



*New Jersey The Attorney General's Committee
on the Public's Right to Know.*

NEW JERSEY'S RIGHT TO KNOW:



A Report On Open Government.

George F. Kugler, Jr.
Attorney General
State of New Jersey

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**THE ATTORNEY GENERAL'S COMMITTEE
ON THE RIGHT TO KNOW**

GEORGE F. KUGLER, JR.
Attorney General

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Deputy Attorney General

MARY ANN BURGESS
Deputy Attorney General

Secretary:
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Trenton, New Jersey
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GRIN AND BEAR IT BY LICHTY



"Since the activities of this company are a matter of public record, the purpose of this meeting is to devise means of covering our tracks in the future!"

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CHAPTER 1

STATE OF NEW JERSEY
GEORGE F. KUGLER, JR.
ATTORNEY GENERAL

TO THE HONORABLE WILLIAM T. CAHILL,
Governor of the State of New Jersey

Dear Governor Cahill:

Pursuant to your request and in an effort to explain and improve the public information practices of government agencies throughout New Jersey, there is herewith submitted my report on the Right to Know laws of New Jersey. It is the product of several months of effort by Deputy Attorneys General Michael Santaniello and Mary Ann Burgess under the direction of Edward C. Laird of my staff.

The focus of this effort has been upon the current status and future direction of New Jersey's Right to Know laws. Each of the executive departments of State government was requested to supply us, through its respective Deputy Attorneys General, the following information:

- (a) What type of records are kept by the agency;
- (b) What records are required by either statute or administrative regulation to be kept by the agency;
- (c) What records are considered confidential by the agency and the reasons therefore; and
- (d) What suggestions, if any, should we consider in modifying the present rules, statutes and practices relating to the release of government information.

We also solicited and obtained the assistance of the League of Women Voters who circulated questionnaires to a representative cross-section of local government units and obtained the experience of their members with those units relating to the release of public information. While the responses contained in those questionnaires cannot be considered definitive, it is a fair conclusion to be drawn from the sampling of responses that we received that numerous local government agencies are unfamiliar with the specific provisions of the present laws and a number of them are somewhat reluctant to comply with the spirit as well as the intent of those laws. My staff also met with representatives of the New Jersey Press Association and discussed with them the problems of public disclosure of information. In addition the Council of State Governments provided us with substantial material on the

practices and laws of the other States, particularly those of Florida, Colorado and California, all of which have recently enacted rather progressive and substantial legislation dealing with public records and open meetings.

In order to determine the current status of the federal laws we solicited and received continuing reports of the hearings and committee work done by the Congressional Committee examining the Federal Freedom of Information Act. We obtained over nine volumes of transcript and hearings and several reports as well as proposed legislation from the Congressional Committee. All this information was examined and used in the preparation of this report. In some cases it serves as the basis for various statutory proposals and in others it has been the basis for suggesting revisions in current executive department regulations passed under the Right to Know Law, *N.J.S.A. 47:1A-1 et seq.*

While there is still work to be done and while the subject itself—the public’s “Right to Know”—is fraught with the ever difficult problem of balancing a multitude of complex and diverse interests, it is our hope that this report will substantially enhance the public’s access to the operational and decision-making process of government. Government must be allowed to function, but to the greatest extent possible that functioning should occur under the searchlight of public awareness. To that end this report is

Respectfully submitted,
GEORGE F. KUGLER, JR.
*Attorney General of the
State of New Jersey*

CHAPTER 2

SUMMARY OF RECOMMENDATIONS

It is the purpose of the following set of recommendations and of the legislation contained in this report to establish a firm and general philosophy of maximum possible disclosure of government information unless such information is otherwise exempt clearly under law. At the same time that a broad philosophy of disclosure of information is being enacted into law, it is necessary to protect certain equally important rights such as a citizen's right of privacy and a government's right to function.

It is not an easy task to balance the opposing interests, but it is not impossible either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, and places emphasis on the fullest responsible disclosure. *See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965).*

The following recommendations are intended to provide the workable framework referred to in the above passage. It is an attempt to provide guidance to government agencies and to citizens so that they might each reach an appropriate balance of conflicting interests so that the maximum possible disclosure of information will be achieved. It must be recognized that no review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system such as the right to privacy and the right to know inevitably impinge upon each other. Law in those circumstances is not wholly self-explanatory or self-executing; its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer the information policies of government instrumentalities.

Consistent with the above statement the following major recommendations are made with respect to the right to know in New Jersey:

- (1) The present public records law contained in *N.J.S.A. 47:1A-1 et seq.* should be repealed and in its place should be passed the proposed Public Information Act of 1974. This proposed legislation contains the following significant principles and provisions:
 - (a) all information shall be public unless specifically exempt in accordance with law;
 - (b) the burden shall be on the agency to place requested information under an exemption and to justify such placement;

- (c) each department of State government shall have a central information officer who shall be responsible for the administration of the Public Information Act in his respective department;
 - (d) there shall be established a Public Information Commission with responsibility for the supervision and implementation of many administrative responsibilities in connection with the provisions of this act;
 - (e) all branches of government shall be covered by the provisions of this act;
 - (f) the duty is upon the public employee to supply the information requested under this act.
- (2) The present open meetings law contained in *N.J.S.A. 10:4-1 et seq.* should be thoroughly examined with an eye toward modifying it to encourage the maximum responsible disclosure of the deliberative processes of government agencies. Such an examination should focus upon the following questions:
- (a) which public bodies should be covered by an open meetings law, including consideration of application to the Legislature and to the Judiciary;
 - (b) what amount of discussion, deliberation or consideration of public business by public bodies should be conducted at a public meeting; in other words what more than the actual vote-taking should be legally required to transpire at a public gathering;
 - (c) when, how and under what circumstances should executive sessions be permitted so that in limited areas and under controlled procedures the government may indeed take certain actions in secret;
 - (d) should not notice provisions, minutes of meetings, and disciplinary controls of conduct at public meetings be included in an open meetings law;
 - (e) what penalties should be included so that public entities are encouraged to conform to the law;
 - (f) should not attorneys costs be provided to the successful private litigant so that he will be encouraged and properly compensated for his efforts to force compliance with the law.
- (3) It is recommended that the proposed Public Information Act be subject to thorough public hearings to solicit the views of all

government instrumentalities as well as the views of all citizens throughout the State.

- (4) It is recommended that attorneys fees and reasonable court costs be awarded to citizens if they are successful in a court suit requesting the disclosure of government information.
- (5) It is recommended that an inter-departmental committee be established to determine an appropriate fee schedule by which government agencies may make appropriate charges for the distribution of information.
- (6) It is recommended that all regulations of the executive departments of government be revised and that this revision be subject to the approval of the Governor pursuant to executive order.
- (7) It is recommended that the functions of the Destruction of Public Records Committee established pursuant to the Destruction of Public Records Act contained in *N.J.S.A. 47:3-8.1 et seq.* be coordinated with the efforts of the State in implementing the proposed Public Information Act.
- (8) It is recommended that the Legislature examine not only the proposed legislation contained herein but also all laws relating to the disclosure and secrecy of public information so that conflicting laws may be repealed. Such a comprehensive review is essential to any intelligent approach to the disclosure of government-held information.
- (9) It is suggested that the Legislature examine the feasibility of a single government commission to be empowered to supervise and administer laws relating primarily to disclosure and responsibility in government; namely, lobbying laws, conflict of interest laws, public information laws, public meetings' laws, financial disclosure laws and any similar such legislative enactments. Each and all of these laws may be more effectively administered and more thoroughly complied with if they are placed under a single agency of government having responsibility for more than just a single coordinate branch.

CHAPTER 3

A. THE NEW JERSEY EXPERIENCE

While the recent United States Supreme Court case of *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973) and the recent New Jersey Supreme Court decision in *Irval Realty Inc. v. Board of Public Utility Commissioners of the State of New Jersey*, 61 N.J. 366 (1972) have given a greater degree of visibility to the laws concerning the public's right to know, there is a long history of judicial recognition of the right and need for an informed public. The present day concept of the public's right to know had its origins in the early English common law. Early case law indicates that by the first half of the 18th century the right of a person to inspect certain public documents in which he had an interest had been established in England. Almost all rights to inspection of such documents were granted, however, on a narrow basis requiring a definite showing of the need to inspect in order to pursue pending litigation. Subsequently this original common law right was expanded to permit the inspection of documents where a "specific controversy" was in existence. For example, there were several cases relating to the determination of who actually possessed the legal title to land.¹ Examination of the court rolls was a necessity to determine the title holder and the courts concluded that litigation was not a prerequisite to the examination of those rolls. Eventually the English common law right evolved to the point where the courts were willing to consider granting writs of *mandamus* for the production of documents of a public nature to persons who could prove themselves sufficiently interested in the subject matter. While they were not willing to establish the status of a taxpayer as indicative of enough interest, they were by the middle of the 19th century beginning to clearly expand the judicial remedy utilized for the purpose of production of public documents. It was this evolution in the English common law which was incorporated and expanded in the early New Jersey common law which dates back to the case of *Ferry v. Williams*, 41 N.J.L. 332 (Sup. Ct. 1879).

In the *Ferry* case the plaintiff was a citizen of the town of Orange and sought a writ of *mandamus* against the local collector of taxes to compel the collector to permit him to inspect certain documents within his possession. The documents were letters of recommendation which were required by the town charter to be filed with the collector of taxes prior to a person receiving a liquor license. Plaintiff alleged that the requirements of the law

¹See, e.g., *Rex v. Allgood*, 7 T.R. 746, 101 Eng. Rep. 1232 (1798); *Rex v. Tallor*, 105 M & S 4, 162 Eng. Rep. 795 (1815).

were not being followed and therefore he desired to inspect the letters of recommendation which were in the possession of the tax collector. Declaring that the case “must be decided by general principles, since the statutes of the state are silent on this subject,” the court went on to examine the English common law and concluded that the proper rule to be followed was:

“The documents in question are of a public nature, and the rule is that every person is entitled to the inspection of such instruments, provided he shows the requisite interest therein.” *Id.* at 334.

The court did not discuss the definition of “documents of a public nature” but did point out what might be considered the requisite interest necessary as being “such an interest in a specific controversy as will enable him to maintain or defend an action, for which the public documents will furnish competent evidence or necessary information.” *Id.* at 336. While this definition seems somewhat more akin to the English common law, its evolution in New Jersey ultimately resulted in the New Jersey State Supreme Court saying that “[s]uch interest need not have been purely personal. As one citizen or taxpayer out of many, concerned with a public problem or issue, he might demand and be accorded access to public records bearing upon the problem, even though his individual interest may have been slight. [Citations omitted]. Yet some showing of interest was required.” *Irval Realty Inc. v. Bd. of Pub. Util. Commissioners, supra*, at 372. The common law right in New Jersey therefore was conditioned upon an appropriate showing of interest; it also permitted an inquiry into the motives of the person requesting the information.²

This common law right as well as the right of discovery under court rule incident to litigation was the sole basis for obtaining access to public documents in New Jersey prior to the passage of the popularly entitled Right to Know Law in 1963. *N.J.S.A. 47:1A-1 et seq.* (reprinted *infra* at page 27). The New Jersey Right to Know Law declares it to be the public policy of this State that *public* records shall be readily accessible for examination by the citizens of this State with *certain exceptions* for the protection of the public interest. *N.J.S.A. 47:1A-1*. This statute, effective June 30, 1963, was preceded by much public agitation, principally from members of the press and by several unsuccessful attempts to secure “public disclosure” legislation.

²Several cases decided under the common law in New Jersey permitted inspection of such things as (a) county records by taxpayers, *Moore v. Board of Freeholders of Mercer County*, 76 N.J. Super. 396 (App. Div.), *modified*, 39 N.J. 26 (1962); (b) voter registration lists by a citizen taxpayer and voter; *Casey v. MacPhail*, 2 N.J. Super. 619 (L. Div. 1949). Discovery of an investigation report done by an independent consultant on the Police Department of the City of Hoboken was not considered to be a public record under the common law right, *Stack v. Borelli*, 3 N.J. Super. 546 (L. Div. 1949).

After several revisions and many modifications, the law that ultimately passed contained the following definition of public records:

- “records required by law to be made, maintained or kept on file by
- any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board,
- body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof. . . .”

As can be seen from this definition, the law first necessitates a consideration of whether the particular record involved is “required by law” to be made, maintained or kept on file. While the definition of law now clearly embodies administrative rules and regulations as well as statutes, this provision nonetheless continues to impose upon the citizen and the government custodian the burden of first determining whether a record is required by law to be made or maintained before considering the merits of disclosing such records. Once it is determined that a record is required by law to be made or maintained, the act then requires an examination of all the potential exceptions—which may be contained in various legal documents authored by several branches of government. The law also contains a specific provision permitting government to withhold from disclosure records relating to any investigation in progress if their disclosure would be inimical to the public interest. In order to enforce the provisions of this act the law specifically provides for a proceeding in lieu of prerogative writ in the Superior Court for production of documents improperly withheld from the public.

In accordance with the provisions of the Right to Know Law, Governor Hughes on June 21, 1963 issued Executive Order No. 7 (reprinted *infra* at page 34) which empowered officials of the various levels of government to adopt regulations setting forth those records which would *not* be considered “public.” The response to this executive order however was not only slow (necessitating a subsequent executive order extending the time limits) but was devoid of uniformity and clearly indicated that there must be a limit upon the number of persons and government units which can make individual determinations of what types of records should be public. Consequently Governor Hughes subsequently issued Executive Order No. 9 which rescinded the authority granted in Executive Order No. 7 and established the various records which were not to be deemed public records under the Right to Know Law. (Executive Orders 8 & 9 are reprinted *infra* at 36 & 38). This list was contained in section 3 of Executive Order No. 9 which reads as follows:

- “(a) Questions on examinations required to be conducted by any State
- or local governmental agency;

- (b) Personnel and pension records which are required to be made, maintained or kept by any State or local governmental agency;
- (c) Records concerning morbidity, mortality and reportable diseases of named persons required to be made. . . .
- (d) Records which are required to be made . . . concerning illegitimacy;
- (e) Fingerprint cards, plates and photographs and other similar criminal investigation records. . . .
- (f) Criminal records required to be made, maintained and kept pursuant to the provisions of R.S. 53:1-20.1 and R.S. 53:1-20.2;
- (g) Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and
- (h) Records relating to petitions for executive clemency.”

In addition, Executive Order No. 9 empowered the head or principal executive of each department *of State government* to adopt and promulgate regulations setting forth which records under his jurisdiction shall not be deemed public records. Pursuant to this section, thirteen regulations enumerating departmental records not open to public inspection and copying were duly adopted and promulgated. To date, no such regulation has been adopted by the following:

- (a) Department of Civil Service;
- (b) Department of Community Affairs;
- (c) Department of Defense; and
- (d) Department of Higher Education.

In addition, several departments have reorganized and it is questionable whether the regulations originally promulgated are now applicable to the new departments. None of the aforementioned regulations have been revised or modified since their original promulgation in 1963.

Several judicial decisions have been rendered under the Right to Know Law³ but none as important as the recent decision of the New Jersey Supreme Court in *Irval Realty Inc. v. Bd. of Pub. Util. Commissioners*, *supra*. A full understanding of that decision provides the most current status report of the public's right to know in New Jersey. Initially it is important to recognize that in *Irval* the two plaintiffs were *suing* for both property

³See *Accident Index Bureau, Inc. v. Male*, 95 N.J. Super. 39 (App. Div. 1967), *aff'd*, 51 N.J. 107 (1968), *app. dism.*, 393 U.S. 530 (1969); *Bzozowski v. Penn.-Reading Seashore Lines*, 107 N.J. Super. 467 (L. Div. 1969) (concluding that an accident investigation report by the PUC must be made public).

damage and personal injury as a result of gas explosions occurring on their property in May and July of 1969. Both plaintiffs had commenced separate suits against South Jersey Gas Company, the utility supplying gas to the respective premises and allegedly responsible for the accidents. Separately, plaintiffs brought a proceeding in lieu of prerogative writ in order to compel the disclosure of the following two types of reports:

- (1) A report prepared by the South Jersey Gas Company itself and submitted to the Board of Public Utility Commissioners pursuant to Board rule contained in *N.J.A.C.* 14:11-5.4. Reports required under this rule include the name and address of the Utility, the date and place of the accident, the effect of the accident upon service in the area, details of the accident upon service in the area, details of the accident itself, what corrective measures were taken and, finally, any recommendations the Utility may care to offer to avoid a recurrence.
- (2) A report customarily prepared by a staff member of the Board of Public Utility Commissioners including many of the same kinds of data listed in the above report and also providing for collating information procured from occupants, neighbors, witnesses, and utility representatives at the scene of the accident as well as policemen or firemen.

The Board of Public Utility Commissioners had passed a regulation pursuant to Governor Hughes' Executive Order No. 9 which required the confidentiality of utility and staff reports relating to such accidents. The Supreme Court however concurred with the views expressed by the lower courts in the *Irval* case and stated that "the power [to issue executive orders or regulations thereunder] was intended to be exercised only when necessary for the protection of the public interest." *Irval, supra*, at 374. It thereby imposed limitations upon both gubernatorial executive orders and any other orders or regulations passed limiting the access to public documents. The court then went on to point out that "[a] person seeking access to public records may today consider at least three avenues of approach. He may assert his common law right as a citizen to inspect public records; he may resort to the Right to Know Law, *N.J.S.A.* 47:1A-1 *et seq.*, or, if he is a litigant, he may avail himself of the broad discovery procedures for which our rules of civil practice make ample provision." *Irval, supra*, at 372. The court pointed out that there were two distinctions between the common law right and the right provided under the Right to Know Law. First, some interest and proper motive was necessary to exercise the common law right. The court indicated that while this interest may not have to be great, there was some showing required. Perhaps more importantly the definition of public records varied depending upon whether the common law right or the

statutory right was involved. The court pointed out that the statutory right is "available to any member of the general public but the range of access is limited by the definitions and exemptions appearing in the statute." *Irval, supra*, at 373. On the other hand, while some interest and proper motive must be demonstrated to exercise the common law right, the definition of public record under that right is significantly broader than that provided in the Right to Know Law. The New Jersey Court cited with approval the case of *Josefowicz v. Porter*, 32 N.J. Super. 585 (App. Div. 1954) wherein a public record was defined for purposes of the common law as:

"... one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. . . ." (Quoting from C.J.S. *Records* § 1, p. 112.)

A fair paraphrase of this definition seems to be that a public record shall be any written memorial incident to the exercise of a public function by a government employee. Thus upon a proper showing of interest and motive, a citizen in New Jersey, pursuant to his common law right to know, may have access to a wide-range of government-held information.

It is significant to an understanding of *Irval* to note the specific language used by the Supreme Court in concluding that each of the reports noted above were required to be disclosed to the plaintiffs. The report which was required by regulation of the Board to be submitted by the gas company was determined to be a public record within the definition of the Right to Know Law itself since the Board rule requiring its production "has the force of law and requires that such reports be made." *Irval, supra*, at 375. The court then refrained from concluding whether the investigative reports prepared by members of the Board's staff met the definition of public records under the Right to Know Law but stated that such a decision was unnecessary since they certainly qualified as public records within the scope of the common law rule. The court hedged its bets, however, and went on to point out that "the facts of another case may quite possibly call for a different result." *Id.*

Recognizing that some public information may contain material which should remain secret, the court suggested that the proper procedure to be followed by the trial courts would be the examination of the information and, if possible, the deletion of sensitive material. This approach is similar to that taken in the past with relation to documents such as income tax returns and corporate records which touch upon trade or business secrets. It is fair, therefore, to summarize the *Irval* decision as follows:

- (1) The court has strongly favored the statutory and common law policy of the fullest possible disclosure of government-held information.
- (2) The interest necessary under the common law right is slight and serves primarily to deter arbitrary and unreasonable requests.
- (3) Reports submitted to government agencies will generally be available to interested members of the public with appropriate deletions where necessary.
- (4) Such reports when required by statute or administrative rule or by the necessary exercise of government functions will be public under the Right to Know statute.
- (5) Such reports as well as *staff investigative reports* will be public to appropriately interested and motivated citizens under the common law right to know and perhaps under the statutory right.
- (6) Reports relating to the public health and safety such as those required in exercising the functions of a Board of Public Utility Commissioners must generally be public.
- (7) Though the presence or potential of a pending suit may influence the basis upon which such records will be disclosed, this is certainly not a requirement to justify the disclosure of government-held information either under the Right to Know statute or under the exercise of the common law right to know.

As is apparent from the above summary the court is undoubtedly nudging the agencies of government toward the revelation of the public's business consistent with recognized but narrow exceptions relating to privacy and governmental functioning.

While most of the attention of the law has been paid to the statute embodying the public's right to obtain access to public *records*, a discussion of the public's right to know requires an examination of an equally important statute that has received very little attention and whose provisions have been subject to severe criticism. The "Open Meetings" statute is contained in *N.J.S.A. 10:4-1 et seq.* (reprinted *infra* at 31). After many years of attempting to get open meetings laws passed in the New Jersey Legislature, the New Jersey Press Association, as a result of a compromise with the Governor, was ultimately successful in 1960. The law provides that "[t]he Legislature finds and declares it to be the public policy of this State to insure the right of the citizens of this State to attend meetings of public bodies, with certain exceptions, for the protection of the public interest." *N.J.S.A. 10:4-1*. The basic substantive provision of the act provides "the public shall be admitted to any meeting of a public body at which official

action is taken." *N.J.S.A.* 10:4-3. The definition of public body is contained in *N.J.S.A.* 10:4-2 and provides that it shall mean "a commission, authority, board, council, committee and every group of two or more persons organized under the law of this State to perform a public governmental function by official action. Official action is then defined as "a determination made by vote." There are numerous exceptions contained in section 10:4-4, the most significant of which is the nonapplicability of the act "to the office of the Governor or the Judicial or Legislative branches of State Government. . . ." The act concludes by providing that any actions taken in violation thereof may be voided by a proceeding in the Superior Court.

This act has been the subject of critical newspaper editorials as well as the basis for a conclusion by the independent citizens' group "Common Cause" that it is totally ineffective and perhaps one of the worst open meetings laws in the country.⁴ By excepting the Legislature it is suggested that the act itself takes away the opportunity to view meetings of the State's most representative body and consequently fails to strike at the very heart of secrecy in the democratic process. But perhaps even more absurd, it is argued, is the provision in the act defining official action as a determination made by vote, thereby limiting the open meetings requirement to the vote-taking procedures of the body. As a Florida court stated in a recent judicial decision:

"Clearly the legislature must have intended to include more than the mere affirmative formal act of voting on an issue or the formal execution of an official document. These latter acts are indeed 'formal,' but they are matters of record and easily ascertainable (though perhaps ex post facto), notwithstanding such legislation; and indeed the public has always been aware sooner or later of how its official voted on a matter, or of when and how a document was executed. Thus, there would be no real need for the act if this was all the framers were talking about." *Times Publishing Company v. Williams*, 222 So. 2d 470, 473-74 (Fla. D. Ct. App. 1969).

There is one further act which deals with public records and has a relationship to the problems encountered when considering the public's right to know. This statute is contained in *N.J.S.A.* 47:3-8.1 *et seq.* and is known as the Destruction of Public Records Law (1953). It establishes a committee in the Department of Education which consists of the State Treasurer, the Attorney General, the State Auditor, the Director of the Division of Local Government in the Department of the Treasury and the head of the Bureau

⁴L. GILSON, MONEY AND SECRECY, 122 & 209 (1972).

of Archives and History in the Department of Education. It is the responsibility of this committee to establish schedules, classifications and categories of records in an effort to provide for the appropriate retention and destruction of records required for the functioning and operation of government. The provisions of this act provide a helpful guide to the retention and destruction of various specific public records and also, by implication, suggest the types of records which are traditionally considered public. In fact, the definition of public records contained in *N.J.S.A. 47:3-16* has on occasion been used by the judiciary as an appropriate basis on which to determine whether a record was public and whether its disclosure should be made. The definition contained in that section is quite broad and refers to:

“any paper, written or printed book, document or drawing, map or plan, photograph, microfilm, sound-recording or similar device, or any copy thereof which has been made or is required by law to be received for filing, indexing, or reproducing by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received by any such officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, in connection with the transaction of public business and has been retained by such recipient or its successor as evidence of its activities or because of the information contained therein.”

The function of the committee as well as the guidance provided by its provisions should be incorporated in a uniform and comprehensive approach to the problem of government-held information and the public's right of access to it. For that reason, we have suggested coordinating the functions of this committee and the implementation of this act with the functions to be exercised under the proposed Public Information Act contained herein.

B. THE FEDERAL ACT

The United States Government has had extensive experience with the problem of freeing government information to public inspection. In 1966 the United States Congress passed and President Johnson signed the Freedom of Information Act. This act was enacted as an amendment of § 3 of the Administrative Procedure Act of 1946 and emerged from the functional inadequacy of that section, which had contained the first general statutory provision for public disclosure of executive branch rules, opinions, and orders as well as public records. Some of its provisions however were vague and contained disabling loopholes which made the section as much a basis for withholding information as one for disclosing. For example that section exempted from disclosure “any function of the United States requiring

secrecy in the public interest.” Moreover, even “matters of official record” were only to be made available to “persons properly and directly concerned” with the information. This section did not provide any remedy for unlawful withholding of information. As pointed out by the United States Supreme Court in the *Mink* case the provisions of the Freedom of Information Act stand in sharp relief against those of prior § 3. The 1966 Act eliminates the “properly and directly concerned” test of access, stating repeatedly that official information shall be made available “to the public,” “for public inspection.”

The 1966 Federal Freedom of Information Act thus clearly expressed the displeasure of Congress with the previous public information policies of government and made it clear that any person should have clear access to identifiable agency records without having to state a reason for wanting the information and that the burden of proving withholding was now placed on the federal agency and not on the person seeking the information. Withholding of information by government under the act is permissive, not mandatory, and must be justified on the basis of one of the following specific nine exemptions. These relate to matters that are —

- “(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data (including maps) concerning wells.”

This act and the exemptions referred to above have begun to produce a growing body of case law and have prompted the United States Attorney General to establish an internal committee for the purpose of advising agencies of the Federal government of their responsibilities under the

Freedom of Information Act. This case law has now been embellished by the first United States Supreme Court decision under the Federal Freedom of Information Act. In *Environmental Protection Agency v. Mink, supra*, the United States Supreme Court specifically considered exemption one and exemption five of the Freedom of Information Act relating to (a) matters “specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy” and (b) matters relating to “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” In the *Mink* case the Environmental Protection Agency was sued by Congresswoman Mink and 32 of her colleagues in the House of Representatives. The suit related to the request for information concerning the Amchitka Island nuclear test. Suit was prompted by a newspaper article which indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test and that some of these recommendations were the result of a “departmental Undersecretary committee named to investigate the controversy.” The information which was sought to be obtained in this suit was the report of the Undersecretary’s committee to the President which consisted of a covering memorandum from Undersecretary Irwin of the Department of State, the report of the committee, five documents attached to that report and three additional letters separately sent to Mr. Irwin. Of the total of ten documents, one, an environmental impact statement prepared by the Atomic Energy Commission was publicly available and was not in dispute. Each of the other nine was claimed to have been “‘prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints. . . .’” 410 U.S. at 77.

In addition, six of the documents were claimed to involve highly sensitive matter vital to the National Defense and Foreign Policy and were described as having been classified top secret and secret pursuant to a Presidential executive order providing for such classifications. The United States Supreme Court concluded that since exemption one under the Freedom of Information Act quite clearly stated that if an executive order required secrecy in the interest of the national defense or foreign policy there was to be no court review, the items so classified were therefore exempt under the Freedom of Information Act.

Disclosure of the remaining three documents conceded to be unclassified was resisted solely on the basis of exemption five relating to inter- and intra-agency memorandums. The three documents here involved were (1) a memorandum from the Council on Environmental Quality to Mr. Irwin,

(2) a letter from Mr. William Ruckleshaus for the Environmental Protection Agency (originally classified as top secret but since declassified) and (3) a letter from Mr. Russell Train, for the Council on Environmental Quality. After pointing out the difficulty in applying the statutory language of the exemption which refers to information which “would not be available by law to a party . . . in litigation with the agency,” the Supreme Court expressly concurred with the view expressed in that exemption which is intended to recognize the general rule that “‘confidential intra-agency advisory opinions . . . are privileged from inspection.’ ” 410 U.S. at 86 (citing *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958)). The public policy involved and obviously condoned by the United States Supreme Court was that of “open, frank discussion between subordinate and chief concerning administrative action.”

The court went on to point out however that the privilege attaching to intra-governmental memoranda clearly has finite limits, even in civil litigation. In each case

“the question [is] whether production of the contested document would be ‘injurious to the consultative functions of government that the privilege of nondisclosure protects’ . . . Thus, in the absence of a claim that disclosure would jeopardize state secrets, . . . memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the government.” 410 U.S. at 87-88, 93 S. Ct. at 836, 35 L.Ed. 2d at 132.

The Supreme Court thereby adopted the fact-opinion distinction which had become prevalent in the federal cases under the Freedom of Information Act and continued to point out that this rule should be implemented wherever the factual material appearing in the documents is in such a form that it is severable without compromising the private remaining portions of the documents. The Court then suggested that the proper approach for the District Courts to use would be to permit the government every means short of an *in camera* inspection of demonstrating that the information contained in inter- or intra-agency memoranda should not be disclosed because it would be injurious to the consultative functions of government or that any factual material contained in such memoranda could not reasonably be extracted from the private remainder of the documents. If such a showing was unsatisfactory to the District Court, the Supreme Court specifically recognized the propriety of an *in camera* inspection. The Court concluded that on remand the District Court should give the government an opportunity to resist disclosure of the three remaining documents and if the government’s position is not persuasive then the Court could undertake an *in*

camera inspection of each of the documents. Justice White delivered the opinion in which Justices Burger, Stewart, Blackmun and Powell joined and in which Justices Brennan, Marshall and Douglas dissented. Justice Stewart in a concurring opinion pointed out that he believed that the Court was powerless to review items one through six because the Congress had so determined. Nonetheless he expressed his displeasure with such a rigid requirement and stated:

“that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be open to the fullest possible disclosure consistent with legitimate interests of national defense. Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.” 410 U.S. at 94-95, 93 S. Ct. at 839, 35 L.Ed. 2d at 136.

The obvious lessons of the *Mink* case are that the Court supports the general policy behind the Freedom of Information Act, that it supports the policy behind exemptions one and five of that act and that where intra-governmental memoranda are concerned, it specifically adopts and suggests the continued application of the standard which distinguishes between fact and deliberative opinion contained in various memoranda. The Court also suggests that the standard to be applied in considering whether memoranda should be privileged is whether or not disclosure would be “injurious to the consultative functions of government.”

At the same time that the United States Supreme Court was considering its decision in the *Mink* case, the United States Congress, undoubtedly prompted by the *Pentagon Papers* case, has been undertaking substantial hearings and proceedings with relation to the effectiveness of the current 1966 Freedom of Information Act. The conclusion reached by the Congressional Committee was that

“The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-dragging by the Federal bureaucracy. The widespread reluctance of the bureaucracy to honor the public’s legal right to know has been obvious in parts of two administrations. This reluctance has been overcome in a few agencies by continued pressure from appointed officials at the policymaking level and in some other agencies through public hearings and other oversight activities by the Congress.” *H.R. No. 92-1419, 92d Cong., 2d Sess. 8-9 (1972).*

The following findings and problems were enumerated in the report:

- (1) "Some agency regulations are confusing, inadequate, or deficient, adhering neither to the guidelines in the 1967 Attorney General's Memorandum nor the intent of Congress."
- (2) "The Office of Legal Counsel, Department of Justice, has undertaken an advisory role to assist other agencies in the administration of the FOI Act, but the office needs to exercise a greater leadership function, for example, by advising other agencies of significant court interpretations of the act and by preparing a pamphlet for the general public to explain the rights of individual citizens to obtain public records from Federal agencies."
- (3) "Some Federal agencies have not kept adequate records of requests for public information under the act to properly evaluate their performance; some have not informed an individual of the precise exemption under the act being exercised to deny a requested record; others have not advised individuals of the administrative right to appeal the denial to a higher agency authority, nor of ultimate rights to legal remedy in the courts."
- (4) "Very few agencies have involved public information officials in administrative decisions on requests for public records under the act; very few agencies have issued clear policy statements on commitment to the principles of the FOI Act, nor have they issued directives to place appropriate priority on compliance with provisions of the act."
- (5) "Many agencies have failed to provide suitable training or orientation of employees on the meaning, intent, and proper administration of the FOI Act, even those directly affected by responsibilities that involve public requests under the act."
- (6) "Excessive fees for search and reproduction of public records in some agencies have deterred individuals desiring access to such records; moreover, there is a wide disparity among agencies and fees charged for the same type of records."
- (7) "The delay by most federal agencies in responding to an individual's request for public records under the FOI Act, or delay in acting on an administrative appeal frequently has negated the basic purpose of the act; while reforms might be initiated at the administrative level, amendments to incorporate recommendations of the Administrative Conference of the United States into the act are a way to achieve the prompt handling of requests by individuals under the act."
- (8) "The delay by Government attorneys in filing responsive pleadings in suits brought by individuals to obtain public records and

the high cost to an individual in pursuing litigation under the act have often been serious deterrents in obtaining public records, giving unfair advantage to the Government.”

- (9) “Federal agencies have not been required to report to Congress on their activities under the FOI Act, and an annual evaluation would not only improve administration of the act but also permit more effective and systematic legislative oversight.”
- (10) “The nine exemptions in the act which permit withholding of information have been misused by Federal agencies. Confused interpretations of agency regulations, the desire to withhold records which might embarrass an agency, and misunderstanding of court decisions affecting these exemptions, all have contributed to the problem. . . .” *H.R. No. 92-1419, 92d Cong., 2d Sess. 10-11 (1972).*

Examination of the various transcripts of the hearings as well as the reports issued by this committee have resulted in many of the recommendations contained in this report. As each comment indicates there is an attempt to “go to school” on the Federal government in its experience with the Freedom of Information Act. Where the recommendations of a Congressional Committee seem applicable to State and local government they have been incorporated; where the recommendations are more applicable to such a large bureaucracy as that of the United States Government than they have been bypassed in favor of a less administratively burdensome suggestion. In any event the federal experience serves as a substantial basis on which many of the legislative suggestions contained in this report are dependent.

C. THE EXPERIENCE IN OTHER STATES

The comments to the proposed legislation contained in this report indicate that there is a growing awareness of, and attention to, the problem of the public’s access to public meetings and public records throughout the country. In particular the States of Florida, Colorado, and California have provided recent and dramatic legislative enactments substantially opening their respective governmental units to the searchlight of public awareness. Florida’s Government in the Sunshine Law is recognized as the model public meetings law in the United States. It has been copied to a great extent recently (by the Legislature and the people in a referendum) in the State of Colorado where they have combined open meetings laws, conflict laws, lobbying laws and financial disclosure laws. California has provided an extensive twenty-year experience in developing adequate and apparently quite effective open meetings laws applicable to State and local governments. And New Hampshire recently enacted open meetings and open records legislation in one law which provides for a wide applicability to all branches of

government. Thus the topic is apparently a very current one and is gaining much public appeal. The visibility of the issues involved have been heightened undoubtedly by the *Pentagon Papers* case and the allegations of increasing government secrecy. *Money and Secrecy* is the title of a recent book produced by "Common Cause" and it condemns the secrecy of government operations and the influence of money on the deliberative processes of the public's business. This movement therefore has engaged citizens' groups, legislatures, congressional committees, the President, the press and the United States Supreme Court all within the space of the last several years. It is against this background and within this current agitation over the public's right to know that this report should be examined.

D. SOURCES FOR DISCLOSING AND WITHHOLDING INFORMATION

In order to fully understand the context within which to make a decision on disclosure of public information it is necessary to know what sources may be called upon in support of disclosing information and what sources are available to deny the disclosure of information. The following is a comprehensive list of those sources and it fairly indicates that there are substantially more avenues available to the purveyors of secrecy than to the pursuers of disclosure.

A. Sources of Information.

1. The Right to Know Law, *N.J.S.A. 47:1A-1 et seq.*, mandating that all records which are required by law to be made, maintained or kept on file by a government agency be public.
2. The Open Meetings Law, *N.J.S.A. 10:4-1 et seq.*, requiring the meetings at which official votes are taken to be conducted in public.
3. The common law right to know which provides citizens, having an appropriate interest and the proper motive, with access to public records defined as:

"When required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. . . ."
4. Federal and State court rules relating to discovery in criminal and civil cases as well as to the use of subpoenas in the requesting of information.

5. The Administrative Procedure Act in New Jersey contained in *N.J.S.A. 52:14B-3*:

“In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions of requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) *make available for public inspection all final orders, decisions, and opinions, in accordance with the provisions of chapter 73 of the laws of 1963 as amended and supplemented (c. 47:1A-1 et seq.).*” (Emphasis added)

6. Certain Federal and State statutes and regulations which require the publication of information. Examples of such statutes or regulations are the New Jersey Lobbying Act, the New Jersey Workmen’s Compensation Act and the Federal Clean Air Act.

B. Sources of Secrecy.

1. Many State statutes which have been uncovered as a result of a computer check on the words “confidential” and “secret,” a representative list of which includes *N.J.S.A. 34:6-98.3* (mine safety inspections), *N.J.S.A. 39:4-130* (accident reports), *N.J.S.A. 54:4-2.42* (confidential tax returns).
2. Rules and Regulations of both the Federal and State government. Such regulations are represented by each of the Department’s regulations passed pursuant to the New Jersey Right to Know Law.
3. Executive Orders of the Governor, such as Executive Order Nos. 9 & 48.
4. The privileges associated with each coordinate branch of government and inherent within the concept of separation of powers. These privileges refer to what might be called legislative, executive, and judicial privileges. They are inherent in the need for the individual integrity and self-preservation of each coordinate branch of government. A President for example can claim executive privilege and while the law is not par-

ticularly clear, it is certain that it will be a rare occasion when such a claim will be reviewed, or if reviewed, overturned by a court of law. This is similarly true in State government where a Governor can exercise the same privilege and while again the courts have not taken a clear position, it is doubtful whether a review would be undertaken, and if so, only on a limited basis. This type of privilege is generally considered to be exercisable only by those having the chief responsibility for the execution of the functions of each of the individual branches. *See generally, Hearings on U.S. Government Information Policies and Practices—Problems of Congress in obtaining Information from the Executive Branch—Before a House Subcommittee of the Committee on Government Operations, 92 Cong., 2d Sess. 3117 (1972); Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A.L. REV. 1044 (1965); Kramer & Marcuse, Executive Privilege—A Study of the Period 1953-1960, 29 GEO. WASH. L. REV. 623 (1961).*

5. Evidential privileges of the Federal and State governments provide substantial bases on which to deny the disclosure of information. In New Jersey for example these are often embodied in both court rules and legislative enactments and they include such privileges as the lawyer-client privilege, a trade secret privilege and an official information privilege. While these privileges cannot and should not be used to thwart the disclosure of disclosable information they must be recognized and considered in the determination of whether certain information may be disclosed at all. For example if it can be demonstrated that commercial information in the possession of government would indeed meet the test of a trade secret then government of course should not disclose to the general public the trade secret of a commercial enterprise.

Moreover in Rule 34 of the New Jersey Rules of Evidence there is a provision which states that “[n]o person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any act of Congress or of this State, or (b) if the Judge finds that the disclosure of the information in the action will be harmful to the interests of the public.” This provision perhaps is a little known privilege but it provides in its breadth of language a significant limitation upon the disclosure of public information. Similarly the United States Supreme Court has recently promulgated the Federal Rules of Evidence which as pointed out in the *Mink* decision,

supra, contains a provision on official information which defines that term to include “intra-government opinions or recommendations submitted for consideration in the performance of decisional or policy-making functions.” (Proposed Rule 509A-2A).

6. There are also significant court rules of both the Federal and State courts which require confidentiality. In Rule 1:38 of the New Jersey Court Rules the courts have provided as follows:

“All records which are required by statute or rule to be made, maintained or kept on file by any court, office or official within the judicial branch of government shall be deemed a public record and shall be available for public inspection and copying, as provided by law, except:

- (a) Personnel and pension records;
- (b) County probation departments records pertaining to investigations and reports made for a court or pertaining to persons on probation;
- (c) Completed jury questionnaires, which shall be for the exclusive use and information of the jury commissioners and the Assignment Judge, and the preliminary lists of jurors prepared pursuant to N.J.S.A. 2A:70-1 and 2, which shall be confidential unless otherwise ordered by the Assignment Judge;
- (d) Records required by statute or rule to be kept confidential or withheld from indiscriminate public inspection;
- (e) Records in any matter which a court has ordered impounded or kept confidential.”

This rule is supplemented by rules relating to the secrecy of search warrants, R. 3:5-4, the secrecy of grand jury proceedings R. 3:6-7, and the secrecy of juvenile records and confidentiality of their proceedings, R. 5:10-7, and perhaps most important R. 1:14-1 which adopts the professional canons of ethics and contains in D.R. 4-101 the canon requiring the preservation of confidences or secrets of a client and in D.R. 7-106 a significant list of items relating to the permissible and nonpermissible publicity of information prior to trial.

7. The New Jersey Conflicts Law, *N.J.S.A. 52:13D-12 et seq.*, also contains a provision which provides that

“No state officer or employee . . . shall willfully dis-

close to any person, whether or not for pecuniary gain, any information not generally available to members of the public which he receives or acquires in the course of and by reason of his official duties. . . ." *N.J.S.A.* 52:13D-25.

8. Constitutional considerations of fair trial and free press impose certain limitations upon all government employees and particularly upon prosecuting agencies. *State v. Van Duyne*, 43 N.J. 369 (1964), *cert. denied*, 380 U.S. 987 (1965).
9. Constitutional rights of individual citizens which might limit the full disclosure of publicly held information.
10. Inter-governmental compacts such as those among law enforcement agencies relating to the release of criminal history information.
11. General bureaucratic hesitancy to disclose information is perhaps the least specific but most devastating source of secrecy.

Thus by looking at the array of sources it is easy to understand why the burden is often placed upon the person wishing to obtain information and not upon the person determined to find a source on which to deny it. Any comprehensive attempt to improve the functioning of the Right to Know must consider the variety of sources of secrecy and, if a new law is to have any hope of success, it must limit the number of sources, the way in which the sources are utilized or at least enhance the ability to challenge the sources. The mere listing of the sources is bound to be of some assistance since they are often unknown and unappreciated both by the people requesting information and by those denying it.

APPENDIX TO CHAPTER 3

The Present N.J. Right to Know Law
The Present N.J. Open Meetings Law
Executive Order No. 7
Executive Order No. 8
Executive Order No. 9

THE PRESENT NEW JERSEY RIGHT TO KNOW LAW

CHAPTER 1A. EXAMINATION AND COPIES OF PUBLIC RECORDS [NEW]

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Sec.

- 47:1A-1. Legislative findings.
- 47:1A-2. Public records; right of inspection; copies; fees.
- 47:1A-3. Records of investigations in progress.
- 47:1A-4. Proceedings to enforce right to inspect or copy.

47:1A-1. Legislative findings

The Legislature finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions, for the protection of the public interest. L.1963, c. 73, § 1.

Section 5 of L.1963, c. 73 provided: "This act shall take effect 30 days following the date of approval."

Title of Act:

An Act concerning public records and their examination by citizens of this State, providing certain exceptions to the right to examine public records, and conferring jurisdiction upon the Superior Court in respect to such examination. L.1963, c. 73.

Plaintiffs in actions against gas company to recover for property damage and wrongful death in connection with gas explosions had clear personal interest in accident reports prepared by the utility and filed with the board of public utility commissioners and in investigation reports prepared by the board's own staff, and thus had a common-law right to inspect the same, which right was in no way curtailed by the Right to Know Law. *Id.*

Interest of public in maintaining confidentiality of accident reports filed by gas company with respect to gas explosions and of investigative reports by staff of the board of public utility commissioners was outweighed by the interest in examining them possessed by plaintiffs who were maintaining actions against the gas company for property damage and wrongful death in connection with the explosions and such plaintiffs had a statutory right to inspect the same, despite contention that disclosure of reports would cause utilities to be disinclined to suggest ways and means whereby such accidents might be prevented in the future, for fear that such proposals might be employed to their detriment by damage claimants. *Id.*

Plaintiff who was denied right to inspect records in possession of board of public utility commissioners pertaining to board investigation

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1. In general

Though under the Right to Know Law the range of access to public records is limited by definitions and exemptions appearing in the statute, the right is available to any member of the general public without necessity of demonstrating any personal or particular interest in the materials sought to be examined. *Irval Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 366, 294 A.2d 425 (1972).

of railroad grade crossing should have proceeded by way of proceeding in lieu of prerogative writs for order requiring custodian of records to produce; however, since subpoena duces tecum seeking access to records did not seek production of records in court or testimony of board official, subpoena would be treated as a proceeding in lieu of prerogative writs and would be decided on the merits. *Bzozowski v. Pennsylvania-Reading Seashore Lines*, 107 N.J. Super. 467, 259 A.2d 231 (1969).

Plaintiff who was involved in civil litigation concerning manner in which an individual met his untimely demise at a railroad grade crossing was entitled under "Right to Know Law" to inspect records in possession of board of public utility commissioners pertaining to investigation by board of grade crossing, and board's regulation that records relating to accidents and investigations of accidents and to safety inspections were not public records copies of which could be purchased or reproduced could not be invoked to deny inspection sought by plaintiff. *Id.*

Citizen's right to inspect public records is not unlimited. *Accident Index Bureau v. Hughes*, 83 N.J. Super. 293, 199 A.2d 656 (1964), affirmed 46 N.J. 160, 215 A.2d 529.

2. Common law

At common law a citizen had an enforceable right to require custodians of public records to make them available for reasonable inspection

and examination, and such right applied generally to all public records but required showing of interest, which need not have been purely personal but could be as a citizen or taxpayer concerned with a public problem or issue. *Irral Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 366, 294 A.2d 425 (1972).

1. Workmen's compensation records

Regulation of Commissioner of Labor and Industry closing workmen's compensation records to public inspection if purpose of inspection is to provide employers with information concerning prospective employees was inappropriate to bar inspection by profit-making organization and was invalid, in view of statutory injunction that records should be open to public inspection in absence of demonstration that abuse of right to inspect could not be isolated and dealt with directly. *Accident Index Bureau, Inc. v. Hughes*, 46 N.J. 160, 215 A.2d 529 (1965).

Regulation promulgated by Commissioner of Labor and Industry that workmen's compensation record should not be deemed public if purpose of inspection or copying is to provide employers with information concerning prospective employees was invalid, and contravened substantive due process, despite public policy to help rather than hinder the disabled in search for employment. *Accident Index Bureau v. Hughes*, 83 N.J. Super. 293, 199 A.2d 656 (1964), affirmed 46 N.J. 160, 215 A.2d 529.

47:1A-2. Public records; right of inspection; copies; fees

Except as otherwise provided in this act or by any other statute, resolution of either or both houses of the Legislature, executive order of the Governor, rule of court, any Federal law, regulation or order, or by any regulation promulgated under the authority of any statute or executive order of the Governor, all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or of any political subdivision thereof or by any public board, body, commission or authority created pursuant to law by the State or any of its political subdivisions, or by any official acting for or on behalf thereof (each of which is hereinafter referred to as the "custodian" thereof) shall, for the purposes of this act, be deemed to be public records. Every citizen of this State, during the regular business hours maintained by the custodian of any such records, shall have the right to inspect such records. Every citizen of this State shall also have the right, during such regular business hours and under the supervision of a representative of the custodian, to copy such records by hand, and shall also have the right to purchase copies of such records. Copies of records shall be made available upon the payment of such price as shall be established by law. If a price has not been established by law for copies of any records, the custodian of such records shall make and supply copies of such records upon the payment of the following fees which shall be based upon the total number of pages or parts thereof to be purchased without regard to the number of records being copied:

First page to tenth page	\$0.50 per page,
Eleventh page to twentieth page	0.25 per page,
All pages over 20	0.10 per page,

If the custodian of any such records shall find that there is no risk of damage or mutilation of such records and that it would not be incompatible with the

economic and efficient operation of the office and the transaction of public business therein, he may permit any citizen who is seeking to copy more than 100 pages of records to use his own photographic process, approved by the custodian, upon the payment of a reasonable fee, considering the equipment and the time involved, to be fixed by the custodian of not less than \$5.00 or more than \$25.00 per day. L.1963, c. 73, § 2.

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1. In general

Accident reports which were required to be filed by gas company with board of public utility commissioners under authority to administrative regulation were "public records" within meaning of this section providing public access to public records "required by law," since such regulation had the force of law, and investigation reports prepared by members of the board's own staff also qualified as "public records," at least within the scope of common-law rule entitling citizens to inspect public records. *Irval Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 306, 294 A.2d 425 (1972).

Property owner and taxpayer, who had tax assessment discrimination appeal pending before Division of Tax Appeals, had a sufficient interest so as to justify inspection of property record cards, which reflect information concerning character and use of property and which were in possession of tax assessor; such records, although not required to be kept by statute, were not required to be withheld from public view either on theory that they contained confidential information or that they belonged to the assessor. *DeLia v. Kiernan*, 119 N.J. Super. 581, 293 A.2d 197 (1972).

Property record cards, which reflect information concerning character and use of property and other factors bearing on valuation appearing in real property tax assessments, were not beyond discovery of taxpayer and real property owner on theory that cards were protected from public view by reason of work product privilege; the cards did not, in any real sense, reflect or embody the mental process, impressions, conclusions and opinions of the assessor. *Id.*

Any inspection of property report cards in hands of tax assessor would be permissible subject to reasonable control as to time, place, copying, etc. *Id.*

Rules and regulations adopted by administrative agencies pursuant to power delegated by the legislature have the force and effect of law within meaning of provision of act governing access to public records except as otherwise provided all records required by law shall be deemed public records. *Irval Realty, Inc. v. Board of Public Utility Com'rs*, 115 N.J. Super. 338, 279 A.2d 866 (1971), affirmed 61 N.J. 366, 294 A.2d 425.

Owners of property damaged by gas explosion had legitimate interest and were possessed of status entitling them to inspect and copy acci-

dent records gas supplier was required to file with board of public utility commissioners pursuant to administrative regulations, notwithstanding agency regulation that accident records were not to be deemed public records for purpose of public inspection. *Id.*

Accident reports, which were required to be filed by public utility with board of utility commissioners under authority of administrative regulation, were "public records" within meaning of this section providing public access to public records. *Id.*

This section in providing that citizens shall have right to purchase copies of public records refers exclusively to copies made by photographic process, approved by custodian. *Guarriello v. Benson*, 90 N.J. Super. 233, 217 A.2d 22 (1966).

Tape recordings of municipal hearings held for purpose of explaining proposed sewer district project to residents of municipality were "public records". *Id.*

2. Exceptions

Within the Right to Know Law, it was not intended that the power of excluding records from the public domain, given to the Governor and by him delegated to executive departments, should be unlimited; rather such power was intended to be exercised only when necessary for the protection of the public interest. *Irval Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 366, 294 A.2d 425 (1972).

Candidate for election to regional high school board of education was not entitled, under the Right to Know Law (§ 47:1A-1 et seq.) to obtain the names and addresses of persons who voted in the 1971 election (so that he could solicit their support for his candidacy in the 1972 election), since one exception to the application of the Right to Know Law is where the examination of the record in question is governed by another statute and since this section and § 18A:14-62 pertain to election of members of a board of education and provide that poll lists shall be "sealed" and retained for one year, thus implicitly barring the public inspection of such records absent a claim of election irregularity. *Shanahan v. New Jersey State Bd. of Ed.*, 118 N.J. Super. 212, 287 A.2d 181 (1972).

3. Limitations

In cases in which public agency asserts that records sought to be examined should remain secret in the public interest, court should call for and examine the report or record in question, and if only certain portions of the record can properly be revealed, should extract such portions and make them available or take such other practical steps as will achieve the desired result. *Irval Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 366, 294 A.2d 425 (1972).

A court has inherent power to impose any restriction necessary to prevent abuse and to

protect the public officials involved on examination by members of the public of records kept by or in possession of officials. *DeLia v. Kiernan*, 119 N.J. Super. 581, 293 A.2d 197 (1972).

4. Discovery

Person seeking access to public records may proceed under his common law right as a citizen, under the Right to Know Law, or, if he is a litigant, pursuant to discovery procedures under rules of civil practice. *Irvial Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 366, 294 A.2d 425 (1972).

Only a litigant in a pending suit may examine public records pursuant to the discovery procedures embodied in rules of civil practice. *Id.*

Interest of public in maintaining confidentiality of accident reports filed by gas company with respect to gas explosions and of investigative reports by staff of the board of public utility commissioners was outweighed by the interest in examining them possessed by plaintiffs who were maintaining actions against the gas company for property damage and wrongful death in connection with the explosions and such plaintiffs had a statutory right to inspect the same, despite contention that disclosure of reports would cause utilities to be disinclined to suggest ways and means whereby such accidents might be prevented in the future, for fear that such proposals might be employed to their detriment by damage claimants. *Id.*

47:1A-3. Records of Investigations in progress

Notwithstanding the provisions of this act, where it shall appear that the record or records which are sought to be examined shall pertain to an investigation in progress by any such body, agency, commission, board, authority or official, the right of examination herein provided for may be denied if the inspection, copying or publication of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to prohibit any such body, agency, commission, board, authority or official from opening such record or records for public examination if not otherwise prohibited by law. L.1963, c. 73, § 3.

47:1A-4. Proceedings to enforce right to inspect or copy

Any such citizen of this State who has been or shall have been denied for any reason the right to inspect, copy or obtain a copy of any such record as provided in this act may apply to the Superior Court of New Jersey by a proceeding in lieu of prerogative writ for an order requiring the custodian of the record to afford inspection, the right to copy or obtain a copy thereof, as provided in this act. L.1963, c. 73, § 4.

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1. In general

Under the Right to Know Law, it is mandatory that relief be sought by action in lieu of prerogative writ only where there is not already pending an action to which the applicant for relief is a party; where there is a pending action, full relief can be sought by taking appropriate steps within the cause. *Irvial Realty Inc. v. Board of Public Utility Com'rs*, 61 N.J. 366, 294 A.2d 425 (1972).

Plaintiff who was denied right to inspect records in possession of board of public utility commissioners pertaining to board investigation of railroad grade crossing should have proceeded by way of proceeding in lieu of prerogative writs for order requiring custodian of records to produce; however, since subpoena duces tecum

seeking access to records did not seek production of records in court or testimony of board official, subpoena would be treated as a proceeding in lieu of prerogative writs and would be decided on the merits. *Bzozowski v. Pennsylvania-Reading Seashore Lines*, 107 N.J. Super. 467, 259 A.2d 231 (1969).

2. Orders for inspection

Generally, orders for inspection of public records should issue upon proof that desired inspection will aid plaintiff in the preparation of his case, or otherwise facilitate proof or progress at trial, or that a denial would prejudice plaintiff. *Bzozowski v. Pennsylvania-Reading Seashore Lines*, 107 N.J. Super. 467, 259 A.2d 231 (1969).

**THE PRESENT NEW JERSEY OPEN MEETINGS
LAW, N.J.S.A. 10:4-1 et seq.**

CHAPTER 4. PUBLIC BODIES [NEW]

ARTICLE 1. MEETINGS

Sec.

- 10:4-1.** Declaration of public policy.
- 10:4-2.** Definitions.
- 10:4-3.** Admission to meetings of public bodies.
- 10:4-4.** Exceptions.
- 10:4-5.** Violations; official action voidable.

ARTICLE 1. MEETINGS

10:4-1. Declaration of public policy

The Legislature finds and declares it to be the public policy of this State to insure the right of the citizens of this State to attend meetings of public bodies, with certain exceptions, for the protection of the public interest. L.1960, c. 173, p. 714, § 1.

Section 6 of the 1960 act, as approved Jan. 9, 1961, provided that the act should take effect on the ninetieth day following its enactment.

Title of Act:

An Act concerning the right of citizens to attend meetings of public bodies. L.1960, c. 173, p. 714.

Library references

States 67.
C.J.S. States § 53, 66.

of proposed zoning enactments to planning board or of "Right to Know Law", notwithstanding lack of newspaper notice of meeting at which planning board had voted to recommend adoption of the ordinance. Tidewater Oil Co. v. Mayor and Council of Borough of Carteret. 80 N.J. Super. 283, 193 A.2d 412 (1963), cause remanded 84 N.J. Super. 525, 202 A.2d 865, affirmed 44 N.J. 338, 209 A.2d 105.

Appropriate implementation of "Right to Know Law" calls, generally, for Superior Court upon proper application to set aside any official action, within act, which is taken without compliance, and mere absence of bad faith or other impropriety on part of public body should not ordinarily move court to stay its hand. Wolf v. Zoning Bd. of Adjustment of Borough of Park Ridge, 79 N.J. Super. 546, 192 A.2d 305 (1963).

"Right to Know Law" does not prohibit closed conference meeting of public body at which no official action, as defined by act, takes place. Id.

2. Closed meetings

Where town council held public meeting concerning lease by town of realty to boys' club, but five councilmen then retired to room closed to public, and mayor and clerk did not join them, and thereafter one councilman came back to council chambers and announced to audience that lease had been tentatively approved, and

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1. In general

Resolution recommending granting of zoning variance was void for failure to comply with right to know law, where vote of board of adjustment was taken at executive meeting in absence of public and formal re-run of board's vote four months later in public did not constitute compliance with § 10:4-1 et seq. Kramer v. Board of Adjustment, Sea Girt, 80 N.J. Super. 454, 194 A.2d 26 (1963).

Adoption of borough zoning ordinance was not violative either of § 40:55-35 requiring submission

formal passage of resolution for lease was merely perfunctory re-run of action that five councilmen had determined to follow in closed room, there was a violation of Right to Know Law requiring that public shall be admitted to any meeting of a public body at which official action is taken. *Scott v. Town of Bloomfield*, 94 N.J. Super. 592, 229 A.2d 667 (1967), affirmed 98 N.J. Super. 321, 237 A.2d 297, appeal dismissed 52 N.J. 473,

246 A.2d 129.

Certain members of a board of education could hold a closed conference where no official action was taken at such conference, and fact such conference was held did not render action taken at a subsequent public meeting invalid. *Schults v. Board of Ed. of Teaneck Tp., Bergen County*, 86 N.J. Super. 29, 205 A.2d 762 (1965), affirmed 45 N.J. 2, 210 A.2d 762.

10:4-2 Definitions

“Public body” and “body” mean a commission, authority, board, council, committee and every other group of 2 or more persons organized under the law of this State to perform a public governmental function by official action. “Official action” means a determination made by vote. L.1960, c. 173, p. 715, § 2.

Library references

States 45.
C.J.S. States § 52, 66.

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1. In general

“Right to Know Law” does not prohibit closed conference meeting of public body at which no

official action, as defined by act, takes place. *Wolf v. Zoning Bd. of Adjustment of Borough of Park Ridge*, 79 N.J. Super. 546, 192 A.2d 305 (1963).

2. Construction and application

Board of adjustment is a “public body” within “Right to Know Law”. *Wolf v. Zoning Bd. of Adjustment of Borough of Park Ridge*, 79 N.J. Super. 546, 192 A.2d 305 (1963).

10:4-3. Admission to meetings of public bodies

The public shall be admitted to any meeting of a public body at which official action is taken. L.1960, c. 173, p. 715, § 3.

Library references

State 67.
C.J.S. States § 58, 66.

1. In general

Where town council held public meeting concerning lease by town of reality to boys' club, but five councilmen then retired to room closed to public, and mayor and clerk did not join them, and thereafter one councilman came back to council chambers and announced to audience that lease had been tentatively approved, and formal passage of resolution for lease was merely perfunctory re-run of action that five councilmen had determined to follow in closed room, there was a violation of Right to Know Law requiring

that public shall be admitted to any meeting of a public body at which official action is taken. *Scott v. Town of Bloomfield*, 94 N.J. Super. 592, 229 A.2d 667 (1967), affirmed 98 N.J. Super. 321, 237 A.2d 297, appeal dismissed 52 N.J. 473, 246, A.2d 129.

Resolution recommending granting of zoning variance was void for failure to comply with right to know law, where vote of board of adjustment was taken at executive meeting in absence of public and formal re-run of board's vote four months later in public did not constitute compliance with statute. *Kramer v. Board of Adjustment, Sea Girt*. 80 N.J. Super. 454, 194 A.2d 26 (1963).

10:4-4. Exceptions

The foregoing shall not apply (a) where contrary provision is made by law, (b) where its application would impair a right to receive funds from the national government (c) where the law provides that a record or report of official action of the type in question is or may be rendered confidential (d) in the case of official action relating only to the procedure to be followed in the conduct of a meeting, (e) to the office of the Governor or the Judicial or Legislative branches of State Government, (f) to the State Parole Board in any capacity or to any other public body to the extent that it acts in a parole capacity, (g) in the case of

official action authorizing the investment of public funds, investigations or other activities where, and only where the accomplishment of the object of the official action is likely to be materially prejudiced if the official action is made publicly known in full prior to the accomplishment of its object, and provided that, prior to taking any such official action the public body shall have adopted a resolution of the body at a meeting of the body to which the public is admitted, (1) stating the general nature of the contemplated action, (2) determining that accomplishment of the object of the contemplated action is likely to be materially prejudiced if that action is made publicly known prior to the accomplishment of its object, and (3) stating in general terms the reasons why material prejudice would be likely to result if the contemplated action were made publicly known in full prior to the accomplishment of its object. L.1960, c. 173, p. 715, § 4.

10:4-5. Violations; official action voidable

Official action taken in violation of the requirements of this act shall be voidable in a proceeding in the Superior Court. L.1960, c. 173, p. 716, § 5.

Library references

States 67.
C.J.S. States § 58, 66.

1. In general

Where town council held public meeting concerning lease by town of realty to boys' club, but five councilmen then retired to room closed to public, and mayor and clerk did not join them, and thereafter one councilman came back to council chambers and announced to audience that lease had been tentatively approved, and formal passage of resolution for lease was merely perfunctory re-run of action that five councilmen had determined to follow in closed room, there was a violation of Right to Know Law requiring

that public shall be admitted to any meeting of a public body at which official action is taken. *Scott v. Town of Bloomfield*, 94 N.J. Super. 592, 229 A.2d 667 (1967), affirmed 98 N.J. Super. 321, 237 A.2d 297, appeal dismissed 52 N.J. 473, 246 A.2d 129.

Resolution recommending granting of zoning variance was void for failure to comply with right to know law, where vote of board of adjustment was taken at executive meeting in absence of public and formal re-run of board's vote four months later in public did not constitute compliance with statute. *Kramer v. Board of Adjustment, Sea Girt*. 80 N.J. Super. 454, 194 A.2d 26 (1963).

EXECUTIVE ORDER NO. 7
ISSUED BY GOV. RICHARD J. HUGHES

WHEREAS, Chapter 73, P.L. 1963, finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State for the protection of the public interests, except as otherwise provided in said law; and

WHEREAS, Said law provides that all records which are required by law to be made, maintained or kept on file by State and local governmental agencies are to be deemed to be public records, subject to inspection and examination and available for copying, pursuant to said law; and

WHEREAS, Said law provides that records which would otherwise be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963, may be excluded therefrom by Executive Order of the Governor or by any regulation promulgated under the authority of any Executive Order of the Governor; and

WHEREAS, It is in the public interest to exercise the authority granted to the Governor under the provisions of Chapter 73, P.L. 1963;

NOW, THEREFORE, I, RICHARD J. HUGHES, Governor of the State of New Jersey, by virtue of the authority vested in me by Chapter 73, P.L. 1963, do hereby order and direct:

1. (a) The following State and local officials are hereby authorized and empowered to adopt and promulgate, from time to time, regulations setting forth which records under their jurisdiction shall not be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963:

- (1) The head or principal executive of each principal department of State government with respect to the records of his department and any agencies, authorities and commissions assigned or allocated to such department;
- (2) The Board of Chosen Freeholders in each of the counties of the State with respect to the records of the county and any agencies, authorities and commissions created by said board;
- (3) The governing body in each of the municipalities of the State with respect to the records of the municipality and any agencies, authorities or commissions created by said governing body;
- (4) The county superintendent of schools in each of the counties of the State with respect to the records of his office and any schools and other institutions under his care and supervision; and
- (5) The superintendent of schools of any school district of the State

with respect to the records of the school district and any schools or other institutions under the care and supervision of the school district.

(b) Any regulation adopted and promulgated pursuant to the provisions of this Executive Order shall be published at least once in a newspaper of general circulation in the State or in the applicable county, as the case may be, and a copy of any such regulation shall be placed on file in the Secretary of State's Office. No regulation shall be effective until it has been so published and filed.

2. All records, other than records which are the subject of a regulation adopted and promulgated pursuant to the provisions of section 2 hereof or otherwise excluded under and pursuant to the provisions of Chapter 73, P.L. 1963, which specifically are required by statute to be made, maintained or kept by any State or local governmental agency shall be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963. All other records of such State and local governmental agencies shall not be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963, but such records shall be subject to such other provisions of law and regulations as shall be applicable thereto and this provision shall in no way be interpreted as to preclude the appropriate State or local officials from using or making available such records for any of the purposes for which such records are made, maintained or kept.

3. For the purpose of allowing the officers herein empowered to adopt and promulgate regulations the opportunity to take such action in an orderly manner, all records which are deemed to be public records, subject to inspection and examination and available for copying, under the provisions of section 2 of this Executive Order shall not be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963, until August 1, 1963.

4. This Executive Order shall take effect immediately.

[SEAL] Given, under my hand and seal this 21st day of June, in the year of Our Lord, one thousand, nine hundred and sixty-three, and of the Independence of the United States, the one hundred and eighty-eighth.

/s/ RICHARD J. HUGHES,
Governor.

Attest:

/s/ LAWRENCE BILDER,
Acting Secretary to the Governor.

**EXECUTIVE ORDER NO. 8
ISSUED BY GOV. RICHARD J. HUGHES**

WHEREAS, Executive Order No. 7 authorized certain State and local governmental officials to adopt and promulgate regulations setting forth which records under their jurisdiction were not to be deemed public records, subject to inspection and examination and available for copying pursuant to the provisions of Chapter 73, P.L. 1963; and

WHEREAS, Said Executive Order provided that, for the purpose of allowing such officials the opportunity to adopt and promulgate regulations in an orderly manner, all records specified in section 2 of such Order which would otherwise be deemed to be public records under and pursuant to Chapter 73, P.L. 1963, should not be subject to inspection and examination and available for copying pursuant to said Chapter 73 only until August 1, 1963; and

WHEREAS, Despite such extension of time, numerous officials and members of the press and the general public have expressed concern over the difficulty of establishing which records are to be public records under the provisions of Chapter 73, P.L. 1963; and

WHEREAS, Only 12 municipalities and two departments of State Government have adopted regulations pursuant to the provisions of Executive Order No. 7 as of this date; and

WHEREAS, The New Jersey Press Association, a prime leader in the effort to achieve passage of Chapter 73, P.L. 1963, among others, has requested additional time so as to be afforded an opportunity to review and object to any exceptions to the public's right to inspect, examine and copy records that might be contemplated in regulations proposed to be adopted under the authority of Executive Order No. 7; and

WHEREAS, Similar requests for additional time have been received from numerous local government officials for the purpose of giving all interested parties an opportunity to review and discuss the application of Chapter 73, and to propose appropriate regulations which may, under the provisions of Chapter 73, be promulgated pursuant to Executive Order No. 7; and

WHEREAS, It is my opinion that an additional period of time could be beneficially utilized to carefully scrutinize exceptions to the public's right to know which may be proposed and to fully consider the need to balance the right to know of the public in a democracy against the risk of unintentional harm or injustice to individuals that might be occasioned by full and indiscriminate exposure of certain records containing data of a sensitive or personal nature without regard to the motivation of those seeking to inspect or copy; and

WHEREAS, The public's right to examine and copy public records, which presently exists under the common law and by statute, remains inviolate even without the benefit of the provisions of Chapter 73, P.L. 1963;

NOW, THEREFORE, I, RICHARD J. HUGHES, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by Chapter 73, P.L. 1963, do hereby order and direct:

1. All records which would otherwise be deemed to be public records, subject to inspection and examination and available for copying under the provisions of Chapter 73, P.L. 1963, shall not be deemed to be public records pursuant to said Chapter 73 until October 1, 1963.
2. No regulation heretofore or hereafter adopted and promulgated by any State or local official pursuant to the provisions of Executive Order No. 7, or any amendment or supplement thereto, shall be of any force and effect until October 1, 1963. The application and effect of any such regulation upon public records may be limited, at any time, by an executive statement, filed by the Governor with the Secretary of State's office, setting forth the nature and extent of the limitations imposed upon such regulations. A copy of such executive statement shall be delivered in person or sent by certified or registered mail to the appropriate State or local official.
3. This Executive Order and Executive Order No. 7 shall in no way be interpreted to replace or affect the right that the general public has, by common law, judicial decision, statute or otherwise, to examine and copy public records and shall be limited in its application to the provisions of Chapter 73, P.L. 1963.
4. Any provisions of Executive Order No. 7 which are inconsistent herewith are hereby revoked and vacated.
5. This Executive Order shall take effect immediately.

[SEAL] Given, under my hand and seal this 1st day of August in the year of Our Lord, one thousand, nine hundred and sixty-three, and of the Independence of the United States, the one hundred and eighty-eighth.

/s/ RICHARD J. HUGHES,
Governor.

Attest:

/s/ LAWRENCE BILDER,
Acting Secretary to the Governor.

**EXECUTIVE ORDER NO. 9
ISSUED BY GOV. RICHARD J. HUGHES**

WHEREAS, Chapter 73, P.L. 1963, finds and declares it to be the public policy of this State that public records shall be readily accessible for examination by the citizens of this State for the protection of the public interest except as otherwise provided in said law; and

WHEREAS, Said Chapter 73 provides that all records which are required by law to be made, maintained or kept on file by State and local governmental agencies are to be deemed to be public records, subject to inspection and examination and available for copying, pursuant to said law; and

WHEREAS, Said Chapter 73 provides that records which would otherwise be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of said law, may be excluded therefrom by Executive Order of the Governor or by any regulation promulgated under the authority of any Executive Order of the Governor; and

WHEREAS, Executive Orders Nos. 7 and 8 authorize certain State and local governmental officials to adopt and promulgate regulations specifying which public records under their jurisdiction are not to be subject to inspection and examination and available for copying pursuant to said Chapter 73; and

WHEREAS, As of this date, only 65 local governmental units have adopted and promulgated regulations under the authority conferred upon them by said Executive Orders; and

WHEREAS, Review and examination of these regulations demonstrates a lack of uniformity with respect to the treatment proposed to be accorded public records; and

WHEREAS, The public interest requires that the public records which are excluded from the application of Chapter 73 be excluded on a uniform and Statewide basis with full regard for the need to balance the right, in a democracy, of the public to know, against the risk of unintentional harm or injustice to individuals that might be occasioned by indiscriminate exposure of certain records containing data of a sensitive or personal nature without regard to the motivation or justification of those seeking to inspect or copy records; and

WHEREAS, Chapter 73 represents a right supplemental to the existing right of the public to examine and copy public records, which right has been established under the common law and by statute and remains inviolate even without the benefit of the provisions of said Chapter 73; and

WHEREAS, Some limitation upon the otherwise unqualified and unrestricted right to examine and copy records provided by Chapter 73 is essential and not detrimental to the public interest since the existing common law and statutory right to examine records remains upon the satisfaction of the requirements imposed by such laws;

NOW, THEREFORE, I, RICHARD J. HUGHES, Governor of the State of New Jersey, by virtue of the authority vested in me by Chapter 73, P.L. 1963, do hereby order and direct:

1. All records, other than records set forth in section 3 hereof or records the subject of a regulation adopted and promulgated pursuant to the provisions of section 2 hereof or otherwise excluded under and pursuant to the provisions of Chapter 73, P.L. 1963, which specifically are required by statute to be made, maintained or kept by any State or local governmental agency shall be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963. All other records of such State and local governmental agencies shall not be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963, but such records shall remain subject to such other provisions of law and regulations as shall be applicable thereto and this provision shall in no way be interpreted as to preclude the appropriate State or local officials from (i) using or making available such records for any of the purposes for which such records are made, maintained or kept or (ii) permitting any person who demonstrates a legitimate reason for wishing to do so to examine such records where such official shall find it not contrary to the public interest or an undue interference with the operation of the office to permit such an examination.

2. (a) The head or principal executive of each principal department of State government, with respect to the records of his department and any agencies, authorities and commissions assigned or allocated to such department or under the supervision or regulation of such department, is hereby authorized and empowered to adopt and promulgate, from time to time, regulations setting forth which records under his jurisdiction shall not be deemed to be public records, subject to inspection and examination and available for copying, pursuant to the provisions of Chapter 73, P.L. 1963.

(b) The text of any regulation adopted after October 1, 1963 pursuant to the provisions of this Executive Order shall be published at least 15 days prior to the proposed effective date of such regulation in at least 10 newspapers published in the State and a copy of any such regulation, with the approval of the Governor endorsed thereon, shall be placed on file in the Office of the Secretary of State. No such regulation shall be effective until it has been so published, approved and filed.

(c) Any regulation which has been heretofore adopted and promulgated by the head or principal executive of a principal department of the State Government pursuant to the provisions of Executive Orders Nos. 7 or 8 shall remain in force and effect until modified or rescinded in accordance with the provisions of this Executive Order.

(d) Any regulation which shall be adopted by the head or principal executive of a principal department of the State government on or before October 1, 1963 shall be fully effective, without the necessity of publication, if a copy of such regulation, with the approval of the Governor endorsed thereon, has been placed on file in the Office of the Secretary of State on or before October 1, 1963.

3. The following records shall not be deemed to be public records subject to inspection and examination and available for copying pursuant to the provisions of Chapter 73, P.L. 1963:

(a) Questions on examinations required to be conducted by any State or local governmental agency;

(b) Personnel and pension records which are required to be made, maintained or kept by any State or local governmental agency;

(c) Records concerning morbidity, mortality and reportable diseases of named persons required to be made, maintained or kept by any State or local governmental agency;

(d) Records which are required to be made, maintained or kept by any State or local governmental agency which would disclose information concerning illegitimacy;

(e) Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency;

(f) Criminal records required to be made, maintained and kept pursuant to the provisions of R.S. 53:1-20.1 and R.S. 53:1-20.2;

(g) Personal property tax returns required to be filed under the provisions of Chapter 4 of Title 54 of the Revised Statutes; and

(h) Records relating to petitions for executive clemency.

4. This Executive Order shall in no way be interpreted to replace or affect the right that the general public has, by common law, judicial decision, statute or otherwise, to examine and copy public records and shall be limited in its application to the provisions of Chapter 73, P.L. 1963.

5. Executive Orders Nos. 7 and 8 are hereby rescinded and any regulations adopted and promulgated thereunder shall be null and void except to the extent provided in Section 2 of this Executive Order.

6. This section and Section 2 of this Executive Order shall take effect immediately and the remainder of the Executive Order shall take effect on October 1, 1963.

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[SEAL] Given, under my hand and seal this 30th day of September in the year of Our Lord, one thousand, nine hundred and sixty-three, and in the Independence of the United States, the one hundred and eighty-eighth.

/s/ RICHARD J. HUGHES
Governor.

Attest:

/s/ LAWRENCE BILDER,
Acting Secretary to the Governor.

CHAPTER 4

PROPOSED PUBLIC INFORMATION ACT OF 1974

AN ACT to require public disclosure of information, records, and documents by government instrumentalities and agencies and repealing the "Right to Know Law" (Ch. 75, Laws of 1963).

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1-1. Short Title

This act shall be known as the "Public Information Act of 1974."

1-2. Declaration of Intent

The Legislature recognizes that nothing so diminishes democracy as the pursuit of secrecy and that if public confidence in government is to be restored then it is necessary to achieve the maximum possible disclosure of governmental affairs. The Legislature also recognizes that the disclosure of any and all information possessed by government would not only inhibit the functions of government but would unnecessarily invade the rights of privacy possessed by all citizens; for the public interest is served not only by protecting the right to know but also by guaranteeing that the individual's privacy and integrity in his personal affairs shall remain inviolate. Consequently it is hereby declared to be the public policy of this State to secure the public's right to know to the maximum extent permitted within the limitations expressed in this act. It is therefore the Legislature's intention that this act should be construed in accordance with the principle of providing maximum access to government-held information without impairing the functions of government or the privacy of individuals.

1-3. Definitions

"Advisory Committee" shall mean any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof, which is

- (i) established by statute or reorganization plan, or
- (ii) established or utilized by one or more government instrumentalities,

in the interest of obtaining advice or recommendations for a government instrumentality, except that such term excludes any committee which is composed wholly of full-time officers or employees of a government instrumentality.

“Consultant” shall mean any person or persons who contract with any government instrumentality to investigate or report on a designated topic, except that such term excludes full-time officers or employees of a government instrumentality.

“Custodian” shall mean any authorized person having custody or immediate control of the information in question including but not limited to the central information officer provided for in section 1-8.

“Decision” shall mean any duly authorized action taken by a government instrumentality or its employees which affects the rights, duties, obligations, privileges or benefits of the public or any member thereof. It shall include but not be limited to policy decisions, resolution of contested cases and the promulgation of rules and regulations.

“Government Instrumentality” shall mean the State and any county, municipality, district, public authority, public agency and any other political subdivision or public body in the State, any official or employee thereof, and any program receiving more than half of its funds from public revenue.

“Information” shall mean all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.

“Law” shall mean a constitutional provision, statute, resolution of either or both Houses of the Legislature, Gubernatorial executive order, rule of court, regulation of a department in the executive branch of state government promulgated under the authority of a Gubernatorial executive order, federal rule, regulation or order, and the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

“Memorandum” shall mean all internal communications, notes, drafts, worksheets, letters and similar materials prepared in the ordinary course of government business.

“Person” shall mean any natural person, corporation, partnership, firm or association.

“Person in Interest” shall mean the person who is the subject of information or any representative designated by said person, except that if the subject of the information is under legal disability, the term “Person in Interest” shall mean and include his parent or duly appointed legal representative.

“State” shall mean the State, including the Legislature, Judiciary and Governor’s Office, and any office, department, division, bureau, board,

commission or agency of the State, and any official or employee thereof.

1-4. Right to Inspect, Examine and Copy Information

Except as otherwise provided by law, all persons shall have the right to inspect, examine, copy and obtain a copy of any information that is made, maintained or kept by or for any government instrumentality for use in the exercise of functions relating to the conduct of the public's business.

1-5. Common Law Interest

This act is not intended to abolish the right of a citizen to obtain government information at common law provided that the release of information on the basis of a common law right to know should be consistent with the policies enunciated in this act.

1-6. Court Rules and Subpoena Power

This act is not intended to affect any of the rules of procedure of the New Jersey or Federal courts, nor is it intended to affect the acquisition of information through the lawful exercise of the subpoena power.

1-7. Privileges

Nothing in this act shall be construed to impair any privileges recognized by law provided that any such privileges possessed by a government instrumentality shall be construed in accordance with the provisions of this act.

1-8. Duty of Public Employees; Central Information Officer

(1) It shall be the duty of all employees of a government instrumentality to assure that all requests for information are processed as promptly as possible pursuant to the provisions of this act.

(2) Each department in the executive branch of state government shall appoint a central information officer to whom requests for information can be presented and who shall be primarily responsible for the department's compliance with the provisions of this act.

1-9. Processing Requests for Information

(1) Whenever a custodian receives a request to inspect, examine, copy or obtain a copy of information, he shall promptly comply with such request. If the requested information cannot be provided pursuant to sections 1-14, 1-15 or 1-17 of this act, then the custodian shall promptly notify the requester, in writing if requested, of the grounds for the denial, including a citation of the statute, rule or regulation under which access is being denied and the requester's right to appeal and to whom such appeal may be made. If the requested information cannot be provided because it is temporarily unavailable due to its being currently in use or in storage, then the custodian shall promptly notify the requester, in writing if requested, of this fact and

of the time and place at which the information will be made available. If, in the opinion of the custodian, the request to inspect, examine, copy or obtain a copy of information is unreasonable because it is overly burdensome in that it would clearly and substantially disrupt agency operations, then the custodian shall promptly notify the requester, in writing if requested, of this fact, provided that the custodian shall only deny access to such information after attempting to reach a reasonable solution with the requester accommodating the interests of both parties.

(2) Whenever any government employee, other than the custodian, receives a request for information, he shall make every reasonable effort to direct the requester to the proper custodian of such information.

(3) The denial of any request for information shall be given to the requester within a maximum of 20 working days from the receipt of the request.

(4) Whenever a request made to a custodian is not properly complied with or the notification requested by this section is not promptly given then the person making such request shall have the right to appeal as provided by section 1-20 of this act.

1-10. Manner and Time of Inspection and Copying

The inspection, examination and copying of information under this act shall be accomplished during the regular business hours of the government instrumentality having immediate control of such information. Every person shall have the right to copy information by hand under appropriate supervision and, consistent with a need to preserve the original information, every person shall have the right to purchase copies from the custodian or use his own duplicating process to obtain copies. A person shall be allowed to use his own duplicating process only when the custodian finds that there is no risk of damage to, or mutilation of, or alteration of, such information and that it will not be incompatible with the economic and efficient operation of the office and the transaction of public business therein.

1-11. Fees

There is hereby created in the Department of State an inter-governmental committee composed of the members of the State Records Committee established by *N.J.S.A.* 47:3-20 and the Executive Director of the Office of Fiscal Affairs, the Administrative Director of the Courts and the Director of the Division of Administrative Procedure or their respective designees. It shall be the duty of this committee to establish uniform fee schedules for use by each government instrumentality when providing public information. These schedules when adopted shall have the force and effect of law and shall be enforced pursuant to the provisions of section 1-20 of this act.

1-12. Annual Reports

Every central information officer and every local government instrumentality shall prepare and submit to the Public Information Commission, by January 31st of each year, an annual report describing each request for information that has been denied with the reasons for such denial and any problems that have been encountered under this act in the preceding calendar year.

1-13. Creation of Records

This act shall not impose any obligation to compile or create information not already in existence at the time of the request. Information is not required to be created by compiling selected items from the files. Such data as lists, ratios, proportions, percentages, per capita, frequency distributions, trends, correlations and comparisons shall be made available only if such data has already been compiled. This section shall not, however, prevent a member of the public from compiling such information provided that the request to inspect, examine, copy or obtain a copy of information conforms to the other provisions of this act.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

(1) (a) Information contained in a memorandum prepared by an employee of government if its disclosure would be injurious to the consultative functions of government. Whenever such a memorandum contains factual or statistical information, this information shall be disclosed if it can be readily extracted from the memorandum without jeopardizing the meaning and confidentiality of the remaining sections. Nothing herein shall be construed to require the disclosure of information contained in a memorandum during the course of preparation.

(b) Any memorandum described in (a) shall not be withheld from disclosure if

- (i) the memorandum represents the sole basis for a decision of government, or
- (ii) the contents have been incorporated by reference in a decision of government, or
- (iii) it is a report or record of a safety or health investigation or inspection.

(2) Reports prepared for any government instrumentality by independent consultants or advisory committees until such instrumentality can

either approve, reject, modify or implement the contents of the final report *provided* that these reports only be withheld at the direction of the head of the government instrumentality after a finding by him that the disclosure of the report would materially prejudice the accomplishment of its objective and provided further that no report be withheld for more than one year from the date on which the final report was submitted to the instrumentality.

(3) Information that has been received from, or transmitted to, a member of the public unless it is information the sender is required by law to transmit. For the purposes of this subsection, "law" shall mean a constitutional provision, statute, executive order, ordinance, resolution, rule or regulation.

(4) Information that is part of an investigatory record compiled for law enforcement purposes except that this section shall not apply to (i) scientific tests, reports or data or (ii) reports or records of safety or health investigations or inspections.

(5) Information pertaining to pending litigation to which a government instrumentality is a party or to claims made pursuant to *N.J.S.A. 59:1-1 et seq.*, until such litigation or claim has been finally adjudicated or otherwise settled according to law.

(6) Internal rules and internal practices not required to be made public by *N.J.S.A. 52:14B-3* if disclosure would unduly impede the functioning of the government instrumentality.

(7) Information received from other states or from the federal government pursuant to an agreement that the information be kept confidential.

(8) The contents of real estate appraisals or other information relating to the possible acquisition of property by a government instrumentality if the disclosure would be likely to benefit a party whose interests are adverse to those of the general community and only until such time as title to the property or property interest has passed to such instrumentality except that where required by law the contents of any appraisals shall be made available to the owner of the property.

(9) Test questions, scoring keys, grades of individuals and other examination data pertaining to the administration of a licensing, employment or academic examination except that after conducting and grading such examination, a person in interest shall have the right to inspect, but not copy, his examination, his answers, transcripts of his oral examination, and his scores. Nothing in this subsection, however, shall prohibit or affect the disclosure of the overall results of any examination.

(10) Information on individual students except that such information shall not be withheld from a person in interest or a person duly authorized

by this State or the United States to inspect such records in connection with his official duties.

- (11) Individual records of applicants or of recipients of government scholarships, grants, loans, public assistance or other financial or rehabilitative assistance programs except that such records shall not be withheld from a person in interest or a person duly authorized by this State or the
- United States to inspect such records in connection with his official duties.

(12) (a) Information relating to the resolution of labor problems of a government instrumentality, through negotiation, mediation or otherwise, if the disclosure of such information would materially prejudice governmental action, provided that no such information shall be withheld after resolution of the problem.

(b) Information relating to the resolution of labor problems in the private sector through negotiation, mediation or otherwise.

1-15. Information That Shall Be Withheld From Disclosure

Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, a government instrumentality shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties:

(1) Information relating to the mental or physical condition, character, personality or family history of a person as well as any similar information that would constitute a clearly unwarranted invasion of personal privacy;

(2) Personnel or pension records of an individual *provided however* that the following shall be public notwithstanding any other provision of this act —

(a) an individual's name, title, position, salary, payroll record, length of service in the government instrumentality and in the government, date of separation from government service and the reason therefore, and the amount and type of pension he is receiving;

(b) Information which discloses conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released.

(3) Commercial or financial information customarily considered confidential and the disclosure of which would constitute a clearly unwarranted invasion of privacy or result in placing the person submitting it at a substantial and unfair competitive disadvantage.

1-16. Deletion of Exempt Information

It shall be the responsibility of a government instrumentality to delete where practical identifying details or other exempt information in order to provide maximum public disclosure.

1-17. Commercial Use of Information

(1) Except as otherwise provided by law and subject to subsection (2) no information shall be provided to or allowed to be compiled from government files by or on behalf of any person who

(a) seeks such information for the purpose of selling it, or furnishing it for consideration, to others, or

(b) seeks to use such information for the purpose of commercial solicitation for profit.

(2) The information described in subsection (1) may be provided to the persons therein described only by the head of a government instrumentality on the terms and conditions prescribed by him. He may release this information only when he finds that such disclosure

(a) is consistent with the other provisions of this act,

(b) would assist in the performance of the assigned duties of the government instrumentality, and

(c) would provide a benefit to the public or members thereof which will substantially outweigh the resulting interference with individual privacy.

1-18. Public Information Commission Established

(1) There is established in the Department of Law and Public Safety a Public Information Commission which shall supervise and coordinate the implementation of this act.

(2) Membership of the Public Information Commission shall consist of the Director of the Division of Administrative Procedure, the State Archivist, a representative of the Governor's Office, the Commissioner of Institutions and Agencies, a representative of the press to be appointed by the Governor from a list of candidates prepared by the New Jersey Press Association, a member of the League of Women Voters to be appointed by the Governor from a list of candidates prepared by the League of Women Voters, the Superintendent of State Police, the Chief Executive Officer of the New Jersey State League of Municipalities and of the New Jersey Association of Chosen Freeholders, and two public members to be appointed by the Governor. Each member, other than the two public members, may appoint a designee to act in his place.

(3) Members of the Public Information Commission who are not *ex officio* shall serve at the pleasure of the Governor during the term of office of the Governor appointing him and until his successor is appointed and qualified. Each member of the Commission shall serve without compensation but shall be entitled to be reimbursed for all actual and necessary expenses incurred in the performance of his duties.

(4) The Director of the Division of Administrative Procedure shall be the Chairman of the Public Information Commission. The Chairman shall preside over the meetings and business of the Commission. A Vice-Chairman shall be elected annually by the Commission from its membership. In the absence of the Chairman, the Vice-Chairman shall have all the powers and duties of the Chairman. A quorum shall be sufficient to conduct the business of the Commission and emergent matters may be resolved by the Chairman with the consent of a majority of the remaining members of the Commission.

(5) The Attorney General shall act as legal advisor and counsel to the Public Information Commission.

(6) The Public Information Commission may, within the limits of funds appropriated or otherwise made available to it for the purpose, employ such other professional, technical, clerical, or other assistants, excepting legal counsel, and incur such expenses as may be necessary for the performance of its duties.

(7) The Public Information Commission, in the performance of its assigned duties under this act, shall be exempt from sections 9 and 10 of the Administrative Procedure Act (*N.J.S.A.* 52:14B-9 to 10).

1-19. Powers and Duties of the Commission

(1) The Public Information Commission shall have the following duties pursuant to the provisions of this act:

(a) To prepare and supplement guidelines pertaining to the disclosure of information under this act and make such guidelines available in pamphlet form or otherwise to the public and to the government instrumentalities throughout this State;

(b) To consider and determine all appeals taken by persons denied information by officials in the executive branch of state government, other than those within the office of the Governor, and, on its own initiative, review any action taken by said officials in which access to information is denied;

(c) To report to the Governor and the Legislature no later than June 30th of each year concerning the operation of this act and any recommendations for legislative changes;

- (d) To review and comment upon any law presently in force or hereinafter enacted which affects the disclosure of government-held information;
 - (e) To coordinate its functions with those of the Destruction of Public Records Committee established in *N.J.S.A. 47:3-8.1 et seq.*
- (2) The Public Information Commission, in order to perform its duties pursuant to the provisions of this act, shall have the power:
- (a) To initiate and conduct investigations;
 - (b) To hold hearings where appropriate;
 - (c) To compel the attendance of witnesses and the production before it of such information as it may deem relevant and proper;
 - (d) To administer oaths and examine witnesses under oath;
 - (e) In connection with appeals, to determine the matter *de novo* and to order the disclosure under appropriate terms and conditions of requested information when it finds that the withholding of such information is contrary to the provisions of this act;
 - (f) To seek and obtain in a summary action in the Superior Court an order mandating compliance with any decision of the Commission made pursuant to the provisions of this act;
 - (g) To adopt such rules and regulations as will guarantee the expeditious and effective implementation of the provisions of this act in the executive branch of State government; and
 - (h) To do all acts and things necessary and convenient to carry out the powers and duties herein expressly provided to the Commission under this act.

1-20. Enforcement Proceedings; Costs and Attorneys Fees

(1) Any person who has been denied for any reason the right to inspect, copy or obtain a copy of any information as provided in this act by any official of the executive branch of state government, other than those within the office of the Governor, shall have a right to appeal that determination to the Public Information Commission established in section 1-18 of this act. The burden shall be upon the government instrumentality to sustain the withholding of information. Such appeal shall not be considered a prerequisite to pursuing, or to be in lieu of, any other remedy provided in this section.

(2) Any person who has been denied for any reason the right to inspect, copy or obtain a copy of any information as provided in this act may apply to the Superior Court of New Jersey by a proceeding in lieu of prerogative writ for an order requiring the custodian of the information to afford inspection, the right to copy or to obtain a copy thereof.

(3) Whenever a proceeding is brought under subsection (2), the court shall determine the matter *de novo* and may proceed in summary manner. The burden shall be upon the government instrumentality to sustain the withholding of information. If the court finds that the information has been improperly withheld from the plaintiff, it may order the information to be made accessible to the plaintiff at the time and in the manner that the court deems appropriate. Except as to causes the court considers of greater importance, proceedings authorized by this section shall take precedence on the docket over all other causes and shall be assigned for hearing at the earliest practicable date and expedited in every way.

(4) Notwithstanding that information is required to be public under this act, a custodian may, if he concludes that the disclosure of this information would do substantial injury to the public interest, apply to the Superior Court of New Jersey for an order permitting him to withhold such information. Hearing on such application shall be held at the earliest practical time. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. In such action, the burden of proof shall be upon the custodian. The person seeking permission to examine the information shall have notice of said hearing served upon him in the manner provided for service of process by the New Jersey Rules of Court and shall have the right to appear and be heard.

(5) Where the government instrumentality does not prevail in any court proceeding brought under this act, the court may assess against such instrumentality attorneys fees and other litigation costs reasonably incurred by the opposing party.

1-21. Penalty

Any government official or employee who shall willfully engage in a continuous and repetitive pattern of violating this act shall be subject to removal from his office or employment after hearing in court and upon application by an aggrieved citizen.

1-22. Appropriation

There is hereby appropriated to the Public Information Commission the sum of \$30,000 for use during the fiscal year ending June 30, 1974.

1-23. Severability

If any clause, sentence, subdivision, paragraph, section or part of this act be adjudged to be unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, subdivision, paragraph, section or part thereof directly involved in the case in which said judgment shall have been rendered.

1-24. Effective Date Provision

This act shall take effect 90 days from the date of its enactment into law.

1-25. Repealer

N.J.S.A. 47:1A-1 through -4 is hereby repealed.

CHAPTER 5

PROPOSED PUBLIC INFORMATION ACT WITH COMMENTS

AN ACT to require public disclosure of information, records, and documents by government instrumentalities and agencies and repealing the "Right to Know Law" (Ch. 75, Laws of 1963).

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1-1. Short Title

This act shall be known as the "Public Information Act of 1974."

1-2. Declaration of Intent

The Legislature recognizes that nothing so diminishes democracy as the pursuit of secrecy and that if public confidence in government is to be restored then it is necessary to achieve the maximum possible disclosure of governmental affairs. The Legislature also recognizes that the disclosure of any and all information possessed by government would not only inhibit the functions of government but would unnecessarily invade the rights of privacy possessed by all citizens; for the public interest is served not only by protecting the right to know but also by guaranteeing that the individual's privacy and integrity in his personal affairs shall remain inviolate. Consequently it is hereby declared to be the public policy of this State to secure the public's right to know to the maximum extent permitted within the limitations expressed in this act. It is therefore the Legislature's intention that this act should be construed in accordance with the principle of providing maximum access to government-held information without impairing the functions of government or the privacy of individuals.

1-3. Definitions

"Advisory Committee" shall mean any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof, which is

(i) established by statute or reorganization plan, or

(ii) established or utilized by one or more government instrumentalities, in the interest of obtaining advice or recommendations for a government instrumentality, except that such term excludes any committee which is composed wholly of full-time officers or employees of a government instrumentality.

"Consultant" shall mean any person or persons who contract with any

government instrumentality to investigate or report on a designated topic, except that such term excludes full-time officers or employees of a government instrumentality.

“Custodian” shall mean any authorized person having custody or immediate control of the information in question including but not limited to the central information officer provided for in section 1-8.

“Decision” shall mean any duly authorized action taken by a government instrumentality or its employees which affects the rights, duties, obligations, privileges or benefits of the public or any member thereof. It shall include but not be limited to policy decisions, resolution of contested cases and the promulgation of rules and regulations.

“Government Instrumentality” shall mean the State and any county, municipality, district, public authority, public agency and any other political subdivision or public body in the State, any official or employee thereof, and any program receiving more than half of its funds from public revenue.

“Information” shall mean all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.

“Law” shall mean a constitutional provision, statute, resolution of either or both Houses of the Legislature, Gubernatorial executive order, rule of court, regulation of a department in the executive branch of state government promulgated under the authority of a Gubernatorial executive order, federal rule, regulation or order, and the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

“Memorandum” shall mean all internal communications, notes, drafts, worksheets, letters and similar materials prepared in the ordinary course of government business.

“Person” shall mean any natural person, corporation, partnership, firm or association.

“Person in Interest” shall mean the person who is the subject of information or any representative designated by said person, except that if the subject of the information is under legal disability, the term “Person in Interest” shall mean and include his parent or duly appointed legal representative.

“State” shall mean the State, including the Legislature, Judiciary and Governor’s Office, and any office, department, division, bureau, board, commission or agency of the State, and any official or employee thereof.

COMMENT

The definition of "Advisory Committee" establishes the scope of § 1-14 (2) which allows a government instrumentality, at the direction of its head, to withhold reports of advisory committees for one year after their submission. As defined in this section, the essence of an advisory committee is first, that its duty is to give advice or recommendations to a government instrumentality. It must be established or utilized as an advisory group which studies, analyzes, and gives its opinion to a government instrumentality on designated topics. Under this definition, a body is not considered an "Advisory Committee" if it has the power to make its findings operational, that is, if it can implement its recommendations by giving them the force and effect of law. The second essential feature of an advisory committee is that it cannot be composed totally of full-time employees of government, it must also have private individuals among its membership. The purpose of this requirement is that section 1-14 (2) is aimed at independent advisory bodies and not at committees composed of staff members who have the duty of advising government officials. Besides these two requirements, the definition also seeks to make the name of the committee insignificant. Whether such a committee is called a committee, board, commission, council, conference, panel, task force or is given any other designation does not affect its status as an advisory committee within the meaning of this definition so long as it possesses the two essential features mentioned above. Additionally, this definition makes the manner by which the committee is established irrelevant. Whether it was established by statute, reorganization plan, or other means available to a government instrumentality, it is an advisory committee so long as it meets the two essential requirements of such committee. Furthermore, the definition also includes the use, by government instrumentalities, of bodies that have already been established.

The definition of "Consultant," like that of "Advisory Committee," refers to section 1-14 (2) which allows a government instrumentality to withhold from disclosure, at the direction of the head of such instrumentality, consultant's reports for a period of one year from their submission. "Consultant" as defined in this section is intended to cover any person or persons who agree with any government instrumentality to study, investigate, analyze, or report on a designated topic within the scope of the official duties or affairs of the government instrumentality. Again, this definition is intended to cover those private individuals, firms or other businesses that are hired by government and is not intended to include government personnel. Therefore the definition excludes full-time officers or employees of the government. Private individuals hired by the government to report on a specific topic would not be considered full-time employees of government

even though they devote all of their time to the required report during the period of their commitment with the government.

The term "Custodian" is used in this act to indicate the person responsible for handling requests for information. It includes both the person legally responsible for making or keeping the records and also the person having personal custody of them. For example, the clerk of a municipality would be the custodian of the records in his personal custody, and the municipal governing body would also be the custodian of these records. The test is whether the person either has custody or immediate control of the records. If he has personal custody then he is a custodian. If he has the right to exercise immediate control over the records he is also the custodian. In each of the executive departments of State government, "custodian" also includes the central information officer required to be appointed by section 1-8 of this act. These officials are included within the term "custodian" because they are given the prime responsibility for the administration of this act in the executive departments.

The definition of "Decision" was inserted in this section to clarify its meaning as used in section 1-14 (1) (b) which deals with memoranda that serve as a basis for a "decision." Since the major aim of that section is to give the public the right to know the underlying reasons for government decisions, "decision" has been broadly defined in this section. This definition seeks to make clear that the term is not limited to decisions in contested cases or decisions that have been ceremoniously categorized as "formal" or "official" by the government instrumentality. It, instead, recognizes that many duly authorized decisions of a government instrumentality are operative without passing through the formal decision-making procedures of such instrumentality.

"Government Instrumentality" has been broadly defined to include every public agency or official performing governmental functions. It encompasses governmental bodies on both the State and local levels including the Legislature and the Governor's Office. Furthermore, it also includes "independent" or "private" programs that receive their financial support from public revenue. For example, it would include drug rehabilitation programs administered by private institutions but financed by the government. These programs have been included because the fact that private institutions are administering publicly funded programs does not diminish the right of the taxpayers to know what is being done with their taxes and how effectively their tax monies are being utilized. By using the word "program" a distinction is made between the project being financed by the government and the institution administering the project. This term has been chosen so that only the information pertaining to the government financed project will be subject to the provisions of this act and not all the

information in the possession of the institution administering such project. For example, where a private university is administering a government financed project, only the records relating to that project will come under this act and not all the records of the university.

The term "Information" is used in this act instead of the term "records" because of the latter's connotation of being limited to written, typewritten or printed materials. "Information" is not limited to these types of materials but is defined to include all materials regardless of physical form or characteristics. The only requirement under this definition is that memorialization take place in some fashion. This broad standard has been adopted because of the increasingly diverse means available for memorializing communications and data and because of government's increased reliance on computers and other mechanical devices to store data. The adoption of a more limited standard would cause the public's right to obtain information to be severely limited and easily frustrated by placing documents on microfilm, by storing information on computer rolls, by taperecording communications and by using various other devices to memorialize information instead of writing, typing or printing it. This definition, therefore, takes into account the numerous methods of recording communications and other data and also provides for any future methods that will be developed. The definition of "information" in this act effects a significant change in the existing law. The existing Right to Know Law, *N.J.S.A. 47:1A-1 et seq.*, uses the term "records" but nowhere defines it. Therefore, the exact scope of the term is uncertain under the existing law and could be confined to what has traditionally been thought of as records, namely printed, typewritten, or written materials. The definition of "information" in this act, then, works a substantial change on the existing law by bringing a wider range of data within the scope of the law.

The definition of "Law" is important because section 1-4 makes a person's right to obtain government information subject to any other provisions of "Law." While it would be desirable to have only one codification setting forth the public's right to gain access to information, it is impossible to do so because of the numerous records involved and the diverse governmental entities having control over them. Therefore the purpose of this definition is to acknowledge the authority of other governmental units, such as the federal government, over information and to limit as far as possible the means of affecting the public's right to gain access to government information. Of necessity, this provision acknowledges that the act must be subject to constitutional provisions and federal authority. It also recognizes the necessity for making the act subject to other statutes, resolutions of the Legislature, executive orders of the Governor and the rules and decisional law of the courts. Where necessary it also provides that the act will be subject

to the regulations of the executive departments of State government when promulgated pursuant to a gubernatorial executive order. This is consistent with the existing Right to Know Law which contains a similar provision. The departments are not directly given the power to exempt information by regulation under this act because this would constitute too great a dispersion of authority over the public's right to information. Instead, by requiring that the regulations be promulgated pursuant to gubernatorial executive order, the ultimate power is with the Governor who can take appropriate action if he finds that the regulations being promulgated are not consistent with the policies expressed in this act. For example, the Governor in issuing his executive order may follow the same course that was taken in Executive Order No. 9 issued by Governor Hughes pursuant to the existing Right to Know Law. In that order, regulations adopted by the principal executive departments did not become effective until they were approved by the Governor.

Of importance in relation to the power to adopt regulations is also the New Jersey Supreme Court's comment in *Irval Realty, Inc. v. Board of Public Utility Commissioners*, 61 N.J. 366 (1972), defining the power to be exercised by the departments. It said that "the power of excluding records from the public domain, given to the Governor, and by him delegated to departments in the executive branch of government . . . was intended to be exercised only when necessary for the protection of the public interest." *Id.* at 374. It should also be noted that under this definition local government entities such as municipalities, counties and school districts cannot affect the provisions of this act. These local bodies were not given this power primarily because of the experience with Executive Order No. 7 issued by Governor Hughes pursuant to the existing Right to Know Law, *N.J.S.A.* 47:1A-2. That order authorized the state departments, county boards of chosen freeholders, municipalities and school districts to adopt regulations setting forth those records within their jurisdiction that would not be deemed to be public records and therefore not open to inspection and examination. Shortly after the issuance of Executive Order No. 7, the State's subdivisions began filing their lists of exempted records. Despite the widespread publicity declaring the law's object to be increased dissemination of government information, the lists submitted caused no such result to materialize and in some cases caused records which had previously been open to the public to become cloaked in a veil of secrecy. Because of this unexpected response, Governor Hughes was forced to issue two additional Executive Orders (Nos. 8 and 9) which postponed, for an additional sixty days, the operative date of the Right to Know Law and revoked the power of the local officials to determine the documents to be protected from disclosure. Therefore, the definition of "law" in this section does not include

promulgations of the local authorities. It is hoped that by defining "law" to limit the number and authority of officials who can exempt information from public disclosure that little additional information will be exempted and only that which is necessary to give effect to the declared intent of this act.

The definition of "Memorandum" relates to section 1-14 (1) which, subject to certain conditions, allows information contained in a memorandum prepared by an employee of government to be withheld from public disclosure. "Memorandum" is defined to mean all materials prepared by a government employee in the ordinary course of government business. The words "communications," "notes," "drafts," "worksheets," "letters" and "similar materials" are all modified by the word "internal." This is to indicate that memorandum only means information that is of an inter- or intra-governmental nature. The definition does not include information that passes between a government instrumentality and persons outside of government; it is only intended to apply to that information which is prepared by government instrumentalities and remains within the framework of government. All materials, be they notes, drafts, worksheets, letters, reports, guidelines, booklets, pamphlets, or other types of information retained within government fall under the meaning of "Memorandum." The phrase "in the ordinary course of government business," has been inserted in the definition to indicate first, that the memorandum must have been prepared by a government employee and second, it must relate to governmental duties or affairs.

The definition of "Person" is significant because, by not limiting the term to natural persons, the act accords the right to inspect government information to corporations, partnerships, firms or associations. Additionally by adopting this definition of "person," sections 1-14 and 1-15 recognize a right of privacy possessed by other than natural persons.

The importance of the phrase "Person in Interest" can be observed in sections 1-14 and 1-15 of this act which exempt specific records from disclosure. In so doing, those sections differentiate between the right of the public to see the information and the right of the person who is the subject of the information to be able to inspect and examine it. The general policy of the act is that even though a member of the general public may not have the right to inspect a certain type of information, a person in interest is recognized as possessing such a right. An intelligence file on a person is an example of information that would not come within this general rule. "Person in Interest" is defined first, to be the person who is the subject of the information, for example, if the information were a student record, the person in interest would initially be the student. However, the definition also

makes provision for the case where the subject is under a legal disability. If, in the example given, the student were a minor, he would, for the purpose of this definition, be considered under a legal disability and therefore his parents or duly appointed legal representative would become the person in interest. Another example of such a legal disability would be incompetency. The definition also makes one who has been designated by the subject of the information a person in interest.

1-4. Right to Inspect, Examine, and Copy Information

Except as otherwise provided by law, all persons shall have the right to inspect, examine, copy and obtain a copy of any information that is made, maintained or kept by or for any government instrumentality for use in the exercise of functions relating to the conduct of the public's business.

COMMENT

The determination of whether a document is open to public inspection under the existing Right to Know Law, *N.J.S.A. 47:1A-1 et seq.*, requires a two-step process. A person must first determine whether the specific document is "required by law to be made, maintained or kept." If this criteria is met, the person must next determine whether the law requires the document to be kept confidential or exempts it from public inspection. If there is no law requiring this confidentiality, then the document is a public record and open to inspection under the existing act. Section 1-4 does away with the first step in this process. By giving every person the right, except if otherwise provided by law, to inspect, examine and copy any information "made, maintained or kept by or for any government instrumentality," the "required by law" criteria of the existing act is eliminated. Since much of the information compiled by government is not "required by law to be made, maintained or kept," the existing act fails to bring within its ambit a significant amount of information to which the public should be able to gain access. For example, health and safety inspection reports that are prepared by agencies under their general regulatory powers, but that are not specifically required to be prepared or kept, would not be required to be disclosed to the public under the existing law. Therefore, by eliminating the "required by law" provision in the existing act, this section immensely broadens the scope of the proposed act to include virtually all information held by government. Such things as accident and inspection reports, police blotters, consultant's reports, audits, vouchers, internal government memoranda and consumer, marketing and other studies conducted by government would all be governed by the provisions of this proposed act. The limitation contained at the end of this section, namely that the information must be made, maintained or kept "for use in the exercise of functions relating to the conduct of the public's business" is a limitation of minimal significance. It has been inserted for two reasons. First, it serves to delineate between government information that is held by a public official and the official's private information held by him. Second, it assures that information not belonging to the government and not required for the performance of any governmental duties, yet coming into the possession of the government will be safe from disclosure.

The phrase "except as otherwise provided by law" in this section serves

to recognize the authority of various governmental entities to control the records within their jurisdiction. The prime example of this is the power of the federal government to control information belonging to it although such information is in the possession of State instrumentalities. The State Department of Defense is a prime illustration of a State instrumentality having access to confidential information of the federal government. This provision serves to acknowledge the existence of these laws and recognize them as exceptions to the public's right of inspection. Another prime example of a government instrumentality able to control the dissemination of information in its possession is the judicial branch of government. There exists several provisions in the New Jersey Court Rules that require specific records to be kept confidential. These include *R. 5:10-7* which prohibits public inspection of juvenile records and *R. 4:79-8* which requires that custody reports be kept confidential.

This section reflects the basic principle adopted by this act, namely, that all government-held information is public unless there is a specific provision exempting it from disclosure. Under this principle the burden is on the government to demonstrate that there is a specific provision allowing it to withhold requested information. The person requesting the information need not prove either a special interest, good cause, a proper purpose, or a direct concern in order to obtain information. Under this section any person has the right to inspect or copy information without meeting any prerequisites. See *Hawkes v. Internal Revenue Service*, 467 F. 2d 787 (6th Cir. 1972). The only exception to this is contained in section 1-17 of the act regulating the commercial use of information.

While the focal point of this act is the public's right to know, it also takes cognizance of the personal rights of individuals and the needs of government in executing its duties. The presence of these countervailing interests makes impossible the disclosure of all government-held information. While the public's right to know is paramount in a democratic society, so are an individual's personal rights such as that to privacy or to a fair trial. Moreover, granting the public the right to inspect government information so that it can ascertain how government is performing, would be an absurdity if it were to preclude the government from performing its duties. As was stated in the Senate Report on the Federal Freedom of Information Act,

“[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.” *S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)*.

This statement expresses the guiding principle on which the proposed act is based. The questions that were pondered in making a determination on what information to exempt from public disclosure were:

1. Would disclosure constitute an invasion of personal privacy [or other personal rights]?
2. Would disclosure prejudice private property rights or give an unfair competitive advantage to any person or group?
3. Would disclosure have the effect of making it difficult or impossible for the agency to fulfill its objectives?
4. Would disclosure discourage candor and frankness in officials' communications with one another?
5. Would disclosure cut off sources of information on which the government relies?" Campbell, *Public Access to Government Documents*, 41 AUST. L. J. 73, 76 (1967).

The above five questions all represent valid governmental considerations and each must be given weight in determining whether specific information should, or should not, be disclosed. However, an affirmative answer to any of the above questions does not necessitate the withholding of information. The interests reflected in these questions must be weighed against the interest of the public to gain information, and it is only when the former outweighs the latter that confidentiality is justified. The balance reached in the proposed act is readily observable in sections 1-14 and 1-15 which contain information that is exempt from public disclosure. Although these sections allow information to be withheld from the public, they must be construed narrowly in light of the predominant purpose of this act. See *Environmental Protection Agency v. Mink*, 410 U.S. at 96 n. 2, 93 S. Ct. at 240, 35 L. Ed. 2d at 137 (1973) (Brennan & Marshall, J.J., concurring and dissenting). Also of prime importance is the fact that most of the information exempt from disclosure under this act is not *commanded* to be kept confidential but is only *allowed* to be kept confidential. Whenever it is determined that no significant government purpose would be served by withholding such information and the disclosure of it would not invade personal privacy or place a person at a competitive disadvantage, the intent of this act is that such information shall be disclosed.

The policies expressed in this section are consistent with the progress that has been made by the federal government in furthering the public's right to know. The first recognition of a right in the general public to gain access to government information was section 3 of the Administrative Procedure Act enacted in 1946, 5 U.S.C. § 1002 (1964). This provision enabled a person to obtain information only if he was "properly and directly concerned" and even then information would not be disclosed if it were being "held

confidential for good cause found.” Because these two provisions encouraged the withholding of information more than the disclosure of it, Congress eliminated them in the present Freedom of Information Act, 5 U.S.C. § 552 (a) (3). The federal act presently makes records available to any person on request. It also has eliminated the “good cause found” exception and in its place has adopted nine more specific exemptions to protect records that should not be disclosed. *S. Rep. No. 813, 89th Cong., 1st Sess. (1965)*; *H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966)*.

These policies are also consistent with the course taken by acts recently adopted in other states. The Colorado Act, adopted in 1968, gives the right to inspect information to “any person” and governs all information regardless of whether or not it is “required by law” to be made, maintained or kept. COLO. REV. STAT. ANN. § 113-2-1 to -6 (Supp. 1969). Similarly, the California Act gives the right of inspection to “every citizen” and governs “any writing containing information relating to the conduct of the public’s business” regardless of its “physical form or characteristics.” CAL. GOV’T CODE § 6250-6260 (West. Supp. 1973).

1-5. Common Law Interest

This act is not intended to abolish the right of a citizen to obtain government information at common law provided that the release of information on the basis of a common law right to know should be consistent with the policies enunciated in this act.

COMMENT

At common law if a citizen could demonstrate a special interest in the information sought, a proper purpose for the seeking of such information and an absence of a strong policy militating against disclosure, he would be entitled to inspect the public records involved. The New Jersey Supreme Court in *Irvial Realty, Inc. v. Board of Public Utility Commissioners*, 61 N.J. 366 (1972), recognized and specifically continued in existence this common law right to know. In discussing the common law approach, the court cited with approval the decision in *Ferry v. Williams*, 41 N.J.L. 332 (Sup. Ct. 1879). The court in *Ferry* broadly defined the "interest" which would justify inspection of public documents stating:

"It seems, therefore, to be sufficient if the person seeking inspection has such an interest in a specific controversy as will enable him to maintain or defend an action, for which the public documents will furnish competent evidence or necessary information.

Nor is it essential that his interest should be private, capable of sustaining a suit or defence on his own personal behalf. It will justify his demand for inspection, if he may act in such suit as a representative of a common or public right." 41 N.J.L. at 336.

It becomes apparent that this common law right to inspect government records was conditioned upon a very flexible "interest" requirement. As the desire to encourage disclosure increased, the requisites of the definition of "interest" decreased. Consequently by the time the Right to Know Law was passed in New Jersey the common law interest was moving steadily toward the goal finally encompassed in that legislation. At this time therefore there is still a distinction between the statutory right to know and the common law right to know but the distinction is quite limited. It is the intention of § 1-5 however to continue the existing viability of the common law right to know and to express the desire that the courts develop its meaning consistent with the principles and policies enunciated throughout the provisions of this act.

This act has balanced the need of confidentiality against the need of a general member of the public to obtain government information, but it has not and cannot balance the need for confidentiality against every special interest that may affect the balance. Although in certain circumstances the interest of the general public may not require disclosure of information, there will be times when the interest of the person seeking the information outweighs the need for confidentiality. The proper balance under these circumstances can only be reached on a case-by-case basis. The flexibility of this right was explained by the court in *Irval* as follows:

“Although we hold, as did the courts below, that as between the interest of the public in maintaining the confidentiality of these records and the interest of the plaintiffs in examining them, the latter outweighs the former, nevertheless the facts of another case may quite possibly call for a different result. It may be that some material in a report such as those we are considering should not be revealed because the public interest will be best served by its remaining secret.” 61 N.J. at 375.

Thus by specifically including § 1-5, the legislature recognizes and continues the case by case common law approach to certain situations and encourages the custodians of government to disclose certain information (otherwise exempt under this act) without court proceedings where they think the interest, purpose and subject matter of the request justifies it.

1-6. Court Rules and Subpoena Power

This act is not intended to affect any of the rules of procedure of the New Jersey or Federal courts, nor is it intended to affect the acquisition of information through the lawful exercise of the subpoena power.

COMMENT

This act is directed at giving the general public the right to obtain government-held information without having to show a special interest in the information or a need for obtaining it. Therefore, the balances that are reached in the act concerning what information is to be open to public inspection and what information may, in the public interest, be kept confidential are premised on a weighing of the need to protect personal rights and the proper functioning of government against the need of a citizen to have knowledge of what his government is doing. However, when the need of a litigant is balanced against the interests of government or against protection of personal rights, the litigant's interests may prevail in instances where the right of the general public would not. This section therefore acknowledges that the need of a litigant to obtain information is different from that of a member of the general public and recognizes that this determination falls within the domain of the courts and cannot be affected by this act. The independence of the discovery rules from the Right to Know Law was expressed by the New Jersey Supreme Court in *Irval Realty, Inc. v. Board of Public Utility Commissioners*, 61 N.J. 366, 372-73 (1972) where it stated that there were three avenues open to gain access to government information, the Right to Know Law, the common law right of a citizen to inspect public records, and a litigant's right to gain information under the broad discovery procedures of the court rules.

Under the federal act, 5 U.S.C. § 552, "inter-agency or intra-agency memorandums or letters" are exempt from public disclosure if they "would not be available by law to a party other than any agency in litigation with the agency." This last phrase makes the disclosure of these memorandums contingent upon the discovery rules. If a person in litigation with the agency could obtain the memorandums then the public can also obtain them. Because, as was noted by the United States Supreme Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86 (1973), the rules of discovery are uncertain and dependent on many factors, this act does not make public access to information contingent on the rules of discovery. Obtaining information under this act and obtaining information under the rules of discovery are treated by this act as two separate means of gaining access to government information. It is expected, however, that government custodians will be aware of the litigant's right to discovery and will not force resort to suit

in order to obtain information that would be granted to him in discovery and would not significantly harm the public interest.

1-7. Privileges

Nothing in this act shall be construed to impair any privileges recognized by law provided that any such privileges possessed by a government instrumentality shall be construed in accordance with the provisions of this act.

COMMENT

New Jersey law recognizes a great number of privileges which allow persons to withhold information. In addition to the fifth amendment privilege, they include, the Lawyer-Client Privilege, *R. Evid.* 26, *N.J.S.A.* 2A:84A-20; the Psychologists' Privilege, *N.J.S.A.* 45:14B-28; the Patient-Physician Privilege, *N.J.S.A.* 2A:84A-22.1 to -22.7; a Trade Secret Privilege, *R. Evid.* 32, *N.J.S.A.* 2A:84A-26; an Official Information Privilege, *R. Evid.* 33 and an Informer's Privilege, *R. Evid.* 36, *N.J.S.A.* 2A:84A-28. These privileges are adopted and applicable in the context of litigation and it is not the intent of this act to impair the exercise of those privileges within that context. It is recognized however that any privilege permitting the withholding of information runs contrary to the fact-finding search for truth at the heart of the advocacy system and at the heart of the credibility of government. Consequently this section uses the word "impair" to indicate that the Legislature anticipates that this act will be considered flexible enough to permit development of its provisions consistent with the growth or restriction of any privileges recognized at law.

This section also recognizes however that to the extent that these privileges are held by a government instrumentality they are occasionally brought in direct conflict with the provisions and purposes of this act—namely the goal of maximum possible disclosure of government-held information. Consequently it is intended that these privileges when possessed by government shall be construed in accordance with the principles and provisions of this act. Several examples illustrating the conflict and the proposed resolution should be helpful:

1. LAWYER-CLIENT PRIVILEGE

The lawyer-client privilege in New Jersey is established in *R. Evid.* 26. While it has not been clearly stated, it has been assumed that privilege applies in the context of a government attorney and his government client. The definition of client in the rule does not specifically say so since it provides "client" means "a person or corporation or other association." A closer reading of that privilege, a consideration of the functions performed by a government attorney and an examination of the determinations made in other States suggest that, while the rule could be amended to specifically

include the government attorney and his client, it is nonetheless reasonable to conclude that the lawyer-client privilege does in fact apply to government attorneys and their clients in the State of New Jersey.

This specific question was considered in California in connection with an inevitable conflict between the open meetings law and the attorney-client privilege. The court in California recognized that California decisional law had assumed without discussion that the privilege was just as available to public agency clients and their lawyers as to their private counterpart. Subsequently and as a result thereof the evidence code distinctly included public agencies and entities among the clients who may assert the privilege. See *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480, 489 (Dist. Ct. App. 1968). The court went on to point out the reasons for this:

“That policy is just as meaningful, as financially important, to public as to private clients. Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, [citations omitted] ‘Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent’s presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.’

Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by indiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney’s professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public’s ‘right to know’ compelled admission of an audience, the ringside seats would be

occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a *sense of treachery* in disclosing that kind of appraisal. To him its conduct in public would be shocking, unprofessional, unthinkable." 69 Cal. Rptr. at 490-491 (footnote omitted).

The court went on to conclude that while the lawyer-client privilege does indeed apply to government attorneys and their government clients it does not have that same wide-range of confidentiality as that applicable to private clients. Since the privilege is for the benefit of the client and since government can set limits upon itself, the court recognized that members of public bodies may not be permitted the same wide-range of confidentiality that private clients possess and therefore open meetings laws and right to know laws must be considered in determining the full scope intended to be accorded the lawyer-client privilege where the government attorney and his government client are involved. 69 Cal. Rptr. at 492.

Similarly the Colorado Attorney General was confronted with the question of whether the provisions of the Colorado Open Meetings Law "prohibit the Attorney General, or his Deputy or any assistant from discussing legal matters or strategy with any state agency in private and without public notice." The Attorney General's answer was no, but discussions with legal counsel could not be used as a subterfuge to undermine the open meetings law. In reaching this conclusion and in stating that the lawyer-client privilege extends to communications between the Attorney General and his government client the Colorado Attorney General relied heavily on the above California case and on the case of *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969). In the Florida case, the court pointed out that "the attorney has the right and duty to practice his profession in the manner required by the Canons unfettered by the clearly conflicting legislation which renders the performance of his ethical duties impossible. He cannot be put in the untenable position of choice between a violation of the statute or a violation of a specific Canon insofar as they *clearly conflict*." 222 So. 2d at 475.

The Florida court went on to discuss the attorney-client relationship and to point out that it is a unique one under the law. "Within this relationship both the attorney and the client enjoy rights and privileges independent of each other. The privilege that the client enjoys is one of confidentiality. The privilege of confidentiality can be waived and the effect of [the open meetings law] has been to waive the privilege on behalf of the Board." 222 So. 2d at 475. The court went on to point out however that there is one aspect of the attorney-client relationship in which there are obligations which bind the attorney. That "aspect involves his duties in the

conduct of pending or impending litigation. His professional conduct in these matters is governed by the Canons of Ethics which are promulgated by the Supreme Court under the integrated bar system in this State.” 222 So. 2d at 475. The Florida court then concluded that the attorney was entitled to the exercise of his privilege to the extent that it was necessary for him to exercise his ethical duties as a lawyer. The court however concluded that the client’s privilege was completely waived under the open meetings law in Florida and the Colorado Attorney General utilized this case and the California case to make a somewhat similar conclusion for his State.

Most recently the United States Supreme Court has promulgated the “rules of evidence for the United States’ courts and magistrates”. It is specifically provided in Rule 503 that there shall be a lawyer-client privilege and that it shall include governmental bodies, *Fed. R. Evid.* 503 A(1). The rule also points out that the privilege may only be claimed by the client.

In this proposed Public Information Act for New Jersey it has been concluded that the lawyer-client privilege does and should apply to the government attorney and his government client. It has also been concluded as indicated in subsequent sections of this act that that privilege should be limited to the extent that it should not preclude the disclosure of Attorney General Opinions or other government-lawyer opinions that are the sole basis for decisions or are incorporated in the actual written decisions of government agencies. *E.g.*, § 1-14 (1) (b). References to those sections in this act and the comments thereunder provide guidance for the courts to determine the full extent of the lawyer-client privilege in government. It should be recognized however that it is not intended to obliterate that privilege nor is it intended to go as far as the Florida court and totally restrict the exercise of the privilege to those requirements necessitated by the Canons of Ethics.

2. OFFICIAL INFORMATION PRIVILEGE

Rule 34 of the New Jersey Rules of Evidence provides that “[n]o person shall disclose official information of this State or of the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State, or (b) if the judge finds that disclosure of the information in the action will be harmful to the interests of the public.” There is no definition provided for the term “official information” and the comment to the rule makes clear that the term is a nebulous one and the rule itself is a very pliable instrument in the quest for withholding information. At a minimum, official information is intended to include “secrets of State” which protect any military or security matters in which the State would be involved. The Federal Rules of Evidence provide a similar privilege in Rule 509(2) which protects secrets

of State and other official information. Official information is defined as:

“ . . . information within the custody or control of a department or agency of the government the disclosure of which is shown to be contrary to the public interest and which consists of: (A) intra-governmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions, or (B) . . . investigatory files compiled for law enforcement purposes and not otherwise available, or (C) information . . . which is not otherwise available to the public pursuant to the [Freedom of Information Act].”

It becomes clear from the mere recitation of the New Jersey privilege and the reference to the Federal Rule that this provision and the provisions of the proposed Public Information Act clearly touch upon and profess to resolve the disclosure of similar information. Consequently it is intended that the privilege be construed and developed in accordance with the provisions provided in this act which have direct application to it.

It should also be noted that the privileges inherent within the coordinate branches of government and exercisable by the individuals chiefly responsible for those branches of government also provide significant limitations upon the power to disclose information. As stated by Chief Justice Weintraub in *Morss v. Forbes*, 24 N.J. 341, 387 (1957):

“Each branch of government has phases of operations which are confidential. The required security is part and parcel . . . of its assigned constitutional role.” *And see Eggers v. Kenny*, 15 N.J. 107 (1954); *Thompson v. German Valley R.R.*, 22 N.J. Eq. 111 (Ch. 1871).

The proposed act therefore recognizes as it must the viability of these privileges and of course can only have limited affect upon their exercise and scope. *See Nixon v. Sirica & Cox; U.S. v. Sirica & Nixon*, Civ. Nos. 73-1962, 73-1967 & 73-1989 (D.C. Cir., decided Oct. 12, 1973) slip opinion at 22-23, 27-30, 33-40.

It is also anticipated that in connection with the exercise of privileges possessed by *private* individuals relating to government-held information that the administrative agencies of government will devise appropriate procedures whereby the burden will be upon the claimant to establish his privilege, the government will review that claim and will decide whether it is a valid one and whether disclosure is mandated. If disclosure is mandated it will of course provide notice to the person claiming the privilege and allow him to take appropriate action before government disclosure.

1-8. Duty of Public Employees; Central Information Officer

(1) It shall be the duty of all employees of a government instrumentality to assure that all requests for information are processed as promptly as possible pursuant to the provisions of this act.

(2) Each department in the executive branch of state government shall appoint a central information officer to whom requests for information can be presented and who shall be primarily responsible for the department's compliance with the provisions of this act.

COMMENT

To assist in the effective implementation of this act, this section places the affirmative duty on all employees of government to promptly and expeditiously process all requests for information and further requires that each department in the executive branch of State government appoint a Central Information Officer. The duty to promptly process requests for information includes not only the duty of the custodian to supply the information, but also includes the duty of all government personnel to direct the requester to the proper custodian and to provide notification when it is either required by this act or is reasonable under the circumstances. To further insure the effective implementation of the provisions of this act, this section requires the appointment of a Central Information Officer. The name, office address and telephone number of the Central Information Officer should be incorporated in the regulations of the Department to comply with *N.J.S.A. 52:14B-3* which provides that each agency shall adopt a rule setting forth "the methods whereby the public may obtain information or make submissions or requests." This officer will be responsible for the department's compliance with this act and will serve as the main liaison between the department and the public. His prime duty will be that of coordinator, advisor and decision-maker for those matters coming within the scope of this act. He will have the responsibility of informing the personnel in his department of the terms of this act, of assuring that requests for information are properly processed and complied with, of disseminating to those administering the act any legal opinions or decisions interpreting its provisions, and of providing decisional uniformity within the department. One of the prime responsibilities of this official will be in deciding whether information that is technically exempt from disclosure under the act should, nevertheless, be disclosed. Although the head of the department should be the ultimate authority within the department in making this determination, the expertise of the Central Information Officer gained from past experiences will be extremely helpful in pointing out to the head of the department the ramifications of withholding or disclosing this information and the policies

adopted by other government instrumentalities in similar situations. Additionally, the existence of a Central Information Officer will serve to prevent unjustified denials of information by personnel in the department who, because of minimal contact with such requests and the lack of a working knowledge of the act, follow proprietary instincts and choose to withhold information. It is also envisioned under this section that some departments may adopt the procedure followed by the United States Department of Health, Education and Welfare, namely that "[a]nyone can grant information but only the chiefs of public information can deny information." *H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 47 (1972)* (pages 43 through 50 of that congressional report also contain a narrative of the role of the public information officer on the federal level, and on page 82, it is recommended that each department should provide a centralized administration of the act and institute seminars and other training procedures.)

Although this section only requires that each department in the executive branch of State government appoint a Central Information Officer, this procedure is also to be encouraged on the local level. There should be one person in each government instrumentality designated to handle requests for information and the name and address of this person should be publicized. This designation should not be a perfunctory action simply to have someone assigned to this task, but should be a serious attempt to implement this act by making someone primarily responsible for learning the provisions of this act and communicating with other officials and the Public Information Commission to gain knowledge of any new developments that arise under it. This is vital because the effective implementation of this act is dependent more on the administrator's understanding of its basic policies than on the technical language of the act. The names and addresses of these State and local information officials should also be transmitted to the Public Information Commission for purposes of compiling a directory that could be disseminated throughout government and to the public.

1-9. Processing Requests for Information

(1) Whenever a custodian receives a request to inspect, examine, copy, or obtain a copy of information, he shall promptly comply with such request. If the requested information cannot be provided pursuant to sections 1-14, 1-15 or 1-17 of this act, then the custodian shall promptly notify the requester, in writing if requested, of the grounds for the denial, including a citation of the statute, rule or regulation under which access is being denied and the requester's right to appeal and to whom such appeal may be made. If the requested information cannot be provided because it is temporarily unavailable due to its being currently in use or in storage, then the custodian shall promptly notify the requester, in writing if requested, of this fact and of the time and place at which the information will be made available. If, in the opinion of the custodian, the request to inspect, examine, copy or obtain a copy of information is unreasonable because it is overly burdensome in that it would clearly and substantially disrupt agency operations, then the custodian shall promptly notify the requester, in writing if requested, of this fact, provided that the custodian shall only deny access to such information after attempting to reach a reasonable solution with the requester accommodating the interests of both parties.

(2) Whenever any government employee, other than the custodian, receives a request for information, he shall make every reasonable effort to direct the requester to the proper custodian of such information.

(3) The denial of any request for information shall be given to the requester within a maximum of 20 working days from the receipt of the request.

(4) Whenever a request made to a custodian is not properly complied with or the notification required by this section is not promptly given then the person making such request shall have the right to appeal as provided by section 1-20 of this act.

COMMENT

There is presently under the existing Right to Know Law no provision similar to that contained in § 1-9. This provision is primarily based on the experience that the federal government has had with the problem of trying to open up government information to public inspection. As it appears from the hearings, investigations, and commentators' reports on the federal act, the most serious problem area encountered was the administration and implementation of the act by agency personnel. It was found that regardless of what records the act made public, its commands could be nullified through the use of certain obstructive tactics by agency personnel. Although these findings were based only on a study of the federal act, it is clear that these

tactics can be just as effectively used to obstruct the purpose of the New Jersey Public Information Act. Therefore, it is the purpose of this section to take advantage of the federal experience and to try to prevent any possible use of these tactics to obstruct the effectiveness of this act.

The primary difficulties that this section seeks to avoid are (1) the delay and footdragging that can be used to thwart a person's right to gain information, (2) an agency's blanket denial of a request for information without determining whether the requested information is in fact exempt from disclosure under this act, and (3) the bureaucratic maze that can prevent a person from ever finding the information he seeks.

The most repeated criticism of the federal act is focused on the delaying tactics used by the agencies to avoid the disclosure of information. This problem has been pointed out by independent commentators,¹ by numerous witnesses testifying at the congressional hearings on the act,² and by the latest Report of the House of Representatives³. In a study conducted by the Administrative Conference of the United States, it was concluded that delay was not always used merely as an evasive tactic but that delay was also caused because of the time it took to determine whether the requested information was exempt from disclosure, or to consider the policy questions related to the release of the requested information or because officials could not break away from their other work to consider the request. Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 ADMIN. L. REV. 217, 223, 243-47 (1971). However, regardless of the causes for delay, it is clear from the federal experience that it can be a serious impediment to a public information act and must be dealt with. A recent Bill, *H.R. 17142*, introduced by Congressman Moorehead in the House of Representatives on October 13, 1972, seeks to deal with this problem by requiring each agency upon receiving a request for a record to

“(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and . . . immediately notify

¹ Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969).

² *Hearings on U.S. Government Information Policies and Practices before a House Subcommittee of the Committee on Government Operations*, 92d Cong., 2d Sess. 1020, 1029, 1064-67, 1221, 1235-39, 1244, 1264, 1273, 1279-83, 1377, 1392-94, 1432, 2025, 2212-13 (1972).

³ H. R. REP. 738, 92d Cong., 2d Sess. 8, 20-42 (1972).

the person making such request of such determination and the reasons therefor;

(B) in the case of a determination not to comply with any such request, immediately notify the person making such request that such person has a period of twenty days (excepting Saturdays, Sundays, and legal public holidays), beginning on the date of receipt of such notification, within which to appeal such determination to such agency. . . .”

This basic approach is followed in this section by requiring that, whenever the custodian of information receives a request for information, he notify the requester of his decision within 20 working days of the receipt of the request. It is important to note, however, that under this section, 20 days is the maximum time allotted for a reply and is not intended to be used as a grant of authority under which an agency can delay for that period of time. The primary command of this section is that the request be complied with or the notification be given *promptly*. Therefore, if the custodian can comply with the request or transmit notice of denial in less than 20 working days, this section requires him to do so.

Under subsection (1) of this section there are three situations that would allow a custodian to refuse to comply with a request for information. These three circumstances are first, when the information is exempt from disclosure under section 1-14, 1-15 or 1-17, second, when the information is currently in use or in storage, and third, where the request would be overly burdensome to the operations of the government instrumentality. Where the information is exempt from disclosure, the custodian is required to notify the requester in writing of such denial. The notification is required to give the reasons why the information is being denied, to give a citation of the statute, rule or regulation under which access is being denied and third, to inform the requester that he has a right to appeal and to whom such appeal must be made. The citation of the pertinent law and the reasons for the denial are required to be placed in the notice to avoid government instrumentalities making blanket denials without knowing whether such denial is lawful and to inform the requester of the basis for the instrumentality's denial so that he will be able to evaluate it and appeal the decision if he so desires.

When the requested information is in use or in storage, the custodian or public information officer is required to notify the requester of this fact and of the time and place at which the information will be made available. This notification may be given orally unless the requester wants it in writing. A similar provision is contained in the Colorado Act which states that:

“If the public records requested are in the custody and control of the person to whom application is made but are in active use or in

storage, and therefore not available at the time an applicant asks to examine them, the custodian shall forthwith notify the applicant of this fact, in writing if requested by the applicant. If requested by the applicant, the custodian shall set a date and hour within three working days at which time the records will be available for inspection." COLO. REV. STAT. ANN. § 113-2-3 (3) (Supp. 1969).

The main distinction between the present section and the Colorado Act is that there is no requirement in this section that the custodian set a date and hour within three working days at which time the records will be made available. The three day time limit contained in the Colorado Act has not been adopted because the circumstances may be such that the custodian will not be able to determine when the records can be made available. However, this section does contemplate that they must be made available within a reasonable amount of time depending upon the particular circumstances. If they are not made available within a reasonable time this section gives the person standing to seek appropriate action from either the Public Information Commission or the courts. Additionally, where a custodian intentionally violates this provision, he becomes subject to the penalties provided in section 1-21 of this act.

Although the notification required by this section is not mandated to be made in writing unless so requested by the applicant, it should nevertheless be placed in writing whenever possible. Written notification will both give the applicant a record of the decision made for purposes of appeal and will also enable the custodian to demonstrate on appeal that he complied with the notice provisions of this section. Moreover, it will provide the custodian with a record of the request and its disposition for purposes of making the annual report mandated by section 1-12 of this Act. Requiring *written* notification in all cases was rejected primarily because such notification will not always be possible nor desired by the requester. The requester may not wish to wait for such notification nor desire to leave his address so that it could be mailed to him. Problems with giving written notice would be compounded where the request for information is received via the telephone and the Requester simply does not want to receive notice in writing. This section definitely contemplates however that the requester will be informed in all cases of his right to have notice *in writing*.

Where the request for information is overly burdensome and would clearly and substantially disrupt agency operations, this section allows the custodian and the requester to attempt to reach a compromise solution which would meet the needs of both parties. This section should only be used in the exceptional case and should not be used as a means for withholding information. An example of the situation envisioned by this provision is a request to inspect a substantial number of files of a government instru-

mentality that are needed daily for the operations of that instrumentality. To produce all the files upon request may preclude the instrumentality from performing its duties. This section therefore would allow a compromise to be reached whereby portions of the files can be produced at given intervals. It is also the purpose of this provision to protect government instrumentalities from having to conduct endless searches to comply with a request which only contains a hazy definition of the desired document. *Cf. Sears v. Gootschalk*, 357 F. Supp. 1327 (E. D. Va. 1973). Where a government instrumentality is presented with such a situation, its duty under this section is to make every effort to help the requester better identify the information or to assist him in refining his request for more readily identifiable information that would meet his needs. *See National Cable Television Assoc., Inc. v. F.C.C.*, 479 F. 2d 183 (D.C. Cir. 1973). Where both of these approaches are fruitless, the custodian may, under this section, deny the request for information and the requester may appeal such denial. It should, however, be *emphatically emphasized* that the custodian has the affirmative duty to render assistance to the requester before he can deny the request under this section. This duty is placed on the custodian because, as the custodian of the information, he is in a far superior position to know what is contained in his files than a member of the general public. Therefore, when he is presented with a request that does not sufficiently identify the desired information, he must assist the requester in more clearly describing it.

It should be noted that a distinction will exist in many cases between an unreasonable request to inspect documents and an unreasonable request for copies of them. Under this section, a request to have the custodian provide copies of certain documents may be unreasonable, while a request to inspect these same documents or to allow the applicant to copy them himself will not be unreasonable. Each case must be determined on its own facts and where providing copies of the requested documents would be unreasonable, every effort should be made to allow the applicant to at least inspect and hand copy them. *See Rosenthal v. Hansen*, 110 Cal. Rptr. 257 (Dist. Ct. App. 1973).

Subsection (2) of this section is designed to assist the public in finding government-held information. Oftentimes a member of the public may be uncertain as to which government instrumentality holds the information sought by him. With the continual expansion of government and the increasing number of records it keeps, a person seeking information could easily become involved in the web of bureaucracy without ever finding the location of the desired documents. Therefore this section places a duty upon every government employee who receives a request for information to make a reasonable effort to direct the requester to the proper custodian of the requested documents. It is envisioned that to assist government employees in perform-

ing this duty, the Public Information Commission established under section 1-18 will compile and disseminate a directory of information officers appointed by the State departments and local government instrumentalities. A similar provision is contained in the Colorado Act which states:

“If the public records requested are not in the custody or control of the person to whom application is made, such person shall forthwith notify the applicant of this fact, in writing if requested by the applicant. In such notification he shall state in detail to the best of his knowledge and belief the reason for the absence of the records from his custody or control, their location, and what person then has custody or control of the records.” COLO. REV. STAT. ANN. § 113-2-3 (2) (Supp. 1973).

Subsection (3) requires that, if a custodian is going to deny information because the information is exempt from disclosure under this act, this denial must be made and notice of it transmitted to the requester within 20 working days from the custodian's receipt of the request.

Subsection (4) gives the person the right to appeal to the Public Information Commission or the courts where compliance with this section has not been achieved. It is noteworthy that this grant of standing is not dependent upon violating the 20-day time limit contained in subsection (3). Instead, a person will have standing if the primary directive of this section is not met, namely that information be disclosed and notification be given *promptly*. This section is to be interpreted as giving a person standing before the 20-day time limit has run where compliance with this section has not been *promptly* accomplished, but the running of the 20-day period automatically confers standing on the person.

1-10. Manner and Time of Inspection and Copying

The inspection, examination and copying of information under this act shall be accomplished during the regular business hours of the government instrumentality having immediate control of such information. Every person shall have the right to copy information by hand under appropriate supervision and, consistent with a need to preserve the original information, every person shall have the right to purchase copies from the custodian or to use his own duplicating process to obtain copies. A person shall be allowed to use his own duplicating process only when the custodian finds that there is no risk of damage to, or mutilation of, or alteration of, such information and that it will not be incompatible with the economic and efficient operation of the office and the transaction of public business therein.

COMMENT

This section is basically the same as the provision in the existing Right to Know Law with, however, two significant modifications. The first is the inclusion in this section of the phrase "consistent with a need to preserve the original information." This provision was included because of the danger of damage to the original information that is inherent in copying certain types of information or utilizing certain copying processes. This was recognized by the New Jersey Supreme Court in *Moore v. Board of Freeholders of Mercer County*, 39 N.J. 26, 30 (1962) where it explained the problems as follows:

"The employment of a mechanical contrivance to produce a copy could subject the document to the possibility of spoilage or destruction during the process of copying, a danger absent in transcribing the contents of a document by hand. It is common knowledge that there are many pieces of equipment capable of producing copies. To permit copying with any machine a particular individual may propose to use, without prior tests as to its capability, would subject the record to the hazard of damage. Although the right to inspect is of vital importance, it is of equal public importance that the original record be not mutilated. Public officials should have the opportunity to select equipment which will assure that the records will not be damaged, and to make suitable arrangements for the availability of such equipment. Hence the result of producing a photocopy can best be obtained by requiring the proper official to furnish such copy at a reasonable cost, rather than by permitting the applicant to make a copy with his own machine."

Under this provision, a custodian may refuse to produce copies or to allow

the mechanical copying of information where there is danger to the original copy. Although it is recognized that a high degree of risk accrues from the copying of certain information, this section does not specifically exempt any information from being copied. Instead, it leaves it to the discretion of the custodian whether, copying of the information should be allowed notwithstanding the fact that a degree of danger to the information exists.

The second distinction between this section and the existing law is that the word "alteration" has been inserted to the phrase "only when the custodian finds that there is no risk of damage to, or mutilation, *or alteration* of, such information." This has been inserted to specifically recognize the inherent danger of rerecording certain materials. For example, allowing a person to use his own process of rerecording tapes of a hearing or meeting or copying computer rolls would also be giving him the chance to alter the information. This phrase therefore recognizes that the custodian may deny this right to copy where such danger of alteration exists.

Not provided for in this section is the danger of altering *the copy* as opposed to alteration of the *original* information. The prevalent danger of alteration of the copy of a tape was the prime reason for the court in *Guarriello v. Benson*, 90 N.J. Super. 233 (L. Div. 1966) to deny the requester's right to copy these recordings. This act, however, takes the position that the government's possession of the original information is an adequate safeguard against alterations of copies. Where someone seeks to use a modified copy, the government can always present the original to show that the copy has been altered.

Since this act governs the disclosure of all types of records regardless of physical form or characteristics, a word should be said about the physical form of the copies required to be provided. The main purpose of this act is to provide meaningful and comprehensible data to the requester. Therefore, as a general rule this act requires that the copy provided be in a physical form that is readable or decipherable by the average person without recourse to highly specialized mechanical devices. Where the data is stored in computers, for example, giving the requester a copy of the computer roll would not meet the mandate of this act unless, of course, the requester were satisfied with that form of the data. Likewise, where specialized mechanical devices, such as computers, are used for storing data, the requester has no absolute right to obtain the data in that exact form. Since the main purpose of this act is to impart knowledge and not necessarily the physical form in which such knowledge is stored, the government instrumentality, may provide such data in a physical form other than the form in which is stored. For example, providing the requester with a typewritten print-out of data on a computer roll will comply with the mandate of this act.

1-11. Fees

There is hereby created in the Department of State an inter-governmental committee composed of the members of the State Records Committee established by *N.J.S.A. 47:3-20* and the Executive Director of the Office of Fiscal Affairs, the Administrative Director of the Courts and the Director of the Division of Administrative Procedure or their respective designees. It shall be the duty of this committee to establish uniform fee schedules for use by each government instrumentality when providing public information. These schedules when adopted shall have the force and effect of law and shall be enforced pursuant to the provisions of section 1-20 of this act.

COMMENT

Because the establishment of a schedule setting forth the searching and copying fees to be charged for information requires thorough and complete study, this section sets up a committee to carry out this task. Research into the ways in which information is stored and the differing processes required to copy information is needed before an accurate and complete fee schedule can be formulated. Such things as copying photographs, aerial photographs, computer rolls, motion picture film, microfilm records, blueprints, architectural drawings, transcripts and a host of similar items must be analyzed to determine the cost and manner of reproduction. For example, one of the things that must be looked into is the contracts entered into by the State with private reporting firms who provide transcription services to government instrumentalities. These contracts must be examined to determine if any of their provisions affect the State's providing copies of these transcripts to members of the public.

The federal government has had significant experience with the problem of fees under the Freedom of Information Act. Several witnesses at the federal hearings testified as to instances where the fees charged discouraged seeking information. One of the major problems encountered was that of fees charged for searching out information. *H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 58-59 (1972)*. One of the findings of the House Subcommittee investigating this area was stated in its most recent report to be that:

“Excessive fees for search and reproduction of public records in some agencies have deterred individuals desiring access to such records; moreover, there is a wide disparity among agencies in fees charged for the same types of records.” *H.R. Rep., supra, at 10.*

Because of this experience in the federal government, the ultimate goal of this section is to have adopted a uniform fee schedule setting forth reason-

able fees to be charged for government information. In so doing, the following guidelines of the Administrative Conference of the United States should be considered. These recommendations are as follows:

“Each agency should establish a fair and equitable fee schedule relating to the provision of information. To assist the agencies in this endeavor, a committee composed of representatives from the Office of Management and Budget, the Department of Justice and the General Services Administration, should establish uniform criteria for determining a fair and equitable fee schedule relating to requests for records that would take into account, pursuant to 31 U.S.C. § 483a (1964), the costs incurred by the agency, the value received by the requester and the public interest in making the information freely and generally available. The Committee should also review agency fees to determine if they comply with the enunciated criteria. These criteria might include the following:

1. **Fees for copying documents.** In view of the public interest in making government information freely available, the fee charged for reproducing documents in written, typewritten, printed or other form that permits copying by duplicating processes, should be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies.

2. **No fee for routine search.** In view of the public interest in making government held information freely available, no charge should be made for the search time and other incidental costs involved in the routine handling of a request for a specific document.

3. **No fee for screening out exempt records.** As a rule, no charge should be made for the time involved in examining and evaluating records for the purpose of determining whether they are exempt from disclosure under the Freedom of Information Act and should be withheld as a matter of sound policy. Where a broad request requires qualified agency personnel to devote a substantial amount of time to screening out exempt records and considering whether they should be made available, the agency in its discretion may include in its fee a charge for the time so consumed. An important factor in exercising this discretion and determining the fee should be whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester.” Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 ADMIN. L. REV. 217, 269-70 (1971).

The fee schedule in the existing Right to Know Law is totally inadequate.

quate for the purposes of this act and too rigid to cover certain types of materials. An example of the rigidity is its application to the recent Task Force Report on Sovereign Immunity that was published by the Attorney General's Office. The application of this schedule would necessitate that the first ten pages of this report be supplied to persons at a cost of \$.50 per page, the 11th to 20th page be supplied at a cost of \$.25 per page and the last 228 pages be supplied at a cost of \$.10 per page to the person requesting it, making the total price of the report \$29.80. As the court said in *Moore v. Board of Freeholders of Mercer County*, 39 N.J. 26, 31 (1962),

“[w]here . . . a considerable number of documents is involved, the charge per page which would be reasonable if but a few pages were involved may well . . . be unreasonable. Where the public right to know would thus be impaired the public official should calculate his charge on the basis of actual costs. Ordinarily there should be no charge for labor.”

The inadequacy of the provision under the present Right to Know Law is also obvious from the fact that it does not cover such things as photographs, microfilm copies and some other materials. Because of the increased scope of this act, it is imperative that a thorough and complete fee schedule be devised to cover all types of information.

1-12. Annual Reports

Every central information officer and every local government instrumentality shall prepare and submit to the Public Information Commission, by January 31st of each year, an annual report describing each request for information that has been denied with the reasons for such denial and any problems that have been encountered under this act in the preceding calendar year.

COMMENT

This section provides for a reporting procedure in order to gain feedback on how the provisions of this act are being implemented and whether the public is being accorded the information they are entitled to. It provides that each government instrumentality must submit a report to the Public Information Commission on a calendar year basis. In the case of the Executive Departments of State government, this section specifically places the duty for compiling and submitting this report upon the central information officers. Every other government instrumentality governed by this act is also required to submit an annual report. However, this section places the duty for the submission of this report on these government instrumentalities and does not specifically state the official who has the responsibility of carrying out the dictate of this section. The particular officials in these instrumentalities who will have the duty of making and submitting this report is left to the discretion of the instrumentality which can adopt the necessary procedures for implementing this section.

Although there is no comparable provision in the existing Right to Know Law, this provision is thought necessary to insure that the act is accomplishing its intended purpose. Because, oftentimes, a member of the public who is denied information will not be aware of whether the information was properly or improperly denied or, if aware, may not appeal the decision or bring it to the attention of other government officials, it is necessary that some procedure be developed to learn how the act is being implemented. If problems arise under the act or if information is being denied that is not intended to be kept confidential by this act, then these reports will enable appropriate action to be taken to correct any of these difficulties. Therefore, these reports are essential to insuring that the public's right to know is being given effect. It is envisioned that compliance with this section may ultimately result in a legislative amendment deleting this requirement if it is demonstrated that the government is fully and fairly responding to requests for information.

The basic procedure adopted in this section is consistent with that sought to be adopted on the federal level. In *H.R. 17142*, introduced by

Congressman Moorhead in the House of Representatives on October 13, 1972 there is included the following provision:

“(d) Each agency shall, on or before March 1 of each calendar year, submit a report to the Committee on Government Operations of the House of Representatives and the Committee on the Judiciary of the Senate which shall include —

- (1) the number of requests for records made to such agency under subsection (a);
- (2) the number of determinations made by such agency not to comply with any such request, and the reasons for each such determination;
- (3) the number of appeals made by persons under subsection (a) (5) (B);
- (4) the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal;
- (5) the number of complaints made under subsection (a) (3); and
- (6) a copy of any rule made by such agency regarding this section;

during the preceding calendar year.”

The present section does not require the detailed information that is required under the federal provision and therefore is much less onerous for administrative purposes. It is recognized that to require the information supplied in the federal bill would be overly burdensome and therefore was not adopted in this act. The information required by this section however is sufficient to enable a constant review of the provisions of this act.

1-13. Creation of Records

- **This act shall not impose any obligation to compile or create information not already in existence at the time of the request. Information is not required**
- ▶ **to be created by compiling selected items from the files. Such data as lists, ratios, proportions, percentages, per capita, frequency distributions, trends,**
- **correlations and comparisons shall be made available only if such data has**
- . **already been compiled. This section shall not, however, prevent a member of the public from compiling such information provided that the request to inspect, examine, copy or obtain a copy of information conforms to the other provisions of this act.**

COMMENT

This section simply acknowledges that the purpose of this act is to afford the public access to information that is in existence and has been memorialized in some way. The act is not intended to place a duty on the government to allocate personnel and resources to create information not already in existence. For example, it would not require a government instrumentality to transcribe public hearings if there is no other law requiring it. However, although this section provides that government is under no duty to create information, it does not permit a government instrumentality to prohibit a person from compiling the information himself so long as the other provisions of this act are not violated. If the information can be compiled from records that are open to public inspection, the individual has a right, under this act, to inspect those records and compile the information. An instance where a person would not have a right to compile information because it would be in violation of a provision of this act would be if the person desired the information for a commercial use in violation of section 1-17.

PREFACE TO SECTION 1-14

On the following pages, section 1-14 begins with the clause:

“Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure”

This phrase has been inserted to make explicit what is already implicit in this section, namely, that this section is only intended to provide a means for exempting the specified information from the general dictate of this act and is not intended to repeal or affect those laws in which discretion has been exercised in favor of requiring the disclosure of this information.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

(1) (a) Information contained in a memorandum prepared by an employee of government if its disclosure would be injurious to the consultative functions of government. Whenever such a memorandum contains factual or statistical information, this information shall be disclosed if it can be readily extracted from the memorandum without jeopardizing the meaning and confidentiality of the remaining sections. Nothing herein shall be construed to require the disclosure of information contained in a memorandum during the course of preparation.

(b) Any memorandum described in (a) shall not be withheld from disclosure if

- (i) the memorandum represents the sole basis for a decision of government, or**
- (ii) the contents have been incorporated by reference in a decision of government, or**
- (iii) it is a report or record of a safety or health investigation or inspection.**

COMMENT

Since internal memoranda of government are generally not required by law to be made, maintained or kept, they do not come within the provisions of the present Right to Know Law. However, with the expanded definition of

- “information” in the proposed Public Information Act, these memoranda would be open to public inspection unless they were specifically exempted. It is therefore the purpose of this section to exempt from public disclosure those memoranda which if disclosed would “be injurious to the consultative functions of government that the privilege of nondisclosure protects.”
- *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973). This policy is essential because of the nature of the decision-making structure. Although the ultimate judgment and the legal responsibility for making a decision or adopting a policy rests with one or a small group of individuals, a host of other personnel are often relied on to provide the decision-makers with legal advice or with various opinions and suggestions relating to the policy considerations, available alternatives, and possible ramifications of a course of action. It is the duty of staff and advisory officials to give a decision-maker all sides of a question. The effective operation of the decision-making process requires that this information be given and accepted freely and candidly, unadulterated by any pressure to conform to an accepted pattern and untempered by the thought of exposing oneself to future vulnerability. As was stated by the House of Representatives in enacting the Freedom of Information Act, 5 U.S.C. § 552:

“Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to ‘operate in a fishbowl.’ Moreover, a Government Agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation.”
H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Consistent with these needs of the decision-making processes of government, the purpose of this section is to allow the withholding of any information in a memorandum that, if disclosed, would tend to impede the deliberative processes of government officials.

- Part (a) establishes the general rule that a government instrumentality may withhold from disclosure information contained in a memorandum prepared by an employee of government, if disclosure would be detrimental to the consultative process. “Memorandum” is defined in section 1-3 to “mean all internal notes, drafts, worksheets, letters and similar materials prepared in the ordinary course of government business.” As indicated in the comment to that section, “memorandum” is broadly defined to include all papers, letters, reports, etc. The basic import of this definition is that it

includes all papers that are prepared and transmitted within government. It is insignificant whether the document is transmitted within an office, within a department or between government instrumentalities. However, what the term "memorandum" does not include are papers and other documents that are either prepared by, or transmitted to, persons outside of government.

After establishing the general rule that government memoranda may be withheld from disclosure, part (a) qualifies this by providing that information of a factual or statistical nature contained in such memoranda may not be withheld under this section if it can be extracted from the memorandum without jeopardizing the meaning and confidentiality of the remaining sections. This language essentially establishes a fact/opinion dichotomy. Under this standard only information in the memorandum which possesses the character of opinion, legal advice or policy considerations or recommendations is exempt from disclosure. It should be noted in this respect that the opinion or advice need not be specifically put in writing by the person giving it. It may be memorialized by another who is transcribing the oral advice or opinion being given. *Fisher v. Renegotiation Board*, 473 F.2d 109 (D.C. Cir. 1972).

This standard is based upon the federal experience under the Freedom of Information Act. Under that act, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from public inspection. Federal agencies have used this language to exclude from public inspection such things as indices,¹ the amount of federal subsidy money being paid,² meat inspection reports,³ and the names of government-paid appraisers and houses they appraised.⁴ The federal courts, including most recently the United States Supreme Court, have been quick to point out, however, that the inter-agency memorandum exception only protects "the consultative functions of government" and does not exempt statistical or factual information contained in these memoranda. *Environmental Protection Agency v. Mink*, 410 U.S. at 87-88, 93 S.Ct. at 836, 35 L.Ed. at 132 ("memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context" would be open to inspection); *Bristol-Myers Co. v. FTC*, 424 F. 2d 935 (D.C. Cir.), *cert. den.*, 400 U.S. 824 (1970); *Philadelphia Newspapers*,

¹H. R. REP. No. 738, 92d Cong., 2d Sess. 21-22 (1972); *Hearings on U.S. Government Information Policies and Practices before a House Subcommittee of the Committee on Government Operations*, 92d Cong., 2d Sess. 1253-54 (1972).

²*Hearings, supra*, at 1268-70.

³*Id.* at 1261-62.

⁴*Id.* at 1294-97; *Philadelphia Newspapers, Inc. v. Department of H. & U.D.*, 343 F. Supp. 1176 (E.D. Pa. 1972).

Inc. v. Department of H. & U.D., 343 F. Supp. 1176, 1178 (E.D. Pa. 1972) (amount of an appraisal is not part of decision-making process and names and addresses of appraisers are essentially factual, therefore they cannot be exempt from disclosure under inter-agency memorandum exemption); *Consumers Union of U.S., Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), *app. dism.*, 436 F.2d 1363 (2nd Cir. 1971) (records of tests done on hearing aids by Veterans Administration were not exempt from public inspection under intra-agency memorandum exemption); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1272-73 (1970). The provision in the proposed act seeks to avoid a similar experience in this State and therefore specifically incorporates the principles established under federal law and given specific approval by the United States Supreme Court.

The distinction adopted in this section is similar to that adopted in Connecticut where "inter-agency or intra-agency memoranda or letters dealing solely with matters of law or policy" are exempt from disclosure. CONN. STAT. ANN. § 1-19 (Non-cum. Supp. 1971). The United States Department of Transportation in implementing the federal act also adopted a like provision, 49 C.F.R. 7.61, which states:

"(a) Any record prepared by a Government officer or employee (including those prepared by a consultant or advisory body) for internal Government use is within the statutory exemption to the extent that it contains —

- (1) Opinions, advice, deliberations, or recommendations made in the course of developing official action by the Government, but not actually made a part of that official action. . . ."

A different approach is taken by the California Act which makes the public status of a memorandum contingent upon whether it is retained by the agency. CAL. GOV'T CODE § 6254 (West Supp. 1972) exempts from disclosure

"(a) Preliminary drafts, notes, or inter-agency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure."

In the proposed section, the phrase — "if it can be readily extracted from the memorandum without jeopardizing the meaning and confidentiality of the remaining sections" — was inserted to cover those situations that may arise where the exempt and non-exempt information are so inextricably

intertwined that it would be absurd to try to separate them, or the deletion of the exempt information would render the non-exempt information incomprehensible. See *Environmental Protection Agency v. Mink, supra*. This determination will obviously require the exercise of a degree of discretion. However, such discretion should always be exercised while cognizant of the basic policy of this act—to provide maximum access to government-held information.

The last part of subsection (a) reads “nothing herein shall be construed to require the disclosure of information contained in a memorandum during the course of preparation.” This sentence merely protects documents that are prepared in the course of compiling a final report or memorandum. The reason for exempting these documents from public inspection is that they represent incomplete works of government personnel that are subject to modification and revision before any action would be taken on them—in effect protecting the preliminary work product of a government official. They constitute a part of the thought processes of an official which by their nature contain unrefined ideas that, after being pondered over, are frequently discarded or modified. To disclose these documents would be to cause significant disruption in the review process toward the adoption of a final government position. It should be noted that this provision is primarily directed at protecting the need for government employees to produce statistical or factual information which they are compiling or using in the course of preparing intra-governmental memoranda. If this factual information is otherwise available then the appropriate custodian of government should be contacted in order to obtain it. Another provision in this act reflecting a similar policy is section 1-14(5) which exempts from disclosure information pertaining to pending litigation to which a government instrumentality is a party.

Part (b) of this section represents a significant limitation on the information that can be withheld from disclosure under part (a). The purpose of part (b) is to open up to the greatest extent possible the decision-making processes of government at their final stages so that the public will know the reasons for government action and can examine and evaluate what has been done by their representatives. Whenever possible, the public should be able to obtain the reasons why a decision has been made or an action taken, and this should be the case regardless of whether the explanations are contained in a formal opinion or in an internal memorandum. See *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 482 F. 2d 710, 721 (D.C. Cir. 1973). The provisions of this part are consistent with the policy expressed in the New Jersey Administrative Procedure Act, *N.J.S.A.* 52:14B-3, which encourages the disclosure of all final orders, decisions, and opinions. The innovative provisions contained in subsection (b) are nonetheless in-

- tended to reach a reasonable and appropriate balance between the need for
- protecting the functioning of the government process and the need for
- understanding the results of that process. The three specifically designated
- areas that serve to trigger the disclosure of otherwise exempt memoranda
- are based upon federal experience particularly federal court decisions, as
- well as upon an examination of several states which have recently considered
- the problem of public disclosure of government actions.

Under (b) (i) a memorandum becomes open to public inspection when it represents the sole basis for a decision of the government instrumentality. A federal case adopting this approach is *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 325 F. Supp. 1146 (D.D.C. 1971), *aff'd*, 482 F. 2d 710 (D.C. Cir. 1973) where the court was faced with the question of what constituted the final opinion of the Renegotiation Board. In holding that recommendations submitted to the Board were part of the Board's final decision in the circumstances presented, the court stated the general rule to be applied as follows:

“[W]hat the Court considers a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. . . . The essential factor is whether or not it represents the final conclusion and reasoning on which the final determination of the Board is based.” *Id.* at 1154. *See American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969).

As a practical matter, this provision will cause agencies to refrain from stating a sole reliance upon legal opinions if such is not the case. It will also require the publication of these opinions when they are the sole basis for agency decision.

Under (b) (ii) a memorandum becomes public if it is incorporated by reference in the decision of a government instrumentality. The rationale for making these memoranda public is that by referring to the memoranda, the instrumentality has acknowledged that it is a basis for the decision and has accorded a certain degree of persuasive authority to such document. Although the instrumentality can easily circumvent this section by not including references to such memoranda in its final decision, this should not be the policy adopted by government. The leading case illustrating the principle established in this provision is *American Mail Line Ltd. v. Gulick, supra*, where, on the basis of recommendations contained in a staff memorandum, the Maritime Subsidy Board ordered that \$3,300,000 in past subsidies be refunded to the government. In its decision the Board specifically stated that its ruling was based on a memorandum prepared by its staff

and attached the last five pages of such memorandum to its opinion. The court held that by referring to the memorandum, the agency incorporated it into its final decision and therefore made it public. The basic policy behind its decision was stated by the court as follows:

“We do not feel that appellee should be required to ‘operate in a fishbowl,’ but by the same token we do not feel that appellants should be required to operate in a dark room. If the Maritime Subsidy Board did not want to expose its staff’s memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action ‘as a matter of convenience’ . . . the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants.” *Id.* at 703. *See Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act, supra*, at 1274-76.

Subsection (b) (iii) has been inserted for the same reasons expressed in the comment to section 1-14(4) relating to investigatory records and is provided here again specifically in order to assure that this exemption will not permit the government to circumvent the provisions contained in the investigatory records section.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(2) Reports prepared for any government instrumentality by independent consultants or advisory committees until such instrumentality can either approve, reject, modify or implement the contents of the final report *provided* that these reports only be withheld at the direction of the head of the government instrumentality after a finding by him that the disclosure of the report would materially prejudice the accomplishment of its objective and provided further that no report be withheld for more than one year from the date on which the final report was submitted to the instrumentality.

COMMENT

It is unclear under the existing Right to Know Law whether reports of consultants or advisory committees are public or confidential. If such reports were "required by law" to be made, maintained or kept by the agency, then they would be public documents unless excluded by another provision of law. However, if the advisory committees were established informally under the general powers of the agency, or independent advisors were utilized by the agency on an informal basis without the passage of any specific rule or regulation, then the reports of these people would not be open to public inspection under the existing law.

This distinction appears to have been followed by the New Jersey Supreme Court in *Tagliabue v. Township of North Bergen*, 9 N.J. 32 (1952) where it held that tax cards prepared by an independent realty appraisal company that were made pursuant to a contract with the municipality were not public records. The court said that it could "discern no mandate embracing the information contained in the controversial documents within the statutory language of entries 'made or * * * required to be made by law.'" *Id.* at 35. In this respect the court viewed the contract, under which these cards were made, as an "extracurricular endeavor to facilitate the new tax program. . . ." *Id.* This decision does imply, however, that the tax cards would have been public if they were required by law to be made. With the interpretation of the "required by law" mandate of the more recent cases, it becomes questionable whether such records still fall outside the scope of the Right to Know Law.

In the proposed act, there is no question that the reports of all consultants or advisory committees are subject to the act. Such reports are made public and treated differently from governmental memoranda because of

their character. Although these reports are analagous to reports prepared by the subordinates or staff of a government official, they possess one major distinction. Unlike a staff member who prepares a report to assist in the policy-making function, an independent consultant is employed and an advisory committee is appointed for the specific reason that a specialist's analysis, based on an acquired expertise in a given field, is required. The prime purpose for their utilization is to obtain the opinion of people who have expertise in an area and whose opinion is therefore a more potent and reliable appraisal. Because both a consultant and an advisory committee are utilized to obtain a more specialized and knowledgeable opinion than can be provided by government personnel and because this entails an extra expenditure of public revenue, and because these people are appointed outside of civil service safeguards, the public should be able to evaluate the final product received in relation to the additional expenditure of revenue. This is especially true in the case of consultants who are generally paid at a monetary rate in excess of that required to employ government personnel to do similar work. It is therefore essential that the public be able to inspect, for itself, whether an expert's opinion was actually needed, whether the reports submitted were being utilized and followed through by government officials, whether the reports justified the additional costs for expertise, and whether advisory committees were not being utilized to further special interest groups. This act, therefore, makes the reports of consultants and of advisory committees open to public inspection. The exception to this general rule is that these reports may be withheld from disclosure for a period of up to one year after they have been submitted. This exception is inserted to enable the government official to analyze, research, evaluate, modify and implement the recommendations contained in the report. However, the power to keep these reports confidential should *only* be invoked where the disclosure of the contents of the report would be inimical to the public interest. So that the power to keep these reports confidential is not invoked as a matter of form and is not abused, this section provides that the power to withhold these reports from public disclosure must be exercised by the head of an executive department, or in the case of another government instrumentality, the head of such instrumentality. It should also be noted that both the interim and the final reports of consultants or advisory committees are public. Therefore, interim reports cannot be withheld from disclosure when they are received unless the head of the instrumentality exercises the power granted by this act. If such power is exercised to withhold interim reports, they may be withheld up to one year after submission of the final report. At the end of this time period, they automatically become public information and must be disclosed.

A prime example of reports that would be kept confidential under this section are those prepared for the Department of Higher Education by

independent consultants who analyze the status of institutions licensed by the Department. Where these reports show that institutions are deficient in certain respects, the Department may revoke their licenses or, if the Department feels that these deficiencies can be corrected, may give the institution a specified period of time within which to comply with the required specifications. If the reports were made public before the institution was given a period in which to correct the deficiencies, it may have the effect of destroying this potential for compliance and forcing the Department to take away the license of an institution which may otherwise have been able to correct the reported deficiencies and become a well-functioning entity. It should also be pointed out that where the circumstances warrant it, the instrumentality may have the one year period extended under 1-20(4) by applying to the court for such an order. The instrumentality, however, would have to prove that the disclosure of the report would *clearly* be detrimental to the public interest before such extension could be granted.

The federal government has recently enacted the Federal Advisory Committee Act, *P.L. 92-463, 86 Stat. 770 (Oct. 6, 1972)*, which has as one of its stated purposes the objective of keeping the Congress and the public informed with respect to the number, purpose, membership, and cost of advisory committees. Section 6 of this act provides:

“(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.”

There are several provisions in that act which relate to public records and open meetings. Section 8 provides:

“(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall —

* * *

- (2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and
- (3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.”

The provision that most directly deals with the public's right to know is section 10 which reads as follows:

“(a) (1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.

(b) Subject to section 552 of title 5, United States Code [the Freedom of Information Act], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.”

This federal act also provides that transcripts of agency proceedings or advisory committee meetings shall be made available at the actual cost of duplication. Additionally, section 13 of the act provides for the filing “of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants” with the Library of Congress to be made available for public inspection and use. For a discussion of this act, see *Hearings on U.S. Government Information Policies and Practices—Public Access to Information from Executive Branch Advisory Groups—Before a House Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. (1972)*.

Although the proposed Public Information Act as it relates to advisory committees is not as extensive or detailed as the Federal Advisory Committee Act, nor does it open to public inspection as much material as does the federal act, its basic policy aim is consistent with that of the federal act. This aim is simply to lift advisory committees from their heretofore secret environment and place them in an environment in which the public is able to view their work.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(3) Information that has been received from, or transmitted to, a member of the public unless it is information the sender is required by law to transmit. For the purposes of this subsection, "law" shall mean a constitutional provision, statute, executive order, ordinance, resolution, rule or regulation.

COMMENT

This section gives a government official the discretion to withhold from public inspection any information that he has either received from, or transmitted to, members of the public and where neither he nor the public were under any specific legal obligation to transmit such information. One of the basic reasons for excluding information that has been *voluntarily* transmitted to government by members of the public is that government must frequently rely upon the voluntary cooperation of individuals in order to perform its assigned functions. The information needed may not be able to be obtained without the government agreeing to keep such information confidential. A good example of this is the program run by the Department of Health relating to clinical laboratories. The department will send what it calls "unknowns" to these laboratories for evaluation. When the laboratory transmits its results back to the department, the department is able to evaluate the quality of the service the laboratory is performing. This program is run on a voluntary basis with the laboratories being under no legal compulsion to cooperate in it. In order to obtain the cooperation of these laboratories, the Department has agreed to keep the results of individual laboratories confidential. This section, therefore, would enable this program and other programs like it to continue in existence.

Probably the two major types of information that will be covered by this section are correspondence and complaints. Two basic reasons exist for exempting correspondence from public disclosure. The first is that the public should be able to communicate to their officials in confidence. Members of the public may have questions, criticisms, complaints, or just general information that they want to convey to their governmental representatives without having it disclosed to everyone else in society. As President Johnson stated on signing the Federal Freedom of Information Act,

"A citizen must be able in confidence to complain to his Government and to provide information . . . without fear of reprisal or of being required to reveal or discuss his sources." Statement by

President Johnson upon signing Public Law 89-487 on July 4, 1966, reprinted in *Hearings on U.S. Government Information Policies and Practices Before a House Subcomm. of the Comm. on Government Operations, 92d Cong., 2d Sess. 1080 (1972)*.

Therefore, in order to encourage communications between the public and its representatives, this section allows correspondence to be withheld from public inspection.

The second reason is that, with the magnitude of correspondence that is received and transmitted by government daily, it would be almost impossible to retrieve it on request. Cognizance must be taken of the fact that correspondence is not only received and transmitted by officials at the top of the governmental hierarchy, but is received and transmitted by every person employed by government. To require these people to disclose correspondence received or transmitted to a certain person or relating to a specific subject would require government employees to expend a great deal of time either searching for the requested document or indexing, according to name and subject, all correspondence received or transmitted by them. This, in balancing the interests, would entail an unreasonable expenditure of public time and funds.

Complaints received from members of the public are also allowed to be withheld from disclosure under this subsection. This policy has been adopted first, to encourage citizens to present their grievances to the proper governmental tribunal without fear of reprisal, and second, to protect persons against whom the complaint has been filed from unsubstantiated and malicious allegations that are contained in some of these documents. The California Act, CAL. GOV'T. CODE § 6254(f) (West Supp. 1972), also contains a provision which allows complaints to be withheld from disclosure. In the federal government, the Commission on Civil Rights has stated their policy on this subject to be:

“As a general rule, it shall be deemed reasonable to conclude that a communicant would not wish disclosed to the public a communication alleging, or supporting an allegation of, the commission of wrongs by certain persons or entities.” 45 *C.F.R.* 704.1 (f)(2).

A like position is taken by the United States Atomic Energy Commission which exempts from disclosure,

“Correspondence received by the AEC relating to an alleged or possible violation of any statute, regulation, order, license or permit.” 10 *C.F.R.* 9.5(a)(7)(ii).

In relation to correspondence and complaints received from the public it is important to note that there is an alternative source available for obtaining the information sought, namely, the person sending the information. This, of course, allows the person requesting that information to obtain it if the person sending it is willing to disclose that fact. It is not the type of information therefore that government generates for itself and protects in its own interest.

It is important to note that this section only *allows* an agency to withhold complaints; it does not *mandate* that this information be withheld. Therefore, it should not be interpreted as precluding those agencies, whose enforcement procedures and effectiveness rely on publicity, from disclosing this information. Examples of such agencies might be Consumer Affairs or Environmental Protection. One of the primary ways that the Division on Consumer Affairs would be able to protect the consumer and stop fraudulent or unconscionable business practices is to disseminate the information that a number of complaints have been received against a certain company or business. This section recognizes that this may be an appropriate procedure to be followed, but also recognizes that mandating the disclosure of one or a couple of complaints against a business might unjustifiably bring injury to such business. Complaints received by the Department of Environmental Protection would fall into the same category. As is discernable from recent history, the impetus furnished by the general public, arising out of the dissemination of information to it, is one of the major reasons for the increased activity in the area of environmental protection. The publicity given to environmental problems and complaints continues to be a major enforcement tool for obtaining compliance with environmental rules and a potent source for obtaining support for needed changes in the law. Therefore, this section would allow, in the discretion of the agency, these complaints to be made public.

Under this section if the sender—be he a government official or a member of the public—is required to transmit the information by law, it is not exempt from public inspection. This includes such things as warning letters, decisions rendered by an administrative agency, or policies and regulations that have been adopted by such agency. Another example of such material are the reports that owners of multiple dwellings must transmit to the government under the Multiple Dwelling Reporting Rule, 2 *N.J.R.* (to be published in *N.J.A.C.* 13:10-1). This rule requires a report to be made on the racial background of applicants seeking to rent premises and of tenants living in the dwelling. Although this report is transmitted from a member of the public to a government official, it is not correspondence within the meaning of this section since the sender is required by law to compile and transmit this document.

The definition of law in this subsection is provided so that it can accomplish the primary purpose of excluding from the operation of this section all information which "is required by law" and distinguishes a specific legal mandate from a general duty to transmit the information. For example, complaints may be withheld under this section even though there is a general duty on citizens to report illegal behavior. Confidential information required by law to be transmitted is governed by other sections of this act, such as § 1-15(1) which excludes from disclosure information relating to a person's physical or mental condition. Since the original definition of law in § 1-3 is somewhat restricted, the broader definition is used in this section since it is related to a different purpose.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(4) Information that is part of an investigatory record compiled for law enforcement purposes except that this section shall not apply to (i) scientific tests, reports or data or (ii) reports or records of safety or health investigations or inspections.

COMMENT

The existing Right to Know Law contains a specific provision exempting from disclosure records pertaining to investigations in progress if such disclosure would be inimical to the public interest. *N.J.S.A.* 47:1A-3. Executive Order No. 9 issued by Governor Hughes pursuant to the Right to Know Law also recognizes the need to keep these records confidential. It exempts from public inspection

“Fingerprint cards, plates and photographs and other similar criminal investigation records which are required to be made, maintained or kept by any State or local governmental agency.”

Executive Order No. 48, a more recent order issued by former Governor Hughes, likewise provides that the investigative files of the State police may not be divulged to any person who is not a member of a duly-recognized law enforcement agency. *See Stack v. Borelli*, 3 N.J. Super. 546 (L. Div. 1949) (court withheld disclosure of report on investigation of Hoboken Police Department).

Consistent with this history of the law affording confidential treatment to investigatory records, this section permits a government instrumentality to withhold these records from disclosure. There are several reasons for exempting these records from public disclosure: first to protect the government's case in a law enforcement proceeding, second to protect the investigatory techniques utilized by the government, third to protect the free and candid flow of opinions and evaluations of government employees concerning the investigation, fourth to protect the identity of informers and other persons on whom the government depends for information concerning the commission of an offense against the laws of this State, and fifth to protect an individual under investigation from defamatory and baseless allegations that have been made against him and that are contained in the files.

Under this section the general rule is established that a government instrumentality may keep information confidential if it is part of an investi-

gatory record and if such record was compiled for law enforcement purposes. "Investigatory record" is intended to mean any records or documents that pertain to investigations conducted by a government instrumentality. The term "record" has been utilized in this provision because of the experience the federal government had with its act. In the federal act, the exemption presently reads "investigatory files." The use of the word "file" however has allowed federal agencies to commingle non-exempt and exempt records in a single file, thereby affording confidential treatment to records not intended to be withheld from the public. *H. R. Rep. No. 92-1419, 92nd Cong., 2d Sess. 84 (1972)*. The phrase "compiled for law enforcement purposes" refers to the enforcement of all types of law. It is intended to include the enforcement of criminal and civil law as well as the enforcement of statutes, rules, regulations, and similar pronouncements having the force and effect of law. *See, e.g., Williams v. IRS*, 479 F. 2d 317 (3rd Cir. 1973).

For the government to carry out its assigned function of enforcing the law, and for the administrative agencies to be able to insure compliance with both the dictates of statute and of their regulations, it is often necessary that investigations be conducted without the individual under investigation gaining knowledge of it or learning of the information that is being uncovered. If the individual becomes aware of an impending investigation, the effectiveness of such investigation would be completely annulled. *See Rogers, The Right to Know Government Business from the Viewpoint of the Government Official*, 40 MARQ. L. REV. 83, 88 (1956). Furthermore, the presentation of an effective case by the government in a law enforcement proceeding requires that there be a certain amount of confidentiality. Premature disclosure could be devastating by giving the person under investigation ample opportunity for fabrication or sufficient time to intimidate witnesses.

Like the trade secrets of private individuals, the techniques utilized in carrying out an investigation are vital to the government in its business of law enforcement. One of the prime advantages government possesses in conducting investigations of illegal activity is that the persons under investigation do not have knowledge of the techniques and equipment being used by government to obtain the required information. To disclose investigatory records containing these techniques would be to give personal notice to those under investigation of the methods and procedures against which they must protect themselves.

Also contained within investigatory records are the comments, opinions, and conjecture of government personnel charged with the duty of carrying out the investigation. These statements contain opinions as to the probable guilt or innocence of an individual, recommendations on whether

- and how to proceed with the investigation, an evaluation of the status of the
- case, advice on what action the government should take in a particular
- situation, and evaluations of the credibility of potential witnesses. This
- advice must be given by these personnel freely and candidly so that their
- superiors can decide what course of action should be taken. Disclosure of
- this information would have an inhibitory effect on the communications
- between these individuals, thereby impeding the effective enforcement of
- the law.

The fourth reason for keeping these records confidential is the "Informer's Privilege." Although it is termed the "Informer's Privilege," it "is in reality the Government's privilege." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). In many instances effective law enforcement depends upon obtaining statements from informers and other persons who have knowledge of relevant facts. It frequently occurs that these people will not make such statements unless it is agreed that this information be kept confidential. Therefore, to alleviate any trepidations or fears that would inhibit the obtaining of this information the government gives an assurance of confidentiality. The need for this privilege has been recognized by both the United States and the New Jersey Supreme Courts, *Roviaro v. United States*, *supra*; *State v. Oliver*, 50 N.J. 39 (1967), and the intent of this section is also to acknowledge the need for it and to protect it from erosion.

In addition to protecting the law enforcement operations of government, this section has exempted investigatory records also to protect the rights of individuals. These files contain a significant amount of information consisting of conjecture, mere rumor, or baseless allegations. They contain many hearsay statements and a good deal of defamatory information that has not been substantiated by government investigators. Rogers, *The Right to Know Government Business from the Viewpoint of the Government Official*, *supra*, at 88. If this information were disclosed, the person under investigation would be convicted by the public before he was accorded any of his due process rights. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). There is a high probability that disclosure of this information could be highly destructive to the reputation of an innocent individual. Furthermore making this information public would destroy many of the judicial safeguards that have been established to protect a person from a wrongful conviction. To avoid prejudice to a defendant, Disciplinary Rule 7-107 of the Code of Professional Responsibility has restricted the information that should be disseminated pending trial. The New Jersey Supreme Court in commenting on a prior Canon stated that it banned

"statements to news media by prosecutors, assistant prosecutors and their lawyer staff members, as to alleged confessions or incul-

patory admissions by the accused, or to the effect that the case is 'open and shut' against the defendant, and the like, or with reference to the defendant's prior criminal record, either of convictions or arrests. Such statements have the capacity to interfere with a fair trial and cannot be countenanced. With respect to prosecutors' detectives and members of local police departments who are not members of the bar, statements of the type described are an improper interference with the due administration of criminal justice and constitute conduct unbecoming a police officer. As such they warrant discipline at the hands of the proper authorities.

The ban on statements by the prosecutor and his aides applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible." *State v. Van Duyne*, 43 N.J. 369, 389 (1964), *cert. denied*, 380 U.S. 987 (1965).

The provision in the Federal Freedom of Information Act which relates to this type of information exempts from disclosure

"Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

For provisions in other states relating to investigatory records *see* CAL. GOV'T. CODE § 6254(f) (West Supp. 1973), COLO. REV. STAT. ANN. 113-2-4(2) (a) (Supp. 1973) and TENN. CODE ANN. 15-305 (Supp. 1973). The House of Representatives' Report indicates that this section was included so as not to

"give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." *H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)*.

In a questionnaire submitted to a House Subcommittee of the Committee on Government Operations, the Department of Justice stated the following policy reasons for withholding investigatory files from the public:

"investigative files of this Department . . . are voluminous. They contain great masses of unevaluated information the release of which would be injurious to innocent persons. In addition, the law enforcement needs of the United States make it vital to protect investigatory techniques and to maintain the continued trust of the

public that investigative information may safely be given to the Department, without fear of its release if the particular file should for some reason later be termed 'closed.' ” *Hearings of U.S. Government Information Policies and Practices Before a House Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. 1202 (1972).*

For the guidelines of the United States Department of Justice on release of information prior to trial see 28 *C.F.R.* 50.2. For an example of a regulation implementing the provision in the federal act see 49 *C.F.R.* 7.65. “Law enforcement purposes” in the federal act and in the present section includes the enforcement of all types of laws. *H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)*; Attorney General’s Memorandum, reprinted in *Hearings, supra*, at 37. This provision would include not only criminal laws but investigations relating to the enforcement of labor laws, securities violations, consumer laws and other investigations concerning violations of either statutes or regulations.

The significant problem that has developed under the federal provision is—does an investigatory file compiled for law enforcement purposes retain that characterization after the conclusion of the enforcement proceedings. Several commentators, and also the latest Report of the House Subcommittee, have suggested that materials in an investigatory file should be entirely open after the enforcement proceedings are completed or after they are precluded by other factors such as the statute of limitations. *H.R. Rep. No. 92-1419, 92nd Cong., 2d Sess. 84 (1972)*. Nader, *Freedom From Information: The Act and the Agencies*, 5 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 1, 6 (1970); *Hearings, supra*, at 1156. The federal courts appear to be taking this position and holding that files are no longer investigatory files compiled for law enforcement purposes where there is no real prospect of future enforcement proceedings. *Bristol-Myers Co. v. F.T.C.*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970); *Legal Aid Society of Alameda Cty. v. Schultz*, 349 F. Supp. 771, 777 (N.D. Cal. 1972); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711-12 (E.D. Pa. 1968). However, several courts have taken the position that

“[a] file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding.” *Cowles Communications, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971); *Frankel v. S.E.C.*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972).

Because the reasons behind the exemption are often equally viable after the law enforcement proceeding as they were before it, the present section

under discussion adopts the reasoning in *Cowles* and allows the government instrumentality to withhold these records both prior and subsequent to law enforcement proceedings. An example of a statute following this same course is found in South Dakota. Their statute provides:

“Section 1-27-1 shall not apply to any office where such records and files relate to criminal actions or matters, except where such actions or matters are completed, and then only at the discretion of the officer having such records and files in his office or under his control.” S.D. COMP. LAWS ANN. 1-27-2 (1967).

After hearing the testimony presented at the Hearings on the Federal Freedom of Information Act, Congressman Moorhead introduced a proposal to amend the federal provision to exempt from disclosure:

- “(7) Investigatory records compiled for any specific law enforcement purpose the disclosure of which is not in the public interest, except to the extent that —
- (A) any such investigatory records are available by law to a party other than an agency, or
 - (B) any such investigatory records are —
 - (i) scientific tests, reports, or data,
 - (ii) inspection reports of any agency which relate to health or safety, or
 - (iii) records which serve as a basis for any public policy statement made by any agency or officer or employee of the United States or which serve as a basis for rule-making by any agency.” *H.R. No. 17142, 92d Cong., 2d Sess. § 2(d) (7) (1972).*

This amendment is in conformity with the recommendation of the House Subcommittee studying the federal act. *H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 84 (1972)*. One of the main reasons for this suggested change was the fact that federal agencies were using this exemption to withhold information concerning health or safety problems from persons directly affected by these hazardous conditions. In discussing the problem relating to workers in hazardous industrial plants, the Subcommittee Report states that the use of this exemption in situations involving “the lives of millions of American workers is contrary to sound public policy.”

The portions of the House Bill that this section has adopted are the exclusion of scientific tests, reports or data and reports or records of safety or health investigations from the definition of “investigatory records.” The former has not been included within investigatory records because the reasons for withholding investigatory records do not also justify the with-

holding of this type of data. Scientific tests, reports or data, therefore, can neither be withheld from disclosure under this section nor as a governmental memorandum under section 1-14(1) since the latter section does not allow factual material to be withheld.

Although the reasons for withholding investigatory records are applicable to "reports or records of safety or health investigations or inspections," this section excludes them (as does the proposed amendment to the federal act) because the reasons for withholding these reports or records are greatly outweighed by the public's right to know of any continuing and imminent peril to their health or safety. Of greater importance than the duty of agencies to enforce health and safety regulations through punitive measures, is their duty to discover and disclose the existence of conditions injurious to members of the public. The preponderance of this duty was clearly recognized by the court in *Bzozowski v. Penn.-Reading Seashore Lines*, 107 N.J. Super. 467, 472 (L. Div. 1969) where it ordered the Board of Public Utility Commissioners to disclose its records of the investigation of an accident that occurred at a grade crossing of the Pennsylvania Reading Seashore Line. See *Irval Realty, Inc. v. Board of Public Utility Commissioners*, 6 N.J. 366 (1972) (court ordered disclosure of accident reports of Board of Public Utility Commissioners concerning the occurrence of a gas explosion). For cases under the Federal Freedom of Information Act concerning records involving public health and safety see *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971) (involved letters of warning issued by the Department of Agriculture sent to meat and poultry processors and the names of processors whose products had been detained); *Weckslor v. Schultz*, 324 F. Supp. 1084 (D.D.C. 1971) (Government inspectors' reports concerning health and safety conditions in plants inspected under the Walsh-Healey Act and notices of violation); *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968) (accident report prepared by the Office of Occupational Safety relating to an employee's death).

An example of the type of health and safety investigations intended to be made public by this act are those conducted by the Bureau of Engineering and Safety. That Bureau conducts inspections of construction sites and factories to insure compliance with the regulations of the Bureau. Where a serious injury or death occurs in a factory or at a construction site, inspectors from the Bureau are dispatched to the accident site to inspect the premises and investigate the accident. These investigations are undertaken for the purpose of determining the cause of the accident and also with the hope that they will lead to the formulation of a regulation that may limit the possibility of the particular type of accident. These inspections may also lead to the issuance of an Order by the Bureau containing citations of any viola-

tions found by the inspectors and also recommendations which the Bureau believes would be helpful in preventing future accidents. Because, in the case of investigations conducted by the Bureau and investigations conducted by similar agencies, the uncovering of violations or dangerous conditions may place many members of the public in a situation of imminent peril, this act takes the position that the right of the public to know of such conditions must predominate over the countervailing interests. A similar position has been taken by a neighboring state whose statute provides that

“... the term ‘public records’ shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants. . . .” PA. STAT. ANN. 65 § 66.1 (Supp. 1973-74).

Like most of the other exemptions contained in this act, this provision does not *direct* that investigatory records must be kept confidential. It leaves this determination to the discretion of the government instrumentality to be exercised by it according to the dictates of each particular case. Disclosure or non-disclosure may depend upon many factors including the stage of the investigation, the duties of the agency, and the fundamental fairness that must be accorded the person under investigation. The exercise of this discretion should be based on the reasons initially presented in this comment justifying withholding of investigatory records. As with the other exemptions under this act, information contained in an investigatory record may only be withheld if a valid reason exists requiring confidentiality. Where no such reason exists, then the record is public. *Ditlow v. Volpe*, 362 F. Supp. 1321 (D.D.C. 1973). Because of the numerous reasons that require the confidentiality of these records and the dependency of their disclosure upon the particular circumstances presented, this section, of necessity, requires that the instrumentality analyze the specific information requested in terms of the factual situation at hand. Whether sufficient reasons exist to support the confidentiality of these records is left to the agency, the Public Information Commission, and the courts.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(5) Information pertaining to pending litigation to which a government instrumentality is a party or to claims made pursuant to *N.J.S.A. 59:1-1 et seq.* until such litigation or claim has been finally adjudicated or otherwise settled according to law.

COMMENT

The source of this section is CAL. GOV'T CODE § 6254(b) (Supp. 1973) which exempts from disclosure:

“Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until such litigation or claim has been finally adjudicated or otherwise settled.”

The comment appended to this section by the California Statewide Information Policy Committee expresses its purpose as follows:

“Any agency cannot be required to release information that pertains to litigation involving that agency. This does not grant to the public agency the right to withhold information on the basis that litigation may occur at some time in the future.

“The same principle applies to claims made by individuals against public entities and public employees.

“Records relating to these cases are available after adjudication or settlement. This section, in effect, upholds the attorney-client privilege. . . .” *Report of the California Statewide Information Policy Committee 9* (March 1970).

This policy expressed by the California Committee is also at the heart of the provision established here. In addition it must be recognized that since the provisions of this act are subject to the qualification “unless otherwise provided by law,” no provision of this act can require the disclosure by an attorney of his work product which may legitimately be withheld consistent with the rules of court. This section relates to the work product problem and recognizes the validity of protecting the mental impressions and opinions of attorneys and any notes in connection therewith. It is an attempt to provide the necessary protection to the government client and its attorney in the pur-

suit of pending litigation or the disposition of claims. On the other hand, to the extent that an attorney's file is disclosable pursuant to discovery rules and to the extent that that disclosure would be consistent with the remaining provisions of this act, it is recognized that the public would be entitled to an examination of such information at the conclusion of the proceedings relating to the litigation or settlement of claims involving a government instrumentality. The provision is not to be used, as pointed out in the California comment, as a subterfuge for failing to disclose information otherwise required to be public under this act and not within the spirit or intent of this particular provision. For example, opinions of an Attorney General required to be public under the governmental memoranda section should not be withheld from disclosure unless of course they were rendered in connection with pending litigation and then only for the period of time during which that litigation exists.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(6) Internal rules and internal practices not required to be made public by *N.J.S.A. 52:14B-3* if disclosure would unduly impede the functioning of the government instrumentality.

COMMENT

This section is aimed at protecting staff instructions and guidelines that require secrecy if the government instrumentality is to adequately perform its assigned duties. It is aimed at protecting such things as investigative techniques, litigation tactics and instructions in settling a claim or other controversy. As is explained in the United States Attorney General's memorandum discussing the purpose for a similar section in the Federal Freedom of Information Act, this section is intended

“to relate to those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function. The examples cited in the House report . . . are ‘operating rules, guidelines, and manuals of procedure for Government investigators or examiners.’ An agency cannot bargain effectively for the acquisition of lands or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential. Similarly, an agency must keep secret the circumstances under which it will conduct unannounced inspections or spot audits of supervised transactions to determine compliance with regulatory requirements. The moment such operations become predictable, their usefulness is destroyed.

As the example cited in the House report indicates, the exemption in subsection (e) (2) is designed to permit the withholding of agency records relating to management operations to the extent that the proper performance of necessary agency functions requires such withholding. However, as the House report states, at page 10, ‘this exemption would not cover all “‘matters of internal management’” such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.’ It follows that the exemption should not be invoked to authorize any denial of information relating to management opera-

tions when there is no strong reason for withholding." *Attorney General's memorandum on the public information section of the Administrative Procedure Act, United States Department of Justice (June 1967) reprinted in Hearings on U.S. Government Information Policies and Practices Before a House Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. 1114-15 (1972). See Cuneo v. Schlesinger, 484 F. 2d 1086 (D.C. Cir. 1973).*

The section in the proposed act allows internal rules and internal practices of a government instrumentality to be withheld from disclosure if, first, they are not required to be made public by *N.J.S.A. 52:14B-3* and if, second, the disclosure of these rules and practices would unduly impede the functioning of the government instrumentality. The phrase "internal rules and internal practices" is not meant to include personnel files or the internal rules and practices governing the employer-employee relationship. Personnel records are dealt with in a separate section of this act and there appears no reason for withholding rules governing items such as lunch hours or parking facilities, etc. Although it can be argued, that the public has no need to obtain these rules, this argument is in contravention of the basic precept of this act which is that all information is public unless a valid reason exists requiring confidentiality. Under this precept it is not the public who must prove a need to gain information, but instead, it is the government that must prove a need for withholding information.

The term "practices" in this section not only includes procedures that an agency follows but also includes the devices that are utilized in implementing these procedures. For example, the actual surveillance of an individual by the police would be a procedure they would use in crime detection. However, such surveillance may require the utilization of radio transmitters or the like. Under this section, not only would "practices" include the specific surveillance techniques utilized, but it would also include the documents used to purchase the transmitters or other information describing their components. If, for example, any of these documents contained the frequency at which these devices operate, it would enable those under surveillance either to uncover the surveillance by buying a receiver operating at the same frequency or by jamming the transmission. This example illustrates that the scope of the term "internal practices" must be measured by the confidentiality required for a government instrumentality to perform its assigned duties.

As previously mentioned, for an internal rule or internal practice to be exempt under this section two conditions must be met. First, the practice or rule must not be required to be made public by *N.J.S.A. 52:14B-3* and,

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(7) Information received from other states or from the federal government pursuant to an agreement that the information be kept confidential.

COMMENT

The purpose of this section is to allow the State to obtain information from other states or from the federal government which these states would not release unless they were assured that the information being transmitted was only disseminated to authorized personnel. For example, for law enforcement personnel to obtain information through the National Crime Information Center, which possesses computerized criminal history data, it is necessary to agree that its disclosure be limited to authorized persons only.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(8) The contents of real estate appraisals or other information relating to the possible acquisition of property by a government instrumentality if disclosure would be likely to benefit a party whose interests are adverse to those of the general community and only until such time as title to the property or property interest has passed to such instrumentality except that where required by law the contents of any appraisals shall be made available to the owner of the property.

COMMENT

Under this section the phrases—"real estate appraisals" and "other information"—are both modified by the phrase "relating to the acquisition of property by a government instrumentality." Therefore the only type of appraisals or information excluded from disclosure by this section is that prepared as a preliminary step to the acquisition of property. This section does not exclude appraisals, such as those conducted for the purpose of real property taxation, that do not involve a planned acquisition of land by a government instrumentality. See *Philadelphia Newspapers, Inc. v. Department of H. & U.D.*, 343 F. Supp. 1176, 1178 (E.D. Pa. 1972) (appraisals done for FHA insurance are open to public inspection).

The reason for exempting the information described in this section is to avoid its use by speculators. Making this information available to the public would provide speculators with a valuable tool that they could utilize to purchase land from unsuspecting owners at a reduced rate. After obtaining this land, they could then resell it to the State at a higher rate than had been paid by them or than the State might have otherwise paid if it bought the property directly from the owner. In such a case, the speculator would be obtaining a windfall at the expense of the prior owner or the State. With respect to the owner of the property, this section is consistent with *N.J.S.A. 20:3-6* (Supp. 1973-74) which provides that prior to an offer made to the owner of property by a condemnor, "the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property."

The phrase "other information" has been inserted in this section to cover evaluations, plans, studies or estimates that would disclose the intent of the government instrumentality to acquire particular property. These are

included in this section for the same reason as the inclusion of real estate appraisals.

The source of this section is COLO. REV. STAT. ANN. § 113-2-4 (2) (a) (v) (Supp. 1973) which allows to be withheld from disclosure:

“The contents of real estate appraisals made for the state or a political subdivision thereof relative to the acquisition of property or any interest in property for public use, until such time as title to the property or property interest has passed to the state or political subdivision, except that the contents of such appraisal shall be available to the owner of the property at any time, and except as provided by Colorado Rules of Civil Procedure. If condemnation proceedings are instituted to acquire any such property, any owner thereof who has received the contents of any appraisal pursuant to this section shall, upon receipt thereof, make available to said state or political subdivision a copy of the contents of any appraisal which he has obtained relative to the proposed acquisition of the property.”

Other similar provisions are found in CAL. GOV. CODE § 6254 (4) (h) (West Supp. 1973) and MASS. GEN. LAWS ANN. c. 66, § 17B (Supp. 1973), the former exempting from disclosure:

“The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency * * * relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreement obtained, provided, however, the law of eminent domain shall not be affected by this provision.”

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(9) Test questions, scoring keys, grades of individuals and other examination data pertaining to the administration of a licensing, employment or academic examination except that after conducting and grading such examination, a person in interest shall have the right to inspect, but not copy, his examination, his answers, transcripts of his oral examination, and his scores. Nothing in this subsection, however, shall prohibit or affect the disclosure of the overall results of any examination.

COMMENT

The source for this section is COLO. STAT. ANN. § 113-2-4 (2) (a) (iii) (Supp. 1973) which allows the following to be kept confidential:

“Test questions, scoring keys, and other examination data pertaining to administration of a licensing examination, examination for employment, or academic examination; except that written promotional examinations and the scores or results thereof conducted pursuant to civil service, or any similar system shall be available for inspection, but not copying or reproduction, by the person in interest after the conducting and grading of any such examination.”

For other provisions allowing this data to be kept confidential see CAL. GOV'T CODE § 6254(g) (West Supp. 1972); 5 C.F.R. § 294.501.

This section is intended to protect examination data that is dependent on confidentiality for its effectiveness. Test questions, scoring keys, and similar examination data are excluded from public inspection simply because this material is utilized for more than one examination. The same test may be used many times, or several of its questions or parts may be incorporated in future examinations.

The last sentence in this section has been inserted to make it clear that, regarding the subject of grades, this section is only aimed at withholding the grades of *individuals* and seeks only to protect the personal privacy of an individual. It cannot be used to protect overall test results. In the case of *Chappell v. Marburger*, C-961-72 (Ch. Div., filed Nov. 20, 1972), plaintiff alleged that the disclosure of the results of the State-wide testing program, conducted by the Department of Education, broken down by individual

class, school, and school district would invade the right of privacy. This section, however, does not protect any purported right of privacy contained by a group of unnamed individuals. Therefore, only test results of named individuals can be withheld. It does not authorize withholding of overall scores or scores relating to given areas, regions or groups. However, it is anticipated that since test results to be understandable are often in need of specialized interpretation, they will be accompanied by explanatory materials to avoid their misinterpretation or misuse.

The present policy of the Department of Education regarding the release of information relating to the State-wide testing program is found in *N.J.A.C. 6:39-1.2* which reads as follows:

“(a) Notwithstanding N.J.A.C. 6:3-1.3, individual student data shall be released only [in accordance with existing State Board Policy pursuant to New Jersey Administrative Code 6:3-1.3 and applicable law, and by the local school districts] to a pupil, his parent or legal guardian, and school personnel and school officials deemed appropriate by the Commissioner.

(b) The State Department of Education shall produce and distribute to chief school administrators as uninterpreted reports: a classroom report for the teacher; a school report for the school principal; a district report for the district superintendent or chief school administrator; and a county report for the county superintendent.

(c) The State Department of Education shall provide an interpreted geographic regions report and an interpreted state report to the State Board and the Commissioner of Education.

(d) Each of these reports shall consist, [where appropriate, of average scores and standard deviations, and shall be accompanied by appropriate explanatory materials] of report forms and interpretive aids approved by the Commissioner.

(e) Reports shall be distributed to local boards, as indicated in (b) (c) and (d) above, in such a manner as to provide a 60-day period from receipt of all standard reports for analysis of data and for the development of additional essential interpretive material by the local board pursuant to 6:39-1.2. During this period such material shall not be available for public distribution.

(f) Following a 60-day analysis period, reports indicated in subsections (b) (c) and (d) above, *excepting classroom and individual pupil reports*, shall be made available to the public; provided, however, that no reports shall be released unless they are accompanied by [interpretation] interpretive materials approved by the Commissioner.

(g) The Commissioner, with the approval of the State Board of Education, may make exceptions to the above regulations with respect to special reports requested by local school districts.”

The major conflict between this rule and section 1-14 (9) of this act is that the rule allows classroom reports to be withheld from disclosure. This section would not allow overall test results that are broken down on a classroom basis to be kept confidential. As indicated above, by allowing test scores to be withheld from disclosure, it is the intent of this section to protect the personal privacy of the individual taking the test. Disclosing results broken down as to classrooms without giving the name of individual pupils is not considered to be an invasion of the privacy of such pupils, and therefore this section would not allow the withholding of this information.

It is also important to note that this section recognizes the right of the applicant to inspect his own examination paper together with the questions on his examination. Because some governmental instrumentalities use oral examinations, it also acknowledges the right of the applicant to inspect a transcript or listen to a tape of this examination. *Kelly v. Civil Service Commission*, 37 N.J. 450 (1962); *Ceniciola v. Civil Service Commission*, Civil No. A-1098-71 (App. Div., Dec. 27, 1972). Additionally, this section enables the applicant to find out the scores he received on any examination. The only limitation placed on this right is the fact that the applicant can only inspect — he cannot copy either by hand or mechanical device or obtain a copy of the examination or his answers to it.

The basic policy contained in this section is in accord with the policy enunciated in existing Executive Order No. 9 issued by Governor Hughes on September 30, 1963 pursuant to the present Right to Know Law withdrawing from the definition of public records

“Questions on examinations required to be conducted by any State or local governmental agency.”

Another provision relating to this subject is *N.J.A.C. 4:1-9.12* which was enacted by the Department of Civil Service and provides that applications, test papers, and other test materials, recordings or transcripts made in oral examinations, and appraisal record sheets

“may be held open to such limited inspection and examination by such persons and under such circumstances as the President may determine to be in the best public interest.”

Other regulations that have been enacted include:
N.J.A.C. 13:29-1.10 (Board of Certified Public Accountants) —

“(e) Examination papers shall remain in the office of the Secretary for a period of six months after each examination, and during the six months any applicant may review his examination papers.”

N.J.A.C. 13:36-3.6 (State Board of Mortuary Science) —

“An applicant who has failed the examination may inspect said examination only upon written request to the Board within 30 days after notification of failure. Said inspection shall be made only at the office of the Board of Mortuary Science, and only under conditions as to maintain the confidential nature of the examination.”

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(10) Information on individual students except that such information shall not be withheld from a person in interest or a person duly authorized by this State or the United States to inspect such records in connection with his official duties.

COMMENT

The purpose of this section is to protect the right of privacy of students in the State's educational institutions. It therefore establishes the general rule that government instrumentalities may keep student records confidential. This, however, would not include records that do not identify a particular student or students. Also since the purpose of this section is to protect the privacy of the student, the section does not allow the withholding of this information if the person in interest does not desire it to be withheld. It is not a privilege of the government instrumentality that is being protected, but instead, it is a privilege possessed by the person in interest. Additionally, this section also recognizes the different status of a person in interest in relation to the status of the general public and confers upon the person in interest the right to see student records. *See, e.g., Dachs v. Board of Education of City of New York*, 277 N.Y.S. 2d 449 (Sup. Ct. 1967) (father, who was entitled by virtue of court order to visitation rights with his children, has sufficient interest to obtain address of his infant daughter in possession of Board of Education); *Van Allen v. McCleary*, 211 N.Y.S.2d 501 (Sup. Ct. 1961) (a parent is entitled as a matter of law to inspect the records of his child maintained by the school authorities); *cf. King v. Anbellan*, 173 N.Y.S.2d 98 (Sup. Ct. 1958) (a member of the Board of Education has a sufficient interest, because of his position, to inspect all the records of the school district including those of students); *Marmo v. New York City Board of Education*, 289 N.Y.S.2d 51 (Sup. Ct. 1968) (person has sufficient interest to obtain the name and addresses of fellow classmates where this information would assist him in defending a criminal indictment).

With respect to the right of parents to inspect the student records of their children, Connecticut has just enacted a provision recognizing such a right. This new statute provides that:

“Either parent or legal guardian of a minor student shall, upon written request to a local or regional school board and within a reasonable time, be entitled to knowledge of and access to all

educational, medical, or similar records maintained in such student's cumulative record, except that no parent or legal guardian shall be entitled to information considered privileged under section 10-154a, as amended." *Pub. Act No. 73-74, 1973 Conn. Sess. Laws 109.*

The information that is considered privileged under this section is found in CONN. GEN. STAT. § 10-154a (Non-Cum. Supp. 1971) which refers to communications made privately and in confidence by a student to a professional employee of his public school in the course of the latter's employment. Specifically the type of professional communications that are privileged are described in paragraph b of the statute which provides:

"Any such professional employee shall not be required to disclose any information acquired through a professional communication with the student, when such information concerns alcohol or drug abuse or any alcoholic or drug problem of such student but if such employee obtains physical evidence from such student indicating that a crime has been or is being committed by such student, such employee shall be required to turn such evidence over to school administrators or law enforcement officials, provided in no such case shall such employee be required to disclose the name of the student from whom he obtained such evidence and such employee shall be immune from arrest and prosecution for the possession of such evidence obtained from such student."

The Tennessee Legislature has also dealt with the problem of student records in a very recent amendment to the public records act. In this amendment they have provided that:

"The records of students in public educational institutions shall be treated as confidential. Information in such records relating to academic performance, financial status of a student or his parent or guardian, medical or psychological treatment or testing shall not be made available to unauthorized personnel of the institution or to the public or any agency, except those agencies authorized by the educational institution to conduct specific research or otherwise authorized by the governing board of the institution, without the consent of the student involved or the parent or guardian of a minor student, except as otherwise provided by law or regulation pursuant thereto and except in consequence of due legal process or in cases on the safety of persons or property is involved. The governing Board of the institution, the State Department of Education, and the Tennessee Higher Education Commission shall

have access on a confidential basis to such records as are required to fulfill their lawful functions. Statistical information not identified with a particular student may be released to any person, agency, or the public; and information relating only to an individual student's name, age, address, dates of attendance, grade levels completed, class placement and academic degrees awarded may likewise be disclosed." TENN. CODE ANN. § 15-305 (Cum. Supp. 1973).

The section proposed above reflects the present law in this State on the disclosure of student records. The statutory provision dealing with these records presently is *N.J.S.A.* 18A:36-19 (1963) which reads as follows:

"Public inspection of pupil records may be permitted and any other information relating to the pupils or former pupils of any school district may be furnished in accordance with rules prescribed by the state board, and no liability shall attach to any member, officer or employee of any board of education permitting or furnishing the same accordingly."

The Department of Education regulation on this subject is found in *N.J.A.C.* 6:3-1.3 which provides:

"(a) Pupil records may, in the discretion of the board of education or any officer or employee of the board designated by the board to act for it, be open to inspection by authorized representatives of the Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy; and, upon request of the Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy, information relating to pupils and former pupils may be furnished for purposes of determining their fitness for induction into the armed services of the United States.

"(b) Pupil records may be open to inspection by persons who, in the judgment of the board of education or any officer or employee of the board designated by the board, have a legitimate interest in the records for purposes of systematic educational research, guidance, and social service.

"(c) Items of information contained in the records of a given pupil shall be made available, upon request, for inspection by a parent, guardian or other person having custody and control of the child, or authorized representative of the same; provided, that after the pupil has attained the age of 21 years, the items of information shall be made available for inspection by the pupil or his authorized

representative, and not to the parent or guardian.

“(d) Items of information contained in the records of a given pupil may be furnished upon request to employers and to institutions of the same or higher grade for purposes of employment and admission to educational institutions.

“(e) Nothing in these rules and regulations contained shall be construed to prohibit the board of education, or any officer or employee of the board designated by the board, to withhold items of information which, in the judgment of the said board, or its designated officer or employee, are of a confidential nature or in which the applicant for such information has no legitimate interest.”

The statutory provision and the departmental regulation are essentially consistent with section 1-14(10). However, there may be a conflict as concerns a person in interest. To the extent that either the statute or the regulation is in conflict with Section 1-14 on this subject, they are changed and the rule in this section becomes predominant. This gives a person in interest the right to have access to this information.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(11) Individual records of applicants or of recipients of government scholarships, grants, loans, public assistance or other financial or rehabilitative assistance programs except that such records shall not be withheld from a person in interest or a person duly authorized by this State or the United States to inspect such records in connection with his official duties.

COMMENT

This section evidences the result of a difficult and delicate balance between the need of the public to know whether its funds are reaching their intended object and the right of the person dependent on the dispensation of these funds to be protected from intrusions into his privacy. Premised on the belief that a person's need to obtain public assistance should not, except when absolutely necessary, require the diminution of his personal rights, this section tips the scale in favor of protecting the rights of the individual and therefore excludes from disclosure the records of those individuals who obtain financial or rehabilitative assistance from the government. It thereby continues in existence the position taken in the present law of this State embodied in the regulations passed pursuant to the existing Right to Know Law. The regulation of the Department of Institutions and Agencies exempts from public disclosure all records "concerning the identity and personal history of individuals applying for or receiving public assistance. . . ." Similarly, the regulation of the Department of Education exempts all records "concerning applications for State scholarships and loans. . . ."

In exempting this information from disclosure, there are several important features of this section that should be pointed out. First, the section does not *mandate* that this information be withheld, but only *permits* the withholding of it in the discretion of the government instrumentality. This, then, would allow the disclosure of this information when such disclosure is determined to be proper, for example, if the government instrumentality determines that publicity would assist in curbing a trend of not repaying student loans.

The second feature of this section is that it accords a right to a person in interest to inspect the information. This would include both the subject of the information and any person designated by the subject to inspect the information. This is an extremely important right in light of the increasing

information on individuals that is being compiled by government and the correlative increase in the possibility of error and misinformation on an individual being contained in his file.

The third feature of this section is one of the prime reasons why the public's right to gain the information has not taken precedence over the individual's right to privacy. The two main arguments for allowing the information described in this section to be open to public inspection are that the public should have a right to be able to gain knowledge of how their tax funds are being spent and it should be able to ascertain whether any fraudulent or illegal activities are being carried out in public assistance programs. These arguments are generally brought forth in discussions concerning welfare programs. However, this section is not limited to welfare. Among the records of other programs that would be affected by this section are those relating to aid to the blind, aid to handicapped persons in need of vocational training, and assistance to those afflicted with chronic renal disease.

Certainly the public has a right to know how its monies are being spent but this does not necessitate the disclosure of individual records. The public can adequately determine where its tax funds are going by inspecting the overall records and reports of the government agencies in charge of these programs without inspecting records concerning individual recipients and applicants. The overall records, reports and budgets of these agencies are available to the public under this act and serve as adequate protection of the public's right to know.

The second argument in favor of public disclosure namely that of determining fraudulent or illegal behavior loses its persuasiveness when considered in light of several factors. First, it is only a minority of people in these programs that are guilty of fraudulent or illegal behavior. To establish a general rule that these records are public would be to sacrifice the rights of the majority in order to punish the conduct of comparatively few individuals. Because our system of government has traditionally emphasized the importance of the fundamental rights of the individual and has sought to protect them from being interfered with, the public's interest in securing individual rights of privacy must prevail. Moreover the disclosure of this information to agencies having the responsibility of supervising these programs and enforcing compliance with their provisions serves as the needed protection of the public's rights.

Another reason for exempting this information from disclosure is that the federal government has inserted provisions in state-federal programs requiring that the state provide for the confidential treatment of information concerning individuals. Examples of these provisions are found in 42 *U.S.C.*

- §§302, 1202, 1352 and 1382 which deal with aid to the blind, the aged, and the disabled and require that the state provide safeguards for information pertaining to individuals under these plans. The recent amendment to these sections requires that the state

- “provide safeguards which permit the use or disclosure of information concerning applicants or recipients only (A) to public officials who require such information in connection with their official duties, or (B) to other persons for purposes directly connected with the administration of the State plan.” Act of Oct. 30, 1972, *Pub. L. No. 92-603, §413, (1972), amending 42 U.S.C. §§302, 1202, 1352 and 1382.*

This federal provision however must be read in conjunction with the following provision which has been interpreted by the general counsel to permit the disclosure of names, addresses and amounts of public assistance without fear of losing federal grants-in-aid.

“No State or any agency or political subdivision thereof shall be deprived of any grant-in-aid or other payment to which it otherwise is or has become entitled pursuant to Title I, IV, X, XIV, or XVI (other than section 1603(a)(3) thereof) of the Social Security Act, as amended, by reason of the enactment or enforcement by such State of any legislation prescribing any conditions under which public access may be had to records of the disbursement of any such funds or payments within such State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes.” *Act of July 25, 1962, Pub. L. No. 87-543, §141(e), 76 Stat. 205 (1962) amending Act of Oct. 20, 1951, Pub. L. No. 183, §618, 65 Stat. 569 (1951).*

Some states have utilized the above statute and have permitted the disclosure of names, addresses and amounts of public assistance. For example, Oklahoma has provided that:

“ . . . the monthly warrant register now furnished the County Boards by the State Department of Public Welfare, showing the names and addresses of all recipients and all employees receiving salary, expenses, mileage and payment under this Act in such county, together with the amount paid to each recipient, shall be a public record in the county office and shall be open to public inspection as provided by law.

* * *

It shall also be unlawful, and shall be a felony, punishable by imprisonment in the State Penitentiary for not to exceed two (2) years, for any person, firm or corporation to publish, or to use for commercial or political purposes, any list or names obtained through access to such records, or for any person, firm or corporation to use, for commercial or political purposes, any list or names of recipients of public assistance." OKLA. STAT. ANN. 56 § 183 (1969).

Other states however have declined to publicize this type of information and have continued to recognize that public assistance records concerning individual applicants or recipients should be kept confidential. California for example provides that:

"Except as otherwise provided in this section, all applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public social services for which grants-in-aid are received by this state from the United States government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of such public social service; provided, however, that any agency having custody of such records may make the disbursement records available to the district attorney upon his request. The information thus obtained shall be made available to the district attorney for the official conduct of his office and shall not be used for any other purpose.

Except as otherwise provided in this section, no person shall publish or disclose or permit or cause to be published or disclosed any list of persons receiving public social services. Any county welfare department in this state may release lists of applicants for, or recipients of, public social services, to any other county welfare department or the Department of Social Welfare, and such lists or any other records shall be released when requested by any county welfare department or the Department of Social Welfare. Such lists or other records shall only be used for purposes directly connected with the administration of public social services. Except for such purposes, no person shall publish, disclose, or use or permit or cause to be published, disclosed, or used any confidential information pertaining to an applicant or recipient. However, this section shall not prohibit the furnishing of such information to other public agencies to the extent required for verifying eligibility or for other purposes directly connected with the administration of public

- social services. Any person knowingly and intentionally violating
the provisions of this paragraph is guilty of a misdemeanor. . . .”
CAL. WELF. & INST’NS CODE §10850 (West 1972).

~ “Notwithstanding the provisions of Section 10850, factual
information relating to eligibility provided solely by the public
assistance recipient contained in applications and records made or
kept by any public officer or agency in connection with the admin-
istration of any public assistance program shall be open for inspec-
tion by the recipient to which the information relates and by any
other person authorized in writing by such recipient. The written
authorization shall be dated and signed by such recipient and shall
expire one year from the date of execution. In the event of any
hearing under the provisions of this division, the attorney or auth-
orized representative of the applicant or recipient shall be entitled
to inspect the case record relating to the applicant or recipient
prior to, as well as during, the hearing.

No list or names obtained through such access to such
records or applications as provided in this section shall be used for
any commercial or political purposes.” CAL. WELF. & INST’NS
CODE §10850.2 (West 1972).

The proposed section 1-14(11) has taken the position expressed by
California and supported by federal law. For the reasons previously stated,
this act continues in existence the present policy of this State recognizing
the privacy and confidentiality of the records of individual applicants and
recipients of public assistance grants.

1-14. Information That May Be Withheld From Disclosure

Unless disclosure is specifically mandated by any law, other than section 1-4 of this act, a government instrumentality may withhold from disclosure:

* * *

(12) (a) Information relating to the resolution of labor problems of a government instrumentality, through negotiation, mediation or otherwise, if the disclosure of such information would materially prejudice governmental action, provided that no such information shall be withheld after resolution of the problem.

(b) Information relating to the resolution of labor problems in the private sector through negotiation, mediation or otherwise.

COMMENT

The primary purpose of this section is to afford the confidentiality necessary to the efficient and expedient settlement of labor problems. The term "labor problems" is utilized to indicate the variety of labor-related problems that this section is intended to cover. It includes such things as mediation, arbitration, negotiation and bargaining between employers and employees. It is because of the public policy in favor of a quick settlement to these disputes that this section becomes necessary. Its purpose is also to protect the position of the government employer from being prejudiced in bargaining and negotiation sessions.

Subsection (a) is limited to problems of a government instrumentality and therefore deals only with the relationship between the government and its employees. Because of this, it is more restricted and limited in scope than subsection (b) which deals with the labor problems in the private sector. Under subsection (a), information can only be withheld if there is a finding that disclosure would *materially prejudice governmental action*. This would include both the action of a government instrumentality while negotiating with its own employees and also the action of the Public Employment Relations Commission which is the entity established to effect the prompt settlement of labor disputes in the public sector. An example of the confidentiality required in the former instance is the case of salary and fringe benefit work-ups that are prepared by a government instrumentality as a prelude to bargaining with its employees. These work-ups contain the maximum capability of the instrumentality in increasing the wages and fringe benefits of its employees. Obviously, if these work-ups were disclosed during the course of negotiation or bargaining, the employees would hold out until the instrumentality agreed to supply them with the maximum salaries and benefits. This would totally destroy the bargaining position of the instrumentality and be a detriment to the public interest.

- A prime consideration underlying this section is the duty assigned to the Public Employment Relations Commission. This Commission was established to deal with the settlement of labor disputes between the public
- employer and the public employees. Whenever negotiations between these parties reach an impasse, the Commission is empowered upon request of
- either party to take such steps as may be necessary to resolve the dispute.
- A recent regulation, adopted by the Commission in 1969 and approved by Governor Hughes, exempts from the public records requirement of the Right to Know Law

“(a) Mediator and fact-finder’s reports, recommendations and memoranda.

(b) Affidavits, showings of interest, statements, reports, memoranda and files submitted to the Public Employment Relations Commission or Executive Director as part of an administrative investigation pertaining to charges alleging a violation of the Act, impasses and representation matters. Provided however, this regulation shall not be construed to prohibit the Public Employment Relations Commission or Executive Director from opening such material to public examination, as it deems necessary.”

This regulation is essentially in accord with the present section except that, under the present section, information may not be withheld after resolution of the problem. The position of the present section has been adopted in order to reach a compromise between the need for confidentiality in the resolution of such disputes and the need of the public to be able to ascertain the relative positions of the parties, the validity of the demands presented, and whether an equitable settlement was reached.

The problem of making information held by the Commission public is primarily a question of premature disclosure. Disclosing mediator’s or fact-finder’s reports prematurely may serve to prolong the dispute instead of furthering a settlement. This is due to the fact that these reports contain subjective evaluations and position analyses which, if made public prematurely, may result in increased adamancy by each of the parties and unyielding adherence to their respective positions. It must be remembered that labor problems often occur in an atmosphere charged with high emotions. It therefore becomes the duty of these negotiators or mediators to ameliorate, instead of increase, this tension. By leaving the discretion in the public instrumentality to determine when information relating to these matters should be made public, provision is made to assist the instrumentality in carrying out this duty.

Another consideration buttressing the enactment of this section is that the withholding of fact-finder’s reports by the Commission is essential if

one of the primary devices for settling these disputes is to be realized. After fact-finding has run its full course, the fact-finder will serve upon the parties a written report containing his recommendation for settlement. Under *N.J.A.C.* 19:12-8 that report may be made public at a subsequent time if, following service of the report, no settlement has been arrived at. This threat that the report will be made public increases the desire of the parties to settle since it acts as a coercive device against the party whose position is not substantiated by the findings in the report and prods him to compromise. Premature disclosure of this report would destroy this weapon of the Commission. Therefore, one of the accomplishments of this section is to allow the Commission to choose the time for the disclosure of the report. It should be noted that after a settlement has been reached, this section neither mandates nor allows the report to be withheld from disclosure.

Part (b) of this section is aimed at the resolution of labor problems in the private sector. It is a more open-ended provision than part (a) because the public has less of an interest in gaining information of private labor problems than of those in the public sector. The primary government instrumentality that will possess information relating to labor problems in the private sector is the State Board of Mediation. This Board provides the apparatus whereby a voluntary, amicable, and expeditious adjustment and settlement of the differences between private employers and employees may be reached. The labor disputants who come before this Board utilize the services of it on a voluntary basis. An essential ingredient of the mediation process rests on the premise that information disclosed by one party in confidence to the mediator will be held in confidence until that party indicates to the mediator that he may disclose it to the other side in whole or in part. Without this premise, mediation cannot function and the disputants will be less inclined to bring their problems to an independent mediator. Consequently, the public interest in the quick settlement of these disputes may be frustrated. The same reasons that require confidentiality of information in the hands of the Public Employment Relations Commission also require confidentiality of information in the hands of the State Board of Mediation. It should be pointed out that the withholding of this information by the Board can be realized in two ways under this act. Initially, the information submitted to the Board by the private parties can be withheld under section 1-14(3) which allows the withholding of information voluntarily submitted to the government by members of the public. The present section, however, is designed to allow the withholding of information made by the instrumentality, such as reports, memoranda and other data relative to the labor problem. Again, like part (a) this section does not mandate that this information be withheld, but leaves it to the proper exercise of the discretion of the instrumentality.

1-15. Information That Shall Be Withheld From Disclosure

- **Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, a government instrumentality shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties:**
- **(1) Information relating to the mental or physical condition, character, personality or family history of a person as well as any similar information that would constitute a clearly unwarranted invasion of personal privacy.**

COMMENT

The major conflict to be resolved in any public information act is that between the government's duty to protect the public's right to know and the government's duty to protect the public's right to personal privacy. It is the paramount function of this section to provide the safeguard for a person's right to privacy, though other sections of this act also serve to protect this right. In safeguarding a person's privacy, it is not the intent of this section merely to prevent tangible injury to the individual but more important to protect a person's individuality in his

"ability to control the flow of information concerning or describing him — a capability that often is essential to the establishment of social relationships and the maintenance of personal freedom. Correlatively, when the individual is deprived of control over the information spigot, he in some measure becomes subservient to those people and institutions that are able to gain access to it. Thus, it has been suggested that the individual whose data profile is bartered or sold has become little more than a commodity." Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1107-08 (1969) (footnotes omitted).

Since expanding government programs require a correlative increase in the quantity of personal information that government must gather, it becomes necessary that government be ever aware of its increasing potential to abrogate individual privacy through the misuse of its information stockpile. This intensified potential is acknowledged in this section and has been a significant consideration in weighing the public's right to individual privacy against the public's right to know. The result is an attempt to protect that information which would, if disclosed, be considered an invasion of privacy, while not, at the same time, allowing a person to thwart the

public's right to know by claiming every piece of information he submits to the government demands confidential treatment. However, the information protected from disclosure under this section should also be protected when it is a part of a document that is a public record.

This subsection recognizes the inherently private nature of information relating to a person's medical, or psychological condition or to his character, personality, or family history. Therefore, it mandates that this information be kept confidential and not be disclosed to anyone without the permission of the person. Because the enumeration of this information may not adequately describe other information of this nature that should be withheld, added to this list is the phrase "and similar information that would constitute a clearly and unwarranted invasion of privacy." Under this phrase, if there is information that does not fall under one of the enumerated categories but is similar to the enumerated information and if the disclosure of this information would constitute a clearly and unwarranted invasion of privacy, then it must be withheld from disclosure under this section. The phrase "similar information" as used here means that the information "must have the same characteristics of confidentiality that ordinarily attach" to information relating to the mental or physical condition, character, personality or family history of a person. *Robles v. Environmental Protection Agency*, 484 F.2d 843, 845 (4th Cir. 1973). They must generally contain " 'intimate details' of a 'highly personal' nature." *Id.*; Note, *Invasion of Privacy and the Freedom of Information Act*, 40 GEO. WASH. L. REV. 527 (1972). In short, this section is intended to exclude from public disclosure all information that would constitute a clearly unwarranted invasion of privacy pertaining to a person's social, familial, environmental, psychological, psychiatric, medical, vocational, institutional, probation or parole history, background, examination, diagnosis, treatment or adjustment.

There are three exceptions to the general rule of confidentiality for information falling within this section. The first is that an official of this State may disclose this information if it is essential to his official duties. An example of this would be a situation where the information would have to be disseminated to the general public in order to locate the carrier of a contagious disease or to capture an escaped mental patient. The second exception is that the information cannot be withheld when disclosure is authorized by a person in interest. This includes the right of the person in interest to gain access to the information as well as his right to permit other persons to inspect this information. The third exception to the general rule of this section is that the information may be released to a person duly authorized by this State or the United States to inspect such information in connection with his official duties. An example of this would be a court's disclosure of medical, psychological and social records of a juvenile to a

1-15. Information That Shall Be Withheld From Disclosure

Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest a government instrumentality shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties:

* * *

(2) Personnel or pension records of an individual *provided however that the following shall be public notwithstanding any other provision of this act*

(a) an individual's name, title, position, salary, payroll record, length of service in the government instrumentality and in the government, date of separation from government service and the reason therefore, and the amount and type of pension he is receiving;

(b) information which discloses conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released.

COMMENT

Retained by this section is the position adopted by Executive Order No. 9 which excludes from public records "personnel and pension records which are required to be made, maintained or kept by any state or local governmental agency." However, this section also seeks to reach a balance between the public's need for information concerning public employees and the latter's right to privacy. This balance is reached by mandatory disclosure of the name, title, position, salary, payroll record, length of government service and reason for leaving of all government employees, and the name of the person receiving a pension and the amount and type of such pension he is receiving. Also made public are data which indicate that an applicant for employment or a pension has the *specific* experience, or educational and medical qualifications *required* for the position or the pension he is seeking.

Disclosure of the name, title, position and type of pension cannot be said to be truly an invasion of privacy and if considered such, it is an extremely insignificant invasion greatly outweighed by the public's right to know who it is employing, what jobs they are performing, and the identities of those receiving government pensions. *See Hearings on U.S. Government Information Policies and Practices Before a House Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. 1154 (1972); Getman v. NLRB, 450 F. 2d 670, 674-75 (D.C. Cir. 1971)* (Court ordered NLRB to disclose, under the Freedom of Information Act, names

- and addresses of employees in its possession to law professors conducting a labor law voting study); *Mans v. Lebanon School Board*, 112 N.H. 160, 290 A.2d 866 (Sup. Ct. 1972) (the court held that salaries of teachers are open to public inspection under the New Hampshire Right to Know Law); *Board of School Dir. v. Wisconsin Emp. Rel. Com'n*, 42 Wis. 2d 637, 168 N.W.2d 92, 101 (Sup. Ct. 1969) (“in the public employment area and particularly in Wisconsin, the names, addresses, salaries and working conditions of the teachers, or any municipal employee, are a matter of public record.”)

The salary, payroll records and pension benefits of government employees can be said to be a more significant invasion of privacy. However, this is outweighed by the need of the public, first, to know how much of their tax monies are going to pay the salaries and pensions of these employees, second, to be able to determine whether a government employee is being under or overpaid, third, to be able to determine whether political appointees or favorites are being paid at the same rate as normal employees, and fourth, to be able to evaluate whether the performance of a government official is worth the cost. To keep this data confidential would be to provide a means for unscrupulous officials to readily pad payrolls under their auspices. The Supreme Court of New Hampshire, in addressing itself to those who thought the public access to teachers’ salaries “would be embarrassing . . . and not in the best interests of the efficient management of school affairs,” noted that:

“For many years in this state salaries of public officials and employees, state and municipal, have been commonly published by statute . . . or made available to the public or disclosed voluntarily without significant damage to individual dignity or the efficient management of the state system.” *Mans v. Lebanon School Board*, 290 A.2d at 868.

For the present regulations governing the disclosure of pension records see *N.J.A.C.* 17:1-4.1, 1-4.22, 2-1.6, 3-1.6, 4-1.6, 5-1.5, 7-1.6, 9-1.2 and 16-1.6 which exclude from public inspection medical records and reports, mailing addresses, individual files relating to beneficiary designation, and matters pertaining to individual accounts.

Part (b) of this subsection mandates the disclosure of data which shows whether an applicant possesses the necessary experience, educational background and medical qualifications for the position or pension he is seeking. The intent of this provision is to mandate the disclosure of sufficient information to enable the public to determine whether an individual meets the legal requisites for either government employment or a government pension. This provision by no means mandates the disclosure of elaborate and com-

plete medical, psychological or other personal information. It simply mandates the disclosure of sufficient data to show that the applicant meets a necessary qualification. When such information is commingled with more detailed and exempt data, the latter may be deleted under section 1-16 of this act.

Since comparatively few positions in government service have specific medical or psychological requirements, the scope of this mandate is not as broad as it first appears. With respect to positions having experiential and educational requisites, the invasion of privacy caused by the disclosure of this information is outweighed by the public's right to know whether the people in its employ have the necessary ability and background for the job they hold. The need of the public to obtain this information is becoming exceedingly more important with the increasing number of government positions requiring specialized knowledge and experience. Such positions as engineers, chemists, personnel directors and planners and a host of others all require specialized knowledge and experience. This requirement together with the fact that the people in these positions exercise a great deal of de facto control over the daily lives of the public necessitates that the public know their capabilities. One need only look at the effect the decisions of governmental experts in the fields of environmental protection and energy conservation have had on the public to know that the public has a significant interest in being able to ascertain whether these governmental employees have an adequate background and sufficient capabilities to perform the jobs they are doing. It is because of this increasing government involvement in people's lives and the nature and scope of decisions that government employees must make that this subsection mandates the disclosure of this information.

Personnel records, within the meaning of this section, include employees' performance ratings. The policy to keep performance ratings confidential has been adopted: first, to protect the right of privacy of the government employee; second, because the evaluations are subjective opinions of the performance of the employee that vary with the person giving the rating; third, public disclosure would impede receiving candid evaluations; and fourth, a supervisor could use the public nature of these ratings as a vindictive mechanism against employees he disliked. The lack of objective criteria, the potential for vindictiveness, the lack of an opportunity for the employee to rebut statements made in the rating, and a substantial potential for abuse leads to the conclusion that these ratings should be kept confidential. Furthermore, there are sufficient internal controls provided to give reasonable assurance that an employee with poor performance ratings will not progress in government service.

By including performance ratings within the term personnel records, it is not intended that this section should abrogate *N.J.A.C. 4:1-20.4* which provides:

“An employee shall be given the opportunity to inspect the records which show his performance evaluation and those of other employees in the same class in his organization unit under such conditions as shall be prescribed by regulation.”

This rule cannot be sustained on the basis of this section of the act but is sustainable on the basis of section 1-5 which retains a person’s common law right to obtain information. Because an employee who is seeking to inspect the performance ratings of other employees in the same class in his organizational unit has a special interest in viewing this material, this regulation is a valid implementation of the right to gain information at common law.

This section basically follows the regulations adopted by the United States Civil Service Commission. *5 C.F.R. 294.702* provides:

“(a) The name, present and past position titles, grades, salaries, and duty stations (which include room numbers, shop designations or other identifying information regarding buildings or places of employment) of a Government employee is information available to the public, . . .

* * *

(b) In addition to the information that may be made available under paragraph (a) of this section, the following information may be made available to a prospective employer of a Government employee or former Government employee:

- (1) Tenure of employment;
- (2) Civil service status;
- (3) Length of service in the agency and the Government;
- (4) When separated, the date and reason for separation

* * *

(f) Except as provided in paragraphs (a) through (e) of this section, information required to be included in an Official Personnel Folder by the instructions of the Commission is not available to the public.”

5 C.F.R. 294.703 provides:

“(a) The Official Personnel Folder of a Government employee or former Government employee shall be disclosed to him, or to his representative designated in writing, or to any other person who has written consent of the employee or former employee

or the written consent of the person who has his right under §294.109.”

As to retirement records, the policy of the United States Civil Service Commission is contained in 5 *C.F.R.* 831.106 which provides:

“(2) If sufficient information is provided to assure positive identification, the Commission will confirm to any inquirer the fact that an individual is or is not on the retirement rolls and, if so, the type of annuity (employee or survivor) being paid.”

The States of California, Colorado and Massachusetts contain provisions in their information acts basically consistent with the present section. The Massachusetts provision, quoted *infra*, takes a slightly different approach by not providing for a blanket exception for personnel records but instead, excluding the medical, physical and psychological data that would normally be included in such a record. CAL. GOV'T CODE §6254 (Supp. 1972) exempts:

“(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”

COLO. REV. STAT. ANN. §113-2-4(2) (Supp. 1973) exempts:

“(c) Personnel files, except applications and performance ratings, but such files shall be available to the person in interest and to duly elected and appointed public officials who supervise his work.”

MASS. GEN. LAWS ANN. c. 66, § 17B (Supp. 1973) exempts:

“(c) Records concerning an employee's medical, physical or psychological condition, including but not limited to medical records, transcripts, graphs, memoranda, notes, reports or charts.”

1-15. Information That Shall Be Withheld From Disclosure

Except as otherwise provided by law or when essential to the performance of official duties or when authorized by a person in interest, a government instrumentality shall not disclose to anyone other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties:

*** * ***

(3) Commercial or financial information customarily considered confidential and the disclosure of which would constitute a clearly unwarranted invasion of privacy or result in placing the person submitting it at a substantial and unfair competitive disadvantage.

COMMENT

Commercial and financial information may be submitted to government either on a voluntary or mandatory basis for the specific purpose of carrying out government functions in the public interest. There exist numerous areas regulated by government where it is required that a person or business submit commercial or financial information or that such information be made accessible as an incident of a government inspection or examination. For example, licensing agencies frequently require applicants to submit statements of personal worth or personal financial data to establish their qualifications for a license. The required submission of information to enable the government to perform its regulatory functions, should not also require the provider to disclose to his competitors or to the community at-large commercial or financial information that he considers personal in a privacy sense or professional in a business sense. Where, on the other hand, the disclosure of this type of information is necessary to the performance of a government function, it must be recognized that government has an obligation to disclose the required information unless it can be demonstrated quite clearly that an unwarranted invasion of individual or professional privacy would result or the person submitting the information would be placed at a very severe competitive disadvantage. Consequently, this section attempts to achieve a very difficult and delicate balance between—the need for the submission of commercial or financial information to perform governmental functions, the need to continue the confidentiality associated with certain commercial or financial information, and the need to disclose that information in certain instances where the disclosure is required to effectively perform the governmental function involved.

In reaching this balance this proposed section indicates a rejection of the use of such broad words without limitation as confidential, privileged or

commercial. Nonetheless, the use of the words financial or commercial in and of themselves produce potential for abuse in the administration of a Public Information Act. It must be recognized that in our economically oriented society almost anything could be categorized as commercial or financial information. Thus in an effort to enhance the disclosure policies embodied in this act and in an effort to give proper recognition to the commercial or financial privacy expected by businesses and individuals, this section establishes two significant limitations upon the breadth of this exemption: (1) the information must be customarily considered confidential, and (2) it must either constitute a clearly unwarranted invasion of privacy or place the person submitting it at a substantial and unfair competitive disadvantage.

The first limitation establishes a standard that forecloses the designation of any and all information as confidential yet permits that designation if it can be established that the community of which the donor of the information is a member considers it to be customarily treated confidential and if society in general would agree with that designation. For example, if the information was submitted by a banking institution, it would be helpful to determine the custom of the banking community with relation to that information; it would not however be dispositive of the question because that community may take a position contrary to what might be considered reasonable by the public-at-large. If after applying this criteria, it is determined that the information would not be customarily designated confidential, then the government cannot under this section withhold the information. If, however, it is customarily considered confidential, then it is necessary for the government to determine whether it constitutes a clearly unwarranted invasion of privacy or results in placing the person submitting it at a substantial and unfair competitive disadvantage.

The privacy criteria is primarily aimed at the protection of the privacy of a natural person, although under this act it is also applicable to a business entity. The important terms in this provision are "clearly" and "unwarranted." These terms have been added because of the fact that any disclosure of information, even just the name of a person, could be considered an invasion of privacy and, to exempt all such information, would impair the disclosure policies established in this act. Therefore, "unwarranted" requires that the government instrumentality must determine that the person's right to privacy outweighs the interest of the general public in obtaining information and the word "clearly" requires that the predominance of the person's right to privacy be obvious.

More essential to business than a right of privacy is its freedom from unfair competition. Recognizing that not all commercial or financial infor-

recognition is bred from an examination of the federal experience under the Freedom of Information Act which exempts from disclosure matters that are considered "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This provision has been termed "the most troublesome provision in the Act." Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787 (1967). Even the United States Attorney General's Office admitted that "[t]he scope of this exemption is particularly difficult to determine." *Attorney General's Memorandum reprinted in Hearings on U.S. Government Information Policies and Practices before a Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. 1116 (1972).*

Like the other areas of difficulty under the Freedom of Information Act, the federal courts have again taken the lead in delineating the meaning of this exemption so that as much information as possible will be disclosed to the public. In this respect these courts have taken the position that "[t]he exemption does not protect all data contained in such [materials], but only that information which cannot be rendered sufficiently anonymous by deletion of filing party's name and other identifying information." *National Cable Television Assoc., Inc. v. F.C.C.*, 479 F.2d 183, 195 (D.C. Cir. 1973). Moreover, the courts will not accept blanket assertions that the documents in question should be exempt because they contain commercial or financial information which is privileged or confidential. In explaining the government's burden, one court has said:

"It is stressed that each . . . item must be shown to be independently confidential *and* not susceptible to being rendered anonymous. The agency must demonstrate both elements. As to any proposed deletions, the entire item in question must be submitted to the Court with the proposed deletions indicated and accompanied by an explanation of their necessity." *Tax Analysts and Advocates v. Internal Revenue Service*, 362 F. Supp. 1298, 1308 (D.D.C. 1973).

It appears that the majority rule in the federal decisions is that this information may only be withheld if its privileged and confidential nature cannot be preserved by making the subject of such information anonymous. Such anonymity would extend both to the subject's identity and to any information that would disclose such identity.

Other states have also had similar difficulty in finding the proper terminology to be used in limiting the breadth of this type of exemption. As indicated earlier, the section proposed herein is intended to provide a reasonable response to the problems that have been uncovered elsewhere. It is recognized that it will not provide a panacea for those problems, but it

is hoped that procedures established to implement this section by governmental agencies will assist in preventing it from becoming a major loophole. In this regard, it is suggested that government instrumentalities consider the adoption of a procedure similar to that of the United States Environmental Protection Agency utilized in the implementation of the Freedom of Information Act. The Environmental Protection Agency's procedure is as follows: Wherever information may be considered exempt from disclosure on the basis of a section such as the one here involved, notice of a request for that information is sent to the supplier of the information who is then given an opportunity to present his views before the information can be disclosed. The Agency, through its General Counsel, reviews the respective positions urged and determines whether or not the information is entitled to the exemption provided in that act. Under the EPA procedures, the government and not the supplier is the final arbiter of confidentiality. It would seem that this is a fair and equitable procedure provided that before disclosure the government notices the supplier of its intention to disclose and allows him to take whatever legal action, if any, he considers appropriate. *See Hearings on U.S. Government Information Policies and Practices Before a House Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. 1900-1901 (1972).*

Finally, it should be recognized that this section is directed primarily at information that is required by law to be submitted to government and which therefore becomes a part of the public's business. It is recognized that the present Right to Know Law contained in *N.J.S.A. 47:1A-1 et seq.* would generally mandate the disclosure of such required information. Nonetheless an examination of the statutes and regulations which create exceptions under that law indicate that there is extensive exemption of financial and commercial information from public disclosure. *See e.g., N.J.S.A. 4:9-15.17* (grade and form of commercial fertilizer shall not be disclosed); *N.J.S.A. 4:12-14* and *N.J.S.A. 4:12A-55* (information relative to the general business of milk production shall be deemed confidential); *N.J.S.A. 17:23-6* (internal audits of insurance companies deemed confidential); *N.J.S.A. 54:47A-7* (reports submitted by the distributors of poultry feed are confidential). It, of course, is not the intention of the present section to expand upon any confidentiality that is now recognized in law but instead it is the purpose, as indicated above, to balance equally important and conflicting interests and to suggest that the above provision be construed like all other exemptions as narrowly as possible and consistent with the general policy of disclosure.

1-16. Deletion of Exempt Information

It shall be the responsibility of a government instrumentality to delete where practical identifying details or other exempt information in order to provide maximum public disclosure.

COMMENT

This section specifically follows the procedure established in *Irval, supra*, and recognizes that there will be instances where it will be totally impractical to attempt to separate either identifying details or factual information from the deliberative and exempt information involved. When exempt and non-exempt information are so inextricably intertwined that deletion and disclosure would be fruitless then of course a government instrumentality shall not be compelled to disclose any of that information. In all other instances, however, except perhaps in connection with the exercise of an executive, legislative or judicial privilege (*See Environmental Protection Agency, et al. v. Mink, 410 U.S. 73 (1973)*) the procedure recognized above will undoubtedly be followed and should be the process utilized by government custodians. The failure of the government instrumentality to delete where appropriate of course does not impair a court's ability to do so.

1-17. Commerical Use of Information

(1) Except as otherwise provided by law and subject to subsection (2) no information shall be provided to or allowed to be compiled from government files by or on behalf of any person who

(a) seeks such information for the purpose of selling it, or furnishing it for consideration, to others, or

(b) seeks to use such information for the purpose of commercial solicitation for profit.

(2) The information described in subsection (1) may be provided to the persons therein described only by the head of a government instrumentality on the terms and conditions prescribed by him. He may release this information only when he finds that such disclosure

(a) is consistent with other provisions of this act,

(b) would assist in the performance of the assigned duties of the government instrumentality, and

(c) would provide a benefit to the public or members thereof which will substantially outweigh the resulting interference with individual privacy.

COMMENT

This section is aimed at preventing the government from becoming a means through which people will have their privacy invaded by being bombarded with commercial solicitations. It is primarily aimed at persons who use the government to obtain information for the purpose of using it to solicit the sale of various commercial commodities. Under this provision, the information can be denied both to the person who actually does the soliciting and also to people who compile the information and resell it to others. It also should be noted that this section does not affect the ability of the press or other news media to publicize lists of marriages, deaths and similar such events for the purpose of public information. The media, of course, should not become a knowing partner in the commercial solicitation or use of such information, but neither should they be prohibited from publicizing it in the interests of public information.

Subsection (b), however, recognizes that in certain instances the release of this information will be proper. This determination must be made by the head of the government instrumentality. An example of such an instance is found with respect to the Division of Motor Vehicles which releases registration information to R. L. Polk and Co. This company is in the business of publishing city and bank directories, compiling motor vehicle statistics, and engaging in various marketing services, including direct-mail advertising.

Polk annually obtains the information pertaining to all auto and truck registrations from each state motor vehicle department and the District of Columbia. This information is then used as an aid to industries by providing accurate economic statistics that automotive, petroleum, tire and related industries, in addition to local businesses, can use to improve the efficiency of their operations. It also serves to aid the auto safety recall program by notifying owners of defective cars and helps the state and local police in law enforcement. Additionally, the federal, state, and local planning agencies utilize this information for transportation studies that they conduct. One of many specific ways in which Polk uses this information to the advantage of industry is in the case of the petroleum industry which uses the statistical data developed from the registration information to aid in the proper location of service stations. A prime benefit to the public is Polk's use of the information to recall possibly defective cars. In 1967, for example, Polk notified a total of 2,029,943 car owners in the United States under the safety recall programs. As to law enforcement, Polk maintains a National Vehicle Identification Number file and also files merging data from all of the states by make, model, series and location. Since state departments do not maintain their files in this way, stolen cars re-registered in other states and specific makes of vehicles involved in a crime could not otherwise be effectively traced. It is because of the fact that there are commercial users of government information that perform a beneficial service to the government and to the public that this section provides an exception to the general rule which prohibits the use of government-held information for commercial purposes.

Under the existing Right to Know Law, the Commissioner of Labor and Industry promulgated a regulation that was aimed at preventing commercial enterprises from obtaining workmen's compensation records to be resold to prospective employers. This regulation was held invalid by the court because it was ambiguous and contradicted existing statutory provisions. Thereafter, the Legislature passed a statute also aimed at preventing commercial firms from obtaining these records and reselling them to employers. In *Accident Index Bureau, Inc. v. Male*, 95 N.J. Super. 39 (App. Div. 1967), *aff'd*, 51 N.J. 107 (1968) this statute was upheld as a proper exercise of the Legislature's power to limit the disclosure of information where the public interest requires it. The language contained in subsection (1) (a), was the language which was considered by the Appellate Division in the *Male* case and specifically approved by the court.

The policy adopted in this section is similar to that contained in H.R. 8903, introduced in the House of Representatives by Congressman Horton on June 3, 1971. This Bill provides for limitations on the disclosure of lists of names and addresses for commercial or unlawful purposes. *See generally*,

- *Hearings on H.R. 8903 and Related Bills, "Sale or Distribution of Mailing Lists by Federal Agencies," before a subcommittee of the Committee on Government Operations, 92 Cong., 2d Sess. (1972).*

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1-18. Public Information Commission Established

(1) There is established in the Department of Law and Public Safety a Public Information Commission which shall supervise and coordinate the implementation of this act.

(2) Membership of the Public Information Commission shall consist of the Director of the Division of Administrative Procedure, the State Archivist, a representative of the Governor's Office, the Commissioner of Institutions and Agencies, a representative of the press to be appointed by the Governor from a list of candidates prepared by the New Jersey Press Association, a member of the League of Women Voters to be appointed by the Governor from a list of candidates prepared by the League of Women Voters, the Superintendent of State Police, the Chief Executive Officer of the New Jersey State League of Municipalities and of the New Jersey State Association of Chosen Freeholders, and two public members to be appointed by the Governor. Each member, other than the two public members, may appoint a designee to act in his place.

(3) Members of the Public Information Commission who are not *ex officio* shall serve at the pleasure of the Governor during the term of office of the Governor appointing him and until his successor is appointed and qualified. Each member of the Commission shall serve without compensation but shall be entitled to be reimbursed for all actual and necessary expenses incurred in the performance of his duties.

(4) The Director of the Division of Administrative Procedure shall be the Chairman of the Public Information Commission. The Chairman shall preside over the meetings and business of the Commission. A Vice-Chairman shall be elected annually by the Commission from its membership. In the absence of the Chairman, the Vice-Chairman shall have all the powers and duties of the Chairman. A quorum shall be sufficient to conduct the business of the Commission and emergent matters may be resolved by the Chairman with the consent of a majority of the remaining members of the Commission.

(5) The Attorney General shall act as legal advisor and counsel to the Public Information Commission.

(6) The Public Information Commission may, within the limits of funds appropriated or otherwise made available to it for the purpose, employ such other professional, technical, clerical or other assistants, excepting legal counsel, and incur such expenses as may be necessary for the performance of its duties.

(7) The Public Information Commission, in the performance of its assigned duties under this act, shall be exempt from sections 9 and 10 of the Administrative Procedure Act (*N.J.S.A. 52:14B-9 to 10*).

COMMENT

The present Right to Know Law declares it to be the public policy of this State "that public records shall be readily accessible for examination by the citizens of this State, with certain exceptions, for the protection of the public interest." *N.J.S.A.* 47:1A-1. Discussion with representatives of the press, questionnaires returned from members of the public and review of executive departmental practices indicate, however, that the present Law has failed to secure this basic objective. The responsibility for such failure may be ascribed to both the public and the government.

To be effective, a public disclosure law must be consistently utilized by a well-informed citizenry. The current law, however, has not been so used and it is reasonable to attribute this non-use to the lack of public knowledge concerning its provisions. It is also essential that the custodians of public information fully understand the law so that they will consistently implement its provisions in accord with the goal of maximum public disclosure. Government officials, however, have often failed to appreciate the thrust of the law and, therefore, have impeded rather than furthered public access to government-held information.

Ultimately, the breakdown between legislative ideal and actual disclosure may be attributed to the fact that disclosure legislation is simply not self-executing. To translate the ideal into reality, an informed public must utilize the legislation and an informed bureaucracy must implement it. To fill this void in the current Law, it is recommended that a Public Information Commission be established which would have responsibility for

- 1) making information concerning the act available to the public;
- 2) training and informing personnel charged with the implementation of the act; and
- 3) providing a prompt review of denials for information sought in the executive branch of state government.

This Commission has, as its prototype, a committee established in the United States Department of Justice to assist in implementing the Federal Freedom of Information Act, 5 *U.S.C.* § 552. Each federal agency has been requested to consult with this committee which is composed of five attorneys "before issuing a final denial under this act if there is any substantial possibility of litigation adversely affecting the Government." *Hearings on U.S. Government Information Policies and Practices Before a House Subcommittee of the Committee on Government Operations, 92 Cong., 2d Sess. 1179 (1972)*. The inherent weakness of this committee is that it is not statutorily established and therefore has only persuasive powers. To remedy this situation, it has been recommended by Rep. John N. Ellenborn, a mem-

ber of the Subcommittee studying this problem, that a central office for making final decisions at the Executive level be established. *Hearings, supra*, at 1415. This recommendation has not been adopted on the federal level primarily because there are existing appeal mechanisms within each executive department at this time and also because a central information commission would be unwieldy and administratively impractical in a government bureaucracy as large as that of the federal government.

The proposed Public Information Commission also finds support in the following recommendations which were submitted by Ward Sinclair of the Washington Bureau of the Louisville Courier-Journal to the Subcommittee on Government Information:

- “(1) The establishment of a watchdog committee whose sole purpose would be to aid the public and the news media in seeing that there is the quickest and fullest disclosure of information by governmental agencies.
- (2) The possible creation, in the executive agencies, of an office whose duty would be to respond promptly to disputed requests for information and whose job it would be to see that good faith responses are given to the public.” *Hearings, supra*, at 1283.

The proposed legislation establishing the Public Information Commission, therefore, draws upon the federal experience with the significant difference that the New Jersey Commission would have statutory powers to effect changes in certain administrative decisions.

Additionally, it should be noted that the problem of public disclosure involves the weighing of countervailing interests of privacy, disclosure and governmental efficiency in myriad situations. Because of this complexity, no statute could include every possible situation or resolve every potential conflict between disclosure and confidentiality. The disclosure problem is therefore analogous to that faced by the Legislature in defining the nebulous area of “conflicts of interest.” The Legislature, in that instance, prohibited certain basic conflict situations and further articulated basic standards to guide the conduct of Legislators and State officers and employees. It also established Legislative and Executive Commissions to implement these general provisions of the Conflicts of Interest Law. *N.J.S.A.* 52:13D-21 and 22. The proposed Public Information Commission would serve a similar function with regard to the implementation of the general provisions of the Public Information Act.

Finally, it is to be stressed that the proposed Public Information Commission will perform its information function for the benefit of the general

- public and will provide guidance for personnel in all State agencies. However, the Commission will supervise the implementation of the act only for the executive branch of State government. This limitation constitutes an attempt to realistically define the scope of what may be effectively accomplished by the Commission. The membership of the proposed Commission represents a broad spectrum of public and governmental interests. It is important to have such representation in order that the work of the Commission will adequately balance the countervailing interests involved in the area of public disclosure.
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1-19. Powers and Duties of the Commission

(1) The Public Information Commission shall have the following duties pursuant to the provisions of this act:

(a) To prepare and supplement guidelines pertaining to the disclosure of information under this act and make such guidelines available in pamphlet form or otherwise to the public and to the government instrumentalities throughout this State;

(b) To consider and determine all appeals taken by persons denied information by officials in the executive branch of state government, other than those within the office of the Governor, and, on its own initiative, review any action taken by said officials in which access to information is denied;

(c) To report to the Governor and the Legislature no later than June 30th of each year concerning the operation of this act and any recommendations for legislative changes;

(d) To review and comment upon any law presently in force or hereinafter enacted which affects the disclosure of government-held information;

(e) To coordinate its functions with those of the Destruction of Public Records Committee established in *N.J.S.A. 47:3-8.1 et seq.*

* * *

COMMENT

These provisions implement several of the recommendations contained in this report. Pamphlets on the Public Information Act should be prepared and distributed to the public and to the government instrumentalities throughout the State and this section makes it a duty of the Public Information Commission to do so. In addition, it establishes a central appeal mechanism for the executive branch of State government to perhaps alleviate the need for unnecessary and cumbersome court proceedings by persons requesting information and in doing so to assist in coordinating and implementing the provisions of the Public Information Act. This section also imposes upon this Commission the duty to comment upon laws which have previously been enacted or which will be proposed. This responsibility includes commenting upon not only statutes but also any rules and regulations that may be passed—in effect it requires an impact statement from the Public Information Commission.

(2) The Public Information Commission, in order to perform its duties pursuant to the provisions of this act, shall have the power:

- (a) To initiate and conduct investigations;
- (b) To hold hearings where appropriate;
- (c) To compel the attendance of witnesses and the production before it of such information as it may deem relevant and proper;
- (d) To administer oaths and examine witnesses under oath;
- (e) In connection with appeals, to determine the matter *de novo* and to order the disclosure under appropriate terms and conditions of requested information when it finds that the withholding of such information is contrary to the provisions of this act;
- (f) To seek and obtain in a summary action in the Superior Court an order mandating compliance with any decision of the Commission made pursuant to the provisions of this act;
- (g) To adopt such rules and regulations as will guarantee the expeditious and effective implementation of the provisions of this act in the executive branch of State government; and
- (h) To do all acts and things necessary and convenient to carry out the powers and duties herein expressly provided to the Commission under this act.

COMMENT

Since it is envisioned that the Commission will affect only the executive branch of government, its powers are primarily limited thereby. It is expected, however, that the Commission will be able to develop informal procedures for hearings and determinations made in accordance with its responsibility to consider any appeals which may be taken by citizens upon a denial of information by the executive branch of State government. It is also anticipated and expected that the provisions of the above powers will allow the Commission to effectively provide guidelines, coordinate the provisions and implementation of this act throughout State government and by so doing provide guidance for local government instrumentalities in implementing this act. While its power of review is limited to the executive branch, its power of coordination is expected to be statewide.

1-20. Enforcement Proceedings; Costs and Attorneys Fees

(1) Any person who has been denied for any reason the right to inspect, copy or obtain a copy of any information as provided in this act by any official of the executive branch of state government, other than those within the office of the Governor, shall have a right to appeal that determination to the Public Information Commission established in section 1-18 of this act. The burden shall be upon the government instrumentality to sustain the withholding of information. Such appeal shall not be considered a prerequisite to pursuing, or to be in lieu of, any other remedy provided in this section.

(2) Any person who has been denied for any reason the right to inspect, copy or obtain a copy of any information as provided in this act may apply to the Superior Court of New Jersey by a proceeding in lieu of prerogative writ for an order requiring the custodian of the information to afford inspection, the right to copy or to obtain a copy thereof.

(3) Whenever a proceeding is brought under subsection (2), the court shall determine the matter *de novo* and may proceed in summary manner. The burden shall be upon the government instrumentality to sustain the withholding of information. If the court finds that the information has been improperly withheld from the plaintiff, it may order the information to be made accessible to the plaintiff at the time and in the manner that the court deems appropriate. Except as to causes the court considers of greater importance, proceedings authorized by this section shall take precedence on the docket over all other causes and shall be assigned for hearing at the earliest practicable date and expedited in every way.

(4) Notwithstanding that information is required to be public under this act, a custodian may, if he concludes that the disclosure of this information would do substantial injury to the public interest, apply to the Superior Court of New Jersey for an order permitting him to withhold such information. Hearing on such application shall be held at the earliest practical time. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. In such action, the burden of proof shall be upon the custodian. The person seeking permission to examine the information shall have notice of said hearing served upon him in the manner provided for service of process by the New Jersey Rules of Court and shall have the right to appear and be heard.

(5) Where the government instrumentality does not prevail in any court proceeding brought under this act, the court may assess against such instrumentality attorneys fees and other litigation costs reasonably incurred by the opposing party.

COMMENT

Subsection (1) of this section confers on a person standing to appeal to the Public Information Commission if he is denied information by any official in the executive branch of State government. The denial must be by an official in the executive branch of State government because of the fact that the appellate jurisdiction of the Commission has been limited to State government instrumentalities in the executive branch of government. This has been done so as not to impinge upon the powers of the other branches of government and of the local instrumentalities to control their own affairs. Appeal to the commission is in addition to and not in lieu of any other remedy provided by this act. If a person receives an adverse determination by the Commission he still has the right to seek *de novo* review in the Superior Court.

Subsection (2) of this section is almost exactly the same as *N.J.S.A. 47:1A-4* which is the enforcement provision under the present Right to Know Law. The only difference is that the word "record" has been replaced with the word "information" to conform to this act.

Under subsection (3) the court is to determine the matter *de novo* and the burden is placed on the government instrumentality to sustain its action. This comports with the Federal Freedom of Information Act which reads — "The court shall determine the matter *de novo* and the burden is on the agency to sustain its action." See *Ethyl v. Environmental Protection Agency*, 478 F.2d 47 (4th Cir. 1973). The burden of proof is placed on the agency under this section because, first, the general rule adopted by this act is that all information is open to public inspection unless it is specifically exempt. To place the burden on the requester would be to render the rule on which this act is based meaningless. Secondly, since the government instrumentality is the only party having knowledge of the information within the contested records, it is the only party that can bear the necessary burden of proof. It would be extremely unreasonable to expect the requester to prove that the records were not exempt from public disclosure when he cannot see or inspect the records and has no knowledge of their specific contents. See *Vaugh v. Rosen*, 484 F.2d 800 (D.C. Cir. 1973).

The requirement that the matter be heard *de novo* takes no position on whether the court should inspect the records *in camera* before making its decision. The United States Supreme Court in the recent case of *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 (1973), decided that in reviewing an assertion that a record is an intergovernmental memorandum, the district court should first give the agency the opportunity to demonstrate, by surrounding circumstances, that the records in question fall

within the inter-agency memorandum exception. It said that *in camera* inspection should not be undertaken automatically and should only be used where necessary. The Court took this position in light of the fact that *in camera* inspection has the effect of impairing the purpose for making these records exempt. The fact that documents of the federal government frequently deal with national security matters might account for the hesitancy of the Court to order *in camera* inspection. The New Jersey Supreme Court on the other hand has accepted the procedure of *in camera* inspection for the purpose of making a determination under the Right to Know Law. The court set forth the procedure to be followed in *Irval Realty, Inc. v. Board of Public Utility Commissioners*, 61 N.J. 366, 375-76 (1972) where it said that:

“In all future cases of this sort, where a controversy arises, the decision should be made by the trial judge to whom the issue will be presented, either on motion or otherwise. He should call for and examine the report or other record. If in his sound judgment some part or all of the information therein contained should not be revealed, he will so rule. If the whole of the record cannot be shown to the party seeking discovery, but certain portions may be, then the judge should extract these portions and make them available for perusal or direct that such other practical steps be taken as will achieve the desired result.”

Though this procedure appears to provide a simple and adequate means of review, significant practical problems have developed with it on the federal level. As in section 1-20 of this act, the federal act also places the burden on the government instrumentality to demonstrate that the information sought falls within one of the exemptions to the act. In attempting to meet this burden, the federal cases disclose that the government instrumentality will simply make blanket assertions that the documents in question fall within one or more exemptions, *e.g.*, the documents contain information of a personal nature which, if disclosed, would constitute an invasion of privacy, or, the documents contain policy and opinion and are exempt under the intra-agency memorandum exemption. The United States Court of Appeals for the District of Columbia has recognized that such blanket assertions have the effect of transferring the burden of proof either to the applicant seeking the information or to the court. Since the applicant is in no position to challenge such an assertion, it becomes the duty of the court to view the documents *in camera* to determine whether the government has properly categorized the information as exempt. The practical problems with this system of review were recently expressed in *Vaugh v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973) where the court said:

“Such an examination . . . may be very burdensome, and is necessarily conducted without benefit of criticism or illumination by a party with the actual interest in forcing disclosure. In theory, it is possible that a trial court could examine a document in sufficient depth to test the accuracy of a government characterization, particularly where the information is not extensive. But where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization as would a party interested in the case.

* * *

The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court’s characterization of the factual nature of the information. Frequently trial courts’ holdings in FOIA cases are stated in very conclusory terms. . . . An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court’s factual determination; it must conduct its own investigation into the document. . . . Obviously an appellate court is even less suited to making this inquiry than is a trial court.

* * *

This burden is compounded by the fact that an entire document is not exempt merely because an isolated portion need not be disclosed. . . . When the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information. Isolating what exemptions apply to what parts of a document makes the burden of evaluating allegations of exemption even more difficult.” *Id.* at 825.

After noting that the current system places the burden of determining the justifiability of a claim of exemption on the courts and that this encourages agencies to automatically claim the broadest possible grounds for exemption covering the greatest amount of information, the court in *Vaugh* proposed several solutions. First, it said that courts should no longer accept the general and conclusory assertions of exemptions. The government, instead, should be required to produce an analysis of the reasons for non-disclosure relatively detailed and in manageable segments. Secondly, it said that in large documents, the agency must specify in detail which portions of the document are discloseable and which are allegedly exempt. To do this, a system of itemizing and indexing should be formulated whereby the reasons for non-disclosure will be keyed to the portions of the document to which they relate.

“Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government’s justification.” *Id.* at 827.

Since this itemized list would be an outline and not contain the specific information exempt from disclosure, it could be submitted to opposing counsel with both parties determining the specific parts of the document that are at issue. At this point, the list would be submitted to the trial judge so that he may examine it and rule on each of the contested items. Finally, the court in *Vaugh* also said that where the records are still voluminous, the court may appoint a special master to evaluate them and report his conclusions to the trial judge. *See also Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973).

Subsection (3) takes into account the fact that information being sought may quickly become stale and no longer be needed by the requester. Therefore, it provides that matters brought under this section may be given precedence over other matters pending before the court and provides that it is the stated intent that every effort should be made to expedite these cases. This policy comports with both that of the Federal and Colorado Acts.

The source of subsection (4) is COLO. REV. STAT. ANN. § 113-2-4(6) (1968) which provides:

“If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection, he may apply to the district court of the district in which such record is located for an order permitting him to restrict such disclosure. Hearing on such application shall be held at the earliest practical time. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. In such action the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard.”

See Colorado Legislative Council, Report to the Colorado General Assembly, Open Public Records for Colorado xviii (Research Publication No. 126, Nov. 1967). The purpose of this section is to provide a safety valve for circumstances that may arise where information otherwise public should, in the public interest, be kept confidential. It acknowledges the fact that

- general rules do not fit the specifics of each individual case. It is not intended for use as a means of exempting classes or categories of information but is only to be used to exempt specific records or documents *in unusual circumstances*. The burden is placed on the government instrumentality to prove that the disclosure of the information will do substantial injury to the public interest. By having to spend the time, money and effort of going to court, the instrumentality will be forced to make a conscious examination of the reasons for its decision. In addition, requiring the government instrumentality to go to court provides an independent evaluation of the purported injury to the public interest. The word substantial has been inserted in this section to indicate that the government instrumentality must meet an extremely heavy burden of proof. This is so because it is seeking to withhold information that the act would normally make public. Therefore, it should be required that the government instrumentality *clearly* show that the disclosure of the information would do substantial injury to the public interest before it is allowed to keep such information confidential.

Subsection (5) has been inserted because of a repeated criticism voiced by witnesses testifying at the hearings on the Federal Freedom of Information Act. The cost of obtaining an attorney and instituting a suit against a government agency was pointed out by these witnesses as a prime factor in discouraging members of the general public from seeking review for unwarranted denials of information. *See, e.g., Hearings on U.S. Government Information Policies and Practices Before a House Subcommittee of the Committee on Government Operations, 92d Cong., 2d Sess. 1065, 1187, 1252, 1264 and 1274 (1972)*. Because of this, the Subcommittee Report recommended that

“[c]ourt costs and reasonable attorneys’ fees should be awarded in the discretion of the court, to the complainant if the court issues an injunction or order against the Government Agency. . . .” *H.R. Rep. No. 92-1419, 92 Cong., 2d Sess. 83 (1972)*.

In accord with this recommendation, *H.R. 17142, 92d Cong., 2d Sess. § 1(d) (1972)* provides that:

“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed.”

This section has been included in this act to encourage people who have been unjustifiably denied access to information to seek vindication of their rights by invoking the jurisdiction of the courts. Without this provision members

of the general public who merely seek information as taxpayers will rarely, if ever, bring their complaints to court. This is especially true in relation to grievances under this act because a general taxpayer will usually gain no monetary or other significant tangible reward if he is successful in litigation and is able to obtain the desired information. It is only the person who is involved in independent litigation and needs the information for those purposes or who has a direct commercial interest in obtaining the information who will incur the botheration of going to court to have a denial of a request for information reviewed. It is therefore the intent of this subsection to provide an impetus for the ordinary citizen who seeks information from his government and for the government employee to provide it.

1-21. Penalty

- Any government official or employee who shall willfully engage in a continuous and repetitive pattern of violating this act shall be subject to removal from his office or employment after hearing in court and upon application by an aggrieved citizen.

1-22. Appropriation

- There is hereby appropriated to the Public Information Commission the sum of \$30,000 for use during the fiscal year ending June 30, 1974.

1-23. Severability

If any clause, sentence, subdivision, paragraph, section or part of this act be adjudged to be unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, subdivision, paragraph, section or part thereof directly involved in the case in which said judgment shall have been rendered.

1-24. Effective Date Provision

This act shall take effect 90 days from the date of its enactment into law.

1-25. Repealer

N.J.S.A. 47:1A-1 through -4 is hereby repealed.

COMMENT

This section is intended to give to the ordinary citizen the right to have a government employee removed when such employee willfully and repetitively violates the provisions of this act. It is not intended that existing removal or disciplinary procedures should be supplanted. The existing procedures are applicable to disciplinary action taken by the appointing authority; whereas this section is applicable to removal initiated by a member of the public. An employee who willfully violates the provisions of this act may be suspended or removed by the appointing authority. Where the appointing authority takes the action, the normal suspension or removal procedures applicable to the particular employee would be followed. This section would not require the appointing authority to bring an action against the employee in court. Under civil service rules, the willful violation of this act would constitute either "insubordination," "conduct unbecoming an employee in the government service," or "other just cause" for disciplinary action.

CHAPTER 6 REPORT ON OPEN MEETINGS

I. INTRODUCTION

Unlike the right to inspect government records, there is no common law right to be admitted to a meeting of governmental bodies. *City of Miami v. Berns*, 245 So. 2d 38, 40 (Fla. Sup. Ct. 1971); Note, 75 HARV. L. REV. 1199, 1203 (1962); *California Assembly Interim Committee on Government Organization, The Right to Know: The Public's Access to Meetings and Records of Government Agencies* 15 (1965). In the 17th and 18th centuries, England frequently visited harsh punishment upon those who publicized parliamentary debates. It appears that the motive for secrecy originally lay in the protection from the Crown, but later it was thought useful to conceal the debates from the electorate as well. As put by a member of the House of Commons in 1738:

“To print or publish the speeches of gentleman in this House looks very much like making them accountable without doors for what they say within.”

Gradually in the 18th century, publication of debates was tolerated but reporters had no privilege to attend and could be excluded upon the request of a single member. By 1874 the concept of open meetings had progressed to the point where a majority vote was required in order to exclude the public.

In the United States the House of Representatives has customarily met in public since its inception and the United States Senate has done so since 1794. Since most of the actual business of the Congress is conducted in committee meetings however and since most of those meetings are not conducted in public the actual operation of the United States Congress is closer to the original position of parliament than might otherwise be expected. Nonetheless many States contain constitutional provisions requiring that their respective Legislatures meet in public. In other States legislative sessions are open as a matter of custom. At least as late as 1962 it appears that no State had a constitutional requirement requiring open meetings of any government body other than the Legislature. See Note, 75 HARV. L. REV. 1199, 1203 (1962).

Originally the open meetings legislation which was passed in the early 19th century related only to specifically defined areas and was contained therefore in legislation which applied only to specific agencies. These

original legislative steps into the area of open meetings therefore did not constitute general legislative recognition of an open meetings requirement applicable to the majority of government agencies. It has only been since World War II that the problem of government secrecy and the need for public scrutiny has resulted in the adoption of more extensive and obviously more effective open meetings legislation. While some have argued that this legislation and the access which it provides to government information is guaranteed by the United States Constitution, it has generally been recognized that the appropriate basis for providing and regulating the public functioning of government is through legislation. Because of the delicate balancing required and because of the complexity of the issues involved in deciding the various questions arising under open meetings legislation, the courts have been reluctant to interfere or expound upon the right to know concept without legislative guidance. Thus in the absence of judicial or constitutional encouragement the proponents of open meetings legislation have turned their attention and focused their energies upon the State Legislatures with growing success in recent years.

II. OPEN MEETINGS —PROS AND CONS

- While many of the reasons supporting the enactment of open meetings legislation are somewhat interrelated there are nonetheless separate concepts which deserve mention in the process of considering the advisability and feasibility of proposing open meetings legislation. In particular
- the following policy considerations favoring open meetings laws should be considered:

1. Essential Attribute of Our Democratic System

The public's right to view the functioning of its government as an imperative of the democratic process is the most frequently cited argument in favor of the open government principle and the one that requires constant reiteration. To espouse belief in the democratic process while recognizing no right in the people to view the functioning of their government is nothing less than the advocacy of hypocrisy. The incompatibility of these positions requires continued repetition because of the ease with which those in government may develop an attitude characteristic of an omniscient autocrat and lose cognizance of the fact they are the employees of the public. It is easy for government personnel to unwittingly develop proprietary instincts and begin feeling that government is their domain; they know what is best for the public and there is no need for interference by "outsiders." This, needless to say, is a blatant contradiction of democratic principles and becomes dangerous in a contemporary society where public relations devices and mass media are available to government to be utilized by it in convincing the public of the propriety of its actions. Without a right in the public to view the government decision-making process, these devices could readily be used to misinform the public. This, in short, would create a system whereby the people were manipulated by government instead of government being controlled by the people. As stated in California's Brown Act, legislation opening up government to the public is important so that the people "may retain control over the instruments they have created." CAL. GOV'T CODE § 54950 (West 1966). The primary means of retaining this control is through the right to vote and this right becomes meaningless if the voter cannot determine what his government officials are doing, what decisions they have made, what are the underlying reasons for such decisions and how they are performing in office. As stated in the often quoted words of Madison:

"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 knowledge gives." Letter to W. T. Barry, Aug. 4, 1822, IX THE WRITINGS OF JAMES MADISON (Hunt ed. 1910) 103.

2. *Government Sprawl*

History has seen an essentially laissez-faire government develop into a government involved in the daily lives of all its citizens. One need only mention a few examples of governmental activities such as motor vehicle licensing, building codes, zoning laws, taxation and unemployment compensation to illustrate the scope of government's expansion. A significant contributor to this increased involvement has been the development of the administrative agency structure. The fields in which government has extended itself through this structure appear limitless. Daily, countless decisions and innumerable actions are taken by these agencies which affect the rights of individuals. With this increase in administrative agency activity, it has become impossible for the Governor, Legislature, Judiciary or other elected representatives of the people in the local units of government to scrutinize every detail these agencies handle, or to be concerned with any but the most important policy decisions these agencies make. As each branch of government expands, the effectiveness of the governmental checks and balances becomes more diluted, requiring an increasing need for openness of government to the public. Without the public having the right to view the decision-making process of state and local administrative agencies and learning of the considerations behind their actions, the power of these bodies will to a large degree go unchecked, thereby allowing them to take hasty or unwarranted action knowing that no one will be able to adequately analyze or criticize their decision.

Another incident of this expansion is government's decreased responsiveness to the needs of the individual. Initially, citizens knew to whom in government they could turn when a problem arose or when they desired to complain of governmental action. Moreover, since many activities took place on the local level and people knew these government officials, informal dissemination of information was able to better meet the needs of the citizenry than it can today. The increased population, expansion of government functions, increased number of government officials and the specialized areas assigned them, all have contributed to a dissociation between government and the governed. This dissociation requires that, at a minimum, government become responsible for informing the citizenry of what it is doing. This duty of opening up government is also consistent with the recent philosophy suggesting a return of responsibility to local units of government and away from the existing policy of centralization of federal government functions. As local and state governments expand their areas of responsibility and control, it is important that they expand their *public* functioning accordingly.

3. *Secrecy, Corruption and Public Confidence*

- Probably the most compelling reason for opening up the decision-making process to the view of the public is that secrecy both shrouds
- corruption and engenders public distrust in government and its officials. As Woodrow Wilson once stated:

- “‘Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.’” E. ROURKE, *SECRECY AND PUBLICITY* 25 (1961) (quoting from *THE NEW FREEDOM* 92-104).

For those officials attempting to engage in illegal activities, a helpful co-conspirator can be the right to act in secret. Unconcerned with public scrutiny, these officials can grant licenses and zoning variances or award contracts to those supplying the additional stipend. Although open meetings laws would by no means be a cure-all for corruption, it would undoubtedly make engaging in it more difficult.

Even though corruption may not exist, “secrecy” is viewed by the public as a synonym for “dishonesty.” Whether dishonesty does, or does not, exist is irrelevant. The important factor is that “secrecy” creates a belief that it exists which, if extensive enough, could destroy needed public support for government action. Like the ethics law and conflict of interest legislation, it is not as much the actual presence of dishonest activity as the appearance of it that is important. Secrecy, similarly, gives the appearance and encourages the view that the privileged, as opposed to the many, have access to government information and obtain preferential treatment. The sole method of combating these notions is to demonstrate their falsity by opening the doors of government so that the truth may be viewed by all.

4. *The Press and Other Commentators*

Within society there are those who have the duty, or have taken on the responsibility, of informing the public on topics affecting government operations. The primary organization which falls into this category is the press. However, public speakers, commentators, government analysts, historians, and professional advisors are all gaining increased power in affecting government operations. Where these people are unable to view the functioning of government or have access only to incomplete or one-sided information, it will inevitably result in erroneous decisions in many cases. For example, if a person cannot conduct a study of what government is engaged in and what is the underlying basis for government decision-making, he will not be able to record an accurate historical account of government operations. If we fail to learn from history we are condemned to ignorance and if government pursues excessive policies of non-disclosure it becomes a willing partner in the perpetuation of such ignorance.

The effect of a policy of closed government is especially pertinent to the press which has received much criticism for inaccurate and biased reporting. It cannot be denied that these types of reporting do exist. Part of the responsibility for this condition, however, must be shouldered by government officials since

“Without free access, reporters will have to rely on ‘sources’ in government, who, since they are only accountable to that particular reporter, may release misinformation or biased information.” Note, *Access to Government Information and the Classification Process—Is There a Right to Know?*, 17 N.Y.L.F. 814 (1971); Kohlmeier, *The Journalist’s Viewpoint*, 23 ADMIN. L. REV. 143, 144 (1971).

If the press cannot gain access to government operations and obtain first hand knowledge of what transpires at a meeting, they must inevitably depend on secondary sources and incomplete information which increases the chance of inaccuracy and further diminishes the trust generated by an informed citizenry.

5. *More Vocal and Educated Populace*

With the country’s increased economic prosperity and technological progress, there has come a more highly educated populace with an increased ability and desire to involve itself in government affairs. Because of this development, people are more aware of the ways in which they can exert power to affect government. The increased alienation between government and these individuals, however, has inhibited the desire for active citizen participation in government and has contributed to public apathy and indifference which is threatening the very foundation of government itself. This alienation has, to a significant extent, been produced by the lords of secrecy who have chosen to treat government as their fiefdom and the public as their serfs. Only a recognition and rejection of this policy of secretive government administration will permit the populace to undertake its proper and necessary role in the process of governing.

The importance of recognizing the development of this more vocal populace is clear when one considers the instances in which a governmental agency has made a decision in private without considering public sentiment. Oftentimes when such a decision is made, the result is unnecessary delay, argumentation and court battles because of the public uproar it creates. By requiring that these decisions be reached in public, the viewpoint of citizens will be more readily available and a more diverse compilation of comments and other facts relating to the subject in question will be acquired. This can be an important deterrent to later public attacks against the decision of the

- public entity by attempting, in the planning, discussion and deliberation stages, to reach a settlement accommodating all positions or at least informing all segments.

6. *Public Interest Groups*

The theory of our republican form of government has always been that the representatives selected by the people will act for the public welfare. The key duty is placed on the state to act for the benefit of the public at-large. Recently, however, it has been recognized that it is also the public's duty to act for the welfare of the state and for the welfare of the rest of the public. Thus through citizens groups and organizations such as the League of Women Voters, Common Cause, taxpayers' associations and Nader's Raiders, a further check on government efficiency and effectiveness has developed. In light of this development and the impact these groups have on the government and the public, it is important that, before they act to influence governmental policies or public opinion, they are able to gain accurate and sufficient information and to have knowledge of the reasons behind government action. Since they are surrogates for the public itself, enhancing their knowledge enhances that of the public, thereby making the right to know a more viable and successful concept.

While there are many persuasive arguments favoring open government meetings, it must be recognized that, since government's duties are almost without limit and often affect individual citizens, many legitimate reasons continue to exist in support of controlled secrecy. Such considerations are:

“Publicizing proposed governmental action may benefit citizens whose interests are adverse to the general community or harm individual reputations. In some cases, particularly when sharply conflicting interests must be accommodated, freedom from the pressure of public opinion may be desirable; the delegates to the Constitutional Convention, for example, felt constrained to work in secrecy. Even in less unique circumstances ‘there is something to be said for open covenants, unopenly arrived at.’ One public official has remarked that ‘there are many details, ramifications and opinions that no sound administrator . . . would care to express in public,’ and it appears that officials are often reluctant to request information at open meetings lest they create a public image of ignorance. In addition, public officials are prone to waste time making speeches for the benefit of an audience, while in a closed meeting they ‘are less on their dignity, less inclined to oratory.’ If the meeting is for preliminary consideration of action, there are additional objectives. An open meeting requirement will tend to disadvantage subordinate officials by publicizing

their disagreement with policies that they must administer. And publicity of proposals put forth during preliminary discussions may frustrate ultimate agreement, for an official hesitates to abandon a view that he has publicly advocated. A final objection to an open meeting requirement arises from the tendency of the press toward 'sensational' reporting. All too frequently newspaper stories are distorted by the bias of the reporter or his paper. Even when there is no bias, newspapers prefer to emphasize as 'newsworthy' only 'controversial matters about which there is some conflict or . . . those items which tend to make legislators appear substantially less than bright. ' ' Comment, 75 HARV. L. REV. *supra*, at 1202 (footnotes omitted).

As is demonstrated by the above considerations, opening up government to the people for whom it was created not only entails a recognition of the interest in the public to see its government at work, but also entails a recognition of the interest of government to be able to properly and efficiently carry out its duties as well as its responsibility to protect the reputations and privacy of those individuals who come before it. Because a certain degree of government efficiency will always be sacrificed in allowing the public to view or participate in government decision-making, a mere decrease in efficiency cannot be the standard in determining whether meetings should be closed. Instead, weight must be assigned to the varying policy considerations on the basis of experience gained under other open meetings requirements.

III. THE STATUTORY APPROACHES IN OTHER STATES

There exists throughout the nation a wide diversity of statutory language used to accord to the public a right to attend government meetings. The statutes range from acts containing multiple provisions to statutes consisting of only one sentence. Some statutes may speak in terms of "meetings," while others may use terminology such as "session" or "proceedings." Some may contain provisions for the holding of executive sessions, *i.e.*, sessions at which the public is excluded, and some may be silent on this subject. Notwithstanding this diversity, three basic approaches, premised on the type of meetings the public has a right to attend, can be discerned from these statutes. These approaches are based first on the distinction between a meeting at which final action occurs (this can be generally defined as vote-taking) and a discussion or deliberation meeting, and second on whether executive sessions are provided for in the statute. These approaches can be stated as follows:

1. Any meeting at which final action occurs (vote-taking) must be public.
2. Any meeting at which either final action or the discussion of public business occurs must be public except for executive sessions authorized and enumerated in specific instances in the statute.
3. Any meeting at which either final action or the discussion of public business occurs must be public.

1. Any meeting at which final action occurs must be public.

The main characteristic of this approach is that it only prohibits the taking of final action in secret. It leaves to the discretion of the public body the question of whether discussion and deliberation meetings should be held in public or in private. This approach is exemplified by the New Mexico provision which reads:

"The governing bodies . . . shall make all final decisions at meetings open to the public. . . ." N.M. STAT. ANN. § 5-6-17 (1953).

As is readily discernible from the language of this statute, this approach only gives the public the right to stand by and view the final ceremony of voting without being able to attend the discussion and deliberation of the government body that served as the prelude to this action. Moreover, under the New Mexico translation of this approach, the public's right has been further limited. In *Board of Education v. State Board of Education*, 79 N.M. 332, 443 P.2d 502 (Ct. App. 1968), the New Mexico court has held that

reaching a final decision by means of a secret ballot did not violate this statute so long as the secret ballot was taken at an open meeting.

Although this first approach is very popular throughout the country, it is usually formulated in language that serves to camouflage its restrictiveness and connote a much broader right. A typical example of the more common form it takes is manifested by the Utah provision which states:

“All meetings of legislative bodies or state or local agencies . . . shall be open and public, and all persons shall be permitted to attend any meeting of these bodies, except as otherwise provided in this chapter.” UTAH CODE ANN. § 52-4-2 (1953).

The “otherwise provided” is found in the next section which states that:

“Nothing contained in this chapter shall be construed to prevent these legislative bodies, boards, and commissions from holding executive sessions from which the public is excluded, but no ordinances, resolutions, rules, regulations, contracts, or appointments shall be finally approved at such executive sessions.” *Id.* § 52-4-3. See HAWAII REV. STAT. § 92-1 *et seq.* (1968); IDAHO CODE § 59-1024 (Supp. 1973).

Though this statute by stating that “[a]ll meetings shall be open and public . . .” appears to establish a broad right in the public, it, in reality, accords no greater right than the New Mexico provision. The limitation contained in the act emasculates this general open meetings requirement and restricts it to a requirement that only final action be taken in public.

New Jersey is also among the states following this first approach. The New Jersey act (reprinted *supra* at 31) establishes the general rule that

“The public shall be admitted to any meeting of a public body at which official action is taken.” *N.J.S.A.* § 10:4-3 (Supp. 1972-73).

“Official action” is then defined to mean a determination made by vote. *N.J.S.A.* § 10:4-2.

Unlike the statutes of the two other states cited above, the New Jersey act makes specific provision for vote-taking on enumerated matters in executive session. The pertinent section provides:

“The foregoing shall not apply (a) where contrary provision is made by law, (b) where its application would impair a right to receive funds from the national government (c) where the law provides that a record or report of official action of the type in

question is or may be rendered confidential (d) in the case of official action relating only to the procedure to be followed in the conduct of a meeting, (e) to the office of the Governor or the Judicial or Legislative branches of State Government, (f) to the State Parole Board in any capacity or to any other public body to the extent that it acts in a parole capacity, (g) in the case of official action authorizing the investment of public funds, investigations, or other activities where, and only where, the accomplishment of the object of the official action is likely to be materially prejudiced if the official action is made publicly known in full prior to the accomplishment of its object, . . .” *N.J.S.A.* 10:4-4 (Supp. 1972-73).

By incorporating these exceptions into the statute, the New Jersey act dilutes the public’s right even further than the New Mexico or Utah provisions. Under the New Jersey act, not only does a government body possess unbridled discretion to hold discussion and deliberation sessions in secret, they also may vote in secret.

2. Any meeting at which either final action or the discussion of public business occurs must be public except for executive sessions authorized and enumerated in specific instances in the statute.

The major distinction between this approach and the first is the expanded coverage given to the *types* of meetings that are required to be public. This approach does not restrict the open meetings requirement to meetings at which a vote is taken but extends it also to meetings at which the members of the public entity merely discuss public business. Coupled with this expanded coverage is the enumeration of instances in which executive sessions are permitted. This approach therefore recognizes both the need of the public to view the discussion and deliberation stages of government decision-making and the need of government to hold executive sessions on specified matters. With respect to the latter, the noteworthy characteristic of this approach is that in attempting to provide for this governmental need, it does not vest unbridled discretion in the public entity to hold executive sessions. Instead it limits this discretion by specifically defining the circumstances that make executive sessions permissible.

This approach is reflected in the California acts which are discussed *infra*. Another example of it can be found in the Iowa provision which states:

“All meetings of the following public agencies shall be public meetings open to the public at all times, and meetings of any public agency which are not open to the public are prohibited,

unless closed meetings are expressly permitted by law. . . .”
IOWA CODE ANN. § 28A.1 (Supp. 1973).

“Meeting” is defined in the act to include:

“[A]ll meetings of *every kind*, regardless of where the meeting is held, and *whether formal or informal*.” *Id.* (emphasis added).

The Iowa executive session provision indicates how the discretion to enter into executive session can be limited by enumerating the specific circumstances permitting it. The Iowa provision states:

“Any public agency may hold a closed session by affirmative vote of two-thirds (2/3) of its members present, when necessary to prevent irreparable and needless injury to the reputation of an individual whose employment or discharge is under consideration, or to prevent premature disclosure of information on real estate proposed to be purchased, or for some other exceptional reason so compelling as to override the general public policy in favor of public meetings. The vote of each member on the question of holding the closed session and the reason for the closed session shall be entered in the minutes, but the statement of such session need not state the name of any individual or the details of the matter discussed in the closed session. Any final action on any matter shall be taken in a public meeting and not in closed session, unless some provision of the Code expressly permits such action to be taken in a closed session. No regular or general practice or pattern of holding closed sessions shall be permitted.” IOWA CODE ANN. § 28A.3 (Supp. 1973).

3. *Any meeting at which either final action or the discussion of public business occurs must be public.*

This third approach is exactly the same as the second except that no provision is made in the statute for the holding of executive sessions. The two leading adherents to this approach are Florida and Colorado whose statutes are discussed *infra*. It should, however, be noted that, in the case of the Florida act, the courts, through judicial interpretation, have begun to engraft exceptions into the act which allow executive sessions. The scope of these exceptions however remain severely limited and are not as broad as those contained in statutes which follow the second approach. This is primarily due to the court being confronted with an absolute statutory prohibition against closed meetings allowing them very little leeway by way of interpretation to permit executive sessions.

Probably the broadest statutory language illustrating this third approach is found in the Colorado provision which reads:

“All meetings . . . at which any public business is discussed or . . . formal action . . . taken are . . . declared to be public meetings open to the public at all times . . .” COLO. REV. STAT. § 3-33-2.

4. *Summary*

The above material provides a brief synopsis of one aspect of open meetings laws, namely, the scope of the laws in terms of the types of meetings that are required to be public. The first approach is basically a protectionist one and clearly goes to the extreme in attempting to protect the functions of government. It constitutes the approach that was used by the earlier open meetings laws which were enacted during a period when the effect of requiring government to hold open meetings was uncertain and public officials were apprehensive about such legislation.

The second approach is perhaps the best that has been developed because it attempts to respond to the complex factors involved and to reach a workable balance among them. The success of this approach depends to a great degree on the specificity of the legislation and the attitude of the people administering it. The exemptions to the open meetings requirement must be sufficiently restrictive to prevent public bodies from frustrating the public's right, yet sufficiently broad to allow private meetings where necessary. Specificity breeds a knowledgeable approach to such laws and built in controls make them to a great extent self-executing and self-regulating and thereby insulated from abuse by their own provisions.

The third approach, like the first, adopts the extreme position. It is overly enthusiastic in giving recognition to the public's right to know and uninterested in acknowledging the other duties of government. This approach's greatest weakness is its failure to recognize that an absolute rule requiring all meetings to be public does not comport with reality; it does not recognize that sometimes there is a greater public interest in secrecy than in disclosure. Drawing the appropriate lines is of course the difficult job under any of the above approaches.

IV. THE CALIFORNIA EXPERIENCE

1. *The Brown Act*

The first significant action taken to deal with the problem of opening up government meetings to the public occurred in California in 1953 in the form of the Ralph M. Brown Act. The California Assembly Interim Committee on the Judiciary, under the chairmanship of Mr. Ralph Brown, undertook an investigation into the problem of closed government meetings at the local level of government. As a result of this investigation, the Brown Act was introduced into the Legislature, passed and signed by the Governor in 1953. Although for a long period prior to the act, cities, counties and other local agencies were governed by charter or statutory provisions requiring them to hold public meetings, no uniform law existed applicable to all of these bodies. Therefore, some local agencies were required to hold open meetings while others were not. Because of this, it was the purpose of the Brown Act to provide a uniform law setting forth the open meetings requirements applicable to all local agencies.

In the most recent report on the Brown Act, issued by the Assembly Interim Committee on Government Organization in 1965, it was noted that there have been a number of criticisms by government officials of the underlying principle of open deliberations embodied in the Brown Act. However, the conclusion of the Committee after holding public hearings on the effectiveness of the act was that:

“Despite the objections which have been raised by a vocal few, no evidence was presented to the committee that the Brown Act has obstructed local government. Local public officials, almost without exception, indicated their support for the Brown Act and expressed the belief that it has served the public interest.” *Committee Report, supra*, at 19 (emphasis omitted).

The primary directive of the Brown Act is that “[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.” CAL. GOV'T CODE § 54953 (West 1966). The definitions of “legislative body” and “local agency” limit the application of the act to the governing bodies of local government instrumentalities and therefore excludes from its scope state agencies. Although it is the declared intent of the act that the “actions” and “deliberations” of the affected agencies be taken openly, the act only commands that “meetings” be open and public. Because the act contains no definition of “meetings,” it was concluded in the 1965 Committee Report that

- “[t]he principal difficulty in interpreting the Brown Act involves a definition of ‘meeting’. It is clear that the Legislature intended a broader interpretation of meeting than had existed in earlier case law so that *actions* and *deliberations* of local public agencies would be open to the public.” *Committee Report, supra*, at 13 (emphasis added).
- The interpretation of “meeting” that had existed in prior case law was that it meant a formal meeting at which action was taken. It was between this definition and a more liberal definition which would include informal gatherings of the agency that the difficulties surrounding the term “meetings” revolved. It was in the case of *City Council of Adler v. Culver City*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (Dist. Ct. App. 1960), that this question received its first judicial review. In *Adler* the court was faced with the issue of whether an informal dinner meeting held by a City Planning Commission came within the mandate of the Brown Act. In deciding this issue the court adopted the strict definition of “meeting” holding that it has reference only to formal assemblages of a legislative body which is sitting as a joint deliberative body as required or authorized by law for the transaction of official business. *Id.* at 811. In adopting this definition, the court appears to have placed primary emphasis on the fact that formal action could only be taken where the legislative body was duly convened. At these informal sessions any action taken could neither bind the local agency nor the members of the body. In response to the court’s decision in *Culver*, the Legislature amended the Brown Act making it a misdemeanor for any member of a legislative body to attend a meeting of such body where “action is taken” in violation of the act. CAL. GOV’T CODE § 54959 (West 1966). A provision was then included defining “action taken” to mean:

“a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of the legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, or an ordinance.” CAL. GOV’T CODE § 54952.6 (West 1966).

The combination of this definition and the misdemeanor provision caused a broadening of the scope of the act by making it a crime to agree at a non-public meeting to take formal action in the future. The California Attorney General interpreted this amendment to severely restrict the *Culver* decision and extend the open meetings law to prohibit “secret gatherings at which a majority of the members of the legislative body agree, or agree to agree.” *Committee Report, supra*, at 23 (quoting from 42 Cal. Op. A.G. 62).

Although under the definition of “action taken” the strict interpretation of meeting could no longer be utilized under the act, a new breed of meeting referred to as the “discussion session” appeared on the scene. This resulted from the fact that most city attorneys and county counsels interpreted the act as only prohibiting meetings at which either formal action was taken or at which a collective commitment or promise was made by a majority of the members of the body. This interpretation of the act thereby allowed legislative bodies to meet in closed session to discuss or deliberate upon public business. As is indicated from the commentary of the Committee Report, the real business of the body was conducted at these discussion sessions. The Interim Committee takes the position in its report that the Brown Act should be made to “indicate as clearly as possible . . . that all discussion, deliberation and action taken by the members of a local legislative body are required to be open to the public unless for specific reasons public policy requires confidentiality.” *Committee Report, supra*, at 29. In 1968, however, the California Court of Appeals seems to have solved the dilemma by disregarding the technical precedents and looking to the intent of the Legislature. In so doing it acknowledged the apparent ambiguity and resolved it by finding the intent of the Legislature to be:

“that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To ‘deliberate’ is to examine, weigh and reflect upon the reasons for or against the choice. . . . Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency’s functions may include or depend upon the ascertainment of facts. . . . Deliberation thus connotes not only collective discussion but the collective acquisition and exchange of facts preliminary to the ultimate decision.” *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 216, 69 Cal. Rptr. 480, 485 (Dist. Ct. App. 1968).

The problem that began with *Culver, supra*, was not limited to the interpretation of “meetings.” The court in that case also held that the City Planning Commission did not come within the definition of “legislative body” and therefore was not governed by the terms of the act. “Legislative body” was defined to mean, “the governing board, commission, directors or body of a local agency, or any board or commission thereof. . . .” CAL. GOV’T CODE § 54952 (West 1966), *amended* (West Supp. 1972). The basis for the court’s excluding from this definition the City Planning Commission was the fact that this commission was an advisory body whose actions

had no force or effect until transmitted to the City Council.

The *Culver* case typifies one of the two main philosophical approaches to open meetings laws. These two approaches are, first, that the public should only have the right to view the making of final decisions that will affect them. Under this approach, a distinction is made between the act of voting and the acts of discussing and deliberating upon public business. There are several reasons for making this distinction. It can be based on the feeling that government cannot properly perform while exposed to public view, or it may be based on the opinion that it would be impractical to include within an open meetings requirement all discussion and deliberation of public business. The second approach is illustrated by the California Court of Appeals in *Sacramento Newspaper Guild, supra*. Under this approach, the futility of attempting to distinguish between meetings at which final actions are taken and meetings at which transpire only discussion and deliberation is recognized. The contemporary trend is to follow this latter approach because of the ineffectiveness of the former. This ineffectiveness can be illustrated by the concept of “advisory committee” that was relied upon in *Culver, supra*. Although in theory, advisory committees are established only to give advice, it is well known that in practice their recommendations are adopted by the governing instrumentality with little deliberation or independent study. In this respect, it should be pointed out that in 1968 a new provision was included in the Brown Act covering advisory bodies created by formal action of a governing body of a local agency. CAL. GOV'T CODE § 54952.3 (West Supp. 1972). Under this provision the meetings of such bodies are open to the public.

2. State Agencies

At the time the Ralph Brown Act was signed by Governor Warren, he stated:

“There isn't any reason at all why we should have a law for local government and then refuse to have the same thing for state government. I personally believe it would be a good thing to have a law for all branches of government, including the Legislature. Some of the worst things that have happened in government have stemmed from secrecy. It should be avoided.” *Committee Report, supra*, at 77.

Thereafter, Ralph Brown, the originator of the Brown Act, introduced an assembly bill aimed at making the open meetings requirement applicable to all agencies of the state. However, the various state agencies submitted numerous requests for exemptions from the proposed act. This response forced the withdrawal of this bill. Because of this, the approach was changed

from the submission of a uniform act governing all state bodies to the inclusion of open meetings requirements in amendments to specific statutes governing particular agencies. In 1965, the Interim Committee in its report recommended the enactment of a comprehensive law applicable to all state agencies similar to the Brown Act. *Committee Report, supra*, at 82. Such a statute was passed in 1967 governing "every state board, or commission, or similar multimember body of the state which is required by law to conduct official meetings. . . ." Specifically exempt from this act is the judicial department of government. CAL. GOV'T CODE § 11121 (West Supp. 1972). The provisions of this act are essentially the same as those contained in the Brown Act.

3. *Executive Sessions*

Both the Brown Act and the act governing state agencies allow executive sessions to be held in certain specified circumstances. The four main areas in which they are authorized in the Brown Act are, first, in the discussion of the security of public buildings or a threat to the public's right of access to public services or public facilities, second, to consider the appointment, employment or dismissal of a public officer or employee,¹ third, consultations and discussions with designated representatives of employee organizations regarding salaries, salary schedules, fringe benefits, and, fourth, the agencies may, during the examination of a witness, exclude from the meeting all other witnesses in the matter being investigated. CAL. GOV'T CODE § 54957 (West Supp. 1972). The act governing state agencies allows executive sessions to be held in more instances than does the Brown Act. Initially, like the Brown Act, it allows executive sessions to be held in matters concerning appointments, employment or dismissal of public officers or employees. However, in that provision it makes holding an executive session contingent on the employee being given written notice of his right to have a public hearing rather than an executive session and it requires this notice to be delivered personally or by mail at least 24 hours before the time for holding the meeting. If this notice is not given, any action taken concerning the employee at an executive session is null and void. The other instances where executive sessions can be held include the following: the preparing, approving, rating or administering of examinations; the consideration of national security matters; parole hearings; deliberations on the conferance of honorary degrees, gifts, donations and bequests; deliberative conferences of the Alcoholic Appeals Board; site selection for state colleges by the trustees of the California State Colleges;

¹*See Lucas v. Board of Trustees of Armijo Joint U.H.S. Dist.*, 96 Cal. Rptr. 431 (Ct. App. 1971) (whether superintendent of high school should be dismissed in executive session).

- discussion of confidential tax returns or data by the Franchise Tax Board;
- consideration of reports of crime conditions by the Board of Correction;
- consideration of proprietary specifications in performance data of manufacturers by the State Air Resources Board; and consideration of investment decisions by the Public Employees Retirement System. CAL. GOV'T CODE § 11126 (West Supp. 1972). The section of the California Act which provides for the holding of executive sessions is one of the most detailed in the country. Also of interest in the California Act is section 11128 which provides that "all executive sessions of a state agency shall be held only during a regular or special meeting of the agency."

One of the basic exemptions that has been found to exist both in California and other states is that demanded by the attorney-client relationship. The court in *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 216, 69 Cal. Rptr. 480 (Dist. Ct. App. 1968) found that the Brown Act operated concurrently with the Evidence Code's lawyer-client provisions. Therefore, it allowed closed sessions between the Sacramento County Board of Supervisors and its attorney. However, because these two codifications do exist concurrently, the confidential sessions are limited only to occasions when absolutely necessary. The court said:

"Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash."

V. FLORIDA'S GOVERNMENT IN THE SUNSHINE LAW

An approach markedly different from that of California is contained in the Florida Government in the Sunshine Law. This law seeks to achieve the ideal by opening to the public *all* discussions and deliberations of government. It is the broadest and one of the briefest laws in the nation and has been used as a basis on which other acts have been drafted. It reads as follows:

“(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

(2) The minutes of a meeting of any such board or commission of any state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizens of this state.

(3) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.” FLA. STAT. ANN. §286.011 (Supp. 1973).

Although this act succeeds in giving the public a broad right to attend government meetings, in so doing, it fails to take into account practical considerations and competing interests. For the person who seeks admittance to a government meeting, it is an ideal law; but for the person whose reputation may be defamed at a public disciplinary proceeding, it affords no protection. The biggest fault of this act is the fact that it makes no provision for those matters, such as investigations, that are required to be discussed in secret. The most recent commentary on the law describes its deficiencies as follows:

“the breadth of its language has raised problems of construction. The terms of the Law are not tempered by any practical exceptions, nor do they provide precise guidelines for operational compliance. Judicial interpretation has corrected some of the

drafting flaws, but three basic, interrelated legal issues remain. The Sunshine Law does not state which bodies are *not* affected by the Law; it does not exclude any types of deliberation from its scope; and fails to recognize any stage in the deliberative process that might not be subject to the requirements of the Act." Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361, 364 (1971).

The leading case interpreting the act and one of the leading cases in the country on open meetings is *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969). This case is of primary importance because it directly confronts the issue of whether the public's right to attend meetings is limited to those gatherings at which a vote is taken or a formal decision is made. In construing the act the court refused to limit its applicability only to those meetings at which formal action was taken. Instead, it held that the act was applicable to assemblies at which occurred "the act of discussing; the act of deliberating; the act of deciding; or the act of listening to reports or expert advice." *Id.* at 473; see, *Hough v. Stenbridge*, 270 So. 2d 288, 289 (Fla. Dist. Ct. App. 1973). In construing the act to cover meetings at which these types of acts occurred, the court premised its decision on the fact that to interpret the act to apply only to meetings at which the formal act of voting on an issue or executing an official document occurred, would make the law a nullity since these matters are easily ascertainable notwithstanding such legislation. The court flatly stated that there would be no need for the act if this were all it intended to make public. It said:

"Every thought, as well as every affirmative act of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire *decision-making process* that the Legislature intended to effect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' and indispensable requisite to 'formal action', within the meaning of the act." *Id.* at 473.

Besides the scope of the act, the court also dealt with the issue of whether any exceptions to the open meetings requirement were recognized in the act. The appellee-school board contended that, notwithstanding the act, it could hold confidential discussions on matters relating to school personnel or enter into secret consultation with its attorney. As to personnel matters, the court said that the board could not attempt to hold secret

meetings on the basis of any rights possessed by third parties. Moreover, the arguments that these matters can more effectively be determined in private was not persuasive since the Legislature, as the representative of the people, has already determined that these matters should be discussed publicly. With respect to holding confidential discussions with its attorney, the court held that the act waived the right of the school board arising under the attorney-client relationship. However, the court said it could not affect the obligations of the attorney under this relationship and where his duties required confidentiality, secret consultations could be held. The court reasoned that the act could not affect the attorney's duties because the Legislature "is without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court." *Id.* at 475. The duties of the attorney that would authorize the holding of confidential sessions would be determined by the responsibilities imposed on him by the Canons of Ethics. Therefore, the executive sessions could be justified because of the attorney-client relationship only if the attorney's duties as prescribed by the Canons of Ethics required confidentiality.

The court engrafted its second exemption onto the act in *Bassett v. Braddock*, 262 So. 2d 425 (Fla. Sup. Ct. 1972). There it was faced with the question of whether labor negotiators employed by a school board may negotiate with teachers' representatives in secret and whether the Board could instruct such negotiators in private. The court held that both of these activities could be conducted in secret without violating the Government in the Sunshine Law. It initially recognized the need for confidentiality in such negotiations and then found the legal basis for its decision by stating that the law only applies to "those 'meetings' that official action is taken. Preliminary 'discussions' may never result in any action taken," 262 So. 2d at 427, and therefore do not come within the scope of the open meetings requirement. In showing that the negotiations were of a very preliminary and tentative nature, the court pointed out that, first, the negotiator had no authority to bind the Board, second, he made his report to the Board in public, third, discussions were had on such recommendations, fourth, the recommendations were in fact modified by the Board in open meetings and fifth, the Board ultimately voted on the recommendations. Therefore, it concluded there was adequate public disclosure of the labor negotiations to comply with the open meetings requirement and the labor relations between the negotiator and the representatives were not a meeting at which official action was taken within the meaning of the statute but were merely preliminary discussion. This case presents a perfect example of a situation for which provision should have been made in a statutory exemption to the act. It appears from the court's opinion that the underlying and true reason for

- holding that these negotiations were exempt from the statutory requirement
- was the fact that their success required confidentiality and making them subject to the open meetings requirement would prejudice the public's interest and bargaining position. As the court put it, "the 'intensity' of the 'sunrays' under the . . . [Sunshine Law] as urged by this appeal could cause a damaging case of 'sunburn' to these employees or to the public. . . ." *Id.* at 426. The narrow scope of this decision and the fiction of the preliminary discussion rationale becomes evident from a reading of the First District Court of Appeal's decision in *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353 (Fla. Dist. Ct. App. 1973). This case dealt with preliminary discussions of a Citizens' Planning Committee that was organized simply to advise the independent planner, the zoning commission and town council in preparing a new zoning plan for the community. Although the discussions of this committee also were clearly of a preliminary nature and the zoning plan was ultimately the subject of public hearings, the court held that the meetings of this committee were subject to the Sunshine Law and therefore open to the public. It distinguished *Bassett v. Braddock, supra*, by saying that the Florida Supreme Court in that case

"found that Section 6, Article I, Declaration of Rights of the Florida Constitution . . . controlled the collective bargaining procedures rather than the provisions of the Government in the Sunshine Law." 279 So. 2d at 358.

The *Bassett* and *IDS Properties* cases exemplify the difficulties that arise when the Legislature fails to provide appropriate exemptions and the court, out of necessity, must engraft such exemptions onto an open meetings law. Unlike the Legislature, the court must find some legal rationale on which to base such an exemption. Though the rationale utilized may be suitable for the specific exemption being engrafted, it may not be suitable as a general rule applicable under the open meetings law. Subsequent courts will therefore have the burden of distinguishing and narrowly construing that case. This in large measure can be avoided by the Legislature providing general, but narrowly described, exemptions with the courts having the duty to apply them to specific factual situations in terms of the overall intent of the open meetings law.

The Attorney General of Florida has been very active in interpreting the Sunshine Law to give effect to its intent. The following is a list of some of the questions presented to the Attorney General and his responses to them:

- Q. "Is the election of the Chairman of the County School Board by secret ballot of the members of the Board during a public meeting in violation of [the Sunshine Law]?" Fla. A.G. Op. No. 071-32 (March 3, 1971).

- A. Yes.
- Q. "Is a telephone conversation between two members of a board or commission relating to or bearing upon the public's business illegal per se?" *Id.*
- A. No, unless conducted covertly or in secret.
- Q. "What is the legal effect of actions taken by boards and commissions in violation of [the Sunshine Law]?" *Id.*
- A. The actions are voidable, not void ab initio.
- Q. "To what public bodies does [the Sunshine Law] pertain?" *Id.*
- A. The Sunshine Law applies only to the legislative branch of government or to bodies performing quasi-legislative functions. It does not apply to the judicial branch of government nor to legislative bodies performing quasi-judicial functions nor to the individual members of the cabinet.
- Q. "Is a luncheon attended by members of a school board and a prospective superintendent of schools prior to selection by the school board of a superintendent necessarily a violation of [the Sunshine Law]?" Fla. A.G. Op. No. 071-58 (March 21, 1971).
- A. "[I]f a majority or a quorum of the board were present at the luncheon and if no notice were given, there would be a violation of the Sunshine Law. If a majority or a quorum were not in attendance, the luncheon would have been legal so long as no efforts were made to exclude the public or the press and so long as the location of the luncheon was not secret or inaccessible."
- Q. "Is a special taxing district within the purview of the Sunshine Law?" Fla. A.G. Op. No. 071-171 (June 30, 1971).
- A. Yes.
- Q. "Is notice required to be published of a 'simple committee' meeting of a public body and if so, in what manner?" Fla. A.G. Op. No. 071-346 (Oct. 21, 1971).
- A. "Notice of an official meeting of members of a city council constituting a 'committee' of such council should be given when official matters are to be considered and discussed, even though the committee membership is less than a quorum of the city council."
- Q. "Is the Sunshine Law applicable to 'consultations among members of a medical panel performing medical services in connection with a city's pension plan?' Fla. A.G. Op. No. 071-380 (Dec. 3, 1971).
- A. A purely advisory body, as opposed to a body having statutory powers and duties that are governmental in nature, does not come within the Sunshine Law. The medical panel is purely advisory in nature.

Q. "May a district school board interview applicants for employment as district school superintendent in secret without violating the Sunshine Law?" Fla. A.G. Op. No. 071-389 (Dec. 7, 1971).

A. No.

VI. THE COLORADO OPEN MEETINGS LAW

The Colorado Open Meetings Law was based on Florida's Government in the Sunshine Law and provides in part:

“(a) All meetings of two or more members of any board, committee, commission, or other policy-making or rule-making body of any state agency or authority or of the Legislature, at which any public business is discussed, or at which any formal action is taken by such board, committee, commission, or other policy-making or rule-making body, are declared to be public meetings open to the public at all times, except as may otherwise be provided in the constitution.

“(b) Any such meetings at which the decision or adoption of any proposed resolution, rule, regulation, or formal action occurs, or at which a majority or quorum of the body is in attendance shall be held only after full and timely notice to the public.” COLO. REV. STAT. ANN. §3-33-2.

The first difference to be noticed between the Colorado and Florida Acts is that the Colorado provision specifically refers to the legislature. It therefore subjects the committees of the legislature to the mandate of this act. The next significant distinction is that the Colorado Act does not use the “official acts” language of the Florida Act but instead replaces it with the phrase “at which any public business is discussed.” It would appear that this change was made so that there would be no doubt as to whether the open meetings requirement related only to meetings at which the acts of voting occurred or also extended to the acts of discussing and deliberating. This phrase appears to adopt the position taken in *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969). The third major distinction is that Colorado has inserted in its act a notice provision requiring the giving of full and timely notice to members of the public.² In examining this provision, the act makes a distinction between meetings that are open to the public and meetings for which notice must be given. Subsection (a) of the act makes all meetings of two or more members of a body at which public business is discussed a public meeting. Subsection (b), however, does not require notice whenever there is present two or more members of a public body but instead makes the giving of notice contingent upon either the taking of formal action at a meeting or the presence of a majority or quorum at such meeting. This would have a substantial effect upon allevi-

²It should be noted that, though Florida's act does not specifically require notice, a reasonable notice requirement has been read into the act by the State's Third District Court of Appeal. *Hough v. Stenbridge*, 278 So. 2d 288, 291 (1973).

- ating the problem of meetings that are theoretically public but of which no
one knows. These provisions would also attack the problem of the so-called
) informal, study, discussion, informational, fact-finding or precouncil gather-
, ings that are used to circumvent the right of the public. To make the notifi-
cation provision more effective subsection (c) of the act provides that the
secretary or clerk of a public body shall maintain a list of persons who
request notification.

Since the Colorado act is of very recent origin, there have been no
judicial decisions concerning it. However, the Colorado Attorney General
has issued two opinions, No. 73-0001 and 0003 concerning the act. The first
question that was answered by the Attorney General was—does the act
prohibit any two legislators from discussing public business in private with-
out giving notice? The Attorney General answered this question as follows:

“[T]he statute does not prohibit two members of the General As-
sembly who are not members of the same policy-making or rule-
making body of this Assembly, from coming together for the
purposes of general discussions regarding pending legislation.
However, if the two hypothetical members of the Assembly . . .
are in fact members of the same committee, the law clearly would
prohibit them from discussing the public business of that com-
mittee in private.”

The Attorney General also held that the act did not “prohibit a department
or division head, or the Governor, or the Lieutenant Governor from discuss-
ing public business with his staff or taking formal action in private and
without public notice.” This was premised on the fact that these officials did
not come within the terminology “two or more members of any board, com-
mittee, commission, or other policy-making or rule-making body of an
agency, or authority of the legislature.” The courts and the grand jury have
also been held to be exempt from the provisions of this act on this same
basis, namely, that neither can be defined as a board, committee, or com-
mission, nor are they policy-making or rule-making bodies. Citing *Times
Publishing Company v. Williams, supra*, and *Sacramento Newspaper Guild
v. Sacramento County Board of Supervisors, supra*, the Attorney General
held that the act was subject to the attorney-client relationship, thereby
allowing a public entity to hold private conferences with its legal counsel.
However, like the court in *Times*, the Attorney General noted that the
confidentiality is limited by the duties of the attorney and seems to adopt
the limitation of the *Times* court, namely, that the right to hold closed
sessions is premised upon the responsibilities of the attorney under the
Canons of Ethics.

VII. CONCLUSION

What can be gleaned from the above statutes of other states is that there are three main questions that must be answered in an open meetings law. They are:

- (1) What public bodies are to be covered by the act?
- (2) What kinds of meetings are to be included within the open meetings requirement?
- (3) What matters may be considered in secret and under what circumstances?

Of assistance in answering these questions is the following conclusion that was reached in a 1962 article on open meetings.

“Open meeting legislation has neither revolutionized the conduct of state and local government nor brought it grinding to a halt. Despite some evasion, the statutes have operated to break down past practices of closed meetings by making officials realize that open meetings represent not just a demand of the press but a legitimate public interest and now a legal requirement. Some disadvantages are unavoidable in any such requirement; but the presence of an audience has not in most cases restrained officials from giving full expression to their views, the problems concededly created by an irresponsible press have not been intensified where open meeting laws are in effect, and the fear that officials would waste time making speeches has proved largely unfounded. A more serious problem is that of accommodating the valid interest in secrecy for the consideration of certain subject matter or for preliminary fact gathering and consultation, while preserving the informative values of open discussion. Press reports of evasion by secret sessions, together with officials’ statements that they have had to skirt the law or occasionally sacrifice thorough discussion, make apparent the difficulties of the legal requirements. To some extent this problem is inherent in the open meeting concept, but it may stem largely from the presently inadequate statutory treatment of executive sessions, which ranges from total prohibition to virtually carte blanche approbation. Furthermore, many problems have been created solely through bad draftsmanship, resulting in ambiguities and incompleteness in many statutes. That fewer than one fourth of the statutes contain a notice provision and that only three have even attempted to establish a reasonable and workable enforcement procedure indicates the haphazard nature of the legislative approach to date. Ensuring the people access to the greatest possible amount of information about governmental activities as

an unimpeachably sound concept and as a basic tenet of democratic government, merits legislative recognition. If the limits and operation of the open meeting principle are defined with the greatest possible precision, many of the difficulties will be resolved, and both press and officials will have a more workable standard for their conduct." Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1219-20 (1962).

1. *Public Bodies Covered by the Act.*

As experience is gained with open meetings laws, an increasing number of government bodies are being brought within the public meetings requirement. This development is apparent in the history of the California acts where the open meetings requirement was first made applicable only to local agencies but, a decade later was extended to state agencies by a separate act. As indicated earlier in this Report the States of Colorado, Florida and California have included within their open meetings laws the Legislature—an inclusion which at present is not contained in the New Jersey Open Meetings Law. This trend is indicative of a broader acceptance of the open meetings principle and a finding that this principle has not had a deleterious effect on the functioning of government. It should also be noted that Congress appears to be heading in the same direction. Recently the Democratic Caucus of the House recommended to the Rules Committee that a rule be adopted making all committee meetings public except for those matters specifically exempt in such rule.

Another development is the inclusion within the recent statutes of advisory bodies. This is a recognition of both the *de facto* authority of these bodies and of the interest of the public to see more than the final decisions of government. Because the recommendations of advisory bodies are frequently adopted by a governmental body without independent study and analysis, these bodies should be included within open meetings legislation. For an example of statutes *specifically* including these bodies within the open meetings requirement see ALASKA STAT. § 44.62.310 (1962); CAL. GOV'T CODE § 5495.3 (West Supp. 1973); ILL. ANN. STAT. 102 § 42 (Smith-Hurd Supp. 1973).

The practical power that these bodies possess and the difficulties that can arise if they are excluded from the open meetings requirement have been recognized in the recent Florida case of *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353 (Dist. Ct. App. 1973). Though the Florida Government in the Sunshine Law does not specifically include advisory bodies within its scope, the court found that a Citizens' Planning Committee came within the provisions of that law notwithstanding the fact that it was a strictly advisory committee without any decision-making authority. The

committee was created after the town had contracted with an independent planner to prepare a new comprehensive zoning plan for the municipality. The committee was comprised of local residents with its purpose being to advise the independent planning consultant, the zoning committee and the town counsel on the plan to be devised and submitted. The court rejected the argument that the committee did not fall within the Sunshine Law because it was strictly advisory and further rejected the argument that the public hearings subsequently held on the proposed plan were sufficient to meet the public's right-to-know under the Sunshine Law.

In holding that the committee's meetings were open to the public the court emphasized first, the governmental nature of the committee's function, second, the problem that would develop if governmental bodies would be allowed to delegate their authority to designated advisory groups who would be outside the Law's scope, and third, the practical power the advisory committee wielded. In these respects, the court said:

"The adoption of a comprehensive zoning plan and ordinance . . . is 'governmental action' of the highest magnitude.

* * *

. . . Had the Town Council, itself, undertaken to met [sic] informally or in private for the purpose of formulating a comprehensive zoning plan which it would ultimately adopt in public, there can be no doubt that the actions of the Town Council would have violated the Government in the Sunshine Law We fail to see any material distinction insofar as the application of the Sunshine Law is concerned between a formal meeting of the Town Council (or any members thereof) where a comprehensive zoning plan is being formulated and an informal meeting of the Citizens' Planning Committee conducted for the same purpose" *Id.* at 356-57

The court noted the important part the committee played in the formulation of the zoning plan in this case. In effect, most of the deliberative function was performed by the committee; the Town Council, for all intents and purposes, simply approving the recommendations of the committee. In readily perceiving the effect on the Sunshine Law if governmental bodies were allowed to delegate their deliberative functions to exempted advisory committees, the court concluded that:

"It would be ludicrous to invalidate the actions of a *public body* which are the result of secret meetings of *that* body or members thereof while at the same time giving approval to actions which result from the secret meetings of *committees designated by such public body*. To recognize this double standard is to defeat 'the

- right of the public to be present and to be heard during *all phases of enactments . . .*” *Id.* at 356 (Court’s emphasis).
-) The proposition enunciated in this case and the rule that is preferable under an open meetings law is simply that:
 - “Those to whom public officials delegate de facto authority to act on their behalf in the formulation, preparation and promulgation of plans *on which foreseeable action will be taken by such public officials* stand in the shoes of such public officials insofar as the application of the Government in the Sunshine Law is concerned.” *Id.*

2. Scope of the Term “Meetings.”

What types of “meetings” should be included within the open meetings requirement is one of the key problems to be solved in drafting an open meetings act, *i.e.*, should it cover only meetings at which final action takes place or should it also cover discussion and deliberation sessions. Although the more restrictive view was adopted in the early period of open meetings legislation, it is currently changing in favor of the broader approach. Because the public’s right is a nullity under the more restricted view and because the opposition of government officials is decreasing as experience is gained under open meetings laws, states are becoming more aware of the need to require a broader statement of the public’s rights. As the court stated in adopting the more liberal view in *Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Super.*, 263 Cal. App. 2d 216, 69 Cal. Rptr. 480, 487 (Dist. Ct. App. 1968):

“An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law’s design, exposing it to the very evasions it was designed to prevent.” (foot-note omitted).

Because of these reasons and because the public has an interest in more than viewing the final decision-making ceremony, it becomes important, when drafting open meetings legislation, to consider inclusion of more than just the vote-taking ceremony.

3. *Executive Sessions.*

An examination of open meetings laws and the experiences under them indicates that there is a need to provide for the holding of executive sessions in prescribed instances. The first reason supporting the need for them is the fact that certain duties of government, such as the conducting of criminal investigations, could not be effectively accomplished if required to be done in public. Secondly, these sessions are important in matters, such as those relating to discipline, where it is necessary to protect the reputation of a person from baseless and defamatory statements. Executive sessions, however, should not be left to the absolute discretion of the public body. By permitting executive sessions to be held upon a majority vote of the body, the public's right under the statute is effectively frustrated. The better approach may be to specifically enumerate those matters which may be deliberated in closed session. The same considerations that would justify discussing and deliberating these matters in closed session, however, would not necessarily also justify the taking of final action at such sessions. Instead, there exist extremely few reasons for requiring a vote to be taken in executive session on the enumerated matters. Therefore, the policy should be adopted that, although these matters may be deliberated in closed session, no final action, *i.e.*, no determination made by vote, shall be taken in such session unless it is found that taking the final action in public would materially prejudice the accomplishment of the desired objective.

Besides enumerating the matters on which executive sessions may be held, certain devices utilized by other states to safeguard this grant of authority from being abused should be considered for adoption. These would include first, that the public entity be required to vote at a public meeting on the necessity for holding the executive session and second, that it be required to give the reasons and source of authority for entering into such session. Similar safeguards are contained in the Alaska and Iowa Acts, ALASKA STAT. § 44.62.310 (1962); IOWA CODE ANN. § 28A.3 (Supp. 1973). The Alaska Act requires a majority vote taken at a public meeting in order to hold an executive session and the Iowa Act requires that the reason and vote of each member for holding such session be placed in the minutes. Similar requirements are found in the present New Jersey Open Meetings Law. Another safeguard that should be considered is contained in the California Act, namely, that executive sessions should be held during the course of a public meeting and not as an independent meeting. The incorporation of these recommendations in an open meetings law plus a notice provision are the essentials necessary to accord to the public a meaningful right to view the functioning of government and to assure to the greatest extent possible that open meetings laws become self-executing and self-regulatory.

