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## ARTICLES

# FEDERAL AND STATE OPEN RECORDS LAWS: THEIR EFFECTS ON THE INTERNAL AUDITORS OF COLLEGES AND UNIVERSITIES

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### I. INTRODUCTION

In recent years many colleges and universities have been exposed to public and private scrutiny for alleged violations of National Collegiate Athletic Association (NCAA) rules and regulations. Many of these alleged violations have culminated in formal NCAA investigations that have resulted in the imposition of sanctions against the offending schools. In the most serious instances of infractions, the NCAA has invoked what has become known as the "death penalty" in order to temporarily suspend a university's athletic program from inter-collegiate competition.<sup>1</sup> One of the most publicized examples of the death penalty occurred in 1987 when the NCAA banned the Southern Methodist University football program from intercollegiate competition for a full season. In sanctioning the Southern Methodist program, the NCAA cited a series of rules infractions (including a pattern of improper financial payments to players) and underscored the seriousness of the infractions by noting the involvement of members of the University's Board of Trustees.<sup>2</sup>

Many of the violations investigated by the NCAA in recent years have involved either direct cash payments or variations of non-cash forms of compensation to student athletes and recruits made either directly by university personnel, or indirectly by university athletic supporters. Although direct cash payments to student athletes is a clear violation of existing NCAA rules and regulations, many other payment practices by the univer-

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1. Douglas Lederman, *Nearly Half the Members in Top Division of NCAA Cited for Violations This Decade*, CHRON. HIGHER EDUC., Feb. 22, 1989 at A35.

2. Susan Oberlander, *Scandal-Plagued SMU Requires Players to Take Course on Issues in Sports*, CHRON. HIGHER EDUC., May 10, 1989 at A33.

sities and their athletic supporters fall into ill-defined areas of the law and NCAA oversight. Some of the more commonly investigated practices have involved categorical issues of recruiting practices, academic eligibility and verification, the provision of fringe benefits (such as free air and ground transportation, access to free off-campus housing), and the non-descript "unethical conduct and lack of institutional control."<sup>3</sup> In recent years this latter category has become one of the most frequently cited forms of violation leveled by the NCAA's Committee on Infractions against the athletic programs of offending institutions.<sup>4 5 6 7</sup>

The idea of a "lack of institutional control" brings into question the internal administrative structure of colleges and universities and the forms of organizational controls employed by them to monitor their various operational activities. One of the more frequently employed controls incorporates the function of the university's internal auditor. An examination of both the definition and the objective of the university's internal audit function from the internal auditing literature indicates that the internal auditor can serve as a control function to examine controls within the university's athletic department. By doing so, the internal auditor can assist individuals within the university, such as the Board of Trustees, the president and the athletic director, in the conduct of their administrative responsibilities by examining both the system of internal controls that affect the athletic department and the systems established to monitor compliance with NCAA rules and regulations.

Internal auditing standards require internal auditors to maintain independence in the conduct of their examinations. The value of the internal auditor's work is enhanced if unlimited and unimpaired access to all aspects of a university's operations is administratively guaranteed. Without such independence and access, the value of the internal auditor's work product becomes suspect. One way in which to achieve such independence is to require that the internal auditor report directly to the highest level of management responsibility within the organization of which it is a part. Within the college and university setting, the highest level of management responsibility is the Board of Trustees/Regents and its audit committee. By assuming a function similar to a corporate Board of Directors, the requirement of

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3. *34 Institutions Under NCAA Sanctions*, CHRON. HIGHER EDUC., Apr. 10, 1991 at A32.

4. Douglas Lederman, *Old NCAA Concept Used as New Weapon to Penalize Programs*, CHRON. HIGHER EDUC., Jan. 9, 1991 at A1.

5. Institute of Internal Auditors, "Statement of Responsibilities of Internal Auditing," (1981).

6. *Id.*

7. *Id.*

direct reporting protects the objective judgment of the internal auditor, maintains the integrity of the internal audit process as an internal monitoring device, and increases the probability that the work product of the internal auditor will be relied upon by the Board as it conducts its organizational oversight responsibilities. Another issue, public inspection of audit work and reports as mandated by Federal and State Open Records Laws must also be addressed when internal auditors report directly to the Board of Trustees.

As part of the investigatory process, Federal and State Open Records Laws have been used as a means to facilitate the public's desire for detailed information concerning NCAA infractions. The public, most notably the media, has asserted that the records of colleges or universities receiving public funds falls under the definition of "public records" which, subject to exceptions, must be open to public inspection and scrutiny and security.<sup>8</sup>

With public pressure for more disclosure, the potential exists for legislatures and courts to encourage the public and the media to use the Federal and State Open Records Laws to gain further access to the audit reports of college & university athletic departments prepared by internal auditors. With the increased possibility that the internal auditor's reports will be subject to inspection, five important issues related to Federal and State Open Records Laws must be considered: (1) who should make the initial determination as to the public's access and inspection of government records; (2) what are the time constraints for compliance, denial and appeals for a petitioner's request; (3) who should have jurisdiction to review the initial decision as well as subsequent appeals; (4) which records, or parts of records (potentially including audit reports, work papers and even an auditor's notes) are subject to public inspection; and most importantly for the auditor; (5) what is the auditor's personal and professional responsibility and liability for records that are made public.

Consideration of these five issues as they relate to the various Federal and State statutes is difficult for the internal auditor to assess since the Open Records Laws not only vary in form from the Federal to State level, but also in comprehensiveness from state to state. The courts on all levels have also added to the confusion with differing interpretations and applications of the various provisions. In order to attempt to clarify some of this confusion, this article will examine the legal ramifications of the Federal and State Open Records Laws as it relates to the work of the internal auditor by dividing the examination into four sections: 1) History of Open Records

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8. Legal Comment, *Supreme Court Bans Media Review of NCAA Inquiry Files*, EDITOR AND PUBLISHER, Feb. 18, 1989 at 20.

Laws; 2) Federal Open Records Laws; 3) State Open Records Laws; and 4) Conclusion.

## II. HISTORY OF OPEN RECORDS LAWS

The United States Constitution and the individual state constitutions guarantee that political power, either directly through voting or indirectly through representation, is derived from the people. In order to exercise political power in a responsible manner people must have access to information.<sup>9</sup> Information clearly becomes a powerful force in guaranteeing that government will be responsive and responsible to the people. The people's right to know the process of government decision-making and to review documents and statistics leading to determinations is therefore basic to our democratic society.<sup>10</sup> Government is the public's business, and the public individually and collectively is represented by a free press, and should have access to the records of government.<sup>11</sup>

Although federal and state government documents clearly fall within the scope of the legislator's intended disclosure of exempted material, problems occur in determining the legislative intent for government and non-government agencies. Access to "government information," however, has natural limits based on the selected definition of the term "government agency" (agency) as well as "information." The term "agency"<sup>12</sup> has numerous meanings in terms of the definitional scope. A limited scope may encompass only the political administrations such as those on local, county, state or national levels. A more expansive definition might allow a person to obtain access to information from not only the political entities, but from all agencies and bureaucracies that carry out government or government related tasks.

With regard to federal law, Congress chose to use a broad, yet somewhat vague definition for "agency,"<sup>13</sup> providing interpretational guidance

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9. HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW*, Preface (1953).

10. *Westchester General Hospital, Inc. v. Department of Health, Education and Welfare*, 464 F.Supp. 236 (M.D. Fla. 1979).

11. NY CLS pub 0 § 84 (1992).

12. 5 U.S.C.S. § 551(1) (1976).

13. "Agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. *Id.*

only in the determination of what is not an "agency." The guidance is in the form of eight exclusions.<sup>14</sup>

Courts have generally interpreted the definitional scope of "governmental agency" in its broadest context to include all political entities as well as any non-governmental organization which receives public funding. In fact, the receipt of public funds has generally been the key factor in bringing non-governmental agencies within the scope of the Open Records Laws.<sup>15</sup> The interpretation therefore encompasses universities which receive public funds.<sup>16</sup>

The definition of the term "information" is equally important in determining exactly what the public should, or more specifically, can access. The determination, however, falls on the selected interpretation of "information," and like the term "government agency," it has been subject to numerous interpretations on both federal and state levels. On the restrictive end of the spectrum, "information" (public records) only includes records which meet specific qualifications outlined in statutes, thereby negating the presumption that a record is public and placing the burden on the seeker to establish its classification within prescribed categories.<sup>17</sup> On the liberal end of the spectrum, public records may be defined to include any and all records that were made involving "government matters" regardless of their source or location.<sup>18</sup>

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14. (A) The Congress;

(B) The courts of the United States;

(C) The governments of the territories or possessions of the United States;

(D) The government of the District of Columbia; or except as to the requirements of section 552 of this title.

(E) Agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) Courts martial and military commissions;

(G) Military authority exercised in the field in time of war or in occupied territory; or

(H) Functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41 (41 U.S.C.S. § 101 et seq.); or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix.

15. State *ex rel* Dalton v. Mundy, 257 N.W.2d 877, 880 (Wis. 1977).

16. Andrea G. Nadel, Annotation, *What Constitutes an Agency Subject to Application of State Freedom of Information Act*, 27 A.L.R. 4th 742, 751-54 (1984).

17. Comment, *Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except. . ."*, 45 Fordham L. Rev. 1105, 1114 (1977).

18. State *ex rel*. City of Bartow v. Public Employees R., 341 So.2d 1000, 1002 (Fla. App. 1977).

The court held that records, affidavits, papers, and notes pertaining to a preliminary investigation of an unfair labor practice charge filed against a city were "public records" subject to disclosure under the Florida Public Records Act, sec. 447201. The court found that preliminary investigations and their related documents were "public records" encompassed by the broad definition of the above act.

From the perspective of the internal auditor under even a restrictive interpretation of "information," audit reports would probably fall within the definition's scope once in the possession of a government agency.<sup>19</sup> A gray area, however, exists as to whether or not undelivered reports and possibly even an auditor's work papers and notes fall under any of the several definitions of "information."<sup>20</sup> Gaining a clearer view of the gray area, however, is difficult due to the differences in the Federal and State Open Records Laws as well as the various interpretations provided by the courts.

### III. OPEN RECORDS LAW

#### *The Federal Law*

In order to make information available to the public, Congress in 1966 enacted the Federal Freedom of Information Act.<sup>21</sup> The Act, however, was for the most part ineffective. The three most significant shortcomings of the Act included: (1) an omission of a deadline for answering requests, (2) a broad exemption permitting secrecy in the area of national security, and (3) a blanket disclosure exception which covered FBI files and most related material.<sup>22</sup>

Even with its shortcomings, the Act remained substantially unchanged for almost eight years. Change finally occurred in 1974 when Congress, possibly feeling a need for openness in the wake of the Watergate scandal, overrode then President Ford's veto, thus adding seventeen new amendments to the 1966 Act. The amendments were opposed by most federal agencies as the public was now given a much stronger means for obtaining government documents.<sup>23</sup>

Further analysis of the federal law will be limited here to the issues of the initial determination of the public's access, jurisdiction, types of records, and the auditor's responsibilities. The article, however, will make no attempt to cover in depth specific procedures in the Act unless they are relevant to the function of the internal auditor.

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19. Andrea G. Nadel, Annotation, *What Are "Records" of Agency which Must Be Made Available Under State Freedom of Information Act*, 27 A.L.R. 4th 680, 686, but see 687 (1984).

20. Andrea G. Nadel, Annotation, *What Constitutes Preliminary Drafts or Notes Provided by or for State or Local Governmental Agency, or Intra-Agency Memorandums, Exempt from Disclosure or Inspection Under State Freedom of Information Acts*, 26 A.L.R. 4th 639, 648 (1983).

21. 5 U.S.C.S. § 552 (1976).

22. Freedom of Information Center Publication, July 1976, page 2.

23. *Id.*

The initial determination as to the public's access and inspection of government records:

Under the Federal Act, Congress chose to delegate to each agency receiving public funding much of the responsibility to publish rules stating the times, places, fees and procedures to be followed in order to make records promptly available to any person.<sup>24</sup> Because of the delegation, the Board of Trustees of each individual university therefore holds or delegates the initial access decision. Internal auditors, therefore, must reference their individual employer's guidelines, which may vary with each university's Board of Trustees.

The time constraints for compliance, denial and appeals for a petitioner's request:

In order to remedy deliberate delays in obtaining records, a ten working-day time limit was set for an agency to respond to an initial request for records.<sup>25</sup> Also, if the initial request was denied, the petitioner may appeal the decision to the agency. Upon appeal, a time limit of twenty working days was set for the agency to respond.<sup>26</sup> For the internal auditor, the time constraints may only be a factor if the Board of Trustees or their delegated records custodian chooses to honor an information request, thereby requiring the auditor to turn over documents. In any event, a decision on disclosure must be made within a relatively short time. Although actual disclosure does not necessarily have to occur within the ten day period, the decision and potential liability should be among the internal auditor's main concerns.

Jurisdiction to review initial decisions as well as subsequent appeals:

If a petitioner exhausts all administrative remedies (as would be the case if the above time limits were not met, or the petitioner was denied access to records both initially and upon administrative appeal), the case could then be brought before the district court of the United States in one of several districts, including: where the complainant resides, or has his or her principal place of business (i.e., if the complainant is a newspaper, the district in which a newspaper's home office is located) or where the agency records are situated, or in the District of Columbia.<sup>27</sup> Not only could the case be brought before a district court in several locations, but Congress also in-

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24. 5 U.S.C. § 552(a)(3) (1976).

25. 5 U.S.C. § 552(a)(6)(A)(i) (1976).

26. 5 U.S.C. § 552(a)(6)(A)(ii) (1976).

27. 5 U.S.C. § 552(a)(4)(B) (1976).



cluded an amendment to further speed the proceedings by giving the case precedence over all other docketed cases (subject to the court's discretion).<sup>28</sup> Congress also chose to include an amendment to allow the court to assess reasonable attorney's fees and litigation costs.<sup>29</sup> The amendment could prove potentially costly for agencies improperly denying information requests due to increasing legal costs.

With the above measures, Congress now gave the public access to vast amounts of government records. A two-pronged final measure, however, was also included in the amendments to attempt to dissuade government employees from circumventing the public's new found access to government records. First, the court may issue a written finding to the Civil Service Commission if it determines that agency personnel acted arbitrarily or capriciously with respect to a withholding. Upon the issuance of the court's finding, the Commission must investigate the withholding and determine if disciplinary action should be taken against the responsible employee. The second prong of the measure empowers the court to punish government employees for contempt for noncompliance with the order of the court.<sup>30</sup> Although remote, internal auditors nevertheless potentially face the possibility of contempt of court charges for improperly refusing to relinquish records, especially in the face of a court order.

The records, parts of records (potentially including audit reports, work papers and even an auditor's notes) which are subject to public inspection:

With Congress having granted the public access to numerous government records as well as having provided the public with the means to enforce compliance with access requests, the issue arises in regard to precisely which records are accessible. The issue of record types may be subdivided into four categories: the first three based on creation, possession, control, and use of the document by the agency,<sup>31</sup> and the fourth encompassing exceptions. The first category includes all records which were created by a government agency in fulfillment of its function. In the case of colleges and universities, examples of these records include everything from complex financial reports to a simple schedule of a travel plan for one of its sports teams. Records created by a government agency are clearly subject to dis-

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28. 5 U.S.C. § 552(a)(4)(D) (1976).

29. 5 U.S.C. § 552(a)(4)(E) (1976).

30. Pub. L. No. 93-502; 88 Stat. 1561.

31. *Bureau of Nat'l Affairs, Inc. v United States Dept of Justice*, 742 F.2d 1484, 1489-90 (D.C. Cir. 1984).

closure under the Act.<sup>32</sup> This first category will most likely affect internal auditors since by definition they are a part of the agency through employment.

The second category encompasses records which are in the possession of a government agency regardless of who prepared the records, including private parties. "Possession" at differing times has been defined from a very broad standard which pertains to any document that an agency is legally entitled to, and to a very narrow standard which includes only documents in the agency's physical possession.

The "private party" is of importance to the internal auditor because virtually any person or entity with which the auditor comes into contact to perform work may be subject to disclosure under the Act. External auditors certainly will be targets for disclosure requests as they may be found to be a "private party" by their contractual status with a university.<sup>33</sup> The term "private parties" may also include consultants, actuaries, and even printers.

An additional concern for internal auditors and private parties will be any future judicial interpretation of the second category which under current interpretation states: "generally materials in the possession of a federal agency *may* be agency 'records' within the meaning of FOIA."<sup>34</sup> The emphasis in the category is on the term "may" because of court holdings that interpret "possession" as being more than mere physical location. The clearest example of records being in the physical possession of an agency yet not falling within the scope of the Act involve records statutorily exempt, such as those characterized as "congressional records."<sup>35</sup> Audit reports and documents, unless held by an exempt entity,<sup>36</sup> once in the possession of a publicly funded university, and possibly once in the possession of the internal auditors, may be subject to disclosure under the Act.

The third category encompasses records which were created and still held by a private party. The category probably relates more to external rather than the internal auditors, however, internal auditors may still find themselves part of judicial interpretations of this third category. Through judicial interpretation a clear rule was almost provided which stated that "records still held by a private party are not subject to disclosure under the Act."<sup>37</sup> However, as with most rules, the category is subject to exceptions,

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32. *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

33. *Nadel*, *supra* note 19, at 686.

34. *Weisberg v. U.S. Dept of Justice*, 631 F.2d 824, 827 (D.C. Cir. 1980).

35. *Center for Nat. Secur. Studies v. CIA*, 577 F. Supp. 584 (D.D.C. 1983).

36. 5 U.S.C.S. 552(b) (1976).

37. *American Federation of Government Employees*, (D.O.E. Nov. 20, 1984) no. HFA-0260.

and with the exceptions come further, and differing, judicial interpretations. The first exception involves the possible categorization of the private party as a government agency, or a part of the contracting government agency, thereby placing the party under the first category outlined above. The categorization would make all the party's records subject to disclosure.

The second exception involves records which were created by private parties under "substantial government control." Although courts have interpreted "substantial governmental control" as control or supervision of day-to-day operations of the private party,<sup>38</sup> the threshold of interpretation control will probably continue to be determined on a case by case basis. Since courts have not specifically examined the control a government agency (for this article's purposes, a publicly funded university) exerts over an auditor, there is a possibility that a court will interpret the normal interaction between an external and internal auditor or university personnel, necessary in the preparation of the audit report, as "substantial government control." Should a court find "substantial control," the external auditor's report and work papers may be subject to disclosure even before formal presentation to the Board of Trustees.

Courts have provided some guidance on the issue of an individual's notes regardless of the individual's status as a government agency employee or private party. Under *Porter County Chapter of Izaak Walton League, Inc v. United States Atomic Energy Commission*,<sup>39</sup> an individual's notes which were not circulated or used by anyone other than the author are not "agency records." Further, under *Kissinger v. Reporters Committee for Freedom of Press*,<sup>40</sup> the physical location of the notes will not affect their status as non-agency records.

The fourth category of records includes nine exemptions found in 5 USCS § 552 (b). Among the exemptions which may be significant for both internal and external auditors includes: records specifically exempted by statute,<sup>41</sup> records relating to personnel rules and practices of an agency,<sup>42</sup> and personnel files which, if released, would constitute an unwarranted invasion of privacy.<sup>43</sup> Congress, however, tempered the exemptions by adding the note that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions

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38. *Id.*

39. 380 F.Supp 630 (N.D. Ind. 1974).

40. 445 U.S. 136 (1980).

41. 5 U.S.C.S. § 552(b)(3) (1976).

42. 5 U.S.C.S. § 552(b)(2) (1976).

43. 5 U.S.C.S. § 552(b)(6) (1976).

which are exempt under this subsection."<sup>44</sup> Therefore, an athlete's file containing disciplinary letters or memos could be made public after portions containing references to that individual were deleted.

The United States Supreme Court has also added its interpretation to the exemptions. In *Chrysler Corp. v. Brown*,<sup>45</sup> the Court found that the exemptions are only permissive, not mandatory. Based on the interpretation, agencies are not required to withhold documents from disclosure merely because they fall within the federal exemptions.<sup>46</sup>

#### THE AUDITOR'S RESPONSIBILITY AND LIABILITY FOR RECORDS THAT ARE MADE PUBLIC:

The section in which auditors must understand to be possibly the most significant in terms of responsibility and potential liability is the comparatively small section covering exceptions. Much of the responsibility and corresponding potential for liability occurs during audits when investigations of possible university violations uncover names of persons who have allegedly either committed or were associated with violations. The auditor becomes confronted with the dilemma regarding a decision to either omit individual names which could result in an inadequate report, or to include individual names in work papers and reports, thereby implicating persons in only alleged violations. Should the implications upon further investigation prove to be unfounded, the auditor may face embarrassment and the university may be subject to civil liability for libel or slander.<sup>47</sup>

Courts have found that in privacy exemption determinations the public's need to know should be balanced against the harm that might result from invasion of privacy of the person to whom the record relates.<sup>48</sup> When names are included in audit reports and work papers it must be noted that although requests for disclosure may be subject to the balancing test, the balancing test does not necessarily include a determination as to the truth or falsity of the alleged violations. A court therefore may determine that disclosure of records, either with or without individual names,<sup>49</sup> is in the public interest.

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44. 5 U.S.C.S. § 552(b) (1976).

45. 441 U.S. 281, 293 (1979).

46. Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 738 (1981).

47. Annotation, *Libel and Slander: Publication by Accidental Communication, or Communication Only to Plaintiff*, 92 A.L.R. 2d 219 (1963).

48. *State v. Public Employees Retirement Sys.*, 397 N.E.2d 1191, 1193 (Ohio 1979).

49. 5 U.S.C. § 552(a)(6)(b) (1976).

The next question that arises is how much of a record should be deleted to protect individuals, and what safeguards are available to prevent improper editing.<sup>50</sup> In *Vaughn v. Rosen*,<sup>51</sup> the court of appeals added some safeguards by determining that any agency which withholds documents or portions of documents must detail and index the items withheld.<sup>52</sup> Although courts potentially have the final determination of what information can properly be excluded, the burden of protecting potentially innocent individuals still falls first upon the auditor who must make the initial choice on the inclusion or omission of names in the original documents. The auditor is therefore faced with the dilemma that an incorrect decision may lead not only to an inadequate report, but also to civil liability, or to the harm that may be caused to the reputation of possibly innocent individuals. The auditor must filter the information that is presented to the Board of Trustees which may negatively impact his or her role as the internal auditor.

#### IV. THE STATE OPEN RECORDS LAWS

Although the Federal Freedom of Information Act is important, it was by no means the first to provide for open government records. State Open Records Laws date back to as early as 1849 when Wisconsin provided for inspection of public records.<sup>53</sup> In fact, only nine states did not possess some form of open records law prior to the passage of the Federal Freedom of Information Law in 1966.<sup>54</sup> It should be noted that although state law dates back to 1849, the earliest laws on access to government documents was judicial in origin, often in response to evidentiary requirements of litigants rather than as a means of a monitoring process of public servants.<sup>55</sup>

In the decade since the adoption of the Federal Act many states have used the Act as a model in either enacting or substantially revising their statutes. (See Appendix A for a current listing of the State and District of Columbia Open Records Laws.) The trend has changed in recent years as states began to look to other states to provide guidance for modifications to the Open Records Laws.<sup>56</sup> Because of the various influences present during the enactment and revision of state open records laws, few states have iden-

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50. Braverman & Heppler, *supra* note 46, at 748.

51. 484 F.2d 820 (D.C. Cir. 1973).

52. *Id.*

53. L. Amico, *State Open Records Laws: An Update*, 50 (1976). Published by the Freedom of Information Center, Columbia, Missouri.

54. Arkansas, Delaware, Maryland, Mississippi, New Hampshire, New York, South Carolina and Virginia did not possess open records laws until after 1966.

55. Comment, *supra* note 17, at 1107.

56. *Id.* at 1106, n.7.

tical laws, and even for those which have similar laws,<sup>57</sup> the interpretations by state agencies and courts assure diversity. In fact, courts in two states (Florida<sup>58</sup> and Minnesota<sup>59</sup>) which have almost identical statutory definitions for the term "public records" reached different results in similar circumstances.<sup>60</sup>

Regardless of the form of the federal or state laws, the major objective is well reflected in the first section of the District of Columbia Act, which is to provide the public with full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.<sup>61</sup> Courts have also followed the idea that disclosure, not secrecy, is the dominant objective of the Act.<sup>62</sup> Internal auditors, as publicly funded universities, face the same issues outlined in the federal section of this paper when attempting to deal with the state laws. Although the issues under the Federal Act are complicated, the complexity is multiplied when the laws are considered under each individual state's legislative form and again when one includes judicial interpretations. Nevertheless, the issues for the internal auditor remain the same between the federal and state laws, each auditor must resolve: (1) who should make the initial determination as to the public's access and inspection of government records; (2) what are the time constraints for compliance, denial and appeals for a petitioner's request; (3) who should have jurisdiction to review the initial decision as well as subsequent appeals; (4) which records, or parts of records (potentially including audit reports, work papers, and even an auditor's notes) are subject to public inspection; and most importantly for the auditor; and (5) what is the auditor's responsibility and liability for records that are made public. In order to provide some coherence to the discussion of the various state laws and their interpretations, where practicable, the laws will be grouped into three categories: restrictive, moderate and liberal. The

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57. *E.g.*, compare the 1968 Colorado Public Records Statute, COLO. REV. STAT. ANN. §§ 4-72-201-206 (1974) WITH THE MARYLAND PUBLIC INFORMATION LAW, MD. ANN. CODE ART. 76A §§ 6 (1975). The apparent modeling is evidenced by a clerical error in the drafting of the original Maryland statute, Law of May 21, 1970, ch. 698, sec. 3 (E)(F), [1970] Md. Laws 1974 (repealed April 9, 1974). This statute refers to district courts. *Id.* However, the Maryland court system contains no district courts as Colorado does, but rather, circuit courts of counties. The error was corrected by the substitution of "circuit court of the counties" for "district court of equity jurisdiction of the district" in Law of April 9, 1974, ch. 216, sec. (e), (f), [1974] Md. Laws 860. *Id.*

58. *Copeland v. Cartwright*, 38 Fla. Supp. 6 (1972).

59. *Kottschade v. Lundberg*, 160 N.W. 2d 135 (Minn. 1968).

60. Comment, *supra* note 17, at 1107.

61. Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate, *Freedom of Information: A Compilation of State Laws*, 1 (1978).

62. *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

categories are simplified versions of two prior categorization methods. The first method of categorization was outlined in a Comment entitled: *Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except . . ."*.<sup>63</sup> The comment employed six categories for the State Open Record Laws, which in order of decreasing restrictiveness includes:

1. A limited Class of Specifically Identifiable Documents or a General Definition of Records but Limited for Public Inspection Purposes by Specific Qualifications;
2. Records Required to be Made by Law, Necessary to be Kept in the Discharge of a Duty Imposed by Law, or Directed by Law to Serve as a Written Memorial of Something Written, Said or Done;
3. Records made or Received Pursuant to Law or as a Convenient and Appropriate Mode of Discharging the Duties of an Office;
4. Records Made or Received in Connection with the Transaction of Public or Official Business;
5. Any Writing Containing Information Relating to the Conduct of the Public's Business; and
6. All Documentary Materials in the Possession of a Public Body.<sup>64</sup>

Although the Comment provides for a seemingly neat method of classification with respect to the complexity of the state laws and their accompanying agency and judicial interpretations, a disclaimer paragraph was included. The first sentence of the paragraph summarizes the true value of any attempt to categorize the state laws: "[i]n practice, any such system of neat classification will break down into fifty categories subject to local needs and philosophies."<sup>65</sup>

A second categorization method was developed by Burt A. Braverman and Wesley R. Heppler in their article *A Practical Review of State Open Records Laws*.<sup>66</sup> The article employed a four category organization for the State Open Records Laws. The categorization included two liberal and two restrictive definitions based on the scope of information (public record). The first liberal interpretation includes all records in the possession of a public agency, regardless of their origin or the reason for their creation or acquisition, unless the state code specifies otherwise. The second liberal interpretation includes records made or received in connection with or relating to a law, duty of the agency, or transaction of public business, or any

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63. Comment, *supra* note 17, at 1105.

64. *Id.* at 1114.

65. *Id.* at 1105.

66. 49 GEO. WASH. L. REV. 720 (1981).

record containing information regarding those matters. The first of the restrictive definitions includes only public records which are required to be kept by law. The second is similar, stating that public records are only those records made pursuant to the law.<sup>67</sup>

For the purposes of this paper, the defining characteristics of the three categories, restrictive, moderate and liberal, will focus on the amount of material that each should allow to be open to public inspection. The restrictive category will predominantly include only those documents which were made pursuant to and required to be kept by law (Appendix B). The moderate category will include all documents in the possession of a public body (Appendix C), and the liberal category will include all records involving public activity regardless of location or origin (Appendix D). In order to maintain consistency as well as retain the perspective of the internal auditor, the three categories will be examined under the same issue subheadings employed in the examination of the Federal Act. Categorization problems nevertheless occur, as some states may be classified as restrictive with information on one issue, while liberal under another issue. Even more frequently, many states seem to be in the gray areas between the liberal and moderate categories, or the moderate and restrictive categories.

The initial determination as to the public's access and inspection of government records:

Most state Freedom of Information statutes require each individual agency to promulgate regulations necessary to carry out their Freedom of Information duties.<sup>68</sup> Because states have chosen to delegate the authority to individual agencies, for a publicly funded university's internal auditor, a review of his or her employer's individual procedures will be necessary to determine exactly what is required regarding the filing and review of freedom of information requests based on state law. Regardless of which of the three categories a state falls under, for the auditor's purposes, the Board of Trustees will either make or provide for the initial determination regarding access and inspection of audit documents. Both ethical considerations in protecting innocent individuals as well as economic concerns in financial liability will drive each Board's establishment of standards.

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67. Nadel, *supra* note 19, at 680.

68. Braverman & Heppler, *supra* note 46, at 751.



The time constraints for compliance, denial and appeals for a petitioner's request:

Time constraints for an agency to respond to an initial request for documents vary from unlimited under most state statutes,<sup>69</sup> to as short as three days.<sup>70</sup> Internal auditors probably need only be aware of their specific state's time constraints if they are requested by the Board of Trustees to relinquish documents. The initial response, however, does not necessarily mean that the sought after documents must be relinquished within the statutory response time. For instance, the Kentucky statute states that "Each public agency, upon the request for records made under KRS 61.870 to 61.884, shall determine within three (3) days (excepting Saturdays, Sundays, and legal holidays) after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision."<sup>71</sup> Although here the relinquishment of the documents may not be necessary within the three day time constraint, a documented decision must be made in a potentially short time (three days) which might later result in both embarrassment and legal liability for the auditor and the university. The embarrassment and legal liability may be the result of improper initial decisions to either release or withhold information which were made in haste to comply with the state's time constraints.

Jurisdiction to review the initial decision as well as subsequent appeals:

The majority of states provide for judicial review for the denial of all or part of an initial request for information, whereas a minority of states lack specific provisions in their Open Records Laws. (See Appendix E for specific states.)<sup>72</sup> Even in the minority states, however, judicial review may still be granted based on mandamus, the state's administrative law or a court's general equity jurisdiction.<sup>73</sup> Under common law, however, freedom of information is not as liberal as interpreted in Open State Record Laws, which should prevent the disclosure of preliminary memorandum and draft documents.<sup>74</sup> Similar to the Federal Act, six states also provide that the review should take precedence, subject to the court's discretion,

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69. Most state open state record laws do not provide any reference to a specified time limit for an agency response to a request for information.

70. KY. REV. STAT. ANN. § 61.880 (Baldwin 1991).

71. *Id.*

72. Freedom of Information Center Publication, *supra* note 22.

73. Braverman & Heppler, *supra* note 46, at 753.

74. Comment, *supra* note 17, at 1122.

over previously docketed cases.<sup>75</sup> Under common law, therefore, rules of evidence and judicial discretion should protect the university at least from financial liability.

With regard to legal fees, in comparison to the Federal Act, (which gives the court discretion to award legal fees), most state laws require the plaintiff to “prevail” before any award can be awarded. A few states in the restrictive category also require that the court find the agency acted “unreasonably” or in “bad faith” before legal fees can be awarded.<sup>76</sup>

For the internal auditor, the decision whether or not to release a document as with the federal law may ultimately reside in the courtroom. One guideline that should be noted is that courts have generally followed legislative intent if it is specifically outlined in a policy section of the Open Records Law. Most often, the legislative policy statements have provided for liberal disclosure interpretations, whereas being restrictive with exception interpretations.<sup>77</sup> In keeping with the generally liberal tone, the majority of states also place the burden of proof on the agency to justify any withholding.

The records, or parts of records (potentially including audit reports, work papers and even an auditor’s notes) are subject to public inspection:

While the Federal Act has four categories of records which Congress in varying degrees intended to be open to public inspection, the state laws are often viewed as fifty distinct categories.<sup>78</sup> A lack of court precedents relating to internal auditors also makes categorization difficult. Because of the lack of clearly defined rules with which to categorize the state laws, the states listed in the restrictive, moderate and liberal categories are rough approximations. The approximations are based on statutory language, legislative intent statements and prior categorization methods.

Within the restrictive category, only records which state laws require to be made and kept are subject to disclosure. (See Appendix A for specific states.) For the internal auditor, the predominate records which fall within the restrictive category are documents presented to the Board of Trustees as well as the external auditor’s reports which may be required for agencies receiving public funds through the NCAA.

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75. Florida, Louisiana, New Hampshire, Oregon, Vermont, Virginia.

76. Arizona, Colorado, Florida.

77. *State v. Evans Campaign Comm.*, 546 P.2d 75, 78 (Wash. 1976).

78. Comment, *supra* note 17, at 1121.

Another group of audit reports, those required of Division I and II college sports programs by the NCAA, may also fall within the restrictive category. These reports specifically deal with financial audits required by the NCAA for each sports program. A problem exists, however, in that although there are general guidelines, there are no specific guidelines for the audits; nor does the NCAA require that the reports be turned over to anyone. The only requirement is that the audits be performed by an independent external auditor rather than a staff member of the institution, such as the internal auditor.<sup>79</sup> Whether or not these audit documents can be construed to be "required by law", thereby falling within the scope of an open record law, will have to be determined at a later date. Under the state laws in the moderate or liberal categories, however, public disclosure is far more likely.

The moderate category includes state laws which allow for disclosure of all documents in the possession of the agency receiving public funds. For the internal auditor, as an employee of a publicly funded university, all documents, including preliminary drafts and memoranda, may be subject to disclosure even before formal presentation to the university's Board of Trustees.<sup>80</sup>

The liberal category encompasses all documents which relate to the agency regardless of location. Under the category, all documents in the possession of a university's Board of Trustees and internal auditors may be subject to disclosure, as well as all documents of external auditors or other private contractors which relate to the university. (See Appendix D for specific states.)

The auditor's responsibility and liability for records that are made public:

The internal auditor's responsibility for the protection of the university, innocent third parties as well as him or herself, will be largely the same as under the federal section of this article. A difference does occur in terms of the liability that an auditor may face due to the differences in state definitions and judicial interpretations of libel and slander as well as rules of civil procedure. A discussion of particular state tort law and civil procedure is beyond the scope of this article, however, the internal auditor should nevertheless have at least an awareness of his or her state's judicial system should legal action arise.

The individual state court systems may also be appealed to by the university or internal auditor in order to obtain confidentiality rules for sensi-

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79. The National Collegiate Athletic Association, NCAA Financial Audit Guidelines, 1986.

80. Comment, *supra* note 17, at 1119, n.86.

tive material which might be segregated from disclosed material.<sup>81</sup> Most states provide for reasonable segregation of material for such areas as personal privacy, however, the initial decision as to how much material should be withheld in order to protect third parties inevitably results in a judgment call which may always be questioned at a later date.

#### V. CONCLUSION

In recent years public pressure for more disclosure of information concerning NCAA violations has intensified. Both Federal and State Open Record Laws have been used by the public to obtain access to more detailed information. The use of these laws to satisfy the desire for such information has affected internal auditors at colleges and universities. Audit reports of athletic departments that are presented to the Board of Trustees/Regents may be subject to public inspection.

Consequently, internal auditors are faced with the task of becoming quasi-legal experts to determine whether to filter information, and, if so, to what extent. These decisions can be difficult both because the Open Record Laws vary in form from the federal to state level and because the courts have rendered differing interpretations and applications of the laws. This paper has attempted to raise concerns regarding the difficulties of such decisions by examining the legal ramifications of the Open Records Laws on the work of the internal auditor.

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81. *Id.* at 1124, n.115.

## APPENDIX A - 50 STATES &amp; D.C.

ALABAMA	ALA. CODE § 36-12-40 (1991)
ALASKA	ALASKA STAT. § 09.25.110 (1991)
ARIZONA	ARIZ. REV. STAT. ANN. § 39-121-101 (1992)
ARKANSAS	ARK. CODE ANN. § 25-29-101 (Michie 1991)
CALIFORNIA	CAL. GOV. CODE § 6250 (1991)
COLORADO	COLO. REV. STAT. § 24-72-201 (1991)
CONNECTICUT	CONN. GEN. STAT. § 1-15 (i990)
DELAWARE	DEL. CODE ANN. § 25-19-101 (1989)
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 1-2901 (1992)
FLORIDA	FLA. STAT. § 119.01 (1990)
GEORGIA	GA. CODE ANN. § 50-18-73 (Michie 1992)
HAWAII	HAW. REV. STAT. §§ 92F-2 (1991)
IDAHO	IDAHO CODE §§ 9-301 Repealed by S.L. 1990 ch. 213, § E effective July 1, 1990
ILLINOIS	ILL. REV. STAT. ch. 116, para. 43.4 (1991)
INDIANA	IND. CODE ANN. § 5-14-1.5-1 (Burns 1991)
IOWA	IOWA CODE ANN. § 22.1 (West 1992)
KANSAS	KAN. STAT. ANN. § 45-201 (1990)
KENTUCKY	KY. REV. STAT. ANN. § 61.870 (Baldwin 1991)
LOUISIANA	LA. REV. STAT. ANN. § 44.1 (West 1991)
MAINE	ME. REV. STAT. ANN. tit. 1, § 401 (West 1990)
MARYLAND	MD. CODE ANN. § 10-611 (1991)
MASSACHUSETTS	MASS. ANN. LAWS ch. 4, § 7 (Law. Co- op 1992)
MICHIGAN	MICH. COMP. LAWS § 15.232 (1991)
MINNESOTA	MINN. STAT. ANN. § 138.17 (West 1992)
MISSISSIPPI	MISS. CODE ANN. § 25-61-1 (1991)
MISSOURI	MO. REV. STAT. § 109.180 (1990)
MONTANA	MONT. CODE ANN. § 2-6-101 (1991)
NEBRASKA	NEB. REV. STAT. § 84-712 (1990)
NEVADA	NEV. REV. STAT. ANN. § 239.010 (Michie 1991)
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 91-A:1 (1990)
NEW JERSEY	N.J. STAT. ANN. § 47:1A-1 (West 1991)

NEW MEXICO	N.M. STAT. ANN. § 14-2-1 (Michie 1991)
NEW YORK	NY CLS PUB. O § 84 (1992)
NORTH CAROLINA	N.C. GEN. STAT. § 132-1 (1991)
NORTH DAKOTA	N.D. CENT. CODE § 44-04-18 (1991)
OHIO	OHIO REV. CODE ANN. § 149.43 (Baldwin 1991)
OKLAHOMA	OKLA. STAT. tit. 51, § 24A.2 (1990)
OREGON	OR. REV. STAT. § 192.410 (1989)
PENNSYLVANIA	PA. STAT. ANN. tit. 65, § 66.1 (1991)
RHODE ISLAND	R.I. GEN. LAWS § 38-2-1 (1990)
SOUTH CAROLINA	S.C. CODE ANN. § 30-4-10 (Law. Co-op 1990)
SOUTH DAKOTA	S.D. CODIFIED LAWS § 1-27-1 (1991)
TENNESSEE	TENN. CODE ANN. § 10-7-503 (1991)
TEXAS	TEX. REV. CIV. STAT. ANN. art. 6252-17 (West 1991)
UTAH	UTAH CODE ANN. § 78-26-1 (1991)
VERMONT	Vt. STAT. ANN. tit. 1, § 2.1-240 (1991)
VIRGINIA	VA. CODE ANN. § 2.1-340 (Michie 1991)
WASHINGTON	WASH. REV. CODE § 42.17.250 (1990)
WEST VIRGINIA	W. VA. CODE § 29 B-1-1 (1991)
WISCONSIN	Wis. STAT. § 19.21 (1989-1990)
WYOMING	WYO. STAT. § 16-4-203 (1991)

## APPENDIX B - RESTRICTIVE

ARKANSAS	ARK. CODE ANN. § 25-29-101 (Michie 1991)
DISTRICT OF COLUMBIA	D.C. CODE ANN. § 1-2901 (1992)
HAWAII	HAW. REV. STAT. §§ 92F-2 (1991)
ILLINOIS	ILL. REV. STAT. ch. 116 para. 43.4 (1991)
INDIANA	IND. CODE ANN. § 5-14-1.5-1 (Burns 1991)
KANSAS	KAN. STAT. ANN. § 45-201 (1990)
NEBRASKA	NEB. REV. STAT. § 84-712 (1990)
NEW JERSEY	N.J. STAT. ANN. § 47:1A-1 (West 1991)
NEW YORK	NY CLS PUB. O § 84 (1992)
OHIO	OHIO REV. CODE ANN. § 149.43 (BALDWIN 1991)
OKLAHOMA	OKLA. STAT. tit. 51, § 24A.2 (1990)
PENNSYLVANIA	PA. STAT. ANN. tit. 65, § 66.1 (1991)
RHODE ISLAND	R.I. GEN. LAWS § 38-2-1 (1990)
SOUTH DAKOTA	S.D. CODIFIED LAWS § 1-27-1 (1991)
TENNESSEE	TENN. CODE ANN. § 10-7-503 (1991)
TEXAS	TEX. REV. CIV. STAT. ANN. art. 6252-17 (West 1991)
UTAH	UTAH CODE ANN. § 78-26-1 (1991)
VERMONT	Vt. STAT. ANN. tit. 1, § 2.1-240 (1991)
VIRGINIA	VA. CODE ANN. § 2.1-340 (Michie 1991)
WASHINGTON	WASH. REV. CODE 42.17.250 (1990)
WEST VIRGINIA	W. VA. CODE § 29 B-1-1 (1991)
WISCONSIN	Wis. STAT. § 19.21 (1989-1990)
WYOMING	WYO. STAT. § 16-4-203 (1991)

## APPENDIX C - MODERATE

ARIZONA	ARIZ. REV. STAT. ANN. § 39-121-101 (1992)
COLORADO	COLO. REV. STAT. § 24-72-201 (1991)
DELAWARE	DEL. CODE ANN. § 25-19-101 (1989)
FLORIDA	FLA. STAT. § 119.01 (1990)
GEORGIA	GA. CODE ANN. 50-18-73 (Michie 1992)
LOUISIANA	LA. REV. STAT. ANN. § 44.1 (West 1991)
MARYLAND	MD. CODE ANN. § 10-611 (1991)
MICHIGAN	MICH. COMP. LAWS § 15.232 (1991)
MINNESOTA	MINN. STAT. ANN. § 138.17 (West 1992)
MISSISSIPPI	MISS. CODE ANN. § 25-61-1 (1991)
MISSOURI	MO. REV. STAT. § 109.180 (1990)
NEVADA	NEV. REV. STAT. ANN. § 239.010 (Michie 1991)
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 91-A:1 (1990)
NEW MEXICO	N.M. STAT. ANN. § 14-2-1 (Michie 1991)
NORTH CAROLINA	N.C. GEN. STAT. § 132-1 (1991)
NORTH DAKOTA	N.D. CENT. CODE § 44-04-18 (1991)
TENNESSEE	TENN. CODE ANN. § 10-7-503 (1991)
TEXAS	TEX. REV. CIV. STAT. ANN. art. 6252-17 (West 1991)
UTAH	UTAH CODE ANN. § 78-26-1 (1991)
VERMONT	VT. STAT. ANN. tit. 1, § 2.1-240 (1991)
VIRGINIA	VA. CODE ANN. § 2.1-340 (Michie 1991)
WEST VIRGINIA	W. VA. CODE § 29B-1-1 (1991)
WISCONSIN	WIS. STAT. § 19.21 (1989-1990)
WYOMING	WYO. STAT. 16-4-203 (1991)



## APPENDIX D - LIBERAL

ALABAMA	ALA. CODE § 36-12-40 (1991)
ALASKA	ALASKA STAT. § 09.25.110 (1991)
CALIFORNIA	CAL. GOV. CODE § 6250 (1991)
CONNECTICUT	CONN. GEN. STAT. § 1-15 (1990)
IDAHO	IDAHO CODE §§ 9-301 Repealed by S.L. 1990 ch. 213, § E effective July 1, 1990
IOWA	IOWA CODE ANN. § 22.1 (West 1992)
KENTUCKY	KY. REV. STAT. ANN. § 61.870 (Baldwin 1991)
MAINE	ME. REV. STAT. ANN. tit. 1, § 401 (1990)
MASSACHUSETTS	MASS. ANN. LAWS ch. 4, § 7 (Law. Co- op 1992)
MONTANA	MONT. CODE ANN. § 2-6-101 (1991)
OREGON	OR. REV. STAT. § 192.410 (1989)
WASHINGTON	WASH. REV. CODE § 42.17.250 (1990)
WEST VIRGINIA	W.VA. CODE § 29 B-1-1 (1991)
WISCONSIN	WIS. STAT. § 19.21 (1989-1990)
WYOMING	WYO. STAT. § 16-4-203 (1991)

## APPENDIX E - JUDICIAL REVIEW

ALASKA	ALASKA STAT. § 09.25.110 (1991)
ARIZONA	ARIZ. REV. STAT. ANN. § 39-121-101 (1992)
ARKANSAS	ARK. CODE ANN. § 25-29-101 (Michie 1991)
CALIFORNIA	CAL. GOV. CODE § 6250 (1991)
COLORADO	COLO. REV. STAT. § 24-72-201 (1991)
CONNECTICUT	CONN. GEN. STAT. § 1-15 (1990)
GEORGIA	GA. CODE ANN. § 50-18-73 (1992)
HAWAII	HAW. REV. STAT. §§ 92F-2 (1991)
ILLINOIS	ILL. REV. STAT. ch. 116, para. 43.4 (1991)
INDIANA	IND. CODE ANN. § 5-14-1.5-1 (Burns 1991)
IOWA	IOWA CODE ANN. § 22.1 (West 1992)
KENTUCKY	KY. REV. STAT. ANN. § 61.870 (Baldwin 1991)
LOUISIANA	LA. REV. STAT. ANN. § 44.1 (West 1991)
MARYLAND	MD. CODE ANN. § 10-611 (1991)
MASSACHUSETTS	MASS. ANN. LAWS ch. 4, § 7 (Law. Co- op 1992)
NEBRASKA	NEB. REV. STAT. § 84-712 (1990)
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 91-A:1 (1990)
NEW JERSEY	N.J. STAT. ANN. § 47:1A-1 (WEST 1991)
NEW MEXICO	N.M. STAT. ANN. § 14-2-1 (Michie 1991)
NORTH CAROLINA	N.C. GEN. STAT. § 132-1 (1991)
OHIO	OHIO REV. CODE ANN. § 149.43 (Baldwin 1991)
OREGON	OR. REV. STAT. § 192.410 (1989)
PENNSYLVANIA	PA. STAT. ANN. tit. 65, § 66.1 (1991)
SOUTH CAROLINA	S.C. CODE ANN. § 30-4-10 (Law. Co-op 1990)
TEXAS	TEX. REV. CIV. STAT. ANN. art. 6252-17 (West 1991)
VERMONT	VT. STAT. ANN. tit. 1, § 2.1-240 (1991)
WASHINGTON	WASH. REV. CODE § 42.17.250 (1990)
WYOMING	WYO. STAT. § 16-4-203 (1991)

