

July 7, 2005

La Varn Williams
Director, Pacifica Foundation
KPFA Berkeley, CA

Re: Analysis of Directors' Inspection Rights Under California Law And Pacifica Bylaws
With a Brief History of the Dispute.

Dear La Varn:

Here is the legal analysis you requested. I hope this will reduce the confusion, real or simulated, over this rather commonplace corporate activity. You may retain this as an attorney-client privileged communication or you may share it as you choose. The privilege is yours to do with as you please. Once you share it with someone outside of a professional that you are working on this issue with or a potential co-petitioner you have waived the privilege. I see nothing in this paper that shouldn't be shared if you so desire.

To have a full understanding of our subject we must understand the context within which it will occur. Pacifica Foundation is a California Non-Profit Public Benefit Corporation. Its Bylaws and California law, generally found in the California Corporations Code, govern it. All code sections cited will be to this code unless otherwise stated.

The Board of Directors is described in Article Five of the Bylaws. Section D makes it clear that the Foundation is governed by the Board of Directors and they are required to uphold the Bylaws

D. GENERAL POWER AND AUTHORITY

Subject to the provisions of the California Nonprofit Public Benefit Corporation law, and any limitations in the Articles of Incorporation and these Bylaws relating to action required or permitted to be taken or approved by the Members or Delegates of the Foundation, the activities and affairs of the Foundation shall be conducted and all corporate powers shall be exercised by or under the direction of the Board.

The Board's specific responsibilities are stated in Section E.

E. SPECIFIC POWERS AND DUTIES

Without prejudice to the general power of the Board set forth above in Section 1D of this Article of these Bylaws, and subject to any limitations set forth in these Bylaws, the ongoing duties and powers of the Board shall include, but not be limited to:

(1) Ensuring and facilitating fulfillment of the purposes of the Foundation as set forth in the Articles of Incorporation;

- (2) Ensuring compliance with applicable state and federal laws;
- (3) Ensuring the financial health of the Foundation by adopting and monitoring an annual budget and overseeing an independent annual audit of the Foundation's books and accounts;
- (4) Ensuring regular communication with the Members;
- (5) Appointing, supervising and discharging the Foundation's Executive Director, Chief Financial Officer and all Foundation officers, prescribing powers and duties for them as are consistent with the law and these Bylaws, and setting salaries and wages;
- (6) Overseeing the conduct, management and control of the Foundation's affairs and activities, including the monitoring of the activities and actions of its radio stations and national staff consistent with applicable law and regulations, the Articles of Incorporation and these Bylaws;
- (7) Meeting at such regular times and places as required by these Bylaws and meeting at such other times as may be necessary in order to carry out the duties of the Board;
- (8) Registering their addresses, telephone numbers, facsimile telephone numbers and email addresses with the Foundation's Secretary. Notices of meetings mailed, transmitted by telecopier or facsimile, or emailed to them at such addresses shall be deemed valid notices thereof.

A Director's responsibilities are also defined under California Statutory Law, section 5231:

- (a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, **including reasonable inquiry**, as an ordinarily prudent person in a like position would use under similar circumstances. (Emphasis added).

California case law also speaks to a director's fiduciary duty:

Directors may not abdicate their authority by delegating their powers of management of the corporation to other persons (Dyer Bros. etc. Iron Works v. Central Iron Works, 182 Cal. 588 [189 P. 445]), and cannot divorce the responsibilities of their office from the duties prescribed by statute (Minton v. Cavaney, 56 Cal.2d 576, 580 [15 Cal.Rptr. 641, 364 P.2d 473]). ... Section 820 of the Corporations Code provides that directors and officers must exercise their powers in good faith and with a view to the interests of the corporation. They occupy a fiduciary relationship to the corporation and are bound to exercise that degree of care that men of common prudence take of their own concerns (Sheppard v. Wilcox, 210 Cal.App.2d 53 [26 Cal.Rptr. 412]). Thus, directors cannot close their eyes to what is going on about them in the conduct of the business of the corporation.

*National Auto. & Cas. Ins. Co. v. Payne 261 Cal.App.2d 403, *412 -413 (Cal.App.1.Dist., 1968)*

Given that Directors have complete responsibility for the "activities and affairs" of their corporation and a duty to make **reasonable inquiry**, the California Legislature enacted

section 6334 to facilitate a Director's ability to fulfill her/his fiduciary duty. By now everyone should be familiar with section 6334, which states:

Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director. (Similar language is found in the Bylaws at Article 12, Section 3).

California case law also supports a broad application of this statute. Section 1602 is the general corporation equivalent of 6334.

*The directors of a corporation owe a fiduciary duty to the corporation and its shareholders. (Hartman v. Hollingsworth (1967) 255 Cal.App.2d 579, 581-582 [63 Cal.Rptr. 563].) Section 1602 represents a legislative judgment that directors are better able to discharge those duties if they have free access to information concerning the corporation. Thus, California has a public policy favoring broad inspection rights for the directors. ... We may not ignore that declaration of public policy. Havlicek v. Coast-to-Coast Analytical Services, Inc. 39 Cal.App.4th 1844, *1852 (Cal.App.2.Dist.,1995)*

The issue in controversy is how do we interpret this code section. The language seems clear and given a Director's fiduciary duty, quite appropriate. There have been various opinions and some posturing on this issue which includes citing cases incorrectly and/or incompletely. There has also been abject denial of director's inspection rights in some quarters. Hopefully we can resolve the issues, eliminate the posturing, and facilitate a director's ability to fulfill his/her fiduciary duty without having to seek court intervention. Unfortunately, way too much Foundation money has been spent on legal issues in the last few years. Most of it was a complete waste due to the hijackers. Some of it is the responsibility of recent former management that was out of step with the reality of who runs the Foundation and some board members that allowed this to happen. It appears that the inspection rights dispute has been the observable focal point of a struggle by a former Executive Director to control the Foundation as opposed to implementing the will of the board. Hopefully with his departure the Foundation will be able to get governance in proper perspective.

Article Nine, Section 7 of the Bylaws defines the Executive Director's role in the running of the Foundation. It makes it clear that the Executive Director works for the Board.

*A. The President of the Foundation shall be referred to as the "Executive Director." The Executive Director shall be the general manager, chief executive officer and chief administrator of the Foundation. **S/he shall be selected, supervised and discharged by the Board. In addition, his/her performance will also be subject to annual evaluation by each LSB, which may make recommendations to the Board.***

*B. **Subject to the control of the Board, the Executive Director shall have general supervision, direction and control of the business and the officers of the Foundation and the primary responsibility for implementing the directives, decisions and policies of the Foundation and the Board** pertaining to administration, personnel, programming, financing and public relations. The Executive Director shall generally promote, coordinate and supervise the mission of the Foundation and **shall have such powers and perform such duties as may be delegated or assigned to him/her by the Board.** (Emphasis added)*

In April of 2004, in response to some struggle over Director's inspection rights, Attorney Kevin Finck produced an opinion paper at the Executive Director's request. It was discussed at the April 28, 2004 public Board Meeting. Finck's report made it clear that the Foundation could set up procedures for inspection but that if a Director ignored them and showed up to inspect that the staff could not refuse the inspection based on the failure to follow the procedures. Directors are not required to state the purpose for their inspection. (Other sections of the code, 6333 and 9513 include "reasonably related to such person's interest" which the legislature left out of 6334 and 1602.) They do not have to give advance notice or a written demand before inspection. The report also pointed out that while there were potential exceptions to the "absolute" right to inspect there are very few. A director that announces that they are going to do something tortious with the information is the major exception. The report also emphasized the need to be careful with certain categories of information that must be kept confidential since a director and the Foundation may be sued for disclosure of confidential information. These included personnel information of current or former employees, information regarding pending or threatened litigation, donor information and proprietary information such as ratings etc.

Disregarding this detailed and expensive legal opinion the Executive Director refused to allow an inspection at WBAI on March 31, 2005 stating that he needed a legal and policy review with the Board. Despite the fact that they are not required to give notice and state what they want to inspect, Directors La Varn Williams and Patty Heffley courteously gave a weeks notice stating some of the document categories they wanted to inspect. The refusal was particularly burdensome to Director Williams since she was in New York for a short time for the Board meeting. Directors Williams and Heffley notified the Board and the Executive Director, the weekend after the first refusal, that they would be

inspecting WBAI on Monday April 4, 2005 before Director Williams left to return to California. Again the Executive Director denied them their right to inspect.

During the April board meeting the issue was discussed and an executive session was planned to deal with the inspection requests that had been denied. The Executive Director raised the question of should Directors Williams and Heffley be allowed in the executive session since they appeared to have an adverse position with the Foundation given that they were considering seeking a court order to be allowed to inspect. I pointed out to several directors that the Executive Director had an adverse position with the Bylaws and California Law. Directors Williams and Heffley were only seeking their inspection rights that he was denying them and that if they went to court it would only be for the court to order the Executive Director to let them inspect. Directors Heffley and Williams were allowed in the executive session. The Board did not order the Executive Director to let them inspect on April 4th and when they went they were denied again. At the April Board Meeting the Executive Director announced that he was resigning no later than June 1, 2005.

Their inspection request was sent to the Coordinating Committee for review. On or about April 11th I delivered a letter to the Executive Director advising him of my representation of Directors Williams and Heffley and that we would be going to court for relief if they were not allowed to inspect soon. No meeting was held until April 17th. At that meeting the Executive Director stated that he had just that day found a new attorney and wouldn't have an opinion from him for a few days. The next Board meeting was on April 25, 2005. At that meeting there was discussion of director's inspection and they voted 12 -3 with 2 abstentions to essentially tell the Executive Director to let directors inspect. Inspection of WBAI was finally allowed in May. The directors and attorney Gail Blasie, were treated like strangers. They were refused access to some files and followed around by adverse directors. One of the "observers" was a director that voted NO on April 25th and another was a director that abstained on April 25th. There have been some negotiations on the denial of access to these files which included personnel files.

On June 8, 2005 La Varn Williams and myself, as agent for Patty Heffley, attempted to inspect the national office in Berkeley. We gave them two days notice. The Executive Director and Chief Financial Officer were present along with other staff and we were not allowed to do an inspection. The Executive Director said they were busy and we told him that we didn't need any help, all we needed was a table to work on and to be shown where the files are located. We were still denied. I then called the President of a Trial Lawyers organization where I sit on the board and asked him if I could inspect the books and records. His response was "When do you want to do it?" There was no hesitation or concern in his voice. What a contrast.

The former Executive Director finally left on June 17, 2005. Over the next weekend the Board met in Berkeley and picked Ambrose Lane as Acting Executive Director. Directors Williams and Heffley communicated with the Acting Executive Director that they were going to inspect on June 21, 2005. They were advised that we would be allowed to inspect. When Directors Williams and Heffley and I arrived on the morning of June 21st

we were met by William Walker with a video camera. Walker is a staff elected director. He was one of the NO votes on April 25th. Several other people were there to “observe”. We were treated like strangers as in New York. Lonnie Hicks, Chief Financial Officer, was there to orchestrate the “inspection”. Without going into great detail we were not allowed to look at any files, despite continued requests. Copies of documents were given to us. We had not requested copies to avoid the time and expense. We were advised that based on legal advice, new attorney more to their liking than Finck, we were not going to be allowed to inspect any personnel files or legal files. I protested and we were still told that we would not be allowed to see any files in those two categories. Apparently their new lawyer wanted all such files sent to him for review before any director would be allowed to inspect. More unnecessary legal expenses for Pacifica?

Two days later Directors Williams and Heffley with Max Blanchet, as agent for Director Wendy Schroell from KPFT, attempted another inspection at the national office. Again they were treated like strangers with several “observers” and in a limited fashion were allowed to see some files. Still no legal files except for legal bills with some areas redacted. The CFO reported as an “inspection” expense all the time of the “staff observers” and the copying of the items that was not requested. He is trying to build a case for the burdensome nature of the inspections. Most of that expense was generated by his activities to impede easy access to the files, not the directors desire to review some files.

Now we have the beginnings of staff cooperation with an activity that is allowed by the Bylaws and California law. This commonplace corporate procedure, for most other corporations, has taken hundreds of hours of directors and staff time and tens of thousands of dollars in legal advice which appears to have been directed toward thwarting inspections. Why? The most common question asked by Pacifica members when they hear of this waste of time and resources to stop inspections is “What are they hiding?”

There appears to be three points that need to be resolved to avoid the lawsuits that many members are demanding, given the failure to allow complete inspections. 1. Treatment of directors during inspections, 2. Personnel files, 3. Legal files.

1. The directors are an integral part of the Foundation. They are hardly strangers. As pointed out above they are responsible for the Foundation. They hire and supervise the Executive Director and set the policies for the foundation that the Executive Director is to implement. So why has the national staff management treated the directors inspections as an invasion by some strangers? The directors are only fulfilling their fiduciary duty by **reasonable inquiry** as allowed and required by law. In a concurring opinion Justice Crosby spoke to this situation:

...in light of a director's potential exposure, the denial of unconditional access to corporate books and records constitutes poor policy: well qualified individuals might decline to serve with something less than absolute inspection rights. (Cf. Gould v. American Hawaiian Steamship Company (D.Del. 1972) 351 F.Supp. 853, 859.)

Chantiles v. Lake Forest II Master Homeowners Assn. 37 Cal.App.4th 914, *929 (Cal.App.4.Dist.,1995)

While there are some differences among directors and staff on how the Foundation should be run, with occasional accusations of improper behavior toward various directors, this cannot be a basis for refusing access to corporate documents.

Only the issues related to the prevention of a tort resulting from Saline's inspection of the documents-not the entirety of his conduct as a director-are relevant to the question of whether limiting Saline's access to corporate documents was appropriate.

Saline v. Superior Court 100 Cal.App.4th 909, *914 (Cal.App.4.Dist.,2002)

It is time for Pacifica to start acting like a mature organization and for the national staff to acknowledge and facilitate the rights of the directors to inspect as part of their fiduciary duty as specifically allowed under the Bylaws. It will save everyone time and keep the Foundation legal fees to a minimum. Especially if they want to attract well qualified individuals to serve on the Board.

2. Personnel files are generally considered confidential. The question is confidential to whom? Obviously confidential personnel information should not be disclosed to anyone outside of those that need to have access in the normal course of running the Foundation. There is no California case that says directors are not entitled to inspect personnel files. The Finck opinion said they must be handled with care and that directors would be individually liable for disclosure. How can one be liable for disclosure without access?

Those that argue that personnel files are off limits point to the case of *Hill v. NCAA* (1997) 7 Ca. 4th 1, for a privacy right that protects against invasions by private citizens as well as the state. They only look to the point that the California Supreme Court acknowledged that privacy right, but they ignore the conditions and qualifications that the Court included. When these are examined we see that this case does not support the refusal to allow directors to inspect personnel files. A look at the specific holdings in *Hill v. NCAA* will make this clear.

(1) A legally protected privacy interest

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest.

Hill v. National Collegiate Athletic Assn. 7 Cal.4th 1, *35 (Cal. 1994)

All reasonable people would concede that a personnel file represents a legally protected privacy interest. No argument here.

(2) Reasonable Expectation of Privacy

The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on plaintiff's part.

"The extent of [a privacy] interest is not independent of the circumstances." (Plante v. Gonzalez,

supra, 575 F.2d at p. 1135.) Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy.... In addition, customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. (See, e.g., *Whalen*, *supra*, 429 U.S. at p. 602 [51 L.Ed.2d at p. 75] [reporting of drug prescriptions to government was supported by established law and "not meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care...A "reasonable" expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. (See, e.g., *Rest.2d Torts*, *supra*, § 652D, com. c ["The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens."]) Finally, the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests obviously affects the expectations of the participant. (See pt. 2(a)(1), *ante.*) *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, *36 -37 (Cal. 1994)

For documents already in an employee's personnel file there can only be a limited expectation of privacy. Documents will have already been seen by the person that filed them and the office manager that has reviewed them for what ever purpose they are in the file; such as a discipline write up, time cards, a medical excuse for missing work, or a letter of recommendation from a former employer, etc. Also future staff and or management may have to review them. The reasonable expectation of privacy that an employee may have is that the documents in his/her file will not be disclosed to anyone other than those in the company for good reason.

(3) Serious invasion of privacy interest

No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part." (Rest.2d Torts, supra, § 652D, com. c.) Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.

c. Defenses to a State Constitutional Privacy Cause of Action

*Privacy concerns are not absolute; they must be balanced against other important interests. (Doyle v. State Bar, supra, 32 Cal.3d at p. 20; Wilkinson, supra, 215 Cal.App.3d at p. 1046.) "[N]ot every act which has some impact on personal privacy invokes the protections of [our Constitution] [A] court should not play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." (215 Cal.App.3d at p. 1046.) The diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a "balancing test." The comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law. *38 **Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest.** Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. **Conduct alleged to be an invasion of privacy is to be evaluated***

based on the extent to which it furthers legitimate and important competing interests. ...
(Emphasis added.) *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, *37 -38 (Cal. 1994)

I am confident that a court would hold that inspection of a personnel file by a director would not constitute a serious invasion of privacy, if an invasion at all.

It is likely that a court would hold that an employee doesn't have an expectation of privacy that would prohibit a director from fulfilling her/his fiduciary duty by inspecting a personnel file. As we have already discussed, a director is an integral part of the Foundation with fiduciary responsibilities mandated by the Bylaws and state law. Of course with this holding would be the understanding that the director must not disclose the information to anyone outside those that would have legal access to said information with civil liability attached for any improper disclosure.

If for some reason the court would hold that there was an expectation of privacy with regard to a director, I am positive that it would also hold that there was a sufficient competing interest to allow the directors inspection. Previously discussed Sections 5231 and 6334, "absolute right at any reasonable time to inspect," and its replication in the Bylaws, would provide the *legitimate and important competing interest*. How is a director to be able to determine if management is handling personnel matters properly without the ability to review personnel files? The same caveat for improper disclosure would apply.

So unless someone thinks they can convince a Judge that a director is a stranger to the Foundation, that a confidential inspection by a director would constitute a serious violation of privacy, and directors have no important and competing interest under Sections 5231 and 6334 and the Bylaws, there is no good faith basis to deny inspection of a personnel file by a director.

3. The Acting Executive Director has refused to allow directors to inspect legal files arguing that *Hoiles v. Superior Court* (1984) 157 Cal.App. 3rd 1192 gives a corporation an attorney-client privilege. I don't disagree that a corporation has the privilege. However, here again we have the use of the general holding and an ignoring of the holding particular to our issue. *Hoiles* is a case where the director in a closely held corporation is suing for breach of fiduciary duty and dissolution of the corporation. It may make sense that he could be limited in his access to the corporations legal files with regard to the pending litigation where he is in an adverse position with the corporation. Given no case on point in California, the court looked to Delaware and *Henshaw v. American Cement Corporation* (1969) 252 A.2d 125, 128 for guidance. In *Henshaw* the suit against the corporation was brought by an individual as a shareholder and director. The *Henshaw* court held as follows:

In answer to a similar contention of an individual whose attorneys were involved in other litigation adverse to the corporation and who brought suit as a shareholder and director, the Delaware Court of Chancery permitted access to otherwise privileged corporate information to the director in that capacity, but not to the attorneys. Reminding the director of his fiduciary obligation to the corporation the chancellor observed, 'A director ... has the right to inspect corporate books and records; that right is correlative with his duty to protect and preserve the

*corporation. He is a fiduciary and in order to meet his obligation as such he must have access to books and records; indeed he often has a duty to consult them. [Citations.]' (Henshaw v. American Cement Corporation (1969) 252 A.2d 125, 128.)
Hoiles v. Superior Court 157 Cal.App.3d 1192, *1201 (Cal.App.4.Dist.,1984)*

Hoiles did not bring suit as a director, which he was, but only as a shareholder. In discussing that issue the court stated:

*We believe Henshaw provides a reasonable solution to the problem presented there and that Hoiles is arguably entitled to review corporate legal *1202 documents and to question Stahr in his role as a director here. But the issue is not presently before us. Hoiles has not sued in that capacity and has not requested the information on a fiduciary basis and independent of his counsel in this proceeding.
Hoiles v. Superior Court 157 Cal.App.3d 1192, *1201 -1202 (Cal.App.4.Dist.,1984)*

There is no reasonable basis to refuse to allow a director to inspect legal or litigation files past or present that don't involve the director. How is a director to review past or present legal work and/or settlement negotiations by counsel and/or staff if not allowed to inspect the files? The director will have to protect the attorney-client privilege, that is clear. Allowing a director to inspect legal files does not violate the Foundations attorney-client privilege. The director is an integral part of the Foundation. Again the refusal to allow inspection raises the question " what are they trying to hide?"

There are no California Appeals Court cases with facts similar to ours. The 2002 case out of Los Angeles County Superior Court, *Auerbach v. Internet Corporation For Assigned Names And Numbers, a California Nonprofit Public Benefit Corporation*, Case # BS 074771 has very similar facts. The judgment in this case was given to the Board at the Berkeley meeting in June. While the Acting Executive Director correctly pointed out that its holding has no authority as precedent, the ruling of that Superior Court Judge after reviewing the same few cases is persuasive as to how an Alameda County Superior Court Judge will likely rule on similar facts.

There is no question that the former Executive Director violated the Bylaws and California Law in refusing to allow inspections on multiple occasions. We may never know his real motive. It is clear that he knew from the Finck opinion that what he was doing was wrong. Some directors supported him in his wrongful conduct. Why? Some didn't want inspections and maybe some didn't understand the law. Those that impeded inspections with votes or actions violated the Bylaws that they are required to uphold.

We are at a point now that if the staff continues to interfere with inspection rights we should promptly go to court unless the Board promptly corrects the problem once and for all time. If they continue to spend money on useless legal attempts to thwart inspections, and get support from other directors, we may have to consider suits against the renegade directors for waste of corporate assets and breach of fiduciary duty. Something has to stop all this foolish waste of Foundation money. The listener/subscribers want good radio

for their money, not anti-transparency legal bills. Should you have any questions please call.

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