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### Judge Frowns on Request for California Bar Data

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A law professor's long-proposed study about affirmative action's effect on bar exams' pass rates has encountered another obstacle.

In a tentative opinion released last week, San Francisco Superior Court Judge Curtis Karnow deflated UCLA School of Law professor Richard Sander's plans by finding that the documents he seeks -- California State Bar historical data on past bar exams -- don't fall within the scope of documents traditionally subject to public disclosure.

"None of the data at issue is presented to a court and none ever is used in *any* form of adjudicatory proceeding," he wrote in *Sander v. The State Bar of California*, [508880](#), "even within the confines of the State Bar with respect, for example, to how any applicant is processed.

"That is," he added, "even were I to expand the notion of 'adjudication' to reach the work of the State Bar in evaluating its applicants, the data sought by Sander would not qualify."

Sander and the San Rafael-based [California First Amendment Coalition](#), a co-plaintiff in the case, will get a chance to change Karnow's mind during a hearing set for Friday afternoon.

Sander has tried to obtain the State Bar data for four years in an effort to build on his own [2004 study](#) (PDF) that suggested racial preferences might contribute to black students' high bar-exam failure rates nationwide. He hypothesizes that affirmative action gave minority students access to elite law schools for which they weren't academically prepared.

The State Bar has repeatedly rejected Sander's requests, saying the information he wants is confidential and was collected with the understanding it wouldn't be released to third parties.

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In his tentative ruling, Karnow also refuted Sander's arguments that Proposition 59 -- passed by the voters in 2004 to make access to public records a civil right under the state Constitution -- applied to every court document.

"This is a stunning shift from what I have termed the traditional test," Karnow wrote, noting that there was no evidence the voters intended the measure to have such a "remarkable reach in modifying the state Constitution and decades of legal development."

Karnow said that if Prop 59 meant what Sander suggested, "then judges' rough notes and other internal documents, which under traditional law are not to be disclosed ... would be open for public inspection. So too grand jury transcripts would have to be disclosed -- but they are not."

The judge, however, left one issue up in the air -- whether data in electronic records, "which must be massaged to some extent for production," become "new" records that are disclosable.

Without expert declarations, Karnow held, the issue "is likely not ripe for adjudication."

Neither Sander's attorney, Jane Yakowitz, director of Project SEAPHE (which stands for Scale and Effect of Admissions Preferences in Higher Education), nor James Chadwick, a partner in Sheppard, Mullin, Richter & Hampton's Menlo Park, Calif., office who represents the California First Amendment Coalition, returned calls seeking comment.

Neither did James Wagstaffe, a partner at San Francisco's Kerr & Wagstaffe who represents the State Bar.