

102 Cal.App.3d 744, 162 Cal.Rptr. 469
 (Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)



Court of Appeal, Second District, Division 5, California.

Gerald Hay KILGORE, Plaintiff and Appellant,
 v.

Evelle YOUNGER, The Hearst Corporation, Francis Dale, Otis Chandler, Bill Farr, The Times Mirror, a corporation and Mike Qualls, Defendants and Respondents.

Civ. 56122.

Jan. 25, 1980.

For Opinion on Hearing, see [180 Cal.Rptr. 657, 640 P.2d 793](#).

Action was brought against Attorney General and newspaper owners, publishers, and reporters for defamation, intentional infliction of emotional distress, and invasion of privacy in connection with release and publication of report on organized crime in California. The Superior Court, Los Angeles County, Jesse Whitehill, J., sustained demurrers and dismissed action, and plaintiff appealed. The Court of Appeal, Bernstein, Assigned J., held that: (1) newspapers captured substance of Attorney General's release, and thus newspaper reports were fair and true so as to come within privilege afforded fair and true reports of proceedings of public meetings; (2) publication of such "newsworthy" information was not circumscribed by plaintiff's right of privacy where articles carefully noted "alleged" nature of report; (3) where Attorney General called press conference in his official capacity, purported to act in that role throughout its duration and dealt exclusively with law enforcement issues, his actions were within the scope of his official duty; (4) only tenable contention that release of report was not "proper" discharge of Attorney General's official duty lay in his alleged illegal dissemination of confidential information; and (5) although complaint did not state a cause of action, plaintiff should be given another opportunity to plead an "improper" publication by Attorney General.

Affirmed in part and reversed in part.

*471 James Edward Green, Van Nuys, for plaintiff and appellant.

George Deukmejian, Atty. Gen., Robert H. Francis, Deputy Atty. Gen., for defendant and respondent Younger.

Flint & MacKay, Stephen G. Contopoulos and Frank Gooch III, Los Angeles, for defendants and respondents The Hearst Corporation, Dale and Qualls.

Robert C. Lobdell and Gibson, Dunn & Crutcher, Robert S. Warren, Robert A. Rizzi, Los Angeles, for defendants and respondents The Times Mirror Co., The Los Angeles Times, Chandler, Farr.

BERNSTEIN, Associate Justice. ^{FN*}

^{FN*} Assigned by the Chairman of the Judicial Council.

Plaintiff Gerald Kilgore appeals from a judgment of dismissal in favor of defendants Evelle Younger, former Attorney General of the State of California; the Hearst Corporation, owner of the Los Angeles Herald Examiner; the Times Mirror Corporation, owner of the Los Angeles Times; the papers' respective publishers: Francis Dale and Otis Chandler; a Herald Examiner reporter, Mike Qualls; and a Times reporter, Bill Farr, all of whose general demurrers to the original complaint were sustained without leave to amend. ^{FN1}

^{FN1}. Two other defendants James Glavas and Edwin Meese though named in plaintiff's action, were never served and thus are not parties to this appeal.

FACTS

102 Cal.App.3d 744, 162 Cal.Rptr. 469
 (Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)

The central facts alleged by Kilgore are these: In July of 1977, Evelle Younger, acting in his official capacity as Attorney General, established within the Justice Department*472 an eight member committee whose task it was to study organized criminal conspiracies within California's borders. Denominated the "Organized Crime Control Commission," the body was specifically charged with investigating the "(then) current level of organized crime in California" and assessing "the effectiveness of (then) existing efforts at control." To this end, the members conducted a series of private hearings and conferences in which they took testimony from both governmental officials and private confidential informants; they also gathered and received "criminal record" and "state summary criminal history" information (see [Pen.Code ss 11075, 11105](#)) concerning some 292 individuals.

On May 2, 1978, the commission delivered a written report to Younger, which discussed generally the problems surrounding organized crime within the state as well as potential solutions. Appended to the report was a list of 92 "individuals whose associations with organized crime activity have been substantiated by the commission through various sources." (Appendix A.) Kilgore was among those so identified.

The following description, along with a picture and residence address, appeared at page 55 of the report: "Kilgore owns and operates a wire service in the Los Angeles area that provides information on sporting events to bookmakers in California and throughout the United States. His company has 15 telephones that provide free information concerning sporting events on a twenty-four hour basis. During 1976, his company had a \$590,000 telephone bill. Kilgore has associated with many bookmakers throughout the country and has been convicted of bookmaking in 1962 and 1975. On May 10, 1977, he was sentenced to fourteen months in federal prison for conspiracy to commit wire fraud."

On the same day, Younger and two of the commission's members held a press conference, during

which Younger announced that he was adopting the report as his own; he thereafter distributed copies of it to the representatives of the media then present, including Qualls and Farr.

In its May 2, "night final" edition, the Herald Examiner featured on its front page Qualls' account of the conference and the substance of the report. Carrying the banner headlines, "The California Crime Syndicate" and "\$6.8 Billion Annual Take Bared in State Panel Report," Qualls' article summarized the commission's findings and stated in part: "Categorized as organized crime groups in the report are outlaw motorcycle gangs, terrorist groups, prison gangs (such as the Mexican Mafia, Black Guerilla Family and Aryan Brotherhood) and syndicates (such as the Mafia or La Cosa Nostra)." A companion article named Kilgore as "among the 92 persons identified by the State Organized Crime Control Commission as allegedly being linked with organized crime in the state."

On May 3, 1978, the Los Angeles Times published an article under the by-line of Bill Farr, which described Younger's announcement as amounting to the release of "a rogue's gallery of 92 reputed mob figures" and characterized the commission's report as dealing with syndicates, gambling, loan sharking, pornography, racketeering, gangland murder, stock fraud and passage of stolen securities. Near the end of the article, however, Farr reported that "the commission also is looking into other types of organized crime such as prison gangs, motorcycle gangs and terrorist organizations. Reports on these activities will be made public later in the year. . . ." Kilgore's name and hometown were printed under the headline, "List of 92 Reputed Mob Figures."

On May 17, 1978, Kilgore served on Dale and Chandler written notices which claimed that certain specified statements in their articles were libelous. He demanded that they be corrected. (See [Civ.Code s 48a.](#)) ^{FN2} Notwithstanding the notices, neither paper published a correction or retraction, either in substantially as conspicuous a manner as the original allegedly libelous publication, or at all.

FN2. The record fails to reflect the precise terms of these notices.

***473** Kilgore then filed the present suit, in which he alleged causes of action for defamation (count 1), intentional infliction of emotional distress (count 2) and invasion of privacy (count 3); he sought general and exemplary damages in the aggregate amount of one million dollars.

In his first count, Kilgore contends that the commission reported false information with regard to him insofar as it maintained (1) that he was a known organized crime figure, (2) that he was associated with organized crime activities, (3) that he had been convicted of bookmaking in 1975, and (4) that he had been sentenced to fourteen months in federal prison for conspiracy to commit wire fraud.

He also asserts that Younger's May 2 news conference was called by him for the purpose of furthering his ongoing gubernatorial campaign and that he acted unlawfully in distributing the commission's theretofore confidential findings and conclusions for purposes of media republication.

Further, he asserts that the two newspapers, their publishers and their reporters, "unlawfully received, printed, published and circulated" written statements about him, which statements "purported" to restate the content of the commission's report and of appendix A thereto, but which, in fact, were unfair and inaccurate summaries.

Finally, Kilgore charges that the statements were published maliciously, with knowledge of their falsity, for the purpose of injuring his reputation and impairing his ability to conduct lawful business within his community, and that they have caused him "to be exposed to hatred, contempt, ridicule, obloquy and to be shunned and avoided."

His second count incorporates by reference the allegations summarized above, and merely adds the assertions that the publications were "for the purpose of causing (him) to suffer severe emotional

distress" and that he had in fact "suffered shame, humiliation, embarrassment, anger and chagrin."

Kilgore's third count, for violation of his right to privacy, supplements the foregoing with the allegations that he has not only never been an organized crime figure but that he has never "associated in any manner with organized crime activities."

He then admits a 1975 conviction for transmitting betting odds ([Pen.Code s 337i](#)) as well as a 1962 plea of guilty to a bookmaking charge ([Pen.Code s 337](#) subd. a). In both instances he was fined and placed on probation. He also concedes a 1971 conviction for disseminating and conspiring to disseminate gambling information in interstate commerce ([18 U.S.C. s 1952](#)) and acknowledges serving in 1977 and 1978 a 14-month sentence therefor. He insists, however, that since 1975 he has neither committed nor been charged with any violation of law, and that since that time he "has led an exemplary, honorable, virtuous life, has assumed a place in respectable society and has made many friends and associates who were not aware of such convictions in his earlier life."

He then alleges that the commission's statements about him were published "intentionally, maliciously, without (his) knowledge or consent for the purpose of infringing upon (his) right to privacy and causing him injury to his peace of mind and feeling" and that in fact he was not only so damaged but was also "abandoned by his friends and associates and was subjected to scorn and obloquy"

Younger's demurrer to "the complaint and each cause of action therein" was grounded on the doctrine of absolute privilege as set forth in [Civil Code section 47\(1\)](#). That section states: "A privileged publication or broadcast is one made 1. In the proper discharge of an official duty."

Both the Hearst Corporation, Times Mirror, and their employees, predicated their demurrers to the first cause of action on the absolute privilege af-

102 Cal.App.3d 744, 162 Cal.Rptr. 469
 (Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)

forded by [Civil Code section 47\(4\) and \(5\)](#): “A privileged publication or broadcast is one made . . . 4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint*474 a warrant shall have been issued. 5. By a fair and true report of (1) the proceeding of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.” As to the second cause of action, the papers, publisher and reporters maintained that both [Civil Code sections 47 subdivisions \(4\) and \(5\)](#) and the constitutional privilege relating to free speech and press operated to bar Kilgore from recovery. Moreover, they asserted that Kilgore had failed to state a cause of action because their conduct could not be characterized as unreasonable, i. e., that which exceeds the bounds of propriety usually tolerated by decent society. (See for example, [Fuentes v. Perez \(1977\) 66 Cal.App.3d 163, 136 Cal.Rptr. 275.](#)) Finally, they challenged the third cause of action on the theory that the material published was newsworthy and that “no action for invasion of privacy can be predicated upon the republication of information from public records.”

Defendants' demurrers were sustained without leave to amend in their entirety. Pursuant thereto, the action was dismissed as to all defendants under [Code of Civil Procedure section 581](#) subdivision 3. This appeal ensued.

THE MEDIA DEMURRERS

As stated above, the media that is all defendants except Younger premised their demurrers on the privilege afforded by subdivisions 4 and 5 of [section 47 of the Civil Code](#): “A privileged publication or broadcast is one made . . . 4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4)

of anything said in the course thereof, . . . 5. By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.” A parallel privilege contained in the Restatement, Second, of Torts reads in relevant part as follows: “The publication of defamatory matter concerning another in a report of . . . a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.” (Id., s 611.)

Clearly, [section 47](#), subdivision 5 provides an adequate basis on which to uphold the trial court's ruling. It cannot be gainsaid that as far as the press was concerned, the news conference was a legally convened public meeting for a lawful purpose to which the public by way of the media had been invited. ^{FN3}

FN3. While we do not doubt that the publication was intended for the public benefit, this analysis makes it unnecessary to solve the troublesome question just where the alternative provision of subdivision 5 “or (2) the publication of the matter complained of was for the public benefit.” fits in. (Cf., [Williams v. Daily Review, Inc. \(1965\) 236 Cal.App.2d 405, 416, 46 Cal.Rptr. 135.](#))

Somewhat more troublesome, however, is the accompanying requirement of section 5 that the media articles be “fair and true” reports. Kilgore, of course, takes the position that the newspaper reports are substantially misleading in that they wrongfully imply that he was, and is, “engaged in criminal conspiracies involving murder, unlawful motorcycle gangs, prison gangs, terrorists, organized gambling, loan sharking, security thefts, investment frauds, pornography, prostitution and drug trafficking.” He maintains that this is neither fair nor true, because while the committee's report may have characterized him as an organized crime fig-

102 Cal.App.3d 744, 162 Cal.Rptr. 469
(Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)

ure, it did not suggest that he was now, or indeed had ever been involved in organized underworld activity in the manner and to the extent set forth above.

The media respond by asserting that the protection of the privilege is earned by any report which captures the substance, the “gist” or “sting” of the subject proceedings or documents. (See [Hayward v. Watsonville Register-Pajaronian and Sun \(1968\) 265 Cal.App.2d 255, 71 Cal.Rptr. 295.](#)) Both papers, of course, urge us to uphold the trial court's conclusion that in fact the substance *475 of their reports remained true to Younger's statements and the materials released by him.

In assessing this question, “the publication(s) (are) to be measured by the natural and probable effect (they) would have on the mind of the average reader. (Citations.) The standard of interpretation to be used in testing alleged defamatory language is how those in the community where the matter(s) (were) published would reasonably understand (them). (Citation.)” ([Handelsman v. San Francisco Chronicle \(1970\) 11 Cal.App.3d 381, 387, 90 Cal.Rptr. 188, 191.](#))

Kilgore's attempt to read the reports' delineation of organized criminal activity as pertaining in all respects to himself is unwarranted. In our view, the average reader of either paper would reasonably interpret the articles to imply only that Kilgore was connected in some fashion with organized crime. As we see it, this is exactly the import of Attorney General Younger's release. In other words, we simply do not believe that the average reader would take the articles to intimate that Kilgore was involved in every or even necessarily more than one type of organized criminal activity. We hold, therefore, that the papers captured the substance of Attorney Younger's release, and thus that the requirement of [section 47](#) subdivision 5, to wit: that the reports be fair and true, was satisfied as a matter of law. The trial court properly so found.^{FN4}

^{FN4.} The media also contend that their ac-

tions were privileged under both the United States and California Constitutions. Because we find [section 47](#) subdivision 5 to be applicable, we need not, and thus do not pass upon this further claim.

As far as the second cause of action for the intentional infliction of emotional distress is concerned, the reasoning which makes such a cause of action subject to the absolute privilege of subdivision 2 of [section 47 of the Civil Code](#), applies with equal force to the privileges contained in subdivision 5 of the same section. (See [Lerette v. Dean Witter Organization, Inc. \(1976\) 60 Cal.App.3d 573, at p. 579, 131 Cal.Rptr. 592.](#))

On the other hand, Kilgore's third cause of action, for invasion of privacy, is not grounded on the alleged inaccuracy of the papers' reportage. Rather, it is predicated on the charge “that even if accurate the publication of the facts interferes with his ‘right to be left alone.’ (Citation.)” ([Kapellas v. Kofman \(1969\) 1 Cal.3d 20, 35, 81 Cal.Rptr. 360, 369, 459 P.2d 912, 921.](#)) With regard to the media, however, Kilgore enjoyed no such rights: By virtue of the release of the report and appendix A thereto, Kilgore's name and alleged criminal involvement became matters of public record. Manifestly, the publication of such “newsworthy” information may not be circumscribed, at least where, as here, the articles carefully noted the “alleged” nature of the report and Kilgore's underworld involvement. (See [Cox Broadcasting Corporation v. Cohn \(1975\) 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328](#), see also [Rest.2d Torts s 652 Com. B](#): “There is no liability (for invasion of privacy) when the defendant merely gives further publicity to information about the plaintiff that is already public.”) On this record, the trial court did not err as to the media demurrers.

YOUNGER'S DEMURRER

Subdivision 1 of [section 47 of the Civil Code](#) provides that a privileged publication is one made “in the proper discharge of an official duty.” When

that privilege applies, it is not qualified but absolute. (*Saroyan v. Burkett* (1962) 57 Cal.2d 706, 710, 21 Cal.Rptr. 557, 371 P.2d 293; see also *Sanborn v. Chronicle Pub. Company* (1976) 18 Cal.3d 406, 412-413, 134 Cal.Rptr. 402, 556 P.2d 764; *Rest. Torts*, s 591.) The absolute privilege is extended to “high-ranking state and federal officials, such as the President of the United States, the governor of any state or territory, cabinet officers of the United States and the corresponding officers of any state or territory” (*Sanborn v. Chronicle Pub. Co.*, *Supra*, 18 Cal.3d at p. 412, 134 Cal.Rptr. at p. 405, 556 P.2d at p. 767) on the rationale that their *476 ability to function would be impaired and society adversely affected if they were not absolutely free of the threat of suit by the defamed seeking recompense for injury. (See *Rest.2d Torts*, ch. 25, title B; 4 *Witkin, Summary of Cal. Law* (8th ed. 1974), *Torts*, s 294.) Unlike qualified privileges, it is not negated by malice or other personal motivation of the publisher.^{FN5} For the absolute privilege to attach, the public official need only be properly discharging an official duty. However, Kilgore contends that Younger was not entitled to the absolute privilege because:

FN5. A qualified privilege is available to all who may publish defamatory matter. However, it obtains only when the publication is made in good faith, in the absence of malice or ill will, and for a proper purpose, i. e., to further a recognized albeit secondary societal interest. Thus, *Civil Code section 47* subdivision 3 states: “A privileged publication . . . is one made (i) in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive of the communication innocent, or (3) who is requested by the person interested to give the information.” The rationale for the existence of the conditional privilege has been said to be that, “(i) if the

protection were not given, true information that should be given or received would not be communicated because of fear of the persons capable of giving it that they would be held liable in an action of defamation if their statements were untrue.” (*Rest.2d Torts*, ch. 25, topic 3, title A. See also *Witkin, supra*, s 306.)

- (1) Appendix “A” of the report released to the press by Younger contained criminal record information within the meaning of *Penal Code section 11075* and state summary criminal history information within the purview of *Penal Code section 11105* and the dissemination of that information to the public was unlawful and therefor not a “proper” discharge of Younger's official duty, and
- (2) The dissemination of the information to the news media was politically motivated, i. e., Younger was acting as a candidate and therefore not performing an “official duty.”^{FN6}

FN6. Among the many statutes defining the duties of the Attorney General, we find the following:

Government Code, section 15025: “The Department of Justice shall seek to control and eradicate organized crime in California by:

- “(a) Gathering, analyzing and storing intelligence pertaining to organized crime.
- “(b) Providing this intelligence to local, state and federal law enforcement units.
- “(c) Providing training and instruction to assist local and state law enforcement personnel in recognizing and combating organized crime.
- “(d) Providing a research resource of specialized equipment and personnel to assist local, state, and federal agencies in combating organized crime.

102 Cal.App.3d 744, 162 Cal.Rptr. 469
 (Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)

“(e) Conducting continuing analyses and research of organized crime in order to determine current and projected organized crime activity in California.

“(f) Initiating and participating in the prosecution of individuals and groups involved in organized crime activities.”

[Government Code, section 15028](#): “The department shall annually report on its activities and accomplishments to the Legislature and to federal, state and local law enforcement agencies, As well as to other interested groups. The first report to the Legislature shall be made no later than July 1, 1972, and shall specify the way in which the department's organization and positions relate to suppressing organized crime and its accomplishments as of that date.” (Emphasis added.)

The latter argument is without merit: Younger's alleged activity, though it may well have been taken to produce a popular and appealing law enforcement image, was for all intents and purposes indistinguishable from actions initiated by public officials truly oblivious to the political ramifications of their moves. Indeed, the dual role of public servant and politician is such a well-established phenomenon that it must be acknowledged as a reality of representative democracy that professed public interests and private political concerns are more often than not co-extensive considerations in any public official's mind. Here, Younger called his press conference in his capacity as Attorney General, purported to act in such role throughout its duration and, at least as is here relevant, dealt exclusively with law enforcement issues. As such, it may not be said that his actions were outside the scope of his official duties, or that his motives were in fact improper. Younger's*477 use of his official platform as a political springboard, rather than vitiating the protections afforded him as a government official, must simply be recognized as nothing more than the

normal exercise of one of the more valuable perquisites of elective office.

Having found Younger to be discharging an “official duty” at the press conference, we must now address Kilgore's other contention as to the “propriety” of that discharge. For this purpose an examination of the statutes governing the privacy and security of criminal history information is required.^{FN7}

^{FN7}. The privacy and security of criminal history information is a matter of increasing state and national concern as witnessed by the fact that in the 3-year period between 1974 and 1977, a significant number of states reacted to the problem by enacting legislation regulating the dissemination of such information; i. e., in 1974, 24 states regulated the dissemination of such information, while by 1977, 40 states had enacted such regulatory statutes. Similarly, in 1974 only 6 states provided civil remedies for violation of privacy and security laws; in 1977, 22 states had enacted such provisions. In 1974 criminal penalties as sanctions for violation of privacy and security laws were available in only 18 states, whereas in 1977, 35 states had enacted statutes providing such penalties. The Federal Privacy Act of 1974 further demonstrates the growing appreciation for fair information practices and supports the concept of security and confidentiality where personal information is involved. (Privacy and Security of Criminal History Information; Compendium of State Legislation as per the National Criminal Justice Information and Statistics Survey, LEAA, United States Department of Justice, 1978, p. 27.) Also, [section 1, Article I of the California Constitution](#) now includes the right of privacy among the other inalienable rights of California citizens, and our own Supreme Court has just recently reit-

102 Cal.App.3d 744, 162 Cal.Rptr. 469
 (Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)

erated its concern on the issue of privacy in [People v. Blair \(1979\) 25 Cal.3d 640, 159 Cal.Rptr. 818, 602 P.2d 738](#).

It is Kilgore's contention that Younger's duty to report under the Government Code was eclipsed by his duty to remain silent under the Penal Code. Under [Penal Code section 11077](#), Younger was responsible for the security of criminal offender record information. It was his duty to see that only authorized agencies received such information and only when it was “. . . demonstrably required . . . ” for performance of official duties.^{FN8}

FN8. The legislative concern with criminal offender record information is reflected in the following sections of the Penal Code:

[Penal Code section 11077](#). Attorney General; duties:

“The Attorney General is responsible for the security of criminal offender record information. To this end, he shall:

“(a) Establish regulations to assure the security of criminal offender record information from unauthorized disclosures at all levels of operation in this state.

“(b) Establish regulations to assure that such information shall be disseminated only in situations in which it is demonstrably required for the performance of an agency's or official's functions.

“(c) Coordinate such activities with those of any interstate systems for the exchange of criminal offender record information.

“(d) Cause to be initiated for employees of all agencies that maintain, receive, or are eligible to maintain or receive, criminal offender record information a continuing educational program in the proper use and control of criminal offender

record information.

“(e) Establish such regulations as he finds appropriate to carry out his functions under this article.

Similarly, Kilgore points out that under [Penal Code section 11105\(b\)](#), state summary criminal history information (i. e., the master record compiled by the Attorney General) may be generally furnished by the Attorney General to only thirteen described and authorized recipients, and that there are only eight other described recipients who may be furnished such information upon a showing of a “compelling need.” ([Pen.Code s 11105](#) subd. b 13.)^{FN9}

FN9. [Penal Code, section 11105](#), reads in pertinent part:

“(b) The Attorney General shall furnish state summary criminal history information to any of the following, when needed in the course of their duties . . .

“(1) The courts of the state.

“(2) Peace officers of the state as defined in Section 830.1, subdivisions (a) and (b) of Section 830.2, subdivisions (a), (b), and (j) of Section 830.3, subdivisions (a), (b), and (c), of Section 830.5, and Section 830.5a.

“(3) District attorneys of the state.

“(4) Prosecuting city attorneys of any city within the state.

“(5) Probation officers of the state.

“(6) Parole officers of the state.

“(7) A public defender or attorney of record when representing a person in proceedings upon a petition for a certificate of rehabilitation and pardon pursuant to [Section 4852.08 of the Penal Code](#).

“(8) A public defender or attorney of record when representing a person in a criminal case and when authorized access by statutory or decisional law.

“(9) Any agency, officer, or official of the state when such criminal history information is required to implement a statute or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements or exclusions, or both, expressly based upon such specified criminal conduct.

“(10) Any city or county, or city and county, or district, or any officer, or official thereof when access is needed in order to assist such agency, officer, or official in fulfilling employment, certification, or licensing duties, and when such access is specifically authorized by the city council, board of supervisors or governing board of the city, county, or district when such criminal history information is required to implement a statute, ordinance, or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements or exclusions, or both, expressly based upon such specified criminal conduct.

“(11) The subject of the state summary criminal history information under procedures established under Article 5 (commencing with Section 11120), Chapter 1, Title 1 of Part 4 of the Penal Code.

“(12) Any person or entity when access is expressly authorized by statute when such criminal history information is required to implement a statute or regula-

tion that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements or exclusions, or both, expressly based upon such specified criminal conduct.

“(13) Health officers of a city, county, or city and county, or district, when in the performance of their official duties enforcing [Section 3110 of the Health and Safety Code](#).

“(14) Any managing or supervising correctional officer of a county jail or other county correctional facility.

“(c) The Attorney General may furnish state summary criminal history information upon a showing of a compelling need to any of the following, provided that when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any entity, in fulfilling employment, certification, or licensing duties, the provisions of Chapter 1321 of the Statutes of 1974 and of [Section 432.7 of the Labor Code](#) shall apply:

“(1) Any public utility as defined in [Section 216 of the Public Utilities Code](#) which operates a nuclear energy facility when access is needed in order to assist in employing persons to work at such facility, provided that, if the Attorney General supplies such data, he shall furnish a copy of such data to the person to whom the data relates.

“(2) To a peace officer of the state other than those included in subdivision (b).

“(3) To a peace officer of another country.

“(4) To public officers (other than peace officers) of the United States, other states, or possessions or territories of the United States, provided that access to records similar to state summary criminal history information is expressly authorized by a statute of the United States, other states, or possessions or territories of the United States when such information is needed for the performance of their official duties.

“(5) To any person when disclosure is requested by a probation, parole, or peace officer with the consent of the subject of the state summary criminal history information and for purposes of furthering the rehabilitation of the subject.

“(6) The courts of the United States, other states or territories or possessions of the United States.

“(7) Peace officers of the United States, other states, or territories or possessions of the United States.

“(8) To any individual who is the subject of the record requested when needed in conjunction with an application to enter the United States or any foreign nation.

“ . . .

“(g) It is not a violation of this section to disseminate statistical or research information obtained from a record, provided that the identity of the subject of the record is not disclosed.

“(h) It is not a violation of this section to include information obtained from a record in (1) a transcript or record of a judicial or administrative proceeding or (2) any other public record when the inclusion of the information in the public re-

cord is authorized by a court, statute, or decisional law.”

*478 Kilgore also notes that [Penal Code sections 11141 and 11142](#) complete the legislative scheme by providing criminal penalties for persons who knowingly furnish a record or information from a record to someone who is not authorized by law to receive it.

The basic problem with Kilgore's arguments, however, is that, to coin a phrase, they “assume allegations not in the complaint.” They are, rather, based on a super-benign reading of paragraph IX of the first cause of action, copied below.^{FN10} By no *479 stretch of the imagination can this paragraph be read to allege “directly and positively” ([People v. Jones \(1899\) 123 Cal. 299, 301, 55 P. 992](#)) or at all that any of the statements concerning Kilgore were revelations of material which the Penal Code enjoins the Attorney General to keep confidential. As far as the pleading is concerned, the “criminal record information” and the “state summary criminal history information” were simply the source of the identities of 292 persons suspected of being linked to organized crime. There is no hint or suggestion that the particular statements concerning Kilgore derived from this allegedly confidential information, rather than from information gathered “from various law enforcement officials, representatives of various governmental regulatory agencies and confidential informants.” In fact, the very opposite should be the truth: the sting at least of the defamation can hardly be the trivial differences between the convictions which Kilgore admittedly suffered and Younger's statements concerning his criminal record, but must, rather, consist of the report's description of Kilgore as an “organized” criminal.^{FN11} A careful reading of the definitions contained in [sections 11075 and 11105 of the Penal Code](#) makes it extremely unlikely, if not impossible, that information that Kilgore is involved in “organized” crime would be deemed confidential. In fact, under [section 11105](#), subdivision a(2)(ii) “records of intelligence information . . . of

102 Cal.App.3d 744, 162 Cal.Rptr. 469
(Cite as: 102 Cal.App.3d 744, 162 Cal.Rptr. 469)

the office of the Attorney General and the Department of Justice” are specifically excepted from the definition of “state summary criminal history information.”

FN10. “Pursuant to such purported authorization from defendant EVELLE J. YOUNGER, the said Organized Crime Control Commission conducted a series of private, ‘closed-door’ hearings and conferences, not open to the public, to gather information, on a confidential basis, from various law enforcement officials, representatives of various governmental regulatory agencies and confidential informants. During the course of such hearings and conferences the said Commission gathered, received and reviewed ‘criminal record information,’ within the meaning of [California Penal Code s 11075](#), and ‘state summary criminal history information,’ within the meaning of [California Penal Code s 11105](#), and ascertained the identities of 292 persons whom it suspected of being linked to organized crime activities in California.”

FN11. We note that if Younger in fact enjoys the absolute privilege interposed against the defamation action, then Kilgore’s privacy count must also fall: “Although the application (of the privilege) usually arises in the context of a defamation action, it is equally applicable to other actions, with the sole exception of an action for malicious prosecution. (Citations.)” ([Pettitt v. Levy \(1972\) 28 Cal.App.3d 484, 489, 104 Cal.Rptr. 650, 653.](#)) “The privilege is provided to protect and to further the particular interests and activities safeguarded (thereby). Those interests and activities are deemed to outweigh the correlative injury caused by their expression that is otherwise protected by the law of tort. (Citations.)” ([Deaile v.](#)

[General Telephone Co. of California \(1974\) 40 Cal.App.3d 841, 849, 115 Cal.Rptr. 582, 587;](#) see also Rest.2d Torts, Tent. Draft (No. 21) ss 652D, 652E.)

The only tenable contention that Younger’s publication was not a “proper” discharge of his official duty lies in his alleged illegal dissemination of information made confidential by [sections 11075 and 11105 of the Penal Code](#). As we have shown, no such illegal dissemination is properly alleged. The complaint therefor does not state a cause of action.

We do, however, believe that the trial court was too precipitate in sustaining the demurrer to the original complaint without leave to amend. We therefore reverse the judgment, solely to give Kilgore another opportunity to plead an “improper” publication. Nothing in this opinion is intended to hold under what circumstances a violation of the strictures of [sections 11077 and 11141](#) would deprive Younger of his absolute privilege. We should first see what plaintiff alleges if he chooses to amend.

The judgment is affirmed as to all respondents except Younger. The judgment is reversed as to Younger and the trial court is directed to permit plaintiff to amend the complaint as to that defendant.

KAUS, P. J., and STEPHENS, J., concur.
 Cal.App., 1980.
 Kilgore v. Younger
 102 Cal.App.3d 744, 162 Cal.Rptr. 469

END OF DOCUMENT