



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 55 | Number 6

Article 2

9-1-1977

Administrative Law -- Public Access to Government-Held Records: A Neglected Right in North Carolina

Joseph D. Johnson

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Joseph D. Johnson, *Administrative Law -- Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C. L. REV. 1187 (1977).

Available at: <http://scholarship.law.unc.edu/nclr/vol55/iss6/2>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

COMMENTS

Administrative Law—Public Access to Government-Held Records: A Neglected Right in North Carolina*

I. INTRODUCTION	1187
II. INTERPRETING THE CURRENT NORTH CAROLINA LAW ...	1189
A. Defining "Public Record"	1189
1. The Statute and Its Background	1190
2. Use of the Term "Public Record"	1192
B. Records Exempt From Public Inspection	1193
1. Exemptions	1193
2. Privilege	1196
3. The Effects of Exemptions	1198
C. Who May Inspect Public Records?	1199
D. Access to Public Records	1200
1. Protection of Public Records	1201
2. Minimizing Disruption of Public Offices	1203
3. Making Copies of Public Records	1204
4. Fees for Inspection	1206
5. Fees for Copies of Public Records	1206
E. Remedies	1207
III. A MORE EFFECTIVE PUBLIC RECORDS ACT	1208

I. INTRODUCTION

It is an uncontested pre-condition of democratic government that the people have information about the operation of their government in order to make informed choices at the polls. For such information to be withheld or manipulated by those holding public office amounts to little more than tampering with the electoral process and a denial of the ultimate sovereignty that resides in the American people.

—Former United States Senator Sam J. Ervin, Jr.¹

Recent events have led to an increased concern about the accountability of government officials; all too often those in power have sought to conduct public business out of the watchful eye of the citizens they

* The author expresses his appreciation to David M. Lawrence, Professor of Public Law and Government, Institute of Government, Chapel Hill, North Carolina, for his invaluable assistance in the preparation of this Comment.

1. Ervin, *Controlling "Executive Privilege"*, 20 *LOX. L. REV.* 11, 11 (1974).

serve. While some degree of confidentiality is necessary for government to operate effectively, the general rule in the American political system must be that the affairs of government be subject to public scrutiny.

The public's right to inspect public records was recognized by the American common law at least as early as 1823.² A number of commentators have suggested that the right of inspection has a constitutional basis,³ but only one court has actually found such a constitutional right.⁴ Courts have often avoided the constitutional question, perhaps because the statutory and common law decisions have postponed its delineation.⁵ Despite the importance of the right of inspection and the presence of a statutory basis for that right,⁶ the North Carolina appellate courts have never considered the limits of the right of inspection in North Carolina.⁷ The absence of legal development in this area indicates a degree of indifference among public officials as well as a general lack of awareness of the law.⁸ The purpose of this Comment is to interpret the current North Carolina law by examining decisions of other jurisdictions and to make suggestions for improving and implementing the right of access in North Carolina.

2. *People ex rel. Palmer v. Vail*, 1 Cow. 589 (Sup. Ct. 1823), *enforced*, 2 Cow. 623 (N.Y. Sup. Ct. 1824).

3. The first amendment is the major constitutional provision relied on. Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952). See also Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Comment, *The Public's Right of Access to Government Information Under the First Amendment*, 51 CHI-KENT L. REV. 164 (1974); Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93 (1973).

4. *Houston Chronicle Publish. Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Ct. App. 1975), *writ of error denied per curiam*, 536 S.W.2d 559 (Tex. 1976). In refusing the application for a writ of error, the Texas Supreme Court specifically declined to decide whether there is a constitutional right to inspect public records. 536 S.W.2d at 561.

5. See *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 654-55, 117 Cal. Rptr. 106, 111-12 (1974).

6. N.C. GEN. STAT. §§ 132-1 to -9 (1974 & Cum. Supp. 1975).

7. The North Carolina Supreme Court in 1887 was faced with a case regarding inspection of records in the office of the register of deeds. That decision, however, is of little value today because of its reliance upon the fee system used in compensating the register of deeds. *Newton v. Fisher*, 98 N.C. 20, 3 S.E. 822 (1887); see text accompanying notes 124-125 *infra*.

8. In an experiment in Illinois, 111 requests for public information were sent to various officials. The officials made no response at all to 61 of the requests. Divorski, Gordon & Heinz, *Public Access to Government Information: A Field Experiment*, 68 NW. U.L. REV. 240, 257 (1973).

II. INTERPRETING THE CURRENT NORTH CAROLINA LAW

The North Carolina public records statute⁹ has never been interpreted by the North Carolina appellate courts. Decisions from other jurisdictions, however, may serve as aids in understanding and interpreting North Carolina's statute.¹⁰ Those decisions provide valuable guidance because courts have often been willing to look beyond the language of their own public records statutes to rely on principles that are remarkably uniform in almost all jurisdictions.¹¹

A. Defining "Public Record"

The original North Carolina statute that recognized the right of any person to inspect public records was enacted in 1935;¹² the section defining the term "public record" was rewritten in 1975.¹³ The intent of the 1975 amendment apparently was to insure that the term be construed broadly: the definition clearly indicates that no record is excluded merely because of its physical form;¹⁴ the records of "any agency of North Carolina government or its subdivisions"¹⁵ are included in the definition; and the term "agency" is also defined broadly.¹⁶ Finally, the definition requires that the record be one that was "made or received pursuant to law or ordinance in connection with the transaction of public business."¹⁷

9. N.C. GEN. STAT. §§ 132-1 to -9 (1974 & Cum. Supp. 1975).

10. For a list of cases from other states that have considered whether particular documents held by local governments are open to public inspection, see Johnson & Lawrence, *Interpreting North Carolina's Public Records Law*, 10 LOCAL GOV'T L. BULL. 16-34 (Inst. of Gov't, Chapel Hill, N.C., 1977).

11. See *Sorley v. Lister*, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (Sup. Ct. 1961), in which the court did not even rely on the public records statutes because they did not "shed much light on whether the items under consideration are or are not public records." *Id.* at 473, 218 N.Y.S.2d at 218.

12. Act of May 2, 1935, ch. 265, § 1, 1935 N.C. Sess. Laws 288.

13. N.C. GEN. STAT. § 132-1 (Cum. Supp. 1975).

14. "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics" *Id.*

15. *Id.*

16. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other policial subdivision of government.

Id.

17. *Id.*

1. The Statute and Its Background

Although North Carolina's current definition of public records is statutory, an examination of common law definitions and classifications of records serves to highlight the scope of the present statute. Prior to 1935, any right of inspection in North Carolina was based on the common law. Although the North Carolina appellate courts were never called upon to provide a common law definition of public records, the decisions of other state courts are instructive. The various common law definitions of public records contain numerous minor differences, but they fall into two major groups. The first and narrower definition is limited to records that are required by law to be made or received, including records that are intended to serve as notice to the public.¹⁸ Records of land transfers, deeds of trust and mortgages are examples of records that are intended to serve as notice. This definition also includes all records that any statute or regulation requires a public officer to make or receive.

A broader definition was recognized in some early decisions¹⁹ that held that public records include not only those records required by law to be made or received, but also records that are "necessary to be kept in the discharge of a duty imposed by law."²⁰ One court concluded that it is enough if the record is used and kept in a public office.²¹ Courts adopting this broader definition found no valid justification for arbitrarily limiting the definition to records kept as required by law.²² The modern trend, in both statutes²³ and court decisions,²⁴ has been toward the broader definition.

Although certain ambiguities exist in the North Carolina statute, the language of the statute appears to embrace the broader definition of public records. The statutory definition includes those records "made or received pursuant to law or ordinance in connection with the

18. *E.g.*, *Linder v. Eckard*, 261 Iowa 216, 220, 152 N.W.2d 833, 836 (1967); *Lefebvre v. Somersworth Shoe Co.*, 93 N.H. 354, 355, 41 A.2d 924, 925 (1945).

19. *E.g.*, *Robison v. Fishback*, 175 Ind. 132, 93 N.E. 666 (1911); *Burton v. Tuite*, 78 Mich. 218, 44 N.W. 282 (1889), *enforced*, 80 Mich. 218, 45 N.W. 88 (1890); *Coleman v. Commonwealth*, 66 Va. 585, 25 Gratt. 865 (1874).

20. *Robison v. Fishback*, 175 Ind. 132, 137, 93 N.E. 666, 669 (1911).

21. *Burton v. Tuite*, 78 Mich. 218, 44 N.W. 282 (1889), *enforced*, 80 Mich. 218, 45 N.W. 88 (1890).

22. *See, e.g.*, *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1960); *Rock County v. Weirick*, 143 Wis. 500, 128 N.W. 94 (1910).

23. *See, e.g.*, CAL. GOV'T CODE § 6252(d) (West Cum. Supp. 1977).

24. *See, e.g.*, *Tingling v. Lang*, 39 Misc. 2d 338, 240 N.Y.S.2d 633 (Sup. Ct. 1963); *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1960).

transaction of public business.”²⁵ The presence of the word “pursuant” appears to indicate that the North Carolina definition includes not only those records required by law, but also those records kept in carrying out lawful duties. Changes made in the statutory language by the 1975 amendment support this conclusion. The original statute referred only to records “made and received in pursuance of law.”²⁶ The phrase “in connection with the transaction of public business,”²⁷ added in 1975, corresponds with language used by courts that have adopted the broader definition.²⁸

The North Carolina statute that grants access to public records also provides for the regulation of the preservation and destruction of those records.²⁹ Some courts in other jurisdictions, confronted with a single definition that applies to both inspection and preservation, have expressed fears that a broad reading of the definition would impose substantial administrative record-keeping requirements with respect to a large number of relatively unimportant records.³⁰ Other courts, however, have found that a broad definition for inspection purposes would not impose unreasonable record-keeping requirements upon public officials.³¹

The North Carolina statute indicates that although the same definition applies to both inspection and preservation,³² the definition of public records should be interpreted broadly. The statute itself does not regulate the preservation and destruction of public records—it delegates that authority to the Department of Cultural Resources.³³ Pursuant to that authority, *The County Records Manual*³⁴ was published in 1970, and *The Municipal Records Manual*³⁵ was published

25. N.C. GEN. STAT. § 132-1 (Cum. Supp. 1975).

26. Act of May 2, 1935, ch. 265, § 1, 1935 N.C. Sess. Laws 288.

27. N.C. GEN. STAT. § 132-1 (Cum. Supp. 1975).

28. See notes 19-21 and accompanying text *supra*.

29. N.C. GEN. STAT. §§ 132-1 to -9 (1974 & Cum. Supp. 1975).

30. Such definitions apply to matters such as the types of ink and paper that must be used in making public records. *Town Crier, Inc. v. Chief of Police*, 361 Mass. 682, 282 N.E.2d 379 (1972); *Kottschade v. Lundberg*, 280 Minn. 501, 160 N.W.2d 135 (1968).

31. *Citizens for Better Educ. v. Board of Educ.*, 124 N.J. Super. 523, 308 A.2d 35 (Super. Ct. App. Div. 1973); *accord*, *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973).

32. N.C. GEN. STAT. § 132-1 to -9 (1974 & Cum. Supp. 1975).

33. *Id.* §§ 121-5, 132-3, -8.1 (1974).

34. NORTH CAROLINA STATE DEP'T OF ARCHIVES & HISTORY, *THE COUNTY RECORDS MANUAL* (1971).

35. NORTH CAROLINA STATE DEP'T OF ARCHIVES & HISTORY, *THE MUNICIPAL RECORDS MANUAL* (1971). Neither of these manuals apply to records at the state level.

in 1971. Although the manuals do not require any records to be made, they identify a large number of public records kept by local officials and regulate the retention and disposal of those records that have actually been made or received by local officials. Any record listed in those manuals should be considered a public record for preservation purposes because the courts should be expected to give deference to the expertise of an agency charged with interpreting and applying the statute. Such records should also be considered public records for inspection purposes unless they fit within an exemption. On the other hand, the omission of a record from the schedules in the manuals should not preclude a determination that the record is nevertheless a public record.³⁶

2. Use of the Term "Public Record"

The term "public record" is used in a number of different contexts, and the definition can vary depending on its particular application. The definition is important in determining the status of a record for such diverse purposes as evidence, constructive notice, judicial notice, destruction, preservation and public inspection. Although different underlying issues are raised in the various contexts, many courts attempt to apply the same definition to various situations without explicitly identifying those considerations that distinguish one application from another. Whether they explicitly recognize it or not, however, courts do indeed vary the definition depending upon the particular use of the term, and an awareness of these distinctions can sometimes resolve apparent conflicts in the cases.³⁷

Conceptual inconsistencies and confusing decisions can often be avoided when courts clarify their definitions, recognizing that the scope of the definition should vary depending upon the purposes for which the record is to be used. For example, a narrow definition might be preferred in an evidentiary context because the ultimate concern is to ensure the authenticity of the record. On the other hand, the definition should be broad in the context of public inspection because the purposes of allowing inspection are broad—access to public records can enhance governmental accountability, encourage informed participa-

36. THE COUNTY RECORDS MANUAL, *supra* note 34, at 2, art. 6; THE MUNICIPAL RECORDS MANUAL, *supra* note 35, at 2, art. 6.

37. See *Robison v. Fishback*, 175 Ind. 132, 137, 93 N.E. 666, 668 (1911); *MacEwan v. Holm*, 226 Or. 27, 38-39, 359 P.2d 413, 418 (1960).

tion in government and increase public confidence in the political system.³⁸

Confusion can also arise in describing records that are exempt from public inspection. A particular record might be included in the general definition of public records, but exempt from public inspection by a particular statute or judicial decision. Courts often state that a record not open to inspection is not a public record.³⁹ Such a record is, however, a public record in that it is public property, and penalties for destruction or removal of the record are still applicable.⁴⁰

B. Records Exempt From Public Inspection

Although the definition of public records is broad, courts have found that certain records are not required to be made available for inspection by members of the public. Records may be exempt from inspection because a statute precludes public inspection,⁴¹ because the courts find that confidentiality is required as a matter of public policy⁴² or because the information contained in the records is privileged.⁴³ Exemptions are normally found, however, only after considering the need for confidentiality in light of the public policy favoring disclosure of public records.

1. Exemptions

A number of special statutes control the status of particular records in North Carolina.⁴⁴ The application of those special statutes

38. See *MacEwan v. Holm*, 266 Or. 27, 38-39, 359 P.2d 413, 418 (1960).

39. *E.g.*, *State ex rel. Spencer v. Freedy*, 198 Wis. 388, 223 N.W. 861 (1929).

40. *People v. Pearson*, 111 Cal. App. 2d 9, 244 P.2d 35 (1952).

41. *E.g.*, N.C. GEN. STAT. §§ 48-24 to -27 (1976).

42. *E.g.*, *Lee v. Beach Publishing Co.*, 127 Fla. 600, 173 So. 440 (1937).

43. See text accompanying notes 61-64 *infra*.

44. *E.g.*, N.C. GEN. STAT. § 7A-109(a) (Cum. Supp. 1975) (court records); *id.* § 7A-287 (1969) (juvenile justice records); *id.* § 9-4 (jury lists); *id.* § 15-207 (1975) (probation records); *id.* § 15A-623(d), -623(e) (records of grand jury proceedings); *id.* § 20-26 (Supp. 1975) (driver's license records); *id.* §§ 20-42(b), -43 (records maintained by the Division of Motor Vehicles); *id.* §§ 20-166.1(i), (j) (accident reports); *id.* § 34-15 (1976) (veterans' records); *id.* §§ 48-24 to -27 (adoption records); *id.* § 74-24.13 (Supp. 1975) (mine safety records); *id.* § 75A-5(f) (1975) (boating records maintained by the Wildlife Resources Commission); *id.* § 97-92(b) (1972) (workmen's compensation records); *id.* § 105-259 (Cum. Supp. 1975) (state tax records); *id.* § 105-289(e) (records furnished to local tax authorities by the Department of Revenue); *id.* § 105-296(h) (business records used for appraisal of property for tax purposes); *id.* §§ 108-16, -45 (1975) (social services records); *id.* §§ 108-75.2, .9 (Supp. 1975) (records relating to the licensing of charitable organizations); *id.* § 111-28 (1975) (records relating to the needy blind); *id.* §§ 114-10(2), -10.1(c) (records of the Division of Criminal Statistics and the Police Information Network); *id.* § 114-15 (records of

is sometimes unclear, and the policies underlying a particular statute must often be carefully examined to determine exactly which records are included in the statute⁴⁵ and which parties are allowed to inspect those records.⁴⁶

Despite the broad definitions given to the term "public record," courts have consistently found that public policy requires some records to be kept secret.⁴⁷ When the right of inspection is solely a product of judicial creation, it is clearly within the power of the courts to create exemptions; however, even in the presence of statutes permitting public inspection of a broad class of records, courts have continued to rely on common law principles to create exemptions when none are provided in the statute.⁴⁸ Although continued adherence to common law

the State Bureau of Investigation); *id.* § 115-100.8(a) (Supp. 1975) (proposed school budgets); *id.* § 116-222 (Interim Supp. 1976) (records of self-insurance programs established for health-care practitioners by the University of North Carolina); *id.* § 120-47.6 (Cum. Supp. 1975) (lobbyists' expense records); *id.* § 120-50 (1974) (lobbyists' registration records); *id.* §§ 126-22 to -28 (Cum. Supp. 1975) (personnel records of state employees); *id.* § 130-64 (1974) (birth and death certificates); *id.* § 130-200 (Cum. Supp. 1975) (autopsy reports); *id.* § 143-341(9)(f) (1974) (records of cost-sharing data processing centers); *id.* § 148-76 (prison records); *id.* § 150A-11(3) (Cum. Supp. 1975) (records pertaining to agency orders, decisions and opinions); *id.* § 153A-98 (personnel records of county employees); *id.* § 160A-168 (1976) (personnel records of city employees); *id.* §§ 163-66, -171, -228 (election records).

This list of special statutes is not intended to be complete. Whenever the status of a particular record is in doubt, a search should be made for relevant special statutes before relying wholly on the provisions of the public records statute.

45. For example, no statute refers specifically to the status of juvenile arrest records. The North Carolina courts could be expected to find, however, that juvenile arrest records must be withheld from public inspection by virtue of the requirement of N.C. GEN. STAT. § 7A-287 (1969) that all juvenile court records be withheld from public inspection. Although a police record of a juvenile arrest is not a juvenile court record, the policies of the Juvenile Court Act would be frustrated if police agencies were required to make public the names of arrested juveniles. See 44 N.C. ATT'Y GEN. 305 (1975). See also *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. Dist. Ct. App. 1962), *cert. denied*, 153 So. 2d 306 (Fla. 1963).

In a more obvious case, another court held that when a statute required proceedings of a grand jury to be secret, the record of those proceedings must also be secret. *Hewitt v. Webster*, 118 So. 2d 688 (La. Ct. App. 1960).

46. For example, N.C. GEN. STAT. § 148-76 (1974) requires prisoners' files to be made available to certain named parties. The North Carolina courts have held that the list of parties in the statute is exclusive; therefore, a prisoner has no right to inspect his own prison records. *Goble v. Bounds*, 13 N.C. App. 579, 186 S.E.2d 638, *aff'd*, 281 N.C. 307, 188 S.E.2d 347 (1972).

47. *E.g.*, *Lee v. Beach Publishing Co.*, 127 Fla. 600, 173 So. 440 (1937); *Stack v. Borelli*, 3 N.J. Super. 546, 66 A.2d 904 (Super. Ct. Law Div. 1949).

48. *E.g.*, *UAW v. Gooding*, 251 Wis. 362, 29 N.W.2d 730 (1947).

The New Jersey Supreme Court held that their public records statute did not diminish the common law right of inspection in *Irval Realty, Inc. v. Board of Pub. Util. Comm'rs*, 61 N.J. 366, 294 A.2d 425 (1972). That ruling, however, has had little, if any, effect on the results of subsequent litigation because a record specifically exempt

exemptions is not specifically authorized by the terms of statutes similar to the North Carolina act, the failure of the legislature to provide meaningful guidance has led the courts either to ignore or to look beyond the terms of the statute to a public policy analysis.⁴⁹ In utilizing this public policy analysis, the courts are placed in a quasi-legislative role, attempting to give meaning to a rather nebulous and constantly evolving standard. Any definition of the public interest leaves much room for subjective interpretation; therefore, the application of the public interest standard can only be understood by examining major areas in which courts have created exemptions.

One of the oldest exemptions created by the courts is that certain police records be withheld from public view in the public interest.⁵⁰ This exemption does not extend to every record maintained by the police,⁵¹ but it clearly includes files and other records relating to criminal investigations.⁵² The policy reasons for this exemption are to encourage police to enter information freely in their reports, to avoid tipping off the subjects of investigation and to protect confidential investigative techniques.⁵³

Courts have also created exemptions to protect the government's sources of information. Sources must sometimes be protected, not only in the areas of criminal law enforcement and corrections,⁵⁴ but also in

from inspection by statute will also be exempt under the public interest standard of the common law. See *Trenton Times Corp. v. Board of Educ.*, 138 N.J. Super. 357, 351 A.2d 30 (Super. Ct. App. Div. 1976) (per curiam); *Nero v. Hyland*, 136 N.J. Super. 537, 347 A.2d 29 (Super. Ct. Law Div. 1975).

49. *E.g.*, *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 221-22, 71 Cal. Rptr. 193, 198-99 (1968).

50. *E.g.*, *People v. Wilkins*, 135 Cal. App. 2d 371, 377-78, 287 P.2d 555, 559 (1955); *Lee v. Beach Publishing Co.*, 127 Fla. 600, 604, 173 So. 440, 442 (1937); *Sapienza v. Paul*, 42 Haw. 14, 22 (1957); *Whittle v. Munshower*, 221 Md. 258, 261, 155 A.2d 670, 671-72 (1959).

51. For example, records relating to police department internal procedures have been held to be open to public inspection. *Cook v. Craig*, 55 Cal. App. 3d 773, 127 Cal. Rptr. 712 (1976). *Contra*, *United States v. Mackey*, 36 F.R.D. 431 (D.D.C. 1965). Other police records have also been held to be open to public inspection. *People v. Coleman*, 75 Misc. 2d 1090, 349 N.Y.S.2d 298 (Nassau County Ct. 1973) (records of citizen complaints against officers); *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976) (arrest records); *Florence Morning News, Inc. v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975) (jail book and log); *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967) (traffic citations).

52. *Glow v. State*, 319 So. 2d 47 (Fla. Dist. Ct. App. 1975); *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974); *Blandford v. McClellan*, 173 Misc. 15, 16 N.Y.S.2d 919 (Sup. Ct. 1940).

53. *People v. Pearson*, 111 Cal. App. 2d 9, 244 P.2d 35 (1952); *Glow v. State*, 319 So. 2d 47 (Fla. Dist. Ct. App. 1975).

54. *See Runyon v. Board of Prison Terms & Paroles*, 26 Cal. App. 2d 183, 79 P.2d 101 (1938).

other administrative areas. Private parties may resist providing information to the government unless confidentiality is assured.⁵⁵ Promises by public officials to maintain confidentiality, however, should not be made lightly, because courts will honor such promises only when required by a statute or by the public interest.⁵⁶

In cases in which persons have sought inspection of land appraisals prior to purchase or condemnation of the land by government agencies, some courts have created exemptions if the land transactions are not final.⁵⁷ These cases suggest that courts are sometimes willing to find exemptions if disclosure would harm the government's financial interests. Such an exemption is generally intended to avoid giving unfair competitive advantages to persons doing business with the government. One court, however, has specifically rejected this exemption, holding that potential harm to the government's financial interests during negotiations for land acquisition is an irrelevant consideration.⁵⁸

As a result of the proliferation of government-held information concerning private citizens, some courts have begun to recognize legitimate privacy interests, creating exemptions when disclosure would result in an unjustified invasion of personal privacy.⁵⁹ The North Carolina courts have not yet faced this issue under the public records statute, but the North Carolina Court of Appeals recently recognized that the fundamental right to personal privacy justified a superior court order prohibiting public disclosure of information submitted to the attorney general in connection with a criminal investigation.⁶⁰

2. Privilege

Even in the absence of specific statutory exemptions denying public access to privileged records, courts have generally recognized that any privileged records may be withheld from public inspection. Such exemptions may exist because the privilege statute itself is construed

55. *City of San Francisco v. Superior Court*, 38 Cal. 2d 156, 238 P.2d 581 (1951).

56. *Papadopoulos v. State Bd. of Higher Educ.*, 8 Or. App. 445, 494 P.2d 260 (1972).

57. *Linder v. Eckard*, 261 Iowa 216, 152 N.W.2d 833 (1967); *Sorley v. Lister*, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (Sup. Ct. 1961).

58. *Gannett Co. v. Goldtrap*, 302 So. 2d 175 (Fla. Dist. Ct. App. 1974).

59. *Wisher v. News-Press Publishing Co.*, 310 So. 2d 345 (Fla. Dist. Ct. App. 1975); *Minneapolis Star & Tribune Co. v. State*, 282 Minn. 86, 163 N.W.2d 46 (1968). See also *People v. Russel*, 214 Cal. App. 2d 445, 29 Cal. Rptr. 562 (1963).

60. *In re Investigation by Atty Gen.*, 30 N.C. App. 585, 588, 227 S.E.2d 645, 647 (1976).

to apply not only to the giving of testimony, but also to any other method of disclosing privileged information.⁶¹ The more prevalent approach is for courts to use the policies underlying the privilege statutes as support for the conclusion that the public interest requires privileged records to be exempt from the disclosure requirements of the public records statute.⁶² Whatever the legal justifications for such an exemption, privileges such as attorney-client or doctor-patient⁶³ have generally justified refusals to permit public inspection.

The only privilege specifically mentioned in the North Carolina public records statute provides a three-year privilege for certain confidential communications made by legal counsel to a public board or agency, but it does not cover the reverse situation of communications made by the agency to legal counsel.⁶⁴ Despite the statute's failure to provide for the confidentiality of an agency's communications to counsel, it seems likely that the North Carolina courts would permit such communications to remain confidential if they were made within the scope of the traditional attorney-client privilege. The major policy justification for the attorney-client privilege is to protect communications made by the client to the attorney rather than vice versa,⁶⁵ and the legislature may have assumed that an explicit statutory provision was needed only to protect communications made by an attorney to the governmental client. Without regard to the statutory language, the existence of a testimonial attorney-client privilege indicates that good public policy requires that confidentiality of privileged communications be maintained, even if the client is a government officer or agency.

Despite the availability of a privilege, inspection must be permitted when the privilege has been waived.⁶⁶ Courts generally view privilege claims with disfavor, looking for inapplicability or waiver of the privilege.⁶⁷ The North Carolina statute that provides the limited attorney-client privilege specifically allows the governmental body to waive the

61. *Massachusetts Mut. Life Ins. Co. v. Board of Trustees*, 178 Mich. 193, 144 N.W. 538 (1913).

62. *Jessup v. Superior Court*, 151 Cal. App. 2d 102, 311 P.2d 177 (1957); *Minneapolis Star & Tribune Co. v. State*, 282 Minn. 86, 163 N.W.2d 46 (1968).

63. *See Pyramid Life Ins. Co. v. Masonic Hosp. Ass'n*, 191 F. Supp. 51 (W.D. Okla. 1961).

64. N.C. GEN. STAT. § 132-1.1 (Cum. Supp. 1975).

65. C. McCORMICK, *HANDBOOK ON THE LAW OF EVIDENCE* § 89, at 182-83 (2d ed. E. Cleary 1972).

66. *People ex rel. Brownell v. Higgins*, 96 Misc. 485, 160 N.Y.S. 721 (Sup. Ct. 1916).

67. *See, e.g., Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).

privilege.⁶⁸ If the privilege exists for the benefit of the agency or board, disclosure to a member of the public should be sufficient to constitute waiver.⁶⁹

3. The Effects of Exemptions

Sometimes a particular record appears to fit within one of the exemptions, but the courts nevertheless may be willing to find that the public interest requires disclosure, even when the exemption is provided by statute. In such a situation, a person's need for inspection of the record may be an important factor. Although personal need for records is not of primary importance in evaluating the public interest, private concerns are often construed to coincide with legitimate public interests.⁷⁰

If a public record is not exempt from public inspection, the law requires that it be made available to any person requesting an inspection.⁷¹ On the other hand, it is possible that public officials might want to disclose to the public a record that fits within one of the exemptions. In a few situations, confidentiality has been required, and the custodian has been held to have no authority to permit public inspection. A privilege such as doctor-patient may not be waived by a public agency;⁷² statutory language sometimes indicates that public inspection of a particular record must not be permitted;⁷³ and one court has indicated that confidentiality is mandatory if disclosure would violate a person's constitutional right of privacy.⁷⁴ With these exceptions, the exemptions

68. N.C. GEN. STAT. § 132-1.1 (Cum. Supp. 1975).

69. *Coldwell v. Board of Pub. Works*, 187 Cal. 510, 202 P. 879 (1921).

70. For example, a farmworker who developed certain adverse reactions to pesticides used in the fields needed to inspect reports submitted by commercial pest control applicators to the county agricultural commissioner in order to gain effective medical treatment. Finding that the public interest in the health and welfare of citizens is compatible with an individual's interest in gaining access to records needed to obtain effective medical treatment, the court expressed its willingness to allow strong considerations of public policy to override the express exemptions provided by statute. *Uribe v. Howie*, 19 Cal. App. 3d 194, 96 Cal. Rptr. 493 (1971). Another court held that although a particular tax record was not normally open to public inspection, access must be allowed to assist petitioner in an administrative appeal. *Tagliabue v. North Bergen Township*, 9 N.J. 32, 86 A.2d 773 (1952).

71. See text accompanying notes 78-83 *infra*.

72. The doctor-patient privilege exists for the patient's benefit, and disclosure of such records should require the patient's permission. *Pyramid Life Ins. Co. v. Masonic Hosp. Ass'n*, 191 F. Supp. 51 (W.D. Okla. 1961).

73. *E.g.*, N.C. GEN. STAT. § 105-296(h) (Cum. Supp. 1975) (tax supervisors prohibited from disclosing financial information submitted by business enterprises except that which is necessary to list or appraise property).

74. *People ex rel. Better Broadcasting Council, Inc. v. Keane*, 17 Ill. App. 3d 1090, 309 N.E.2d 362 (1973).

provided by statute or the common law do not require that the records be withheld, and the agency may, in its discretion, disclose such records to the public.⁷⁵

The equal protection clause of the United States Constitution generally prohibits discrimination in granting access to public records. Once the custodian has permitted a particular record to be inspected by a member of the public, he may not later claim that the record is exempt from public inspection. Selective disclosure is permissible, however, when there is a rational basis for such action. For example, it may be permissible for a public agency that maintains records on individuals to permit only the subject to inspect his records. It is clear, however, that equal rights of inspection must be granted to all persons similarly situated.⁷⁶

Finally, it should be remembered that records exempt from general public inspection may nevertheless be available through discovery for use in litigation. The standards for discovery of public records differ from the standards for public inspection, and exemptions from general public inspection, whether by statute or under the common law, have no direct impact upon a discovery order.⁷⁷

C. *Who May Inspect Public Records?*

At common law, a person or his agent⁷⁸ had a right to inspect a particular public record only if he had a legal interest in the document.⁷⁹ The interest, however, did not have to be private—it was enough if inspection would enhance or promote some legitimate public interest. The application of such an interest requirement often became confusing, even meaningless, because almost any citizen or taxpayer

75. *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).

76. *Quad-City Community News Serv., Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971). See also *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).

77. *Fears v. Burris Mfg. Co.*, 48 F.R.D. 91 (N.D. Miss. 1969); *Nunziata v. Police Dep't*, 73 Misc. 2d 29, 341 N.Y.S.2d 22 (Sup. Ct. 1973).

78. *State ex rel. Hansen v. Schall*, 126 Conn. 536, 12 A.2d 767 (1940); *People ex rel. Busby v. Smith*, 342 Ill. App. 448, 96 N.E.2d 830 (1951); *Pressman v. Elgin*, 187 Md. 446, 50 A.2d 560 (1947).

79. *Brewer v. Watson*, 71 Ala. 299 (1882); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332 (1879); *State v. Harrison*, 130 W. Va. 246, 43 S.E.2d 214 (1947). See also *Newton v. Fisher*, 98 N.C. 20, 3 S.E. 822 (1887).

Courts have disagreed as to the origin of the interest requirement. Some courts have stated that the interest requirement was a direct limitation upon the right of inspection. *E.g.*, *Brewer v. Watson*, 71 Ala. 299 (1882). Others have found that the right

could assert some legitimate public interest to justify an inspection.⁸⁰ At least one court has concluded that the interest requirement is an unwarranted impediment to a common law right of inspection.⁸¹ The North Carolina statute has eliminated the difficulties caused by the common law interest requirement. In North Carolina, the right of inspection granted by the statute may be exercised by "any person,"⁸² and such language in other states has been taken to indicate clearly that the interest requirement has been eliminated.⁸³

D. Access to Public Records

The North Carolina statute provides that "[e]very person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person"⁸⁴ The custodian of public records⁸⁵ must comply with any request for inspection if the request is sufficiently definite to enable the records to be located.⁸⁶ Courts have identified certain positive elements that are necessary to provide an effective right of inspection. Adequate space must be provided for inspection,⁸⁷ and the custodian must permit public records to be inspected during office hours.⁸⁸ Members of the public must be allowed personally to examine the originals of public records where they are normally kept.⁸⁹ The right to

of inspection existed for the benefit of any person, but the remedy, mandamus, was only available to persons with an interest in the record. *E.g.*, *Colnon v. Orr*, 71 Cal. 43, 11 P. 814 (1886). One court compounded the confusion by adopting both rules concerning the origin of the interest requirement. *Courier-Journal & Louisville Times Co. v. Curtis*, 335 S.W.2d 934 (Ky. 1959).

80. *See, e.g.*, *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941); *Excise Comm'n v. State ex rel. Skinner*, 179 Ala. 654, 60 So. 812 (1912); *Courier-Journal & Louisville Times Co. v. Curtis*, 335 S.W.2d 934 (Ky. 1959); *State ex rel. Charleston Mail Ass'n v. Kelly*, 149 W. Va. 766, 143 S.E.2d 136 (1965).

81. *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974).

82. N.C. GEN. STAT. §§ 132-6, -9 (1974 & Cum. Supp. 1975).

83. *Direct Mail Serv., Inc. v. Registrar of Motor Vehicles*, 296 Mass. 353, 5 N.E.2d 545 (1937); *Orange County Public. Div. of Ottaway Newspapers-Radio, Inc. v. White*, 55 Misc. 2d 42, 284 N.Y.S.2d 293 (Sup. Ct. 1967); *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N.W. 30 (1887).

84. N.C. GEN. STAT. § 132-6 (1974).

85. The custodian is defined as "[t]he public official in charge of an office having public records." *Id.* § 132-2.

86. *See Rosenthal v. Hansen*, 34 Cal. App. 3d 754, 110 Cal. Rptr. 257 (1973); *Dunlea v. Goldmark*, 85 Misc. 2d 198, 380 N.Y.S.2d 496 (Sup. Ct. 1976).

87. *See Bruce v. Gregory*, 65 Cal. 2d 666, 423 P.2d 193, 56 Cal. Rptr. 265 (1967).

88. *See id.* *See also Sorley v. Lister*, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (Sup. Ct. 1961).

89. *Florence Morning News, Inc. v. Building Comm'n*, 265 S.C. 389, 396, 218 S.E.2d 881, 884 (1975).

inspect public records includes the right to make copies, either on a typewriter, by hand or by photography.⁹⁰

Courts often state that the right to inspect public records is an absolute right.⁹¹ A number of practical necessities, however, require that certain limitations be placed upon that right. The safety of the records must be assured and undue interference with official duties should be avoided. Requests for inspection must be reasonable and costs must sometimes be borne by the person inspecting the records. Establishing reasonable regulations regarding access to public records is a discretionary matter that depends upon the characteristics of the public offices involved;⁹² however, that discretion is limited. When regulations are made on an ad hoc basis, the chances for arbitrary and unreasonable limitations on the right of access are increased. Therefore, those regulations should be promulgated in advance, either by the governing board or by the custodian pursuant to policies established by the governing board, and the regulations should be made available to persons seeking access.⁹³ The discretionary power to establish such regulations must be exercised in a manner consistent with the public's right to inspect public records. The right of access is considered an important right in a popular government, and any limitations upon that right are permissible only to the extent necessary to protect the records and to prevent undue interference with official duties.⁹⁴

1. Protection of Public Records

The general rule requires that members of the public be allowed personally to inspect originals of public records where they are normally kept. The right to inspect originals exists even if the facts contained in the record have been published and made available to the public.⁹⁵ Although this rule must be followed as closely as possible, the duty of the custodian to care for the public records in his office⁹⁶ and to super-

90. See, e.g., *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 181 N.E.2d 376 (1962); *Matte v. City of Winooski*, 129 Vt. 61, 271 A.2d 830 (1970).

91. See, e.g., *Pressman v. Elgin*, 187 Md. 446, 50 A.2d 560 (1947).

92. *Upton v. Catlin*, 17 Colo. 546, 31 P. 172 (1892); *Sorley v. Lister*, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (Sup. Ct. 1961).

93. See *City of Philadelphia v. Ruczynski*, 24 Pa. D. & C.2d 478 (C.P. 1961).

94. See generally *Whorton v. Gaspard*, 239 Ark. 715, 393 S.W.2d 773 (1965); *Marsh v. Sanders*, 110 La. 726, 34 So. 752 (1903); *Direct Mail Serv., Inc. v. Registrar of Motor Vehicles*, 296 Mass. 353, 5 N.E.2d 545 (1937).

95. *Cable v. Brown*, 323 So. 2d 217 (La. Ct. App. 1975).

96. See N.C. GEN. STAT. § 132-7 (1974).

wise public inspection⁹⁷ clearly indicates that certain necessary precautions can serve as limitations upon the rule. For example, if there is a substantial threat to the security of a particular record, the custodian can make copies of the record available to members of the public in a safe location. Such a denial of access to the originals will be upheld only when the security problems are clearly shown to be substantial.⁹⁸

Concerns for the safety of public records can also justify limited curtailment of access to the original records, particularly when the records are stored in files. A rule providing that a person desiring access to certain files must choose the files he wants to inspect from a list of all the files in the office has been upheld as a proper method of protecting files that are easily lost or misplaced.⁹⁹ In rare situations, concern for the safety of records can justify a total denial of access. For example, one state court found that although the ballots cast in an election appeared to fit the definition of public records, inspection by members of the public would endanger the safety of the ballots and perhaps make them inadmissible in an election contest. A complete denial of access was held to be proper, at least until after the time allowed for challenges had passed.¹⁰⁰

The custodian is also required to provide adequate space for inspection of public records.¹⁰¹ The space that will be adequate depends on the size of the office and the number of requests for inspection. In a large office that receives many requests for inspection, it may be necessary to provide a special area devoted exclusively to inspection of public records. On the other hand, in an office that receives few, if any, requests for inspection, it should be enough to provide an unoccupied chair along with a table or desk when the need arises. In providing space for inspection, the custodian must remain aware of his duty to supervise the inspection. Although a particular situation might justify removal of the records to another office for purposes of inspection, adequate supervision is normally facilitated by requiring that inspection be conducted in the office or area where the records are normally kept.¹⁰²

97. *See id.* § 132-6.

98. *Florence Morning News, Inc. v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975).

99. *Gorton v. Dow*, 54 Misc. 2d 509, 282 N.Y.S.2d 841 (Sup. Ct. 1967).

100. *State ex rel. Roussel v. St. John the Baptist Parish School Bd.*, 135 So. 2d 665 (La. Ct. App. 1961); *cf. People ex rel. Sherman v. Slater*, 42 Ill. App. 3d 396, 355 N.E.2d 735 (1976) (production of voter affidavits allowed).

101. *See Bruce v. Gregory*, 65 Cal. 2d 666, 423 P.2d 193, 56 Cal. Rptr. 265 (1967).

102. *See Sorley v. Lister*, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (Sup. Ct. 1961).

2. Minimizing Disruption of Public Offices

In addition to the concern for protection of public records, a number of administrative considerations affect the right of access. The general rule is that access should be allowed during all business hours.¹⁰³ However, in one case involving an office that was open from 8 a.m. until 5 p.m., the reviewing court found no substantial denial of access when the records were made available only between the hours of 8:30 a.m. and 4:30 p.m.¹⁰⁴ It is also proper to deny access during hours in which the sole custodian of the records is required to be out of the office.¹⁰⁵

Access may be limited whenever necessary to prevent undue interference with agency functioning. While the agency's use of public records must normally take priority over the use of those records by members of the public, the custodian's duty to permit access is no less important than other official duties.¹⁰⁶ Therefore, it is not permissible to deny access because of mere inconvenience or because the custodian has too much other work to do.¹⁰⁷

Problems with agency functioning may arise when records are needed by agency employees or when public demand for inspection is substantial; however, any limits on access that are intended to prevent interference with the functioning of an agency are permissible only when those limits are strictly necessary to prevent direct interference with the work of the office.¹⁰⁸ A period of greater workload is not, in itself, a sufficient reason to deny or limit access.¹⁰⁹ While it is impossible to suggest specific rules that will be appropriate in every case, one court has clearly stated the conditions that must exist before access may be limited. The court held that inspection may be denied or restricted only if: (1) the records are needed by officials or employees in the course of their work; (2) the adequate office space provided for public inspection is in use by other members of the public at that time; (3) there is valid reason to fear defacement or other damage to the records, and supervision is, at that moment, impossible; or (4) the

103. *Id.*

104. *Bruce v. Gregory*, 65 Cal. 2d 666, 423 P.2d 193, 56 Cal. Rptr. 265 (1967).

105. *Upton v. Catlin*, 17 Colo. 546, 31 P. 172 (1892).

106. *State ex rel. Research Institute v. Nix*, 195 Okla. 176, 155 P.2d 983 (1944).

107. *Weinstein v. Rosenbloom*, 59 Ill. 2d 475, 322 N.E.2d 20 (1974); *State ex rel. Research Inst. v. Nix*, 195 Okla. 176, 155 P.2d 983 (1944).

108. *Bruce v. Gregory*, 65 Cal. 2d 666, 678, 423 P.2d 193, 201, 56 Cal. Rptr. 265, 273 (1967).

109. *Id.*

person inspecting the records is monopolizing them to the detriment of other members of the public.¹¹⁰

The extent to which access may be limited requires a knowledge of factors unique to each office and each group of records. For example, substantial problems arose when 700 to 800 daily requests were made for information contained in an eleven-volume record.¹¹¹ The custodian established rules providing that any individual's inspection was limited to one hour per day; the inspection was further limited to those matters in which the individual had an interest; and a request for a general personal inspection was denied. The limitations were upheld because they were shown to be necessary in view of the limited facilities and the number of requests for inspection by members of the public.¹¹² In another case, the use of a card index system required knowledge of a code. Although the public would normally have a right to inspect the index personally, a rule permitting the use of the index only under the supervision of the custodian's employees was upheld in a unique situation where that was the most efficient method of granting access.¹¹³

Although courts generally try to maximize the right of access, problems can arise when exceptionally large requests for information are made. Courts have therefore concluded that the right of access is limited by the rule of reasonableness. An overly broad request for large numbers of records does not have to be honored if compliance would constitute an unreasonable burden upon the custodian of the records. For example, one court held that, in the absence of a central index in a large school system, the board of education did not have to search the records of over 800 schools to locate the addresses of two students.¹¹⁴

3. Making Copies of Public Records

The right of inspection and examination also includes the right to make copies of public records. The North Carolina access statute¹¹⁵

110. *Id.*

111. *In re Lord*, 167 N.Y. 398, 400, 60 N.E. 748, 749 (1901).

112. *Id.* at 401-02, 60 N.E. at 749.

113. *State ex rel. Louisville Title Ins. Co. v. Brewer*, 147 Ohio St. 161, 70 N.E.2d 265 (1946) (per curiam). The evidence showed that the rule was not imposed until the custodian's work had been unreasonably hindered by the public's use of the index. *Id.* at 163-64, 70 N.E.2d at 266.

114. *Marquesano v. Board of Educ.*, 19 Misc. 2d 136, 191 N.Y.S.2d 713 (Sup. Ct. 1959).

115. N.C. GEN. STAT. § 132-6 (1974).

does not mention copying by the public, but the remedies section provides a remedy when a person has been denied access to public records for the purpose of "inspection, examination or copying."¹¹⁶ Even in the absence of specific language permitting copying, it has uniformly been held that the right of inspection and examination includes, as a necessary complement, the right to make copies.¹¹⁷

At one time, members of the public had to make all their copies by hand or on a typewriter. Modern cases have held that photography and photocopying are also proper methods.¹¹⁸ When public records are stored in computers the right of inspection includes the right to have copies of computer tapes.¹¹⁹ Concern for the safety of public records, however, has led to certain limitations upon the right to make copies. In making photocopies, members of the public have no absolute right to use their own machines. The custodian has the option of making the copies on his machine.¹²⁰

Considerations of safety should also lead to the conclusion that members of the public have no right to make their own copies of magnetic tapes, whether they are computer tapes or voice recordings. The custodian is generally obligated to provide copies of magnetic tapes upon request, particularly when duplicate copies are kept available to replace lost or damaged originals.¹²¹ One court has held, however, that if transcripts of a magnetic voice recording had already been made available to the public, the possibility of damage to the original justified a refusal to allow it to be duplicated.¹²² Courts have also concluded that the right to make copies is limited by the rule of reasonableness. An agency's refusal to comply with a request for copies of documents amounting to over 80,000 pages has been upheld, the court noting that the public records statute was not intended to put state agencies into the printing business.¹²³

116. *Id.* § 132-9 (Cum. Supp. 1975).

117. *E.g.*, *Fuller v. State ex rel. O'Donnell*, 154 Fla. 368, 17 So. 2d 607 (1944); *Marsh v. Sanders*, 110 La. 726, 34 So. 752 (1903).

118. *E.g.*, *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 181 N.E.2d 376 (1962); *Logan v. Mississippi Abstract Co.*, 190 Miss. 479, 200 So. 716 (1941); *Tobin v. Knags*, 107 S.W.2d 677 (Tex. Ct. App. 1937).

119. *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973).

120. *Moore v. Board of Chosen Freeholders*, 39 N.J. 26, 186 A.2d 676 (1962); *Matte v. City of Winooski*, 129 Vt. 61, 271 A.2d 830 (1970).

121. *Ortiz v. Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971).

122. *Guarriello v. Benson*, 90 N.J. Super. 233, 217 A.2d 22 (Super. Ct. Law Div. 1966).

123. *Rosenthal v. Hansen*, 34 Cal. App. 3d 754, 110 Cal. Rptr. 257 (1973).

4. Fees for Inspection

Some cases in the late 1800's approved the practice of charging fees for use of public records, particularly when persons were making abstracts of records relating to land. Those decisions were reached because the custodian's pay consisted solely of the fees that he collected. When the custodian's position became salaried, he was no longer allowed to charge a fee for inspection of the records.¹²⁴ Other courts have refused to allow fees to be charged for inspection, even when the custodian depended upon fees for his pay.¹²⁵

The modern rule is that no fee for inspection can be charged when the custodian performs no services beyond locating and retrieving the records.¹²⁶ This principle applies even though the information acquired from the records may be sold for private gain.¹²⁷ Fees may be permissible when extraordinary services are rendered. For example, a rule requiring examiners to pay guards a fee for supervising extensive examination of public records has been approved.¹²⁸ Courts have disagreed as to whether a fee may be imposed for continuous use of office space in conducting examinations.¹²⁹

5. Fees for Copies of Public Records

While free access to public records must normally be allowed, fees can often be charged for making copies of public records; however, fees may be imposed only when the custodian makes the copies. When members of the public make their own copies, whether by hand, by typewriter or with their own copying machines, no fee for copies may be imposed.¹³⁰ When the custodian furnishes certified copies of public records, the North Carolina statute provides for the payment of legally prescribed fees;¹³¹ however, no statute of general applicability sets fees for certified copies.¹³² Using the fee schedule of registers

124. Compare *Buck & Spencer v. Collins*, 51 Ga. 391 (1874), with *Atlanta Title & Trust Co. v. Tidwell*, 173 Ga. 499, 160 S.E. 620 (1931).

125. E.g., *Bell v. Commonwealth Title Ins. & Trust Co.*, 189 U.S. 131 (1903).

126. *State ex rel. Davis v. McMillan*, 49 Fla. 243, 38 So. 666 (1905); *State ex rel. Patterson v. Ayers*, 171 Ohio St. 368, 171 N.E.2d 508 (1960).

127. *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889), *enforced*, 80 Mich. 218, 45 N.W. 88 (1890).

128. *State ex rel. Higgins v. Lockwood*, 74 N.J.L. 158, 64 A. 184 (1906).

129. A fee for extensive use of office space was permitted in *Burton v. Reynolds*, 102 Mich. 55, 60 N.W. 452 (1894) (per curiam). *Contra*, *Atlanta Title & Trust Co. v. Tidwell*, 173 Ga. 499, 160 S.E. 620 (1931).

130. *Whorton v. Gaspard*, 239 Ark. 715, 393 S.W.2d 773 (1965).

131. N.C. GEN. STAT. § 132-6 (1974).

132. Fees to be charged by the Secretary of State are provided by *id.* § 147-37.

of deeds as a guide,¹³³ one dollar is probably a legitimate amount to charge for most certified copies.

A fee may also be charged when the custodian furnishes uncertified copies of public records, whether the record is a simple document¹³⁴ or a computer tape.¹³⁵ Again, using the North Carolina fee schedule of registers of deeds as a guide, the fee should "bear a reasonable relation to the quality of copies supplied and the cost of purchasing and maintaining copying equipment."¹³⁶ This standard allows recovery of the actual costs of reproduction. The standard, however, refers only to the equipment costs and the quality of copies, indicating that there should be no recovery of the cost of labor incurred in making the copies.¹³⁷

E. Remedies

An action to compel disclosure of public records may be brought only after the custodian has either denied access or applied regulations that unreasonably hinder or delay access.¹³⁸ The complaint should be directed to a specific, named officer,¹³⁹ and it should clearly describe the materials that are alleged to be public records.¹⁴⁰ The complaint should also allege that the request for access was made during regular office hours.¹⁴¹

The traditional form of relief for wrongful denial of access to public records has been a writ of mandamus.¹⁴² The North Carolina statute authorizes the court to issue "an order compelling disclosure."¹⁴³ Although the North Carolina statute does not allocate the burden of proof, the general rule is that once the person seeking inspection has

133. *Id.* § 161-10(9) (1976).

134. *Sorley v. Lister*, 33 Misc. 2d 471, 218 N.Y.S.2d 215 (Sup. Ct. 1961).

135. *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973).

136. N.C. GEN. STAT. § 161-10(11) (1976).

137. *See Moore v. Board of Chosen Freeholders*, 39 N.J. 26, 186 A.2d 676 (1962).

138. *Gorton v. Dow*, 54 Misc. 2d 509, 282 N.Y.S.2d 841 (Sup. Ct. 1967).

139. *District of Columbia v. Bakersmith*, 18 App. D.C. 574 (1901). Due process requires that the custodian be given notice of an action to compel disclosure of records. *State ex rel. Ely v. Allen Circuit Court*, 261 Ind. 419, 304 N.E.2d 777 (1973). A person other than the usual custodian may be a proper defendant if that person has the authority to permit inspection. *Carter v. Fench*, 322 So. 2d 305 (La. Ct. App. 1975).

140. *District of Columbia v. Bakersmith*, 18 App. D.C. 574 (1901).

141. *State v. Egan*, 159 La. 199, 105 So. 288 (1925).

142. *E.g.*, *Egan v. Board of Water Supply*, 205 N.Y. 147, 98 N.E. 467 (1912).

143. N.C. GEN. STAT. § 132-9 (Cum. Supp. 1975).

made the necessary prima facie allegations,¹⁴⁴ the burden of proof is on the officer or agency to justify the denial of access.¹⁴⁵ If a particular record is found to be open to public inspection, the prevailing modern view is that the court must compel disclosure without regard to the person's intended use of the records.¹⁴⁶ Generally, however, courts retain a degree of equitable discretion and will deny access if inspection is sought for unlawful purposes.¹⁴⁷

III. A MORE EFFECTIVE PUBLIC RECORDS ACT

Despite the importance of the right to inspect public records, the North Carolina statute adds little to the common law right of inspection. While the statute defines public records broadly¹⁴⁸ and grants the right of inspection to any person,¹⁴⁹ it leaves to the courts the task of defining exemptions and it fails to adequately encourage compliance. Any public records statute places certain duties upon government employees; such a statute will be administered more effectively if those duties

144. See *Yarish v. Nelson*, 27 Cal. App. 3d 893, 903, 104 Cal. Rptr. 205, 213 (1972).

145. E.g., *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974); *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961). See also *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967).

146. *Direct Mail Serv., Inc. v. Registrar of Motor Vehicles*, 296 Mass. 353, 5 N.E.2d 545 (1937); *People ex rel. Brownell v. Higgins*, 96 Misc. 485, 160 N.Y.S. 721 (Sup. Ct. 1916).

Vestiges of the common law requirement of an interest in the record have led some courts to state that access must be permitted only if inspection will serve a rather nebulous "useful purpose." E.g., *Pressman v. Elgin*, 187 Md. 446, 451-52, 50 A.2d 560, 563-64 (1947). Other courts have rejected such a requirement, holding that the right of inspection "may be exercised out of idle curiosity." *Butcher v. Civil Serv. Comm'n*, 163 Pa. Super. Ct. 343, 345, 61 A.2d 367, 368 (1948). See also *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1960).

147. Courts have stated that access may be denied if the records are to be used for the following purposes: to further an illegal conspiracy restraining trade, *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768 (E.D. Pa. 1957); to make copies that are to be used to impair a common law copyright, *Edgar H. Wood Assocs., Inc. v. Skene*, 347 Mass. 351, 363, 197 N.E.2d 886, 894 (1964); or to intimidate or harass, *State ex rel. Daily Gazette Co. v. Bailey*, 152 W. Va. 521, 164 S.E.2d 414 (1968). If the custodian contends that the purpose of inspection is harassment, there must be actual evidence of bad faith to justify the denial of access. *Welt v. Board of Educ.*, 68 Misc. 2d 1061, 328 N.Y.S.2d 930 (Sup. Ct. 1972); see *State ex rel. Hansen v. Schall*, 126 Conn. 536, 12 A.2d 767 (1940); *Casey v. MacPhail*, 2 N.J. Super. 619, 65 A.2d 657 (Super. Ct. Law Div. 1949); *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1960). But see *Moberly v. Herboldsheimer*, 276 Md. 211, 227-28, 345 A.2d 855, 864 (1975) ("invidious or improper motives" would not affect a person's right to inspect public records). See also *Industrial Foundation of the South v. Texas Indus. Accid. Bd.*, 540 S.W.2d 668, 674-75 (Tex. 1976).

148. N.C. GEN. STAT. § 132-1 (Cum. Supp. 1975); see text accompanying notes 25-28 *supra*.

149. *Id.* §§ 132-6, -9 (1974 & Cum. Supp. 1975).

are clearly and explicitly defined by the terms of the statute itself. In addition, the right of inspection benefits the public generally, and a clear, explicit statute would make it easier for members of the public to become aware of and to exercise their rights under the statute. Finally, traditional remedies can be expanded or modified to discourage delays caused by agency inaction. Suggestions for correcting some of the weaknesses and deficiencies of the current North Carolina statute are considered by way of the examination and evaluation of a proposed model statute as well as the public records statutes of other jurisdictions.¹⁵⁰

PROPOSED NORTH CAROLINA PUBLIC RECORDS ACT¹⁵¹
WITH COMMENTARY

Section 1: Declaration of Policy

The legislature, mindful of the right of individuals to privacy, finds and declares that access to full and complete information regarding the conduct of government and the official acts of public officials and employees is a fundamental and necessary right of every person. To that end, the provisions of this Act shall be liberally construed.

Comment on Section 1

The general purposes of a public records statute are to encourage informed participation in government, insure governmental accountability and increase public confidence in the political system.¹⁵² The policy of such an act should be to require disclosure of all public records unless substantial reasons exist to require confidentiality. However, conflicting interests are involved—the public's right to know must be balanced against the need for individual privacy and the state's need to maintain the confidentiality of certain matters.¹⁵³ This statute at

150. For evaluations of the federal Freedom of Information Act, see Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970); Note, *The Freedom of Information Act: A Seven-Year Assessment*, 74 COLUM. L. REV. 895 (1974).

151. This proposed act does not address questions relating to preservation and destruction of public records. It assumes that the current statutory provisions regulating preservation and destruction will be retained. See N.C. GEN. STAT. §§ 132-1 to -9 (1974 & Cum. Supp. 1975).

152. Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1164 (1975).

153. See Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 SW. L.J. 431, 434-38 (1975).

tempts to provide a degree of flexibility to deal effectively with the competing interests that may arise, and this declaration of policy should serve as a guide to the interpretation and application of its provisions.¹⁵⁴

Section 2: Short Title

This Act shall be known as the North Carolina Public Records Act.

Section 3: Definitions

For the purposes of construing this Act, unless the context requires otherwise:

(1) "Agency" means any agency of North Carolina government or its subdivisions, including every public office, public officer or official (state or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

(2) "Custodian" means the public official in charge of an office having public records or any authorized person having personal custody or control of public records.

(3) "Person in interest" means the person who is the subject of a record or any representative designated by said person, except that if the subject of the record is under legal disability, "person in interest" shall mean his parent or duly appointed legal representative.

(4) "Public record" means any writing prepared, owned, used or retained by any agency in pursuance of law or in connection with the transaction of public business. "Writings" means all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts or other documentary material, regardless of physical form or characteristics.

Comment on Section 3

In order to provide the maximum right of inspection, the definition of public records should be broad enough to include all records

154. For statements of policy in other public records statutes, *see, e.g.*, CAL. GOV'T CODE § 6250 (West Cum. Supp. 1977); COLO. REV. STAT. § 24-72-201 (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Vernon Cum. Supp. 1976-77). The Texas act also requires its provisions to be liberally construed to provide the maximum rights of inspection. *Id.* § 14(d).

made or received in the transaction of public business.¹⁵⁵ No good reasons exist to limit arbitrarily the definition to records required by law to be made or received. Many important records are maintained by public agencies, not because of a legal requirement but rather because of convenience and good office practices. Inspection of the records of public agencies should be denied only when policy analysis has led to a clear, specific exemption for a particular record or class of records.¹⁵⁶

Section 4: Exemptions

(a) The following records are exempt from the disclosure requirements of Section 7 of this Act:

(1) Records that are specifically exempted from disclosure by a federal statute or regulation, or by a state statute;

(2) Investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures or (F) endanger the life or physical safety of law enforcement personnel;

(3) Test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination;

(4) Communications within an agency or between agencies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public interest in encouraging frank communication between officials

155. For examples of broad definitions of public records, see 5 U.S.C. §§ 552(a) (1)-(2) (1970 & Supp. V 1975); CAL. GOV'T CODE § 6252(d) (West Cum. Supp. 1977). See also Project, *supra* note 152, at 1168-70.

156. An example of a narrow definition that obscures the real policy elements is the rule that preliminary or tentative matters are not open for inspection until they reach some final form. *People ex rel. Better Broadcasting Council, Inc. v. Keane*, 17 Ill. App. 3d 1090, 309 N.E.2d 362 (1973); *Linder v. Eckard*, 261 Iowa 216, 152 N.W.2d 833 (1967); *Sanchez v. Board of Regents*, 82 N.M. 672, 486 P.2d 608 (1971). It would seem more accurate to acknowledge that preliminary matters are indeed public records, and then proceed to a policy analysis to determine whether the particular record should remain confidential until the transaction is completed. See *Conover v. Board of Educ.*, 1 Utah 2d 375, 267 P.2d 768 (1954).

and employees of agencies clearly outweighs the public interest in disclosure;

(5) Information submitted to an agency in confidence, when such information should reasonably be considered confidential and the agency has obliged itself in good faith not to disclose the information and the public interest would suffer by the disclosure;

(6) The contents of real estate appraisals, made by or for any agency relative to the acquisition or sale of property, until the project or prospective sale is abandoned, until all of the property has been acquired or until the property to which the appraisal relates is sold. In no event, however, shall disclosure be denied more than three years after the appraisal;

(7) Library and museum material contributed by private persons, to the extent of any limitations placed thereon as conditions of such contributions.

(b) The following records are exempt from the disclosure requirements of Section 7 of this chapter, except that any of the following records shall be made available to the person in interest:

(1) Medical, psychological and similar files the disclosure of which would constitute an unwarranted invasion of personal privacy;

(2) Trade secrets, privileged information and confidential commercial information.

Comment on Section 4

One of the most serious weaknesses of the current North Carolina statute is its almost total failure to specify any exemptions.¹⁵⁷ The North Carolina courts can be expected to use their own judgment together with common law principles to create exemptions when none exist in the current statute, but legislative guidance in making such policy decisions would be helpful to all persons affected by the statute. If the statute contained specific, narrowly-drawn exemptions, members of the public could more easily understand their rights, the duties of public officials would be more clearly defined and the courts would have less difficulty in applying the policies of the act to a specific record. Exemptions should be carefully and narrowly drawn, however,

157. The only exemption mentioned in the statute is a limited exemption for communications made by an attorney to a governmental client. N.C. GEN. STAT. § 132-1.1 (Cum. Supp. 1975); see text accompanying notes 64-69 *supra*. A number of other statutes, however, contain provisions that determine the status of various types of records; see statutes cited in note 44 *supra*.

to prevent them from becoming giant loopholes that can be manipulated by the agencies.¹⁵⁸

The exemptions listed in the above model statute are not intended to be exhaustive. They are merely intended to illustrate to the reader exemptions that the legislature might create. Although various statutes from other jurisdictions contain different exemptions, a number of common policies can be found underlying most of those exemptions.¹⁵⁹ Specific exemptions from disclosure requirements have been created: (1) disclosure prohibited by state or federal statute;¹⁶⁰ (2) to protect agency deliberative processes;¹⁶¹ (3) to protect confidential sources of information;¹⁶² (4) to protect the confidentiality of certain law enforcement records;¹⁶³ (5) to protect public and state interests, financial¹⁶⁴ and otherwise;¹⁶⁵ (6) to protect generally against invasions of personal privacy;¹⁶⁶ (7) to maintain the confidentiality of privileged records;¹⁶⁷ and (8) to protect confidential commercial data and trade secrets.¹⁶⁸

158. See Nader, *supra* note 150.

159. Project, *supra* note 152, at 1172-74; Comment, *The California Public Records Act: The Public's Right of Access to Governmental Information*, 7 PAC. L.J. 105, 109-10 (1976). See also *Republican Party v. State ex rel. Hall*, 240 Ark. 545, 548, 400 S.W.2d 660, 662 (1966); *Gold v. McDermott*, 32 Conn. Supp. 583, 347 A.2d 643, 647 (Super. Ct. 1975).

160. *E.g.*, 5 U.S.C. § 552(b)(3) (1970).

161. *E.g.*, *id.* § 552(b)(5); OR. REV. STAT. § 192.500(2)(a) (1975); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(11) (Vernon Cum. Supp. 1976-77); WASH. REV. CODE ANN. § 42.17.310(i) (Supp. 1975).

162. *E.g.*, OR. REV. STAT. § 192.500(2)(c) (1975); WASH. REV. CODE ANN. § 42.17.310(1)(e) (Supp. 1975).

163. *E.g.*, 5 U.S.C. § 552(b)(7) (Supp. V 1975); COLO. REV. STAT. § 24-72-204(2)(a)(I) (1973); OR. REV. STAT. § 192.500(1)(c), (2)(d) (1975); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(8) (Vernon Cum. Supp. 1976-77); WASH. REV. CODE ANN. § 42.17.310(1)(d) (Supp. 1975).

164. *E.g.*, 5 U.S.C. § 552(b)(8) (1970); CAL. GOV'T CODE § 6254(h) (West Cum. Supp. 1977); COLO. REV. STAT. § 24-72-204(2)(a)(IV) (1973); OR. REV. STAT. §§ 192.500(1)(e), (f) (1975); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(4), (5), (12) (Vernon Cum. Supp. 1976-77); WASH. REV. CODE ANN. § 42.17.310(1)(g) (Supp. 1975).

165. *E.g.*, 5 U.S.C. § 552(b)(2) (1970); CAL. GOV'T CODE § 6254(g) (West Cum. Supp. 1977); COLO. REV. STAT. § 24-72-204(2)(a)(II), (III) (1973); OR. REV. STAT. § 192.500(1)(d) (1975); WASH. REV. CODE ANN. § 42.17.310(1)(f) (Supp. 1975).

166. *E.g.*, 5 U.S.C. § 552(b)(6), (7) (1970 & Supp. V 1975); COLO. REV. STAT. § 24-72-204(3)(a)(II) (1973); OR. REV. STAT. § 192.500(2)(b) (1975); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(2), (9), (14) (Vernon Cum. Supp. 1976-77); WASH. REV. CODE ANN. § 42.17.310(1)(a)-(d) (Supp. 1975).

167. *E.g.*, CAL. GOV'T CODE § 6254(k) (West Cum. Supp. 1977); OR. REV. STAT. § 192.500(2)(h) (1975); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(3) (Vernon Cum. Supp. 1976-77); WASH. REV. CODE ANN. § 42.17.310(1)(j) (Supp. 1975).

168. *E.g.*, 5 U.S.C. § 552(b)(4) (1970); CAL. GOV'T CODE § 6254.7(d) (West Cum. Supp. 1977); OR. REV. STAT. § 192.500(1)(b), (e) (1975); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(10) (Vernon Cum. Supp. 1976-77).

Section 5: Effects of Exemptions

(a) The custodian may permit inspection or copying of any specific records exempt under the provisions of Section 4 of this Act if the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.

(b) The custodian may deny examination of a public record not exempt by Section 4 of this Act if, on the facts of the particular case, such examination would clearly not be in the public interest and would substantially and irreparably damage any person or would substantially and irreparably damage vital governmental functions.

(c) An agency may voluntarily make part or all of its records available to the public if: (1) examination is not expressly prohibited by law; (2) the records are then made available to any person; and (3) the agency takes proper precautions to protect against unwarranted invasions of personal privacy.

Comment on Section 5

In establishing exemptions, it is important to consider whether they should be construed as absolute or conditional. The common law gives courts some flexibility in finding exemptions by virtue of the judicially created public interest standard used in determining which records are exempt from public inspection.¹⁶⁹ On the other hand, the exemptions provided in the federal Freedom of Information Act are exhaustive, and the courts have no equitable discretion under that act to allow records to be withheld unless they fall within one of the statutory exemptions.¹⁷⁰

This model statute is patterned after state acts that have taken intermediate positions. Those state acts contain specific exemptions, but they also permit the courts to find additional exemptions by using variations of the public interest standard.¹⁷¹ Conversely, some state acts do

169. See text accompanying notes 47-49 *supra*.

170. *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971).

171. *E.g.*, CAL. GOV'T CODE § 6255 (West Cum. Supp. 1977); WASH. REV. CODE ANN. § 42.17.330 (Supp. 1975). The Colorado act contains a unique provision directing the custodian to apply for a court order authorizing disclosure restrictions if the custodian believes that public inspection of the record would do "substantial injury" to the public interest. COLO. REV. STAT. § 24-72-204(6) (1973). As a practical matter, it appears difficult to enforce the requirement that the custodian seek a court order. Perhaps the custodian's failure to apply for such an order would influence a judge's decision to award court costs and attorney's fees to the party seeking disclosure as provided by *id.* § 24-72-204(5).

not consider the specific exemptions conclusive—although a record fits a statutory exemption, inspection by the public must nevertheless be permitted.¹⁷² Such provisions indicate that the exemptions are not only intended to provide clear guidance to public officers and the courts in responding to requests for inspection, but also to retain a degree of flexibility in order to avoid unreasonable results in exceptional cases.

An effective public records statute should also indicate whether its exemptions are mandatory. The traditional rule is that statutory or common law exemptions are not mandatory, and the custodian has the discretion to open a record to public inspection unless expressly prohibited by statute.¹⁷³ It is often important, however, that information remain confidential, particularly when privacy interests are involved. Therefore, this model statute specifies that nondisclosure is mandatory when required by privacy considerations.¹⁷⁴

Once a decision has been made to withhold a particular record from public inspection, the general rule is that it may not be disclosed to a member of the public without disclosing it to any and all persons requesting an inspection.¹⁷⁵ When the government maintains information on individuals, however, it is often desirable to permit the subject to inspect the records pertaining to him while withholding those records from the public generally. Therefore, it is advisable to identify those records that only the subject should be able to inspect and to include

172. CAL. GOV'T CODE § 6254(a) (West Cum. Supp. 1977); OR. REV. STAT. § 192.500(1) (1975); WASH. REV. CODE ANN. § 42.17.310(3) (Supp. 1975).

173. Texas has incorporated this rule into its statute. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 14(a) (Vernon Cum. Supp. 1976-77).

174. Some North Carolina statutes contain provisions requiring that the confidentiality of various tax records be maintained. *E.g.*, N.C. GEN. STAT. §§ 105-259, -289(e), -296(h) (Cum. Supp. 1975).

Although the problems associated with "reverse freedom of information" suits are beyond the scope of this comment, those suits are becoming increasingly important in the federal courts and should not be ignored in providing protection for legitimate privacy interests. *See* Project, *supra* note 152, at 1221-1340; Comment, *Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 NW. U.L. REV. 995 (1976); Comment, *Public Access to Government-Held Computerized Information*, 68 NW. U.L. REV. 433 (1973); Note, *Protection From Government Disclosure—The Reverse-FOIA Suit*, 1976 DUKE L.J. 330; Note, *The Privacy Act of 1974: An Overview*, 1976 DUKE L.J. 301.

For some possible solutions to privacy problems posed by criminal justice information systems, see 28 C.F.R. § 20 (1976); Swan, *Privacy and Record Keeping: Remedies for the Misuse of Accurate Information*, 54 N.C.L. REV. 585, 594-602 (1976).

175. *See* text accompanying note 76 *supra*. *See also* COLO. REV. STAT. § 24-72-204 (2)(b) (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 14(a) (Vernon Cum. Supp. 1976-77).

in the statute a special section for subject access, as provided in section 4(b) of this model act.¹⁷⁶

Section 6: Deleting Confidential Information

(a) Agencies shall, whenever reasonably possible, avoid combining public records that must be open for inspection with public records that are exempt from public inspection.

(b) The exemptions of Section 4 of this Act are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. In each case the custodian shall fully explain in writing to the person seeking inspection the justification for the deletion.

(c) No exemption shall permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.

Comment on Section 6

The right of inspection can be unreasonably curtailed when public officials unnecessarily combine exempt and non-exempt materials.¹⁷⁷ Public officials should therefore be encouraged to follow record-keeping procedures that enhance, rather than limit, the public's right of inspection.¹⁷⁸

It is sometimes necessary to combine exempt and non-exempt materials; consequently, a statute should require the agency to edit the records in response to requests for inspection, deleting confidential information whenever possible.¹⁷⁹ Although editing can enhance the

176. See Privacy Act of 1974, 5 U.S.C. § 552a (Supp. V 1975); COLO. REV. STAT. § 24-72-204(3) (1973). North Carolina also has some statutes that provide special rights of inspection for the subjects of the records. *E.g.*, N.C. GEN. STAT. § 7A-287 (1969) (juvenile records); *id.* § 34-15 (veterans' records). See also H. TURNBULL & C. McALLASTER, *THE LAW AND THE MENTALLY HANDICAPPED IN NORTH CAROLINA*, 3-1 to 3-16 (1976).

177. Nader, *supra* note 150, at 9-10.

178. *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 739 (1941). In *Holcombe*, the Alabama Supreme Court required a sheriff to permit public inspection of certain prison records, even though the sheriff contended that the records contained some confidential information concerning persons indicted but not yet arrested. Implicit in the court's opinion was a finding that records of pre-arrest indictments should not be maintained by the sheriff on forms designed for prisoners and in books containing records that must be open to public inspection. *Id.* at 599, 200 So. at 748.

179. *E.g.*, 5 U.S.C. § 552(b) (Supp. V 1975); OR. REV. STAT. § 192.500(3) (1975); WASH. REV. CODE ANN. § 42.17.310(2) (Supp. 1975).

goals of a public records statute, it is a burdensome task that requires some knowledge of the law. It is also possible that, in deleting confidential portions of documents, either the deleted portions can be inferred from the balance or the deletions may reach the point that it would be meaningless to disclose the balance. Editing, therefore, should only be required: (1) upon documents that contain, for the most part, non-exempt material; (2) when segregation of exempt and non-exempt information is reasonably possible; and (3) when editing can be accomplished without destroying the confidentiality of exempt material.¹⁸⁰ It is also possible to delete certain identifying details¹⁸¹ and to release statistical information¹⁸² without disclosing the identities of the persons involved, thereby protecting their rights of privacy while permitting public access to valuable documents and statistical data.

Section 7: Inspection and Copying of Public Records

Every person has a right to inspect or copy any public record in this state, except as expressly provided by Sections 4 and 5 of this Act.

Comment on Section 7

The common law requirement that a person show some interest in a record before being allowed to inspect is generally disfavored.¹⁸³ Some states still retain a minimal standing requirement,¹⁸⁴ but the trend is to grant the right of inspection to any person without regard to interest in the record or other special considerations of standing. Since the right of inspection is intended to benefit the public generally, the better approach is to allow any member of the public to enforce that right. The only standing requirement remaining is that a person must actually be denied access to records before instituting judicial proceedings.¹⁸⁵

180. *Turner v. Reed*, 538 P.2d 373, 377 n.8 (Or. Ct. App. 1975); Comment, *supra* note 159, at 147-48.

181. *E.g.*, WASH. REV. CODE ANN. §§ 42.17.260(1), .310(2) (Supp. 1975).

182. *Id.* § 42.17.310(2).

183. *See* text accompanying notes 78-83 *supra*.

184. For example, Louisiana grants the right of access to taxpayers, electors or their agents. LA. REV. STAT. ANN. § 44:31 (West 1950). However, a Louisiana court has indicated that even a casual visitor to the state who has bought merchandise and paid the sales tax might be able to enforce the right of inspection. *State ex rel. Roussel v. St. John the Baptist Parish School Bd.*, 135 So. 2d 665 (La. Ct. App. 1961).

185. *But see* notes 70 & 176 *supra* (situations in which personal need might influence a decision to permit inspection and in which access might be allowed only if the subject of the record is seeking an inspection).

Section 8: Access to Public Records

(a) Availability of Public Records. Unless otherwise expressly provided by statute, the custodian of public records shall furnish proper and reasonable opportunities for inspection and examination of the records in his office and reasonable facilities for making memoranda or abstracts therefrom, during usual business hours, to all persons making a request for public records that reasonably describes such records. Upon request, the custodian shall also provide exact copies of public records or shall permit any person to use agency facilities for the copying of public records, unless it is clearly impracticable to do so. Computer data shall be provided in a form determined by the agency.

(b) Request by Mail or Telephone. Requests for copies of public records that reasonably describe the records sought and that are received by mail or by telephone shall be honored by agencies unless such records are exempt from inspection by the provisions of this Act.

(c) Rules and Regulations. Reasonable rules and regulations shall be adopted and enforced, consistent with the intent of this Act to provide full public access to public records, but only to the extent necessary (1) to protect public records from damage or disorganization and (2) to prevent excessive interference with other essential functions of the agency. Such rules and regulations shall provide for the fullest assistance to inquiries and the most timely action possible on requests for information.

For local government agencies, the rules and regulations shall be promulgated by the appropriate governing body or by the agency pursuant to policies and guidelines established by the governing body. State agencies shall adopt their own rules and regulations.

Such rules and regulations shall be prominently posted by the agency and shall be made available upon request free of charge to any person seeking to inspect or copy that agency's public records.

(d) Records That Are Unavailable. If the public records requested are in active use or in storage and are therefore not available at the time an applicant wishes to examine them, the custodian shall promptly notify the applicant of this fact, in writing 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.

If the public records requested are not in the custody or control of the person to whom application is made, such person shall promptly 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 the name of the person who has custody or control of the records.

(e) Denial of Access. If the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial. The statement shall cite the specific exemption that applies to the record in question.

(f) Prompt Responses Required. Agency responses to requests for inspection shall be made promptly. Agencies shall establish mechanisms for the prompt review of decisions denying inspection, and such review of denials shall be deemed completed at the end of the fifth business day following the receipt of the request for inspection and shall constitute final agency action for the purposes of review by the Attorney General.

(g) Removal of Public Records. Nothing in this Act shall authorize any person to remove original copies of public records from the offices of any agency without the written permission of the custodian of the records.

(h) No Duty To Perform General Research. This Act does not require the custodian to perform general research within the reference and research archives and holdings of state libraries.

Comment on Section 8

It would be difficult, if not impossible, to define with any degree of specificity the types of limits that may be placed upon the right of access. The characteristics of offices differ greatly, and the demands for inspection may range from many daily requests to virtually no requests. Therefore, the best approach is to provide general guidelines, leaving to the agencies, and ultimately the courts, the task of applying those guidelines to the needs of a particular office or agency. The guidelines should indicate that free inspection and copying of public records during all office hours¹⁸⁶ is the rule; limits should be placed upon that right only when strictly necessary to protect the records and to prevent undue interference with the operations of the agency.¹⁸⁷ Every public office or agency, however, should be required to promul-

186. *E.g.*, WASH. REV. CODE ANN. § 42.17.280 (Supp. 1975).

187. *E.g.*, OR. REV. STAT. § 192.430 (1975); WASH. REV. CODE ANN. §§ 42.17.270, .290 (Supp. 1975). *See also* text accompanying note 94 *supra*.

gate its rules for inspection in advance and to make those rules available to persons seeking to inspect or copy public records.¹⁸⁸ Such a requirement limits the chances for arbitrary and unreasonable limitations on the right of access that can often result when rules are made on an ad hoc basis.

Section 9: Fees for Inspection and Copying

(a) Inspection. No fee may be charged for the inspection and copying of public records except as provided by this section.

(b) Certified Copies. The custodian of public records shall furnish upon request certified copies of such records if the record is of a nature permitting such copying. The agency may establish fees reasonably calculated to reimburse it for its actual cost in making such copies available, but in no event shall the fee exceed one dollar per page, except as otherwise expressly provided by statute.

(c) Other Copies. Agencies may impose a reasonable charge for providing copies of public records and for the use by any person of agency equipment to make copies of public records. The charge may not exceed the actual cost of reproduction exclusive of costs of labor, except as otherwise expressly provided by statute. However, in cases of exceptionally large and burdensome requests for copies that can only be made by the custodian, the charge may include costs of reproduction and reasonable labor costs.

(d) Deposit. The agency may require the person requesting copies to furnish a deposit, consisting of the anticipated costs of copying such records, as a condition precedent to the making of such copies.

(e) Waiver of Fees. Copies of public records shall be furnished without charge or at a reduced charge when the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

(f) Stocks of Publications. The fee provisions of this section do not apply to stocks of publications properly held for sale.

Comment on Section 9

While no costs should be imposed for mere inspection, it is reason-

188. *E.g.*, 5 U.S.C. § 552(a)(1) (1970); WASH. REV. CODE ANN. § 42.17.250(1) (Supp. 1975). *See also* *City of Philadelphia v. Ruczynski*, 24 Pa. D. & C.2d 478 (C.P. 1961).

able to impose a fee when the agency or officer provides copies of public records. A public records statute should make provisions for such a fee, by way of either a specific amount¹⁸⁹ or a formula for establishing a reasonable fee.¹⁹⁰ Costs should generally be minimized to avoid placing unnecessary burdens upon the right of access. The agency has a duty to provide its records for public inspection. This model statute provides that charges should cover only costs of reproduction, leaving the agency, except in the case of voluminous reproduction, the burden of absorbing labor costs.¹⁹¹

Section 10: Limits Upon the Use of Public Records

This Act does not authorize any agency to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies shall not do so unless specifically authorized or directed by law. Lists of applicants for professional licenses and lists of professional licensees, however, shall be made available, upon request, to those professional associations or educational organizations recognized by their professional licensing or examination board.

Comment on Section 10

One of the most substantial interests that the Act attempts to protect is the right of personal privacy. This section is intended to protect individuals from particularly objectionable uses of public records.¹⁹²

Section 11: Pre-Judicial Review of Denial of Inspection

(a) Petitioning the Attorney General. Any person denied the right to inspect or to receive a copy of any public record of any agency, or subjected to rules and regulations that unreasonably limit access to public records in violation of this Act, may petition the Attorney General, either to review the public record to determine if it may be withheld from public inspection or to review the agency's rules and regulations to determine if they are unreasonable and in violation of this Act.

189. See COLO. REV. STAT. § 24-72-205 (1973).

190. See 5 U.S.C. § 552(a)(4)(A) (Supp. V 1975); WASH. REV. CODE ANN. § 42.17.300 (Supp. 1975). The North Carolina fee schedule for registers of deeds contains a formula for determining the fee to be charged for making uncertified copies. N.C. GEN. STAT. § 161-10(11) (1976).

191. See *Moore v. Board of Chosen Freeholders*, 39 N.J. 26, 186 A.2d 676 (1962).

192. See *Accident Index Bureau, Inc. v. Male*, 95 N.J. Super. 39, 229 A.2d 812 (Super. Ct. App. Div. 1967). See also N.C. GEN. STAT. § 34-15 (1976); *id.* § 108-45 (1975).

The burden is on the agency to sustain its action. The Attorney General shall issue an advisory opinion denying or granting the petition, or denying it in part and granting it in part, within seven days from the day he receives the petition.

(b) Form of Petition. A petition to the Attorney General requesting him to order that a public record be made available for inspection or be produced shall be substantially in the following form, or in a form containing the same information:

_____ (date)

I (we), _____ (name(s)), the undersigned, request the Attorney General to determine if _____ (name of agency) and its employees are required to make available for inspection (or produce a copy or copies of) the following records:

1. _____ (name or description of record)
2. _____ (name or description of record)

I (we) requested to inspect and/or copy these records on _____ (date) at _____ (address). The request was denied by the following person(s):

1. _____
(name of public officer or employee and title or position, if known)
 2. _____
(name of public officer or employee and title or position, if known)
- _____ (signature(s))

This form shall be delivered or mailed to the Attorney General's office.

Upon receipt of such a petition, the Attorney General shall notify promptly the agency involved. The agency shall then transmit the public record disclosure of which is sought, or a copy, to the Attorney General, together with a statement of its reasons for believing that the public record should not be disclosed. In an appropriate case, with the consent of the Attorney General, the agency may disclose instead the nature or substance of the public record to the Attorney General.

Comment on Section 11

The current North Carolina statute provides a remedy for wrong-

ful denial of access to public records,¹⁹³ but the possibilities of delay in obtaining relief and the costs of litigation render that remedy largely ineffective. As a practical matter, public officials can expect very few court challenges to wrongful denials of access under the current statute. A number of factors can delay or restrict judicial resolution of the matter: the agency might take a long time to reach its decision whether to deny access; there may be no administrative review of the denial; court action may be delayed; costs of litigation may be prohibitive; and judicial sanctions may be ineffective in encouraging agency compliance. In the face of such obstacles, it is no wonder that there has been no appellate litigation on the subject in North Carolina. It is clearly necessary to provide speedy, effective relief for wrongful denials of access.

Access to public records can be effectively denied by agencies, not by clear refusals, but through delays and inaction. Probably the best solution to such delays is to presume a denial if the agency fails to reach a decision within a specified time period, as provided in section 9(f) of this model act.¹⁹⁴ Following denial of access, the prospect of litigation may not appear practical to most individuals. Thus, the Texas and Oregon acts invoke the aid of the attorney general in enforcing the right of access. The Texas act provides that if the governmental body wants to withhold a particular record, it must, within ten days after receiving a request for information, request a decision on the matter by the attorney general.¹⁹⁵ The Oregon act takes a slightly different approach, authorizing individuals to request a decision by the attorney general.¹⁹⁶ Under both of these acts, the attorney general's role is made an indispensable part of the review process.¹⁹⁷

This section of the model act permits a citizen to invoke the aid of the attorney general. In keeping with the traditional role of the attorney general in North Carolina,¹⁹⁸ his opinion is advisory only, and

193. N.C. GEN. STAT. § 132-9 (Cum. Supp. 1975).

194. The Oregon statute provides that failure to act upon a request within seven days constitutes denial. OR. REV. STAT. § 192.465 (1975). The Washington statute requires the agency to give specific reasons for denial of access, and agency review of the denial is considered final at the end of the second business day following the denial. It has, however, no time limits applicable to the initial denial of access. WASH. REV. CODE ANN. §§ 42.17.310(4), 320 (Supp. 1975).

195. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Cum. Supp. 1976-77). This requirement is not applicable to records that have previously been declared exempt from inspection by either the attorney general or the courts. *Id.*

196. OR. REV. STAT. §§ 192.450, 465, 470 (1975).

197. *Id.*; TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Cum. Supp. 1976-77).

198. *Lawrence v. Shaw*, 210 N.C. 352, 361, 186 S.E. 504, 509-10 (1936); see N.C. Gen. Stat. § 114-2(5) (1975).

neither the agency nor the person seeking inspection is required to obtain his opinion prior to instituting court action. Although such an opinion is only advisory, it would be expected that in most situations an agency would routinely abide by the opinion. Thus, the provision permits a member of the public to obtain prompt and, in most cases, effective review by a neutral party without that person having to obtain a lawyer's services.

Section 12: Judicial Authority

(a) **Judicial Review.** Any person aggrieved under this Act may institute proceedings for injunctive or declarative relief in the Superior Court to enforce his rights under this Act. The court shall determine the matter *de novo*, and the burden is on the agency to sustain its action. The court may view the documents *in camera* before reaching a decision. In the event of noncompliance with the order of the court, the responsible agency employee may be punished for contempt of court.

(b) **Expedited Hearing.** Except as to causes the court considers of greater importance, proceedings arising under this Act shall take precedence on the docket over all other causes and shall be assigned for trial at the earliest practicable date and expedited in every way. The times for responsive pleadings and for hearings in such proceedings shall be set by the court with the object of securing a decision at the earliest possible time.

(c) **Attorney's Fees.** If the withholding of records was without substantial justification, or if the agency rules and regulations regarding access to public records were promulgated or applied without substantial justification, the aggrieved party shall be awarded his costs and disbursements and reasonable attorney's fees. If the aggrieved party prevails in part, the court may in its discretion award him his costs and disbursements and reasonable attorney's fees or an appropriate portion thereof.

Comment on Section 12

An important element of effective relief is prompt resolution of disputes. A statutory provision requiring that suits for disclosure be given preference on court dockets and be heard at the earliest possible time can prevent many delays that normally accompany litigation.¹⁹⁹

199. See, e.g., 5 U.S.C. § 552(a)(4)(D) (Supp. V 1975); COLO. REV. STAT. ANN.

Such a provision is particularly important in the case of public records because a delay in resolution often amounts to a denial of relief as a practical matter.

The issues should also be determined by the court *de novo*.²⁰⁰ An agency decision regarding public access to records should not be given deference by the courts—the issue does not involve an area of agency expertise and the policies of a public records act require the courts to guard against the natural tendency of public agencies to unnecessarily withhold records from public inspection, particularly when disclosure might cause inconvenience or embarrassment to the officials involved.

Once the person seeking to compel disclosure has established a *prima facie* case, the burden of proof should be upon the agency to justify its denial of inspection.²⁰¹ Such an allocation of the burden of proof coincides with the policy of permitting inspection unless good reason can be shown to withhold the record. Also, since only the agency knows the actual contents of the record, it is the only party able to sustain the burden of proof. It is often possible for the court to reach a decision merely upon the agency's affidavits, depositions and witnesses, without actually examining the records in issue.²⁰² If the agency cannot meet its burden of proof without disclosing the information claimed to be confidential, however, the court should be authorized to reach a decision by examining the records *in camera*.²⁰³

The court's decision and order may take various forms,²⁰⁴ but the effects of the order are generally the same. If a public official fails to permit inspection as directed by the court order, he may be cited

§ 24-72-204(5) (1973); OR. REV. STAT. § 192.490(2) (1975).

200. *E.g.*, 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975); OR. REV. STAT. § 192.490(1) (1975); WASH. REV. CODE ANN. § 42.17.340(2) (Supp. 1975).

201. *E.g.*, 5 U.S.C. § 552(a)(4)(B) (Supp. V 1975); OR. REV. STAT. § 192.490(1) (1975); WASH. REV. CODE ANN. § 42.17.340(1) (Supp. 1975).

202. It is obviously unnecessary to introduce the disputed records into evidence for all parties to examine. In a South Carolina case, the court held that after an agency introduced contested records into evidence, claims of confidentiality need not be considered. *Florence Morning News, Inc. v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975).

203. *E.g.*, OR. REV. STAT. § 192-490 (1975); WASH. REV. CODE ANN. § 42.17.340(2) (Supp. 1975). The decision to conduct an *in camera* inspection is, under most statutes, a discretionary decision, but failure to conduct such an inspection when the agency has no other method of meeting its burden of proof constitutes abuse of discretion. *In re Muszalski*, 52 Cal. App. 3d 475, 125 Cal. Rptr. 281 (1975).

204. CAL. GOV'T CODE § 6258 (West Cum. Supp. 1977) (injunctive or declaratory relief); N.C. GEN. STAT. § 132-9 (Cum. Supp. 1975) ("order compelling disclosure"); TEX. REV. CIV. STAT. ANN. art. 6252-17a § 8 (Vernon Cum. Supp. 1976) (*mandamus*).

for contempt.²⁰⁵ Some state acts authorize civil or criminal penalties for wrongful refusal to permit inspection of public records. The maximum criminal penalties range from a fine of twenty dollars for each month of refusal²⁰⁶ to a one thousand dollar fine or six months imprisonment.²⁰⁷ Maximum civil penalties range from twenty-five dollars for each day access is wrongfully denied²⁰⁸ to one hundred dollars per offense.²⁰⁹ Most withholding of information, however, is probably not in bad faith, so it seems that punitive sanctions would be seldom used and largely ineffective in enforcing such an administrative duty.²¹⁰

Although punitive sanctions may be ineffective in enforcing the right of inspection, a number of statutes reflect an awareness that litigation costs often discourage enforcement of the right by persons who have been denied access to public records. Particularly in cases in which inspection is sought, not for private gain, but for the purely public purpose of monitoring the performance of officials and agencies as contemplated by the statutes, the public interest compels the conclusion that enforcement by "private attorneys general" should be encouraged. In such a situation, however, it is seldom possible for an individual to invest large amounts of money into litigation, even when that person clearly has a right to inspect the record. Therefore, a number of statutes permit private litigants to recover attorney's fees and other litigation costs. The California and Washington statutes provide that winning plaintiffs "shall" be awarded costs and fees;²¹¹ such a recovery is

205. *E.g.*, CAL. GOV'T CODE § 6259 (West Supp. 1977); OR. REV. STAT. § 192.490 (1) (1975). The order compelling disclosure should be directed to the responsible agency employee rather than the agency itself because the order can then be enforced by finding the responsible employee to be in contempt of court if he fails to permit inspection. Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 VA. L. REV. 466, 482-84 (1968).

206. MASS. ANN. LAWS ch. 66, § 15 (Michie/Law. Co-op 1971).

207. LA. REV. STAT. ANN. § 44:37 (West 1950). The minimum penalty for the first offense is a one hundred dollar fine or one month imprisonment. For subsequent convictions, the possible penalties are increased to fines ranging from \$250 to \$2000 or imprisonment for periods ranging from two to six months or both. *Id.*

208. WASH. REV. CODE ANN. § 42.17.340(3) (Supp. 1975).

209. OHIO REV. CODE ANN. § 149.99 (Page 1969).

210. The original North Carolina statute provided a misdemeanor penalty of a maximum of twenty dollars for each month of refusal or neglect in permitting public records to be inspected, but the legislature apparently concluded that such a punitive sanction was ineffective and amended that provision to eliminate the criminal penalty. Act of May 2, 1935, ch. 265, § 9, 1935 N.C. Sess. Laws 290 (current version at N.C. GEN. STAT. § 132-9 (Cum. Supp. 1975)). *See also* COLO. REV. STAT. § 24-72-206 (1973) (provides misdemeanor penalties only if the violation is wilful and knowing).

211. CAL. GOV'T CODE § 6259 (West Cum. Supp. 1977); WASH. REV. CODE ANN. § 42.17.340(3) (Supp. 1975). The California provision specifies that the costs and fees are the liability of the agency rather than the individual official. That statute also permits the agency to recover its court costs and attorney's fees if the plaintiff's case is

permitted under the federal act if the complaining party "has substantially prevailed";²¹² and the Colorado act permits recovery if the denial is arbitrary or capricious.²¹³

Section 13: Penalty

Any person who wilfully destroys, mutilates, removes without permission as provided by this Act, or alters public records is guilty of a misdemeanor.

IV. CONCLUSION

The current North Carolina public records statute²¹⁴ gives all members of the public the right to inspect a broad class of records; however, the statute provides only the basic framework through which the boundaries of that right of inspection can be developed by the courts. Since the North Carolina appellate courts have decided no cases under the current statute, officials and members of the public must look to cases from other jurisdictions to be able to understand the actual elements of the right of inspection.

It seems clear that members of the public are sometimes denied access to records that they have a right to inspect, whether the reason for the refusal is a misunderstanding of the law, mere indifference or an actual desire of the custodian to avoid public disclosure of certain information. The absence of litigation under the current statute would seem to indicate that the law is difficult to apply and enforce.

In order for North Carolina citizens to have an effective right of inspection, members of the public and public officials need an unambiguous statute defining those records that must be open for inspection. In addition, an effective, speedy remedy must be provided that will not drain the financial resources of the private litigant. Enhancing the right of access to public records benefits not only the individual seeking inspection, but benefits also other members of the public by ensuring the accountability of public officials. The legislature would be well advised to consider the importance of the issues involved and to enact the necessary measures to improve the right of access in North Carolina.

JOSEPH D. JOHNSON

"clearly frivolous." CAL. GOV'T CODE § 6259 (West Cum. Supp. 1977).

212. 5 U.S.C. § 552(a)(4)(E) (Supp. V 1975).

213. COLO. REV. STAT. § 24-72-204(5) (1973).

214. N.C. GEN. STAT. §§ 132-1 to -9 (1974 & Cum. Supp. 1975).