

**UNDER THE AUSPICES OF PRIVACY . . . OR NOT:
SURVEYING THE STATE JUDICIAL TREATMENT OF
ACCESS TO GOVERNMENT RECORDS**

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Master of Arts

by
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The undersigned, appointed by the dean of the Graduate School, have examined the thesis entitled:

UNDER THE AUSPICES OF PRIVACY . . . OR NOT:
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ACCESS TO GOVERNMENT RECORDS

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DEDICATION

I could not have successfully reached this major milestone without the support of my family. Mom and dad, I could not have thanked you enough for your love, patience, and understanding. Quincy, Jo, and Glenn, you have never failed to encourage me in times of difficulty.

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UNDER THE AUSPICES OF PRIVACY . . . OR NOT: SURVEYING THE STATE JUDICIAL TREATMENT OF ACCESS TO GOVERNMENT RECORDS

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ABSTRACT

While privacy is paramount to a person's liberty interest, it is not absolute in all circumstances. Often, public interests trump an individual's right to privacy. Since the enactment of freedom of information statutes by every state, there is a strong presumption of government disclosure. Government agencies, for purposes of openness and accountability, are required by public records statutes to release various types of information. Some of the government records may contain identifying information, which if disclosed, would constitute an unwarranted invasion of personal privacy. Courts are often called upon to resolve the clash between protecting the privacy of individuals and promoting the public interest in disclosure.

This study, through an examination of case opinions issued by the supreme courts of the fifty states, aims to determine how state courts across the nation address the issue of personal privacy exemptions in public records disputes. This thesis intends to find out if state courts are following the federal categorical approach to FOI exemptions. The purpose of this thesis is to draw inferences regarding an overall trend in the post-*Reporters Committee* state judicial treatment of privacy and information disclosure concerns and the states' attitudes toward access to personally-identifiable information in government-held records.

I. INTRODUCTION: A NEW ERA OF CONFIDENTIALITY

*“The privacy and dignity of our citizens [are] being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen — a society in which government may intrude into the secret regions of [a] man’s life at will.”*¹

(Justice William O. Douglas, 1966)

*“A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”*²

(James Madison, 1822)

In 2004, reporters Matthew Doig and Chris Davis from the *Sarasota Herald-Tribune* were writing a story about teachers’ performance on state certification tests.³ The story described how hundreds of thousands of students in Florida were taught by uncertified teachers.⁴ The reporters submitted requests under Florida’s open records law at the state Department of Education (hereinafter “Department” or “education department”) for a roster of teachers and where they work. The requested information also included a list of teachers’ Social Security numbers and their certification test scores.⁵ Since the education department was using Social Security numbers to identify the teachers, the reporters argued that they “needed the numbers to accurately match

¹ *Osborne v. United States*, 385 U.S. 323, 343 (1966).

² Letter from James Madison to W. T. Barry (Aug. 4, 1822), reprinted in *THE COMPLETE MADISON* 337 (S. Padover ed., 1953) (cited in John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157 (1985)).

³ Nicholas Coates, *The Privacy Crackdown*, 31 NEWS MEDIA & L. 4 (2007), available at <http://rcfp.org/news/mag/31-3/cov-thepriva.html> (last visited Oct. 29, 2007).

⁴ Coates, *supra* note 3, at 4.

⁵ *See id.*

teachers from each list.”⁶ The Department denied the requests, claiming that disclosure of records containing state employees’ Social Security numbers would constitute an invasion of privacy.⁷ The Department first delayed the release of the requested information for nine months. It then redacted all data for every teacher from two counties and withheld its 2003 staff database.⁸ The reporters ultimately sued for disclosure of the requested records, but the trial court’s holding in favor of disclosure was later reversed on appeal.⁹ The Florida Court of Appeals reasoned that the requests did not help further any legitimate public interests such as locating noncustodial parents and enforcing child support obligations.¹⁰

The experience of Doig and Davis is not unique among members of the media. Journalists, especially investigative reporters, rely heavily on open records laws¹¹ to locate sources to interview and to acquire information about government actions.¹² While there is tremendous social value in public access to government records, such access often implicates the individual interest in privacy.¹³ In situations where requesters seek full disclosure of government records that contain private information, an individual’s control over his or her affairs unavoidably runs counter to the social needs for information and a government functioning for the public good.¹⁴ Citing practical obscurity, the exaltation of privacy values over the right to know, and the threat of

⁶ Coates, *supra* note 3, at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Fla. Dep’t of Educ. v. NYT Mgmt. Servs., 895 So. 2d 1151, 1154 (Fla. Dist. Ct. App. 2005).

¹¹ Coates, *supra* note 3, at 4.

¹² Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 62 (2003).

¹³ Hoefges, Halstuk & Chamberlin, *supra* note 12, at 6.

¹⁴ ADAM CARLYLE BRECKENRIDGE, *THE RIGHT TO PRIVACY* 2 (2d ed. 1970).

identity theft, legislatures and courts seem more willing than ever to shroud government operations and records in secrecy.

Many politicians, scholars, and judges regularly quote the aforementioned truism by James Madison to justify the need for government transparency and access laws.¹⁵ According to these individuals, democratic governance relies heavily on the public's having access to information about the inner workings of agencies.¹⁶ They contend that government secrecy and nondisclosure would impair democracy by "diluting or disabling citizen participation in politics and government."¹⁷ Moreover, the loss of any government openness may "breed[] mistrust, dampen[] the fervor of its citizens, and mock[] their loyalty."¹⁸ While an informed citizenry builds on the notion of government openness, the federal government, in the name of privacy protection, has demonstrated an increasing effort to prevent the public from accessing agency records with individually identifiable information. Although the invention of personal computers and database technology has enhanced our capacity to do things that are previously unattainable,¹⁹ the ease of exchanging data online signifies a growing risk of potentially sensitive information being disclosed to the public.²⁰ From smart cards to massive governmental and private genetic banks, people are rapidly losing their personal privacy.²¹ The concern for unwarranted invasion of privacy prompted the U.S. Supreme Court to hand

¹⁵ Moon, *supra* note 2, at 1157.

¹⁶ See Martin E. Halstuk, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent*, 4 COMM. L. & POL'Y 111, 117-19 (1999).

¹⁷ Ryan Lozar, *Federal Secrecy and the States: The Impact of Information Closures on Local Government Operations*, 2 INFO. SOC'Y J.L. & POL'Y 103 (2005).

¹⁸ S. REP. NO. 813 (1965), as reprinted in S. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. NO. 93-82, 93D CONG., 2d Sess., at 45 (Comm. Print 1974).

¹⁹ Myra Moran, Sissy Holloman, William Kassler & Beverly Dozier, *Living with the HIPAA Privacy Rule*, 32 J.L. MED. & ETHICS 73, 75 (2004).

²⁰ Moran, Holloman, Kassler & Dozier, *supra* note 19, at 75.

²¹ ROY L. MOORE, MASS COMMUNICATION LAW AND ETHICS 383 (2d ed. 1999).

down in 1989 an influential decision²² that greatly broadened the scope of privacy exemptions under the federal Freedom of Information Act (hereinafter “FOIA”). As a result, the previously held presumption in favor of information disclosure is suddenly superseded by some personal privacy interests that government agencies claim to safeguard.²³ Since the Supreme Court decision, the protection of personal privacy interests is treated categorically by federal courts instead of balancing.

The federal government’s crackdown on access to agency records with personally-identifiable information has not only strengthened national-level secrecy but also trickled down to state- and local-level operations. Under the constitutional doctrine of federal preemption, federal laws and policies may prevail over the autonomous operation of state laws to ensure a uniform implementation of information control throughout the nation.²⁴ Due to the influence of the federal privacy scheme, state access laws²⁵ are constantly amended to allow or block release of certain government data and documents. While attempting to conform to the national privacy policies, states also seek to preserve their commitment to promoting government openness and prevent such openness from being “sucked into the federal secrecy vacuum.”²⁶ Therefore, it would be interesting to see how state courts have resolved the clash between safeguarding personal privacy and disclosing government information amid the increasing national demand for privacy protection.

²² United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) [hereinafter *Reporters Comm.*].

²³ See Kristen Elizabeth Uhl, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 269 (2003).

²⁴ Lozar, *supra* note 17, at 108.

²⁵ In this paper, the phrase “access laws” will be used interchangeably with “freedom of information laws” and “public records laws.”

²⁶ Lozar, *supra* note 17, at 110.

Despite the commendable effort by scholars to track changes in the federal judiciary's approach to weighing individual and social concerns, a comprehensive study has yet to be conducted to determine if there is an overall trend among the highest courts of the fifty states in their balancing of privacy and disclosure interests in state agency records. This thesis attempts to find out how state courts address the tension between personal privacy exemptions and release of government information and whether or not state courts are following the footsteps of the federal courts in suppressing access to agency records or, contrary to the U.S. Supreme Court's 1989 decision, maintaining a more transparent environment. The methodology used in this study involves legal research. The researcher has analyzed the text of state case opinions addressing statutory privacy exemptions in disputes concerning the issue of access to government records. Inferences have been drawn regarding an overall pattern in the state judicial treatment of statutory privacy exemptions and these courts' attitudes toward a more transparent, democratic government.

As a functioning democracy, American society relies heavily on the proper enforcement of laws and regulations by institutions and courts of law. Such reliance becomes even more pertinent in the case of state courts, whose adjudicative decisions as well as interpretations of the law exert a direct and immediate influence on the public. In the interests of democracy and government accountability, it is important for citizens to be aware of the approaches that their state courts use in deciding whether or not certain private information in government records is disclosable under state public records laws. For the press, knowing where the judicial boundary is drawn regarding individual privacy and public access to certain types of information would help reduce the amount of time

reporters may waste arguing over inaccurate interpretations of public records laws with government agencies and officials.²⁷ Since media access to the government promotes the public interest by “facilitating the press’ role as a . . . watchdog that examines and evaluates governmental operations,”²⁸ journalists, through understanding the courts’ different analyses, can also learn to make more compelling justifications for why media access to certain government records containing personally-identifiable information serves the public good.²⁹

²⁷ The Reporters Committee for Freedom of the Press, *Health Care Journalists’ Access to Hospitals Curtailed Under HIPAA*, A REPORTER’S GUIDE TO MEDICAL PRIVACY LAW, available at <http://www.rcfp.org/hipaa/hospitals.html> (last visited Oct. 29, 2007).

²⁸ Hoefges, Halstuk & Chamberlin, *supra* note 12, at 62.

²⁹ See David Cuillier, *Public Support for Press Access Declines as Personal Privacy Concerns Increase*, 25 NEWSPAPER RES. J. 95, 99 (2004).

II. REVIEW OF THE LITERATURE: THEORY AND HISTORY

INDIVIDUAL CONCERNS

A. Case Law Development of the Right to Privacy

Considered by many Americans as “one of the most sacred and fundamental rights,”³⁰ privacy often elicits an intensely emotional response from the public. According to the results of a 1993 Louis Harris and Associates poll, eighty-five percent of the respondents viewed protection of privacy as “absolutely essential” or “very important.”³¹ In addition, ninety-six percent of the polled individuals answered “it was important . . . [that] all personal . . . information be designated as sensitive, that penalties be imposed for unauthorized disclosures, and that laws spell out who has access to . . . records and what information could be obtained.”³² Privacy allows people to be in a place where they can “think [their] own thoughts, have [their] own secrets, live [their] own life, reveal only what [they] want[] to the outside world.”³³ Despite the popular belief in one’s entitlement to privacy, the emergence and protection of privacy rights by the judiciary and the legislature are less than straightforward.

³⁰ Danel Michelle Nickels, Note, *Casting the Discovery Net Too Wide: Defense Attempts to Disclose Nonparty Medical Records in a Civil Action*, 34 IND. L. REV. 479 (2001) (citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 475 (1991), where the author states that “[p]rivacy [is] . . . among the most fundamental rights that we have as citizens of this country”).

³¹ Charity Scott, *Is Too Much Privacy Bad for Your Health? An Introduction to the Law, Ethics, and HIPAA Rule on Medical Privacy*, 17 GA. ST. U. L. REV. 481, 491 (2000) (citing Louis Harris & Associates, *Equifax-Harris Poll* (released Nov. 1993), available at Westlaw, POLL Database, QUESTION ID: USHARRIS.110593 R3C, nos. 008, 010, 015).

³² Scott, *supra* note 31, at 492.

³³ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 545 (1970).

The right to privacy has no roots in the English common law.³⁴ In fact, the American concept of privacy rights is a product of the late nineteenth century, a time when modern industrial states and mass circulation magazines and newspapers began to emerge.³⁵ In a historic 1890 *Harvard Law Review* article, Boston attorneys Samuel D. Warren and Louis D. Brandeis introduced the phrase “right to privacy” to describe their concern regarding media intrusion into private citizens’ lives.³⁶ Warren and Brandeis were provoked by the incessant media coverage on the lavish parties they threw during the 1880s.³⁷ According to the authors, every person has the right to enjoy life, which includes the right to privacy.³⁸ They perceived the right to privacy as a natural and logical extension of common law principles in tort, nuisance, libel, and slander, which were created to protect intangible personal property and nonphysical injuries.³⁹ The right to privacy signifies “the [individual’s] right to be let alone.”⁴⁰ A right “against the world,”⁴¹ the right to privacy should prevent from publication any matters concerning a person’s habits, relations, and private life.⁴² Even though the Warren and Brandeis article focuses primarily on one’s right to be free from unwanted publicity in the press, it brought the notion of privacy to national attention by proposing a new legal paradigm for an individual’s personality interest.⁴³

³⁴ See BRECKENRIDGE, *supra* note 14, at 4; RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY* 27 (1987).

³⁵ Larry Moore, *Regulating Publicity: Does Elvis Want Privacy?*, 5 *DEPAUL-LCA J. ART & ENT. L. & POL’Y* 1 (1994); *see also* HIXSON, *supra* note 34, at 28.

³⁶ Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1891).

³⁷ *See* HIXSON, *supra* note 34, at 30.

³⁸ Warren & Brandeis, *supra* note 36, at 193

³⁹ *Id.* at 194; *see also* Moore, *supra* note 35, at 4.

⁴⁰ Warren & Brandeis, *supra* note 36, at 193.

⁴¹ *Id.* at 202.

⁴² *Id.* at 204.

⁴³ *Id.* at 200.

While the notion of the right to privacy was introduced by two legal scholars, it owed much of its growth to various Supreme Court decisions recognizing an implied right to privacy.⁴⁴ In the landmark case *Griswold v. Connecticut*,⁴⁵ two physicians challenged the constitutionality of a Connecticut statute that prohibited the use of contraceptives. The physicians were arrested as accessories who prescribed contraceptives and provided medical advice regarding their use to married couples.⁴⁶ Invalidating the statute, the United States Supreme Court held that the state's forbidding the use of contraceptives would bring about "maximum destructive impact upon [marital] relationship."⁴⁷ Justice William Douglas, writing for the majority and citing numerous cases involving privacy and freedom of association, stated the right of privacy is one of the several "penumbras . . . formed by emanations from those [specific] guarantees [in the Bill of Rights] that help give them life and substance."⁴⁸ It is "so rooted in the traditions and conscience of our people to be ranked as fundamental."⁴⁹ In this instance, marital privacy not only serves a noble purpose older than the Bill of Rights⁵⁰ but also "concerns a relationship lying within the zone of privacy [protected] by several [other] fundamental constitutional guarantees"⁵¹ including the Fourth, Fifth, and Ninth

⁴⁴ Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 1 *COMMLAW CONSPECTUS* 71, 74 (2003); see also *Poe v. Ullman*, 367 U.S. 497, 516-522 (1961) (dissenting opinion); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Roe v. Wade*, 410 U.S. 113 (1973); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Whalen v. Roe*, 429 U.S. 589 (1977); *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁴⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁶ *Griswold*, 381 U.S. at 480.

⁴⁷ *Id.* at 487.

⁴⁸ *Id.*

⁴⁹ *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

⁵⁰ *Griswold*, 381 U.S. at 486.

⁵¹ *Id.* at 485.

Amendments.⁵² The fact that a right “is not guaranteed in so many words by the . . . Constitution”⁵³ does not mean that it may be violated. The *Griswold* court’s conclusion of privacy being in the penumbras of constitutional protections became the “pertinent beginning point”⁵⁴ for decisions in subsequent privacy cases.⁵⁵

With the *Griswold* “penumbra rights of ‘privacy and repose’”⁵⁶ in mind, the Supreme Court of the United States continued to “raise[] the bar in the interest of privacy”⁵⁷ during the 1970s. In the 1973 case of *Roe v. Wade*,⁵⁸ Justice Blackmun, writing the lead opinion, further expanded the notion of privacy. The celebrated *Wade* dispute involved the constitutionality of state statutes criminalizing individuals who “procure [or attempt to procure] an abortion,”⁵⁹ except in situations where “an abortion [is] procured or attempted by medical advice for the purpose of saving the life of the mother.”⁶⁰ The Court held that abortion, as a fundamental right of privacy, is within the scope of personal liberty and due process under the Fourteenth Amendment.⁶¹ While this privacy is not unqualified and is subject to limitations,⁶² it outweighs the government’s compelling interests in restraining such right under these circumstances. The *Wade*

⁵² See *Griswold*, 381 U.S. at 484.

⁵³ *Id.* at 491. Justice Goldberg, in his concurring opinion, emphasized the importance of the Ninth Amendment as a source of support for privacy rights.

⁵⁴ *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

⁵⁵ See *Eisenstadt*, 405 U.S. at 438; *Wade*, 410 U.S. at 113.

⁵⁶ *Griswold*, 381 U.S. at 485.

⁵⁷ Victoria S. Salzmann, *Are Public Records Really Public?: The Collision Between the Right to Privacy and the Release of Public Court Records Over the Internet*, 52 BAYLOR L. REV. 355, 363 (2000).

⁵⁸ *Wade*, 410 U.S. at 113.

⁵⁹ *Id.* at 117-18.

⁶⁰ *Id.* at 118.

⁶¹ *Id.* at 153.

⁶² *Id.* at 155.

decision strengthened the judicial backing for a constitutional right to privacy and increased “its relative weight when compared to competing governmental interests.”⁶³

In the 1976 case of *Department of the Air Force v. Rose*,⁶⁴ the Supreme Court for the first time addressed the issue of information privacy under the FOIA. Student editors of the *New York University Law Review*, writing an article on disciplinary systems in military service academies, sought access to case summaries of cadet honor and ethics hearings maintained in the United States Air Force Academy’s reading files.⁶⁵ The Court affirmed the holding of the Second Circuit Court of Appeals and ordered release of the requested records. The Court held, *inter alia*, that Exemption 6, one of the FOIA’s privacy exemptions, did not create a blanket exemption for personnel or similar files “in the absence of a showing of a clearly unwarranted invasion of privacy.”⁶⁶ Justice Brennan, delivering the opinion of the majority, noted that Congress has “enunciated a single policy”⁶⁷ of balancing the private and public interests. Congress has indicated in Exemption 6’s legislative history that “nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in its ‘personnel’ files.”⁶⁸

While conceding that disclosure of case summaries could possibly subject disciplined cadets to lifelong embarrassment and practical disabilities,⁶⁹ the Court found that these summaries do not contain “vast amounts of personal data”⁷⁰ to “constitute the

⁶³ Catherine Louisa Glenn, *Protecting Health Information Privacy: The Case for Self-Regulation of Electronically Held Medical Records*, 53 VAND. L. REV. 1605, 1615 (2000).

⁶⁴ *Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976).

⁶⁵ *Rose*, 425 U.S. at 355.

⁶⁶ *Id.* at 371.

⁶⁷ *Id.* at 373.

⁶⁸ *Id.* at 372.

⁶⁹ *Id.* at 376-77.

⁷⁰ *Id.* at 377.

kind of profile of an individual ordinarily to be found in his personnel file.”⁷¹ On the contrary, the requested summaries do not include the names of the cadets except in guilty cases, are widely disseminated among cadets as an instructional and educational tool, and contain no facts other than the alleged Honor or Ethic Code violations.⁷² Protective of the public interest in access, the Court reasoned that “all sectors of our society . . . have [not only] a stake in the fairness of any system”⁷³ but also an interest in “the treatment of cadets, whose education is publicly financed and who furnish a good portion of the county’s future military leadership.”⁷⁴ The *Rose* court’s approach to balancing the possible invasion of privacy against the congressional policy of opening up agency action to public scrutiny has set a precedent for subsequent cases involving FOIA privacy exemptions.⁷⁵ It was not until 1989 that the Court’s favoring of public access gave way to protection of personal privacy.

In *Whalen v. Roe*,⁷⁶ the Court addressed the issues of medical information and the patients’ right to privacy by determining the constitutionality of the New York State Controlled Substances Act of 1972, which required physicians to record and report to the state department of health the names and addresses of all patients who have obtained prescription drugs. The Court, reversing the District Court’s decision, held that the state law was constitutional and the “patient-identification requirement was a reasonable exercise of New York’s broad police powers.”⁷⁷ Individual liberty or privacy, according

⁷¹ *Rose*, 425 U.S. at 377.

⁷² *Id.*

⁷³ *Id.* at 369.

⁷⁴ *Id.*

⁷⁵ *See, e.g.*, *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004); *United States Dep’t of State v. Ray*, 502 U.S. 164 (1991); *Reporters Comm.*, 489 U.S. at 749.

⁷⁶ *Whalen*, 429 U.S. at 591.

⁷⁷ *Id.* at 598.

to the justices, is not a fundamental and unqualified right guaranteed to all.⁷⁸ New York's disclosure requirement "d[id] not automatically amount to an impermissible invasion of privacy"⁷⁹ because the state government has a vital interest in controlling the distribution of dangerous drugs⁸⁰ and has implemented a rational and reasonably secure means to monitor the information. Noting the narrow application of its holding, *i.e.* appropriate only for the present issue in question, the *Whalen* court also acknowledged explicitly a zone of privacy where any information "personal in character and potentially embarrassing or harmful if disclosed"⁸¹ within this zone would be protected from inappropriate disclosure. Consequently, the *Whalen* approach to weighing individual liberty and government interests has left the door open for potential future litigation involving individual privacy and disclosure of personal information.

As case law has illustrated, the United States Constitution does not provide an explicit right to information privacy.⁸² There is no mentioning of the word "privacy" in the Constitution.⁸³ Constitutional guarantees extend only to protecting individuals against state actions and government intrusions.⁸⁴ Nonetheless, the Supreme Court has shown its willingness to expand the reach of privacy interests by reading between the

⁷⁸ See *Whalen*, 429 U.S. at 597.

⁷⁹ *Id.* at 602.

⁸⁰ *Id.* at 598.

⁸¹ *Id.* at 605.

⁸² Gina Marie Stevens, *Privacy: Total Information Awareness Programs and Related Information Access, Collection, and Protection Laws*, Mar. 21, 2003, at 5, at <http://www.fas.org/irp/crs/RL31730.pdf> (last visited Sept. 25, 2007).

⁸³ BRECKENRIDGE, *supra* note 14, at 4.

⁸⁴ Stevens, *supra* note 82, at 5.

lines of the Constitution. The Court, through a series of FOIA decisions,⁸⁵ has sought to delineate boundaries for privacy exemptions and public access to government records.

B. Statutory Protection of Privacy Interests

Not only is there a lack of explicit constitutional provisions on the privacy of records with personal information, there is also no omnibus statute that provides comprehensive legal protection on informational privacy in the United States.⁸⁶ Instead, U.S. legislators have attempted to protect the privacy of data and records in two major areas: 1) information maintained by the federal government⁸⁷ and 2) documents—such as financial reports, medical information, and school records—held by private entities. While the judiciary worked on defining the scope of privacy, legislators have struggled with regulating public access to personal information that is deemed to be of sufficient significance. Congress, through its enactment of the Privacy Act of 1974⁸⁸ (hereinafter “Privacy Act” or “Act”), created a statutory protection for information privacy. The Act protects privacy by allowing any individual access to his or her record. The Privacy Act aims “to balance the government’s need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies’ collection, maintenance, use, and disclosure of personal information about them.”⁸⁹ The Act mandates that “no [federal] agency shall disclose any record which is contained in a system of records by means of communication to any

⁸⁵ Following the *Rose* ruling, the U.S. Supreme Court addressed different aspects of information privacy in FOIA cases such as *Dep’t of State v. Washington Post Co.*, 456 U.S. 595 (1982) and *FBI v. Abramson*, 456 U.S. 615 (1982).

⁸⁶ Stevens, *supra* note 82, at 5.

⁸⁷ Douglas J. Sylvester & Sharon Lohr, *The Security of Our Secrets: A History of Privacy and Confidentiality in Law and Statistical Practice*, 83 DENV. U. L. REV. 147, 167 (2005).

⁸⁸ The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (2004) (codified in part at 5 U.S.C. § 552(a)).

⁸⁹ United States Department of Justice, *Overview of the Privacy Act of 1974, 2004 Edition: Policy Objectives*, at <http://www.usdoj.gov/oip/1974polobj.htm> (last visited on Sept. 26, 2007).

person, or to another agency”⁹⁰ unless exemptions apply or certain conditions have been fulfilled. Any agency-held record with personally-identifiable information such as medical history would fall under the purview of the Act. The Privacy Act is the first statutory attempt to restrict disclosure of personally-identifiable information maintained by federal agencies.

Given its vague statutory language and limited legislative history, the Privacy Act leaves many issues of information privacy unresolved.⁹¹ Aside from the Privacy Act, Congress also passed the Family Educational Rights and Privacy Act of 1974⁹² (hereinafter “FERPA”) to protect the privacy of student education records.⁹³ The FERPA, applicable to all schools that receive funds under a U.S. Department of Education program,⁹⁴ gives parents “the right to inspect and review the education records of their children.”⁹⁵ In general, schools may not release any information from a student’s education record under the FERPA unless they have written consent from the parent or eligible student.⁹⁶ Like many other privacy statutes, the FERPA provides for statutory exemptions that permit schools to disclose without consent certain directory information such as the student’s name, address, telephone listing, and date of birth.⁹⁷

As the public increases its interaction with government agencies and acquires more innovative tools to access information that was originally difficult to obtain,

⁹⁰ 5 U.S.C. § 552(b).

⁹¹ United States Department of Justice, *Overview of the Privacy Act of 1974, 2004 Edition: Introduction*, at <http://www.usdoj.gov/oip/1974intro.htm> (last visited on Sept. 26, 2007).

⁹² The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2006). This statute is also referred to as the “Buckley Amendment,” named after U.S. Republican Senator James Buckley of New York.

⁹³ United States Department of Education, *General: Family Educational Rights and Privacy Act (FERPA)*, at <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited Oct. 27, 2007).

⁹⁴ United States Department of Education, *supra* note 93.

⁹⁵ 20 U.S.C. § 1232g(a)(1).

⁹⁶ § 1232g(b).

⁹⁷ § 1232g(a)(5).

Congress sees more personal data falling into the hands of government. To lessen the rising threat of unauthorized information disclosure, Congress has enacted more privacy statutes that deal with information access in areas not addressed by the Privacy Act and the FERPA.

Another federal statute restricting the release of records by government agencies is the Driver's Privacy Protection Act of 1994⁹⁸ (hereinafter "DPPA"). Generally, as a condition for registering an automobile or obtaining a driver's license, vehicle owners and drivers must provide personal information, which includes their names, telephone numbers, addresses, Social Security numbers, medical information, vehicle description, and photographs, to their state motor vehicle departments (hereinafter "DMVs").⁹⁹ Many states subsequently sell this information to businesses and individuals to generate significant revenues.¹⁰⁰ The DPPA was enacted after a series of abuses of driver's personal information held by state DMVs.¹⁰¹ One notorious incident cited by Congress was the murder of actress Rebecca Schaeffer. An obsessed fan, after having obtained Schaeffer's address from the California DMV, used the address to stalk and kill her.¹⁰² Congress also noted the case of Iowa home robbers targeting victims by writing down the license plate numbers of expensive cars and using such information to obtain home addresses from the state DMV.¹⁰³ As a means to reduce information abuses, the DPPA regulates the disclosure and resale of personal information contained in state DMV

⁹⁸ The Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (2006).

⁹⁹ See *Reno v. Condon*, 528 U.S. 141, 143 (2000).

¹⁰⁰ *Reno*, 528 U.S. at 143.

¹⁰¹ Electronic Privacy Information Center, *The Drivers Privacy Protection Act (DPPA) and the Privacy of Your State Motor Vehicle Record*, at <http://www.epic.org/privacy/drivers/> (last visited Oct. 26, 2007).

¹⁰² Electronic Privacy Information Center, *supra* note 101.

¹⁰³ *Id.*

records.¹⁰⁴ It prohibits state DMVs and their employees from “knowingly disclos[ing] or otherwise mak[ing] available to any person or entity” such information. Nonetheless, certain uses of personal information in state DMV records are permissible under the statute’s exemptions, such as uses in connection with judicial proceedings,¹⁰⁵ research activities,¹⁰⁶ and employment purposes.¹⁰⁷ Under the DPPA’s regulatory scheme, state agencies could no longer disclose freely a driver’s personal information without that individual’s consent.¹⁰⁸

In the field of health care, access to a person’s medical information has become an increasingly prominent controversy and concern, as medical records may be stored in online government databases.¹⁰⁹ The exponential growth of modern technological innovations has inevitably expanded the threat to privacy, thus prompting further congressional action to manage the offshoots of information technology and processing, which include “the collection of personal information, its accuracy, security and storage, the right of the subject to access it, as well as use and disclosure.”¹¹⁰ In 1996, Congress passed the Health Insurance Portability and Accountability Act¹¹¹ (hereinafter “HIPAA”). Even though the overall purpose of the HIPAA is to improve the American health care system and “to simplify the administration of health insurance,”¹¹² it also

¹⁰⁴ 18 U.S.C. § 2721.

¹⁰⁵ § 2721(b)(4).

¹⁰⁶ § 2721(b)(5).

¹⁰⁷ § 2721(b)(9).

¹⁰⁸ *Reno*, 528 U.S. at 144.

¹⁰⁹ Anthony L. Osterlund, *The Unequal Balancing Act Between HIV-Positive Patients and Physicians*, 25 OHIO N.U. L. REV. 149 (1999).

¹¹⁰ Roger S. Magnusson, *The Changing Legal and Conceptual Shape of Health Care Privacy*, 32 J.L. MED. & ETHICS 680, 683 (2004).

¹¹¹ Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.), available at <http://aspe.hhs.gov/admsimp/pl104191.htm> (last visited Sept. 23, 2007) [hereinafter “HIPAA”].

¹¹² HIPAA ¶ 1.

establishes standards for the disclosure of individually identifiable health information created or maintained by health care providers who engage in the electronic transmission of such information in connection with health plans or health care clearinghouses.¹¹³ Moreover, the HIPAA instructs the United States Department of Health and Human Services (hereinafter “DHHS”), in the absence of a congressional regulation, to publish a medical privacy rule that specifies the conditions under which health information may be disclosed or used by applicable entities.¹¹⁴ Responding to the HIPAA requirement, the DHHS promulgated the Standards for Privacy of Individually Identifiable Health Information¹¹⁵ (hereinafter “Privacy Rule”) in August 2002. Some scholars and medical practitioners have speculated whether the HIPAA and its Privacy Rule perform more as disclosure regulations or privacy protection laws.¹¹⁶ Regardless of their true nature, the HIPAA and its Privacy Rule are notable in their being recent attempts by the federal government to create “a foundation of . . . protections for the privacy of protected health information.”¹¹⁷

The Privacy Act, the FERPA, the DPPA, and the HIPAA are only some of the major privacy protection statutes at the national level.¹¹⁸ There are many other federal laws designed to protect citizens against unauthorized access and use of private

¹¹³ HIPAA § 1172(a).

¹¹⁴ HIPAA tit. II, subtit. F.

¹¹⁵ United States Department of Health & Human Services, *Medical Privacy: National Standards to Protect the Privacy of Personal Health Information*, at <http://www.hhs.gov/ocr/hipaa/finalreg.html> (last visited Sept. 26, 2007). The regulation is also called the “Privacy Rule.”

¹¹⁶ Richard Sobel, *The HIPAA Paradox: The Privacy Rule That’s Not*, 4 HASTINGS CTR. REP. 40 (2007).

¹¹⁷ United States Department of Health & Human Services, *General Overview of Standards for Privacy of Individually Identifiable Health Information*, at 1, at <http://www.hhs.gov/ocr/hipaa/guidelines/overview.pdf> (last visited Sept. 26, 2007).

¹¹⁸ See California Office of Privacy Protection, *Privacy Laws*, at <http://www.privacy.ca.gov/lawenforcement/laws.htm> (last visited Oct. 27, 2007).

information in different areas ranging from finance and credit reporting¹¹⁹ to online computer security.¹²⁰ However, Congress is not the only entity responsible for creating an extensive collection of statutes to protect privacy; state legislatures have enacted privacy laws for their citizens as well. Often, local privacy laws lack uniformity and vary substantially from one state to another in the subject matters they address. For the purpose of this literature review, an in-depth description of every existing state privacy statute would be a time-consuming project in and of its own. Therefore, the implicated state privacy statutes and their personal privacy exemptions examined for this research will be discussed later in the analysis chapter.

PUBLIC INTERESTS

A. Emergence of Freedom of Information Laws

Freedom of information (hereinafter “FOI”) statutes are laws that intend to provide the public a judicially enforceable right of access to meetings and records held by government agencies.¹²¹ Prior to these statutes, the public bore the burden of proving to agencies its need to know the requested information.¹²² Since their implementation, FOI laws have replaced the “burden of proof” standard with a “right to know” standard.¹²³

¹¹⁹ See, e.g., The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (2006).

¹²⁰ E.g., Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506 (2006); The Electronic Communications Privacy Act, 18 U.S.C. § 2701 *et seq.* (2006).

¹²¹ Martin E. Halstuk, *When Is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 J.L. & PUB. POL’Y 361, 367 (2005) [hereinafter *Invasion of Privacy*].

¹²² See Uhl, *supra* note 23, at 266-67.

¹²³ See *id.* at 267; see also Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government Is Up To*, 11 COMM. L. & POL’Y 511, 552 (2006).

Consequently, they carry a strong presumption of full disclosure by government agencies on the basis of openness and accountability.¹²⁴

In an article examining the development of the federal FOIA, Anderson explained that the notion of openness being a vital constituent of an accountable government is acknowledged through the codification of public records laws.¹²⁵ Allowing the public to know what its “government is up to”¹²⁶ establishes an informed citizenry that has the capability to scrutinize agency actions and hold the government responsible for any misconduct or waste. Openness is the bedrock of democracy, as access to information builds up public trust in the government.¹²⁷ With this philosophy in mind, Congress enacted the Freedom of Information Act¹²⁸ in 1966 to increase accountability in the federal government and to protect the public interest in democracy.¹²⁹

The FOIA requires federal agencies to disclose various types of information.¹³⁰ Agencies must publish general information about their organization, including procedural rules and policy statements, in the Federal Register.¹³¹ In addition, agencies “shall make available for public inspection and copying”¹³² certain records such as final opinions and orders on matters adjudicated by the agency, unpublished policy interpretations, and administrative staff manuals.¹³³ The FOIA also establishes the right of any person to

¹²⁴ See *Invasion of Privacy*, *supra* note 121, at 361.

¹²⁵ See Keith Anderson, *Is There Still a “Sound Legal Basis?”: The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605, 1608 (2003).

¹²⁶ Anderson, *supra* note 125, at 1608.

¹²⁷ See generally *id.* at 1607; OpenTheGovernment.org, *Public Trust and Accountability*, at <http://openthegovernment.org/article/articleview/32/1/15> (last visited Oct. 29, 2007).

¹²⁸ The Freedom of Information Act, 5 U.S.C. § 552 (1996).

¹²⁹ Anderson, *supra* note 125, at 1611; see also Uhl, *supra* note 23, at 266.

¹³⁰ Bradley Pack, *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 ARIZ. L. REV. 815, 821 (2004).

¹³¹ 5 U.S.C. § 552(a)(1).

¹³² § 552(a)(2).

¹³³ § 552(a)(2).

request by writing access to federal agency records.¹³⁴ Upon receipt of such request and within twenty business days,¹³⁵ the agency “shall make the records promptly available to”¹³⁶ the requester. The FOIA also imposes an accountability requirement compelling federal agencies to report annually to Congress and the U.S. Attorney General the number of access denials and the reasons for not complying with FOI requests for government records.¹³⁷

However, not all records maintained by federal agencies are subject to the FOIA’s disclosure requirements. There are nine types of records exempted from disclosure under the FOIA.¹³⁸ Agencies need not disclose records concerning: (1) matters classified by an Executive Order in the interest of national security or foreign policy;¹³⁹ (2) matters related solely to the agency’s internal personnel rules and practices;¹⁴⁰ (3) information specifically exempted from disclosure under another statute;¹⁴¹ (4) trade secrets, commercial, and financial information that is privileged or confidential;¹⁴² (5) inter-agency or intra-agency memorandums that would not be available by law to a party other than an agency in litigation with the agency;¹⁴³ (6) personnel and medical files whose disclosure would constitute a clearly unwarranted invasion of personal privacy;¹⁴⁴ (7)

¹³⁴ § 552(a)(3)(A).

¹³⁵ § 552(a)(6)(A).

¹³⁶ § 552(a)(3)(A).

¹³⁷ § 552(e). The accountability and reporting requirements were added as an amendment to Section 552(e) of the FOIA by the Electronic Freedom of Information Act Amendments of 1996. See The Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C. § 552 (1996) (codified as amended in scattered subsections of 5 U.S.C. § 552), *available at* http://epic.org/open_gov/efoia.html (last visited Apr. 18, 2008).

¹³⁸ § 552(b).

¹³⁹ § 552(b)(1)(A).

¹⁴⁰ § 552(b)(2).

¹⁴¹ § 552(b)(3).

¹⁴² § 552(b)(4).

¹⁴³ § 552(b)(5).

¹⁴⁴ § 552(b)(6).

records kept for law enforcement purposes;¹⁴⁵ (8) information related to supervision or operation of a financial institution;¹⁴⁶ and (9) geological and geophysical data concerning wells.¹⁴⁷ More specifically, Exemption 7 is applicable only to records that (a) could reasonably be expected to interfere with enforcement proceedings;¹⁴⁸ (b) would deprive a person of the right to a fair trial or an impartial adjudication;¹⁴⁹ (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy;¹⁵⁰ (d) could reasonably be expected to reveal the identity of a confidential source;¹⁵¹ (e) would reveal secret law enforcement techniques and strategies that could be used by others to circumvent the law;¹⁵² or (f) could reasonably be expected to endanger a person's life or physical safety.¹⁵³ Exemptions 6 and 7(C), which allow agencies to withhold records in order to protect the privacy of the people mentioned in agency documents, are privacy exemptions that attempt to balance the public's interest in government openness and individual privacy interests.¹⁵⁴ The FOIA has provided "a right [that] is virtually unprecedented anywhere else in the world: the right to obtain government documents just for the asking."¹⁵⁵

With the public demanding more transparency and information access, the influence of the FOIA quickly spread beyond the federal government. In the wake of Watergate, national concern for openness in government records and functions quickly

¹⁴⁵ § 552(b)(7).

¹⁴⁶ § 552(b)(8).

¹⁴⁷ § 552(b)(9).

¹⁴⁸ § 552(b)(7)(A).

¹⁴⁹ § 552(b)(7)(B).

¹⁵⁰ § 552(b)(7)(C).

¹⁵¹ § 552(b)(7)(D).

¹⁵² § 552(b)(7)(E).

¹⁵³ § 552(b)(7)(F).

¹⁵⁴ Hoefges, Halstuk & Chamberlin, *supra* note 12, at 11.

¹⁵⁵ Pack, *supra* note 130, at 817 (citing Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 657 (1984)).

spilled over into state-level operations. Even though the FOIA was not the first federal statute to establish the right of public access to government records,¹⁵⁶ it jump-started the right to information movement across the nation. Many state legislatures jumped on the bandwagon and enacted their own versions of open government law for local agencies.¹⁵⁷ Some states even modeled their public records statutes after the federal FOIA¹⁵⁸ and included privacy exemptions similar to those in the federal law.¹⁵⁹

B. Changes in the Scope of Government Openness

Public access to government records has increased steadily since the enactment of the FOIA despite numerous statutory amendments and the attempt by the Reagan Administration to curtail the statute's reach.¹⁶⁰ In the 1990s, the Clinton Administration "ushered in an era of increased FOIA disclosures"¹⁶¹ and government openness through the issuance of two key memoranda. On October 4, 1993, Attorney General Janet Reno issued a memorandum announcing a new policy to increase the availability of government information to the public.¹⁶² The memorandum rescinded a 1981 rule that allowed federal agencies to withhold information merely on a "substantial legal basis."¹⁶³ The Reno memorandum required a "presumption of disclosure"¹⁶⁴ in every agency's disclosure and nondisclosure decision made under the FOIA. Furthermore, the

¹⁵⁶ David S. Jackson, *Privacy and Ohio's Public Records Act*, 26 CAP. U. L. REV. 107, 113 (1997).

¹⁵⁷ James C. Hearn, Michael K. McLendon & Leigh Z. Gilchrist, *Governing in the Sunshine: The Impact of State Open-Meetings and Record Laws on Decision-Making in Higher Education*, EDUC. RESOURCES INFO. CENTER 5, available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/85/86.pdf (last visited Oct. 27, 2007).

¹⁵⁸ Jackson, *supra* note 156, at 113.

¹⁵⁹ *Id.* at 114.

¹⁶⁰ See Anderson, *supra* note 125, at 1613-17.

¹⁶¹ See Uhl, *supra* note 23, at 271.

¹⁶² Attorney General Janet Reno's Memorandum for Heads of Departments and Agencies (Oct. 4, 1993), available at <http://www.fas.org/sgp/clinton/reno.html> (last visited Oct. 27, 2007) [hereinafter "Reno Memo"].

¹⁶³ Reno Memo, *supra* note 162.

¹⁶⁴ *Id.*

Department of Justice would only defend assertions of a FOIA exemption in cases where an agency “reasonably foresees”¹⁶⁵ that disclosure would be harmful to an interest protected by the asserted exemption. Along with the Reno memorandum, President William J. Clinton encouraged all federal agencies and departments to renew their commitment to government transparency under the Freedom of Information Act.¹⁶⁶ The President’s statement reiterated the importance of upholding the letter and spirit of the FOIA.¹⁶⁷ It also reminded agencies of their responsibility “to distribute information on [their] own initiative”¹⁶⁸ in order to build an informed citizenry. Through the issuance of the concurrent memoranda, the Clinton Administration has steered the government toward an era of increased transparency and FOIA disclosures. This new openness policy remained effective throughout the Clinton Presidency and was followed by federal agencies until October 2001.¹⁶⁹

While the scope of access to government information increased substantially during the Clinton era, it has been scaled back after the terrorist attacks on September 11, 2001. A major government measure was the issuance of Attorney General John Ashcroft’s FOIA memorandum on October 12, 2001.¹⁷⁰ Stating that a federal agency’s discretionary decision to disclose FOIA-protected information “should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy

¹⁶⁵ Reno Memo, *supra* note 162.

¹⁶⁶ President William J. Clinton’s Memorandum for Heads of Departments and Agencies (Oct. 4, 1993), available at <http://www.fas.org/sgp/clinton/reno.html> (last visited Oct. 27, 2007) [hereinafter “Clinton Memo”].

¹⁶⁷ Clinton Memo, *supra* note 166.

¹⁶⁸ *Id.*

¹⁶⁹ Uhl, *supra* note 23, at 272.

¹⁷⁰ Anderson, *supra* note 125, at 1621.

interests that could be implicated by disclosure of the information,”¹⁷¹ the Ashcroft memorandum superseded and completely reversed Janet Reno’s openness policy. While the Reno standard assumed a strong presumption of agency disclosure, Ashcroft’s statement elevated the standard of proof on the part of the requesters, requiring them to show a need to know the information they seek to access.¹⁷² Ashcroft also promised to defend agency decisions as long as there is “a sound legal basis”¹⁷³ for their withholding of information. The Ashcroft memorandum, by raising the legal standard of proof for the public, has drawn criticisms from many legal commentators, advocacy groups, and members of the media.¹⁷⁴ It signifies an abrupt and drastic change in the federal government’s attitude toward the public’s right to access freely and openly government information.¹⁷⁵ Although it is the judicial interpretations that ultimately make or break the FOIA, one should not dismiss so quickly the memoranda of the Attorneys General. Since the Department of Justice plays an important role in enforcing the FOIA and supervising agency compliance with the statute,¹⁷⁶ the Attorneys General, as head of the Department of Justice, and their statements “serv[e] as the primary source of policy guidance for [federal] agencies”¹⁷⁷ on FOIA-related matters. The expansion of discretionary power in the agencies’ FOIA decision-making may likely lead to a severe increase in the curtailment of civil liberties.

¹⁷¹ Attorney General John Ashcroft’s Memorandum for Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* <http://www.usdoj.gov/oip/011012.htm> (last visited Oct. 27, 2007) [hereinafter “Ashcroft Memo”].

¹⁷² Ashcroft Memo, *supra* note 171.

¹⁷³ *Id.*

¹⁷⁴ Anderson, *supra* note 125, at 1622.

¹⁷⁵ *See id.* at 1624.

¹⁷⁶ Uhl, *supra* note 23, at 269.

¹⁷⁷ *Id.*

In its 2006 annual report, OpenTheGovernment.org, a pro-transparency advocacy group, identified several measurable indicators that help determine and evaluate secrecy in government in the United States.¹⁷⁸ The organization surmised from its data that the practice of government secrecy and nondisclosure has continued to expand among federal agencies.¹⁷⁹ The organization identified more than fifty types of governmental restrictions placed on sensitive but unclassified (hereinafter “SBU”) information, *e.g.* information implicating personal privacy, in 2006.¹⁸⁰ There were also more than sixty different types of marking—many of which are inconsistent and contradictory—used by federal agencies to identify SBU information and to block such information from public access.¹⁸¹ Many of the marking types were contradictory, and their key terms lacked precise definition.¹⁸² Based on the collected data, OpenTheGovernment.org asserted that because government officials are given too much discretion to withhold information from the public, such unrestrained secrecy has severely undermined the purpose of the FOIA.¹⁸³

During Sunshine Week 2006, the Associated Press (hereinafter “AP”) conducted a study analyzing access laws in all fifty states since September 11, 2001.¹⁸⁴ With the assistance of their local press associations, AP reporters tracked the access bills proposed in every state since the terrorist attacks and tallied those that have become statutes.¹⁸⁵ They examined the impact of each statute by rating it “as loosening existing limits on

¹⁷⁸ Patrice McDermott & Emily Feldman, *Secrecy Report Card 2006*, OPENTHEGOVERNMENT.ORG, at 2, at <http://www.openthegovernment.org/otg/SRC2006.pdf> (last visited Oct. 27, 2007).

¹⁷⁹ McDermott & Feldman, *supra* note 178, at 2.

¹⁸⁰ *Id.* at 11.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 4-5.

¹⁸⁴ Robert Tanner, *States Steadily Restricting Government Information Available to Public*, ASSOCIATED PRESS, Mar. 12, 2006, at http://www.ap.org/FOI/foi_031306a.html (last visited Oct. 28, 2007).

¹⁸⁵ Tanner, *supra* note 184.

public access to government information, restricting the limits, or neutral.”¹⁸⁶ The study found that 616 laws were enacted to restrict access, 284 laws were passed to increase access, and another 123 laws had a mixed or neutral effect.¹⁸⁷ The AP concluded that in general, states have increasingly restricted public access to government records since the terrorist attacks, as lawmakers have approved more than twice as many measures that deny access as laws that require disclosure.¹⁸⁸

RIGHTS IN CONFLICT: PRIVACY AND ACCESS TO INFORMATION

A. What the United States Supreme Court Says

As the previous sections have noted, privacy in individually identifiable information is paramount to an individual’s liberty interest. Even though the right to privacy is not unqualified, the “recognition of a broadened privacy interest”¹⁸⁹ in one’s personal information has instilled a heightened sense of prudence in the courts’ handling of cases. In fact, such heavy emphasis on information privacy protection poses a difficult challenge for courts hearing disputes that involve requests for access to government-kept records. What should courts do in the face of two clashing interests? How should courts balance between preventing breaches in individual privacy and upholding the presumption of government openness under public records laws?

The United States Supreme Court established a new approach to balancing the private and social interests in the controversial 1989 case of *United States Department of*

¹⁸⁶ Tanner, *supra* note 184.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL’Y 313, 343 (2005).

*Justice v. Reporters Committee for Freedom of the Press*¹⁹⁰ (hereinafter *Reporters Committee*). In *Reporters Committee*, CBS news correspondent Robert Schakne and the Reporters Committee for Freedom of the Press¹⁹¹ filed a FOIA request for the FBI’s rap sheet on Charles Medico.¹⁹² Medico was an owner of Medico Industries, “a legitimate business dominated by organized crime figures [in Pennsylvania].”¹⁹³ Schakne requested the criminal records to help his investigation into the relationship between Medico Industries and former Congressman Daniel J. Flood.¹⁹⁴ Medico Industries allegedly had received defense contracts in exchange for political contributions to Flood.¹⁹⁵ Initially, the FBI released records of three of Charles Medico’s brothers, who were all deceased, but denied the request for information on Charles Medico because he was still alive.¹⁹⁶ Schakne sued to access the records, contending that Medico’s nonfinancial crime history is “a matter of public record.”¹⁹⁷ Ruling in favor of Schakne, the Court of Appeals for the D.C. Circuit reversed the District Court’s holding¹⁹⁸ and reasoned that there is no privacy interest in an FBI compilation of law enforcement agency records when such information would be readily available as public records from those individual agencies.¹⁹⁹ On appeal, the Supreme Court, reversing the D.C. Circuit, held that a person’s rap sheet—a computerized compilation of criminal arrests, indictments,

¹⁹⁰ *Reporters Comm.*, 489 U.S. at 749.

¹⁹¹ Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee “Central Purpose” Reformulation*, 54 ADMIN. L. REV. 983, 988 (2002).

¹⁹² *Reporters Comm.*, 489 U.S. at 757.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 759.

¹⁹⁹ *Reporters Comm. for Freedom of the Press v. United States Dep’t of Justice*, 816 F.2d 730, 740 (D.C. Cir. 1987).

acquittals, convictions, and sentences²⁰⁰—is categorically exempt from disclosure under Exemption 7(C) of the FOIA because release of “law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy.”²⁰¹

Amid the controversy, the *Reporters Committee* court also created a set of famous guiding principles called the “central purpose” doctrine.²⁰² Throughout the decision, the Court emphasized the notion of “central purpose” by repeating similar phrases such as “basic purpose”²⁰³ and “core purpose.”²⁰⁴ The Court highlighted specifically that under the central purpose test, the reason for disclosure of records held by agencies must fall within “the ambit of the public interest that the FOIA was enacted to serve,”²⁰⁵ which is to enlighten the public of government activities.²⁰⁶ Public interest does not include the general public’s desire or mere curiosity²⁰⁷ to know what “records . . . the Government happens to be storing.”²⁰⁸ Justice John Paul Stevens, writing for the Court, stated that the FOIA’s purpose is not advanced by disclosure of information about private citizens that is found in various governmental files but reveals very little of an agency’s conduct.²⁰⁹

²⁰⁰ *Reporters Comm.*, 489 U.S. at 757.

²⁰¹ *Id.* at 780.

²⁰² *Id.* at 774. In fact, the Supreme Court never identified the central purpose doctrine by such a name. The Court viewed the doctrine more as a set of principles for interpreting and analyzing congressional intent that underlies the FOIA. See Christopher P. Beall, *The Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249, 1255 (1996). In the *Reporters Committee* opinion, the phrase “central purpose” appeared once in the sentence:

In other words, although there is undoubtedly some public interest in anyone’s criminal history, especially if the history is in some way related to the subject’s dealing with a public official or agency, the FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.

Reporters Comm., 489 U.S. at 774.

²⁰³ *Reporters Comm.*, 489 U.S. at 774 (quoting *Rose*, 425 U.S. at 372).

²⁰⁴ *Reporters Comm.*, 489 U.S. at 775.

²⁰⁵ *Id.*

²⁰⁶ Carol Might, *DNA Analysis and the Freedom of Information Act: Information or Invasion?*, 26 OKLA. CITY U. L. REV. 773, 795 (2001).

²⁰⁷ Might, *supra* note 206, at 793.

²⁰⁸ *Reporters Comm.*, 489 U.S. at 780.

²⁰⁹ *Id.* at 773.

According to the central purpose test, Charles Medico’s rap sheet “would tell [the public] nothing about the character of the *Congressman’s* behavior . . . [or] anything about the conduct of the *Department of Defense* (DOD) in awarding one or more contracts to the Medico Company.”²¹⁰ There was indisputably some public interest in Medico’s rap sheet,²¹¹ *i.e.* his criminal history would provide details for a news story, “but, in itself, [it was] not the kind of public interest for which Congress enacted the FOIA.”²¹² Justice Stevens concluded that the privacy interest in preserving the practical obscurity of a person’s rap sheet information will always be high.²¹³

The *Reporters Committee* decision has created a bright-line rule²¹⁴ determining that disclosure of a private citizen’s FBI rap sheet is not part of the public interest intended for protection by the FOIA.²¹⁵ Since its introduction in 1989, *Reporters Committee’s* cramped notion of the central purpose under the FOIA has posed many difficult and complex problems for “the future of public access to vast stores of government-held information that does not necessarily reveal government operations but that still holds great public interest.”²¹⁶ Examples of such publicly significant information may include results of the Food and Drug Administration’s prescription and nonprescription drug trial tests,²¹⁷ airline records kept by the Federal Aviation Administration,²¹⁸ results of the National Aeronautics and Space Administration-

²¹⁰ *Reporters Comm.*, 489 U.S. at 774.

²¹¹ *Id.* at 775.

²¹² Beall, *supra* note 202, at 1257.

²¹³ *Reporters Comm.*, 489 U.S. at 780.

²¹⁴ *Id.*

²¹⁵ Hoefges, Halstuk & Chamberlin, *supra* note 12, at 24.

²¹⁶ Halstuk & Davis, *supra* note 191, at 990.

²¹⁷ *Id.*

²¹⁸ *Id.*

conducted airline pilot surveys,²¹⁹ and the Federal Emergency Management Association's reports on financial loans to disaster victims.²²⁰ The *Reporters Committee* court's tilting of the scale, which restricts tremendously the definition of disclosable government records and expands the scope of personal privacy exemption under the FOIA, has ousted the traditional balancing of public interest in disclosure against individual interest in privacy by federal courts.²²¹

A more recent federal case addressing the issue of personal privacy in agency-held records is *Reno v. Condon*.²²² In *Reno*, the Attorney General of South Carolina sued the United States, claiming that the Driver's Privacy Protection Act violates the Tenth and Eleventh Amendments to the U.S. Constitution. The DPPA penalizes any person who knowingly obtains or discloses a driver's personal information for uses not permitted under its provisions.²²³ The DPPA's provisions conflict with South Carolina law. The state statute allows any person or entity to access information contained in records kept by the state motor vehicle department, provided that the requesters fill out a form listing their names and addresses and state that the requested information will not be used for telephone solicitation.²²⁴ Delivering a unanimous opinion, Chief Justice Rehnquist reversed the judgment of the Court of Appeals and held that the DPPA is "a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause."²²⁵ The Court reasoned that personally-identifiable information regulated by the

²¹⁹ The Reporters Committee for Freedom of the Press, *NASA FOIA Denial Prompts Congressional Questions*, at <http://rcfp.org/news/2007/1026-foi-nasare.html> (last visited Oct. 29, 2007).

²²⁰ Corinna Zarek, *Katrina Clampdown*, 29 NEWS MEDIA & L. 4 (2005), available at <http://www.rcfp.org/news/mag/29-4/cov-katrinac.html> (last visited Oct. 29, 2007).

²²¹ Halstuk & Davis, *supra* note 191, at 986.

²²² *Reno*, 528 U.S. at 141.

²²³ *Id.* at 144-45.

²²⁴ *Id.* at 147.

²²⁵ *Id.* at 148.

DPPA is “a thing in interstate commerce”²²⁶ subject to congressional regulation. Even though federalism was ultimately the question answered by the Supreme Court in *Reno*, the underlying issue implicated the complex relationship between personal information privacy and access to such information in government records.

B. What Legal Scholars Think

In an article examining how the *Reporters Committee* central purpose doctrine has been applied in federal cases to restrict disclosure of information held by government, Beall noted that the courts “have construed [the] FOIA in a way that displaces accessibility as the paramount goal.”²²⁷ Beall found that the Supreme Court’s interpretation of the central purpose doctrine has essentially “sounded a death knell”²²⁸ for those Exemption 6 cases arguing for derivative uses of FOIA information, *e.g.* in situations where disclosure of FOIA information may potentially provide more information about agency action.²²⁹ The author also discovered that in personal privacy cases involving Exemption 7(C), many Circuits have interpreted expansively the privacy interests being protected.²³⁰ The personal privacy interests extend not only to results that flow directly from disclosing the information but also to indirect, secondary effects resulting from the disclosure.²³¹ These federal cases have “present[ed] an overall picture of a federal judiciary intent on reining in citizen access to information collected and compiled by the very federal agencies whose existence is paid for by these citizens.”²³² Aside from the federal cases, Beall surveyed some 1995 amendments to state public

²²⁶ *Reno*, 528 U.S. at 148.

²²⁷ Beall, *supra* note 202, at 1284.

²²⁸ *Id.* at 1267.

²²⁹ *Id.*

²³⁰ *Id.* at 1270.

²³¹ *Id.*

²³² *Id.* at 1299.

records laws as well. His analysis indicated that unlike federal courts, state legislatures have adopted a different philosophy to public records cases involving personal privacy exemptions.²³³ The amendments suggested that state legislators tend to view government information as “property” belonging to the public and that a more open approach to information access is deemed necessary.²³⁴ Many states showed a much greater willingness to encourage public access to government records and more effort to establish a public policy of openness.²³⁵

Similarly, journalism scholars Hoefges, Halstuk, and Chamberlin reached the conclusion that the Supreme Court has created a trend of “broadly interpreting FOIA-related privacy interests and allowed even a minimal privacy concern to trigger FOIA privacy exemptions.”²³⁶ By reviewing a series of Supreme Court cases in which the privacy exemption was used to deny access to federal agency records with personal information, the authors noted the Court’s tendency to allow the FOIA privacy exemptions to be used “as shields to repel requests . . . [for any] records containing personally-identifiable information.”²³⁷ The Court has ignored the congressional intent of open agency records to public scrutiny by establishing a de facto rule against information disclosure.²³⁸ The privacy side of the balance has come to carry such great importance that it would take a tremendously convincing showing of the public interest to outweigh personal privacy exemptions.

²³³ Beall, *supra* note 202, at 1252.

²³⁴ *Id.*

²³⁵ *Id.* at 1299.

²³⁶ Hoefges, Halstuk & Chamberlin, *supra* note 12, at 56.

²³⁷ *Id.* (quoting Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 485 (1995)).

²³⁸ Hoefges, Halstuk & Chamberlin, *supra* note 12, at 57.

However, not all federal courts have scrupulously followed the *Reporters Committee* decision in determining whether or not to allow release of requested government records.²³⁹ Journalism professors Martin Halstuk and Charles Davis, in an article reviewing the impact of the *Reporters Committee* opinion on FOIA requests for documents, argued that some federal courts have interpreted the central purpose test to provide “a strictly limited but still viable basis for disclosure in certain cases.”²⁴⁰ These courts fall into two groups. One group believes that the public interest in disclosure can occasionally outweigh one’s privacy interest in situations where “government information might indirectly lead to revelations about official misconduct . . . and the requester possesses ‘compelling evidence’ of this misconduct.”²⁴¹ The second group of courts claims that release of records is permitted “when the requested information can potentially benefit the subject of the record.”²⁴² Even though the approaches of these two groups of courts do not represent the majority view, they offer more flexibility in the way courts balance public access against privacy exemptions.²⁴³

In the overall scheme of privacy statutes and public records laws, the small amount of available literature on extensive state regulation studies suggests a vast disproportion between research on federal statutory privacy exemptions and its state counterparts. The states’ regulatory schemes are much less analyzed largely due to the substantial variations in their privacy and access statutes.²⁴⁴ Consequently, the availability of literature and systematic analyses on the judicial treatment of access to

²³⁹ Halstuk & Davis, *supra* note 191, at 1006.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1006-07 (citing *Bennett v. DEA*, 55 F. Supp. 2d 36, 42 (D.D.C. 1999)).

²⁴² Halstuk & Davis, *supra* note 191, at 1007 (citing *Lepelletier v. FDIC*, 164 F.3d 37 (D.C. Cir. 1999)).

²⁴³ Halstuk & Davis, *supra* note 191, at 1013.

²⁴⁴ Hearn, McLendon & Gilchrist, *supra* note 157, at 5.

government records that contain individually identifiable information remains rather limited. There is a need for systematic analyses of state case law to determine how privacy exemptions have been addressed in public records disputes. Therefore, with the hope of contributing to a better understanding of access to information, this thesis has studied the general pattern of how state courts across the nation balance the competing interests of individual privacy and public disclosure when access to government records with personally-identifiable information is sought. A comprehensive analysis would shed some light on the legislature and the judiciary, allowing the general populace to become more aware of what their local governments and courts are doing in terms of ensuring information privacy and promoting government openness. Additionally, it may help members of the media monitor agency progress, which may lead to improvement in government services for citizens. Understanding how the courts identify and balance the clashing interests may also help journalists in their endeavor to gain access to government documents with private information that may have social significance. The results of this study may also help the public take a more active and informed role in future law and policy formulation to produce fair information practices.

III. METHODOLOGY: LEGAL RESEARCH

Given the paucity of systematic analyses on the state judicial treatment of personal privacy exemption post-*Reporters Committee*, this study uses legal research methodology to analyze state case law on privacy and access to government records. As communication scholars Donald M. Gillmor and Everette E. Dennis observed:

Legal research of the traditional, documentary mode is largely adversarial. The legal researcher sets down a provocative proposition and marshals evidence to support its plausibility, and that evidence may come from opinions [of] the court, dissenting opinions, legislative histories, constitutional interpretation, and legal commentaries.²⁴⁵

Legal research, although largely doctrinal, is “the foundation of legal scholarship”²⁴⁶ in common law systems such as the United States, whose legal system is based on the principle of *stare decisis*.²⁴⁷ *Stare decisis*, the Latin phrase meaning “to stand by things decided,”²⁴⁸ dictates that judges adhere to judicial precedents and not decide cases based on personal predilections.²⁴⁹ Once a competent court of law has officially decided on an issue or question of law, subsequent disputes involving the same or similar issue and facts must be resolved the same way by other courts “unless it be for urgent reasons and in exceptional cases.”²⁵⁰ With such heavy reliance on precedents,

²⁴⁵ Donald M. Gillmor & Everette E. Dennis, *Legal Research in Mass Communication*, in RESEARCH METHODS IN MASS COMMUNICATION 335 (Guido H. Stempel III & Bruce H. Westley, eds., 2d ed. 1989).

²⁴⁶ Daxton R. Stewart, *The Missouri Sunshine Law: Toward a Model of Enforcement 20* (2004) (published M.A. thesis, University of Missouri-Columbia) (on file with the University of Missouri-Columbia Library).

²⁴⁷ Dennis S. Sears, *Vision: The Essence of Professionalism and Key to the Future of Law Librarianship as a Profession*, 98 LAW LIBR. J. 81, 89 (2006).

²⁴⁸ BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

²⁴⁹ Maureen Straub Kordesh, *Navigating the Dark Morass: A First-Year Student's Guide to the Library*, 19 CAMPBELL L. REV. 115, 120 (1996).

²⁵⁰ Kordesh, *supra* note 249, at 120 (citing WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (3d ed. 1914)).

effective and efficient legal research requires the “integration of various types of legal materials.”²⁵¹

Since case law and precedents are often the most pertinent to individuals interested in researching legal matters,²⁵² they are used and analyzed more frequently than other legal resources. However, legal research methodology is not limited to examining published case opinions. It also includes the studying of enacted statutes, promulgated regulations, legislative history, and other secondary authorities such as law review articles. Together, these resources provide a comprehensive means to understand important issues of law.

For centuries, many legal theorists and scholars have viewed legal research methods in the United States as a positivist process. Traditional positivist theorists consider the American legal system as “one in which precedent and legal rules influence courts (in at least some respects) but do not compel answers, [and] one in which judges have discretion but not unlimited freedom.”²⁵³ The mainstream positivist approach to legal research sees the law as “the normative counterpart of a world amenable to rational and objective description.”²⁵⁴ An interpretation of the law should be objective²⁵⁵ and aims to find the one set of truths or a solution to a legal problem.²⁵⁶ However, the methodology of positivist legal research has been criticized by Critical Legal Studies scholars and poststructuralists who claim that traditional legal research reflects only the

²⁵¹ Sears, *supra* note 247, at 89.

²⁵² Stewart, *supra* note 246, at 21.

²⁵³ Peter C. Schanck, *Taking Up Barkan’s Challenge: Looking at the Judicial Process and Legal Research*, 82 LAW LIBR. J. 1, 22 (1990).

²⁵⁴ Michael Duggan & David Isenbergh, Commentary, *Poststructuralism and the Brave New World of Legal Research*, 86 LAW LIBR. J. 829 (1994).

²⁵⁵ Duggan & Isenbergh, *supra* note 254, at 829.

²⁵⁶ Stewart, *supra* note 246, at 22; *see* Duggan & Isenbergh, *supra* note 254, at 829.

interests of those with authority and in control of society,²⁵⁷ thus excluding the denigrated opinions of marginalized groups.²⁵⁸

Despite its largely adversarial and positivist nature, legal research methodology has been one of the oldest and most commonly used techniques in communication research.²⁵⁹ Gillmor and Dennis contend that in order to understand communication issues with origins in substantive law, their context must be placed within the larger legal framework.²⁶⁰ In mass communication, legal research methodology performs primarily these five functions:

- 1) To clarify the law and offer explanation through analysis of procedure, precedent, and doctrine;²⁶¹
- 2) To reform old laws and suggest changes in the law;²⁶²
- 3) To provide a better understanding of how law operates on society;²⁶³
- 4) To analyze the political and social processes that shape communication laws;²⁶⁴ and
- 5) To furnish materials for legal, journalistic, and mass communication education.²⁶⁵

Understanding the tension between information access and personal privacy requires a combination of traditional and social scientific legal research methods.

Traditional legal research methodology works best in the retrieval of pertinent legal

²⁵⁷ See Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 LAW LIBR. J. 391 (1993).

²⁵⁸ Farmer, *supra* note 257, at 393.

²⁵⁹ Gillmor & Dennis, *supra* note 245, at 333.

²⁶⁰ *Id.* at 331.

²⁶¹ *Id.* at 341.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 342.

²⁶⁵ *Id.*

authorities—in this study, case opinions of each state—while the social scientific approach allows for the use of empirical data and observations to determine the societal significance of these judicial holdings.²⁶⁶ In fact, empirical data alone is insufficient for solving normative and legal problems or eliciting available policy responses.²⁶⁷ Unquestionably, the social scientific legal research approach contributes to the public’s awareness of government policies and influences future policy-making. Communication researcher Sandra Braman insists that observations and data must be linked to the fundamental legal discipline in order for communication studies to exert a profound impact on law-making and political decision-making.²⁶⁸ By combining the two approaches, researchers could then analyze more efficiently the intrinsic and extrinsic factors of law.²⁶⁹ The study of legal jurisprudence would only have a maximum bearing on society only when the public understands precisely how the various aspects of life are affected by certain legislative changes. Braman²⁷⁰ as well as Gillmor and Dennis²⁷¹ maintain that legal research should reflect the idea that law, politics, and society are an indivisible trinity.

While legal research methodology may not be a subject commonly scrutinized in literature, many studies in communication research have entailed the combined application of traditional and social scientific legal research methods. Such approach, for example, is commonly used for studying the regulation of indecent content in mass media by the Federal Communications Commission (hereinafter “FCC”). Communication

²⁶⁶ See Gillmor & Dennis, *supra* note 245, at 343.

²⁶⁷ Sarah Braman, *Policy As a Research Context*, in COMMUNICATION RESEARCHERS AND POLICY-MAKING 35 (Sarah Braman ed., 2003).

²⁶⁸ See Braman, *supra* note 267, at 48.

²⁶⁹ Gillmor & Dennis, *supra* note 245, at 346.

²⁷⁰ See Braman, *supra* note 267, at 52-53.

²⁷¹ See Gillmor & Dennis, *supra* note 245, at 353.

professor Jeremy Lipschultz conducted a study by analyzing the content of all broadcasts cited for indecent language and the FCC letters received by offending radio stations in 1989.²⁷² Acknowledging that a simple qualitative, descriptive analysis of indecency law or policy alone is insufficient for an in-depth understanding, Lipschultz traced the evolution of indecency law through the application of appropriate legal standards within the broader social and political context, along with a careful, categorical examination of sources such as broadcast content, FCC rulings, Supreme Court decisions, and general policies.²⁷³ Studies like this help illustrate how communication research may benefit tremendously from the combined approach to legal research. Traditional legal analysis, coupled with social scientific observations and empirical data, enables researchers to extend their research from merely generating theoretical principles to formulating predictions and generalizations about media behaviors, which can be of practical applicability to society. Legal research methodology has increased our knowledge of the operation and decision-making of courts and government agencies, thus allowing the public and media organizations to make wiser policy judgments in the future.

This study has examined all case opinions issued by the highest courts of all fifty states addressing the conflict between access under public records laws and statutory personal privacy exemptions. Even though the *Reporters Committee* opinion applies to FOIA requests and federal agency actions and is only a nonbinding, persuasive precedent for state courts, it is unquestionably a seminal and far-reaching decision on all cases involving personal privacy protection under public records laws. Therefore, the *Reporters Committee* case has served as a starting point for the time frame from which

²⁷² Jeremy Harris Lipschultz, *Conceptual Problems of Broadcast Indecency Policy and Application*, 14 COMM. & L. 3 (1992).

²⁷³ See Lipschultz, *supra* note 272, at 4-6.

the state judicial decisions were selected. The research has analyzed state case law after 1989 that involved state personal privacy exemptions in litigation over access requests for government records. Legal research methods were employed during the study to collect and analyze the materials. First, the traditional legal research approach was used in the compilation of data. The researcher searched for state cases in the LexisNexis online database by keywords such as “privacy exemption,” “confidentiality exception,” “record,” “access,” and “invasion of personal privacy.” The database search attempted to generate all of the cases addressed by each state’s highest court on the issue of statutory privacy exemptions. It was expected that not all state supreme courts have dealt directly with the tension between personal privacy exemptions and access to government records. Therefore, for states without opinions from their highest courts, the search looked at decisions of lower courts that have examined the issue.

Next, the text of the opinions was analyzed. When assessing the content, the researcher took the nontraditional, social scientific legal research approach to determine which factors or elements play a more influential role in the courts’ decisions. The analysis also sought to understand if the enactment of privacy laws and FOI statutes has affected the way state judges balance public interests and individual concerns. The analysis tried to determine the extent to which the *Reporters Committee* rationale has influenced how state courts adjudicated cases involving fundamental questions of access and privacy. The combined use of traditional and nontraditional legal research approaches in this study has enabled the researcher to conduct a thorough case law analysis. By doing a “functional analysis’ . . . to understand the meaning or scope of a

rule or category,”²⁷⁴ the researcher was able to identify, distinguish, and reconcile the numerous rationales behind the courts’ decisions. Thus, insights and inferences have been drawn regarding an overall trend in the judicial balancing of personal privacy and access interests and the states’ attitudes toward privacy in public records.

Based on the keyword search conducted, over 145 case opinions were generated. Most of the cases found were inapplicable for this study either because they only mentioned in passing the research topic or the personal privacy exemption was not the main issue of the case. In total, 24 case opinions were chosen and examined because they addressed directly the topic at issue. Not every state supreme court has addressed the question of personal privacy exemptions on point. Therefore, for those jurisdictions without supreme court opinions, the researcher searched the intermediate and lower courts. Of these 24 decisions, eighteen were supreme court cases, five were issued by state intermediate courts, and one was from a state trial court.

²⁷⁴ See Paul T. Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409, 455 (1986) (quoting David Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479, 481 (1984)).

IV. ANALYSIS

With the enactment of public records laws across the nation, states share a common policy favoring disclosure and public access to records of government affairs. While society has experienced an “expansion of public access”²⁷⁵ to government records, the overarching policy of transparency is not unlimited. The public’s right to inspect government records is often restricted by a variety of statutory exemptions.

To determine whether or not certain government records can be released to the public under access laws, state courts take into consideration various factors such as legislative policy, private interests, the public interest in knowing, and the types of information sought. These factors, coupled with the pertinent statutory exemptions, pose a complex challenge to judges in their adjudication of public records litigation. Careful analysis of state case law has revealed both similarities and differences in the courts’ approaches to dealing with FOI disputes involving personal privacy exemptions.

In terms of protecting an individual’s right to privacy, all fifty states²⁷⁶ and the District of Columbia have provisions in their public records statutes that exempt certain identifying information from disclosure if their release would infringe on a person’s privacy right or constitute an unwarranted invasion of personal privacy. These statutory provisions either generally exempt information of a personal nature from disclosure or specifically identify exempt records. In addition to protecting privacy rights through FOI

²⁷⁵ *Wemhoff v. District of Columbia*, 887 A.2d 1004, 1008 (D.C. 2005).

²⁷⁶ See *Capital City Press v. E. Baton Rouge Parish Metro. Council*, 696 So. 2d 562 (La. 1997).

laws, some states recognize common law and constitutional²⁷⁷ rights to privacy as well. For the purpose of this study, the researcher searched for supreme court (and if unavailable, lower level court) opinions in all fifty states and selected decisions that addressed on point the issue of statutory personal privacy exemptions. This resulted in 24 cases, which were placed into two categories—(1) jurisdictions undertaking methods other than balancing and (2) jurisdictions practicing a balancing approach—and analyzed in the subsequent sections. For states that fell within the first category, they were further classified according to the specific types of methods used to adjudicate public records lawsuits. For those jurisdictions in the second category, their ways of weighing access against privacy were analyzed according to the types of records or information sought.

THE LITTLE-TO-NO BALANCING APPROACH

A. Following Prior Case Law

Presumably, with competing interests at play, courts should weigh the general policy favoring government openness against the benefits of nondisclosure. However, not all states follow this method strictly. To investigate the extent to which the *Reporters Committee* holding has affected the way state courts resolve personal privacy exemption disputes, this section will analyze the approaches undertaken by states that do not balance interests. Connecticut, for example, relies on a test created by prior case law. In *Rocque v. Freedom of Information Commission*,²⁷⁸ a reporter from *The Hartford Courant*

²⁷⁷ See National Conference of State Legislatures, *Privacy Protections in State Constitutions*, Apr. 6, 2008, at <http://www.ncsl.org/programs/lis/privacy/stateconstpriv03.htm> (last visited Apr. 7, 2008). States that have expressly provided a constitutional right to privacy are Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. In other states, constitutional and common law rights to privacy are created judicially by courts.

²⁷⁸ *Rocque v. Freedom of Info. Comm'n*, 774 A.2d 957 (Conn. 2001).

compelled release of personnel records pertaining to a sexual harassment investigation of a department manager at the department of environmental protection.²⁷⁹ The Supreme Court of Connecticut, affirming in part the trial court’s ruling, held the identity of the alleged victim in the sexual harassment investigation at issue to be exempt from disclosure under the state FOIA because releasing the information to the public would constitute an invasion of individual privacy.²⁸⁰ However, the court also ruled that in future cases, similar information is not always exempt from disclosure under the public records statute and would not always constitute an invasion of the complainant’s privacy.²⁸¹

According to General Statutes § 1-210(b)(2) of the Connecticut Code, “[n]othing in the [state’s] Freedom of Information Act shall be construed to require disclosure of . . . [p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.”²⁸² However, the statutory provisions do not specify the instructions for determining invasions of personal privacy. To decide whether or not there is an invasion of privacy under § 1-210(b)(2), the *Rocque* court used the test enunciated in *Perkins v. Freedom of Information Commission*.²⁸³ The *Perkins* test states that § 1-210(b)(2) precludes disclosure “only when the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person.”²⁸⁴ The *Perkins* test²⁸⁵ defines invasion of personal privacy as a tort

²⁷⁹ *Rocque*, 774 A.2d at 959.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 968.

²⁸² CONN. GEN. STAT. § 1-210 (b)(2) (2008).

²⁸³ *Perkins v. Freedom of Info. Comm’n*, 635 A.2d 783 (Conn. 1993).

²⁸⁴ *Perkins*, 635 A.2d at 791.

²⁸⁵ The *Perkins* test is modeled after the standard enumerated in the Restatement (Second) of Torts, which states that “[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly

action²⁸⁶ and rejects the traditional balancing test by requiring both prongs of the test be satisfied before judges may exempt records from disclosure.²⁸⁷

In *Rocque*, the court divided the information into two categories: 1) those concerning the complainant's identity and related identifying information such as home address and 2) the balance of the information claimed to be exempt, including location and date of the alleged sexual harassment, an investigation letter from the department commissioner to the complainant, and statements of the witnesses.²⁸⁸ The court noted that the first category of information was not "of legitimate public concern,"²⁸⁹ as the name of the alleged victim would not contribute anything significant to the public's understanding and evaluation of the investigation.²⁹⁰ In addition, sexually explicit information in the second category, such as investigation documents and details of improprieties, was not a matter of legitimate public concern as well.²⁹¹ While the *Rocque* court conceded that sexual relations are generally private matters²⁹² and that disclosure of identifying, sexually explicit information would be highly offensive to a reasonable person²⁹³ due to the "unique sensitivity of the issues involved,"²⁹⁴ it took a narrow approach to settling the dispute.²⁹⁵ The court stated that in cases involving personal privacy exemptions, independent factual findings and analysis are necessary for

offensive to a reasonable person, and (b) is not of legitimate concern to the public." See RESTATEMENT (SECOND) OF TORTS § 652D (1997).

²⁸⁶ *Rocque*, 774 A.2d at 964.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 965.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 966.

²⁹² *Id.* (citing *Perkins*, 635 A.2d at 790).

²⁹³ *Rocque*, 774 A.2d at 966 (citing *Perkins*, 635 A.2d at 791).

²⁹⁴ *Rocque*, 774 A.2d at 966.

²⁹⁵ *Id.* at 967.

determining whether disclosure of information is exempt.²⁹⁶ It is important that “the claimant of the exemption . . . provide more than conclusory language, generalized allegations or mere arguments of counsel.”²⁹⁷ Instead, the claimant must reflect in “a sufficiently detailed record . . . reasons why an exemption applies to the materials requested.”²⁹⁸ Only when the party claiming the personal privacy exemption proves that the requested information is not a legitimate matter of public concern and that disclosure of information would be highly offensive to a reasonable person would Connecticut courts deny access to public records.²⁹⁹

The Connecticut Supreme Court has taken an approach more nuanced than that adopted by federal courts in deciding whether or not access would constitute an invasion of personal privacy.³⁰⁰ Instead of a mere categorical approach, different factors including the potential for humiliation or embarrassment and a person’s reasonable expectation of privacy must all be considered carefully by the judges.³⁰¹

B. Abiding By the Statutory Language

While Connecticut courts perform a judicially-created test to determine if personal information should be withheld from government records, other jurisdictions look to the public records statutes for guidance. Massachusetts courts, for instance, adhere closely to the plain language of the statutory exemptions. In *Wakefield Teachers Association v. School Committee*,³⁰² a town resident requested “any information . . .

²⁹⁶ *Rocque*, 774 A.2d at 968.

²⁹⁷ *Id.* at 963 (quoting *New Haven v. Freedom of Info. Comm’n*, 535 A.2d 1297, 1301 (Conn. 1988)).

²⁹⁸ *Id.*

²⁹⁹ *Rocque*, 774 A.2d at 968.

³⁰⁰ See also *Criminal Justice Comm’n v. Freedom of Info. Comm’n*, 585 A.2d 96, 99 (Conn. 1991).

³⁰¹ See *Criminal Justice Comm’n*, 585 A.2d at 99; see also *Galvin v. Freedom of Info. Comm’n*, 518 A.2d 64 (Conn. 1986); *Judiciary Comm. v. Freedom of Info. Comm’n*, 473 A.2d 1248 (Conn. 1983).

³⁰² *Wakefield Teachers Ass’n v. School Comm.*, 731 N.E.2d 63 (Mass. 2000).

regarding the suspension of a [public school] teacher”³⁰³ who had written inappropriate notes to his female students.³⁰⁴ The state supreme court found the investigation report, which was compiled by the superintendent and resulted in the teacher’s suspension without pay for four weeks, to be absolutely exempt from disclosure because it belonged to the teacher’s personnel file.³⁰⁵

According to Massachusetts’ public records law, records are exempt from public release if they are part of the “personnel and medical files or information; [or] any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.”³⁰⁶ The *Wakefield Teachers Association* court concluded that such statutory clause has created two categories of exempt records:³⁰⁷ 1) “personnel and medical files or information”³⁰⁸ and 2) “other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.”³⁰⁹ Noting that federal³¹⁰ and other state courts³¹¹ have decided similarly on treating disciplinary reports as part of an employee’s personnel record, the Massachusetts court iterated the importance of not questioning the statutory language and the legislative intent behind the codified exemption.³¹² The Massachusetts legislature, by specifying the different types of exempt

³⁰³ *Wakefield Teachers Ass’n*, 731 N.E.2d at 66.

³⁰⁴ *Id.* at 65.

³⁰⁵ *Id.* at 64.

³⁰⁶ MASS. GEN. LAWS ch. 4, § 7(26)(c) (2008).

³⁰⁷ *Wakefield Teachers Ass’n*, 731 N.E.2d at 67 (citing *Globe Newspaper Co. v. Boston Ret. Bd.*, 446 N.E.2d 1051 (Mass. 1983)).

³⁰⁸ ch. 4, § 7(26)(c).

³⁰⁹ § 7(26)(c).

³¹⁰ See *Fed. Labor Relations Auth. v. United States Dep’t of the Navy*, 966 F.2d 747 (3d Cir. 1992); *Schonberger v. Nat’l Transp. Safety Bd.*, 508 F. Supp. 941, 942 (D.D.C. 1981); *Associated Dry Goods Corp. v. NLRB*, 455 F. Supp. 802 (S.D.N.Y. 1978).

³¹¹ See *Pivero v. Largy*, 722 A.2d 461 (N.H. 1998); *Swinton v. Safir*, 720 N.E.2d 89 (N.Y. 1999).

³¹² *Wakefield Teachers Ass’n*, 731 N.E.2d at 70.

records and purposefully not adopting the analogous federal FOIA,³¹³ has seen “the need to establish a more sensitive and particularized balance between the public interest in disclosure and the individual’s interest in personal privacy than is possible under a general exemption.”³¹⁴ Massachusetts’ judiciary maintains the position of respecting the determination of the legislative body and not modifying the statutory language.

Statutory language also plays a dominant role in the judicial examination of open records disputes in Wyoming. A manager of transportation and parking services for the University of Wyoming was fired based on the content of a secret tape recording of an internal traffic appeals committee meeting.³¹⁵ The manager wanted access to the tape recording but was denied by university officials who contended the tape recording was not an official university record,³¹⁶ and even if it was a public record, it fell within the personal privacy exemption. The relevant statutory provision exempts from disclosure “[r]ecords or information compiled *solely* for purposes of investigating violations of, and enforcing, internal personnel rules or personnel policies the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”³¹⁷ (emphasis added). The Wyoming Supreme Court reversed the district court’s order, holding that the tape recording was a public record subject to release.³¹⁸

³¹³ *Wakefield Teachers Ass’n*, 731 N.E.2d at 71.

³¹⁴ *Id.* at 69 (quoting *Globe Newspaper Co.*, 446 N.E.2d at 1057).

³¹⁵ *Sheaffer v. State*, 139 P.3d 468, 469 (Wyo. 2006).

³¹⁶ *Sheaffer*, 139 P.3d at 470.

³¹⁷ WYO. STAT. ANN. § 16-4-203(d)(xi) (2008).

³¹⁸ *Sheaffer*, 139 P.3d at 474.

The supreme court reasoned that notwithstanding the duty of the individual who made the tape recording, it was “received . . . [by the university] in connection with the transaction of public business.”³¹⁹ From the public policy perspective, society has an immense interest in knowing about the work-related conduct of state employees, and internal investigations by public entities into employee misconduct or wrongdoings at work would certainly be considered “public business.”³²⁰ While Wyoming’s public records law has not expressly named investigative reports as public records, an obvious and ordinary reading of the statute would suggest so.³²¹ The Wyoming court also surmised that the tape recording, as a public record, was not exempt from disclosure because it was not produced “solely”³²² or exclusively for investigative purposes. Rather, under the circumstances, the tape existed long before the investigation began.³²³ It was made originally for purposes other than investigation. The Wyoming Supreme Court has complied with the practice of strict statutory construction more than the method of balancing.

Washington is another jurisdiction whose judicial interpretation of personal privacy exemption is limited by state law. In *Brouillet v. Cowles Publishing Co.*,³²⁴ a publishing company asked the Superintendent of Public Instruction, a state agency responsible for disciplining teachers, for records stating the reasons for teacher certificate revocations.³²⁵ The publisher hoped to use these records in preparation for its

³¹⁹ § 16-4-201(a)(v).

³²⁰ *Sheaffer*, 139 P.3d at 472.

³²¹ *Id.*

³²² § 16-4-203(d)(xi).

³²³ *Sheaffer*, 139 P.3d at 473.

³²⁴ *Brouillet v. Cowles Publ’g Co.*, 791 P.2d 526 (Wash. 1990).

³²⁵ *Brouillet*, 791 P.2d at 527.

investigative articles on sexual misconduct of teachers with students.³²⁶ The Washington Supreme Court, affirming the trial court's ruling, ordered the school system to release to the publishing company the requested records with redactions to protect the identity of molested students.³²⁷

Even though Washington's FOI statute exempts "specific investigative records compiled by . . . state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential . . . for the protection of any person's right to privacy,"³²⁸ the *Brouillet* court concluded that there was no violation of an individual's privacy right.³²⁹ The determination of whether a person's right to privacy has been intruded requires no balancing in Washington.³³⁰ Instead, the party raising the invasion of privacy argument must prove that "disclosure of information about the person: (1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public."³³¹ The Washington court found sexual abuse of students to be of legitimate public concern because the public needs information such as the extent and nature of sexual improprieties in schools to better address the problem.³³² The *Brouillet* case suggests that the Washington legislature's statutory requirements for an invasion of privacy claim are flexible but still precise enough for a detailed examination of the privacy interest at stake. It has also broadened the state court's

³²⁶ *Brouillet*, 791 P.2d at 528.

³²⁷ *Id.* at 533.

³²⁸ WASH. REV. CODE § 42.17.310(1)(d) (2008).

³²⁹ *Brouillet*, 791 P.2d at 532.

³³⁰ *Id.* at 531.

³³¹ WASH. REV. CODE § 42.17.255 (2008). The Washington court, like the Connecticut judiciary, has also adopted the Restatement (Second) of Torts test for invasion of privacy. See RESTATEMENT (SECOND) OF TORTS § 652D (1997).

³³² *Brouillet*, 791 P.2d at 532.

attitude in allowing release of government records even when the people involved may be embarrassed by the disclosure.³³³

In determining whether certain public records are exempt from disclosure, Illinois courts first examine whether the exemptions are *per se* before deciding whether the application of a balancing test is necessary. A *Chicago Tribune* reporter investigating scholarships awarded by state legislators demanded access to the names and addresses of all scholarship recipients.³³⁴ His request was denied by the Illinois State Board of Education, who claimed the state FOIA also exempts any “information [from inspection and copying if its disclosure] . . . would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information.”³³⁵ More specifically, information exempt under this section “shall include *but is not limited to* . . . files and personal information maintained with respect to . . . students or other individuals receiving . . . educational [or] financial . . . care or services directly or indirectly from federal agencies or public bodies”³³⁶ (emphasis added). The court agreed with the argument of the state board of education and held that the requested personal data need not be released to the reporter.³³⁷

The Illinois Appellate Court emphasized the statutory language “but is not limited to” to denote the likelihood of other types of information falling within the exemption even if they have not been specifically identified.³³⁸ Furthermore, the mandatory term “shall” excludes the use of the balancing test, as the legislature has clearly expressed its

³³³ *Brouillet*, 791 P.2d at 532.

³³⁴ *Gibson v. Ill. State Bd. of Educ.*, 683 N.E.2d 894, 895 (Ill. App. Ct. 1997).

³³⁵ 5 ILL. COMP. STAT. 140/7-(1)(b) (2008).

³³⁶ 5 ILL. COMP. STAT. 140/7-(1)(b)(i).

³³⁷ *Gibson*, 683 N.E.2d at 900.

³³⁸ *Id.* at 897.

intention to exempt *per se* certain types of information because their disclosure would result in a clearly unwarranted invasion of personal privacy.³³⁹ The Illinois court explicitly rejected federal courts' interpretation and balancing approach under the federal FOIA and decided that if the requested information in public records cases falls under a statutory exemption category, it is exempt *per se* from disclosure.³⁴⁰ If it does not fall within any exemption, courts should then use a balancing test to determine whether disclosure would constitute an unwarranted invasion of personal privacy.³⁴¹ The specific statutory exemptions have helped the Illinois judiciary lessen much of its balancing practice.

Likewise, the California Public Records Act, with its detailed exemptions, restricts the judges' authority to balance competing public and private interests. The California Supreme Court's reasoning in *Williams v. Superior Court*³⁴² illustrated the attempt by the state judiciary to abide by legislative intent. Even though the *Williams* decision centered primarily on the exemption of law enforcement investigatory files from disclosure, the court noted that the state legislature has enacted exemption provisions with "the right of individuals to privacy"³⁴³ in mind. Privacy provisions protecting the identity of confidential informants³⁴⁴ and against the disclosure of personnel or medical files that would lead to "unwarranted invasion[s] of personal privacy"³⁴⁵ reflect the legislature's effort to limit public access to certain types of government maintained information. It is not up to the judiciary to reword the public records act or to interpret

³³⁹ *Gibson*, 683 N.E.2d at 898.

³⁴⁰ *Id.* at 899.

³⁴¹ *Id.* at 898.

³⁴² *Williams v. Super. Ct.*, 852 P.2d 377 (Cal. 1993).

³⁴³ CAL. GOV'T CODE § 6520 (2008).

³⁴⁴ § 6524(f).

³⁴⁵ § 6524(c).

the statute in a way that renders the legislative intent useless.³⁴⁶ While the California Public Records Act may have paralleled the federal FOIA, the California Supreme Court does not follow the federal courts' balancing test.

C. Defeating the Presumption of Openness

New York, unlike many aforementioned states, has a general privacy exemption provision. The New York court addressed the issue of personal privacy exemption in *Data Tree, LLC v. Romaine*,³⁴⁷ where an online public land record and data provider sent a FOI request to county clerks for electronic copies of public land records.³⁴⁸ The request was denied by the county clerks based on the state's privacy personal exemption,³⁴⁹ which "authorizes each agency to deny access to records or portions of such records that, if disclosed, would constitute an 'unwarranted invasion of personal privacy.'"³⁵⁰ The New York Court of Appeals, remanding the case, found the lower court to have applied incorrectly a burden-shifting standard in its analysis.³⁵¹ The court concluded because there is a common presumption of openness in government affairs, state agencies must meet the burden of demonstrating that the requested records "fall[] squarely within a FOIL exemption by articulating a particularized and specific justification for denying access."³⁵² The New York court also observed the possibility of state entities redacting private, exempt information from public records to keep up with the policy of access.³⁵³ As the personal privacy exemption comes with a nonexclusive

³⁴⁶ See *Williams*, 852 P.2d at 387-88.

³⁴⁷ *In re Data Tree, LLC v. Romaine*, 880 N.E.2d 10 (N.Y. 2007).

³⁴⁸ *In re Data Tree, LLC*, 880 N.E.2d at 13.

³⁴⁹ N.Y. PUB. OFF. § 87(2)(b) (2008).

³⁵⁰ *In re Data Tree, LLC*, 880 N.E.2d at 15.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.* at 16.

list of examples,³⁵⁴ New York's courts seemingly have much flexibility in determining the scope of the term "unwarranted invasion of personal privacy." However, as this case has suggested, unless state agencies can prove a precise statutory exemption applies, New York's judiciary would uphold the underpinning policy of open government and disclosure.

Like New York, the presumption of openness runs deep in Georgia. In *Red & Black Publishing Co. v. Board of Regents*,³⁵⁵ the student newspaper of the University of Georgia demanded under the state's Open Records Act for records of disciplinary proceedings by the student Organization Court against two fraternities for hazing.³⁵⁶ The Board of Regents claimed that the records were statutorily exempt by the personal privacy exemption, which has provided that public records need not be released if they are "[m]edical or veterinary records and similar files, the disclosure of which would be an invasion of personal privacy."³⁵⁷ The Board of Regents further contended that the statutory exemption has been triggered by the federal FERPA,³⁵⁸ as the case involved students' educational records.³⁵⁹

The Supreme Court of Georgia affirmed the ruling of the trial court and held that the Organization Court records be released to the student newspaper. The *Red & Black Publishing Co.* court dismissed the FERPA claim, stating that the federal statute deals more with the withholding of federal funds for institutions practicing the release of

³⁵⁴ *Id.* at 15 (citing § 89(2)(b)(i)-(vi)).

³⁵⁵ *Red & Black Publ'g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993).

³⁵⁶ *Red & Black Publ'g Co.*, 427 S.E.2d at 259.

³⁵⁷ GA. CODE ANN. § 50-18-72(a)(2) (2008).

³⁵⁸ In 2003, Congress addressed the issue of access to university disciplinary records by introducing the David Schick Honesty and Campus Justice Act. Amending the FERPA, the Schick Act requires postsecondary education institutions to disclose the results of student disciplinary proceedings conducted by such institutions against alleged perpetrators of "any crime of violence or . . . nonforcible sex offense." See 20 U.S.C. § 1232g(b)(6)(A)-(C).

³⁵⁹ *Red & Black Publ'g Co.*, 427 S.E.2d at 260.

educational records and not directly with the control of privacy right or access to school records by individual students.³⁶⁰ Holding the FERPA to be inapplicable, the Georgia court determined that the state FOIA must apply, as it is state policy “that the public’s business must be open, not only to protect against potential abuse, but also to maintain the public’s confidence in its officials.”³⁶¹ The records and proceedings of the student Organization Court must be open to the public because the agency was a “[disciplinary] vehicle by which the [u]niversity carrie[d] out its responsibility.”³⁶² Without balancing the conflicting public and private interests, the Georgia Supreme Court reached its decision based on the presumption of openness. Such an outcome has ensured that state agencies cannot use duties of their affiliated organizations as an excuse for withholding records that are open to the public.

D. Looking to the Functions of the Requested Information

Colorado, unlike many jurisdictions discussed in this chapter, does not have a personal privacy exemption specifically carved out in its public records statute.³⁶³ Nonetheless, gleaned from the history of the state’s FOI law and statutory amendments, the Colorado judiciary has been able to recognize and protect the unnamed privacy interests entrenched in the public records scheme. In *Denver Publishing Co. v. Board of County Commissioners*,³⁶⁴ the Board of County Commissioners produced an extensive report based on its investigation of the county clerk and recorder’s office upon allegations of sexual harassment, misuse of county funds and property, and constructive

³⁶⁰ *Red & Black Publ’g Co.*, 427 S.E.2d at 261.

³⁶¹ *Id.* at 263.

³⁶² *Id.*

³⁶³ In Colorado, the right to privacy is also protected by the penumbra rights in Article II of the state constitution. See COLO. CONST. art. II.

³⁶⁴ *Denver Publ’g Co. v. Bd. of County Comm’rs*, 121 P.3d 190 (Colo. 2005).

discharge.³⁶⁵ The report included several sexually explicit e-mail messages exchanged between the county clerk and recorder and an assistant deputy clerk.³⁶⁶ A publishing company, pursuant to the Colorado Open Records Act, sought release of the full investigative report with the e-mail messages. The Colorado Supreme Court found that many of the e-mail messages at issue were not public records under the state’s public records law.³⁶⁷

Section 24-72-202 of the Colorado Open Records Act defines “public records” as:

[A]ll writings made, maintained, or kept by the state, any agency, institution, . . . or political subdivision of the state . . . *for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds*” (emphasis added).³⁶⁸

Public records also “include[] the correspondence of elected officials”³⁶⁹ as long as the correspondence is “demonstrably connected to the exercise of functions required or authorized by law or administrative rule”³⁷⁰ or involves “the receipt or expenditure of public funds.”³⁷¹ The *Denver Publishing Co.* court recognized that by narrowing the definition of “public records” to refer to those records directly involved in government functions,³⁷² the state legislature has intended to protect the unspecified but inherent individual privacy interests.³⁷³ The restrictive “public records” definition calls for a

³⁶⁵ *Denver Publ’g Co.*, 121 P.3d at 192.

³⁶⁶ *Denver Publ’g Co.*, 121 P.3d at 192.

³⁶⁷ *Id.*

³⁶⁸ COLO. REV. STAT. § 24-72-202 (2008).

³⁶⁹ § 24-72-202(6)(a)(II)(B).

³⁷⁰ § 24-72-202 (6)(a)(II)(B).

³⁷¹ § 24-72-202(6)(a)(II)(B).

³⁷² *Denver Publ’g Co.*, 121 P.3d at 197.

³⁷³ *Id.* at 195

content-driven inquiry that would eliminate records unrelated to public funds or functions.³⁷⁴

Here, the e-mails were related neither to the exercise of public functions nor to the spending of public funds.³⁷⁵ The messages were sent and received by the county clerk and recorder in furtherance of his personal, *i.e.* extramarital, relationship.³⁷⁶ E-mail messages do not qualify as public records merely because they are exchanged between state employees using public computers or receiving public funds.³⁷⁷ *Denver Publishing Co.* has provided a notable example of state courts realizing the significance of reaching beyond the statutory language to defend privacy interests. From an access standpoint, such a formulation is problematic. Judges may abuse their discretion or authority when they reach beyond the plain language of the statute. Inconsistent judicial interpretations of the law would also lead to courts rewriting the statute and actively legislating.

THE BALANCING APPROACH

A. Disciplinary Records and Complaint Files

While jurisdictions have used a variety of approaches to navigate through the quagmire of public records litigation, many states have stayed with the traditional approach of judicial balancing. This section will examine how state courts weigh the competing interests in situations involving different types of records. The Kentucky Supreme Court, in *Kentucky Board of Examiners v. Courier-Journal & Louisville Times*

³⁷⁴ *Id.* at 197.

³⁷⁵ *Denver Publ'g Co.*, 121 P.3d at 196.

³⁷⁶ *Id.* at 201.

³⁷⁷ *Id.* at 199.

Co.,³⁷⁸ followed the traditional approach by weighing the public’s right to know and a person’s privacy interest. The Kentucky court acknowledged that “there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests.”³⁷⁹ A newspaper sought release of documents and complaint files relating to a psychologist who was accused by his patients of sexual improprieties.³⁸⁰ The Kentucky Board of Examiners of Psychologists, citing § 61.878(1)(a) of the state code,³⁸¹ denied the newspaper’s FOI request to inspect the files. The supreme court stated the language of exemption § 61.878(1)(a) has revealed “an unequivocal legislative intention”³⁸² that certain public records be withheld from society because “disclosure would constitute a clearly unwarranted invasion of personal privacy.”³⁸³ Even though allowing the public to inspect records maintained by the Board of Examiners of Psychologists may help ensure that the agency is licensing only ethical and competent psychologists,³⁸⁴ it would also constitute an unwarranted invasion of privacy of patients who have complained against the psychologist.³⁸⁵ The complaint files in this case comprised mostly of detailed allegations against the psychologist’s sexual misconduct. Such information “touche[d] upon the most intimate and personal features”³⁸⁶ of people’s lives. Cautioning that the state policy of openness is “to subserve the public interest . . . [and] not to satisfy the

³⁷⁸ *Ky. Bd. of Exam’rs v. Courier-Journal & Louisville Times Co.*, 826 S.W.2d 324 (Ky. 1992).

³⁷⁹ *Ky. Bd. of Exam’rs*, 826 S.W.2d at 327.

³⁸⁰ *Id.* at 325.

³⁸¹ KY. REV. STAT. ANN. GEN. § 61.878(1)(a) (2008). The statute provides that “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy” are exempt from disclosure.

³⁸² *Ky. Bd. of Exam’rs*, 826 S.W.2d at 327.

³⁸³ *Id.*

³⁸⁴ *Id.* at 328.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

public's curiosity,"³⁸⁷ the Kentucky Supreme Court reversed and remanded the appellate court's decision, holding that the personal privacy interest outweigh[ed] the public good in this instance and that the requested files be withheld from the public.

The Kentucky court recognized that in invasion of privacy disputes, a case-specific approach is necessary because the balance of interests is affected by the context and circumstances of each case.³⁸⁸ Whether or not disclosure of government files constitutes a clearly unwarranted invasion of personal privacy is "intrinsically situational."³⁸⁹

In *State Organization of Police Officers v. Society of Professional Journalists-University of Hawaii*,³⁹⁰ the Hawaii Supreme Court addressed the issue of disclosure of police disciplinary records. The police department argued that access to such records has been denied by one of the statutory exemptions of Hawaii's Uniform Information Practices Act (Modified) (hereinafter "UIPA"),³⁹¹ which allows for nondisclosure of government records if their release would constitute "a clearly unwarranted invasion of personal privacy."³⁹² While acknowledging that a person has a significant privacy interest in "public employment personnel file type information . . . and employee misconduct information if employee is suspended or discharged,"³⁹³ the court decided that the release of information relating to police officers' misconduct in the course of their official duties does not constitute an invasion of personal privacy.³⁹⁴

³⁸⁷ *Id.*

³⁸⁸ *Ky. Bd. of Exam'rs*, 826 S.W.2d at 328.

³⁸⁹ *Id.*

³⁹⁰ *State Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw.*, 927 P.2d 386 (Haw. 1996).

³⁹¹ HAW. REV. STAT. ch. 92F (2008).

³⁹² § 92F-13(1).

³⁹³ § 92F-14(4).

³⁹⁴ *State Org. of Police Officers*, 927 P.2d at 405.

The supreme court deferred to the Hawaii Constitution³⁹⁵ and the UIPA, whose core policy regarding government affairs is to be “as open[] as possible . . . [while] tempered by a recognition of the right of the people to privacy.”³⁹⁶ As prior state cases have held, informational privacy protects only information that is “highly personal and intimate.”³⁹⁷ In this instance, the supreme court looked to the legislature’s general policy statement and determined that as a matter of public policy, society’s knowledge of work-related wrongdoings by public employees has outweighed the privacy interests of the police officers.³⁹⁸ Even though the UIPA contains several specific exemptions, the Hawaii court still balances the public access interest against an individual’s right to privacy in order to determine whether there is a clearly unwarranted invasion of personal privacy.

B. Identifying Information

Similarly, the case-by-case method to analyzing disclosure and privacy interests is practiced by the Oregon judiciary, as shown in *Guard Publishing Co. v. Lane County School District No. 4J*.³⁹⁹ A publisher has been denied access to names and addresses of replacement teachers who served as coaches during a teachers’ strike.⁴⁰⁰ The pertinent personal privacy exemption raised by the school district to deny FOI requests exempts from disclosure:

Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular

³⁹⁵ See HAW. CONST. art. I, § 6.

³⁹⁶ HAW. REV. STAT. § 92F-2.

³⁹⁷ *State Org. of Police Officers*, 927 P.2d at 406 (citing *Painting Indus. v. Alm*, 746 P.2d 79 (Haw. 1987)).

³⁹⁸ *State Org. of Police Officers*, 927 P.2d at 406.

³⁹⁹ *Guard Publ’g Co. v. Lane County School Dist. No. 4J*, 791 P.2d 854 (Or. 1990).

⁴⁰⁰ *Guard Publ’g Co.*, 791 P.2d at 855.

instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.⁴⁰¹

The Oregon Supreme Court, reversing the court of appeals, held that the school district may not withhold the information requested without “an individualized showing of justification for exemption.”⁴⁰²

Like all other jurisdictions, the Oregon Supreme Court began its statutory analysis by stating the general policy favoring disclosure.⁴⁰³ The court reasoned that a state agency has no separate authority outside the statutory language to exempt public records from disclosure by promising the contributors of information confidentiality.⁴⁰⁴ Here, the school district has erroneously promised the replacement teachers that their personal information would be kept confidential during the strike. Such a blanket nondisclosure policy ran contrary not only to the legislative intent but also to the existing case-by-case notion as implied by the state’s FOI scheme.⁴⁰⁵

Oregon has adopted a reasonably liberal and rational approach to balancing conflicting disclosure and privacy interests. The state legislature does not intend the privacy exemption to be absolute. According to the statute, even if the release of information of a personal nature would constitute an unreasonable invasion of privacy, the party requesting access may still defeat the privacy exemption by demonstrating with “clear and convincing evidence”⁴⁰⁶ that disclosure would benefit the public.⁴⁰⁷ Unlike the specific personal privacy exemptions in many other jurisdictions, the Oregon public

⁴⁰¹ OR. REV. STAT. § 192.502(2) (2008).

⁴⁰² *Guard Publ’g Co.*, 791 P.2d at 855.

⁴⁰³ *Id.* at 857.

⁴⁰⁴ *Id.* at 858.

⁴⁰⁵ *Id.*

⁴⁰⁶ § 192.502(2).

⁴⁰⁷ *Guard Publ’g Co.*, 791 P.2d at 857.

records law observes the fundamental principle that each FOI case is to be judged on its own merits.⁴⁰⁸

In *Pennsylvania State University v. State Employees Retirement Board*,⁴⁰⁹ the Pennsylvania Supreme Court addressed the issue of whether names, salaries, and service history of university employees are exempt from disclosure by the personal security exemption of the state's Right to Know Act.⁴¹⁰ At the time of litigation, Pennsylvania State University (hereinafter "PSU") was not considered a public entity subject to the public records law.⁴¹¹ However, because PSU employees could choose to participate in the state's retirement benefit plan, their compensation information was public record.⁴¹²

The Pennsylvania court acknowledged the public interest in encouraging government transparency⁴¹³ and learning about the "specific basis of guaranteed disbursements to certain individuals from the [state's] retirement fund."⁴¹⁴ Information regarding salaries and service history would not only serve as evidence for PSU employees' vested contractual right to the benefits they have earned from work but also help calculate their warranted annuities and compensation.⁴¹⁵ Thus, such information fit the statutory definition of "public record" as an "account, voucher[,] or contract dealing with the receipt or disbursement of funds by an agency."⁴¹⁶ The court also examined the application of the privacy exemption, which asserts that public records are exempt if their disclosure "would operate to the prejudice or impairment of a person's reputation or

⁴⁰⁸ *Guard Publ'g Co.*, 791 P.2d at 858; see also *Jordan v. Motor Vehicles Div.*, 781 P.2d 1203 (Or. 1989).

⁴⁰⁹ *Pa. State Univ. v. State Employees' Ret. Bd.*, 2007 Pa. LEXIS 2406 (Pa. 2007).

⁴¹⁰ *Pa. State Univ.*, 2007 Pa. LEXIS 2406 at 1.

⁴¹¹ *Id.* at 3.

⁴¹² *Id.* at 5.

⁴¹³ *Id.* at 20.

⁴¹⁴ *Id.* at 5.

⁴¹⁵ *Id.* at 8.

⁴¹⁶ 65 PA. CONS. STAT. § 66.1 (2008).

personal security.”⁴¹⁷ Even though the statutory provision has not explicitly enumerated the term “invasion of personal privacy,” the Pennsylvania judiciary has long considered the reputation and personal security exemption to protect privacy rights.⁴¹⁸ In *Pennsylvania State University*, the supreme court found the public’s right to know how the government spends its fund to substantially outweigh the employees’ privacy rights regarding their names and salaries, especially when the individuals voluntarily submitted such information to a state agency for purposes of receiving government disbursements.⁴¹⁹ The court concluded that with the employees’ voluntary participation in “a government program managed by a public agency for which compensation disclosure is required by law,”⁴²⁰ any expected privacy rights in their salaries are extinguished.

This case reinforced the balancing approach commonly practiced by Pennsylvania courts to see “whether the records requested would potentially impair the reputation or personal security of another, and [such an analysis] must balance any potential impairment against legitimate public interest.”⁴²¹ Although the Pennsylvania Supreme Court conceded that the holding of this case would not extend to private information such as social security numbers and phone numbers whose disclosure may potentially jeopardize people’s personal security,⁴²² the court stressed the policies of inspecting each

⁴¹⁷ § 66.1.

⁴¹⁸ *Pa. State Univ.*, 2007 Pa. LEXIS 2406 at 18 (citing *Goppelt v. Philadelphia Revenue Dep’t*, 841 A.2d 599 (Pa. Commw. Ct. 2004) and *Cypress Media, Inc. v. Hazleton Area School Dist.*, 708 A.3d 866 (Pa. Commw. Ct. 1998)).

⁴¹⁹ *Pa. State Univ.*, 2007 Pa. LEXIS 2406 at 22.

⁴²⁰ *Id.* at 26 (quoting *Pa. State Univ. v. State Employees’ Ret. Bd.*, 880 A.2d 757, 768 (Pa. Commw. Ct. 2005)).

⁴²¹ *Pa. State Univ.*, 2007 Pa. LEXIS 2406 at 27.

⁴²² *Id.* at 5.

case on its own facts and “balancing . . . interests where privacy rights and public interest conflict.”

C. Personnel Files

Michigan is another state that balances access and privacy interests in FOI cases. *Bradley v. Saranac Board of Education*⁴²³ involved a parent requesting copies of a teacher’s personnel file, which included disciplinary records and performance evaluations, from a school district.⁴²⁴ The school district informed the teacher that it planned to release all the requested documents because of its state FOIA obligation.⁴²⁵ The teacher argued that her personnel file was exempt by § 15.243(1)(1)(a) of Michigan’s Freedom of Information Act, which allows a public body to withhold a public record if it contains “[i]nformation of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.”⁴²⁶ The Michigan Supreme Court opined that both the “personal nature” and “a clearly unwarranted invasion of an individual’s privacy” elements must be satisfied for the statutory exemption to apply.⁴²⁷ Adopting a privacy standard according to the community’s “customs, mores, or ordinary views,”⁴²⁸ the *Bradley* court stated that “information is of a personal nature if it reveals intimate or embarrassing details of an individual’s private life.”⁴²⁹

⁴²³ *Bradley v. Saranac Bd. of Educ.*, 565 N.W.2d 650 (Mich. 1997).

⁴²⁴ *Bradley*, 565 N.W.2d at 652.

⁴²⁵ *Id.*

⁴²⁶ MICH. COMP. LAWS § 15.243(1)(1)(a) (2008).

⁴²⁷ *Bradley*, 565 N.W.2d at 654.

⁴²⁸ *Id.* at 655.

⁴²⁹ *Id.*

Under this test, the Michigan court found that Bradley’s personnel file did not contain intimate information or details that would embarrass her if disclosed.⁴³⁰ The requested documents spoke only to the “performance appraisals, disciplinary actions, and complaints relating to the [teachers’] accomplishments in their public jobs.”⁴³¹ As the records in question were not of “a personal nature,” the *Bradley* court did not continue with the “clearly unwarranted invasion of privacy” prong and ordered the school district to release the information.⁴³² The court also noticed that the public interest in increasing access to personnel records is high. Public scrutiny and access to personnel information would encourage state employees to evaluate the performance of their peers more candidly.⁴³³ Although Michigan’s public records statute is modeled after the federal FOIA, it does not specifically exempt personnel records from disclosure. The Michigan court acknowledged the state legislature’s intentional enactment of a general exemption.⁴³⁴ The difference between having a general privacy exemption and a specific one has led Michigan and Massachusetts courts to dissimilar outcomes in terms of public access to personnel files.

Like *Bradley*, the Wisconsin case of *Pangman & Assoc. v. Basting*⁴³⁵ involved public records demands for the personnel files of state employees. The state agency maintaining the personnel files of police officers refused to release the information to a law firm, claiming that doing so would lead to an unwarranted invasion of the police

⁴³⁰ *Bradley*, 565 N.W.2d at 655.

⁴³¹ *Id.*

⁴³² *Id.* at 656.

⁴³³ *Id.* at 657.

⁴³⁴ *Id.* at 656-57.

⁴³⁵ *Pangman & Assoc. v. Basting*, 473 N.W.2d 538 (Wis. Ct. App. 1991).

officers' personal privacy.⁴³⁶ Despite the lack of specific statutory language protecting against clearly unwarranted invasions of personal privacy, the overall scheme of the Wisconsin Public Records Law⁴³⁷ dictates that exemptions apply only when the public interest in openness is outweighed by the interest in privacy.⁴³⁸ The Wisconsin Court of Appeals found that the records custodian has a legitimate interest in protecting the police officers' privacy because the requests might be "an unwarranted use of . . . [their] disciplinary [records] . . . [and] performance/promotion evaluations"⁴³⁹ for purposes other than upholding government transparency. The *Basting* analysis was a typical example of judicial weighing of public policy and individual interest.

The Alabama judiciary, with its adoption of the rule-of-reason test, also enforces the balancing approach in public records litigation. The rule-of-reason test states that:

It would be helpful for the legislative department to provide the limitations by statute as some states have done. Absent legislative action, however, the judiciary must apply the rule of reason. . . . Recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure. Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.⁴⁴⁰

The Alabama Court of Appeals applied this test in *Graham v. Alabama State Employees Association*⁴⁴¹ and ordered the director of the state personnel department to release personnel records of administrative law judges to the Alabama State Employees

⁴³⁶ *Basting*, 473 N.W.2d at 545.

⁴³⁷ See WIS. STAT. §§ 19.31-19.39 (2007).

⁴³⁸ See *Basting*, 473 N.W.2d at 542.

⁴³⁹ *Id.* at 545.

⁴⁴⁰ *Stone v. Consol. Publ'g Co.*, 404 So. 678, 681 (Ala. 1981).

⁴⁴¹ *Graham v. Ala. State Employees Ass'n*, 2007 Ala. Civ. App. LEXIS 724 (Ala. Civ. App. 2007).

Association. The appellate court concluded the “clearly unwarranted invasion of personal privacy” standard used by the United States Supreme Court in *National Archives & Records Administration v. Favish*⁴⁴² was inapplicable here because the language of Alabama’s open records law differed from that of the federal FOIA.⁴⁴³ Even if the Alabama Administrative Code explicitly exempts certain personnel records from disclosure,⁴⁴⁴ the Alabama court pronounced that these exemptions must be construed strictly. According to the court, privacy exemptions should be “applied only in . . . cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will be adversely affected, when weighed against the public policy considerations suggesting disclosure.”⁴⁴⁵

In *Graham*, the lower court had already ordered redaction of personal information from the files, thus protecting the privacy of those individuals mentioned in the personnel records.⁴⁴⁶ Using the rule-of-reason test to balance an individual’s privacy interest against the public need for government transparency under state law, the Alabama court refused to adopt the more stringent *Favish* standard. Instead, its objective focused more on preserving the public policy of open government whenever possible, without infringing on a person’s privacy.

⁴⁴² *Favish*, 541 U.S. at 157.

⁴⁴³ *Graham*, 2007 Ala. Civ. App. LEXIS 724 at 20.

⁴⁴⁴ ALA. ADMIN. CODE r. 670-x-17-.03 (2008). According to Rule 670-x-17-.03 of the Alabama Administrative Code, records of the state personnel department are confidential if they are “applications for examination of persons who have not been employed,” “lists of eligibles who have competed successfully on examinations,” and “test materials . . . which if known to an applicant might give him an advantage in competing for appointment or promotion.”

⁴⁴⁵ *Graham*, 2007 Ala. Civ. App. LEXIS 724 at 22.

⁴⁴⁶ *Id.* at 18.

Arkansas, on the other hand, models its balancing approach after the federal standard. In *Stilley v. McBride*,⁴⁴⁷ an attorney submitted a request under the Arkansas Freedom of Information Act to obtain home addresses from the personnel files of two police officers.⁴⁴⁸ The attorney wanted the addresses because it would be cheaper for him to serve the officers by mail than in person.⁴⁴⁹ The city attorney claimed that the addresses were exempt from disclosure under the personal privacy exemption of the state FOIA,⁴⁵⁰ which allows for the withholding of personnel records if their release would be a “clearly unwarranted invasion of personal privacy.”⁴⁵¹ The Arkansas Supreme Court held that the denial of the FOI request here was proper⁴⁵² despite opining:

The fact that [S]ection 25-19-105(b)(10) exempts disclosure of personnel records only when a clearly unwarranted personal privacy invasion would result, indicates that certain “warranted” privacy invasions will be tolerated. Thus, [S]ection 25-19-105(b)(10) requires that the public’s right to knowledge of the records be weighed against an individual’s right to privacy. The public’s interest, the right to know that its safety is protected by competent and the best-qualified police lieutenants, is substantial. Because [S]ection 25-19-105(b)(10) allows warranted invasions of privacy, it follows that when the public’s interest is substantial, it will usually outweigh any individual privacy interests and disclosure will be favored.⁴⁵³

In determining whether personnel files fall within the personal privacy exemption, Arkansas has adopted the federal judicial standard of balancing the public’s interest in access and an individual’s right to privacy.⁴⁵⁴ The Arkansas Supreme Court, after carefully examining federal cases such as *Brown v. FBI*⁴⁵⁵ and *United States Department*

⁴⁴⁷ *Stilley v. McBride*, 965 S.W.2d 125 (Ark. 1998).

⁴⁴⁸ *Stilley*, 965 S.W.2d at 126.

⁴⁴⁹ *Id.*

⁴⁵⁰ ARK. CODE ANN. § 25-19-105(b)(10) (2008).

⁴⁵¹ *Stilley*, 965 S.W.2d at 126.

⁴⁵² *Id.* at 129.

⁴⁵³ *Id.* at 126-27 (citing *Young v. Rice*, 826 S.W.2d 252 (Ark. 1992)).

⁴⁵⁴ *Stilley*, 965 S.W.2d at 127.

⁴⁵⁵ *Brown v. FBI*, 658 F.2d 71 (2d Cir. 1981).

of Defense v. Federal Labor Relations Authority,⁴⁵⁶ concluded that “a substantial privacy interest exists in records revealing the intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.”⁴⁵⁷ The *Stilley* court noted that releasing home addresses to the public might increase potential safety concerns and nuisance of people contacting or harassing officers at home.⁴⁵⁸ The *Stilley* court saw no significant public interest, as the sole reason for requesting the home addresses was for the attorney’s personal benefit. Consequently, the interest in protecting the privacy of public employees’ home addresses substantially outweighs the public interest.

D. Investigative Reports

Aside from personnel files, staff investigation reports were also problematic areas for judges. The Supreme Court of Rhode Island addressed the issue of whether or not reports investigating school operations are barred from disclosure under state FOI personal privacy exemption. In *Pawtucket Teachers’ Alliance Local No. 920 v. Brady*,⁴⁵⁹ a school committee hired an outside consultant to investigate faculty interactions and poor school operations under the leadership of a new principal. A local teachers’ alliance asked the committee to release the report written by the consultant on the results of his investigation.⁴⁶⁰

The Rhode Island Access to Public Records Act exempts from disclosure “all records which are identifiable to an individual applicant for benefits, clients, patient, student, or employees; including, but not limited to, personnel, medical treatment,

⁴⁵⁶ *United States Dep’t of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487 (1994).

⁴⁵⁷ *Stilley*, 965 S.W.2d at 127.

⁴⁵⁸ *Id.* at 128.

⁴⁵⁹ *Pawtucket Teachers’ Alliance Local No. 920 v. Brady*, 556 A.2d 556 (R.I. 1989).

⁴⁶⁰ *Brady*, 556 A.2d at 557.

welfare, employment security and pupil records”⁴⁶¹ The main purpose of the public records act is “to facilitate public access to governmental records which pertain to the policy-making functions of public bodies,”⁴⁶² but the intent of its exemptions is “to protect from disclosure information about particular individuals maintained in the files of public bodies when disclosure would constitute an unwarranted invasion of personal privacy.”⁴⁶³ The Rhode Island Supreme Court acknowledged the state legislature’s desire to strike a balance between disclosure and privacy.

Here, the school principal’s right to privacy outweighed the public’s right to know.⁴⁶⁴ The investigative report contained highly personal information such as employment history, past criminal convictions, and disciplinary matters,⁴⁶⁵ which were “ordinarily found in personnel files.”⁴⁶⁶ The circumstances and context of the report would ultimately reveal the principal’s identity.⁴⁶⁷ The *Brady* court cautioned that it would be a clear “derogation of public policy and . . . contraven[tion] of the express [statutory] language”⁴⁶⁸ if a personnel file such as staff investigation report was released. As many other jurisdictions have done, Rhode Island follows the statutory language closely. However, the *Brady* court has also paid much attention to the potential social harm that might result from disclosure of the report. The release of the investigative report would not only “effectively license the public to review the performance of any

⁴⁶¹ R.I. GEN. LAWS § 38-2-2(d)(1) (2008).

⁴⁶² § 38-2-1.

⁴⁶³ § 38-2-1.

⁴⁶⁴ *Brady*, 556 A.2d at 559.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 560.

principal or teacher under the guise of an investigation into school operation and administration”⁴⁶⁹ but also disrupt the ongoing investigation.⁴⁷⁰

Another type of government records whose release has been heavily litigated involves police investigative reports, as *Cox Arizona Publications v. Collins*⁴⁷¹ has demonstrated. Reporters from several Arizona newspapers sought to compel the Phoenix police department to produce copies of its investigative reports on illegal drugs and gambling by the Phoenix Sun basketball team.⁴⁷² Immediately after the requests were submitted, the police department delivered all existing copies of the investigative reports to the county attorney’s office. It then denied the reporters access, claiming that the documents were no longer in its possession.⁴⁷³ The state court of appeals first held that:

Neither reporters nor the public . . . are entitled to examine and photocopy police reports in an active ongoing criminal prosecutions, because the countervailing interests of . . . confidentiality, privacy[,] and the best interests of the state make disclosure inappropriate.⁴⁷⁴

However, the Arizona Supreme Court rejected the appellate court’s reasoning, stating such a “blanket rule . . . contravenes the strong policy favoring open disclosure and access, as articulated in Arizona statutes and case law.”⁴⁷⁵

The *Collins* court surmised that the police department has failed to overcome the presumption of access because it argued “in global generalities of the possible harm that might result”⁴⁷⁶ from disclosure. As reports of ongoing police investigations did not sit

⁴⁶⁹ *Brady*, 556 A.2d at 559.

⁴⁷⁰ *Id.*

⁴⁷¹ *Cox Ariz. Publ’ns v. Collins*, 852 P.2d 1194 (Ariz. 1993).

⁴⁷² *Collins*, 852 P.2d at 1196.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 1198 (quoting *Cox Ariz. Publ’ns, Inc. v. Collins*, 818 P.2d 174, 186 (Ariz. Ct. App. 1991)).

⁴⁷⁵ *Collins*, 852 P.2d at 1198.

⁴⁷⁶ *Id.*

squarely within the general exemptions of Arizona’s public records act,⁴⁷⁷ the police department must show without ambiguity how disclosure of the Phoenix Sun reports would infringe on the players’ rights of “privacy, confidentiality[,] and safety”⁴⁷⁸ or would “not [be] in the best interest of the state.”⁴⁷⁹ Even though Arizona has not created a specific personal privacy exemption in its FOI statute, the supreme court cautioned that there should always be a balance between access and privacy interests. The court neither intended to create a sweepingly broad exemption from the state’s public records statute⁴⁸⁰ nor allowed state agencies to release “public records [liberally] with impunity.”⁴⁸¹ Instead, FOI decisions concerning invasions of personal would entail a careful weighing of public and private interests.

The question of whether or not police investigative reports is subject to disclosure has also been addressed by the Nevada Supreme Court and the Texas Court of Appeals. In Nevada, several newspapers demanded and were denied access to a written investigative report by the police department regarding the dismissal of a case.⁴⁸² The newspapers claimed that police investigative reports were the same as records of criminal history,⁴⁸³ which, according to the state FOI law,⁴⁸⁴ must be disclosed to the media upon request. The newspapers also claimed that a judicial balancing of competing interests was unnecessary because, as evidenced by the statutory language, the legislature has already carried out the requisite balancing and intended investigative reports to be

⁴⁷⁷ *Collins*, 852 P.2d at 1198.

⁴⁷⁸ ARIZ. REV. STAT § 39-123-(C)(2)(b) (2008).

⁴⁷⁹ § 39-123-(C)(2)(b).

⁴⁸⁰ *Collins*, 852 P.2d at 1198.

⁴⁸¹ *Id.* at 1199.

⁴⁸² *Donrey of Nev., Inc. v. Bradshaw*, 798 P.2d 144, 145 (Nev. 1990).

⁴⁸³ *See Donrey of Nev., Inc.*, 798 P.2d at 145.

⁴⁸⁴ *See NEV. REV. STAT. 179A.100(5)* (2008).

accessible by the public. The Nevada Supreme Court disagreed with the newspapers' argument and held that despite what prior case law in other jurisdictions says, "a balancing of the interests involved is necessary."⁴⁸⁵ Here, the trial court erred in not performing the balancing test. The police department provided no reasons for its withholding of the investigative report. Additionally, since criminal proceedings had already ended, it was unnecessary to keep the report confidential for the purpose of protecting investigative techniques or confidential sources.⁴⁸⁶ There was also no foreseeable danger to those police officers involved in the investigation.⁴⁸⁷ Balancing the absence of invasion of individual privacy against Nevada's general open government policy,⁴⁸⁸ the state supreme court ordered release of the report.

The Texas case resulted from the media seeking to compel disclosure of investigative reports concerning sexual harassment charges against police officers.⁴⁸⁹ The court of appeals began its analysis by stating that in cases like this one, judges should balance the privacy rights of harassment victims against the public's right to "full and complete information regarding . . . government [affairs] and the official acts of . . . public officials and employees."⁴⁹⁰ The court ruled that the personnel file exemption⁴⁹¹ of the Texas Open Records Act was inapplicable because the report was not the police officer's personnel file.⁴⁹² Instead, it was part of an investigation file kept by another

⁴⁸⁵ *Donrey of Nev., Inc.*, 798 P.2d at 147.

⁴⁸⁶ *Id.* at 148.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. 1992).

⁴⁹⁰ *Morales*, 840 S.W.2d at 522.

⁴⁹¹ TEX. REV. CIV. STAT. ANN. art. 6252, § 3(a)(2) (1992) (currently known as the "Texas Public Information Act," TEX. GOV'T CODE § 552.102(a), whose provision exempts from disclosure "information in a personnel file, [which, if disclosed] . . . would constitute a clearly unwarranted invasion of personal privacy").

⁴⁹² *Morales*, 840 S.W.2d at 524.

department.⁴⁹³ However, the requested investigative report was exempt by another statutory provision, which allows for nondisclosure if the “[i]nformation [is] deemed confidential by law, either Constitutional, statutory, or by judicial decision.”⁴⁹⁴ The information sought here concerned sexual harassment charges, which “involve[d] the most embarrassing and intimate of details.”⁴⁹⁵ The investigative report contained extremely private information such as names of victims, witness statements given under disciplinary threat,⁴⁹⁶ and details of misconduct. As public policy encourages “the full disclosure of improper conduct [by victims] and prompt resolution of valid complaints,”⁴⁹⁷ sensitive information regarding sexual harassment charges must be withheld from the public. The Texas court, examining the weight of personal privacy interest, concluded that the public has no legitimate interest in knowing the intimate details of the charges and identities of the witnesses.⁴⁹⁸ While Texas and Nevada have both dealt with investigative reports, the outcomes were different. The nature of the requested information and the amount of personally-identifiable data in the document have tremendous influence on the courts’ decisions.

E. Criminal History

The Delaware Superior Court examined the issue of reporters seeking access to files in the state’s criminal justice system database.⁴⁹⁹ The requested information was intended for a newspaper study on the effectiveness of the state criminal justice

⁴⁹³ *Morales*, 840 S.W.2d at 524.

⁴⁹⁴ § 3(a)(1).

⁴⁹⁵ *Morales*, 840 S.W.2d at 523.

⁴⁹⁶ *Id.* at 525.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Bd. of Managers v. Gannett Co.*, 808 A.2d 453 (Del. Super. Ct. 2002).

system.⁵⁰⁰ Pursuant to the relevant statutory exemption, the state agency keeping the database withheld the documents because the definition of “public records” excludes “[c]riminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy.”⁵⁰¹

The court determined that such statutory language is not a blanket exemption for all criminal records and files;⁵⁰² rather, there must be a weighing of various factors, including the Delaware FOIA’s open government policy and an individual’s right to privacy.⁵⁰³ The Delaware court likened the information sought in this case to that requested in *Reporters Committee*.⁵⁰⁴ While the criminal justice system database contained many files with personal data that threatened individual privacy by nature,⁵⁰⁵ the reporters did not request any information that would allow them to identify directly or indirectly individuals in the files.⁵⁰⁶ The court decided to honor the media’s right to publish newsworthy events⁵⁰⁷ and the public’s right to government information because there would be no invasion of personal privacy.

By and large, state courts do not follow the decisions of federal courts, especially when state laws are involved. In this study, every case opinion invoked state FOI statutes and exemptions, and most jurisdictions undertook their own balancing test. However, there are some states, such as Maine, that look to the federal approach to balancing openness and privacy interests for guidance. The Maine Superior Court adjudicated a

⁵⁰⁰ *Gannett Co.*, 808 A.2d at 454.

⁵⁰¹ DEL. CODE ANN. tit. 29, § 10002(d)(4) (2008).

⁵⁰² *Gannett Co.*, 808 A.2d at 458.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 460.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at 460-61.

⁵⁰⁷ *Id.* at 458 (citing *Wallace v. Capital Cities*, 1989 Del. Super. LEXIS 319 (Del. Super. Ct. 1989)).

case⁵⁰⁸ involving a newspaper asking the state attorney general to release reports of sexual abuse by priests against children.⁵⁰⁹ The reports mentioned the names of local priests who had already passed away and were no longer subject to criminal prosecution.⁵¹⁰ The attorney general argued that these documents were public records exempt from disclosure under Maine’s Criminal History Record Information Act.⁵¹¹ According to Section 614(2) of the Criminal History Record Information Act, intelligence or investigation information maintained by law enforcement agencies is confidential and disclosure is prohibited if it would “[c]onstitute an unwarranted invasion of personal privacy.”⁵¹²

Even though the superior court decided the reports at issue were not subject to disclosure because law enforcement proceedings were still ongoing, the court still outlined the test to be applied in future invasion of privacy litigation. Looking to cases such as *Reporters Committee* to see how federal courts have interpreted the federal FOIA, the Maine Superior Court noted that the statutory meaning of “unwarranted invasion of privacy” differs from that in a tort or constitutional action.⁵¹³ In this context, the statutory term “unwarranted” entails a judicial balancing of the different elements at stake to determine whether “a disclosure . . . would cause embarrassment or harassment because of sensitive, derogatory or intimate personal information.”⁵¹⁴ In cases involving deceased individuals, the rights and privacy interests of the decedent’s family must be

⁵⁰⁸ *Blethen Me. Newspapers, Inc. v. State*, 2002 Me. Super. LEXIS 156 (Me. 2002).

⁵⁰⁹ *Blethen Me. Newspapers, Inc.*, 2002 Me. Super LEXIS 156 at 1.

⁵¹⁰ *Id.*

⁵¹¹ ME. REV. STAT. ANN. tit. 16, §§ 661-623 (2008).

⁵¹² tit. 16, § 614(2).

⁵¹³ *Blethen Me. Newspapers, Inc.*, 2002 Me. Super LEXIS 156 at 3.

⁵¹⁴ *Id.* at 4 (citing *Fiumara v. Higgins*, 572 F. Supp. 1093 (D.C.N.H. 1983)).

considered carefully as well.⁵¹⁵ The balancing test summarized by the superior court suggests that the Maine judiciary would take a similar path as federal courts do in evaluating open access and personal privacy interests.

F. Emergency Tapes

Other than personnel records and investigative reports, 911 tapes and transcripts have also been closely scrutinized by judges in public records disputes. The New Jersey Superior Court, in *Asbury Park Press v. Ocean County Prosecutor's Office*,⁵¹⁶ ordered a county prosecutor to withhold a 911 tape and transcript relating to a double homicide incident.⁵¹⁷ As New Jersey's Open Public Records Act states:

[A] public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy⁵¹⁸

The superior court noted that despite the privacy provision was found in the "Legislative findings" section of the state's FOI law, the overall statutory scheme and language still reflected the legislature's intent to protect a person's privacy interest.⁵¹⁹ In numerous occasions including the senate judiciary committee hearing, New Jersey legislators have clearly expressed their awareness for privacy concerns.⁵²⁰ The court found that not only did the dying words of the victim not contribute to "even a scintilla of insight into the functioning of government,"⁵²¹ the content would greatly distress and "offend . . . any

⁵¹⁵ *Blethen Me. Newspapers, Inc.*, 2002 Me. Super LEXIS 156 at 4.

⁵¹⁶ *Asbury Park Press v. Ocean County Prosecutor's Office*, 864 A.2d 446 (N.J. Super. Ct. Law Div. 2004).

⁵¹⁷ *Asbury Park Press*, 864 A.2d at 459.

⁵¹⁸ N.J. STAT. ANN. § 47:1A-1 (2008).

⁵¹⁹ *Asbury Park Press*, 864 A.2d at 455.

⁵²⁰ *See id.* at 455-57.

⁵²¹ *Id.* at 458.

person of normal sensibilities.”⁵²² It would be unthinkable to force the victim’s family members to relive those gut-wrenching, dying moments of their loved one simply for the purpose of satisfying public curiosity.⁵²³ Consequently, there was an expectation of privacy in 911 calls and transcripts. By inspecting the privacy exemptions of other jurisdictions and analyzing carefully the statutory language, the New Jersey Superior Court took a comprehensive balancing approach to analyze the interests in promoting access and protecting privacy rights.

⁵²² *Id.*

⁵²³ *Id.*

V. CONCLUSION

RESULTS

The objective of this study was to find out how state supreme courts across the nation have addressed personal privacy exemptions in FOI disputes. The keyword search generated over 145 case opinions. Of these cases, only 24 were chosen and analyzed because they addressed directly the topic at issue. Many states have examined the applicability of personal privacy exemptions when government records are requested under public records acts, but due to the limited scope of the research question, only one case was selected from each jurisdiction. Additionally, not all highest courts of the states have adjudicated the issue on point. For those states without issued opinions by the highest courts, the researcher searched the intermediate and lower courts. Even so, not all lower level courts have delivered case opinions on personal privacy exemptions. It should also be noted that some states, such as Florida,⁵²⁴ Louisiana,⁵²⁵ and Montana,⁵²⁶ have constitutions clearly providing for the individual right to privacy. Consequently, while these jurisdictions have attempted to weigh personal privacy against public access to records, their opinions were inapplicable to this study because they concerned the constitutional right to privacy in other contexts.

The researcher noticed that of the 24 selected cases, all jurisdictions acknowledge the importance of the presumption of openness, which has been explicitly indicated by state legislatures in their enactment of sunshine laws. Each state's statement of public

⁵²⁴ *E.g.*, *Post-Newsweek Stations v. Doe*, 612 So. 2d 549 (Fla. 1993).

⁵²⁵ *See, e.g.*, *Angelo Iafate Constr., LLC v. State*, 879 So. 2d 250 (La. 2004).

⁵²⁶ *See, e.g.*, *Yellowstone County v. Billings Gazette*, 143 P.3d 135 (Mont. 2006).

policy under the public records statute favors disclosure by entitling all individuals “to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.”⁵²⁷ Nevertheless, as far as disclosure goes, allowing the public to access government records that contain an individual’s private information raises important concerns. Knowing how to promote government accountability without sacrificing personal privacy poses a difficult challenge for judges.

Table 1 and Table 2 provide summaries of the key results of this study. Case analysis has suggested that there is a lack of consistency in judicial decisions regarding the disclosure of government records with personally-identifiable information.

Table 1. Judicial Holdings by “Little-to-No Balancing” States on Personal Privacy Exemptions

| LITTLE-TO-NO BALANCING | | | |
|-------------------------------|-------------------|-------------------------|-------------------------|
| <i>States</i> | <i>Disclosure</i> | <i>Requesting Party</i> | <i>Category</i> |
| California | No | Media | Investigative Reports |
| Colorado | No | Publisher | Investigative Reports |
| Connecticut | No | Media | Personnel Files |
| Georgia | Yes | Media | Disciplinary Records |
| Illinois | No | Media | Identifying Information |
| Massachusetts | No | Town Resident | Investigative Reports |
| New York | Yes | Publisher | Public Land Records |
| Washington | Yes | Publisher | Investigative Reports |
| Wyoming | Yes | School Employee | Meeting Recording |

⁵²⁷ *Wemhoff*, 887 A.2d at 1008 (quoting D.C. CODE § 2-531 (2001)).

Table 2. Judicial Holdings by “Balancing” States on Personal Privacy Exemptions

| BALANCING | | | |
|------------------|-------------------|-----------------------------|--|
| <i>States</i> | <i>Disclosure</i> | <i>Requesting Party</i> | <i>Category</i> |
| Hawaii | Yes | Media | Disciplinary Records & Complaint Files |
| Kentucky | No | Media | Disciplinary Records & Complaint Files |
| Oregon | Yes | Publisher | Identifying Information |
| Pennsylvania | Yes | Media | Identifying Information |
| Alabama | Yes | State Employees Association | Personnel Files |
| Arkansas | No | Attorney | Personnel Files |
| Michigan | Yes | Parent | Personnel Files |
| Wisconsin | No | Law Firm | Personnel Files |
| Arizona | Yes | Media | Investigative Reports |
| Nevada | Yes | Media | Investigative Reports |
| Rhode Island | No | Teachers' Alliance | Investigative Reports |
| Texas | No | Media | Investigative Reports |
| Delaware | Yes | Media | Criminal History |
| Maine | No | Media | Criminal History |
| New Jersey | No | Media | Emergency Tapes |

For Table 1 jurisdictions undertaking approaches other than the balancing of competing interests, courts have shown slightly more inclination toward denying requests for the release of government records. Judges seemed more unwilling to release files that fall under the investigative reports category than others. For states in Table 2, it was the opposite. Judicial orders for the disclosure of government records exceeded those for withholding.

OVERALL TREND

As the data have shown, there is no fixed formula for judges to apply when adjudicating FOI lawsuits involving personal privacy exemptions. Courts generally evaluate each public records dispute on a case-by-case basis because the facts of every lawsuit and the types of information sought differ. Some judges may proceed conservatively by strictly following the plain language of the statutory exemptions or looking to the legislative history to determine whether legislators have intended to withhold the records at issue. These jurisdictions tend to err on the side of caution with nondisclosure than to second-guess legislative intent.

Other courts weigh individual privacy rights against the public interest in access. These courts show more inclination toward disclosure, as the balancing approach gives judges more flexibility to go beyond the plain statutory provisions. On the whole, state courts veer away from the bright-line, central purpose test enumerated in the federal case of *Reporters Committee*. Only three jurisdictions—Maine, Delaware, and Nevada—mentioned the case in their opinions. The discussion of *Reporters Committee* by the Maine⁵²⁸ and Delaware⁵²⁹ courts was merely to illustrate how federal courts have distinguished privacy in the FOIA context of “unwarranted invasion of privacy” from privacy traditionally protected by the constitution or tort law. While *Reporters Committee* was mentioned in the Nevada case for the purpose of contending how the federal categorical approach to the public records exemptions would provide more workable rules, it appeared in the sole dissenting judge’s argument and not in the

⁵²⁸ See *Blethen Me. Newspapers, Inc.*, 2002 Me. Super LEXIS 156 at 3-4.

⁵²⁹ See *Gannett Co.*, 808 A.2d at 458-59.

majority opinion.⁵³⁰ Therefore, none of the jurisdictions has given much attention to the Supreme Court's decision.

The fact that the *Reporters Committee* holding was seldom mentioned in state decisions indicates that state courts neither favor nor practice the strict categorical approach to FOI exemptions. This shows that the federal categorical approach is not finding its way to state courts, as the *Reporters Committee* case has hardly caused a ripple among states. Such a trend is evidence of vibrant state judiciaries operating independently from federal control. This is an encouraging phenomenon for the general populace because the restrictive federal approach, bound by numerous categories of exempt records, automatically shuts out many of the important public interests.

Instead of following the footsteps of federal courts, state judges look into factors other than the plain language of the public records statutes, such as undue humiliation or nuisance to an individual and the fundamental public policy scheme favoring openness, before ruling on a case. While jurisdictions vary somewhat on how they undertake the weighing of interests, *e.g.* Alabama with its rule-of-reason test and New Jersey with its comprehensive balancing approach, they exercise more latitude in interpreting the scope of personal privacy exemptions than those who do not engage in balancing. In many cases, the nature of the information sought plays a significant role in the judges' decisions. The more intimate and detailed the information is, the less likely the courts would be in supporting disclosure. However, judges performing the balancing test often uphold disclosure as long as the personally-identifiable information is redacted from the records.

⁵³⁰ See *Donrey of Nev., Inc.*, 798 P.2d at 152.

Among state courts, the judicial balancing of privacy and access interests is still the prevalent norm in terms of personal privacy exemptions. Even with the Supreme Court's endorsement of the categorical approach, state judges remain uninfluenced and continue to practice what they have always been doing since the enactment of public records laws and privacy statutes, which is to weigh the public interest in access against individual privacy.

In the overall scheme of state FOI litigation involving statutory exemptions, the balancing method performs a more impartial and comprehensive job than the categorical approach does. Even though the rules and outcomes of the categorical approach are more straightforward and predictable, the analyses largely dismiss the long-held presumption of openness. By denying the release of government records based on the discrete groups of exempt information, courts inadvertently shift the presumption to personal privacy. Such a shift would simply defeat the purpose of legislatures enacting public records laws. The balancing approach, on the other hand, attempts to protect an individual's right without sacrificing too much of the public interest. The weighing of competing interests ensures that no relevant factor is instinctively rejected. Because the facts, *e.g.* the party compelling disclosure and the nature of the requested personal information, vary substantially from one FOI dispute to another, the balancing approach better equips judges with the flexibility to deal with unanticipated circumstances and subtleties in each case.

Often, the inconsistencies among judicial attempts to resolve the conflict between openness and an individual's right to privacy make it difficult for the public to know

precisely the accessibility of government records containing personal information.⁵³¹ It is even more so for members of the media, who commonly use public records laws to further their investigations. In this study, the media, which included newspapers and publishers, was a litigating party to seventeen of the 24 FOI lawsuits examined. The judges, in nine out of the seventeen cases, ultimately allowed the media to access the records at issue. Such favorable outcomes seem encouraging to members of the media. Many states, such as Wisconsin and Arkansas, have shown more suspicion toward private entities, such as attorneys and law firms, who exploit public records statutes for personal or business gains.⁵³² Courts recognize that while media coverage and access to an individual's personal information may sometimes "embarrass and annoy, [and] some may mean loss of status, friends, and even economic well-being[,] . . . the freedom of the press demands a high degree of latitude so that the 'free state' can continue."⁵³³ As long as there is a showing of legitimate reasons for media access to government records containing personal information, *e.g.* exposing government waste or work-related misconduct by public employees, judges usually factor in freedom of the press as an important interest to be upheld in many public records disputes.

It should be noted that this study is not without limitations. Since only 24 case opinions are available for analysis, the study assumes that these data are representative enough to reveal an overall trend across the nation. However, for the 26 states that have yet to address the issue of personal privacy exemptions, there is always the possibility, however slight, of judges inventing approaches or standards other than the ones discussed

⁵³¹ RAYMOND WACKS, *PERSONAL INFORMATION: PRIVACY AND THE LAW* 155 (1989).

⁵³² *See, e.g.*, *Theragenics Corp. v. Dep't of Natural Res.*, 536 S.E.2d 613 (Ga. Ct. App. 2000); *Zink v. Commonwealth*, 902 S.W.2d 825 (Ky. Ct. App. 1994).

⁵³³ BRECKENRIDGE, *supra* note 14, at 74.

in this study. Furthermore, this thesis focuses on the post-*Reporters Committee* time period. Because this is not a case opinions study across time, the researcher could not compare and conclude how state courts have changed before and after the Supreme Court case. Examining the judicial approaches, this research is merely one of the attempts to understand the intricate balance between state government secrecy and information disclosure in the realm of access laws. Future research may take a longitudinal approach by examining state FOI statutes over time to determine which types of government files have been most frequently litigated in terms of their disclosure. Other research may also focus on assessing the level of disclosure compliance by state agencies and finding out which statutory exemptions or privileges are frequently invoked to deny access to government records. In order to devise better policies, it is also important for the public to know the statutory remedies for agency violations of public records laws and the judicial constraints for discouraging future violations.

Privacy rights, due to their elusiveness, have always been an intricate subject matter for judges. Legal scholar Serge Gutwirth explains the intangible traits of privacy:

Because privacy is intimately interwoven with individual freedom, it is undefined, contextual, relational, and nonabsolute. It is undefined because freedom implies a multitude of choices and possibilities. It is contextual because the lack of clear privacy criteria means that each case has to be judged by itself, based on all relevant aspects. It is relational because the issue of privacy always implies at least two actors. It is nonabsolute because the freedom of one individual inevitably comes face-to-face with the freedoms of all others, including the public interest. Hence, protecting privacy means that an interest with fluctuating and “soft” characteristics has to be made “hard.” Understandably, this is a complex and delicate affair, and the outcome always depends on different actors, facts, and decisions.⁵³⁴

⁵³⁴ SERGE GUTWIRTH, *PRIVACY AND THE INFORMATION AGE* 83-84 (2002).

In most of the literature, the mentioning of privacy rights ultimately leads to a discussion on the clash between the populace and individuals in a way “a legislative or judicial response is required to protect the citizen[s] against . . . [societal] depredations upon [their] security and freedom.”⁵³⁵ Personal privacy exemptions, as we have seen, are examples of legislative response for the protection of an individual’s right. Instead of lessening the judicial burden, the legislative creation of FOI exemptions has further complicated the problem of maintaining balance among the public’s right to open government, freedom of the press, and an individual’s right to privacy. Although openness in government affairs is currently the prevalent trend among states, courts may likely see an increase in litigation regarding access to government records containing personally-identifiable information, as society’s concerns for identity theft and loss of personal privacy continue to rise.⁵³⁶

⁵³⁵ WACKS, *supra* note 531, at 135.

⁵³⁶ *See* MOORE, *supra* note 21, at 437.

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