsuccessful applicants, is unprecedented and presents significant risks of identification. No evidence was presented at trial that any profession is subject to the release of the type of information requested here, either in California or any state. For these reasons, the Court concludes that the requested records are exempt from disclosure pursuant to the CPRA's "catch-all" exemption. Accordingly, the instant petition is denied based on this additional ground.

VI. Protocols One, Two, and Four Do Not Adequately Protect Against the Risk of Re-Identification and Protocol Three Provides Limited Utility of the Data

A central issue in this case has always been the risk that State Bar applicants' privacy interests would be harmed by disclosure of the requested records given the risks of re-identification. The Supreme Court stated that upon remand this Court must resolve "whether and how a record that is responsive to plaintiffs' requests may be produced without identifying individual applicants or otherwise unduly burdening any legitimate competing interests." *Sander, supra*, 58 Cal.4th at 327. Petitioners proposed four new "protocols" for anonymizing the Admissions Database, which they contend adequately protect

against the risks of re-identification.[5] As discussed below, the Court concludes that Petitioners' Protocols One, Two and Four do not adequately protect against the risk that applicants may be re-identified using the State Bar's data. Further, while Protocol Three provides the most protection against re-identification, disclosure of the data requested pursuant to this protocol provides minimal value. Thus, disclosure of the requested records pursuant to Protocol Three is unwarranted on this basis.

A. Protocols One, Two, and Four do not adequately protect against the risk of re-identification

Protocols One, Two and Four purport to make use of a data de-identification technique called "k-anonymity." Because Protocol Three does not attempt to apply this technique, it is discussed separately. According to the State Bar's data privacy expert, Latanya Sweeney, Ph.D., k-anonymity ensures that for every record that appears in the dataset there are always at least "k" indistinguishable copies. Second Sweeney Report p. 18. For example, applying a "k=5" to the State Bar data means that the resulting data guarantees that for every record of an individual applicant that appears in the State Bar's data, there would be at least five indistinguishable copies. Protocols One, Two, and Four vary both in the size of "k" and in the other anonymization techniques proposed under each protocol.

Protocol One entails creation of a physical data enclave that would provide controlled access to a modified version of the Admissions Databases. Arbuckle Report at pp. 30-32. Under Protocol One, as with all other protocols, personally identifying information, such as names, addresses, and Social Security numbers would first be deleted from the data. Protocol One purports to apply a k=5. It would also require members of the public wishing to access the data to sign Data User Agreements through which they agree not to attempt to identify individuals or disclose any inadvertent identifications; and it would limit what items members of the public can take into and out of the enclave.[6] Arbuckle Report at pp. 30-32; Protocol Summary at pp. 1-4.

Protocol Two entails creation of a public use file from the Admissions Database, and purports to

[5] Petitioners assert that this Court is not limited to analyzing the four protocols proposed by Petitioners, and that this Court may fashion on its own a different protocol for disclosing the requested records. The evidence presented at trial is a testament to the expertise required in developing, analyzing, and implementing these protocols. The Court is in no position to assume such an endeavor.

[6] A comprehensive description of Protocol One is outlined in the Arbuckle Report at pp. 30-32, and Exhibit 3, Summary of Protocol Dataset Creation ("Protocol Summary"), at pp. 1-4.

apply a k=11. Additionally, under Protocol Two, aspects of the data that would tend to produce only a few matches would be eliminated or combined. For example, data related to persons graduating from unaccredited law schools would be eliminated, or race categories would be reduced from eight to four (White, Black, Hispanic, and Other). Also, the resulting data would be modified to cure any remaining cell size issues. For example, if either the "Black" or "Hispanic" cells are fewer than eleven, they would be combined into an "underrepresented minority" category.[7]

Protocol Four would create a public data file using the techniques of Protocol Two, but would apply three additional de-identification techniques to prevent re-identification by a person who knows or has access to an individual's law school GPA. First, the protocol would eliminate all information for a randomly selected 25% of the applicants. Second, it would round law school GPAs to two significant digits (e.g., 3.18 would become 3.2). Third, Protocol Four would suppress unique law school GPAs, but only for those applicants' records where the law school attended, year of graduation, reported race, and status of having passed or failed the bar are identical.[8]

The evidence demonstrates that Protocols One, Two, and Four do not adequately protect against the risk of re-identification.

The percentage of unique records that would exist after application of any of Protocols One, Two, and Four are significantly higher than other acceptable norms. Both Petitioners' and the State Bar's experts agree that measuring the percentage of unique records in a dataset is one way to calculate the risk of re-identification. TT 180:12-181:15 [Arbuckle]. Dr. Sweeney's calculations show the following percentages: 47% of the data after application of Protocol One are unique records across all fields; 46% of the data under Protocol Two are unique records across all fields; and 31% of the data under Protocol Four are unique records across all fields.[9] Tr. Ex. 93; *see also* Third Sweeney Report p. 13. Dr. Sweeney's calculations further show how, under these protocols, members of minority groups are more likely to be re-identified from the State Bar's data than their white counterparts. Third Sweeney Report pp. 9, 12, 13;

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[7] A comprehensive description of Protocol Two is outlined in the Arbuckle Report at pp. 32-36, and Protocol Summary at pp. 4-7.

[8] A comprehensive description of Protocol Four is outlined in the Arbuckle Report at pp. 40-42, and Protocol Summary at pp. 11-12.

[9] Dr. Sweeney's calculations are based on the datasets produced by Petitioners in May 2016, which reflect the data resulting from Petitioners' application of their proposed protocols.

see also TT 612:21-613:17. Petitioners' data privacy expert, Luk Arbuckle, testified that Dr. Sweeney's calculations are accurate insofar as they represent the actual number of unique records in the resulting datasets. TT 200:18-25 [Arbuckle]. Regardless of whether the HIPAA standard is .02% to .04%, as Respondents contend, or .22%, as Petitioners contend, the percentages described above vastly exceed that standard.[10]

The Court is not persuaded by Mr. Arbuckle's opinion that only data that is "publicly knowable," i.e. law school attended, year of graduation, race/ethnicity, and status of having passed or failed the bar, should be considered when counting the number of unique records in the datasets, in which case the percentage of unique records across these fields of data is 0% for both Protocols Two and Four. *See* Arbuckle Report p. 33; TT 210:23-211:9 [Arbuckle]; Tr. Ex. 223. As Dr. Sweeney testified, Petitioners' protocols improperly ignore the possibility that a person who knows an applicant's law school GPA, LSAT score, and/or the number of times an applicant took the bar exam can combine that piece of information with the State Bar data in order to re-identify the applicant. TT 496:3-15; 555:11-556:5 [Sweeney]; *see also* TT 230:1-231:8; 409:14-25 [Mr. Arbuckle agreed that the risks of re-identification increase when an applicant's law school GPA, LSAT score, and/or the number of bar attempts are known]. Such a situation could arise when applicants themselves, employers, law school staff, journalists, or other persons with access to such other information attempt to re-identify applicants from the data. *See* Second Sweeney Report at p. 15; *see also* TT 496:3-497:13, 498:9-499:7, 499:24-501:5, 525:1-526:22, 667:12-669:3, 671:7-19 [Dr. Sweeney testified regarding various studies in the field of data privacy that considered both publicly and privately held information]. Indeed, given the increasingly vast amount of personal information that can be found on the internet and or social media sites, as well as modern technological advancements that aid in data re-identifications, this Court cannot ignore the risk that information that may not be known to the general public, such as law school GPAs, is available, and may become known and used to re-identify individual applicants from the data.

In addition to the high percentage of unique records in the data resulting from Protocols One, Two, and Four, the datasets present significant risks that, even if individual applicants cannot be matched

[10] Although neither party asserted that HIPAA standards applied in this case, both parties compared their respective calculations against the HIPAA standard for medical records.

with particular records, inferences can be drawn about applicants simply by virtue of their belonging to a particular group. Such "attribute disclosures" might result from the State Bar's data when a person is able to determine that an applicant who attended a particular law school, graduated at a certain year, and is of a certain race/ethnicity must also be one of such applicants who share a certain range of law school GPA, for example. Petitioners did not present any evidence demonstrating how Protocols One, Two, and Four protect against the risk of attribute disclosures; rather, they merely contend that only unique or "1:1" identifications are relevant to the Court's assessment. The Court disagrees with Petitioners. Petitioners' own data privacy expert testified that attribute disclosures are relevant in the field of data privacy. TT 269:16-270:1 [Arbuckle]. Moreover, the possibility of being linked to a negative attribute can be just as harmful as a verified, 1:1 identification. The human consequence of attribute disclosures is a legitimate concern, and is relevant to this Court's analysis. *See Sander, supra*, 58 Cal.4th at 327 (trial court may consider "other legitimate interests"). For the reasons stated above, Protocols One, Two, and Four do not adequately protect against the risks of re-identification.

B. Protocol Three Provides Limited Utility of the Data

Protocol Three entails creation of a public use file from the Admissions Databases using a variety of de-identification techniques. Specifically, law school names would be eliminated from the data, and LSAT scores and law school GPAs would be "standardized" or "recoded" to reflect the applicants' scores based on a computed average rather than their actual scores and GPAs. This protocol requires the State Bar to drastically manipulate actual data from the Admissions Database, which results in data that offers the least value. TT 738:17-23; 744:12-17 [Arbuckle]. Petitioners presented no compelling evidence or argument regarding the utility of data disclosed pursuant to Protocol Three. No purpose is achieved by requiring the State Bar to perform extensive computerized gymnastics to anonymize the data contained in the Admissions Database such that it might be subject to disclosure, when the information has minimal or no value.

CONCLUSION

The instant Petition for Writ of Mandate is denied based on the following independently sufficient grounds:

1. The disclosure of the requested records pursuant to any of Petitioners' protocols requires the creation of a new record, and thus the State Bar is not required to disclose the data;

2. The requested records are barred from disclosure pursuant to Business and Professions Code section 6060.25;

3. The requested records are exempt from disclosure pursuant to Government Code section 6254(k) in that disclosure is prohibited by state law;

4. The requested records are exempt from disclosure pursuant to Government Code section 6254(c) in that disclosure constitutes an unwarranted invasion of privacy; and

5. The requested records are exempt from disclosure pursuant to Government Code section 6255(a), the CPRA's "catch-all" exemption.

Respondents are directed to prepare a Judgment consistent with this Order, and submit it to counsel for Petitioners and Intervenors for approval as to form.

Dated: November 7, 2016

Mary E. Wiss
Judge of the Superior Court

Superior Court of California
County of San Francisco

RICHARD SANDER, et al.,

Petitioners,

vs.

STATE BAR OF CALIFORNIA, et al.,

Respondents,

DWIGHT AARONS, et al.,

Intervenors.

Case Number: CPF-08-508880

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, T. Michael Yuen, Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On November 7, 2016, I electronically served the ORDER DENYING PETITION FOR WRIT OF MANDATE via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: November 7, 2016

T. Michael Yuen, Clerk

By: Sean Kane

Sean Kane, Deputy Clerk