Washington Law Review

Volume 62 | Number 2

4-1-1987

Are Privacy and Public Disclossure Compatible?: The Privacy Exemption to Washington's Freedom of Information Act—In re Rosier, 105 Wn. 2d 606, 717 P.2d 1353 (1986)

Matthew Edwards

ARE PRIVACY AND PUBLIC DISCLOSURE COMPATIBLE?: THE PRIVACY EXEMPTION TO WASHINGTON'S FREEDOM OF INFORMATION ACT—*In re Rosier*, 105 Wn. 2d 606, 717 P.2d 1353 (1986).

In 1972, Washington State voters passed Initiative 276, the Public Disclosure Act,[1] by a substantial margin.[2] The initiative contained four measures intended to open up government,[3] including one designed to ensure public access to government-held records.[4] This measure, popularly known as Washington's Freedom of Information Act (FOIA), provides a mechanism by which individuals can access information held by the government, subject to only a few exemptions.[5] One such exemption prevents disclosure which is an "unreasonable invasion" of personal privacy.[6] The Washington Supreme Court greatly expanded the scope of this personal privacy exemption in *In re Rosier*.[7] Prior to this decision, the exemption had been interpreted potentially to exclude only information which was highly offensive to a reasonable person.[8] After *Rosier*, any information which is linked to an individual[9] and which reveals something "unique" about that individual[10] may be exempted, subject to a balancing of the public and the private interest.[11] This expanded protection of privacy, however, is both bad policy and an unwarranted interpretation of the FOIA.[12]

The supreme court ought to interpret the privacy exemption in a manner that acknowledges the specific circumstances which justify the protection of the individual's privacy under the FOIA. Privacy ought to be protected, for example, when the government has illicitly acquired the information,[13]

1. Initiative 276, 1973 Wash. Laws ch. 1 (codified at WASH. REV. CODE §§ 42.17.010–.945. (1985)).

2. The initiative passed 959,143 to 372,693, an approval rate of 72%. WASHINGTON STATE SECRETARY OF STATE, 1972 ABSTRACT OF VOTES 2.

3. The measures related to campaign financing, lobbyist reporting, reporting of public officials' financial affairs, and public records. WASH. REV. CODE §§ 42.17.010–.945. (1985).

4. *Id.* §§ 42.17.250–.340.

5. See *id.* § 42.17.310(1) for the list of specific exemptions.

6. *Id.* § 42.17.260(1).

7. 105 Wn. 2d 606, 717 P.2d 1353 (1986).

8. Hearst Corp. v. Hoppe, 90 Wn. 2d 123, 135–36, 580 P.2d 246, 253 (1978). In addition to being highly offensive, information had to be of no legitimate public interest to satisfy the *Hearst* test. *See infra* note 35 and accompanying text.

9. *See infra* notes 75–86 and accompanying text.

10. *See infra* notes 87–104 and accompanying text.

11. *See infra* note 105 and accompanying text.

12. *See infra* notes 106–17 and accompanying text.

13. *See infra* notes 121–22 and accompanying text.

has promised confidentiality in order to get more accurate information,[14] or when disclosure would chill the individual's exercise of fundamental rights.[15] The privacy exemption should strictly protect privacy in such circumstances. This interpretation would make disclosure more predictable, better protect privacy, and best implement the FOIA's main purpose of assuring free and open access to government-held information.

I. WASHINGTON'S FREEDOM OF INFORMATION ACT

Washingtons Freedom of Information Act provides a means by which private individuals can access a broad range of government-held information. The act requires agencies to make "all public records" available for public inspection.[16] Individuals denied access to a public record may seek *de novo* judicial review of the agency's decision.[17] The act specifically instructs courts to take into account that "free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."[18]

Some information, however, is exempted from disclosure. Agencies are directed to delete identifying details when disclosing a record "[t]o the extent required to prevent an unreasonable invasion of personal privacy."[19] The act also exempts several specific categories of information relating to personal privacy.[20] Although purporting to protect a "right to privacy,"[21] the act does not attempt to define the phrase.[22] Thus, the statutory language leaves unresolved the tension between the act's goal of ensuring free and

14. *See infra* notes 123–27 and accompanying text.

15. *See infra* notes 128–31 and accompanying text.

16. "Each agency . . . shall make available for public inspection and copying all public records." WASH. REV. CODE § 42.17.260(1) (1985).

17. *Id.* § 42.17.340(1). The act also gives the agency the burden of proving that it is required to refuse disclosure. *Id.*

18. *Id.* § 42.17.340(2).

19. *Id.* § 42.17.260(1).

20. *Id.* § 42.17.310(1). The first of the specific exemptions absolutely protects personal information in school, public institution, welfare, and prisoner files. The other exemptions, encompassing employment, tax, and investigative files, protect information to the extent disclosure violates a "right to privacy." *Id.*

However, the Revised Code of Washington provides that the specific exemptions are inapplicable "to the extent that information, the disclosure of which would violate personal privacy . . . , can be deleted from the specific records sought." *Id.* § 42.17.310(2). Thus even information which appears absolutely protected by § 42.17.310(1)(a) may be disclosed if the requestor shows that disclosure does not intrude upon any individual privacy interests. The combined effect of these two provisions appears to shift the burden of proof with respect to such information from the agency to the requestor.

21. *Id.* § 42.17.310(2), (3).

22. "Privacy" is not included on the list of terms defined for purposes of the act. *See Id.* § 42.17.020.

open access to government-held information, and its articulated desire to protect individual privacy.

The disclosure provisions of Washington's Freedom of Information Act are modeled in large part after the disclosure provisions of the federal Freedom of Information Act.[23] The federal FOIA, enacted in response to agency abuse of the disclosure provisions of the Administrative Procedure Act,[24] is designed to ensure broad disclosure of government-held information. Key to this design is the provision requiring disclosure "to any person."[25] Federal courts interpret this phrase to mandate release of information without regard to the requestor's purpose in seeking it.[26] Information not exempt under Washington's act must likewise be made available "to any person."[27]

The disclosure exemptions in Washingtons FOIA, however, differ significantly from the federal act,[28] particularly the privacy exemption. The federal act's privacy exemption protects information, the disclosure of which would be a "clearly unwarranted" invasion of personal privacy.[29] Federal courts have consistently interpreted the phrase "clearly unwarranted" to call for a balancing of interests. The right of any individual to privacy is weighed against the public interest in disclosure of the information; unless the scales clearly tip in favor of privacy, the information must be made available.[30] This balancing necessitates inquiry into the purpose for which information is sought, in order to weigh that purpose against the privacy interest in the information to determine whether disclosure is warranted.[31] Only the privacy exemption, due to its "clearly unwarranted"

23. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified at 5 U.S.C. § 552 (1977)).

24. EPA v. Mink, 410 U.S. 73, 79 (1973); S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965).

25. 5 U.S.C. § 552(a)(3) (1977).

26. Federal courts have interpreted the "to any person" language of the federal FOIA to require that every requestor receive identical access with respect to all but the privacy exemptions. 2 J. O'REILLY, FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS AND THE LAW § 16.01, at 2 (1986).

27. WASH. REV. CODE § 42.17.270 (1985); 5 U.S.C. § 552(a)(3) (1977).

28. The federal FOIA exempts nine categories of information. 5 U.S.C. § 552(b) (1977). Washington's FOIA exempts fifteen different categories. WASH. REV. CODE §§ 42.17.310(1), .315 (1985).

29. 5 U.S.C. § 552(b)(6) (1977).

30. Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976); S. REP. No. 1219, 88th Cong., 2d Sess. 7 (1964).

31. Originally, some courts evaluated and weighed the particular purpose for which the requestor sought the information, rather than the generalized public interest in disclosure. *See, e.g.*, Getman v. NLRB, 450 F.2d 670, 677 & n.24 (D.C. Cir. 1971).

However, most courts now agree that the interest that ought to be balanced under the federal FOIA is the general public interest in disclosure, not the individual interest of the requestor and his or her particular purpose for seeking the information. Columbia Packing Co. v. USDA, 563 F.2d 495, 499-500 (1st Cir. 1977). A factor weighed in determining the public interest, though, remains the likelihood that the requestor will use the information in a way that will benefit the public. Church of Scientology v. Department of the Army, 611 F.2d 738, 746 (9th Cir. 1979); *see* Comment, *The Freedom of Information*

language, overcomes the federal FOIA's broad requirement of disclosure without regard to intended use.

The Washington FOIA, on the other hand, exempts information, the disclosure of which is an "unreasonable invasion" of personal privacy.[32] The language of Washington's act significantly differs from that of the federal act.[33] The Washington Supreme Court, therefore, originally interpreted the privacy exemption in Washington's FOIA to arrive at a test different from that used by the federal act. The test announced by the court in *Hearst Corp. v. Hoppe*[34] interpreted the "unreasonable invasion" language to exempt information, if its disclosure would be highly offensive to a reasonable person and if the privacy interest served by suppression outweighed the public interest in release.[35] Unlike the federal privacy test, which engaged directly in a balancing of interests, information under Washington's privacy test had to first pass the threshold of being highly offensive to a reasonable person before such balancing took place.[36] Washington's FOIA, as interpreted prior to *Rosier,* thus required the disclosure of more information than did its federal counterpart.

II. *IN RE ROSIER*

The Washington Supreme Court broadened its interpretation of the privacy exemption in *In re Rosier.*[37] Rosier, who was campaigning for a seat on a public utility district board, made an FOIA request of the utility for a list of the names and addresses of all its customers.[38] The utility refused to provide this information, alleging that disclosure would amount to an unreasonable invasion of its customers' privacy interests.[39] Subsequently, the utility refused a police department's request for the power

Act's Privacy Exemption and the Privacy Act of 1974, 11 HARV. C.R.-C.L. L. REV. 596 (1976).

32. "To the extent required to prevent an unreasonable invasion of personal privacy, an agency shall delete identifying details when it makes available or publishes any public record . . . ." WASH. REV. CODE § 42.17.260(1) (1985).

33. *See supra* note 29 and accompanying text.

34. 90 Wn. 2d 123, 580 P.2d 246 (1978).

35. *Hearst,* 90 Wn. 2d at 135–36, 580 P.2d at 253.

36. Under the federal act, the information may be relatively inoffensive but exempt from disclosure, if the public interest in its release is yet weaker. *See, e.g.,* Public Citizen Health Research Group v. Department of Labor, 591 F.2d 808, 809 (D.C. Cir. 1978) ("The threat to privacy thus need not be patent or obvious to be relevant. It need only outweigh the public interest.").

37. 105 Wn. 2d 606, 717 P.2d 1353 (1986).

38. *Rosier,* 105 Wn. 2d at 608, 717 P.2d at 1355. Rosier wanted to obtain the list in order to mail campaign literature to the utility's customers. Opening Brief of Appellant at 12.

39. *Rosier,* 105 Wn. 2d at 608, 615, 717 P.2d at 1355, 1359; Brief of Respondent Pub. Util. Dist. No. 1 of Snohomish County at 1. The utility alleged that some individuals, such as police officers and women residing at battered women's shelters, did not want their home addresses made available to the public. Brief of Respondent at 8–10.

consumption records of a particular individual suspected of growing marijuana in his home, although it had routinely provided such information before.[40]

The supreme court granted both Rosier and the police department access to the information each sought.[41] However, in doing so the court articulated new standards for the protection of private information from FOIA requests. First, the court declared that the act contained a general personal privacy exemption entirely distinct from any specific exemption.[42] Next, the court stated that any information which identified "particular, identifiable individuals as somehow unique from most of society" implicated a privacy interest.[43] Finally, the court reaffirmed the propriety of balancing the individual privacy interest against the public interest in disclosure.[44] The court held that the name and address list, while matching names with information, did not identify individuals as being "unique from most of society."[45] As to the individual power consumption record, the court held that a privacy interest did inhere, and that the public interest in disclosure outweighed the privacy interest only when police have an articulable suspicion of an individual's illegal conduct.[46]

The *Rosier* standard represents a substantial broadening of the protection of personal privacy interests under Washington's FOIA. A privacy interest now encompasses potentially any information linked to an individual, rather than only information which is highly offensive to a reasonable individual. Washington's privacy exemption, as interpreted by the court in *Rosier,* may now exclude more information from disclosure than its federal counterpart.

---

40. *Rosier,* 105 Wn. 2d at 608, 717 P.2d at 1355.

41. *Id.* at 609, 717 P.2d at 1356.

42. *Id.* at 609–11, 717 P.2d at 1356–58. The opinions of both the majority and dissent dealt at length with the proper construction of the statute. A detailed analysis of this technical issue is beyond the scope of this Note.

However, as a policy, it makes little sense to protect the individual's privacy in information only if the information is physically located in a certain file. The United States Supreme Court recognized this in connection with the federal act's enumeration of "personnel, medical, or similar files," by holding that this phrase encompasses all information of the kind that is normally found in such files, rather than only information actually located in the files themselves. Department of State v. Washington Post Co., 456 U.S. 595, 601 (1982).

Applying the exemption to information, wherever located, does not mean that the exemption should operate to exclude large amounts of information. The articulated policy of Washington's FOIA is *both* to disclose most information and to protect privacy. WASH. REV. CODE § 42.17.010(11) (1985). The privacy exemption should also comport with the FOIA's primary purpose of assuring easy access to most government-held information.

43. *Rosier,* 105 Wn. 2d at 612, 717 P.2d at 1357.

44. *Id.* at 612, 614, 717 P.2d at 1357–58.

45. *Id.* at 612–13, 717 P.2d at 1358.

46. *Id.* at 614–15, 717 P.2d at 1359.

III. ANALYSIS

Washington's Freedom of Information Act articulates a desire to protect a right to privacy.[47] Privacy, however, is a broad and ill-defined legal concept.[48] The FOIA affects an individual's privacy because it requires the government to disclose information it has acquired about the individual, upon a third party's request.[49] Unless information is exempt, the individual loses control over its further dissemination when he or she discloses it to the government. This interest in controlling the dissemination of information about oneself has been described as "informational privacy."[50] Therefore, the court's interpretation of the FOIA privacy exemption determines the extent to which an individual is entitled to informational privacy.

The Washington Supreme Court in *Rosier* recognized that its original interpretation of the privacy exemption in *Hearst* did not adequately protect informational privacy.[51] However, in its effort to correct the inadequacies of the *Hearst* test, the court erred. Its new interpretation of the privacy exemption is excessively broad.[52] It subjects too much information to a balancing test that both inadequately protects privacy and does not ensure free and open access to most government-held information.[53] The privacy exemption should be interpreted to exclude information only in specific instances, but should protect such information strictly.[54] Such an interpretation would best resolve the tension between open access and individual privacy that underlies Washington's FOIA.

---

47. WASH. REV. CODE §§ 42.17.010(11), .260(1), .310(1)(a)–(e) (1985).

48. Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 & n.9 (1980); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977); Comment, *The Interest in Limited Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 143 n.23 (1983). Widely credited with originating the idea that privacy deserves legal protection is Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *But see* Comment, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981).

This vagueness is partly because the explicit protection of privacy as a distinct interest has not had a long history in the American legal tradition. Torts such as battery or trespass protect the individual's privacy by protecting the individual's interest in avoiding harm to his person or property. At common law, though, privacy never received legal protection in its own right, absent violation of some other tangible interest. *See* Pratt, *The Warren and Brandeis Argument for a Right to Privacy*, 1975 PUB. L. 161.

49. *See supra* notes 16–18 and accompanying text.

50. A. WESTIN, PRIVACY AND FREEDOM 7 (1967); *see also* A. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 25 (1977); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 693–95 (1972).

51. *See infra* notes 55–66 and accompanying text.

52. *See infra* notes 75–104 and accompanying text.

53. *See infra* notes 105–17 and accompanying text.

54. For example, the privacy exemption should protect information when the government has illicitly acquired it, has promised confidentiality, or when disclosure would affect the exercise of fundamental rights. *See infra* notes 118–32 and accompanying text.

A. *The* Hearst *Test*

In *Rosier,* the Washington Supreme Court rejected the privacy test it had earlier articulated in *Hearst Corp. v. Hoppe.*[55] The *Hearst* test involved two criteria. First, disclosure of the information in question had to be highly offensive to a reasonable person.[56] Second, the private nature of the information had to outweigh the public interest in its disclosure.[57]

The *Hearst* test derived from Prosser's tort of the publication of embarrassing private facts.[58] However, the *Hearst* court's reliance on Prosser's tort was misplaced. The tort, in addition to the two criteria incorporated into the *Hearst* test, also required that such information be published.[59] The tort provided no remedy when information was merely disclosed to a few individuals.[60]

The publication requirement shows that the tort does not attempt to protect an individual's interest in informational privacy. Rather, it protects the individual's interest in anonymity, in not being the subject of widespread attention.[61] In the tort context, an objective standard—that the information published must be highly offensive to a reasonable individual—is appropriate. It ensures there is no remedy unless the published information fastens the public's attention upon the individual.[62] Informa-

55. 90 Wn. 2d 123, 580 P.2d 246 (1978).

56. *Hearst,* 90 Wn. 2d at 135, 580 P.2d at 253.

57. *Id.* at 136, 580 P.2d at 253.

58. "Inasmuch as the statute contains no definition of the term . . . [t]he most applicable privacy right would appear to be that expressed in tort law." *Id.* at 135, 580 P.2d at 253.

59. Prosser, *Privacy,* 48 CAL. L. REV. 383, 393 (1960); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

60. *See* W. KEETON, PROSSER AND KEETON ON TORTS § 117 (5th ed. 1984); *see also* Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort,* 68 CORNELL L. REV. 291, 337–41 (1983) (arguing that the tort's publication requirement is an artificial device, which "exists solely to cut off an intolerably attractive invitation to the hypersensitive and litigious, and not in response to valid differences in the capacity of public versus private gossip to cause harm").

61. If the information is not widely disseminated, then the individual's ability to move about freely without undue attention being paid to him or her remains intact. *See* Gavison, *supra* note 48, at 432–33. Zimmerman, in her article dismissing the viability of the tort, characterizes the interest it protects as "selective anonymity," or the ability to "control the circles within which the details of our lives and characters are disseminated." Zimmerman, *supra* note 60, at 338. However, the interest the tort recognizes is not that of control, but of retaining the individual's ability to interact anonymously with strangers. Bloustein came closer to a correct characterization when he stated that the tort protected the individual from being made a "public spectacle against his will." Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?,* 46 TEX. L. REV. 611, 619 (1968).

62. An objective standard—that a reasonable (average) person must find the information highly offensive—ensures that the public pays attention to and stigmatizes the individual. The effect which disclosure must have upon the public's attention can be likened to the reaction when someone shouts, "Here is the President!" *See* Gavison, *supra* note 48, at 432; *see also* Powers, *Privacy and the Communications Media: Public Events, Private Lives* in PRIVACY: A VANISHING VALUE? 230 (W. Bier ed. 1980) (an anecdotal discussion). The disclosure must also stigmatize the individual so as to unfavorably interfere with his or her opportunity to interact anonymously with the public.

tion might be offensive to a particular individual. The one publishing the information may know that it is offensive to that particular individual. However, unless the information is highly offensive to a reasonable individual, the public has not had their attention directed to the individual.[63] His or her anonymity is not destroyed, so the law provides no remedy.

Taken out of context, the *Hearst* criteria did not adequately encompass the informational privacy interests that the FOIA exemption should protect. The *Hearst* test, because it ensured that most information would be disclosed, fit well with the FOIA's intent to provide free and open access to government-held information.[64] However, since the privacy exemption was not intended to protect merely anonymity,[65] the exemption's requirement that information be highly offensive to a reasonable person did not properly distinguish private and nonprivate information. Because the exemption did not address the individual's interest in informational privacy, properly excludable information could not be protected.[66] The *Hearst* test inadequately protected legitimate informational privacy interests.

B. The Rosier *Privacy Exemption Test*

In its effort to encompass legitimate privacy interests left unprotected by the earlier privacy exemption, the *Rosier* court went too far. The court stated that information which is readily identifiable to an individual, and which reveals a unique fact having social implications, is exempt if the information's private nature outweighs the public interest in disclosure.[67] The court's new test focuses excessively on the FOIA's subsidiary desire to respect privacy, emasculating the act's primary purpose of providing easy and open access to government-held information. First, the courts broad

63. *See, e.g.*, Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964) (damages awarded against newspaper which published picture of plaintiff with dress blown up over her head at county fair, even though thousands were present at the time); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) (no damages for article recounting history of child prodigy and describing his current whereabouts, eccentricities, etc.); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931) (damages awarded for movie made about murder trial of former prostitute since reformed).

64. *See, e.g.*, Columbian Publishing Co. v. City of Vancouver, 36 Wn. App. 25, 671 P.2d 280 (1983); Van Buren v. Miller, 22 Wn. App. 836, 592 P.2d 671 (1979). The lower courts applied the *Hearst* test, found the information not to be highly offensive, and therefore compelled disclosure.

65. The vast majority of information disclosed under the FOIA is neither of the kind that might cause such a loss of anonymity, nor disseminated to more than a few individuals. Moreover, the potential harm to anonymity comes not from the first disclosure by the government to an individual, but from a further publication by the individual to the public at large.

66. The privacy exemption as interpreted in *Hearst* did not include information disclosed in a recognized confidential relationship, or information suggesting improper discrimination. *See infra* notes 123–32 and accompanying text. The test only looked to the information's content, and not the context in which it had been disclosed.

67. *Rosier*, 105 Wn. 2d at 612, 717 P.2d at 1357.

redefinition does not adequately delineate what information may or may not implicate a privacy interest.[68] Second, by increasing the amount of information that may implicate a privacy interest, the new definition necessitates increased resort to a balancing test. A balancing test compels inquiry into the purposes for which the information will be used, contrary to the spirit of the act.[69] Such a test inherently begets unpredictable results.[70] This unpredictability will enable an agency to misuse the privacy exemption to frustrate the FOIA's policy of open access to information.[71] Washington needs to adopt a privacy exemption test which better conforms to the spirit of its FOIA. Informational privacy ought to be protected only when justified by special circumstances, such as when the government itself has illicitly acquired the information,[72] when the government has agreed not to disclose the information in order to foster more accurate disclosure,[73] or when disclosure would have a chilling effect on the exercise of fundamental rights.[74]

1. Distinguishing Private Information Under the Rosier *Test*

An initial difficulty in applying Washington's new privacy exemption test is determining whether government-held information implicates a privacy interest at all.[75] The court stated that any information linked to a particular individual, which "identifies particular, identifiable persons as somehow unique from most society," implicates a privacy interest.[76] Information, then, must initially satisfy two criteria to meet the *Rosier* test. First, the information must be linked to a specific individual.[77] Second, the information must have social implications distinguishing that individual as somehow unique from the rest of society.[78] These criteria are ambiguous, and potentially subject to an overly broad interpretation.

---

68. *See infra* notes 75–98 and accompanying text.
69. *See infra* notes 99–104 and accompanying text.
70. *See infra* note 106 and accompanying text.
71. *See infra* notes 111–14 and accompanying text.
72. *See infra* notes 121–22 and accompanying text.
73. *See infra* notes 123–27 and accompanying text.
74. *See infra* notes 128–31 and accompanying text.
75. Under the new privacy exemption test, information must first be linked to a specific individual and must reveal a unique fact or have social implications. Only information meeting these criteria has its private nature weighed against the public interest in its disclosure. *Rosier*, 105 Wn. 2d at 612, 717 P.2d at 1357.
76. *Id.* The court later stated that "an individual has a privacy interest whenever information which reveals unique facts about those named is linked to an identifiable individual." *Id.* at 613, 717 P.2d at 1358.
77. *See infra* notes 79–86 and accompanying text.
78. *See infra* notes 87–91 and accompanying text.

It is not always easy to determine whether information can be readily linked to a specific individual. Some statements clearly do link an individual with a piece of information.[79] However, the court did not indicate just how specific the identification must be.[80] Information sometimes is linked not to one individual, but to more.[81] Is information about a few individuals sufficiently linked to a specific individual to implicate a privacy interest under the court's test?[82] If so, at what point does the class become large enough so that the information is no longer private?[83]

It is likewise unclear whether information linked to a specific, but unnamed individual satisfies this prong of the court's test.[84] Whether such information is deemed private would seem to depend on how identifiable it appears to make the individual.[85] In reality, though, if the requestor actually possesses enough independent information, so that the additional

79. For example, the statement "Joe owns a gun" clearly links an identity—Joe—with a piece of information—ownership of a gun.

80. The court first stated that the information had to be matched to "a particular individual's name." *Rosier,* 105 Wn. 2d at 609, 717 P.2d at 1356. Later, it stated that disclosure had to identify "particular, identifiable persons." *Id.* at 612, 717 P.2d at 1357. Then, information had to be "*specifically identified* to a *particular* individual's name." *Id.* at 613, 717 P.2d at 1358 (emphasis in original). Finally, it must be "linked to an identifiable individual." *Id.*

81. For example, "Either Joe or Jack owns a gun."

82. The court held that the release of the names and addresses of the utility district's customers did link names with information. *Rosier,* 105 Wn. 2d at 612, 717 P.2d at 1357. However, this is functionally equivalent to a series of specific names matched with specific information, as one learns something definite with each name, i.e., the individual's address and the fact that he or she is the public utility's customer. In the example above, one only learns a probability, that there is a fifty percent chance Joe owns the gun.

The United States Supreme Court, although acknowledging that the threat posed by potential identification "cannot be rejected as trivial" and that redaction, or the elimination of names, "cannot eliminate all risks of identifiability," has interpreted the federal exemption's requirement that disclosure be "clearly unwarranted" to require a threat to privacy "more palpable than mere possibilities." Department of the Air Force v. Rose, 425 U.S. 352, 380–81 & n.19 (1976).

83. In a certain sense, the statement "someone owns a gun" reveals information that is linked to every individual—anyone could possibly own that gun. Such information is intuitively not private.

84. Gavison relates the following example:

> Consider the famous anecdote about the priest who was asked, at a party, whether he had heard any exceptional stories during confessionals. "In fact," the priest replied, "my first confessor is a good example, since he confessed to a murder." A few minutes later, an elegant man joined the group, saw the priest, and greeted him warmly. When asked how he knew the priest, the man replied: "Why, I had the honor of being his first confessor."

Gavison, *supra* note 48, at 430–31.

The priest revealed information linked to a specific person. Query whether the information, which the priest assumed could not be matched to the individual, was sufficiently identifiable to satisfy the *Rosier* test?

85. The statement "the 3,264,198th person to visit the Empire State Building owns a gun" links information to a specific individual, but the identity of that person is presumably unascertainable. One suspects that the court would hold that this information does not meet the first prong of its test. The difference, however, between this and the priest's first confessor is just one of degree.

information permits the identification of the individual, then linkage occurs.[86] Thus, whether information is "linked" to a specific individual depends on how much other information the requestor, and others, already have or might obtain. A great deal of information therefore could be considered potentially linked to an individual.

The second criterion the *Rosier* court articulated as necessary to implicate a privacy interest is similarly ambiguous. Private information, according to the *Rosier* test, must also have "social implications" setting an individual apart as "somehow unique from most of society."[87] It is not clear how unique the information must be, however, or what social implications it must have, in order to satisfy this test. For example, males constitute only about 49% of the total population.[88] Maleness therefore distinguishes one as being unique from most of society,[89] and it certainly has social implications.[90] The supreme court, however, presumably did not intend to

86. Whether a statement is "readily identifiable" to an individual thus depends on how much other information one assumes is known. In the previous example, if one knows that the 3,264,198th visitor to the Empire State Building is Joe, the information becomes readily identifiable to Joe.

Federal courts often attempt to sanitize, by eliminating identifying details, information disclosed under the federal FOIA. At least one court, though, has acknowledged the difficulties inherent in this task:

> The problems in undertaking to decide which portions of an employee's statement may be released to his employer without revealing that employee's identity are enormous, if, indeed, not insoluble. Merely deleting the name from the statement would not insure against identification, since the employee's narrative, or part of it, may be such that the employer could identify the employee involved, or could narrow the group down to two or three employees. Moreover, it is doubtful whether the court could select which portions to release with the degree of certainty required adequately to protect the interests of employees who wish to avoid identification.

Harvey's Wagon Wheel, Inc. v. NLRB, 91 L.R.R.M. (BNA) 2410, 2415 (N.D. Cal. 1976), *remanded in part on other grounds*, 550 F.2d 1139 (9th Cir. 1976); *see also* Andrews v. Veterans Administration, 613 F. Supp. 1404 (D. Wyo. 1985) (awarding damages against agency for improperly sanitizing files). *But see* Citizens for Envtl. Quality, Inc. v. USDA, 602 F. Supp. 534 (D. D.C. 1984) (summary judgment compelling disclosure of urinalysis test results on a specific, but unnamed, individual granted on basis that *no* invasion of privacy was shown, despite affidavits stating that the identity of the individual tested could be "readily deduced" and that speculation as to subject of test had already "focused on two individuals").

87. *Rosier*, 105 Wn. 2d at 612, 717 P.2d at 1357. The court alternatively phrased it as "reveals unique facts about those named." *Id.* at 613, 717 P.2d at 1358.

88. Males constitute 48.58%, and females 51.42%, of the total United States population. 1986 WORLD ALMANAC AND BOOK OF FACTS 258.

89. One dictionary defines unique as follows: "1. one and only; single; sole. 2. different from all others; having no like or equal. 3. singular; unusual; extraordinary; rare: still regarded by some as an objectionable usage." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1999 (2d ed. 1983).

Clearly, the court did not mean unique in the first or second sense, as it required such information to distinguish the individual as being "somehow unique from *most* of society." *Rosier*, 105 Wn. 2d at 612, 717 P.2d 1357 (emphasis added). Therefore, the court has to have meant that information must distinguish the individual as being unusual from most of society. *Rosier* leaves the question of how unusual unanswered.

90. For example, only males must register for the draft. 50 U.S.C. app. § 453 (1981).

suggest that a statement linking identity with gender implicates privacy interests.[91]

The court's application of its criteria to the facts of *Rosier* shed little light on what the court meant. The court held that the lists of names and addresses of utility customers, while linking names with information, neither identified those named as being somehow unique from most of society, nor had social implications.[92] Disclosure of a specific individual's power records, though, did satisfy the criteria for implicating a privacy interest.[93] The court stated that suspiciously high power usage was a "unique fact."[94]

The court's articulated standard does not adequately explain these different results. The fact that an individual is a customer of a particular public utility does have potential social implications,[95] and probably does distinguish him from most of society.[96] Similarly, any individuals power usage records will also be unique,[97] and may have a variety of social implications.[98] Certainly, the power usage records are more unique and have more obvious social implications than the list of utility customers. The point, however, is that the difference between the two is not one of definition, as the *Rosier* court purports, but merely one of degree. Therefore, some other criteria must distinguish the two results.

Analysis of the decision suggests that the distinguishing criteria is the possibility of misuse of the information by the requestor. Rosier's request was clearly for the purpose of putting together a mailing list for his political campaign.[99] No improper use of the information readily suggested itself to the court.[100] In analyzing the police department's request, however, the court assumed that the information sought would reveal suspiciously high

91. If taken literally, the court's requirement that information be unique would mean that a statement such as "Joe is a male" implicates a privacy interest while the statement "Judy is a female" would not implicate a privacy interest, since that fact does not distinguish her from most of society. Such a result is clearly absurd.

92. *Rosier*, 105 Wn. 2d at 612–13, 717 P.2d at 1358.

93. *Id.* at 614, 717 P.2d at 1358–59.

94. *Id.*

95. For example, being the customer of a particular utility reveals the individual's selection of energy sources, and perhaps something about his or her attitude toward conservation.

96. Snohomish County's total population in 1985 was 373,000. The Snohomish County P.U.D. served 148,867 individual customers. SNOHOMISH COUNTY PUBLIC UTILITY DISTRICT 1985 ANNUAL REPORT 35. As this is less than half the population, this makes the utility customer at least slightly unusual.

97. In this case, the information might even be unique in the primary sense of the term, as no two individuals likely will have identical histories of power consumption.

98. For example, one might infer that the individual is likely engaged in growing controlled substances, as the court assumed the police department would do. *Rosier*, 105 Wn. 2d at 615, 717 P.2d at 1359.

99. *Id.* at 608, 717 P.2d at 1355.

100. *Id.* at 612–13, 717 P.2d at 1358.

power usage, since this was the purpose behind the request.[101] The perceived likelihood of subsequent misuse by the police, who had requested the information, apparently caused the court to hold that a privacy interest inhered.[102] Having held that the information met the threshold definition implicating privacy interests, the court could then engage in a balancing test, enabling it to delineate the circumstances under which release of the information would be proper.[103] Therefore, any information which the court feels a requestor might possibly misuse may be sufficiently private to warrant the application of the balancing test.[104] The new privacy exemption test announced in *Rosier* encompasses, and thus potentially excludes, more information than appropriate from Washington's FOIA.

2. *Balancing Tests and the FOIA's Privacy Exemption*

The balancing test the court adopted in *Rosier* also contradicts the intent underlying Washington's FOIA for several reasons. First, the balancing test itself is inherently inaccurate and unpredictable. Balancing necessitates an evaluation of the magnitude of each interest involved, so that one can meaningfully decide which interest prevails over the other. However, because nonexempt information must be released to any person, the court must evaluate the possibility of the information's misuse by any member of the public. This is simply an impossible task.[105]

---

101. *Id.* at 614–15, 717 P.2d at 1359.

102. The court stated that the individual has a privacy interest in "preventing general 'fishing expeditions' by the governmental authorities." *Id.* at 615, 717 P.2d at 1359. This statement anticipates that the police would take further action against the individual on the basis of the information they obtained, for example, by searching the premises.

The court is confusing the different privacy interests involved. If it wishes to ensure that the police will not intrusively invade the individual's privacy, the court should prohibit such conduct directly by holding that this information does not constitute sufficient probable cause on which to issue a warrant. In fact, in a case decided subsequent to *Rosier*, the court did so rule. *See* State v. Huft, 106 Wn. 2d 206, 720 P.2d 838 (1986). So, the individual's privacy interest in preventing a "general fishing expedition," while valid, is not an *informational* privacy interest which warrants a denial of disclosure.

103. "If the police have an articulable suspicion of illegal acts, the release of records leads to effective law enforcement, thereby furthering the public interest." *Rosier*, 105 Wn. 2d at 614–15, 717 P.2d at 1359.

104. The test thus circumvents the FOIA's policy of disclosure to any person, without regard to the purpose of the requestor. *See supra* notes 25–27. Information is private because it may be misused, and its private nature (the possibility of its misuse against the individual) is weighed against the public interest in disclosure. This enables the court to consider the purpose for which the information is requested on the privacy side of the balancing test, rather than in evaluating the quantum of "public interest," which would be contrary to the act's mandate of disclosure "to any person." The second prong of the *Rosier* test therefore becomes whether information is sufficiently unique to permit its misuse. But information is always potentially subject to misuse by someone.

105. What courts faced with this task really do is select a small, inherently arbitrary sample of the possible misuses to which any information might be put, and compare that to a similarly arbitrary sample

Principled balancing therefore necessarily entails limiting the examination of the interests involved to specific public benefits and specific invasions of privacy resulting from disclosure to specific persons for specific purposes. In turn, this necessitates limiting the actual disclosure of the information to those persons and purposes. Since such limited disclosure is contrary to the policy of disclosure "to any person," either balancing or unlimited disclosure must give way. Federal courts have resolved this contradiction by purporting to consider the generalized public interest in disclosure. At the same time, however, they accord heavy, often decisive, weight to the individual requestor's specific purpose.[106]

The differing language of Washington's FOIA, however, should be interpreted to avoid adoption of the federal FOIA's balancing approach. Washington's FOIA does track the language of the federal FOIA in mandating disclosure to "any person."[107] Therefore, Washington's FOIA should be interpreted similarly to the federal act in this respect,[108] to require disclosure without inquiry into the purpose for which any information is requested. However, Washington's FOIA employs an "unreasonable invasion" standard to exempt information as private.[109] Because it avoids "clearly unwarranted," Washington's FOIA should be interpreted to avoid the balancing process used in interpreting the federal FOIA's privacy exemption, and the concomitant need to evaluate the purpose for which any information is requested.[110] Washington's privacy exemption should not be interpreted to call for a balancing test.

---

of the public benefits that might accrue through disclosure. One judge acknowledged the quixotic nature of this task:

> If the lower courts find it difficult to agree as to whether a specific public benefit is outweighed by a specific invasion of privacy, how can they possibly balance hypothetical public benefits against hypothetical invasions of privacy? The ease with which such a vague hypothetical balancing test can be manipulated is obvious. By failing to mention beneficial uses to which *some* members of the public might put the information, and emphasizing the dangers of a "computerized dossier" that *some* members of the public might create . . . , [the] conclusion is foreordained.

Kestenbaum v. Michigan State Univ., 327 N.W.2d 783, 799 (Mich. 1982) (Ryan, J., dissenting) (emphasis in original, footnotes omitted).

In fact, this language is too harsh. The problem is not that judges *choose* to ignore some possibilities so as to manipulate the test. They simply cannot help but do so. Accurate evaluation of the public or private interests involved in disclosure to the general public is inherently impossible.

106. *See supra* note 31 and accompanying text.

107. WASH. REV. CODE § 42.17.270 (1985).

108. *See supra* notes 25–27 and accompanying text.

109. WASH. REV. CODE § 42.17.260(1) (1985).

110. While comparison with the federal FOIA shows an intent to reject the balancing test used by federal courts, it does not necessarily follow that the use of the phrase "unreasonable invasion" rejects all possible balancing tests. The phrase could suggest a balancing where the scales are not so clearly tipped in favor of disclosure. However, the federal FOIA provides another example of a balancing test which is not so strongly tilted in favor of disclosure. The investigatory record exemption of the federal act, 5 U.S.C.

Second, the *Rosier* balancing test contradicts the intent underlying Washington's FOIA by tempting agencies to make use of its ambiguity and unpredictability. Since balancing necessitates a subjective evaluation of the interests involved, an agency could almost always articulate arguably sufficient grounds for suppressing any information.[111] This very problem of agency abuse is what originally caused Congress to adopt the federal FOIA.[112] While Washington's FOIA does envision agencies making an initial determination,[113] the court in *Rosier* belittled the substantial danger involved in placing the highly subjective evaluations implicit in its new test in the hands of the agency.[114] Giving agencies such discretion contradicts the FOIA's purpose of assuring free and open access to information.

Finally, by applying a balancing test, the *Rosier* court recognized a right to informational privacy. However, informational privacy does not deserve

---

§ 552(b)(7) (1977), provides for exemption of information whose disclosure would merely be an "unwarranted" invasion of personal privacy. Since Washington's FOIA also declined to follow this example, the choice of the words "unreasonable invasion" ought to be given a different construction. The Washington Supreme Court has implicitly recognized this twice, in *Hearst* and in *Rosier,* by refusing to adopt the federal act's balancing test.

Moreover, if the drafters of Washington's FOIA intended to reject balancing, they had little choice but to use a phrase like "unreasonable invasion." Merely exempting information which constitutes an invasion of privacy would exempt too much, including all information which could be linked to an individual. But no alternative existed which recognized the specific interest in informational privacy and attempted to distinguish in a principled way cases where disclosure would and would not be reasonable. Assuming this to be the case, then, the drafters could only articulate a rather vague desire to prevent "unreasonable invasions" of privacy and leave it to the courts to determine, within the parameters of free and open access to most information, what kind of disclosures constitute such an invasion.

111. One court openly acknowledged that the federal FOIA, in calling for a "discretionary balancing of competing interests [is] necessarily . . . inconsistent with the purpose of the Act to give agencies, and courts as well, definitive guidelines in setting information policies." Getman v. NLRB, 450 F.2d 670, 674 n.10 (D. D.C. 1971); *see also* Nader, *Freedom from Information: the Act and the Agencies,* 5 HARV. C.R.-C.L. L. REV. 1, 14 (1970) ("The FOIA will remain putty in the hands of government personnel unless its provisions are given authoritative and concrete interpretation by the courts.").

112. *See supra* note 24.

113. WASH. REV. CODE § 42.17.260(1) (1985).

114. "[T]he releasing agency must examine the context . . . . [It] must then analyze the propriety of disclosure . . . . [It] must weigh the privacy interest against the public interest . . . ." *Rosier,* 105 Wn. 2d at 612, 717 P.2d at 1357. "Although this burden might seem onerous, the agency is best suited to determine whether the facts warrant an exemption." *Id.* at 60 n.1, 717 P.2d at 1357 n.1.

The dissent, on the other hand, feared that the new privacy exemption would transform the " 'freedom of information act' into a 'government censorship of public records act'." *Id.* at 618, 717 P.2d at 1360 (Andersen, J., dissenting). Committing this discretion to the agency would make "every employee of a public agency a 1-person censor. . . ." *Id.* at 629, 717 P.2d at 1367 (Andersen, J., dissenting).

In fact, the court had a good example of the potential for overly broad agency interpretation in the facts before it. Rosier was appealing the utility board's decision to deny him access to its records. This not only protected whatever privacy interest the utility's customers had, but also prevented Rosier from obtaining efficient access to the electorate, so that he could challenge the policies of the incumbent board members. Although Rosier eventually vindicated his right to the records, the election had long since been held by the time the court ordered disclosure.

legal protection for its own sake. Informational privacy means that individuals are able to control what information about them is released.[115] Individuals will naturally manipulate the information disseminated to suppress that which is unfavorable to them.[116] Decision makers dealing with such individuals will be denied access to relevant information with which they could make more accurate decisions.[117] Since informational privacy is in general inefficient, it should not receive legal protection simply for its own sake.

C. *Properly Protecting Privacy*

A proper privacy exemption would recognize that an individual's interest in informational privacy does deserve legal protection when it promotes some other important interest. At least three sets of circumstances can be recognized as readily justifying informational privacy. First, according the individual a right to informational privacy is the only appropriate remedy against the government's illicit acquisition of information about the individual.[118] Second, informational privacy sometimes promotes efficiency, by encouraging complete and accurate disclosure of information which an individual would not otherwise cooperate in disclosing.[119] Finally, informational privacy can be an instrument for the protection of other fundamental rights.[120] A privacy test which exempted information satisfying these specific criteria would adequately protect against "unreasonable invasions" of privacy while still comporting with the FOIA's main goal of providing free and open access to government-held information.

The privacy exemption should prevent the government from disseminating information, illicitly or intrusively acquired from the individual. Information, unlike something tangible, cannot be returned to remedy its improper acquisition.[121] Therefore, the law should give the injured party at least the right to suppress further dissemination of such information.[122]

115. *See supra* notes 49–50 and accompanying text.

116. Posner, *The Right of Privacy,* 12 GA. L. REV. 393, 399 (1978); *see also* Thomson, *The Right to Privacy,* 4 PHIL. AND PUB. AFF. 295 (1975).

117. Posner, *supra* note 116, at 399–400.

118. *See infra* notes 121–22 and accompanying text.

119. *See infra* notes 123–27 and accompanying text.

120. *See infra* notes 128–31 and accompanying text.

121. The law cannot "unring the bell." Maness v. Myers, 419 U.S. 449, 460 (1975); *see* Gerety, *supra* note 48, at 285–86 & n.191.

122. Information obtained by an unreasonable government search or seizure, for example, ought to be suppressed regardless of its content if the law truly is operating to protect the individual's privacy rights. In Providence Journal Co. v. FBI, 602 F.2d 1010 (1st Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980), the court held that information obtained as a result of an illegal government search was exempt from disclosure under the federal FOIA. The opinion below had approved disclosure, looking only at the information's content. In reversing, the court admitted that "no other court has exempted information

Exempting such information does not violate the FOIA's spirit of free and open access, as the government ought not to have acquired the information in the first place.[123]

In addition, granting individuals informational privacy sometimes promotes efficiency by encouraging the accurate disclosure of information which might otherwise remain undisclosed. Individuals control a great deal of information which others cannot easily obtain without that individual's cooperation.[124] Often, the individual would not cooperate in disclosing the information if he or she thought it likely that it would freely circulate after disclosure.[125] If providing the government with accurate information is sufficiently important, then the legislature ought to give the individual the ability to suppress the further dissemination of such information.[126] The specific privacy exemptions of Washington's FOIA should only protect information disclosed by the individual for the purpose of, for example,

---

under [an FOIA privacy exemption] solely on the ground that the manner in which the information was obtained forbids release, instead of balancing on the basis of the actual contents of the requested material." *Id.* at 1014 (citations omitted).

If the purpose of the exclusionary rule is merely to deter police misconduct, however, then the use of such illegally obtained information in forums other than the courtroom should not be prohibited. *See* Stone v. Powell, 428 U.S. 465 (1976) (purpose is deterrence, so information illegally seized by police may be used by IRS in separate investigation).

Since Washington's exclusionary rule is intended to protect privacy, Washington's FOIA ought to exempt information from disclosure which is obtained through unreasonable government search and seizure. State v. Bonds, 98 Wn. 2d. 1 (1982); *see* Note, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459 (1986).

123. The original reasonableness of a search may depend on the provisions the government has taken to guard against the further dissemination of the information. *See* Whalen v. Roe, 429 U.S. 589 (1977); Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

124. This kind of information would include, for example, medical information, information necessary to qualify for welfare benefits, or tax information. *See* WASH. REV. CODE § 42.17.310 (1985).

125. In an economic sense, informational privacy reduces the transaction costs of the communication. *See* Posner, *supra* note 116, at 401–02.

126. This is the rationale traditionally recognized to explain evidentiary privileges. Privileges operate to suppress relevant evidence from being admitted in court. "Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 72 (3d ed. 1984). In the context of the FOIA, the availability of government-held information to the public, rather than to the administrators of justice, is sacrificed.

The appropriate party to make this determination is the legislature, not the agency. Agencies naturally tend to apply exemptions in a way that benefits them. *See supra* notes 111–14 and accompanying text. Since informational privacy reduces the costs of the communication to the individual, and hence increases the accuracy of the information the agency receives, the agency would always want to afford informational privacy to the individual. But the proper question is not whether informational privacy makes for more accurate disclosure, but whether the benefits of the increased accuracy outweigh the benefits of broad disclosure of government-held information. This is a legislative decision. *See, e.g.*, Van Buren v. Miller, 22 Wn. App. 836, 592 P.2d 671 (1979) (court rejected a tax assessor's argument that disclosure would make obtaining accurate tax information more difficult).

receiving medical care or welfare benefits or determining taxes, rather than protecting any information which is physically contained in such files.[127]

Finally, informational privacy limits the ability of others to discriminate efficiently against the individual.[128] An individual may engage in conduct which society ought to promote, or at least protect.[129] If direct legal protection is impossible or inadequate,[130] the government should not disseminate information, the disclosure of which would have a "chilling effect" upon the exercise of fundamental rights. For example, the disclosure of a list of the members of the NAACP would tend to restrict the exercise of free speech.[131]

IV. CONCLUSION

The Washington Supreme Court correctly rejected the privacy exemption test articulated in *Hearst* because it insufficiently protected legitimate informational privacy interests. The *Rosier* test, however, overly protects

127. Such an interpretation comports with the language of the statute, which does not exempt *all* information found in such files, but only information whose disclosure would violate the individual's right to privacy. This analysis would also exempt information given for such purposes, even if it was located in a place other than the file. *See supra* note 42 and accompanying text.

128. Informational privacy is inefficient, in that it denies decision makers access to information with which they could more efficiently allocate resources. *See supra* note 116 and accompanying text. Most human activity presumably ought to be promoted so that, in general, efficiency is desirable. However, if the activity in question is one society desires to discourage, then it ought to make it as inefficient, and hence difficult, as possible.

129. For example, one may engage in unpopular political speech. *See infra* note 130 and accompanying text. This may have been the kind of privacy interest the *Rosier* court attempted to encompass by finding a privacy interest in information about an individual which reveals a unique fact and has social implications. *See supra* note 102.

130. According informational privacy to an activity that can be directly protected may just reduce society's incentive to take corrective measures which directly protect the activity. If discrimination against a certain group should be ended, the law should prohibit the discrimination, rather than just assist members of the group to keep their status secret.

For example, the law may protect AIDS carriers against improper discrimination by directly prohibiting certain decision making based on such knowledge. Or, it could accord AIDS carriers informational privacy so that decision makers did not have the knowledge with which to improperly discriminate. The problem with the latter approach is that the suppressed information may be legitimately relevant to some decisions. For example, blood banks properly discriminate against AIDS patients in not accepting their donated blood. *See* Gavison, *supra* note 48, at 452–54.

131. Alabama *ex rel.* Patterson v. NAACP, 357 U.S. 449 (1958); *see also* Committee on Masonic Homes v. NLRB, 556 F.2d 214 (3d Cir. 1977) (disclosure of the names of individuals who signed union authorization cards would "chill" the exercise of a right to organize, frustrating a statutorily enacted policy of *secret* balloting); Philadelphia Yearly Meeting of the Religious Soc'y of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975) (police accumulation of publicly available information on citizen's group not an invasion of privacy, but subsequent disclosure to non-law enforcement entities may present invasion of the plaintiff's associational rights). *Compare* Industrial Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (although disclosure might chill individual from exercising statutory right to file workman's compensation claim, such a right is not fundamental).

the individual's informational privacy. Too much information potentially falls within the court's broad redefinition of privacy interests. Consequently, too much information is subjected to the vagaries of an impossibly imprecise balancing test. Moreover, there is no sound policy reason for the court to broadly protect a right to informational privacy.

The FOIA's privacy exemption ought to be interpreted to protect information only in specific instances, without resort to a nebulous balancing test. Such an interpretation would comport with the intent of broad disclosure underlying Washington's FOIA, and protect the individual's legitimate privacy interests. The exemption should include information illicitly acquired by the government, disclosed in a protected relationship, or related to undesirable discrimination. When any of these conditions are met, there is a sound basis for denoting disclosure as unreasonable. Otherwise, Washington's policy of free and open access to government-held information ought to be observed.[132]

Matthew Edwards

132. The Washington Supreme Court heard oral arguments February 17th, 1987 on a case involving the privacy exemption: Cowles Publishing Co. v. State Patrol, 44 Wn. App. 882, 724 P.2d 379 (1986), *appeal granted,* 107 Wn. 2d 1006 (No. 53097-1). A newspaper made an FOIA request for police agency internal affairs files. *Id.* at 884–85, 724 P.2d at 382. These files included the testimony of accused police officers, who are required to testify before the disciplinary board and are dismissed for asserting a privilege against self-incrimination. *Id.* at 886, 724 P.2d at 383. The trial court found that § 42.17.310(1)(b), exempting personal information found in public employee files to the extent disclosure violates the right to privacy, and § 42.17.310(1)(d), similarly exempting information in investigative files, compelled suppression of the officer's names. *Id.* at 887, 724 P.2d at 384. The appellate court unanimously reversed. *Id.* at 898, 724 P.2d at 389. That court held the *Rosier* privacy test inapplicable on the novel ground that the information related to individuals involved in a governmental operation. *Id.* Applying the *Hearst* privacy exemption, the court found that the information was not "highly offensive," and that the public interest in disclosure outweighed whatever privacy interest the subject officers had in the files. *Id.* at 892–94, 724 P.2d at 386–89.

These facts illustrate the pitfalls inherent in any kind of balancing test. The appellate court looked only to the specific purposes for which the requesters sought the information in gauging the magnitude of the public and private interests involved, completely ignoring the information's potential for misuse by other members of the public. In fact, an accurate evaluation of the magnitude of the threat to the officer's privacy involved in disclosure to the public is well-nigh impossible.

The supreme court ought to acknowledge that the officers' legitimate informational privacy interest in the information contained in these files is limited to information the officers themselves disclosed to the investigators. The exemptions contained in § 42.17.310(1)(b) and (d) should be interpreted to exempt information given by the individual to the government for the purpose of securing employment or assisting in an investigation. Therefore, such information should be deleted from the files, with the remainder made available to the public. This result would both protect the officer's legitimate privacy interests and assure free and easy access to most government-held information, satisfying the spirit of Washington's FOIA.