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Open Government Laws and Public Employment Provisions

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OPEN GOVERNMENT LAWS AND PUBLIC EMPLOYMENT PROVISIONS

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INTRODUCTION

In the 1960s and 1970s federal and state legislatures enacted a number of laws which provide for public access to information collected and used by the government and to the decision-making process itself. These open government laws[1] include the federal Freedom of Information Act (FOIA),[2] the Privacy Act,[3] the Gov-

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1. Open government laws seek to guarantee public access by members of the public to certain documents and records or to the decision-making process of their government. These laws all seek the same end—open government—but the provisions of each particular statute vary substantially in their history and approach. *See, e.g.*, Wickham, *Let the Sun Shine! Open-meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480 (1973); Note, *Texas Open Meetings Act Has Potentially Broad Coverage But Suffers From Inadequate Enforcement Provisions*, 49 TEX. L. REV. 764 (1972); Note, *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 HARV. L. REV. 1199 (1962); N. DORSEN, P. BENDER, B. NEUBORNE, & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 387-90 (4th ed. 1979).

2. The best known open government law is the Federal Freedom of Information Act (FOIA), Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982)). The Act was amended extensively in 1974, Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561 (1974). The FOIA is a document and records law; while it grants access to goverment documents and records, it does not require the government to prepare materials that do not exist or to summarize existing records. The Act applies to all agencies within the executive branch except members of the president's immediate personal staff whose function is to advise and assist the president. Access must be granted to any person without a showing of need. The privacy exemptions of the FOIA, however, allow for consideration of the identity of the requester. *See infra* notes 39-40 and accompanying text.

Under the FOIA, government documents and records must be made available unless they fall under one of nine exemptions justifying withholding. 5 U.S.C. § 552(b)(1)-(9) (1982). Therefore, while the FOIA codifies the general policy that government documents and records are public, several important exceptions exist. The broadly drawn exemptions have generated considerable litigation, and judicial interpretation of the first, third, and seventh exemptions have motivated congressional amendments. *Id.* § 552 (b)(1), (3), (7). *See generally*, O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS, AND THE

ernment in the Sunshine Act,[4] the Federal Advisory Committee

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LAW, §§ 11, 13, 17 (1977) [hereinafter FEDERAL INFORMATION DISCLOSURE].

By providing access to government documents and records, the FOIA seeks to give citizens the opportunity to understand and evaluate the actions of government officials. Knowledgeable citizens are better able to criticize governmental policy. Furthermore, the potential for close examination of the conduct of government officials has the salutory influence of encouraging honest and efficient government. *See* Davis, *The Information Act: A Preliminary Analysis*, 34 U. CH. L. REV. 761, 804 (1967); Kramer & Weinberg, *The Freedom of Information Act*, 63 GEO. L.J. 49, 49 (1974); Comment, *Development Under the Freedom of Information Act - 1980*, 1981 DUKE L.J. 213, 214.

3. Like the FOIA, the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (codified at 5 U.S.C. § 552a (1982)), is a document and records law, but it varies substantially from the FOIA. The Privacy Act grants an individual access to his or her own records; the general public cannot secure access to others' records through the Act. The Privacy Act covers only documents and records that are part of a system of records maintained by an agency and containing information about an individual from which "information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5) (1982). The Act applies to all agencies in the federal executive branch because the Privacy Act adopts the definition of agency contained in FOIA. *Compare id.* § 552(e) *with* § 552a(a)(1).

The Act, however, does more than grant access to records; it also controls the acquisition, content, dissemination and use of information collected under the Act. *Id.* § 552a(e). The Act provides a procedure whereby an individual can amend his or her record and provides the right to seek redress should the agency fail to grant such an amendment. *Id.* § 552a(g). The Privacy Act contains broad exemptions, *id.* § 552a(j), and several specific ones, *id.* § 552a(k). These exemptions embody policies sometimes different from those contained in the FOIA. Through these various provisions, the Privacy Act seeks to manage and to control the vast amount of information which government agencies collect regarding individuals. The Act reflects congressional concern with the potential for abuse and the influence that information practices could have on the political process.

4. Unlike the Freedom of Information Act and the Privacy Act, the Government in the Sunshine Act of 1976, Pub. L. No. 94-405, 90 Stat. 1242 (codified at 5 U.S.C. § 552b (1982)) [hereinafter "Sunshine Act"], is not a document and records law. Rather, it provides access to the meetings of certain federal agencies. The Sunshine Act covers all agencies "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the president with the advice and consent of the Senate and any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a)(1) (1982). The phrase "to such position" refers only to the term "collegial body" and thus members must have been appointed and confirmed for the position on the specific "collegial body." Symons v. Chrysler Corp. Loan Guarantee Bd., 670 F.2d 238 (D.C. Cir. 1981). While the Sunshine Act provides access to meetings, it does not provide a right to participate, nor does it require that a meeting be held. *See* Communications Systems v. F.C.C., 595 F.2d 797 (D.C. Cir. 1978). The Sunshine Act contains ten exemptions, 5 U.S.C. § 552b(c)(1)-(10) (1982), including seven contained in the FOIA. *Compare id.* § 552(b) (2), (3), (4), (6), (7) (8) *with* § 552b(c) (2), (3), (4), (6), (7), (8). Since the purpose of the Sunshine Act is to allow citizen observation of the deliberative process, it contains no exemption for the deliberative process as does the FOIA. Additional exemptions not contained in the FOIA respond to particular needs relating to government deliberations including the need to close meetings regarding litigation or arbitration, *id.* § 552b(c)(10). The Sunshine Act imposes procedural and notice requirements for open meetings and extensive procedures for closed ones. Re-

Act,[5] and similar state laws.[6] During this period, the same legislative bodies also substantially modified the existing laws regulating public sector collective bargaining, appointment, discipline, protection of "whistleblowers," and conflicts of interest. Examples of these modifications are found in the Civil Service Reform Act of 1978[7] and the Ethics in Government Act of 1978.[8]

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cordkeeping requirements, *id.* § 552b(f)(1), and the right to judicial review, *id.* § 552b(h), serve to protect access to agency deliberations.

The Sunshine Act rests upon the same premise as the FOIA: public evaluation of government decisions should be encouraged to enhance the accountability of government employees. The Sunshine Act applies this policy to the deliberative process. The FOIA grants access to the deliberative records while the Sunshine Act grants access to the process. Because it applies only to multi-headed agencies, the Sunshine Act has substantially less scope than the FOIA or the Privacy Act.

5. Like the Sunshine Act, the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (codified at 5 U.S.C. § 1-12 (1982)), is an open meeting provision, but its genesis lies in the difficulty of structuring the process by which the government obtains advice and recommendations from persons outside of government. FACA focuses upon advisory committees, 5 U.S.C. app. §§ 3(2), 5 (1982). The Act seeks to structure the advisory committee process through reporting requirements, limitations on the term of an advisory committee, special procedures for the establishment of such committees, requirements for supervision and control by government employees, and recordkeeping requirements. *Id.* § 5(a)-(b)(7). The Act seeks to open advisory committee meetings to the public, and to this end mandates notice and access. *Id.* § 10(a)(1)-(3). The FACA also seeks to inform citizens of the role private advice and recommendations plays in government decisions. Citizen access and a desire to keep governmental decision making separate from private influences not properly channeled through agency procedures motivates the Act.

6. *See infra* notes 12-14, 201-03, 215, 239-42, 245, 250, 258, 278.

7. Watergate and the constitutional crisis which arose during the Nixon presidency starkly demonstrated the need for fair administration, efficiency, and legislative control of the public service. Fairly read, the investigations of the Senate Select Committee on Presidential Campaign Activities demonstrated how President Nixon would have used the public service illegally for personal, political purposes and illustrated the inadequacy of mechanisms to control abuse. The lessons of the Nixon years combined with renewed concerns about the efficiency of the Civil Service to produce the proposals of the Carter Administration resulting in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1202.

The Civil Service Reform Act sought to implement two conflicting policies. First, the Act sought to increase the protection of employees and of the public service from manipulation and abuse. To accomplish this, the Act prohibited certain practices including political referrals of candidates, 5 U.S.C. § 2301(a)(8)(B), discrimination for non-job-related reasons, *id.* § 2302(b)(10), and coercion of political activities, *id.* § 2302(b)(3) (1982). The Act articulated the procedural rights of employees facing disciplinary actions, *id.* § 7513, and placed the resolution of major disciplinary actions in an independent quasi-judicial agency, *id.* §§ 1201, 1205. Congress established collective bargaining rights for federal employees, *id.* § 7101, and created an independent labor relations authority to oversee the collective bargaining process, *id.* § 7104. In addition, the Act established an Office of Special Counsel charged with the responsibility to ensure that personnel authority was not abused, *id.* §§ 1204, 1205.

Second, the Act sought to increase management flexibility. The Act created a core of senior employees over which agency management would have greater flexibility of appoint-

Neither the newly created open government laws nor the recently modified public employment statutes clearly address the relationship between the two bodies of law.[9] Consequently, many

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ment, assignment, pay, and removal, *id.* §§ 3132(a)(2) (Senior Executive Service position), 3131 (Senior Executive Service). Middle level managers were placed under merit pay provisions, and the Act implemented a performance evaluation plan that more closely tied advancement and discipline to performance, *id.* § 4312. The Act eased standards for removal or demotion of an employee for unsatisfactory performance, *id.* § 4303. Together, these provisions attempted to make managers accountable for the performance of their programs while giving them the managerial authority needed to direct those programs. Combined with these provisions was the creation of an Office of Personnel Management to aid and advise federal agencies and to decentralize personnel authority within the federal government, *id.* §§ 1101-1103.

The interplay of these two policies within the Act has created conflict and uncertainty. Moreover, the balancing of these conflicting policies depends upon expectations concerning institutional relationships and performance that have not always been met. The Act emphasized, however, personal accountability as an important method of accomplishing both policies.

8. Pub. L. No., 95-521, 92 Stat. 1824 (codified as amended in scattered sections of tits. 2, 5, 18, 28 & 39 U.S.C.) (Supp. II - Supp. IV 1980).

9. The failure to address the relationship between the two stems perhaps from the significant differences in their nature and history. Public employment laws are less coherent than open government provisions, and the policies and goals of public employment laws are, accordingly, more difficult to discern. Unifying patterns nevertheless exist, and an understanding of these patterns requires an analysis of the historical development of these provisions and of specific pieces of legislation.

Systematic attempts to regulate public employment occupy nearly one hundred years of American history from the Pendleton Act of 1883 to the Civil Service Reform Act of 1978. During that period Congress enacted a number of laws concerning appointment, pay, discipline, loyalty and security, conflicts of interest, personnel actions, fringe benefits, occupational health and safety, veterans preference, restrictions on the political activities of public employees, equal employment opportunity, collective bargaining, senior civil servants, and protection of whistleblowers. Today, public employment law represents an amalgam of these provisions, reflecting different judgments regarding the need for regulation of varying aspects of public employment. While these enactments represent judgments of particular historical periods, they share common perspectives and principles.

The Pendleton Act symbolized the beginning of the modern civil service and three historical forces representing principles that have become important parts of public employment law. First, the Pendleton Act resulted from the attempts of reformers to alter a corrupt system of patronage that was perceived as a threat to democracy itself. Public employment law continues to embody the principle that the public service should facilitate fair administration of the laws. Second, business concepts of efficiency and burgeoning government regulation increased the need for competency in the public service. Efficient administration remains a guiding principle of public employment law. Third, the Pendleton Act illustrated the struggle between the president and Congress for control of the civil service.

Congress passed a number of laws between 1883 and 1978 dealing with public employment, but none of these statutes systematically attempted reform. Many simply represented reaction to specific problems. An examination of some of these provisions illustrates not only their idiosyncratic characteristics but also their relationship to the principles guiding

conflicts have emerged in effectuating the policies incorporated

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the more systematic enactments.

The Pendleton Act primarily addressed the merit selection of federal employees through competitive examination. Soon after passage of the Pendleton Act, Congress recognized the need to protect employees appointed by merit selection from arbitrary removal. Without such protection, the reforms built around merit selection might crumble. In 1912, Congress passed the Lloyd-LaFollette Act of 1912, § 6, 37 Stat. 539 (current version at 5 U.S.C. § 7513 (1982)), which provided that no person appointed by competitive examination can be removed from his position except for such cause as will promote the efficiency of the service. In addition, the Act required a government agency to give the employee reasonable notice and a reasonable time to reply, as well as the right to respond in writing with supporting documents. The Civil Service Commission developed procedures for the review of agency action and slowly developed an administrative mechanism to accomplish the review. *See discussion at* Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U.L. REV. 323, 329-40 (1970).

Congress further established procedural rights for veterans in the Veterans Preference Act of 1944, 58 Stat. 387, *repealed by* Pub. L. No. 89-554, 80 Stat. 652 (1966); *see* Guttman, *supra*, at 324. The Act specified in greater detail the procedures with which an agency must comply in disciplining veterans and provided the right to appeal to the Civil Service Commission. While these modifications rested upon a desire to benefit veterans following World War II, the modifications meshed with those provided in the Lloyd-LaFollette Act. These and other legislative initiatives concerning the rights of federal employees subject to discipline implement the policies of the Pendleton Act. The Civil Service Reform Act completed the development by establishing a statutory basis for the rights of employees who are selected by competitive examination. 5 U.S.C. § 7513 (1982).

Like merit selection and competitive examination, restrictions on the political activities of public employees always have been tied closely to concerns about patronage and the desire for an impartial and effective public service. As the federal bureaucracy increased its involvement in private activities, fear of the abuse of the power by the federal bureaucracy to advance partisan political causes led to the enactment of restrictions on the political activities of federal employees. The Hatch Act, 53 Stat. 1147 (codified as amended in scattered sections of 5 & 18 U.S.C. (1982)), prohibited a federal employee from using his authority or influence to interfere with or affect an election and from taking any active part in political management or in political campaigns. The penalty for violation of the Hatch Act is job removal, 5 U.S.C. § 7325 (1982). While critics have faulted both the application of the Act, *see* Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510 (1962), and its guiding principle, *see* Esman, *The Hatch Act: A Reappraisal*, 60 YALE L.J. 986 (1951), the Act has withstood judicial scrutiny. *See, e.g.*, United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (Congress has authority to bar public employees from political campaigning and management); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) (Congress has authority to restrict the political activities of federal employees). Attempts at legislative modification likewise have failed. *See generally*, Vaughn, *Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond*, 44 GEO. WASH. L. REV. 516 (1976). The Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 102 (1978) (codified at 5 U.S.C. § 7101 (1982)), embodies principles contained in the Hatch Act and charges the administrative structure created by the Civil Service Reform Act with enforcement of the Hatch Act. *See* 5 U.S.C. §§ 1205(e)(1)(A) (1982) (investigative powers of Special Counsel) 7325 (MSPB may apply lesser penalty than removal). A series of public employment laws addressed the role of government as employer. Such provisions concerned pay, fringe benefits (such as health care and retirement), job health and safety, and labor

within open government and public employment laws. Because both sets of enactments are complex, with diverse provisions and policies contained within them, courts are confronted with a considerable challenge when asked to reconcile and integrate the different policies contained in these laws.

This Article examines the relationship between open government laws and public employment provisions, and suggests interpretations in both areas of the law which would foster judicial reconciliation of the policies contained within them. The Article also explores the differing assumptions of these laws concerning the control and use of information. While analysis of both state and federal law is included, the central discussion focuses upon federal provisions. The Article concludes that further reconciliation will require legislative action, and that effective legislation must view the two bodies of law as different approaches to similar problems. This conclusion rests upon the common focus of these laws—regulating and controlling public bureaucracies.

I. JUDICIAL INTERPRETATION OF THE RELATIONSHIP BETWEEN OPEN GOVERNMENT LAWS AND PUBLIC SECTOR LABOR RELATIONS PROVISIONS

Judicial decisions interpreting the relationship between open government laws and public employment provisions generally focus upon four major areas in public employment: public sector labor relations, government investigations of applicants and employees, disciplinary and other personnel actions, and ethics and

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relations. As with the Veterans Preference Act of 1944, 58 Stat. 387 (repealed 1966), some public employee laws reflected passing societal concerns articulated at a particular time. While the provisions may be consistent with the general goals of public employment legislation established in the Pendleton Act and the Civil Service Reform Act, they were motivated by more specific and particular concerns. Apart from the Veterans Preference Act of 1944, examples include the loyalty and security legislation of the 1950s and the equal employment provisions of the 1960s and 1970s.

Fears about the loyalty of federal employees in the 1950s led to administrative actions increasing the scrutiny of the loyalty and suitability of federal employees and applicants for federal positions. *See, e.g.*, 5 C.F.R. § 731.202(a)(7) (1982). Supplementing these administrative actions was legislation similarly designed. *See* 5 U.S.C. § 7532 (1982). A critical aspect of this scrutiny involved investigations of applicants and employees and an evaluation of their loyalty as well as the risks they might pose to the security of the government.

While public employment laws are less coherent than open government laws, the bulk of public employment laws can be related to two or three basic principles which have remained unaltered for nearly a hundred years.

accountability. The open government provisions most often at issue are freedom of information laws, privacy acts and open meeting acts. In addition, judicial interpretation sometimes includes discussion of public financial disclosure provisions. The interrelationship between open government laws and public employment provisions is a complex problem, and attempts to reconcile the many conflicts arising between the two bodies of law have been difficult. Thus, while the courts' decisions often turn upon interpretation of the open government laws, these decisions may not be scrutinized fully or evaluated without considering the relevant public employment provisions.

A. *Public Sector Labor Relations*

Judicial interpretation of open government laws affecting public sector labor relations principally focuses upon three areas: 1) access to the bargaining process through sunshine provisions; 2) acquisition by unions of information related to collective bargaining or to the union's duty of fair representation of individual employees; and 3) acquisition by third parties of information regarding union activities. Resolution of issues encompassed in these areas requires a court to give initial consideration to the unique character of public sector labor relations; for example, determining access to collective bargaining materials involves an examination of the bargaining process, union requests for information tests the status of unions under open government laws, and third party requests suggest how much of a union's activity can be insulated from public scrutiny. The importance of each determination is explored below.

1. *Access to the bargaining process.* One of the first issues which state courts had to confront was the question of whether meetings held in preparation for collective bargaining and collective bargaining sessions must be open to the public.[10] The decision

10. Board of Selectmen v. Labor Relations Comm'n, 7 Mass. App. Ct. 360, 388 N.E.2d 302 (1979); State *ex. rel.* Bd. of Pub. Util. v. Crow, 592 S.W.2d 285 (Mo. Ct. App. 1979); Burlington Community School Dist. v. Public Emp. Relations Bd., 268 N.W.2d 517 (Iowa 1978); Talbot v. Concord Union School Dist., 114 N.H. 532, 323 A.2d 912 (1974). *Contra* Carroll County Educ. Ass'n v. Board of Educ., 294 Md. 144, 448 A.2d 345 (1982) (legislature intended collective bargaining meetings be made public); Littleton Educ. Ass'n v. Arapahoe County School Dist., 191 Colo. 411, 553 P.2d 793 (1976) (in absence of express statutory authorization, closed school board meetings held to violate public meetings laws).

of the Supreme Court of Florida in *Bassett v. Braddock*[11] illustrates the rationale courts have employed when called upon to construe sunshine laws to exclude collective bargaining preparatory meetings and collective bargaining sessions.

In *Bassett*, the Florida Supreme Court reasoned that open meetings concerning the public employer's negotiations would disadvantage the public employer by advising the union of the employer's negotiating strategy.[12] Moreover, the court determined that publicity during the bargaining process could force the parties into rigid positions.[13] Yet despite the closed-door negotiations, the court found that the philosophy of the open meeting provisions was satisfied because an agreement reached in negotiation was tentative, and because the public would have an opportunity to comment before the adoption or final ratification of the agreement.[14] Since *Bassett*, many commentators have discussed whether such access would have the effect presumed by the courts[15] and whether open bargaining primarily benefits labor or management.[16] For example, Professor Summers has argued that public knowledge of negotiations is necessary because collective bargaining is an integral part of the political process.[17] For Summers, a lack of knowledge of the positions taken by the parties during bargaining handicaps the public's ability both to present views before an agreement is reached and to hold public officials responsible for their actions.[18] Summers has suggested, however, that the enhancement of public knowledge need not involve open sessions, but rather some

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11. 262 So. 2d 425 (Fla. 1972).

12. *Id.* at 426-28.

13. *Id.* at 428.

14. *Id.* at 427. Similar state provisions allowing closed meetings to discuss negotiation strategies have been interpreted to permit closed meetings only during actual discussion of labor negotiations, *see* Wexford County Prosecuting Att'y v. Pranger, 83 Mich. App. 197, 268 N.W.2d 344 (1978), or to permit status briefings on negotiations. *See* Jefferson City Bd. of Educ. v. Courier-Journal, 551 S.W.2d 25 (Ky. Ct. App. 1977).

15. *See, e.g.*, Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas*, 13 HOUS. L. REV. 291 (1976). Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 901-02 (1972).

16. Casey, *What is the Effect of a "Sunshine Law" on Public Sector Collective Bargaining: A Management Perspective*, 5 J.L. & EDUC. 481 (1976); Slesnick, *What is the Effect of a "Sunshine Law" on Public Sector Collective Bargaining: A Union Perspective*, 5 J.L. & EDUC. 487 (1976).

17. Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1199 (1974).

18. *Id.* at 1197.

procedure by which government officials report to the public regarding the course of negotiations.[19]

Meetings where bargaining strategy is discussed also may be closed to the public under federal statutory provisions. For example, the Government in the Sunshine Act permits an agency to close a meeting in order to prevent the premature disclosure of information which would be likely to "significantly frustrate implementation of a proposed agency action."[20] The conference report which accompanied the Act on passage by the House and Senate cites the discussion of an agency's strategy in collective bargaining as an example of actions falling under this language.[21] The authors of the conference report assumed that disclosure of management strategy might make agreement difficult if not impossible.[22] This interpretation of the Government in the Sunshine Act, based on the conference report, allows an agency to close strategy sessions regarding collective bargaining.[23]

Unions have argued before the North Dakota Public Employment Relations Board, an administrative agency charged with interpreting and enforcing public sector collective bargaining agreements, that violations of open meeting provisions relating to negotiations and to other agency actions should be deemed unfair labor practices.[24] Courts have been reluctant to so interpret general labor legislation.[25] Indeed, the Civil Service Reform Act of 1978 clearly defines unfair labor practices in a manner which does not require that a violation of an open government provision be held an unfair labor practice.[26]

Because violations of open government laws do not constitute unfair labor practices, the courts must formulate remedies under

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19. *Id.* at 1198.

20. 5 U.S.C. § 552b(c)(9)(B) (1982).

21. S. REP. No. 1178, 94th Cong., 2d Sess. 24 (1976).

22. *Id.*

23. Bargaining sessions, as contrasted with strategy sessions, are unlikely to fall under the Sunshine Act because the Act applies only to the meetings of the heads of multi-headed agencies. While agency heads may plan negotiation strategies and approve negotiated agreements, it is unlikely that the heads of the agency would negotiate directly with union representatives.

24. *See, e.g.*, Dickinson Educ. Ass'n v. Dickinson Pub. School Dist. No. 1, 252 N.W.2d 205 (N.D. 1977).

25. Local 79, Serv. Employees Int'l Union v. Lapeer County Gen. Hosp., 111 Mich. App. 441, 314 N.W.2d 648 (Mich. Ct. App. 1981).

26. *See* 5 U.S.C. § 7116 (1982).

the open government laws themselves. When such violations are considered, decisions should rest upon whether the court interprets the open government provisions to provide reversal as a remedy. A violation which is harmless should not be used to overturn an otherwise proper agency action.[27] The Government in the Sunshine Act does not provide for the remedy of reversal of an agency action taken in violation of the Act,[28] and the legislative history of the Act indicates that such a remedy is not necessarily implied. Thus, unions may not have grounds for redress for specific agency actions under either the open government or the labor laws.

While open meeting provisions allow an agency to close a meeting for certain reasons, the provisions do not mandate that the agency do so.[29] Therefore, an agency could choose to hold an open bargaining session, but if it does choose to exercise its discretion to hold an open bargaining session, its conduct may be viewed as a refusal to bargain in good faith.[30] The determination that such an agency action, which is already allowed under open government laws, is a refusal to bargain in good faith, rests upon the presumption that a negotiating process open to the public is inconsistent with collective bargaining. Thus, the policies incorporated into the public sector collective bargaining law limit the discretion allowed by open government laws.

Courts confronting an open meeting law that does not specifi-

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27. Dickinson Educ. Ass'n v. Dickinson Pub. School Dist. No. 1, 252 N.W. 2d 205 (N.D. 1977).

28. In an action brought under 5 U.S.C. § 552b(h)(2) (1982), challenging an agency's holding of a closed meeting, the court cannot correct Sunshine Act violations; it cannot "set aside, enjoin or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose." *Id.* Section 552b(h)(2) does not create an independent right of action. Persons invoking 552b(h)(2) must satisfy traditional standing requirements. S. REP. No. 354, 94th Cong., 2d Sess. 34 (1976). The legislative history suggests that only in extreme circumstances is a court to set aside an agency action taken at a closed meeting. *Id.*; S. REP. No. 1178, 94th Cong., 2d Sess. 22 (1976). The factors suggested in finding such extreme circumstances are: 1) if the violation is intentional; 2) if there are repeated violations; 3) if the violation is prejudicial to the rights of any person participating in review proceedings; and 4) if the public interest clearly supports revising the agency action. S. REP. No. 354, *supra* at 34.

29. Exemptions to open meeting provisions may be discretionary, giving the agency authority to close meetings, but not requiring it to do so. For example, under the Sunshine Act, some agencies declined to apply exemptions available to them. *See, e.g.*, 16 C.F.R. § 1012 (1982).

30. *See* Talbot v. Concord Union School Dist., 114 N.H. 532, 533, 323 A.2d 912, 913-14 (1974).

cally exclude collective bargaining negotiations must decide whether or not to create an exemption from access. Because of the effect which publicizing such information may have on negotiations, a court's decision must consider not only the open meeting laws but also the character of the bargaining process in the public sector. Statutes or judicial decisions dictating access to collective bargaining implicitly assume important differences between collective bargaining in the public and private sectors. These differences may rest upon a perceived public interest vindicated by knowledge of the negotiation process, but regardless of their source, courts clearly cannot avoid evaluating the differences between public and private sector labor relations. Union requests for information therefore illustrate the manner by which the unique nature of public sector labor relations affects a public employee union's access to information.

2. *Union requests for information.* Government records contain considerable information which would be useful to a labor organization. These records contain information helpful to union organizing; reports concerning negotiating strategy and budgetary constraints valuable in establishing the union's negotiating position; and the contingencies planned by the employer should a strike occur, an important consideration in the union's decision of whether to strike or not. Individual union officials as well as unions have requested information useful to the labor organizations, and the courts have considered these requests for information under open government laws in a variety of circumstances. This Section discusses the response of the courts to these requests. It also explores the extent to which a union and a government employer may negotiate regarding the release of information, and how both open government provisions and public sector labor laws may restrict a union's access to such information.

B. *Union Access to Information: Organization, Negotiation and Strikes*

In attempting to organize employees or to displace another union as a bargaining representative, unions have sought the names and addresses of public employees within the appropriate governmental unit.[31] A union also has sought copies of grievance

31. Clark v. Walton, 347 So. 2d 670 (Fla. Dist. Ct. App. 1977); Webb v. City of Shreve-

decisions filed by employees represented by a rival union,[32] and the names and addresses of employees signing a petition seeking an election to challenge the union's status as exclusive representative.[33]

Since most state freedom of information provisions provide access to any person or organization regardless of need,[34] state courts in these instances have been called upon to consider whether any special reasons exist for treating unions or union organizers differently from other organizations or persons.[35] One source to which the courts look to decide this issue is public sector labor relations law.[36] Absent special reason for treating a union's request differently, employee privacy interests generally have been considered insufficient to deny access to names and addresses.[37] One state court has stated, however, that employee privacy interests may be sufficient not only to require that matter identifying individuals be deleted from grievance decisions, but also to prohibit a public employee relations board from granting access to the names and addresses of employees seeking an election to challenge the union's status.[38] While the federal FOIA also grants access to any person regardless of need, the use to which the requester will put the information becomes relevant when the request may invade the privacy interests of public employees.[39] Cases interpreting the federal

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port, 371 So. 2d 316 (La. Ct. App.), *cert. denied*, 374 So. 2d 657 (La. 1979); Warden v. Bennett, 340 So. 2d 977 (Fla. Dist. Ct. App. 1976).

32. United Fed. of Teachers v. New York City Health & Hosp. Corp., 104 Misc. 2d 623, 428 N.Y.S.2d 823 (Sup. Ct. 1980).

33. Police Benevolent Ass'n v. Helsby, 84 Misc. 2d 17, 374 N.Y.S.2d 262 (Sup. Ct. 1975) (information specifically exempt under open government statute).

34. *See* Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 727 (1981).

A public information law may not require that the agency provide the information in a particular format. *See, e.g.*, Seigle v. Barry, 422 So. 2d 63 (Fla. Dist. Ct. App. 1982) (agency not required to use program developed by requester to provide computer data); *see also* Yeager v. Drug Enforcement Admin., 1 GOV'T DISC. SERV. (P-H) ¶ 80,283 (D.D.C. 1980) (agency not required to "compact" data to avoid application of the privacy exemption).

35. Generally, the fact that the requester is a union organizer does not present any special reason for treating the request differently. Warden v. Bennett, 340 So. 2d 977 (Fla. Dist. Ct. App. 1976).

36. *Id.*

37. Clark v. Walton, 347 So. 2d 670 (Fla. Dist. Ct. App. 1977); Warden v. Bennett, 340 So. 2d 977 (Fla. Dist. Ct. App. 1976).

38. United Fed. of Teachers v. New York City Health & Hosp. Corp., 104 Misc. 2d 623, 428 N.Y.S.2d 823 (Sup. Ct. 1980).

39. 5 U.S.C. § 552(b)(6) (1982). The "clearly unwarranted" language of (b)(6) indicates

Act suggest, however, that access still would follow closely the pattern of the state cases.[40]

Unions have used FOIA provisions to acquire two types of information for negotiation: material useful in identifying and evaluating management's negotiating strategy, and material regarding substantive issues likely to be the subject of negotiation. With the first, public information law controls; with the second, labor relations law predominates. This distinction is significant because it oftentimes will allow unions access they would not otherwise have had. For example, budgetary documents, useful to a union in determining negotiating strategy, are not necessarily exempt from disclosure. While state FOIA provisions may exempt documents developed in preparation for a negotiation,[41] budgetary documents developed in the normal course of business may be available even though the documents provide information helpful to a union in adopting a negotiation strategy.[42] Although the Government in the Sunshine Act allows an agency to close those portions of meetings concerning proposed strategy in collective bargaining,[43] agencies may not close meetings discussing the agency's budget proposals.

The United States Court of Appeals for the District of Columbia emphasized in *Common Cause v. Nuclear Regulatory Commission*[44] that disclosure of the budgetary process differed from disclosure of collective bargaining strategies because disclosure of the latter would likely frustrate significantly the implementation of a proposed agency action. The court reasoned that unlike bargaining strategies, disclosure of an agency's budget discussions would not

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that the interests of the requester and of the public must be balanced against the privacy interests of the individual. *See* Department of the Air Force v. Rose, 425 U.S. 352 (1976).

40. The exemption favors disclosure, Rural Housing Alliance v. United States Dept. of Agric., 498 F.2d 73 (D.C. Cir. 1974); the invasion of privacy by the release of names and addresses is limited; and the union serves not a limited commercial interest but potentially the interest of all employees who are members. *See* Disabled Officers Ass'n v. Brown, 1 GOV'T DISC. SERV. (P-H) ¶ 79,182 (D.D.C. 1979). *Contra*, American Fed. of Gov't Employees v. United States, 3 GOV'T DISC. SERV. (P-H) ¶ 83,236 (4th Cir. 1983) (release of names and addresses would benefit union in a proprietary sense rather than a public sense). *See infra* discussion at notes 222-29.

41. *See supra* at notes 10-14.

42. If documents are prepared in the normal course of business, they cannot have been prepared "in preparation for negotiations." *See* City of Gainesville v. International Ass'n of Fire Fighters, Local 2157, 298 So. 2d 478, 479-80 (Fla. Dist. Ct. App. 1974).

43. *See supra* notes 20-23.

44. 674 F.2d 921 (D.C. Cir. 1982).

affect the decisions of private parties concerning those parties' dealings with the government.[45] Since federal general service employees may not negotiate regarding salary,[46] the behavior of unions toward the government is probably not affected by budget information. To the extent this assumption is true, the court's distinction between information relating to collective bargaining strategies and to the budgetary process is sound. In some instances, however, even documents that directly relate to an agency's negotiating strategy may be available to a union. Under New York's freedom of information law,[47] a union gained access to a report prepared by a state agency that compiled salary data and information regarding fringe benefits of teachers and administrators of specific school districts.[48] The report was used by the school districts in negotiating salaries with the union. No exemption contained in the state freedom of information law applied to the report, and the agency therefore was ordered to provide the report to the union as it would to any other requester.

In similar circumstances, a federal court has held that a union does not enjoy rights greater than that of a member of the public requesting the information, and on that basis upheld an agency's denial of a request for information. In *National Treasury Employees Union v. U.S. Department of the Treasury*,[49] a union requested a handbook to be used by agency officials in collective bargaining. Portions of the handbook contained the history of each article in the contract and the agency's interpretation of the particular article. The court concluded that since these provisions did not affect a member of the public, they related solely to the internal personnel practices of the agency.[50] The court rejected the

45. *Id.* at 933.

46. Federal employees may negotiate "conditions of employment" except where such matters are specifically provided for by federal statute. *See* 5 U.S.C. § 7103(a)(12), (14) (1982). Federal employees salaries are determined by an extensive statutory scheme. *See* 5 U.S.C. chs. 51-59 (1982).

47. N.Y. Pub. Off. Law § 87 (McKinney Supp. 1982).

48. Doolan v. Board of Coop. Educ. Serv., 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979).

49. 487 F. Supp. 1321 (D.D.C. 1980).

50. *Id.* at 1323. *See* 5 U.S.C. § 552(b)(2) (1982). The (b)(2) exemption allows withholding of documents or records that are "related solely to the internal personnel rules and practices of an agency." In Department of the Air Force v. Rose, 425 U.S. 352 (1976), the Supreme Court adopted a narrow interpretation of this exemption. The Court found that "exemption 2 is not applicable to matters subject to such a genuine and significant public

union's argument that as federal employees its members were indeed "members of the public" affected by the handbook.[51] Rather, the court held that the concept "members of the public" distinguished the public at large from federal employees.[52]

Union access to information useful in bargaining also may be obtained under labor relations provisions. For example, the Civil Service Reform Act imposes upon an agency the obligation to provide information maintained in the regular course of business and which is otherwise available for proper discussion of subjects within the scope of collective bargaining.[53] This provision arguably provides unions with access to information not necessarily available to a member of the public under FOIA.[54] The Civil Service Reform Act does, however, permit an agency to withhold documents that guide, advise, or train management officials regarding collective bargaining.[55] This exemption from disclosure under the Civil Service Reform Act would also permit withholding under FOIA,[56] because FOIA exempts from disclosure documents specifically exempted under qualifying federal statutes.[57]

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interest." *Id.* at 369.

An opinion of the United States Court of Appeals for the District of Columbia articulates the factors used to evaluate an agency's assertion that an agency manual or guide is protected from release by the (b)(2) exemption. The court identified the crucial factors to be: 1) is the manual predominantly used for internal purposes; 2) is it designed to establish rules and practices for agency personnel such as law enforcement techniques; and 3) would public disclosure risk circumvention of agency regulations. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981). Administrative manuals relating to grievance, equal opportunity employment complaints, discipline, transfers for disciplinary reasons, and ethical matters are matters of public interest and are available to employee organizations as they would be to any member of the public. FBI Agents Ass'n v. FBI, 3 GOV'T. DISC. SERV. (P-H) ¶ 83,058 (D.D.C. 1983).

51. National Treas. Employees Union v. United States Dep't of the Treas., 487 F. Supp. 1321 (D.D.C. 1980).

52. *Id.* at 1322-23.

53. 5 U.S.C. § 7114(b)(4) (1982).

54. Within the scope of 5 U.S.C. § 7114(b)(4) (1982) is likely to fall information exempt under 5 U.S.C. § 552(b)(2) (1982). *But see* American Fed. of Gov't Employees v. United States, 3 GOV'T DISC. SERV. (P-H) ¶ 83,236 (4th Cir. 1983) (court refused to order disclosure of names and addresses to union which alleged that government agency restricted worktime union organizing).

55. 5 U.S.C. § 7114(b)(4)(C) (1982).

56. *See* National Treas. Employees Union v. United States Customs Serv., 2 GOV'T DISC. SERV. (P-H) ¶ 82,1919 (D.D.C. 1982).

57. 5 U.S.C. § 552(b)(3) (1982). To qualify under the exemption a statute must require that information be withheld or "establish particular criteria for withholding or refers to particular types of matters to be withheld." The language was designed to include within

Finally, striking unions sometimes seek the names and addresses of substitute employees hired by the public employer in anticipation of a strike.[58] Unless a court is willing to assume that the union will seek to intimidate these substitute employees, the potential misuse of the information by the union should not preclude access when other requesters would be entitled to the information.[59] Arguably, a similar result attends even if the requester's use is relevant to weighing the interests in disclosure and privacy.[60]

C. *Negotiating to Disclose Information*

The frequent inclusion of provisions which dictate agency information practices within collective bargaining agreements illustrates that public sector collective bargaining affects various statutory provisions. Likewise, open government laws may affect contractual obligations incorporated into a collective bargaining agreement by, for example, an FOIA provision compelling a public employer to disregard a portion of a collective bargaining agreement. In *Mills v. Doyle*,[61] a Florida appeals court ordered the release of documents concerning a grievance filed by a schoolteacher against the school system. The public employer had refused to provide a grievance file to the requester because the agreement between the employer and the bargaining agent for the employees

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the FOIA exemptions documents protected from release by other federal statutes. *See generally* FEDERAL INFORMATION DISCLOSURE, *supra* note 2, at ch. 13.

58. For example, union representatives for teachers might seek the names and addresses of substitute teachers because substitutes would provide an alternative supply of labor in the event of a strike; their interests are often at odds with full time teachers, and they may be represented by their own organization.

59. *See* Morrison v. School Dist. 48, 53 Or. App. 148, 631 P.2d 784 (1981); Lane County School Dist. No. 4 v. Parks, 55 Or. App. 416, 637 P.2d 1383 (1981). In *Morrison*, the court specifically refused to use the collective bargaining statutes to create an exemption to release the names and addresses under the public information laws. It should be noted, however, that some state statutes give access automatically to the names and addressses of public employees. *See infra* note 243 and statutes listed therein.

60. If the request is made by a union representing striking employees (*see, e.g.*, Timberlane Reg. Educ. Ass'n v. Crompton, 114 N.H. 315, 319 A.2d 632 (1974)), access might be denied if the applicable labor relations law prohibited the strike. In these circumstances, granting access to the information would advance the union's efforts toward achieving an illegal purpose and the public interest would weigh against disclosure. A union, however, need only request the lists prior to the commencement of a strike. In those circumstances, a court would find it much more difficult to identify a public interest which would tip the balance against disclosure.

61. 407 So. 2d 348 (Fla. Dist. Ct. App. 1981).

required that grievance documents remain confidential. The court held that the grievance documents were available under the public records law, and concluded that to allow a private contract to exempt public records from disclosure would destroy the public records law.[62]

In contrast, the decision of the Fourth Circuit Court of Appeals in *Local 2047 v. Defense General Supply Agency*[63] illustrates that an open government provision may allow an agency to withhold from a public employee union information that was previously provided under a collective bargaining agreement. In that case, the agency agreed to provide the union with access to certain information concerning employees of the agency; this information was relevant to the union's representation of employees within the bargaining unit. However, the agreement also specifically provided, as was then required by Executive Order 11491,[64] that the terms of the agreement were governed by existing and future law. Subsequently, Congress enacted the Privacy Act which prohibited the release of the information the union was to receive under the agreement.[65] Since the Privacy Act prohibited release, the collective bargaining agreement incorporated the prohibition under Executive Order 11491. By implication, even if the collective bargaining agreement did not incorporate future law, the public employer would be bound by the statutory provision.[66]

The union argued that the Privacy Act empowered the agency to promulgate regulations exempting release of the information to the union from the prohibitions of the Act.[67] Since the agency had the power to disclose, the union contended that the agency should not be allowed to issue regulations which foreclosed access to information provided for under the collective bargaining agreement.

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62. *Id.* at 350.

63. 573 F.2d 184 (4th Cir. 1978).

64. *Id.* at 186, quoting Exec. Order 11491, 34 Fed. Reg. 17,605 (1969).

65. Unless certain exceptions apply, the Privacy Act prohibits the release of information regarding an individual contained in an agency system of records and retrievable by some personally identifiable symbol without the written consent of the individual. 5 U.S.C. § 552a(b) (1982).

66. Collective bargaining agreements in the federal government are subject to law, rule, and regulation. 5 U.S.C. § 7117 (1982). *See infra* notes 73-76. The impact of changes in law or regulation may be a more difficult question in states where the scope of collective bargaining is less clearly limited.

67. Local 2047, American Fed'n of Gov't Employees v. Defense Gen. Supply Center, 573 F.2d 184 (4th Cir. 1978).

The court rejected this argument, reasoning that the agency's rulemaking authority could not be limited by an agreement entered into in advance of the legislation.[68] Relying upon the presumption of the validity of administrative regulations and the existence of justifiable grounds for narrowing access to certain information,[69] the trial court denied the union relief[70] and the Fourth Circuit affirmed.

Public information laws properly limit the provisions in collective bargaining agreements which violate those laws. When, however, an agency enjoys discretion in its information practices under open government laws,[71] collective bargaining agreements can limit the exercise of that discretion. Still, an agency will not necessarily be under an obligation to bargain with the union regarding such practices nor to meet and confer with it.[72] The agency's authority or duty to negotiate its information practices with a public employee union turns upon the interpretation of the applicable statutes regulating public sector labor relations. For example, the labor management relations sections of the Civil Service Reform Act impose, with certain exceptions, a duty to negotiate rules affecting working conditions.[73] One of these exceptions is that negotiation is not permitted when the personnel rule is specifically provided by federal statute or government-wide rule or regulation.[74] The legislative history of the Civil Service Reform Act emphasizes that bargaining within this scope is required except where inconsistent with law, rule, or regulation.[75] Therefore, in circumstances where an open government law allows agency discretion, federal unions

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68. *Id.* at 186.

69. The court found the requested information to be of a personal nature, and concluded that refusal to provide the information to the union was dictated by congressional concern about the release of personal information collected by agencies to third parties. *See* Local 2047, American Fed'n of Gov't Employees v. Defense Gen. Supply Center, 423 F. Supp. 481, 485 n.8 (E.D. Va. 1976), *aff'd*, 573 F.2d 184 (4th Cir. 1978).

70. 423 F. Supp. at 486.

71. For example, most of the exceptions to the federal FOIA are discretionary and do not create any mandatory duty to withhold. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

72. Berkeley Police Ass'n v. City of Berkeley, 76 Cal. App. 3d 931, 143 Cal. Rptr. 255 (1977).

73. 5 U.S.C. § 7103(a)(12) (1982).

74. *Id.* § 7117.

75. H. CONF. REP. No. 1717, 95th Cong., 2d Sess. 155 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2860, 2889.

may seek to bargain regarding an agency's information practices.[76]

Cases concerning requests for information by federal employee unions illustrate how limitations on the scope of collective bargaining can restrict substantially the rights of a union to information through the collective bargaining process. Under the Civil Service Reform Act, agencies are not required to negotiate personnel rules specifically established by federal statute or regulation.[77] In the federal government, statutes set wages,[78] retirement,[79] classification,[80] performance evaluations,[81] and fringe benefits.[82] Therefore these subjects are not mandatory topics for bargaining.[83] Given these limitations on bargaining, unions may not require the employer to provide the information as part of the bargaining process, but must seek the information under the federal Freedom of Information Act.

Federal employee unions have sought a wide assortment of material under the FOIA, such as information concerning new classification standards,[84] documents outlining Senior Executive Performance Objectives and Expectations,[85] position papers outlining potential staff cuts,[86] and rate proposals of carriers participating in the federal employee health benefits program.[87] In each of these cases,[88] the courts evaluated the union's request for information as if the request for the information had been by a member of the

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76. Very few, if any, collective bargaining agreements, however, include union negotiated rights under the Privacy Act such as provisions granting union access to additional information. J. O'REILLY, UNIONS' RIGHTS TO COMPANY INFORMATION 89-90 [herinafter UNIONS' RIGHTS TO COMPANY INFORMATION].

77. 5 U.S.C. § 7117 (1982).

78. *Id.* §§ 5301-5311, 5501-5596.

79. *Id.*

80. *Id.* §§ 5101-5115.

81. *Id.* §§ 4301-4304.

82. *Id.* §§ 6301-6326 (leave of service), 8701-8716 (life insurance), 8901-8913 (health insurance).

83. *Id.* § 7106(a).

84. National Treas. Employees Union v. United States, 2 GOV'T DISC. SERV. (P-H) ¶ 81,146 (D.D.C. 1981).

85. Ferris v. IRS, 2 GOV'T DISC. SERV. (P-H) ¶ 82,084 (D.D.C. 1981).

86. American Fed'n of Gov't Employees v. Department of Educ., 3 GOV'T DISC. SERV. (P-H) ¶ 82,491 (D.D.C. 1982).

87. National Ass'n of Gov't Employees v. Campbell, 1 GOV'T DISC. SERV. (P-H) ¶ 80,129 (D.D.C. 1980).

88. Even though a union might not directly bargain regarding these issues, information concerning them could be valuable to the union in representing and advising individual employees and in informing and counseling its membership.

general public. On this basis, the courts denied the union's access to at least part of the information sought. Thus, it may be concluded that while FOIA provides an alternative means by which unions may gain access to information regarding matters which are not the subject of bargaining,[89] the Act fails to provide a government union with a suitable substitute for the rights enjoyed by unions in the private sector.[90]

D. *Requests Regarding Union Activity*

In many instances, public employers legitimately may collect information regarding activities of public employee unions. For example, the Civil Service Reform Act allows union officers to use official time to pursue certain union activities relating to collective bargaining and other union responsibilities.[91] In order to implement this provision, a federal agency may need to maintain records regarding the on-duty activities of union officers.[92]

Although the acquisition of information regarding union activities by the government is permissible, a problem arises because much of this information appears to be available to the public under open government provisions, regardless of a requester's motive. Freedom of information provisions provide little special protection for information describing union activities, and as a result

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89. Under the FOIA, a prevailing party in certain circumstances may recover attorneys' fees. 5 U.S.C. § 552(a)(4)(E) (1982). Although a union may be entitled to attorneys' fees, it may find that the amount recoverable is limited to less than the market value of services provided. *See* National Treas. Employees Union v. United States Dep't of the Treas., 656 F. 2d 848 (D.C. Cir. 1981).

90. In the private sector, the National Labor Relations Act has been interpreted to require the employer to provide information "particularly within the knowledge of either party [that] is of the essence of the bargaining process." S.L. Allen Co., 1 N.L.R.B. 714, 728 (1936). Considerable information is presumed relevant to the bargaining process, including wage data of all types, bonus programs, insurance, pension and health plans, job classification, training data, and equal employment data. UNIONS' RIGHTS TO COMPANY INFORMATION, *supra* note 76, at 23-36.

The Civil Service Reform Act requires, unless prohibited by law, that the agency furnish to a union which is an exclusive representative of a bargaining unit data maintained in the normal course of business proper for discussion within the scope of bargaining. 5 U.S.C. § 7114(b)(4) (1982). *See supra* notes 53-57.

91. 5 U.S.C. § 7131(a), (c), (d) (1982). Activities related to internal business affairs, such as solicitation of membership or collection of dues, shall not be conducted on official time. *Id.* § 7131(b).

92. Such information gathering authority, of course, cannot be used to intimidate union officials. *See* 5 U.S.C. § 7116 (1982).

third parties enjoy considerable access to these types of documents. For example, in *American Federation of Government Employees v. Veterans Administration*,[93] upon request by the Public Service Research Foundation, the Veterans Administration released documents disclosing the names of certain union officers and the amount of official time that each had spent on union activities. The federal district court rejected an attempt by the public employee union to restrict future access to such records, finding that union officials had no privacy interest that would be affected by release of the information. According to the court, documents concerning the amount of official time spent on union related activities were no different in nature from reports on the amount of time an employee spent performing normal duties.[94] Because the union officers had no privacy interest that would be affected by release, the court deemed the identity or purpose of the requester as irrelevant.[95] The reasoning of the case suggests that freedom of information provisions may make documents regarding unions and their activities available to the public.

E. *Reconciliation of Policies Regarding Public Sector Labor Relations*

The difficulties confronted in applying open government provisions to public sector collective bargaining arise in part from the distinctions drawn by public employment provisions between public and private sector labor relations. For example, because of the prohibition against strikes in public sector labor law, courts must consider whether the prohibition provides a basis for denying a union information under a freedom of information law.[96] Moreover, because the scope of bargaining is often more narrow in the public than the private sector, unions often find they must use open government provisions to acquire information readily available during

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93. 2 GOV'T DISC. SERV. (P-H) ¶ 81,159 (D.D.C. 1981).

94. *Id.* at 81,424.

95. *Id.*

96. *See supra* note 29. For a description of state public employee strike prohibitions, see H. TANIMOTO & J. NAJITA, GUIDE TO STATUTORY PROVISIONS IN PUBLIC SECTOR COLLECTIVE BARGAINING: STRIKE RIGHTS AND PROHIBITIONS (1974). Provisions contained in 5 U.S.C. § 7311 (1982) prohibit strikes by federal employees, and 18 U.S.C. § 1918 (1976) provides criminal penalities for violations.

the collective bargaining process in the private sector.[97] The restricted scope of bargaining also may influence interpretation of open government provisions,[98] and the ability of a union to negotiate regarding access to information.[99]

More importantly, the difficulties encountered in applying open government provisions to public sector collective bargaining highlight the significant differences between public sector labor relations and labor relations in the private sector. Public sector labor relations take place within a political process to which open government laws provide public access. The issue of public access to the negotiation process, the union's use of freedom of information provisions, the impact of open government laws upon provisions of a labor contract, and third party requests for information regarding union activity demonstrate that labor relation litigation in the public sector likely will include important questions regarding public scrutiny that need not be addressed in private sector labor relations. Because of open government laws, courts should not ignore the differences between collective bargaining in the public and private sectors.

In examining the difficulties encountered in reconciling public sector labor relations with open government provisions, specific values that resist application of the private sector model to public sector labor relations should be favored over general arguments about the character of collective bargaining in the public sector. Principal among these specific values is the need for the public to understand and to evaluate governmental actions including those involving collective bargaining.

II. Judicial Interpretations of the Relationship Between Open Government Laws and Employee Rights

A. *Investigations of Applicants and Employees*

Federal agencies conduct a number of different types of investigations of federal employees and applicants for federal employment. Agencies investigate applicants for job qualifications,[100] suit-

97. *See supra* notes 53-57 and notes 77-90.
98. *See supra* notes 34-51.
99. *See supra* notes 61-76.
100. Agencies enjoy considerable discretion in the determination of the scope of an in-

ability,[101] and security.[102] Agencies scrutinize employees for promotion,[103] for discipline (including possible criminal prosecution),[104] and for other personnel actions including transfers and reassignments.[105] These investigations may be conducted by the agency itself, by another agency, by the Office of Personnel Management, by the Federal Bureau of Investigation, or by another special investigatory agency. These federal investigations are similar to investigations conducted by state governments.[106] Access to these investigative reports by the applicants and employees depends upon the character of state freedom of information and state privacy provisions.

Federal employees are protected by the Federal Privacy Act. Senator Sam Ervin, the sponsor of the Senate Privacy Act bill and its staunchest supporter, long had opposed the occurence of overly broad investigations and the use of improper investigatory techniques by federal agencies which threatened the privacy interests of federal employees.[107] The Privacy Act addresses many of these concerns and provides protection by controlling the acquisition of information,[108] by restricting the content of government records[109] and the use of these records,[110] and by permitting the individual who was the subject of records covered by the Act to inspect[111] the

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vestigation into an applicant's qualifications.

101. *See* 5 C.F.R. pt. 731 (1982).

102. 5 U.S.C. § 7532 (1982)(agency head may suspend or remove, without pay, an employee suspected of being a threat to national security); *see also* 5 C.F.R. § 731.202 (7) (1982) (employee may be removed where there is reasonable doubt as to his loyalty to the U.S. government).

103. 5 C.F.R. pt. 430 (perfomance appraisals), pt. 335 (promotions) (1983).

104. 5 U.S.C. §§ 7501-7543 (1982).

105. 5 C.F.R. §§ 317.201-.703 (1982).

106. *See, e.g.*, Nero v. Hyland, 76 N.J. 213, 386 A.2d 846 (1978).

107. For many years, Senator Ervin chaired the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. During his tenure as chairman, the subcommittee vigorously investigated violations of the privacy of federal employees. Senator Ervin introduced legislation in 1976 to protect the rights and privacy of federal employees. *See* S. REP. No. 873, 91st Cong., 2d. Sess. 4 (1970).

108. 5 U.S.C. § 552a(e)(1)-(3) (1982).

109. *See, e.g., id.* § 552a(e)(5)(records must be accurate, timely, and complete), (7)(no record may be kept of first amendment speech), (9)(record-keeping practices addressed and regulated).

110. *Id.* § 552a(b), (c), (e)(10).

111. *Id.* § 552a(d)(1), (g)(1)(B). In the Privacy Act, Congress sought to protect individuals from the improper collection and misuse of personal data concerning them. Therefore, some portions of an individual's records relating to a third party may be available to the

records and request their amendment.[112]

Because the Privacy Act explicitly concerns federal employees, Congress, in passing the Act, considered its impact on federal personnel practices. For example, of the seven specific exemptions to the Act,[113] three directly concern federal personnel policy,[114] the most significant being the exemption for "investigatory material compiled solely for the purposes of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information."[115] This exemption, however, protects only a confidential source providing information under an express promise of confidentiality.[116] As to information obtained prior to the passage of the Privacy Act, the exemption protects the identity of the sources who were given an implied promise of confidentiality.[117]

In some circumstances, the FOIA as well as the federal Privacy Act applies to investigatory records sought by an applicant for a federal job or by a federal employee. If the FOIA gives an individual access to his records superior to that provided by the Privacy Act, the individual may rely upon the FOIA to provide such access.[118] However, the circuit courts have differed as to

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individual. Congress did not intend to limit access on the grounds that information does not pertain to the requester. Voelker v. IRS, 646 F.2d 332 (8th Cir. 1981).

112. 5 U.S.C. § 552a(d)(3), (4), (g)(1)(A) (1982).

113. *Id* § 552a(k). In addition to the specific exemptions, two general exemptions apply to the records of the Central Intelligence Agency and to the records of any agency or part of any agency whose principal function is criminal law enforcement, including crime control, apprehension, prosecution, correction, probation, and pardon and parole. The latter records are exempted only if they contain: 1) information compiled for the purpose of identifying criminal offenders; 2) information compiled for the purpose of criminal investigation; or 3) reports compiled at any stage of criminal law enforcement—from arrest and indictment through release and supervision. *Id.* § 552a(j).

114. *Id.* § 552a(k)(5), (6), (7). The three exemptions concern: 1) testing and examination material used solely to determine individual qualifications for appointment the release of which would affect the testing process. States have similar protection for examination material, *see, e.g.*, Social Serv. Employees Union, Local 371 v. Cunningham, 109 Misc. 2d 331, 437 N.Y.S.2d 1005 (Sup. Ct. 1981); Marvel v. Dalrymple, 38 Pa. Commw. 67, 393 A.2d 494 (1978); 2) evaluation materials for promotion in the armed services; and 3) certain investigatory materials.

115. 5 U.S.C. § 552a(k)(5) (1982).

116. *Id.*

117. *Id.*

118. Several reasons exist why access might be available under the Freedom of Information Act but not under the Privacy Act. First, the Privacy Act applies only to agency systems of records while the FOIA contains no such restriction. Second, the Privacy Act requires that the record be retrievable by name or personal identifying symbol, while the

whether the Privacy Act restricts an individual's access to his own records under FOIA.[119] Therefore, depending upon the circuit, applicants and employees may seek access to their records concerning themselves under either FOIA or the federal Privacy Act.

Requests for access to and amendment of investigatory records have come from unsuccessful applicants for federal jobs,[120] as well as from employees who are denied promotion,[121] who are investigated for misconduct,[122] or who are disciplined following an investigation.[123] While these requests arise in different settings and are made under both the FOIA and the Privacy Act, they have raised similar issues. These issues stem principally from the application of the exemptions of the FOIA and the Privacy Act.

FOIA requires only that a specific document be identified with reasonable particularity. Third, the exemptions, both general and specific, differ from the exemptions to the FOIA. *Compare* 5 U.S.C. § 552(b)(1)-(9) (1982) *with id.* § 552a(j)-(k). Therefore, an exemption might bar access under the Privacy Act while no exemption would apply to the record under FOIA. Of course, FOIA only grants access and does not give by itself any right to seek amendment of records. Any right to amend would arise from the Privacy Act. Because the Privacy Act allows an individual access to his or her own record, access under the Privacy Act is often more likely than access under FOIA. While fees may be charged under the FOIA, fees are not charged under the Privacy Act.

119. The Fifth and Seventh Circuits have held that an individual who is barred by a Privacy Act exemption from obtaining his record may not obtain the record under FOIA. Painter v. FBI, 615 F.2d 689 (5th Cir. 1980); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The United States Court of Appeals for the District of Columbia has held that the legislative history of the Privacy Act clearly shows that the Privacy Act was not intended to be used in this way to limit the FOIA. Greentree v. United States Customs Serv., 674 F.2d 74 (D.C. Cir. 1982); *accord* Porter v. United States Dep't of Justice, 717 F.2d 787(3d Cir. 1983). It should be noted that because the venue for any FOIA case may be laid in the District of Columbia, 5 U.S.C. § 552(a)(4)(B) (1982), that circuit is particularly influential in interpreting the FOIA.

120. Londrigan v. FBI, 670 F.2d 1164 (D.C. Cir. 1981); White v. United States Civil Serv. Comm'n, 589 F.2d 713 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 830 (1979); Lorenz v. United States Nuclear Reg. Comm'n, 516 F. Supp. 1151 (D. Colo. 1981); Jane Doe v. United States Civil Serv. Comm'n, 483 F. Supp. 539 (S.D.N.Y. 1980); Mervin v. Bonfanti, 410 F. Supp. 1205 (D.D.C. 1976).

121. Blevins v. Plummer, 613 F.2d 767 (9th Cir. 1980) (military promotion); Devine v. Marsh, 2 GOV'T DISC. SERV. (P-H) ¶ 82,022 (E.D. Va. 1981).

122. Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981) (security investigation), *cert. denied*, 455 U.S. 950 (1982); Von Tempske v. United States Dep't of Health & Human Serv., 2 GOV'T DISC. SERV. (P-H) ¶ 82,091 (W.D. Mo. 1981); Johnson v. United States Dep't of Justice, 2 GOV'T DISC. SERV. (P-H) ¶ 82,041 (D. Or. 1981) (FBI investigation); Barnard v. IRS, 2 GOV'T DISC. SERV. (P-H) ¶ 81,214 (S.D. Fla. 1981); Perry v. FBI, 2 GOV'T DISC. SERV. (P-H) ¶ 81,342 (D. Ill. 1980) (investigation of former employee).

123. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982); Smiertka v. United States Dep't of Treas., 604 F.2d 698 (D.C. Cir. 1978).

1. *Nature of investigations.* Agency investigations of applicants rely heavily upon information provided by third parties.[124] Under the exemption to the Privacy Act, the identity of sources is protected if the person supplying the information was given an express promise of confidentiality.[125] In limited circumstances, the content of a report may be protected even if the identity of the confidential source is known.[126] If, prior to the effective date of the Privacy Act, an individual provided the information under an implied promise of confidentiality,[127] the identity of the person providing such information is protected. Determining whether the circumstances implied a promise of confidentiality can be difficult and the burden rests with the agency to establish an implied promise.[128] In carrying its burden of persuasion, the agency may not rely upon broad, general conclusions unrelated to the circumstances of the specific investigation.[129]

Agency investigations of employees also involve information provided by third parties including that provided by other federal employees.[130] While the exemption for suitability investigations clearly applies to investigations of applicants for federal positions, the application of the exemption to investigations of federal employees is less clear. The Tenth Circuit has concluded that suitability for federal employment requires a determination by the agency not only when an applicant is hired but also throughout an employee's service, and that the exemption applies to investigations of federal employees as well as applicants.[131] The court refused to treat suitability as a term of art applying to a limited category of conduct. Rather, the court treated it as a general term encompassing misconduct occuring at any time during the tenure

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124. *See, e.g.*, Lorenz v. United States Nuclear Reg. Comm'n, 516 F. Supp. 1151 (D. Colo. 1981) (confidentiality of NRC's employment investigation source protected).

125. 5 U.S.C. § 552a(k)(5) (1982). The exemption protects the identity of confidential sources in cases seeking amendment of, or access to, records. Jane Doe v. Civil Serv. Comm'n, 483 F. Supp. 539 (S.D.N.Y. 1980).

126. According to the Tenth Circuit, the substance of confidential information is connected to the source and must be protected to serve the purposes of the exemption. Volz v. United States Dep't of Justice, 619 F.2d 49 (10th Cir.), *cert. denied*, 449 U.S. 982 (1980).

127. 5 U.S.C. § 552a(k)(5) (1982).

128. Londrigan v. FBI, 670 F.2d 1164, 1169 (D.C. Cir. 1981).

129. *Id.* at 1170.

130. *See infra* notes 131-33.

131. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982).

of a federal employee.[132]

An investigation of a federal employee is more likely to concern the law enforcement duties of a federal agency than is the investigation of an applicant. Thus, agency inspectors general and internal investigative units, as well as criminal law enforcement officers, are more likely to be involved regarding the performance of public duties by federal employees.[133] If the investigation is for law enforcement purposes, the law enforcement exemption to the FOIA may become available to the agency.[134]

Investigations of employees also are likely to involve circumstances where the agency reasonably can anticipate litigation. Personnel actions against the employee following an investigation predictably may lead to litigation either by the employee or by the agency. The Privacy Act exempts from access "information compiled in reasonable anticipation of a civil action or proceeding."[135] While the exemption applies to civil actions in court, its application to administrative proceedings that are judicial in form is less clear.[136] To the extent that it applies, the exemption is broader than the attorney work product privilege and includes all documents or materials prepared in anticipation of a civil action or proceeding.[137]

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132. *Id.* at 406.

133. Criminal law enforcement records fall under one of the general exemptions of the Privacy Act; administrative investigations do not. *See supra* note 113. Therefore, characterization of the investigation of an employee as criminal or administrative becomes important. Von Tempske v. United States Dep't of Health & Human Serv., 2 GOV'T DISC. SERV. (P-H) ¶ 82,091 (W.D. Mo. 1981).

134. The law enforcement exemption of FOIA applies to administrative as well as criminal matters. 5 U.S.C. § 552(b)(7) (1982). In criminal law enforcement investigations, however, the agency may withhold the identity of the confidential source and confidential information obtained only from a confidential source. Two exemptions exist: one protecting the identity of the confidential source and a separate exemption protecting confidential information obtained only from a confidential source. Duffin v. Carlson, 636 F.2d 709 (D.C. Cir. 1980). In other investigations involving civil or administrative enforcement authority, the agency may withhold records that disclose the identity of the confidential source. Regardless of the dates of the investigation, for a source to be confidential an agency *must* have given an express or implied assurance of confidentiality. Pope v. United States, 599 F.2d 1383 (5th Cir. 1979) (implied assurances found); Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977). A confidential source may include other law enforcement organizations, including the agencies of foreign governments. Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980); Church of Scientology v. United States Dep't of Justice, 612 F.2d 417 (9th Cir. 1979).

135. 5 U.S.C. § 552a(d)(5) (1982) (exempting the concerned party from access).

136. *See infra* notes 83-87.

137. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982).

2. *Acquisition, disclosure, and amendment.* Investigations of applicants and employees are likely to involve issues regarding the acquisition of information, the disclosure of information, and the amendment of agency records. The Privacy Act requires that, "to the greatest extent practicable," an agency should acquire information concerning applicants and employees directly from the subject of its inquiry.[138] With applicants, the agency usually seeks a great deal of information from the job seeker before proceeding to other sources.[139] Where the agency suspects wrongdoing on the part of an employee, the agency may be required to first seek information directly from the employee before contacting other sources.[140]

Investigations of employees as well as investigations of applicants may include information acquired from other sources within an agency and from other agencies. While the Privacy Act prohibits the release by an agency of an individual's record without the individual's consent,[141] it allows an agency to exempt from the consent requirement disclosure within the agency of information to officials who have a need for the record in performance of their duties.[142] In addition, any record may be disclosed within the agency or outside of it for purposes compatible with the original purposes for which the record was compiled.[143] These "routine uses," where disclosure is allowed without consent,[144] must be published annually in the Federal Register.[145] However, routine use is an ambiguous concept, and the question of whether or not disclosure of agency records to an investigator from another agency constitutes a routine use therefore depends upon the meaning given to the

138. 5 U.S.C. § 552a(e)(2) (1982).

139. The application process for federal employment requires completion of an extensive form, SF-171, that provides significant information about the applicant's background, education, employment, and experience.

140. Johnson v. IRS, 2 GOV'T DISC. SERV. (P-H) ¶ 81,370 (W.D. Tex. 1981). The court in *Johnson* does not discuss whether there is a likelihood that notice provided by the requirement would interfere with the investigation. Such discussion would be relevant because the Act requires the information be obtained directly from the subject "to the greatest extent practicable."

141. 5 U.S.C. § 552a(b) (1982).

142. *Id.* § 552a(b)(1). For example, a superior may require knowledge of the background of an employee handling money or checks. Brooks v. Grinstead, 3 GOV'T DISC. SERV. (P-H) ¶ 83,054 (E.D. Pa. 1982).

143. 5 U.S.C. § 552a(a)(7), (b)(3) (1982).

144. *Id.*

145. *Id.* § 552a(e)(4)(D).

term and upon the circumstances in which it is applied.

Investigations of employees appropriately involve a number of the employees' personnel records to which agency officials must have access in the course of the investigation. For example, an investigation by management officials of an employee for violation of personnel provisions may draw upon agency personnel files and equal opportunity employment records without requiring the consent of the employee to the disclosure of the files and records.[146] However, a broad interpretation of the scope of the routine use exception and the power of agency officials in personnel matters would allow examination of almost every agency record regarding an employee without first obtaining the employee's consent.

Examination of the records of other agencies during an investigation of an employee would raise additional considerations. Principal among these would be the purpose for which the other agency collected the information. The routine use exemption would be more difficult to invoke regarding an interagency transfer of records because of the possibility that the agency holding the record had not promulgated the necessary routine use regulation.

Investigation of an applicant will be more likely to involve the records of other agencies and is less likely to violate the Privacy Act. There are two reasons for this phenomenon. First, to the extent that the records of another agency concern an applicant's previous employment with that agency, an applicant is likely to have consented to the release of records as part of the application for subsequent employment.[147] Second, suitability and security investigations utilize interagency exchange of the same types of records in case after case. Since these exchanges involve records collected for a similar purpose—to determine security risk and suitability—the routine use standard is satisfied,[148] and the agencies involved are likely to have promulgated the necessary routine use regulations.[149]

Although the Privacy Act would allow employees and appli-

146. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982).

147. Perry v. FBI, 2 GOV'T DISC. SERV. (P-H) ¶ 81,342 (D. Ill. 1980), illustrates that most application processes involve consent to the release of the records of other agencies.

148. Arguably, files which contain only general information about the lawful activities of citizens would violate the Privacy Act's prohibition against the collection of such information. Consequently, their use in security or suitability determinations is improper. 5 U.S.C. § 552a(e)(7) (1982). For a related discussion, *see infra* notes 54-55.

149. *See* 5 C.F.R. § 294.703(b) (1982).

cants to seek amendment of records that the employee or applicant believes to be inaccurate,[150] there is some case law which limits the right to amend to factual matters and excludes opinions and conclusions from amendment.[151] Courts draw this distinction because they believe opinions and conclusions are not subject to verification, and they therefore decline to determine the propriety of an agency decision not to amend a conclusion or opinion.[152]

3. *Reconciliation of the Privacy Act with agency investigations.* The provisions of the Privacy Act can be reconciled with agency investigations of applicants and employees. Reconciliation is easiest where the investigations concern applicants or the off-duty conduct of employees. In these situations, the investigations provide the bases for predicting the behavior of the applicant as a federal employee or the behavior of the employee on the job. Like their private sector counterparts, agency officials attempt to predict job performance, honesty, or the possibility of a security risk, and investigations into these areas are a necessary part of this process of prediction. The ability to predict accurately involves significant interests of the agency and of those persons subject to investigation. Both the agency and the subjects of investigation share a desire for investigations which will readily distinguish desireable and undesireable employees and applicants. For example, the agency does not want unqualified persons likely to commit dishonest acts to be hired or retained. Persons who are qualified hope to be identified as such, and those who pose little danger to the agency do not wish to be identified as persons posing a substantial risk. Likewise, the agency does not wish to exclude capable employees because the agency has identified them erroneously as unqualified or dangerous.

The more a predictive system seeks to identify persons posing particular risks, however, the more likely it is to identify incor-

150. 5 U.S.C. § 552a(d) (1982).

151. Blevins v. Plummer, 613 F.2d 767 (9th Cir. 1980); Trinidad v. United States Civil Serv. Comm'n, 2 GOV'T DISC. SERV. (P-H) ¶ 81,322 (N.D. Ill. 1980).

152. Blevins v. Plummer, 613 F.2d 767, 768 (9th Cir. 1980). The distinction between factual matters and opinions and conclusions is often difficult to draw. For purposes of the Privacy Act, the characterization of a record entry as fact or opinion rests upon the rationale for the distinction—whether the matter is subject to resolution through the trial process. Some opinions may be amenable to judicial resolution although the burden of showing error will be great. R.R. v. Dep't of the Army, 482 F. Supp. 770 (D.D.C. 1980) (plaintiff desired anonymity).

rectly persons who do not pose such risks. Every predictive system must draw some lines; some decision must be made concerning the factors relevant in predicting future behavior. Factors must be isolated which are closely related to the behavior being predicted. In addition to carefully considered criteria for prediction, a predictive system must have accurate data. Many of the requirements of the Privacy Act help to assure the accuracy of the data.[153]

The Privacy Act also addresses the appropriate criteria for prediction. Because privacy plays an important role in the development of private associations,[154] the Act prohibits, with certain exceptions, the collection of information regarding an individual's exercise of first amendment rights.[155] The fear that the power of government will be used to impose political conformity motivates these restrictions, and this fear is particularly relevant when the government investigates present or potential federal employees.

The requirements of the Privacy Act also influence the criteria for prediction by allowing individuals to view their investigatory records. Individuals are provided with some insight into the criteria and thereby are given some basis for challenging and perhaps altering these criteria.[156]

The application of the federal Privacy Act to investigatory programs that are predictive both vindicates the interests of the subjects of the investigation and protects the effectiveness of these programs. The decisions of the courts, in the main, further the goals of the Act, goals which are also an implicit part of a properly administered predictive scheme.

Reconciliation of the Privacy Act with employee investigations seeking to determine whether the employee committed a particular

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153. Among the requirements helping to assure the accuracy of the data are: 1) that the information derive whenever appropriate from the individual who is the subject of the investigation; 2) that the agency maintain timely, accurate and relevant materials; 3) that the subject of the investigation have access to the investigatory records; and 4) that the subject be allowed to challenge the content of the records.

154. An excellent discussion of the importance of personal privacy to political association is found in A. WESTIN, PRIVACY AND FREEDOM 42-51 (1967). Westin notes that the mark of tyranny is secrecy for the regime accompanied by the regime's knowledge of the activities of all other groups. *Id.* at 21-23.

155. 5 U.S.C. § 552(e)(7) (1982).

156. To the extent that the use of the criteria is prohibited by law, the courts provide an avenue of redress. The possibility of exposure of questionable criteria likely influences government officials against the use of these criteria. Also, knowledge of the basis for decisions allows use of the political process to seek redress administratively or legislatively.

act while on duty poses different problems. Investigations of employee misconduct or violation of agency rules and regulations do not seek to develop data by which to predict how the employee will behave in the future. Rather, they only seek to determine whether the employee has committed a particular act for which a penalty may be imposed.[157] While the requirements of the Privacy Act help to assure an accurate and fair determination, in many instances other procedures available to the employee accomplish a similar purpose.[158] Unfortunately, judicial decisions do not draw explicitly the distinction between predictive and enforcement investigations, and as a result may apply the requirements of the Act to impede unnecessarily enforcement investigations.[159]

Reconciliation of the Privacy Act with investigations of applicants and employee benefits from the attention given to these investigations in the development of the Act. The Privacy Act addressed the problems posed by these investigations, and melded the requirements of the Act with the purpose of investigations of applicants and employees.

B. *Discipline and Other Personnel Actions*

Like any employer, government agencies regularly take actions which affect the status, rights, benefits, and working conditions of public employees. Employees have brought suits under open meeting laws, freedom of information provisions and privacy acts in response to these personnel actions. A number of the personnel ac-

157. In a broad sense, even on-duty conduct provides a basis for prediction. The efficiency of the service standard for discipline, 5 U.S.C. § 7513 (1982), requires that the agency believe the conduct demonstrates that the employee's behavior will disrupt the service. When the investigation is used as the basis for the transfer or reassignment of an employee, the agency also predicts that a change in assignment or location is likely to alter the employee's behavior or change the impact of the conduct on the administration of government. In these situations, however, little debate surrounds the appropriate criteria or the relevance of the specific conduct. Therefore, use of investigations for determining whether a particular act has been committed while the employee is on duty is different than the use of investigations of applicants or of the off-duty conduct of employees.

158. For example, disciplinary actions in the federal government must comply with a number of procedural and substantive requirements. 5 U.S.C. §§ 7513, 7701 (1982). The relationship of the procedural safeguards in public employment to remedies provided by open government laws is discussed *infra* at notes 192-98.

159. *See, e.g.*, Johnson v. IRS, 2 GOV'T DISC. SERV. (P-H) ¶ 81,370 (W.D. Tex. 1981) (requirement to acquire information where practicable from the subject of the investigation).

tions which have given rise to litigation under open government laws relate to the actions of agency officials normally subject to review.[160] These types of personnel actions, such as removals, disability retirements, suspensions, reprimands, reductions in force, reassignments, injury compensation, equal employment complaints, classification decisions, performance ratings, and grievances, provide articulated procedures for redress.[161] These procedures vary in complexity and in formality, but each provides a method of appeal either within the agency or outside and an opportunity to reexamine the initial decision of agency officials.

A second group of personnel actions giving rise to litigation under open government laws concerns the actions of agency officials not ordinarily subject to review.[162] These types of personnel

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160. Federal cases include: Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982) (disciplinary proceeding); Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981) (forced resignation); Volz v. United States Dep't of Justice, 619 F.2d 49 (10th Cir. 1980) (withholding of evaluation reports); Schuler v. United States, 617 F.2d 605 (D.C. Cir. 1979) (grievance); Cazalas v. United States Dep't of Justice, 660 F.2d 612 (5th Cir. 1981) (removal); Lee v. United States Dep't of Labor, 2 GOV'T DISC. SERV. (P-H) ¶ 81,335 (D. Va. 1981) (disability payments); Murphy v. National Security Agency, 2 GOV'T DISC. SERV. (P-H) ¶ 81,389 (D.D.C. 1981) (promotion); Allen v. Henifin, 26 Fair Empl. Prac. Cas. (BNA) 581 (D.D.C. 1980) (reassignment); Hacopian v. Marshall, 2 GOV'T DISC. SERV. (P-H) ¶ 81,312 (D. Cal. 1980) (injury compensation); Liguori v. Alexander, 495 F. Supp. 641 (S.D.N.Y. 1980) (reduction in work force); Mole v. Customs Serv., 2 GOV'T DISC. SERV. (P-H) ¶ 80,127 (E.D. Pa. 1980) (disclosure of documents); Gedden v. United States Postal Serv., 2 GOV'T DISC. SERV. (P-H) ¶ 81,369 (S.D. Iowa 1980) (equal opportunity complaint); Ehlschide v. Dep't of Labor, 2 GOV'T DISC. SERV. (P-H) ¶ 82,228 (E.D. Ky. 1980) (disability retirement).

State jurisdictions have decided: Hudson v. School Dist. of Kansas City, 578 S.W.2d 301 (Mo. App. 1979) (reassignment); McAulay v. Board of Educ., 61 A.D.2d 1048, 403 N.Y.S.2d 116 (1978) (unsatisfactory performance rating), *aff'd*, 48 N.Y.2d 659, 396 N.E.2d 1033, 421 N.Y.S.2d 560 (1979); Cole v. Woodcliff Lake Bd. of Educ., 155 N.J. Super. 398, 382 A.2d 966 (1977) (removal); Lamolinara v. Barger, 30 Pa. Commw. 307, 373 A.2d 788 (1977) (removal); Gabriel v. Turner, 50 A.D.2d 889, 377 N.Y.S.2d 527 (1975) (reduction in force); Florida Dep't of Pollution Control v. State Career Serv. Comm'n, 320 So. 2d 846 (Fla. Dist. Ct. App. 1975) (removal); Arkansas State Police Comm'n v. Davidson, 253 Ark. 1090, 490 S.W.2d 788 (1973) (removal); Tingling v. Lang, 39 Misc. 2d 338, 240 N.Y.S.2d 633 (Sup. Ct. 1963) (classification).

161. *See, e.g.*, 5 C.F.R. §§ 754.105 (1982) (procedure for appeal of removal or other disciplinary action); 831.1204 (c), 831.1205 (appeal from decision concerning disability retirement); 752.405 (procedure to appeal suspension); 351.901 (appeal from a reduction in work force); 177.109 (appeal from injury compensation); 511.601-.615 (appeal of a classification decision); 432.206 (appeal of performance rating).

162. Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982) (disclosure to citizens); Parks v. IRS, 618 F.2d 677 (10th Cir. 1980) (savings bond drive); Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980) (videotape of conversation); Johnson v. United States Dep't of the Air Force, 526 F. Supp. 679 (W.D. Okla. 1980) (acceptance of employees' petition); Church v. United States, 2 GOV'T DISC. SERV. (P-H) ¶ 81,350 (D. Md. 1980) (investigation of employ-

actions, such as posting sign-in/sign-out sheets, encouraging employees to participate in savings bond or charity drives, checking the whereabouts of absent employees, videotaping or otherwise recording conversations with employees, counseling an employee regarding job performance, receiving a petition or request from other employees, making statements to the press, and making recommendations to potential employers of employees who have left the agency, provide no articulated standards for review.

In this second category, litigation under open government laws focuses specifically upon the information practices of the public employer. These civil actions illustrate that absent open government laws, employees usually lack a legal basis for challenging these agency practices. In the former category, however, litigation under open government laws seeks to acquire information for use in other administrative or judicial proceedings. In many instances, employees seek to substitute or complement existing procedures with the remedies of open government laws.

1. *Personnel actions not normally subject to review.* Because employees often challenge the collection and use by the agency of information regarding specific employees, they often invoke the Privacy Act. Judicial decisions which apply the Privacy Act in such cases examine the character of restraints which properly should be placed upon specific agency practices. The courts have rejected employee contentions that the Privacy Act prohibits officials from posting sign-in/sign-out sheets,[163] a supervisor from entering his evaluations of the employee's performance into the employee's personnel file without following the notice provisions required by the Privacy Act,[164] a manager from passing a petition concerning an

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ees' whereabouts); American Fed. of Gov't Employees v. NASA, 482 F. Supp. 281 (S.D. Tex. 1980) (sign-in/sign-out sheet); Savarese v. United States Dep't of HEW, 479 F. Supp. 304 (N.D. Ga. 1979) (employment recommendation), *aff'd*, 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); Jones v. Veterans Admin., 1 GOV'T DISC. SERV. (P-H) ¶ 79,198 (E.D. Wash. 1979) (employment recommendation); Houston v. United States Dep't of Treas., 494 F. Supp. 24 (D.D.C. 1979) (performance counseling).

A grievance might be possible in many of these actions, but grievance procedures likely will not be used. First, the scope of agency grievance procedures will probably be limited. *See* 5 C.F.R. pt. 771 (1982) (agency administration grievance system). Second, the management rights provision of the Civil Service Reform Act makes it unlikely that a grievance could result in the alteration of agency practices. 5 U.S.C. § 7106 (1982).

163. American Fed. of Gov't Employees v. NASA, 482 F. Supp. 281 (S.D. Tex. 1980).

164. Houston v. United States Dep't of Treas., 494 F. Supp. 24 (D.D.C. 1979); 5 U.S.C. § 552a(e)(3) (1982) requires that an individual from whom information is acquired be in-

employee to appropriate agency officials,[165] and an agency from checking with an employee's private physician to determine if an employee's given reason for absence was verified.[166]

In deciding these cases, the courts have avoided application of the Privacy Act through interpretation of the terms "records" and "systems of records."[167] Underlying the definition of the terms, however, is the fear that another interpretation of the Privacy Act's requirements would impede government business and that the situations considered are not ones involving policies of the Act. For example, in holding that the agency need not give the employee notice under the Act before entering evaluation of the employee's work in his personnel file, one court emphasized that the information transmitted was not covered by the Privacy Act because it related "directly to official government business."[168] Moreover, supervisors enjoy considerable discretion in compiling information for use in their supervisor capacities. A supervisor may, without violating the Privacy Act, privately take notes to refresh his memory in preparing evaluation or promotion reports or job assignment recommendations.[169] The notes, however, must be kept private; if the notes are included as part of agency records, they become subject to the requirements of the Privacy Act.[170]

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formed of the authority for its collection and the purposes and uses to which the information will be put.

165. Johnson v. Air Force, 526 F. Supp. 679 (W.D. Okla. 1980).

166. Church v. United States, 2 GOV'T DISC. SERV. (P-H) ¶ 81,350 (D. Md. 1980).

167. *See supra* notes 164-66 and accompanying text.

168. Houston v. United States Dep't of Treas., 494 F. Supp. 24, 28 (D.D.C. 1979). The court in American Fed. of Gov't Employees v. NASA, 482 F. Supp. 281 (S.D. Tex. 1980), emphasized that sign-in/sign-out sheets were not covered by the Act's definition of records because they did not contain information "reflective of some quality of characteristic or the individual." In *Johnson* and *Church*, the court relied upon the failure of the information to be made part of any organized agency records.

169. Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982); Waldrop v. Air Force, 3 GOV'T DISC. SERV. (P-H) ¶ 83,016 (S.D. Ill. 1981) (complaint letters retained by the supervisor became part of agency records).

170. Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982). One of the crucial requirements is that the notes be made part of the agency's records in a timely manner. The notes would be considered timely if incorporated by the time of the next evaluation or report. *Cf.* Thompson v. United States Dep't of Transp., 547 F. Supp. 274 (S.D. Fla. 1982). If not so incorporated, the notes must remain private and be used only to refresh the memory of the supervisor. The court in *Chapman* feared that incorporation of notes inconsistent with the official record would deprive an employee of the opportunity to rebut information at the time when the employee also remembered the event. In *Chapman*, the court also required an agency to disclose in the *Federal Register* that it incorporated private notes which would

The courts have recognized that disclosure of information to prospective employers or to the press creates a more difficult problem. Release of information from a system of records without the individual's consent violates the Privacy Act.[171] In these release cases, the courts have struggled with the question of whether a supervisor's comments regarding the employee which were based upon the supervisor's memory should be treated as the disclosure of information from a system of records. If the agency official has independently acquired the information and discloses it from memory, the Privacy Act does not apply even if the information is contained in a system of records.[172] If, however, the official's knowledge rests upon the record, even if acquired before the record was made part of a system of records, the Privacy Act applies regardless of whether or not the disclosure is made from memory.[173] These decisions regarding supervisors seek to ensure, within the confines of the Privacy Act, that supervisors may continue to act upon their personal contact with employees and their experience with them. Moreover, they illustrate that courts will not apply the Privacy Act to alter the fundamental character of the relationship between supervisor and subordinate.

When agency actions involve important policies of the Privacy Act, however, the courts have applied the Act even when the applicability of the Act was unclear. The Tenth Circuit has found that, absent an exception for routine uses, the use of personnel records to further the agency's savings bond drive violated the Privacy Act.[174] Similarly, the District of Columbia Circuit Court of Appeals has held the clandestine videotaping of an exchange between an agency official and employees regarding a classification dispute to be violative of the Act's prohibition against the collection of records describing the exercise of first amendment rights.[175] Even though the discussion concerned agency personnel practices directly affecting the employees, complaints by employees to their

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be used to contradict periodic official evaluations.

171. 5 U.S.C. § 552a(b)(1982).

172. Jones v. Veterans Admin., 1 GOV'T DISC. SERV. (P-H) ¶ 79,198 (E.D. Wash. 1979); Savarese v. United States Dep't of HEW, 479 F. Supp. 304 (N.D. Ga. 1979), *aff'd*, 620 F.2d 298 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); King v. Califano, 471 F. Supp. 180 (D.D.C. 1979).

173. Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982).

174. Parks v. IRS, 618 F.2d 677 (10th Cir. 1980).

175. Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980).

supervisors were held to be protected by the first amendment.[176] Moreover, the court construed the Act's protection of the exercise of first amendment rights to apply without regard to the fact that the videotape was made part of a system of records covered by the Act.[177]

Employees have relied upon the Privacy Act in the situations described above precisely because they generally lack any other way of challenging agency policy or seeking legal redress. Some of the actions seem motivated by a desire to use the law to address personal grievances arising out of the superior-subordinate relationship;[178] others seem directed to more general agency practices over which employees have little control.[179] In particular, former employees have few avenues for seeking redress for misconduct by agency officials in giving recommendations to prospective employers or in making comments to the press,[180] and as a result they have looked to the Privacy Act for relief.

2. *Personnel actions normally subject to review.* When an agency's personnel action is subject to review, an employee may use an open government law to obtain information in preparation

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176. *Id.* at 920. The Supreme Court recently limited the scope of first amendment protection of communications between employees and their supervisors. The Court emphasized that the character of first amendment protection rests upon whether the speech related to a matter of public interest and concern. According to the Court, not all matters concerning internal office policies constitute matters of public interest and concern. Connick v. Myers, 103 S. Ct. 1684 (1983).

177. Albright v. United States, 631 F.2d at 919-20. On remand, employees were unable to recover damages because they could not show any adverse effect. Albright v. United States, 3 GOV'T DISC. SERV. (P-H) ¶ 83,025 (D.D.C. 1982).

178. *E.g.*, Brookens v. United States, 627 F.2d 494 (D.C. Cir. 1980); Church v. United States, 2 GOV'T DISC. SERV. (P-H) ¶ 81,350 (D. Md. 1980); Houston v. United States Dep't of Treas., 494 F. Supp. 24 (D.D.C. 1979).

179. American Fed. of Gov't Employees v. NASA, 482 F. Supp. 281 (S.D. Tex. 1980); Parks v. IRS, 618 F.2d 677 (10th Cir. 1980). An agency has a duty to inform an employee if a supervisor has invaded his privacy without permission; the supervisor has no grounds to object to disclosure of the violation. Bartel v. United States Fed. Aviation Auth., 3 GOV'T DISC. SERV. (P-H) ¶ 83,003 (D.D.C. 1982).

180. The Supreme Court in Barr v. Matteo, 360 U.S. 564 (1958), adopted an absolute immunity for federal employees acting within the scope of their duties. In most instances, recommendations fall within the scope of the duty of supervisory and management officials. The Supreme Court also held that civil service employees may not sue their superiors for violation of constitutional rights under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Because of the elaborate laws protecting federal employees from arbitrary action, the Court has declined to create new legal liability without legislative aid. Bush v. Lucas, 103 S. Ct. 2404 (1983).

for that review. These laws also provide access to information useful in determining whether judicial as well as administrative review should be sought in the first place.

Open government provisions are crucial for the acquisition of information by the employee when the review procedures do not give the employee access to the desired information. For example, before enactment of the Civil Service Reform Act of 1978,[181] review procedures for removals, demotions, lengthy suspensions, and reductions in force by the Civil Service Commission limited employee access to information held by the agency, and the Commission lacked subpoena power to aid the employee.[182] Grievances, equal employment opportunity complaints, and employee appeals of injury compensation decisions fail to provide an employee with access to considerable information that might be useful in challenging the agency's action. In these situations, open government laws serve as a substitute for discovery procedures by providing information enabling an employee to evaluate and to pursue his claims.

However, the Privacy Act exempts from access material prepared in reasonable anticipation of a civil action or proceeding.[183] This exception has been broadly interpreted to extend beyond material that would be protected by the traditional attorney work product privilege.[184] The scope of this exemption and therefore its impact upon the use of the Privacy Act as a form of discovery by employees depends upon whether a court interprets civil actions and proceedings to encompass a quasi-judicial administrative proceeding.[185] The deliberative privilege contained within the exemptions to the FOIA encompasses the attorney work product privilege and protects the deliberative process, but does not extend as far as the exemption contained in the Privacy Act.[186] Therefore, FOIA

181. 5 U.S.C. § 1205(b)(2) (1982).

182. *See* Williams v. Zuckert, 372 U.S. 765 (1963) (per curiam), *vacating* 296 F.2d 416 (D.C. Cir. 1961).

183. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982).

184. *Id.* at 408.

185. The court might protect documents compiled in a removal case even if the term civil action or proceeding was not extended to quasi-judicial administrative proceedings. Because removal actions are ultimately subject to judicial review, 5 U.S.C. § 7703 (1982), removal actions might involve a reasonable anticipation of a civil action.

186. 5 U.S.C. § 552(b)(5) (1982); *see also* NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 154 (1975) (recognizing attorney workproduct privilege exemption within FOIA); Robbins, Tire & Rubber Co. v. NLRB, 437 U.S. 214 (1978) (verbatim witness statements are within

may provide the employee access to certain information not available to him under the Privacy Act.[187]

Reconciliation of the use of open government laws with discovery methods in other proceedings often occurs with the application of open government provisions, particularly the FOIA. With public employment cases, the courts follow the principles generally applicable when open government laws are used as substitutes for discovery.[188] Generally, actions under open government laws will not delay other proceedings.[189] The discovery rules of a proceeding operate independently of the application of the FOIA;[190] in FOIA litigation, the purpose for which the requester seeks the information usually remains irrelevant to the application of the provision.[191]

Open government laws are also utilized as substitutes for review procedures available under public employment provisions. Because the Privacy Act provides for the amendment of a record and in some circumstances for damages against an agency,[192] the Privacy Act may be substituted as a basis for actions explicitly provided under public employment provisions.[193] For example, an employee may seek to remove a reprimand from his file by seeking to amend his records under the Privacy Act rather than pursuing agency grievance procedures.[194] However, by failing to use availa-

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FOIA work product privilege), *rev'g* 563 F.2d 724 (5th Cir. 1977).

187. Martin v. Merit Sys. Protection Bd., 2 GOV'T DISC. SERV. (P-H) ¶ 82,416 (D.D.C. 1982).

188. *See generally* Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 GEO. WASH. L. REV. 843 (1981).

189. Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1 (1974).

190. *Id.* at 22.

191. Hoover v. United States Dep't of Interior, 611 F.2d 1132 (5th Cir. 1980).

192. 5 U.S.C. § 552a(g)(2) (1982). To recover, a person must show the adverse effect resulting from an unfavorable determination relating to qualification, character, rights, opportunities or benefits and intentional or willful agency conduct. Recovery is limited to actual damages. The Eleventh Circuit has held that actual damage is limited to proven pecuniary loss. Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982). Absent proof of actual damages, a plaintiff is entitled to recover only the statutory minimum of $1,000.

193. FOIA provides a less attractive alternative because the only remedy under FOIA is release of the documents. 5 U.S.C. § 552(a)(4)(B) (1982). Neither amendment nor damages are available under FOIA.

194. Kennedy v. Andrus, 459 F. Supp. 240 (D.D.C. 1978). If the employee is able to seek redress under the Privacy Act, the employee obtains judicial review of the agency determination. Since a reprimand is not a disciplinary action for which there is administrative review outside of the agency, the employee is left with the agency's resolution of his grievance under an agency grievance provision. Under a negotiated grievance provision, the employee would be able to obtain binding arbitration should his union decide to pursue the

ble grievance procedures, an employee may be collaterally attacking a final decision of the agency.[195] In order to protect the integrity of the procedures established for review of personnel actions, the District of Columbia Circuit Court of Appeals has held that an employee should not be allowed to substitute the Privacy Act for established grievance procedures.[196]

The Privacy Act may also provide a complementary remedy. Whether or not an employee may pursue a Privacy Act claim in conjunction with procedures included in public employment provisions depends upon whether or not the public employment provision can be interpreted as providing an exclusive remedy. If the public employment provisions do not preclude redress under the Privacy Act, an employee must still follow the procedures set forth in the Privacy Act.[197] However, Privacy Act claims are not necessarily foreclosed by either a successful or unsuccessful use of procedures for public employment provisions.[198] The Privacy Act may foreclose claims that previously had been available under public employment provisions. For example, the Court of Claims has held that in suits for back pay before the court, the Privacy Act provides the exclusive remedy for one aggrieved by derogatory material in his files generated by his removal.[199] Therefore, the Privacy Act withdraws the consent of the government to suit except under that Act.

Finally, an open government law may also provide a basis for overturning an agency action not taken in public session as required by such a law. While the federal Government in the Sunshine Act may not provide for overturning an agency decision because the Act is violated,[200] many state open meeting laws do allow the violation of their provisions to serve as a basis for reversing an administrative decision.[201] An open meeting provision therefore may provide a method of challenging an agency personnel action

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grievance to arbitration.

195. *Id.* at 242.

196. White v. United States Civil Serv. Comm'n, 589 F.2d 713 (D.C. Cir. 1978), *cert. denied*, 444 U.S. 830 (1979).

197. Schuler v. United States, 617 F.2d 605 (D.C. Cir. 1979).

198. Fiorella v. United States Dep't of HEW, 2 GOV'T DISC. SERV. (P-H) ¶ 81,363 (W.D. Wash. 1981).

199. Fiorentino v. United States, 607 F.2d 963 (Ct. Cl. 1979).

200. *See supra* note 28.

201. *See supra* notes 188-89 and accompanying text.

independent of review under public employment laws.[202] Some state courts have treated violations as requiring reversal of administrative decisions taken during improperly closed meetings,[203] while other state courts have allowed violations of open meeting laws to be a significant consideration in deciding whether a particular administrative decision should be reversed.[204]

3. *Reconciliation of policies involved in discipline and other personnel actions.* The application of open government provisions to disciplinary and other personnel actions highlights the distinctive character of public employment law. Public employment law provides no redress for many personnel decisions which may aggrieve employees, and thus places considerable discretion with agency officials. Review procedures often are quite limited in scope and fail to provide the employee with access to agency information that an employee might find useful in determining whether to seek review or to pursue redress. These aspects of public employment provisions explain why employees often use an open government law in connection with agency personnel actions.

In their application of open government laws, courts have refused to allow open government laws to be used to reduce agency discretion in personnel actions or to alter the character of the employment relationship. Courts have been particularly sensitive to preserving the established avenues of review provided in public employment provisions. It is only when the policies of the open government laws have been clearly at stake that the courts have allowed the use of open government provisions to alter agency personnel practices. This traditional deference of the courts to executive agencies in personnel matters therefore limits the application of open government provisions to discipline and other agency per-

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202. *E.g.*, Hudson v. School Dist., 578 S.W.2d 301 (Mo. Ct. App. 1979); Cole v. Woodcliff Lake Bd. of Educ., 155 N.J. Super. 398, 382 A.2d 966 (1978).

203. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969); Emmanuel Baptist Church v. North Cornwall Township, 26 Pa. Commw. 427, 364 A.2d 536 (1976); Toyah Indep. School Dist. v. Pecos-Barstow Indep. School Dist., 466 S.W.2d 377 (Tex. Civ. App. 1971). *See also* Channel 10, Inc. v. Independent School Dist. 709, 298 Minn. 306, 215 N.W.2d 814 (1974) (agency bylaws in violation of open meetings laws would be voided if such relief had been requested). *But see* Anti-Administration Ass'n v. North Fayette County Comm. School Dist., 206 N.W.2d 723 (Iowa 1973) (even if "open meetings" law was violated, action taken was neither void nor voidable).

204. Hudson v. School Dist., 578 S.W.2d 301 (Mo. Ct. App. 1979).

sonnel actions.

C. *Ethics and Accountability.*

Third parties can seek information about the operation of government through open government laws. Much of this information concerns public employees, including names and addresses of employees and former employees,[205] applications for employment,[206] compensation and salary information,[207] attendance records,[208] personnel files,[209] performance evaluations,[210] personnel investigations,[211] injury claims,[212] allegations of misconduct or official abuse of power,[213] and conflicts of interest.[214]

Third party access to such information concerning public employees often conflicts with the privacy interests of those employ-

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205. *E.g.*, Heimerle v. Attorney Gen., 1 GOV'T DISC. SERV. (P-H) ¶ 80,023 (D.D.C. 1980); Woo v. Reinhardt, 2 GOV'T DISC. SERV. (P-H) ¶ 82,080 (D.D.C. 1981); Palm v. United States Dep't of State, 1 GOV'T DISC. SERV. (P-H) ¶ 80,296 (D.D.C. 1980); Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980); Gannett Co. v. County of Monroe, 59 A.D.2d 309, 399 N.Y.S.2d 534 (1977) (terminated employees), *aff'd*, 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978); New York Teachers Pension Ass'n v. Teachers' Retirement Sys., 71 A.D.2d 250, 422 N.Y.S.2d 389 (1979) (retired teachers); State v. Public Employees' Retirement Sys., 60 Ohio St. 2d 93, 397 N.E.2d 1191 (1979) (retired employees); Mergenthaler v. Pennsylvania State Employees' Retirement Bd., 33 Pa. Commw. 237, 372 A.2d 944 (1977) (retired employees); Aswell v. Lunt, 375 So. 2d 142 (La. 1979), *cert. denied*, 378 So. 2d 434 (La. 1979).

206. Douglas v. Michel, 410 So. 2d 936 (Fla. Dist. Ct. App. 1982); Board of Educ. v. Memphis Pub. Co., 585 S.W.2d 629 (Tenn. Ct. App. 1979); Kenai v. Kenai Peninsula Newpapers, 642 P.2d 1316 (Alaska 1982); City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523 (Iowa 1980); Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633 (Fla. Dist. Ct. App. 1982).

207. Redding v. Jacobsen, 638 P.2d 503 (Utah 1981); Mans v. Lebanon School Bd., 112 N.H. 160, 290 A.2d 866 (1972); People v. Janura, 59 Ill. App. 3d 143, 376 N.E.2d 22 (1978); Penokie v. Michigan Tech. Univ., 93 Mich. App. 650, 287 N.W.2d 304 (1979).

208. *E.g.*, Kanzelmeyer v. Eger, 16 Pa. Commw. 495, 329 A.2d 307 (1974).

209. News Press Publishing Co. v. Wisher, 345 So. 2d 646 (Fla. 1977); Trenton Times Corp. v. Board of Educ., 138 N.J. Super. 357, 351 A.2d 30 (1976).

210. Trahan v. Larivee, 365 So. 2d 294 (La. Ct. App. 1978), *cert. denied*, 366 So. 2d 564 (La. 1979); Ridenour v. Board of Educ., 111 Mich. App. 798, 314 N.W.2d 760 (1981).

211. Farrell v. Village Bd. of Trustees, 83 Misc. 2d 125, 372 N.Y.S.2d 905 (Sup. Ct. 1975); City Council of Santa Monica v. Superior Court, 204 Cal. App. 2d 68, 21 Cal. Rptr. 896 (1962).

212. Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. 1023 (D.D.C. 1979).

213. Stern v. Small Business Admin., 516 F. Supp. 145 (D.D.C. 1980); Columbia Packing Co. v. United States Dep't of Agric., 563 F.2d 495 (1st Cir. 1977); The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1982).

214. Washington Post v. United States Dep't of Health & Human Resources, 2 GOV'T DISC. SERV. (P-H) ¶ 81,047 (D.D.C. 1980).

ees. Accordingly, resolution of this conflict rests heavily upon the perceived character of public employment and the status of public employees. Most open government laws resolve this conflict either through the definition of information to which the public is entitled or through specific provisions protecting the privacy interests of public employees. Given the practical realities of our expansive federal system, the resolution occurs in general terms and varies from jurisdiction to jurisdiction.[215]

Laws requiring public financial disclosure by high ranking public officials constitute a body of open government laws which specifically address the conflict between access and privacy. The analysis of various courts, therefore, may differ more in interpreting general provisions than in interpreting financial disclosure laws. This section, therefore, discusses public financial disclosure laws separately.

1. *The conflict between public access and employee privacy in federal law.* The federal Freedom of Information Act illustrates how open government laws address the privacy interests of public employees. The FOIA contains three exemptions which directly concern the types of information regarding federal employees likely to be sought by third parties.[216] The Act exempts from disclosure documents or records that are "related solely to the internal personnel rules and practices of an agency."[217] In addition, an agency may withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[218] A more limited privacy provision applies to investigatory records.[219] The exemption relating solely to

215. Access to certain types of materials, such as salary information, may be specifically resolved by some state legislatures. *See, e.g.*, Penokie v. Michigan Tech. Univ., 93 Mich. App. 650, 287 N.W.2d 304 (1979) (after decision but before publication of same, the Michigan legislature enacted Mich. Comp. Laws § 15.243 (1)(a), which mirrors the holding in *Penokie* by mandating disclosure of salary records of employees); Redding v. Jacobsen, 638 P.2d 503 (Utah 1981) (the disclosure of personally identifiable salary information is forbidden by the Publication of Higher Education Salary Data Act of 1979, Utah Code Ann. § 53-48a-1).

216. Certain documents, such as appointment calendars, may not be treated as agency records if the documents were not generated by the agency and the agency does not seek to retain or control the documents. Bureau of Nat'l Affairs v. United States Dep't of Justice, 3 GOV'T DISC. SERV. (P-H) ¶ 83,082 (D.D.C. 1983).

217. 5 U.S.C. § 552(b)(2) (1982).

218. *Id.* § 552(b)(6).

219. *Id.* § 552(b)(7)(C). The seventh exemption allows an agency to withhold law en-

internal personnel matters is narrowly construed.[220] This is because it is believed that if the public has a legitimate interest in the material, the material does not relate solely to internal personnel matters and should be released.[221]

Because of the narrow scope of the exemption for internal personnel rules and practices, the protection of the privacy interests of federal employees must fall primarily upon the exemption for personnel and medical files and similar files creating a clearly unwarranted invasion of personal privacy. According to the United States Supreme Court, the protection of this material depends principally upon whether the files contain intimate and embarrassing details regarding the individual.[222] The Supreme Court has emphasized that the privacy interests to be protected, rather than the structure of the records in which the information appears, should control interpretation of the exemption.[223] For example, even if biographical information regarding an employee is extracted from a personnel file, the resulting document is not protected if it contains no information of an intimate or embarrassing nature.[224]

Although a file contains intimate or embarrassing information about an employee, release of the information may be required unless the release would constitute a clearly unwarranted invasion of personal privacy.[225] In determining whether release creates a prohibited invasion of the right to privacy, a court must balance the public's interests in access against the individual's interests in privacy.[226] A substantial invasion of privacy interests may be warranted if an important public purpose is to be served by release,

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forcement records if the agency can demonstrate that one of six specific harms will follow. One of these harms is that the release of the information would constitute an unwarranted invasion of personal privacy. Commentators disagree as to whether the deletion from (7)(C) of the term "clearly," appearing in the sixth exemption, by the conference committee during consideration of the 1974 amendments to the Act lessens the showing which an agency must make. *Compare* FEDERAL INFORMATION DISCLOSURE, *supra* note 2, at 17-26, *with* Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U.L. REV. 37, 48 (1975). Regardless of the weight attached to privacy interests, both (b)(6) and (b)(7)(C) require a balancing of interests.

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

221. *Id.* at 369.

222. *Id.* at 376-77.

223. State Dep't v. Washington Post Co., 456 U.S. 595 (1982).

224. Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980).

225. 5 U.S.C. § 552(b)(6) (1982).

226. Department of the Air Force v. Rose, 425 U.S. 352, 380-82 (1976).

while a less severe invasion may be clearly unwarranted when not balanced by a competing public purpose. Decisions which discuss requests for the names and addresses of federal employees illustrate the balancing of interests. Since these requests implicate privacy interests,[227] their release has been held to be an unwarranted invasion of personal privacy if the only purpose for the release of the information is commercial.[228] If, however, the requester seeks the names in an effort to appeal to employees or former employees to join an organization representing specific interests, at least one court has held that such might constitute a sufficient public purpose which might warrant release.[229]

In some instances, even significant invasions of personal privacy may be warranted. Normally, a citizen has little interest in the career of an individual employee,[230] and no substantial public purpose is served by access to intimate or embarrassing details regarding the employee. Whether a public interest is sufficient to warrant release of embarrassing information depends upon the articulation of the interest and the weight attached to it. One instance where the public interest in the careers of individual federal employees warrants substantial weight is when the employee has been discharged for bribery.[231] In these circumstances, the personnel records of the particular employee provide the public with necessary information about the involvement of other officials and aid in the formulation of measures to be taken to prevent the reoccurrence of such events.[232] Beyond this, the weight to be assigned to the public interest varies. The public interest in the performance of an official's duties may not be sufficient when release affects significant privacy interests,[233] nor may general allegations of agency misconduct be sufficient to implicate a public interest necessary to examine the intimate or embarrassing details of an individual's

227. Heimerle v. Attorney Gen., 1 GOV'T DISC. SERV. (P-H) ¶ 80,023 (D.D.C. 1980); Disabled Officers Ass'n v. Brown, 1 GOV'T DISC. SERV. (P-H) ¶ 79,182 (D.D.C. 1979).

228. *See* Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974). A similar result follows if the requester has only narrow personal reasons for seeking the information. Heimerle v. Attorney Gen., 1 GOV'T DISC. SERV. (P-H) ¶ 80,023 (D.D.C. 1980).

229. Disabled Officers Ass'n v. Brown, 1 GOV'T DISC. SERV. (P-H) ¶ 79,182 (D.D.C. 1979).

230. Columbia Packing Co. v. United States Dep't of Agric., 563 F.2d 495, 499 (1st. Cir. 1977).

231. *Id.* at 499-500.

232. *Id.*

233. Stern v. Small Business Admin., 516 F. Supp. 145, 149 (D.D.C. 1980).

career.[234]

These decisions give considerable weight to the privacy interests of federal employees at the cost of public scrutiny over the operation of government. In particular, the requirement that a specific factual record of wrongdoing be established to create a legitimate public interest in individual careers reduces the use of open government provisions to inquire into suspected misconduct by individual officials. The public interest is substantial so long as the information sought relates to the performance of an individual employee in a significant public program. The privacy of federal employees may better be reconciled with public evaluation of government if consideration is given to the rank of the official and the importance of the official in the success or failure of the particular program.

The exemptions to the federal Freedom of Information Act are permissive in that they do not require the agency to withhold information and they do not serve as absolute prohibitions against release.[235] However, this permissive character may inadequately protect the interests shielded by the Act.[236] In contrast, the privacy exemption of the Freedom of Information Act is mandatory. If the information falls under a protected category and its release would constitute a clearly unwarranted invasion of personal privacy, the agency is barred from releasing it. The mandatory character of the privacy exemption is a result of the relationship between the privacy exemptions of the FOIA and the federal Privacy Act. If release of the information constitutes a clearly unwarranted invasion of personal privacy, then its release is barred by the Privacy Act.[237]

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234. Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. 1023 (D.D.C. 1979). The court distinguished *Columbia Packing* by noting that those officials whose records were sought had been convicted of bribery, which created a legitimate public interest in their careers. *Id.* at 1029. Assumptions of wrongdoing are insufficient to create a public interest strong enough to outweigh the privacy interests of the individual employees. *Id.* at 1029-30.

235. Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

236. Patten & Weinstein, *Disclosure of Business Secrets Under the Freedom of Information Act: Suggested Limitations*, 29 AD. L. REV. 193 (1976); Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 112-13 (1980). An excellent article discussing actions seeking to restrain disclosure is Campbell, *Reverse Freedom of Information Act Litigation: The Need for Congressional Action*, 67 GEO. L.J. 103 (1978).

237. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 520 (1977). *See* Note, *The Freedom of Information Act's Privacy Exemption and the*

Accordingly, the privacy exemption to the Freedom of Information Act and the Privacy Act do coherently mesh.[238]

2. *The conflict between public access and employee privacy in state law.* Resolving the conflict between access and employee privacy in state open government laws is a more difficult problem. State open government laws vary widely and access to information concerning public employees depends upon the definition of public record[239] and the nature of exemptions contained within the specific act.[240] Public record may be broadly or narrowly defined[241] and exemptions may be broadly or narrowly drawn.[242] Moreover, open government laws may consider specifically access to certain types of information affecting the privacy interests of public employees, including access to names and addresses,[243] and salary information.[244]

While some state open government laws provide for judicial balancing of the public interest in access against the privacy interests of individuals similar to the federal approach,[245] others do not

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Privacy Act of 1974, 11 HARV. C.R.-C.L. L. REV. 596 (1976); Note, *The Privacy Act of 1974*, 1976 DUKE L.J. 301.

238. PRIVACY PROTECTION STUDY COMMISSION, *supra* note 237, at 520. At least one commentator believes, however, that the relationship is not clear. FEDERAL INFORMATION DISCLOSURE, *supra* note 2, at § 20.13.

239. Braverman & Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 732 (1981).

240. *Id.* at 737-47.

241. *Id.* at 732-36.

242. For example, rather than prohibiting the release of information that would invade personal privacy, a provision might more narrowly restrict release of information affecting personal security. Personal security need not mean personal privacy. *See, e.g.*, Kanzelmeyer v. Eger, 16 Pa. Commw. 495, 500, 329 A.2d 307, 310 (1974) ("Security commonly means a state of freedom from harm, danger, fear or anxiety,—a state not affected by another's knowledge of one's illness or bereavement").

243. CAL. CIV. CODE § 1798.3(c) (West Supp. 1983); MD. ANN. CODE art. 76A, § 3(c)(x) (Supp. 1982); TEX. STAT. ANN. § 6252-17a § 6 (Vernon Supp. 1983) (names, but not addresses).

244. *See, e.g.*, Redding v. Jacobsen, 638 P.2d 503 (Utah 1981) (statute exempting salary information of employees of institutions of higher education upheld as constitutional). *See* S.C. CODE ANN. § 30-4-40(a)(6) (Supp. 1982); TEX. STAT. ANN. § 6252-17a § 6 (Vernon Supp. 1983); VT. STAT. ANN. tit. 1, § 317(b)(7) (Supp. 1982); WASH. REV. CODE § 41.06.160 (Supp. 1982).

245. *See* CALIF. GOV'T CODE § 6254 (West Supp. 1982); CONN. GEN. STAT. § 1-19b (1979); DEL. CODE ANN. tit. 29, § 10002(d) (1974); D.C. CODE ANN. § 1-1524 (1981); HAWAII REV. STAT. § 92-51 (1976); ILL. ANN. STAT. ch. 116, § 43.6 (Smith-Hurd Supp. 1982); KY. REV. STAT. § 61.878(1)(a) (1981); MICH. COMP. LAWS ANN. § 15.243(1)(a)(iii) (West 1981); N.H. REV. STAT. ANN. § 91-A:5 (1977); N.Y. PUB. OFF. LAW § 89(2)(a) (McKinney Supp.

or severely limit the character of the individual privacy interests that can be considered.[246] Some states that have freedom of information laws do not have privacy provisions.[247] When courts lack the legislative authority to balance interests in resolving the conflict between access and employee privacy, they are left with general state or federal constitutional protections of the right of privacy.[248]

1982); TEX. STAT. ANN. art. 6252-17a § 3(2) (Vernon Supp. 1982); WASH. REV. CODE § 42.17.310(b) (Supp. 1982).

The advisory opinions of the State of New York Committee on Open Government illustrate the way in which the balancing of interests occurs under state law. The Committee's advisory opinions articulate two basic principles: 1) that public employees, because they are accountable to the public, enjoy less privacy than private citizens; and 2) that the release of records relevant to an employee's performance of public duties does not create an unwarranted invasion of personal privacy. The Committee's opinions indicate the breadth of records regarding public employees available to the public. These include: reprimands, FOIL-AO-2062, June 22, 1981; the substance of citizen complaints against employees, FOIL-AO-1742, Oct. 29, 1980; portions of a resume relating to specific educational and experience requirements of a job, FOIL-AO-1836, Jan. 12, 1981; name, title and salary, FOIL-AO-2452, Apr. 27, 1982; attendance record, FOIL-AO-1778, Nov. 26, 1980; seniority lists, FOIL-AO-1477, Apr. 17, 1980; records of grievance proceedings, FOIL-AO-960, Nov. 30, 1978; arbitration decision and award, FOIL-AO-1313, Nov. 23, 1979; reasons given for removal, FOIL-AO-1317, Nov. 26, 1979; charges filed against an employee, FOIL-AO-1338, Dec. 18, 1979; vacation and sick leave records, FOIL-AO-1187, July 3, 1979; and certain portions of internal disclosure of interests questionnaires, FOIL-AO-2249, Oct. 30, 1981. On the other hand, portions of documents and records not relating to the performance of duties may not be available. *E.g.*, place of residence, FOIL-AO-2614, Sept. 20, 1982, and home address, FOIL-AO-1928, Mar. 26, 1981. The opinions are less clear on disclosure of whether an appointment is temporary or permanent, FOIL-AO-2613, Sept. 20, 1982, and whether the composition of an organization by sex must be released, FOIL-AO-1298, Nov. 1, 1979.

246. *See* ALA. CODE § 36-12-40 (1977) (all public writings of the state available except as otherwise provided expressly by statute); IDAHO CODE § 9-301 (1979) (any public record available except as otherwise provided by statute); MO. REV. STAT. § 109.180 (1966) (available except as otherwise provided by law); MONT. CODE ANN. § 2-6-102(1) (1981) (available except as otherwise expressly provided by statute); NEB. REV. STAT. § 84.712 (1976) (available except as otherwise expressly provided by statute); NEV. REV. STAT. § 239.010(1) (1981) (available unless declared by law to be confidential); N.C. GEN. STAT. § 132-1.1 (1981) (only confidential communications by legal counsel to a public agency are exempt); N.D. CENT. CODE § 44-04-18 (1978) (available except as otherwise specifically provided by law). *See also* MISS. CODE ANN. § 25-53-53 (Supp. 1982) (agency originating the data determines its confidentiality).

247. These states are: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, Wisconsin, and Wyoming. The District of Columbia also has no separate privacy act.

248. *E.g.*, Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633 (Fla. 1980).

Because of the variety of state open government laws and the different methods of interpreting and applying access provisions, conclusions regarding the resolution of the conflict between privacy and access are more difficult to draw in cases involving state law than those concerning federal law. Despite this difficulty, the state cases suggest that state courts are likely to give less weight to employee privacy interests than the federal courts. Several factors support this judgment.

First, the different weight attached to employee privacy by state courts reflects in part the different legal settings in which state courts consider the privacy interests of public employees. The constitutional protection of privacy interests may be less restrictive as to access than a legislative judgment such as the one contained in the federal Freedom of Information Act and Privacy Act.[249] Specific legislative judgments contained in some laws favor access at the expense of employee privacy interests.[250] Second, state courts confront the conflict between access and privacy in a setting which tends to emphasize access to personal information regarding public employees. The number of state cases far exceeds the number of similar federal cases, and the news media appear particularly interested in the affairs of local governmental units.[251] This media interest combined with a substantial caseload may be reflected in different judicial attitudes toward employee privacy.

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249. The federal laws make specific legislative judgments regarding the protection of privacy interests. Constitutional protection is less clear, and the scope of appropriate legislative judgment about access to material affecting personal privacy is therefore broad.

250. The following states provide access to all public records, have no specific exemption for employee personnel records, and have no separate privacy act: LA. REV. STAT. ANN. § 44:1, :3 (West 1982); ME. REV. STAT. ANN. tit. 1, § 402 (1979); MO. REV. STAT. § 109.180 (1966); NEB. REV. STAT. § 84-712 (1976); NEV. REV. STAT. § 239.010 (1981); N.J. STAT. ANN. § 47:1A-2 (West Supp. 1982); N.C. GEN. STAT. § 132-1.1 (1981); N.D. CENT. CODE § 44-04-18 (1978); OKLA. STAT. tit. 51, § 24 (1962); S.D. CODIFIED LAWS ANN. § 1-27-1 (Supp. 1982); TENN. CODE ANN. § 10-7-503 (Supp. 1982).

Four states expressly provide for specific information concerning public employees when that information is deemed not to be confidential. *See* MD. ANN. CODE art. 76A, § 2 (Supp. 1982)(salaries of all state, county and municipal employees are public records); MICH. STAT. ANN. § 4.1801(13a) (Supp. 1982) (salary records of school district employees are available); VT. STAT. ANN. tit. 1, § 317(b) (Supp. 1983)(public records include individual salaries); TEX. STAT. ANN. art. 6252-17a, § 6 (Vernon Supp. 1983)(names, sex, ethnicity, salaries, title, and dates of employment of all employees of the state and all its political subdivisions are public information).

251. A substantial percentage of the state cases cited *supra* notes 205-13 involve local newspapers, radio or television stations.

The lesser weight attached to employee privacy interests reflects a different judicial perception of the character of public employment. State courts seem more willing than federal courts to articulate a significant public interest simply because the information concerns the performance of a public employee or issues relating to public employment.[252] This willingness reflects a view that public employment is significantly different than other employment.

3. *Public financial disclosure.* Public financial disclosure provisions explicitly provide public access to information regarding the private financial affairs of certain public employees. In so doing, these provisions value access above the privacy interests of individual employees. The public interests perceived to be served by public financial disclosure include increasing public confidence in government,[253] providing a meaningful enforcement method for violation of conflict of interest provisions,[254] altering the perceptions and conduct of public employees,[255] and encouraging debate and evaluation of conflict of interest provisions.[256]

Despite arguments that public financial disclosure fails to reduce conflicts of interest and might even deter qualified and honest persons from seeking public employment,[257] most state govern-

252. *Compare* Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. 1023, 1029 (D.C. Cir. 1979) ("ordinarily the individual careers of public servants are of small general interest") *with* Kenai v. Kenai Peninsula Newspapers, 642 P.2d 1316, 1324 (Alaska 1982) ("Public Officials must recognize their official capacities often expose their private lives to public scrutiny") (citation omitted).

253. Note, *The Constitutionality of Financial Disclosure Laws*, 59 CORNELL L. REV. 345, 346 (1974).

254. Punishment of a public employee for failure to report may be much easier than punishment for accepting a gift or holding a financial interest in a matter subject to the employee's official action.

255. Comment, *State Legislative Conflicts of Interest: An Analysis of the Alabama Ethics Commisssion Recommendations*, 23 ALA. L. REV. 369, 401 (1971) (disclosure encourages legislators to be more careful when handling extra-legislative economic activities or conflict situations).

256. Stein v. Howlett, 52 Ill. 2d 570, 578, 289 N.E.2d 409, 413 (1972), *appeal dismissed*, 412 U.S. 925 (1973).

257. *Hearings on H.R. 3249 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 99 (1976) (testimony of Harvey Pitt, SEC General Counsel) [hereinafter *House Judiciary Hearings on H.R. 3249*]. The Council of State Governments has found some evidence suggesting that financial disclosure adversely affects recruitment. COUNCIL OF STATE GOVERNMENTS, STATE CONFLICT OF INTEREST/FINANCIAL DISCLOSURE 25-26 (1975). The General Accounting Office found it "extremely difficult, if not impossible to attribute any specific degree of federal recruiting difficulties to

ments have adopted some form of public financial disclosure.[258] With the passage of the Ethics in Government Act of 1978,[259] the federal government joined the majority of states in requiring public financial disclosure by at least some public employees. The Act illustrates the types of questions underlying public financial disclosure provisions. Principal among these questions are who should report, what should be reported, what information should remain confidential, and how should disclosure be enforced.

Determining who should report focuses upon whether a grade or salary scale or more general criteria should be used.[260] A grade and salary scale offers administrative efficiency, but at the cost of covering some positions where little risk of conflicts of interest exists and excluding other positions, which although of a lower rank,

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the [Federal Ethics in Government Act of 1978] or to any of its provisions." GENERAL ACCOUNTING OFFICE, INFORMATION ON SELECTED ASPECTS OF THE ETHICS IN GOVERNMENT ACT OF 1978 App. I, at 1 (1983) [hereinafter ETHICS ACT STUDY].

258. ALA. CODE § 36-25-14 (1975); ALASKA STAT. §§ 39.50.020-.030 (1980); ARIZ. REV. STAT. ANN. §§ 38-542, -545 (1974); ARK. STAT. ANN. § 12-1630 (1979); CALIF. GOV'T CODE §§ 87202-87203 (West 1976 & Supp. 1983); COLO. REV. STAT. § 24-6-202 (1982); CONN. GEN. STAT. § 1-83 (Supp. 1982); DEL. CODE ANN. tit. 29, § 5855 (1979); D.C. CODE ANN. § 1-1462 (1981 and Supp. 1982); FLA. STAT. § 112.3145 (1978); HAWAII REV. STAT. § 84-17 (Supp. 1982); ILL. ANN. STAT. ch. 127 § 604A-101 (Smith-Hurd 1981 & Supp. 1982); IND. CODE ANN. § 4-2-6-8 (Burns 1982); KAN. STAT. ANN. § 46-247 (1981); LA. REV. STAT. ANN. § 42-1114 (West Supp. 1983); MD. ANN. CODE art. 40A §§ 4-102, -103, 6-201 (1982); MASS. GEN. LAWS ANN. ch. 268B, § 5(b) (West Supp 1983); MICH. STAT. ANN. § 4.1701 (131) (Callaghan 1977); MINN. STAT. ANN. §§ 10A.07, .09 (West 1977 and Supp. 1983); MISS. CODE ANN. § 25-4-25 (Supp. 1982); MO. ANN. STAT. § 105.460 (Vernon 1966); MONT. CODE ANN. § 2-2-131 (1981); NEB. REV. STAT. § 49-1493 (1978); NEV. REV. STAT. § 281.561 (1979); N.M. STAT. ANN. § 10-16-10 (1983); N.Y. PUB. OFF. LAW § 74(3)(j) (McKinney Supp. 1982); OHIO REV. CODE ANN. § 102.02 (Page 1978 and Supp. 1983); PA. CONS. STAT ANN. tit. 65 § 404 (Purdon Supp. 1982); R.I. GEN. LAWS § 36-14-15 (Supp. 1982); S.C. CODE ANN. § 8-13-810, -820 (1977 and Supp. 1982); S.D. CODIFIED LAWS ANN. § 3-1A-3 (1980); TENN. CODE ANN. § 8-50-501, -502 (1980 and Supp. 1982); TEX. REV. CIV. STAT. ANN. arts. 6252-9b(3)-(4) (Vernon Supp. 1983); UTAH CODE ANN. § 67-16-7 (1978); VA. CODE ANN. §§ 2.1-352, -353.(B) (1979 and Supp. 1982); WASH. REV. CODE ANN. § 42.17.240 (Supp. 1983); W. VA. CODE § 6B-1-1 (1979); WIS. STAT. ANN. § 19.43 (West Supp. 1982).

259. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of tits. 2, 5, 18, 28, 39) (Supp. II - Supp. IV 1980).

260. During congressional consideration of the Ethics in Government Act, Common Cause, a citizen lobbying group, supported the use of grade scales to avoid administrative difficulties that would be created by broad criteria. *Hearings on S.555 Before the Senate Comm. on Gov't Affairs*, 95th Cong., 1st Sess. 97 (1977) (testimony of Fred Werheimer). The American Civil Liberties Union opposed coverage based on classification or pay because "[a]dministrative or legislative convenience can never be the justification for unneccessary invasions of privacy." *Hearings on H.R.1, H.R.9, H.R.6954 Before Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 503 (1977) [hereinafter *House Judiciary Hearings on H.R.1*].

pose substantial risks of conflicts of interest. Congress, through the Ethics in Government Act, chose to use a grade scale level as a means of defining who should report, thereby applying the provision to all high ranking federal officials.[261] Constitutional challenges to the Ethics in Government Act as well as to similar state provisions have raised equal protection objections to the classification used to require reporting.[262] Generally, these challenges have been unsuccessful.[263]

The Act requires the reporting of a variety of financial interests including earned and unearned income,[264] assets and liabilities,[265] certain transactions,[266] compensation received,[267] and posi-

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261. 5 U.S.C. app. § 201 (1982).

262. *See, e.g.*, Duplantier v. United States, 606 F.2d 654 (5th Cir. 1979) (Ethics in Government Act disclosure provisions as applicable to art. III judges held constitutional); Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 519, 315 N.E.2d 9, 13 (executive order requiring state employees to make financial disclosures upheld), *cert. denied*, 419 U.S. 1058 (1974); Montgomery County v. Walsh, 274 Md. 502, 525, 336 A.2d 97, 111 (1975) (county financial disclosure statute upheld), *appeal dismissed*, 424 U.S. 901 (1976). Some public officials also have challenged disclosure statutes' classification of those who must report as unnecessarily broad. *See* Goldtrap v. Askew, 334 So. 2d 20 (Fla. 1976); Klaus v. Minnesota State Ethics Comm'n, 309 Minn. 430, 244 N.W.2d 672 (1976); Fritz v. Gordon, 83 Wash. 2d 275, 517 P.2d 911, 926, *appeal dismissed*, 417 U.S. 902 (1974).

263. Some courts have found the classification of employees too broad to accomplish the legislative purpose. Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970); Evans v. Carey, 85 Misc. 2d 119, 379 N.Y.S.2d 354 (Sup. Ct.), *rev'd*, 53 A.D.2d 109, 385 N.Y.S.2d 965 (App. Div), *aff'd*, 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976).

264. 5 U.S.C. app. § 202(a)(1)(A) (1982). Income derived from dividends, interest, rent and capital gains exceeding $100 must be reported but only by value categories. As to other forms of income, the employee must report the source, type, amount, and value of income received exceeding $100.

265. *Id.* § 202(a)(3)-(4). Assets and liabilites must be reported within categorical values. The Act does not distinguish between real and personal property. The Act does not require reporting the value of a personal residence not used for the production of income, provides a $1,000 *de minimus* exception, and excludes savings accounts and certificates of deposit aggregating to $5,000 or less.

266. *Id.* § 202(a)(5). The employee must report all transactions including a description, date, and value involving the purchase, sale, or exchange of real property, stocks, bonds or commodity futures. Excluded is any transaction between the employee and the employee's spouse or children as well as the transfer, purchase or sale of a personal residence. *See also id.* § 209(1) (definition of income).

267. *Id.* § 202(a)(6)(B). The employee must report the names of people who paid him compensation in excess of $5,000 in any of the two calendar years in which he first files a report. The employee must also provide a brief description of the services performed. The Act protects the lawyer-client privilege and requires the employee to be directly involved in the provision of services. The employee must report any arrangements regarding future employment as well as leaves of absence from government service and continuation of pay-

tions held.[268] Because of the perception that gifts and income were likely sources of conflicts of interest, considerable detail regarding gifts and income is included in the Act.[269] The provisions, however, are not all-inclusive. By placing limits upon what must be reported under the Act,[270] Congress reduced the administrative burdens on the employee and the intrusions into financial privacy. The amount of information required to be reported under the Act reflects what Congress perceived to be the type of financial interests likely to entail conflicts of interest.

Whether to require the reporting of the interests of spouses and other relatives presented a difficult problem.[271] While Congress viewed the privacy interests of spouses as being entitled to special consideration, exclusion of spouses' interests opened a substantial possibility of evasion.[272] The Act thus requires a spouse's income to be reported, but Congress accommodated the spouse's privacy interests in a number of ways.[273]

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ments and benefits by previous employers.

268. *Id.* § 202(a)(6)(A). An employee must disclose all positions held as an officer, trustee, director, partner, employee, representative, proprietor, or consultant of any corporation, firm, or business, including non-profit organizations. Excluded from reporting are honorary positions and positions held in any religious, social, fraternal or political entity. Requiring the reporting of positions held in these entities would constitute an improper invasion of the first amendment rights of free association. *See* American Fed. of Gov't Employees v. Schlesinger, 443 F. Supp. 431, 434-35 (D.D.C. 1978) (challenge to internal reporting regulations).

269. 5 U.S.C. app. § 202(a)(2) (1982). *See also supra* note 264. The Act distinguishes between gifts of food, lodging, transportation, entertainment and other gifts. Gifts of food, lodging, transportation and entertainment are to be reported if gifts from any individual in a calendar year total $250 or more. Other gifts are to be reported if gifts from any individual in a calendar year total $100 or more. The employee must report the source, value and description of the gift. Gifts from relatives are excluded.

270. *See supra* notes 264-69 and accompanying text.

271. Critics of inclusion of spouses' financial interests noted the altered role of women in society and the modification of the marriage relationship. H.R. REP. No. 800, 95th Cong., 1st Sess. 105 (1977); *House Judiciary Hearings on H.R. 3249, supra* note 257, at 35 (statement of Rep. E.W. Pattison).

272. *House Judiciary Hearings on H.R. 1, supra* note 260, at 45.

273. 5 U.S.C. app. § 202(e) (1982). There are five principal exemptions from the reporting requirements: 1) While the spouse's source of earned income exceeding $1,000 received from any person must be reported, only the character of the employee's business need be reported if the spouse is self-employed in a business or profession. 2) Gifts and reimbursements need not be reported if the spouse receives them independent of the spouse's relationship with the employee. 3) The employee need not report the spouse's property holdings, transactions, property, and liabilities if the employee certifies that the employee has no knowledge of the financial interest, that it is not derived from the employee's assets or income, and that the employee does not derive any economic benefits from the financial interest. 4) No report of the spouse's financial interest is required if the spouse is living apart

Government departments and agencies raised objections during congressional consideration of the Act claiming that much of the information being contemplated for inclusion should remain confidential. They stressed privacy interests, the adverse effect on recruitment, and the fear of abuse of the information.[274] While Congress rejected confidentiality, the Ethics in Government Act incorporates protections for reporting employees including review of the report prior to disclosure,[275] destruction of reports after a period of six years,[276] and penalties for use of the reports for unlawful purposes or for commercial purposes such as solicitation.[277]

Congress sought to provide an enforcement structure and penalties that were sufficiently flexible to deal with both severe and less egregious violations. As do many of the state provisions,[278] the

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from the employee with an intent to end the marriage or to have a permanent separation. 5) Alimony and other payments related to divorce need not be reported.

Some state cases have addressed the requirement of reporting of spouse's financial interest. *See, e.g.*, Lehrhaput v. Flynn, 129 N.J. Super. 327, 333, 323 A.2d 537, 541 (1974), *aff'd*, 740 N.J. Super. 250, 356 A.2d 35 (1976), *aff'd*, 75 N.J. 459, 383 A.2d 428 (1978) (striking down a portion of a New Jersey statute requiring an employee to report the assets of a spouse).

274. *Privacy Interests: House Judiciary Hearings on H.R. 3249, supra* note 259, at 71 (testimony of M. Lawton, Deputy Ass't Att'y Gen.), 107 (statement of R. Albrecht, Dep't of Treas. General Counsel), 115 (testimony of R. Wiley, Dep't of Defense General Counsel), 112 (statement of C. Goodman, U.S. Civ. Serv. Comm. General Counsel); *Adverse Effect on Recruitment: House Judiciary Hearings on H.R. 3249, supra* note 257, at 99 (testimony of H. Pitt, SEC General Counsel); *Fear of Abuse: House Judiciary Hearings on H.R. 1, supra* note 260, at 480 (statement of R. Keller, Deputy Comptroller General).

275. 5 U.S.C. app. § 206 (1982). An appropriate official must review the report and sign it after determining that no conflict of interest was found. This official may request additional information. If, after notice and an opportunity to respond, the appropriate official determines the report discloses a conflict of interest, the official may notify the employee of steps that must be taken to resolve the conflict. Included in such steps are divestiture, restitution, establishment of a blind trust, voluntary transfer, reassignment, or resignation.

276. *Id.* § 205(d). Filed reports are destroyed after six years. Reports on unconfirmed appointees or of unelected presidential and vice-presidential candidates are destroyed after one year.

277. *Id.* § 205(f). Reports may not be obtained or used for unlawful purposes. The attorney general may bring a civil action against any person who misuses access to the reports and may recover a penalty up to $5,000. Although only ten percent of the approximately 12,000 employees filing reports are political appointees, almost eighty percent of the requests concern political appointees. Most requests come from the media and public interest groups. ETHICS ACT STUDY, *supra* note 257, app. I at 11-13.

278. Twenty-seven states have criminal remedies. *See* ALA. CODE § 36-25-27(a) (1975) (maximum fine of $10,000 and maximum sentence of 10 years); ALASKA STAT. § 39.50.060(a) (1977) (willful violation a misdemeanor; maximum fine $1,000 and maximum sentence six months); ARIZ. REV. STAT. ANN. § 38-544 (fine of $1,000 or 30 days in county jail maximum penalty); ARK. STAT. ANN. § 12-1632 (1979) (maximum penalty $500 fine); CALIF. GOV'T

Ethics in Government Act provides civil and administrative reme-

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CODE § 91000(a)-(b) (West 1976 and Supp. 1983) (intentional violation a misdemeanor; maximum penalty $10,000 or three times the amount unreported); COLO. REV. STAT. § 24-6-202(7) (1982) (misdemeanor for willful violation; fine of not less than $1,000 and not more than $5,000); CONN. GEN. STAT. 1-89 (Supp. 1983) (imprisonment up to one year and fine of $1,000 for intentional violation); D.C. CODE ANN. § 1-1471(a)-(b) (1981 and Supp. 1982) (maximum penalty 5 years and $5,000, but $10,000 for willful or intentional violations); FLA. STAT. ANN. § 112.317(6) (1978) (willful violation a misdemeanor of the first degree); ILL. ANN. STAT. ch. 127, § 604A-107 (Smith-Hurd 1981) (willful violation a Class A misdemeanor); KAN. STAT. ANN. § 46-251 (1981) (failure to file a true statement a Class B misdemeanor); MASS. GEN. LAWS ANN. ch. 268B, § 5(f) (1982) (statement signed under penalty of perjury); MICH. STAT. ANN. §§ 4.1701(175), (180) (Callaghan 1977) (midemeanor; $1,000 or ninety days); MINN. STAT. ANN. § 10A.10 (1977 and Supp. 1983) (knowing certification of false information a felony); MISS. CODE ANN. § 25-4-31(3) (Supp. 1982) (knowing violation a misdemeanor); NEB. REV. STAT. § 49-14, 126 (1978 and Supp. 1982) (Accountability & Disc. Comm'n may pursue various criminal remedies); NEV. REV. STAT. § 281.581 (1979) (willful failure to file a misdemeanor); OHIO REV. CODE ANN. § 102.06 (1978 and Supp. 1983) (Ethics Comm'n may recommend prosecution); PA. CONS. STAT. ANN. § 65-409(b) (Purdon Supp. 1982) (misdemeanor; $1,000 or one year maximum penalty); R.I. GEN. LAWS § 36-14-18 (Supp. 1980) (willful violation maximum penalty $500 and/or one year); S.C. CODE ANN. § 8-13-1010 (1977 and Supp. 1981) (willful violation a misdemeanor, maximum penalty $1,000 and/or 90 days); S.D. CODIFIED LAWS ANN. § 3-1A-6 (1980) (intentional violation a Class 2 misdemeanor); TENN. CODE ANN. § 8-50-505 (1980) ($1,000 maximum fine); TEX. REV. CIV. STAT. ANN. art. 6252-9b(10) (Vernon Supp. 1982) (knowing violation a Class B misdemeanor); UTAH CODE ANN. § 67-16-12 (1978) (knowing violation a misdemeanor and incurs removal from office); W. VA. CODE § 613-1-2 (1979) (intentional violation a misdemeanor punishable by six months to one year confinement); WIS. STAT. ANN. § 19.58(1) (West 1972 and Supp. 1982) (intentional violation incurs fine of not less than $100 nor more than $5,000 and/or imprisonment of not more than one year in county jail).

Twenty-one states have civil or administrative remedies. *See* ALA. CODE § 36-25-27(c) (1975) (criminal penalties do not preclude powers of agencies or commissions to discipline their employees); ALASKA STAT. § 39.50.070-.080 (1980) (failure to file can preclude confirmation, appointment, or collection of salary); CALIF. GOV'T CODE §§ 83116, 91001, 91004 (West 1976 & Supp. 1983) (cease and desist order; monetary penalties); CONN. GEN. STAT. § 1-88, -89(6) (West Supp. 1983) (civil penalty of $10 per day and agencies retain the power to discipline); DEL. CODE ANN. tit. 29, § 5858(c) (1979) (State Personnel Comm'n may remove, suspend, or take other disciplinary action); FLA. STAT. ANN. § 112.317(1)-(5) (West 1982 & Supp. 1983) (civil penalties include removal, suspension, restitution and $5,000 fine); HAWAII REV. STAT. § 84-19 (1976 & Supp. 1982) (att'y general authorized to void contracts where necessary); ILL. ANN. STAT. ch. 127, § 604A-107 (Smith-Hurd 1981) (failure to file within the prescribed time results in ineligibility for or forfeiture of the position); IND. CODE ANN. § 4-2-6-4(3) (Burns Supp. 1983) (State Ethics Comm'n shall recommend appropriate sanction or remedy); LA. REV. STAT. ANN. § 42-1153 (West Supp. 1983) (civil penalties include removal, suspension, and demotion); MD. ANN. CODE art. 40A, § 2-105(d)(8) (1982) (State Ethics Comm'n shall recommend appropriate penalty); MASS. GEN. LAWS ANN. ch. 268B, §§ 4, 5(c) (West Supp. 1983) (State Ethics Comm'n may issue an appropriate order including civil penalty not exceeding $2,000); MICH. STAT. ANN. § 4.1701(171) (1977) (criminal penalties do not limit the powers of other governmental bodies to discipline their employees); NEB. REV. STAT. §§ 49-14, 126 (1978 & Supp. 1982) (Accountability & Disclosure Comm'n may pursue various civil penalties); N.M. STAT. ANN. § 10-16-14(B) (1978) (dismissal, demotion, or sus-

dies as well as criminal penalties for violations of the Act.[279] The Act also establishes an Office of Government Ethics to fulfill enforcement and review responsibilities.[280]

Constitutional challenges to state public financial disclosure provisions have rested upon allegations that the provisions violated employees' rights to privacy, rights of free association, rights against self-incrimination, and the right to equal protection under the law. Challenges based upon the constitutional right to privacy have failed either because the courts have found that public employees' financial interests are not protected by a constitutional right to privacy,[281] or because a compelling state interest justifies infringement upon the right of privacy.[282] Challenges upon equal

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pension); N.Y. PUB. OFF. LAW § 74(4) (McKinney Supp. 1982) (violators may be fined, suspended or removed from office); OHIO REV. CODE ANN. § 102.06 (Page 1978 & Supp. 1983) (Ethics Comm'n shall make appropriate recommendation); R.I. GEN. LAWS 36-14-13 (Supp. 1982) (Conflict of Interest Comm'n shall recommend penalty); VA. CODE 2.1-628 (Supp. 1983) (may forfeit office or employment) WASH. REV. CODE. ANN. § 42.17.390 (Supp. 1983) (penalties include fines of $10,000 or ten dollars per day of tardiness); WIS. STAT. ANN. § 19.58(2) (West Supp. 1982) (criminal penalties do not limit the powers of a department to discipline employees).

279. 5 U.S.C. app. § 204 (1982). A civil penalty not to exceed $5,000 is provided for a knowing or willful failure to file or for a knowing or willful falsification. In addition, administrative penalties are provided for failure to file, for falsification, for failure to provide additional information, and for failure to take steps to eliminate a discovered conflict. The General Accounting Office found that agencies "have made little use of the administrative enforcement authority given them by the [Ethics in Government Act of 1978]." ETHICS ACT STUDY, *supra* note 257, at 5.

280. 5 U.S.C. app. § 401 (1982) The Office has enforcement and review responsibilities, including the responsibility to provide and publish advisory opinions, *id.* § 402. Rules and regulations are to be made after notice and comment and the Act gives any person standing to seek judicial review of a regulation, *id.* § 404.

281. *See* Gideon v. Alabama State Ethics Comm'n, 379 So. 2d 570 (Ala. 1980); Goldtrap v. Askew, 334 So. 2d 20 (Fla. 1976); Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9, *cert. denied*, 419 U.S. 1058 (1974); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976); Snider v. Shapp, 45 Pa. Commw. 337, 405 A.2d 602 (1979); *In re* Kading, 70 Wisc. 2d 508, 235 N.W.2d 409 (1975); *see also* Opinion of the Judges to the Senate, 375 Mass. 795, 376 N.E.2d 810 (1978) (advisory opinion that public officers can be required to make financial disclosures without violating their right of privacy); Kenny v. Bryne, 144 N.J. Super. 243, 365 A.2d 211 (1976) (executive order requiring state employees to make financial disclosures held not to violate their right of privacy), *aff'd*, 75 N.J. 458, 383 A.2d 428 (1978). *Contra*, Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d 332 (1976) (financial disclosure provisions in state ethics act held unconstitutionally vague).

282. *See* County of Nevada v. MacMillen, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911, *appeal dismissed*, 417 U.S. 902 (1974). *See also* Slevin v. City of New York, 551 F. Supp. 917, 931 (S.D.N.Y. 1982) (employee's privacy not violated by financial disclosure to city government).

protection,[283] due process,[284] or the right against self-incrimination[285] have likewise generally failed. It is clear, therefore, that public financial disclosure laws resolve the conflict between access and privacy in favor of access. This judgment rests upon the perceived importance of the values involved in this specific area of disclosure.

4. *Reconciliation of the conflict between accountability and personal privacy.* The conflict between public access to governmental information and employee privacy exposes basic judicial perceptions concerning the character of public employment which warrant re-evaluation. Articulation of employee privacy interests requires courts to assess the character of public employment. Absent constitutional restraints, the courts' characterization depends upon how much of the public character of government business is to be imputed to the acts of the individual employee. The more willing a court is to conclude that issues regarding public employees legitimately elicit public scrutiny, the less likely a court is to require specific or exceptional reasons for the interest in the activities of a particular public employee.[286]

Historically, the rights of public employees have been most often discussed in the face of action by a governmental unit against the employee. In this context, the recognition of the rights of public employees led to the abandonment of the concept that public employment was a privilege along with the rejection of the belief that public employees, by accepting their positions, waived rights that other citizens enjoyed.[287] Open government laws once again force the courts to confront the propriety of intrusions upon individual interests permitted solely on the basis of the person's status as a government employee. Not surprisingly, given the strong policies supporting public access and the ambiguity of the individual rights invaded, courts have perceived the character of public employment as being fundamentally different than that of

283. *See supra* cases cited at note 262.

284. Stein v. Howlett, 52 Ill. 2d 570, 289 N.E.2d 409 (1972), *appeal dismissed*, 412 U.S. 925 (1973); Montgomery County v. Walsh, 274 Md. 502, 336 A.2d 97 (1975), *appeal dismissed*, 424 U.S. 901 (1976).

285. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965) (public employees are not a highly selective group inherently suspect of criminal activities).

286. *See supra* notes 249-52 and accompanying text.

287. *See generally*, D. ROSENBLOOM, FEDERAL SERVICE AND THE CONSTITUTION (1971).

private employment. Public financial disclosure by public employees illustrates that significant intrusions into the privacy of public employees follow from justifications resting upon the public's need to understand and to police official conduct. Public financial disclosure provisions link the general policies favoring access to the affairs of individual employees.

CONCLUSION

Judicial decisions interpreting the relationship between open government laws and public employment provisions provide an insightful perspective from which to examine these two important substantive bodies of law. This perspective presents views of each body of law that otherwise would be difficult to acquire. The relationship between the two bodies of law also exposes common policies and purposes which provide principles for further reconciliation.

In areas such as government investigation of applicants and employees, requests for information regarding employees, and public financial disclosure, legislative bodies often have directly addressed the relationship between the two bodies of law. While legislative accommodation of competing values often has left considerable ground for dispute, it can be fairly said that judicial decisions reflect the policy judgments of the legislatures. In other areas, such as labor management relations and personnel actions, legislative determinations are less clear. While the statutes may address specific problems, they do not contain judgments directed to the reconciliation of the conflicting policies contained in public employment provisions and open government laws.

Judicial decisions in all four areas reviewed, however, offer discernable patterns because the two bodies of law address similar problems. The history of the two bodies of law illustrates that open government provisions seek to provide public understanding of the operations of government and thereby encourage public participation in government and provide a method of official accountability. The history of public employment laws shows that public employment provisions seek to encourage the fair and efficient administration of government. Underlying these provisions to encourage the fair and efficient administration of government is the concept of personal responsibility and accountability. Open government laws and public employment provisions both concern democratic

control of public bureaucracies. The two bodies of law address similar questions, such as how individuals within the organization can be held responsible for their conduct, how the public should be involved in the administration of public programs, and to what protections public employees should be entitled. A brief examination of these questions demonstrates common concerns yet also illustrates specific conflicts reflected in the litigated cases.

Public employment provisions seek to ensure that pay, promotion, and discipline turn upon evaluation of an individual's performance. This evaluation rests primarily in the hands of the public employer. Public employment provisions provide but a small role for the citizen in the evaluation of individual employees. Open government provisions, on the other hand, focus upon accountability through public access to information regarding official actions. This evaluation, however, often requires information regarding individual employees. Therefore, open government provisions clash not only with the privacy rights of the individual employee but also with the employee's expectations that evaluation will remain in the hands of the public employer.

Open government laws and public employment provisions address the protection of employee rights differently. Public employment provisions protect individual employees because protection is necessary to ensure that public employers exercise their authority over personnel in a manner which furthers the purposes for which it was granted. Unbridled discretion of public officials would limit the ability of legal rules to structure and to control public employment. Open government provisions define employee rights principally as restrictions upon public access. Therefore, employees have been markedly unsuccessful in using open government provisions to alter the character of the employment relationship or the restraints placed upon the public employer. Only when the restraint is clearly required by the open government provision have the courts been willing to act to provide protection. Because employee rights are viewed as restrictions upon public access, courts have been willing to define employee interests narrowly.

Legislation within the two areas requires judicial reconciliation, not only because of the conflicting policies, but also because legislatures have often failed to understand that the two areas address similar questions. The spate of legislation in both areas in recent years reflects a growing anxiety about the power of public

bureaucracies and a desire to impose legal restraints upon them. The next generation of legislative initiatives demands a recognition of the commonality of concerns expressed in open government laws and public employment provisions, along with a willingness to alter both areas to fit a general theory of the regulation of official conduct.