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Constitutional Right of Privacy - Open Records: North Dakota Upholds Personnel File as Governmental Record Open for Public Inspection

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CONSTITUTIONAL RIGHT OF PRIVACY — OPEN RECORDS: NORTH DAKOTA UPHOLDS PERSONNEL FILE AS GOVERNMENTAL RECORD OPEN FOR PUBLIC INSPECTION*

Meredith Hovet was employed by the Hebron Public School District (School District) as a teacher during the 1986-87 school year.[1] During the course of Hovet's employment, a personnel file was maintained by the School District.[2] In June 1987, the School District agreed to grant Madonna Tibor's request to review Hovet's personnel file.[3] Hovet sought a permanent injunction enjoining the School District from allowing the review of his personnel file by anyone other than a legal representative of the School District.[4] Hovet also sought a temporary restraining order prohibiting the review.[5] A hearing was held and a temporary restraining order was granted.[6]

At trial, Tibor argued that the personnel file was a public record open to inspection under sections 44-04-18[7] and 15-29-10[8] of

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* The 1989 North Dakota Legislature addressed a bill that would have closed teachers' files to all but school administrators and school board members. H.R. 1254, 51st Leg. Assembly (1989). The bill to close teachers' files to the public was prompted by the North Dakota Supreme Court's ruling in the comment case, Hovet v. Hebron Pub. School Dist., 419 N.W.2d 189, 190 (N.D. 1988). The controversial bill was approved in the House and Senate but was vetoed by Governor George Sinner. Grand Forks Herald, Apr. 11, 1989, at B.1, col.1. The House voted 55-49 to override but that margin was 16 votes short of the two-thirds majority needed to override the Governor's veto. *Id.*

1. Hovet v. Hebron Pub. School Dist., 419 N.W.2d 189, 190 (N.D. 1988). Hovet taught business education and physical education during the 1986-87 school year. *Id.* He had been employed by the Hebron Public School District (School District) for the previous three school years. *Id.*

2. *Id.*

3. *Id.* Madonna Tibor, a "parent and patron" of the School District, requested that the School District allow her to review Hovet's personnel file by a letter dated May 21, 1987. Memorandum Decision and Order for Judgment at 1, Hovet v. Hebron Pub. School Dist., 419 N.W.2d, 189 (N.D. 1988)(Civ. No. 15167)(trial court decision); *Hovet*, 419 N.W.2d at 190. On June 2, 1987, the superintendent for the School District agreed to provide a review of Hovet's personnel file. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* At the hearing in which the temporary restraining order was granted, the trial court also ordered that Tibor become a party to the action. *Id.*

7. N.D. CENT. CODE § 44-04-18 (1978). Section 44-04-18 of the North Dakota Century Code provides:

> 1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by the public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
> 2. Violations of this section shall be punishable as an infraction.

Id.

8. *Id.* § 15-29-10 (Supp. 1987). Section 15-29-10 of the North Dakota Century Code provides: "The records, vouchers, and papers of the [school] district are open to

the North Dakota Century Code, and article XI, section 6 of the North Dakota Constitution.[9] Hovet and the School District both acknowledged that the personnel file was a governmental record.[10] However, Hovet and the School District argued that the personnel file was confidential pursuant to an implied exception to the open records law provided in section 15-47-38 of the North Dakota Century Code[11] and chapter 15-38.2 of the North Dakota Century Code.[12] Hovet also argued that his privacy right, as guaranteed him by the United States and North Dakota Constitutions, would be violated if the public was allowed to inspect his personnel file.[13]

The trial court determined that Hovet's personnel file was a

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examination by any taxpayer of the district. These records, or a transcript thereof certified by the business manager, must be received in all courts as prima facie evidence of the facts therein set forth." *Id.*

9. *Hovet*, 419 N.W.2d at 190. *See* N.D. CONST. art. XI, § 6. Article XI, section 6 of the North Dakota Constitution provides:

> Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

Id.

10. *Hovet*, 419 N.W.2d at 190. The concession by the parties that a personnel file is a governmental record was based on a previous determination by the North Dakota Supreme Court that a personnel file is a public record under the open-records law. *Id. See* City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578 (N.D. 1981)(former police chief's personnel file is a public record under the open records law). For a discussion of *Grand Forks Herald* see *infra* notes 108-124 and accompanying text.

11. *Hovet*, 419 N.W.2d at 191. *See* N.D. CENT. CODE § 15-47-38 (Supp. 1987). Section 15-47-38 of the North Dakota Century Code provides that "the meeting [to determine a teacher's discharge] shall be an executive session of the board unless both the school board and the teacher shall agree that it shall be open to other persons or the public." *Id.* Hovet argued that the procedures outlined in § 15-47-38 were designed to facilitate openness in the proceedings and to protect the teacher's reputation. *Hovet*, 419 N.W.2d at 191. Hovet and the School District reasoned that opening a teacher's personnel file — which would be reviewed at the executive session proceedings held to determine a teacher's discharge — to the public, endangered these stated goals. *Id.*

12. *Hovet*, 419 N.W.2d at 192. *See* N.D. CENT. CODE ch. 15-38.2 (Supp. 1987). Chapter 15-38.2 of the North Dakota Century Code generally provides that a teacher has a right to review his or her personnel file, to make written comments on anything placed in that file, and to have those comments attached to the file. *Id.* The chapter also prohibits the use of secret personnel files to which the teacher does not have access. *Id.* However, chapter 15-38.2 of the North Dakota Century Code does not specifically address the status of teacher personnel files. *Id.*

13. *Hovet*, 419 N.W.2d at 192. *See, e.g.*, Tinker v. Des Moines Community School Dist., 393 U.S. 503, 506 (1969)(constitutional rights are not shed at the schoolhouse gate). In *Hovet*, Hovet argued that his violation of privacy was comparable to the privacy violation found in *Tinker*, stating that "[t]eachers, like students, do not 'shed their constitutional rights . . . at the schoolhouse gate.'" *Hovet*, 419 N.W.2d at 192. *But see* Bowers v. Hardwick, 478 U.S. 186, 196 (1986)(homosexual sodomy is not protected by a privacy right recognized by the Federal Constitution); City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 573, 578-79 (N.D. 1981)(personnel records are not protected by a right to privacy arising under the Federal Constitution or the North Dakota Constitution).

public record open for inspection.[14] On appeal, the North Dakota Supreme Court affirmed the trial court's ruling and *held* that Hovet's personnel file was a public record open for inspection under sections 44-04-18 and 15-29-10 of the North Dakota Century Code and article XI, section 6 of the North Dakota Constitution.[15] *Hovet v. Hebron Public School District*, 419 N.W.2d 189 (N.D. 1988).

While the *Hovet* court found a statutory and constitutional right to inspection of public records, a general right of the public to inspect governmental records and documents was not recognized by the common law.[16] The English courts gradually developed a limited right of access for those who sought to obtain evidence for use in litigation.[17] This "litigation interest" rule was accepted in the United States and was gradually expanded to allow inspection of governmental records by those seeking to defend the public interest.[18]

However, even at the turn of the century, some important barriers to public access remained to those attempting to get access to records in the United States.[19] If the requestor's purpose was improper, such as curiosity, maliciousness, or commercial

14. *Hovet*, 419 N.W.2d at 191. The trial court issued a judgment of dismissal. *Id.* at 190.

15. *Id. See* N.D. CENT. CODE § 44-04-18 (1978)(public or governmental records are open for public inspection except as otherwise specially provided by law); *Id.* § 15-29-10 (Supp. 1987)(taxpayers of the district may examine the records, vouchers, and papers of the district); N.D. CONST. art. XI, § 6 (public or governmental records are open for public inspection unless otherwise provided by law). Tibor also requested that the School District be required to pay her costs and attorney fees incurred in litigating the issue of whether Hovet's personnel file was a governmental record open for public inspection. *Hovet*, 419 N.W.2d at 193. The North Dakota Supreme Court declined to do so because Tibor failed to perfect a cross-appeal on the issue as required by the Rules of Appellate Procedure. *Id.*; N.D.R. APP. P. 3.

16. H. CROSS, THE PEOPLE'S RIGHT TO KNOW 25 (1953).

17. *Compare* Rex v. Tower, 4 M and S 162, __, 105 Eng. Rep. 795, 795 (1815)(court granted mandamus to lord to permit him to inspect the court-rolls of his manor even though no suit was pending) *and* Rex v. Lucas, 10 East 235, __, 103 Eng. Rep. 765, 765 (1808)(one who has prima facie title to a copyhold is entitled to inspect the court-rolls and take copies of them, even though no suit is pending) *with* Rex v. Allgood, 7 T.R. 746, __, 101 Eng. Rep. 1232, 1232 (1798)(freehold tenant of a manor has no right to inspect the court-rolls unless some cause is pending in which his right may be involved).

18. *See, e.g.*, Nowack v. Fuller, 243 Mich. 200, __, 219 N.W. 749, 751 (1928)(plaintiff, as a citizen and tax-payer, has a common-law right to inspect the public records in the auditory general's office); In re Caswell, 18 R.I. 835, __, 29 A. 259, 259 (1893)(judicial records of the state should be accessible to the public under reasonable restrictions as to the time and mode of examination, but should not be used to gratify private spite or promote public scandal).

19. *See* Watkins, *Access to Public Records Under the Arkansas Freedom of Information Act*, 37 ARK. L. REV. 741, 745 (1984)(author suggests that some barriers to public access would include prohibiting access to those records which would be detrimental to the public and those records that were on file at the government agency, but were not required by law to be kept).

gain, inspection of the public records was not permitted.[20] In addition, if disclosure of the information would be detrimental to the public interest, a governmental body could withhold the records.[21] Moreover, a record was considered a "public record" subject to disclosure only if it was one "required to be kept" by state law.[22]

The United States Supreme Court has recognized that there is a "paramount public interest in a free flow of information to the people concerning public officials."[23] However, the first amendment to the United States Constitution has not been construed to include a general right of public access to governmental records and proceedings.[24] Thus, the task of providing for access to particular governmental information and requiring openness from the bureaucracy has fallen to Congress and the states.[25]

Early North Dakotans appreciated the concept of the public's right to know.[26] As the state proceeded to draft a growing number of statutes, various provisions for open meetings and open

20. *See, e.g.*, Clement v. Graham, 78 Vt. 290, __, 63 A. 146, 154 (1906)(inspection was allowed where the individual seeking to inspect vouchers kept by the State Auditor provided that the inspection was not actuated by motives of curiosity). *But see* State *ex rel.* Colescott v. King, 154 Ind. 621, __, 57 N.E. 535, 537 (1900)(relater, being one who contributes to the public revenue, is entitled to inspect public records despite allegations of curiosity).

21. *See, e.g.*, State *ex rel.* Denson v. Miller, 204 Ala. 234, __, 85 So. 700, 701 (1920)(to know the names upon the jury roll is to know the names within the jury box and such knowledge may result in serious evils in the administration of justice by jury trial).

22. *See, e.g.*, Linder v. Eckard, 261 Iowa 216, __, 152 N.W.2d 833, 836 (1967)(appraisals of appellant's property were not records required to be kept and, therefore, were not public records within the contemplation of the open records statute); Nero v. Hyland, 76 N.J. 213, __, 386 A.2d 846, 851 (1978)(character investigations made at the behest of the Governor as chief executive in connection with a contemplated nomination are not public records under New Jersey's Right to Know Law because they are not required by law to be made, maintained, or kept on file by any agency or official of the State).

23. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

24. U.S. CONST. amend. I. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 2 (1978)(news media have no constitutional right of access to the county jail, over and above that of other persons, to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television); Pell v. Procunier, 417 U.S. 817, 835 (1974)(prohibiting the media from interviewing prison inmates does not infringe upon freedom of speech or the right of a free press). *But see* Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 555 (1980)(absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public).

25. *See* Watkins, *supra* note 19, at 741 (outlining the history of the development of open records statutes). The federal government, all 50 states, and the District of Columbia have enacted some type of open meetings legislation and every state except Mississippi has passed open records states. *Id.* at 741-42 n.4. The North Dakota open meetings and open records statues are collected in Guy & McDonald, *Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota*, 53 N.D.L. REV. 51 (1976). The federal provisions dealing with open meetings and open records are codified at 5 U.S.C. §§ 552, 552b (1982).

26. Guy & McDonald, *supra* note 25, at 51. As early as 1872, laws providing for posting and publication of notices of regular and special township meetings were passed in North Dakota. *Id.*

records gradually crept into North Dakota law.[27] However, no single statute covered all meetings or records.[28] In the early 1950s Sigma Delta Chi, a national journalism association, drafted model open meetings and open records statutes, and encouraged its state chapters to enact these model statutes.[29] The North Dakota chapter of Sigma Delta Chi endorsed the model set of open meetings and open records statutes at its 1956 meeting and then sought to encourage the North Dakota Legislature to enact the statutes for the State.[30]

On February 1, 1957, open meetings[31] and open records[32] measures were introduced in the North Dakota Legislature by a bi-partisan group of legislators.[33] The open meetings and open records bills were referred to the House Committee on Political Subdivisions where they met some opposition.[34] In spite of a recommendation given by the House Committee on Political Subdivisions to indefinitely postpone the open records measure, the North Dakota House of Representatives unanimously passed both measures on February 14, 1957.[35]

The two bills were assigned to the Senate General Affairs Committee which reported both bills out of committee on February 27, 1957.[36] The Senate General Affairs Committee recommendations were adopted by the entire Senate on February 27, 1957.[37] The North Dakota Senate thereafter passed the open

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27. *Id.* at 52. For examples of statutes dealing with North Dakota's open meetings and open records provisions, see *A Digest of North Dakota Laws Pertaining to Access to Public Meetings and Information*, compiled by Rep. Ralph Beede, Republican, Elgin, North Dakota, and presented at the annual meeting of the North Dakota chapter of Sigma Delta Chi, the professional journalism fraternity, in Valley City, North Dakota, in April 1954.

28. Guy & McDonald, *supra* note 25, at 52.

29. *Id.* at 53. The model open meetings and open records statutes drafted by Sigma Delta Chi in the early 1950s were similar to the measures introduced to the North Dakota legislature in 1957. *Id.*

30. *Id.* The North Dakota Press Association also endorsed the model open meeting and open records statutes. *Id.*

31. H.R. 694, 35th Leg., 1957 N.D. Laws 590.

32. H.R. 695, 35th Leg., 1957 N.D. Laws 591.

33. H.R. J. 695, 35th Leg. Assem. of N.D. 181 (1957)(indicating that there were five sponsors of the open records bill: Rep. Walter O. Burk, (Dem.-Williston); Rep. Arthur A. Link (Dem.-Alexander); Rep. Norbert Muggli (Rep.-Dickinson); Rep. Hjalmer Nygaard (Rep.-Enderlin); and Rep. Murray Baldwin (Rep.-Fargo).

34. Guy & McDonald, *supra* note 25, at 53. The Senate General Affairs Committee recommended passing the open meetings bill. H.R. J. 694, 35th Leg. Assem. of N.D. 332 (1957)(passed by a vote of 16 to 2). However, the Senate General Affairs Committee voted to recommend "indefinite postponement" for the open records measure. H.R. J. 695, 35th Leg. Assem. of N.D. 332 (1957)(passed by a vote of 19 to 8).

35. Guy & McDonald, *supra* note 25, at 53. The votes by the North Dakota House of Representatives for the open meetings and open records measures were both 111 to 0. H.R. J. 694, 695, 35th Leg. Assem. of N.D. 398-99 (1957).

36. Guy & McDonald, *supra* note 25, at 53.

37. *Id. See* S. J. 694, 695, 35th Leg. Assem. of N.D. 570 (1957). The open meetings and open records bills were re-referred to the Senate General Affairs Committee by the full

records bill on March 6, 1957.[38] On March 8, 1957, the open meetings bill was also passed by the North Dakota Senate.[39]

Because of persistent communications between legislators and the press, North Dakota established two comprehensive statutes dealing with open meetings and open records.[40] These statutes have not been amended since they were passed.[41] The North Dakota open records statutes provides: "Except as otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state, or organizations supported in whole or in part by public funds or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours."[42]

A state's general open meetings and open records statutes are not the sole determinants of whether documents are subject to public disclosure.[43] All states have laws that restrict or grant access to certain information in specific areas.[44] In addition to the general North Dakota open records provision, there are other various provisions which govern open records for particular governmental bodies.[45] For example, records of county coroners,[46] the

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Senate. Guy & McDonald, *supra* note 25, at 53. The Senate General Affairs Committee then sent the open meetings and open records bills back to the full Senate with attached committee reports. *Id.* There was a significant amount of debate when the open records bill came before the North Dakota Senate for a vote on March 6, 1957. *Id.* at 53, n.16. A number of senators joined in criticizing the bill, stating that the bill was overly broad. *Id.* at n.16. The committee reports were, however, adopted and placed on the calendar without recommendation. S. J., 35th Leg. Assemb. of N.D. 681 (1957).

38. Guy & McDonald, *supra* note 25, at 53. *See* S. J. 695, 35th Leg. Assem. of N.D. 724 (1957)(open records bill passed by a vote of 29 to 18).

39. Guy & McDonald, *supra* note 25, at 53. *See* S. J. 694, 35th Leg. Assem. of N.D. 877 (1957)(open meetings bill passed by a vote of 30 to 13).

40. Guy & McDonald, *supra* note 25, at 53. For a compilation of the comments between legislators and the press regarding the statutes dealing with open meetings and open records, see N.D. PRESS ASS'N, THE NORTH DAKOTA FREEDOM OF INFORMATION STORY (1957)(revealing communications such as letters to the editor, public statements, and editorials that occurred between the legislators and the press). For the text of the North Dakota open meetings statute, see ch. 306, 1957 N.D. Laws 590 (codified at N.D. CENT. CODE § 44-04-19 (1978)).

41. *See* N.D. CENT. CODE § 44-04-19 (1978)(governmental meetings are open to the public); *Id.* at § 44-04-18 (1978)(governmental records are open for public inspection).

42. *Id.* at § 44-04-18 (1978).

43. Braverman & Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 724 (1981).

44. *Id.* at 724. State open record laws generally defer to the specific statutes which grant or restrict access to certain information through a specific exemption or through a definition of "public records." *Id.* These specific disclosure statutes have been relied on by state courts in granting or prohibiting disclosure of records sought under the state open records laws. *Id.*

45. *Id.*

46. N.D. CENT. CODE § 11-19.1-08 (1985)(all records of the coroner are property of the county and are public records).

State Highway Department,[47] and charitable organizations required to file their records with the Secretary of State[48] are open to the public. However, records kept by the Department of Health,[49] the Social Service Board,[50] the Employment Secretary Bureau,[51] as well as several other agencies or departments are closed from public inspection by specific statutory exceptions.[52]

The most common example of statutes that restrict access to an otherwise disclosable record are state privacy laws.[53] The United States Constitution has not been interpreted to expressly protect a right of privacy contravening the openness of governmental records.[54] However, as state statutes have been created to restrict access to otherwise disclosable information, the United States Supreme Court has similarly construed several provisions of the United States Constitution to protect the privacy rights of individuals in information contained in public records.[55] Generally, privacy interests that are the result of an individual interest protected by a specific constitutional amendment receive constitutional protection.[56]

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47. *Id.* at § 24-02-11 (Supp. 1987)(files and records of the State Highway Department shall be open for public inspection under reasonable regulations).

48. *Id.* at §§ 50-22-03 to -04 (1982)(records of charitable organizations filed with the Secretary of State are public records).

49. *Id.* at § 23-02.1-27 (1978)(State Department of Health may authorize the disclosure of data contained in vital records).

50. *Id.* at § 50-06-15 (1982)(records kept by the Social Service Board concerning persons applying for or receiving public assistance are not open for public inspection).

51. *Id.* §§ 52-01-02 to -03 (1982)(Employment Security Bureau records determining the benefit rights of individuals are confidential and not open for public inspection in any manner revealing the individual's or employing unit's identity).

52. Guy & McDonald, *supra* note 25, at 69-80 (discussing open records provisions).

53. Braverman & Heppler, *supra* note 43, at 724. Only a small number of states have not yet enacted privacy statutes. *Id.* at 725. An example of a state's statutory privacy scheme can be found in South Dakota's privacy legislation which prohibits disclosure of adoption records, certain birth records, and income tax return information. *See* S.D. CODIFIED LAWS ANN. §§ 25-6-15(Supp. 1988)(restrictions on access to court records); 34-25-16.4 (1986)(sealing of original birth certificates); 10-1-28.2 (1982)(lists compiled by department of revenue are confidential).

54. Thompson, *Public Employees Financial Disclosure Law Requiring Detailed Disclosure from Low Echelon Employees Not Unconstitutional*, 62 WASH. U.L.Q. 337, 339 (1984). The right to privacy from undue intrusion by a private entity is generally protected by tort law rather than by the Constitution. *See* Restatement (Second) of Torts § 652B-E (1977)(addressing the tort of invasion of privacy). *See generally* Warren & Brandies, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890)(the original discourse from which most current tort law concerning privacy developed).

55. Thompson, *supra* note 54, at 339.

56. *Id.* The first, third, fourth, and fifth amendments of the United States Constitution have been interpreted by the United States Supreme Court to protect privacy rights within specific contexts. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969)(right of an individual to read an obscene book within the privacy of the home is covered under the first amendment protection of freedom of speech and association); Katz v. United States, 389 U.S. 347, 350 n.5 (1967)(privacy and sanctity of one's home is protected by the third amendment's prohibition against unconsented peacetime quartering of soldiers); Mapp v. Ohio, 367 U.S. 643, 646 (1961)(fourth amendment is applied to protect individuals from

The United States Supreme Court has identified two different types of privacy interests:[57] "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."[58] Past decisions in which the United States Supreme Court has established that a right of privacy exists have been in cases involving governmental intrusions into matters relating to marriage,[59] procreation,[60] contraception,[61] and child rearing and education.[62] However, the Court has recently refused to extend the right of privacy to protect private homosexual sodomy between consenting adults.[63]

The United States Supreme Court has also extended a narrow right of privacy in a selected number of cases that deal with the person[64] and the home.[65] However, the court has also limited

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invasion of the privacy of the home); Boyd v. United States, 116 U.S. 616, 630 (1886)(fifth amendment privilege against self-incrimination encompasses invasion of "the sanctity of a man's home and the privacies of life"). Some justices of the United States Supreme Court have also interpreted the ninth amendment as providing a source of fundamental interests which, though not specified in the Constitution, are nonetheless protected. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965)(Goldberg, J., concurring)(ban on contraceptives violated the zones of privacy). The Ninth Amendment to the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

57. *See* Whalen v. Roe, 429 U.S. 589, 598 (1977)(constitutionally protected "zones of privacy" involve the right of an individual not to have his private affairs made public by the government, and the right of an individual to be free in action, thought, experience, and belief from governmental compulsion).

58. *Id.* at 598. Under the autonomy branch of an individual right to privacy, constitutional protection has thus far been limited to intimate personal activities and the freedom to make fundamental choices involving oneself, one's family, and one's relationship with others. *See* Paul v. Davis, 424 U.S. 693, 713 (1976)(interest in reputation, by itself, is not a constitutionally protected privacy interest); *see generally* Thompson, *supra* note 54 at 342 (discussing applications of the different types of privacy interests).

59. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967)(right of privacy protected when dealing with marriage).

60. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153-54 (1973)(right of privacy extended to the abortion context).

61. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)(right of married persons to use contraceptives fell within a zone of privacy guaranteed by the Bill of Rights).

62. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)(privacy interest protects the right of parents to direct the upbringing and education of children).

63. Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986). In *Bowers v. Hardwick* the United States Supreme Court upheld a Georgia law prohibitin consensual sodomy as applied to homosexuals. *Id.* at 195. The Court, however, did not comment on the validity of the law as applied to heterosexuals. *Id.* at 195-96. Therefore, because the United States Supreme Court placed a strong emphasis on the fact that *Bowers* involved *homosexual* sodomy, it left open the possibility that an attempt to prohibit heterosexual sodomy might violate one's right to privacy. *Id.* at 188 n.2.

64. *See, e.g.*, Katz v. United States, 389 U.S. 347, 353 (1967). In *Katz* the Court acknowledged that the fourth amendment protects people — not simply "areas" — against unreasonable searches and seizures, and that therefore, the Government's electronic listening to and recording of Katz' words while he used a telephone booth constituted an impermissible invasion of privacy. *Id.* at 353.

65. *See, e.g.*, Bivens v. Six Unknown Fed'l Narcotics Agents, 403 U.S. 388, 392-93 (1971)(action of FBI agents who entered Bivens' apartment, searched it, arrested Bivens,

these zones of privacy in a decision involving a claim of a right to privacy which would prohibit the maintenance of computerized records of prescriptions for dangerous drugs.[66] In *Whalen v. Roe*[67] the Court concluded that maintaining computerized records of prescriptions for certain dangerous drugs did not constitute an invasion of any liberty or right protected by the fourteenth amendment.[68] The *Whalen v. Roe* decision further strengthens the United States Supreme Court's statement in a 1967 decision that "the protection of a person's general right to privacy — his right to be left alone by other people — is, left largely to the law of the individual states."[69]

All but a small number of states have enacted privacy statutes which restrict access to otherwise disclosable records.[70] For example, South Dakota's privacy legislation restricts access to adoption records and certain birth records[71] and to income tax return infor-

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and threatened his family, all without a warrant and without probable cause, constituted an impermissible invasion of privacy).

66. Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977)(maintaining computerized records of prescriptions for certain dangerous drugs did not constitute an invasion of privacy).

67. 429 U.S. 589 (1977).

68. Whalen v. Roe, 429 U.S. 589, 606 (1977). In *Whalen* the New York statute at issue set up a system in which the names and addresses of all patients who received prescriptions for certain drugs were placed on a central computer. *Id.* at 591. The prescription information was taken from reports which doctors were required to file with the State Health Department. *Id.* at 592. The United States Supreme Court recognized a right of privacy encompassing a general individual interest in avoiding disclosure of personal matters. *Id.* at 602. Despite recognizing this general right, the Court concluded that New York's statutory scheme for maintaining computerized records of prescriptions for certain dangerous drugs did not constitute an invasion of any right protected by the fourteenth amendment even though the patient identification requirement imposed by the law could affect the reputation or independence of the patients. *Id.*

69. Katz v. United States, 389 U.S. 347, 350-51 (1967).

70. Braverman & Heppler, *supra* note 43, at 724.

71. S.D. CODIFIED LAWS ANN. §§ 25-6-15 (1976 & Supp. 1988), 34-25-16.4 (1977). Section 25-6-15 of the South Dakota Codified Laws Annotated provides:

> The files and records of the court in adoption proceedings shall not be open to inspection or copy by other persons than the parents by adoption and their attorneys, representatives of the department of social services, and the child when he reaches maturity, except upon order of the court expressly permitting inspection or copy. No person having charge of any birth or adoption records shall disclose the names of any parents, or parents by adoption, or any other matter, appearing in such records, except upon order of the circuit court for the county in which the adoption took place or other court of competent jurisdiction.

Id. at § 25-6-15 (1976 & Supp. 1988). Section 34-25-16.4 of the South Dakota Codified Laws Annotated provides:

> When a new certificate of birth is established purusant to §§ 34-25-15 to 34-25-16.2 [relating to legitimation of children and adoption], inclusive, the original certificate of birth together with the adoption information or other evidence upon which a new certificate is made shall be sealed, filed, and may be opened only upon order of a court of competent jurisdiction, or by the secretary of health for purposes of properly administering the vital registration system.

Id. at § 34-25-16.4 (1977).

mation.[72] Several states have enacted statutes that prohibit the disclosure of "trade secrets" or comparable business information.[73] Statutes have also been invoked to protect various records including working papers of property tax assessors,[74] police records and records of criminal proceedings of an acquitted defendant,[75] complaints filed with a council on judicial complaints,[76] and inmates' prison records.[77]

Some state courts recognize a fundamental right to privacy for governmental employees' personnel files, regardless of whether the state has enacted informational privacy statutes.[78] The issue of whether the disclosure of performance evaluation reports, completed by the directors of various departments of the City of Lafayette, constituted an impermissible invasion of privacy was raised in the Louisiana case of *Trahan v. Larivee*.[79] Trahan, a radio station general manager and vice president, requested access to evaluation reports of city employees below the director level.[80] The Louisiana Court of Appeal determined that perform-

72. *Id.* at 10-1-28.2 (1982). Section 10-1-28.2 of the South Dakota Codified Laws Annotated provides: "All lists of taxpayers, licensees, or applicants compiled by the department of revenue are confidential. It is a Class 2 misdemeanor to disclose any such list except to the extent necessary to carry out the official duties of the department." *Id.*

73. *See* Braverman & Heppler, *supra* note 43, at 725 n.28 (listing twenty-one states with statutes prohibiting disclosure of trade secrets or comparable business information). *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-107 (1986), 41-1959 (1985 & Supp. 1988), 23-426 (1983).

74. *See, e.g.*, CAL. REV. & TAX. CODE § 408(a) (West 1987 & Supp. 1989)(records of property tax assessors not required by law to be kept are not open for public inspection).

75. *See generally* CONN. GEN. STAT. ANN. § 54-142 (West 1985 & Supp. 1989)(restricting access to non-conviction information).

76. *See, e.g.*, OKLA. STAT. ANN. tit. 20, § 1658 (West Supp. 1989)(judicial complaints filed with the Council on Judicial Complaints are not open to the public).

77. CAL. PENAL CODE § 2081-5 (West 1982)(complete case records of prisoners are made available to the Board of Prison Terms).

78. *See, e.g.*, Trahan v. Larivee, 365 So.2d 294, 300 (La. Ct. App. 1978)(disclosure of written documents prepared to evaluate the job performance of various department heads in the city administration and containing notes on the department heads' job interest, cooperation, and other items would be an unconstitutional invasion of privacy); *writ denied*, 366 So.2d 564 (La. 1979).

79. 365 So.2d 294, 298-99 (La. Ct. App. 1978); *writ denied*, 366 So.2d 564 (La. 1979). In *Trahan* the initial question asked by the appellate court was whether performance evaluation reports of city employees constituted "public records." *Id.* at 298. The reports were written documents prepared at the request of the chief elected official of the City of Lafayette and were to be used to evaluate various city employees. *Id.* The Louisiana Court of Appeal found that these reports constituted "public records" as set forth by the legislature. *Id.* Having concluded that the performance evaluation reports constituted "public records," the court had to determine if publication or disclosure of these records should be denied as being an invasion of privacy under the provisions of the Louisiana Constitution. *Id.* at 298-99; LA. CONST. art. I, § 5 (every person shall be secure against invasions of privacy).

80. Trahan v. Larivee, 365 So.2d 294, 296 (La. Ct. App. 1978); *writ denied*, 366 So.2d 564 (La. 1979). Evaluations of the city employees were conducted purusant to the direction of the mayor with the chief administration officer serving as the evaluator. *Id.* at 296. Trahan, who was the vice president and general manager of KVOL radio station, gave Larivee, chief administrative officer for the city of Lafayette, the person entrusted with the

ance evaluation reports of city employees did fall within the statutory definition of "public records."[81] However, the Louisiana Court of Appeal held that to publish or disclose such reports would constitute an invasion of the city employees' privacy.[82]

The Louisiana Constitution specifically addresses the issue of privacy in article I, section 5, which provides in part: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."[83]

A fundamental right of privacy also appears in the Montana Constitution.[84] In *Missoulian v. Board of Regents of Higher Education*[85] the Montana Supreme Court analyzed the privacy provision of the Montana Constitution and held that job performance evaluations of university presidents were matters of individual privacy and that presidents' privacy interests clearly exceeded the public's constitutional and statutory right to know.[86] The Board of

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records, written notice that he intended to request access to the evaluation reports. *Id.* at 295, 296. Larivee advised Trahan that access would be granted only if Trahan received written consent from each individual director. *Id.* at 296. Only one of the city directors gave Trahan consent to review the reports. *Id.* at 299.

81. *Id.* The term "public records" was defined by the Louisiana court as:

> All records, writings, accounts, letters and letter books, maps, drawings, memoranda and papers, and all copies or duplicates thereof, and all photographs or other similar reproductions of the same, having been used, being in use, or prepared for use in the conduct, transaction or performance of any business, transaction, work, duty or function which was conducted, transacted or performed by or under the authority of the Constitution or the laws of this state, or the ordinances or mandates or orders of any municipal or parish government or officer or any board or commission or office established or set up by the Constitution or the laws of this state, or concerning or relating to the receipt or payment of any money received or paid by or under the authority of the Constitution or the laws of this State are public records, subject to the provisions of this Chapter except as hereinafter provided.

Id. LA. REV. STAT. ANN. § 44:1A(2)(West 1982).

82. *Trahan*, 365 So.2d at 300. The Louisiana Court of Appeal analyzed the evaluation process and found that the evaluation reports of the city employees were very personal and were basically opinions of the individual doing the evaluating. *Id.* at 300. The court explained that the purpose of the performance evaluation reports was to provide the employees' superiors with the information necessary to evaluate the performance of such employees. *Id.* The information would aid the employees' supervisors in making a determination of whether to grant an employee permanent status, awarding merit raises, recognizing superior and inferior performance, and other matters which pertain to good management. *Id.* Consequently, the Louisiana Court of Appeal stated that the confidentiality of the reports was very important, and therefore held that the individual rights of the employees prevailed over the public's "right to know." *Id.*

83. LA. CONST. art. I, § 5.

84. *See* MONT. CONST. art. II, § 10. Article II, section 10 of the Montana Constitution provides in part: "*Right of Privacy.* The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." *Id.*

85. 207 Mont. 513, 675 P.2d 962 (1984).

86. Missoulian v. Board of Regents of Higher Educ., 207 Mont. 513, __, 675 P.2d 962, 973 (1984).

Regents of Higher Education (Board), in *Missoulian*, which was responsible for hiring, firing, and supervising the presidents, adopted procedures for the evaluation of university presidents.[87] The Performance Evaluation Policy established by the Board created two levels of evaluation, an annual review and a more thorough periodic evaluation to be done every three years.[88] Individuals evaluated under the Board's Performance Evaluation Policy were informed that confidentiality would be observed throughout the evaluation process.[89]

At the Board's meeting on April 21, 1980, the *Missoulian*, a local newspaper, requested that the Board allow individuals from the *Missoulian* to attend the performance evaluation of one of the university presidents.[90] The *Missoulian* also sought access to the evaluation documents.[91] The Board denied the *Missoulian*'s request, stating that the demand of individual privacy clearly exceeded the merits of public disclosure.[92] The *Missoulian* brought an action against the Commissioner of Higher Education and the Board under the "right to know" provision of the Montana Constitution and the Montana Open Meeting Act, challenging the closure of the evaluation meetings.[93] The Board moved for sum-

87. *Id.* at __, 675 P.2d at 964.

88. *Id.* at __, 675 P.2d at 964. The annual review by university presidents consisted of the president preparing a list of goals and objectives for the institution and an informal and confidential discussion of performance between the president and the Board of Regents of Higher Education (Board). *Id.* at __, 675 P.2d at 964. The periodic evaluation of university presidents was more formal and complex. *Id.* at __, 675 P.2d at 964. A president receiving a periodic evaluation was to prepare a thorough evaluation of the university administration. *Id.* at __, 675 P.2d at 964. During the periodic evaluation, people in close contact with the president, including his faculty, staff, students and administration, were interviewed by the Commissioner of Higher Education on various aspects of the president's performance. *Id.* at __, 675 P.2d at 964. The Board would then discuss the periodic evaluation and results of the interviews with the president. *Id.* at __, 675 P.2d at 964.

89. *Id.* at __, 675 P.2d at 964. The Commissioner of Higher Education gave each interviewee an assurance that the interview would be confidential. *Id.* at __, 675 P.2d at 964. The Board's Performance Evaluation Policy specified that "the principle of confidentiality would be observed throughout the review process" and that the principle would "apply to written documents and to discussions among all those who participate." *Id.* at __, 675 P.2d at 964. Several of the presidents indicated that they would have written the self-evaluations differently if they knew that the evaluations were to be public documents. *Id.* at __, 675 P.2d at 966.

90. *Id.* at __, 675 P.2d at 964. The *Missoulian* argued that the meetings held for the discussion of the university presidents' performance evaluations involved "the carrying out of the public's business in public education and therefore the public should be apprised." *Id.* at __, 675 P.2d at 964.

91. *Id.* at __, 675 P.2d at 964.

92. *Id.* at __, 675 P.2d at 964. After the request to review the particular president's evalution documents was denied, the *Missoulian* changed its request to include access to all presidential evaluations. *Id.* at __, 675 P.2d at 965. This request was also denied. *Id.* at __, 675 P.2d at 965.

93. *Id.* at __, 675 P.2d at 965. *See* MONT. CONST. art. II, § 9 (right to observe deliberations of all public bodies except where need for individual privacy is greater than need for public disclosure); MONT. CODE ANN. § 2-3-203 (1987)(meetings of public

mary judgment alleging that neither the constitutional nor statutory right to know provisions were violated.[94] The district court granted the Board's motion for summary judgment.[95]

On appeal the issue addressed by the Montana Supreme Court was whether job performance evaluations of university presidents, which express subjective comments from Board members, anonymous interviewees, and the presidents themselves, are matters of individual privacy protected by the Montana Constitution or whether the privacy clause extends only so far as to protect matters of family or health not affecting job performance.[96] The *Missoulian* argued that the presidents' job performance is a public matter which society is unwilling to recognize as private and that no privacy interest exists which would protect the performance evaluations from disclosure.[97] The *Missoulian* also argued that the job performance evaluations were not protected by the privacy clause of the state constitution because the presidents' privacy rights were diminished by their status as university presidents.[98] The Montana Supreme Court rejected the argument that the status of university presidents diminished their privacy rights.[99] The supreme court emphasized that disclosing the presidents' job performance evaluations would not only violate the university presidents' privacy interests, but would affect the privacy rights of numerous administrative staff, faculty members and other university employees having a considerable privacy interest in the evaluation sessions.[100]

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organizations or agencies supported in whole or in part by public funds must be open to the public except where individual privacy concerns outweigh merits of public disclosure or where open meeting would have detrimental impact on collective bargaining or litigation).

94. *Missoulian*, 207 Mont. at __, 675 P.2d at 963. Initially, the Board moved for summary judgment shortly after the action was filed. *Id.* at __, 675 P.2d at 963. The motion was denied by the district court on November 10, 1980, after the issue was extensively briefed and argued. *Id.* at __, 675 P.2d at 963. After discovery was completed, both parties moved for summary judgment. *Id.* at __, 675 P.2d at 963.

95. *Id.* at __, 675 P.2d at 963. On June 17, 1982, the district court granted the Board's motion for summary judgment, sustaining closure of the meeting. *Id.* at __, 675 P.2d at 967.

96. *Id.* at __, 675 P.2d at 967.

97. *Id.* at __, 675 P.2d at 967. The *Missoulian* contended that university presidents could have no reasonable expectation of privacy unless it was encompassed in the narrow areas of personal health and family which do not affect job performance. *Id.* at __, 675 P.2d at 967.

98. *Id.* at __, 675 P.2d at 969. The *Missoulian* argued that university presidents were policy-making officials whose actions were of great importance to the public and whose privacy rights were diminished by their status as public officials. *Id.* at __, 675 P.2d at 969.

99. *Id.* at __, 675 P.2d at 969. The Montana Supreme Court agreed that the university presidents' privacy interests may be less, in some circumstances, than other employees. *Id.* at __, 675 P.2d at 969. However, the court indicated that the university presidents are not expected to waive their constitutional protection by taking office and stated that the presidents' privacy interests were strong enough to protect the confidentiality of their performance evaluations. *Id.* at __, 675 P.2d at 969.

100. *Id.* at __, 675 P.2d at 969. The matters discussed with regard to the numerous

The Montana Supreme Court referred to *Trenton Times Corp. v. Board of Education*,[101] a New Jersey case in which a similar issue was raised.[102] In *Trenton Times* the New Jersey Superior Court found that personnel records and evaluations of a school superintendent were private matters not subject to the public's right to know.[103] The court in *Trenton Times* stated:

> Personnel records . . . include employees' performance ratings. The policy to keep performance ratings confidential has been adopted: first, to protect the right of privacy of the government employees; second, because the evaluations are subjective opinions of the performance of the employee that vary with the person giving the rating; third, public disclosure would impede receiving candid evaluations; and fourth, a supervisor could use the public nature of these ratings as a vindictive mechanism against employees he dislikes. The lack of objective criteria, the potential for vindictiveness, the lack of an opportunity for the employee to rebut statements made in the rating, and a substantial potential for abuse leads to the conclusion that these ratings should be kept confidential.[104]

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administrative staff, faculty members, and other university employees, the court stated, was of a sensitive and personal nature and would reasonably be expected to remain confidential. *Id.* at __, 675 P.2d at 969.

101. 138 N.J. Super. 357, 351 A.2d 30 (N.J. Super. Ct. App. Div. 1976).

102. *Missoulian*, 207 Mont. at __, 675 P.2d at 969-70; *see* Trenton Times Corp. v. Board of Educ., 138 N.J. Super. 357, __, 351 A.2d 30, 31 (App. Div. 1976). In *Trenton* a newspaper publisher filed a complaint pursuant to the New Jersey Right to Know Law, requesting that the Board of Education and the superintendent of public schools permit the publisher to inspect and copy a letter addressed to the superintendent. *Id.* at __, 351 A.2d at 31. For the text of the New Jersey Right to Know Law, *see* N.J. STAT. ANN. § 47:1A-2 (West Supp. 1988)(all records required by law to be kept are deemed public records). The letter in question contained a notice of nonrenewal of the superintendent's contract. *Trenton Times Corp.*, 138 N.J. Super. at __, 351 A.2d at 31. The letter also included an unsolicited evaluation of the superintendent's performance. *Id.* at __, 351 A.2d at 31. Because the statement in the letter was regarded as confidential, the statement was not placed in the superintendent's personnel file, or in any other file under the control of the Board of Education of the City of Trenton. *Id.* at __, 351 A.2d at 31.

103. *Trenton Times Corp.*, 138 N.J. Super. at __, 351 A.2d at 34. The New Jersey Superior Court indicated that no statute requires an evaluation of an employee's performance to be given in connection with a notice of nonrenewal in the absence of the employee's request. *Id.* at __, 351 A.2d at 32. In *Trenton Times* the proferred evaluation was purely gratuitous because the superintendent never requested any reasons for nonrenewal or any evaluation of his performance. *Id.* at __, 351 A.2d at 32. The letter written by the Board of Education was for the superintendent's information and was not placed in the superintendent's personnel file nor retained by the board itself. *Id.* at __, 351 A.2d at 32. At all times, the letter was regarded as personal to the superintendent, confidential, and of a sensitive nature. *Id.* at __, 351 A.2d at 32.

104. *Id.* at __, 351 A.2d at 33. By applying the explanation of "personnel records" that depicts the importance of confidential performance ratings, the court found that disclosure of the letter sent to the superintendent would be a violation of his right to privacy. *Id.* at __, 351 A.2d at 34.

The Montana Supreme Court recognized that the reasons supporting a policy of confidential evaluations coupled with the dangers of public disclosure recognized by the New Jersey court were valid.[105] Thus, in *Missoulian*, the Montana Supreme Court held that university presidents' job performance evaluations were matters of individual privacy, protected by the Montana Constitution.[106]

In 1981, the North Dakota Supreme Court addressed a problem similar to that addressed in *Trenton Times* and *Missoulian* in *City of Grand Forks v. Grand Forks Herald*.[107] The court addressed the issues of whether municipal personnel files were public records subject to disclosure pursuant to section 44-04-18 of the North Dakota Century Code and article XI, section 6 of the North Dakota Constitution, and whether disclosure of the contents of a personnel file would constitute an impermissible invasion of privacy.[108]

In *Grand Forks Herald* the plaintiff, S. D. Knutson, was employed as the chief of police by the City of Grand Forks (City) until August 20, 1973, when he resigned.[109] In 1980, Knutson became a candidate for the office of county commissioner of Grand Forks County.[110] On August 18, 1980, a Grand Forks Herald reporter approached the personnel director for the City and requested an opportunity to inspect the City's records relating to Knutson's employment as the chief of police.[111] The personnel director refused to allow inspection of the records.[112] The City commenced a declaratory action against the Grand Forks Herald

105. Missoulian, Inc. v. Board of Educ., 207 Mont. 513, __, 675 P.2d 962, 970 (Mont. 1984).

106. *Id.* at __, 675 P.2d at 970. *See* MONT. CONST. art. II, § 10.

107. 307 N.W.2d 572 (N.D. 1981). *See Missoulian*, 207 Mont. 513, 675 P.2d 962 (1984); *Trenton Times*, 138 N.J. Super. 357, 351 A.2d 30 (App. Div. 1976). *Missoulian* is discussed *supra* notes 85-100 and accompanying text. *Trenton Times* is discussed *supra* notes 101-104 and accompanying text.

108. City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 575 (N.D. 1981). *See also* N.D. CENT. CODE § 44-04-18 (1978)(public or governmental records are open for public inspection except as otherwise specifically provided by law); N.D. CONST. art. XI, § 6 (public or governmental records are open for public inspection unless otherwise provided by law).

109. *Grand Forks Herald*, 307 N.W.2d at 573. During the time that Knutson was employed by the City of Grand Forks (City) as chief of police, a personnel file was kept by the City. *Id.* at 574.

110. *Id.* at 574. Because Knutson was a candidate for a public office, a Grand Forks Herald reporter was interested in making the contents of Knutson's personnel file open to the public. *Id.*

111. *Id.* The Grand Forks Herald reporter was interested in the records specifically relating to Knutson's employment and the terms and conditions of a negotiated settlement of resignation agreed upon between the City and Knutson. *Id.*

112. *Id.*

on August 25, 1980, stating that the documents in Knutson's personnel file were not subject to disclosure, notwithstanding the provisions of section 44-04-18 of the North Dakota Century Code.[113]

On September 17, 1980, the district court held a declaratory judgment hearing in which the city personnel director testified about particular items generally found in personnel files maintained by the City, including work evaluations, salary changes, Internal Revenue Service forms, insurance matters, retirement matters, credit reports, and reports relating to mental illness or alcoholism.[114] The district court determined that the personnel file maintained by the City was a public record within the meaning of article XI, section 6 of the North Dakota Constitution[115] and section 44-04-18 of the North Dakota Century Code.[116]

On appeal the City argued that the municipal personnel files were not public records subject to disclosure because chapter 44-04-18 of the North Dakota Century Code and article XI, section 6 of the North Dakota Constitution do not define the term "records."[117] The North Dakota Supreme Court disagreed with the City's argument, stating that the term "records" as used in section 44-04-18 of the North Dakota Century Code and article XI, section 6 of the North Dakota Constitution was intended to have an expansive meaning.[118] The court indicated that the City is a political subdivision of the State, and therefore, all of its records are considered public records open equally for inspection to members of the public.[119] The court concluded that absent a specific exception which would somehow preclude inspection of the per-

113. *Id.*; *see* N.D. CENT. CODE § 44-04-18 (1978). For the text of § 44-04-18 of the North Dakota Century Code, see *supra* note 7. In its prayer for relief, the City requested a declaratory judgment to determine the rights of the parties and also to determine whether personnel files are public records open for inspection. *Grand Forks Herald*, 307 N.W.2d at 574. The Grand Forks Herald requested a writ of mandamus from the district court, but the district court denied the request. *Id.* In its answer submitted on September 15, 1980, the Grand Forks Herald asserted that the City did not have standing to seek a declaratory judgment; that the complaint filed by the City failed to state a claim on which relief could be granted; and that the City's claim was frivolous. *Id.*

114. *Grand Forks Herald*, 307 N.W.2d at 574. The personnel director did not testify as to which documents were specifically contained in Knutson's personnel file, but rather what documents were generally contained in the personnel files maintained by the City. *Id.*

115. *See* N.D. CONST. art. XI, § 6. For the text of article XI, section 6 of the North Dakota Constitution, see *supra* note 9.

116. *Grand Forks Herald*, 307 N.W.2d at 574. *See* N.D. CENT. CODE § 44-04-18 (1978). For the text of section 44-04-18 of the North Dakota Century Code, see *supra* note 7.

117. *Grand Forks Herald*, 307 N.W.2d at 577.

118. *Id. See* N.D. CENT. CODE § 44-04-18; N.D. Const., art. XI, § 6.

119. *Grand Forks Herald*, 307 N.W.2d at 578. The City argued that thought processes, work product, preliminary data, and work sheets and notes are not considered records. *Id.* In turning away the argument the court noted that no specific exception existed in North Dakota law which would allow even these matters to be withheld from public inspection. *Id.*

sonnel file, the file should be open to public inspection.[120] The court advised the City and Knutson to seek a remedy with the legislature.[121]

The North Dakota Supreme Court also addressed the issue of whether disclosure of Knutson's personnel file would constitute an impermissible invasion of his right of privacy.[122] The court explained that no violation of a right of privacy could be found because "a generalized right of privacy is not mentioned in the Federal or State Constitutions; thus, if a right of informational privacy does exist it has not yet been recognized."[123]

Although the United States Congress has enacted an informational privacy statute based upon the assumption that a constitutional right of privacy exists, the North Dakota Legislature has not enacted any similar legislation.[124] Other than the protection against unreasonable searches and seizures accorded by article I, section 8 of the North Dakota Constitution, no statutory or constitutional right of privacy has yet been recognized under the North Dakota Constitution.[125]

The North Dakota Supreme Court re-examined the potential existence of an informational privacy right in *Hovet v. Hebron Public School District*.[126] In *Hovet* the court addressed the issue of whether a public school teacher had a privacy right which would

120. *Id.* The court stated that no statutory authority specifically prescribed the maintenance of municipal personnel files or the material to be retained in the files. *Id.* However, the court reasoned that the expansive language of § 44-04-18 of the North Dakota Century Code seemed to imply that these personnel files were public records open to inspection. *Id. See* N.D. CENT. CODE § 44-04-18 (1978). Both article XI, section 6 of the North Dakota Constitution and section 44-04-18 of the North Dakota Century Code specifically state that "except as otherwise provided by law," public records are open for public inspection. *Grand Forks Herald*, 307 N.W.2d at 578. *See* N.D. CONST. art. XI, § 6; N.D. CENT. CODE § 44-04-18 (1978).

121. *Grand Forks Herald*, 307 N.W.2d at 578.

122. *Id.* Knutson asserted that a right of informational privacy existed under both the federal and the state constitutions, thereby preventing the disclosure of the contents of his personnel file. *Id.* Knutson relied on the tort of invasion of privacy in reaching this assertion. *Id.* However, whether the tort of invasion of privacy exists under North Dakota law has not been decided. *Id. See* Volk v. Auto Dine Corp., 177 N.W.2d 525, 529 (N.D. 1970)(whether a tort action lies in North Dakota for an invasion of a person's privacy has not been considered); *Grand Forks Herald*, 307 N.W.2d at 578.

123. *Grand Forks Herald*, 307 N.W.2d at 578. *But see* Griswold v. Connecticut, 381 U.S. 479 (1965)(several guarantees in the Bill of Rights protect privacy interests and create a penumbra of protection for other unenumerated rights).

124. *Grand Forks Herald*, 307 N.W.2d at 579. *See* Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended as 5 U.S.C. § 552a (1982)(recognizing right of privacy is a "personal and fundamental right" protected by the constitution and specifying the requirements necessary for maintaining records on individuals)).

125. *Grand Forks Herald*, 307 N.W.2d at 579. *See* N.D. CONST. art. I, § 8 (protection against unreasonable searches and seizures).

126. 419 N.W.2d 189 (N.D. 1988).

be violated if his personnel file was open to the public.[127] A number of North Dakota Supreme Court decisions have established that once a record is determined to be a governmental record it must be open for public inspection under the North Dakota Constitution and state statutes.[128] Hovet and the School District both agreed that the personnel file was considered a governmental record for purposes of determining if it was subject to the North Dakota open records law.[129] However, they argued that section 15-47-38 of the North Dakota Century Code provided an implied exception to the open-records law, thereby protection Hovet's personnel file from inspection.[130] Hovet and the School District reasoned that section 15-47-38 of the North Dakota Century Code was designed to protect a teacher's reputation because of its requirement that certain executive session proceedings be followed when a school board discharges a teacher.[131] In addition, Hovet and the School District stated that opening a teacher's personnel file to the public harms the goals of facilitating openness in the proceedings and protecting the teacher's reputation provided for in the executive session proceedings.[132]

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127. Hovet v. Hebron Pub. School Dist., 419 N.W.2d 189, 190 (N.D. 1988).

128. *Id.* at 190. *See, e.g.*, City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 577 (N.D. 1981)(governmental records are required to be open for public inspection); Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 171 (N.D. 1986)(documents submitted to assist in hiring city police chief were considered public records); Williston Herald, Inc. v. O'Connell, 151 N.W.2d 758, 763 (N.D. 1967)(public has a right to inspect records of judicial proceedings after the proceedings are docketed). *Grand Forks Herald* is discussed *supra* notes 108-25 and accompanying text.

129. *Hovet*, 419 N.W.2d at 190. Hovet and the School District agreed that the personnel file was considered a governmental record by applying previous North Dakota Supreme Court decisions. *Id. See, e.g.*, City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 577-78 (N.D. 1981)(personnel file of the chief of police was considered a governmental record and was therefore open for public inspection); Forum Publishing Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986)(applications submitted to a consulting firm under contract to the city to assist in hiring a police chief were considered governmental records and were therefore considered "public records" subject to the open record law requiring disclosure to the public). In *Forum Publishing Co. v. City of Fargo*, the North Dakota Supreme Court explained that the purpose of the open record law would be thwarted if documents so closely connected with public business were found not to be public records. *Id.* at 172.

130. *Hovet*, 419 N.W.2d at 191. *See* N.D. CENT. CODE § 15-47-38 (Supp. 1987) (procedure required for discharging teachers). Section 15-47-38 of the North Dakota Century Code specifies the procedures used when a school board discharges a teacher or does not renew a teacher's contract. *Id.* Procedures provided in section 15-47-38 of the North Dakota Century Code include: 1) upon the decision for a nonrenewal, the reasons for not renewing a teacher's contract must be taken from specific and documented findings arising from formal reviews conducted by the board with respect to the teacher's overall performance; 2) these proceedings are to be held in an executive session unless both parties agree that they may be open to the public; 3) no action for libel or slander shall lie for statements expressed at the executive sessions. *Id.*

131. *Hovet*, 419 N.W.2d at 191.

132. *Id.*; N.D. CENT. CODE § 15-47-38(2)(Supp. 1987)(special meeting on teacher's nonrenewal shall be in executive session unless both school board and teacher agree it shall be open to the public).

The North Dakota Supreme Court responded to Hovet's argument that there was an implied exception to the open records law by stating that such a contention ignored the plain language of the open records law.[133] The North Dakota Supreme Court concluded that because the open records law provides that governmental records are records open for public inspection "except as otherwise specifically provided by law," an exception to the open records law may not be implied.[134] The court stated that because of the plain terms of North Dakota's constitutional and statutory provisions, a record will not be excepted from the open records law until its status is specifically addressed by the legislature.[135] Therefore, the court concluded that the contention that section 15-47-38 of the North Dakota Century Code implies an exception to the open-records law for teacher personnel files must fail.[136]

The North Dakota Supreme Court next addressed the argument of Hovet and the School District that an exception to the open records law for teachers' personnel files can be based on chapter 15-38.2 of the North Dakota Century Code.[137] Chapter 15-38.2 of the North Dakota Century Code generally provides that a teacher has a right to review his or her personnel file and add written comments to the file.[138] Chapter 15-38.2 also prohibits the use of secret personnel files that are not accessible to the

133. *Id.* The open records law provides that governmental records are open to the public "[e]xcept as otherwise specifically provided by law." N.D. CENT. CODE § 44-04-18(1)(1978). In analyzing this provision, the court in *Hovet* indicated that the North Dakota Century Code provides that "words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. . . ." *Hovet*, 419 N.W.2d at 191. *See* N.D. CENT. CODE § 1-02-02 (1987). In addition, the court also stated that the word "specific" is usually defined to mean "[e]xplicitly set forth; particular, definite." *Hovet*, 419 N.W.2d at 191 (citing AMERICAN HERITAGE DICTIONARY 1173 (2d college ed. 1973)). The definition of "specific," the court noted, is opposite to the meaning of "implied," which is defined to mean "suggested, involved, or understood although not clearly or openly expressed." *Hovet*, 419 N.W.2d at 191; *see* AMERICAN HERITAGE DICTIONARY 1173 (2d college ed. 1973). Thus, the court concluded that an exception to the open-records law may not be implied. *Hovet*, 419 N.W.2d at 191.

134. *Hovet*, 419 N.W.2d at 191. A record may not be excepted from the open records law unless the legislature has specifically addressed the status of that type of record and concluded that the record is "confidential" or not open to public scrutiny. *Id.*

135. *Id.* at 191. The North Dakota Supreme Court's decision that specific action must be taken in order for a record to be excepted from the open records law is supported by comments made at the time the open records law was being considered. *Id.* Representative Ralph Beede, speaking on behalf of the open records law at the time of its enactment in 1957, stated "that if administrative agencies, such as the State Public Service Commission which gets certain private information from utilities, feel they have records that should be kept confidential, 'they should come to the Legislature and let it decide on the question.' " Bismarck Tribune, February 15, 1957, at 1, col. 2.

136. *Hovet*, 419 N.W.2d at 191.

137. *Id.* at 192. *See* N.D. CENT. CODE § 15-38.2-01 (1981 & Supp. 1987)(teacher has a right to review his or her personnel file).

138. *Id.* ch. 15-38.2 (1981 & Supp. 1987).

teacher.[139] Because the status of teacher personnel files as open or closed records is not specifically addressed in chapter 15-38.2 of the North Dakota Century Code, the supreme court concluded that this argument must also fail due to the fact that an exception to the open records law may not be implied.[140]

Hovet also alleged that he had a right to privacy guaranteed him by the United States Constitution and the North Dakota Constitution which would be violated if his personnel file was allowed to be opened for public inspection.[141] The North Dakota Supreme Court referred to its decision in *City of Grand Forks v. Grand Forks Herald* where it rejected the claim that a governmental employee's personnel file was protected by a constitutional right of privacy.[142] In rejecting Hovet's argument, the court indicated that it had not been shown that a teacher's personnel file is any different from that of other governmental employees.[143]

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139. *Id.*

140. *Hovet*, 419 N.W.2d at 192. The North Dakota Supreme Court indicated that the argument that there is an exception to the open records law for teacher personnel files based on chapter 15-38.2 of the North Dakota Century Code was similar to the School District's initial contention that an exception to the open records law may be implied in section 15-47-38 of the North Dakota Century Code because the statutes do not specifically address the status of teacher personnel files. *Id.* The North Dakota Supreme Court restated that an exception to the open records law may not be implied. *Id.* In addition, the court noted that the legislative history of chapter 15-38.2 of the North Dakota Century Code indicated that the legislature did not address the open records law when it considered the status of teacher personnel files. *Id.* The legislature stated that the purposes of the open records bill were: "(1) to prevent and prohibit secret files; and (2) to provide a reasonable method for allowing teachers to see what is in their personnel file." Sen. Educ. Comm. Minutes (Jan. 31, 1977).

141. *Hovet*, 419 N.W.2d at 192. *See* U.S. CONST. amend. IX; N.D. CONST. art. XI, § 6. Hovet argued that *Tinker v. Des Moines Community School District* was applicable to his case because teachers, like students, do not "shed their constitutional rights . . . at the schoolhouse gate." *Id. See* Tinker v. Des Moines Community School Dist., 393 U.S. 503, 514 (1969)(prohibiting high school and junior high school students from wearing armbands as a symbol of opposition to the Vietnamese War violated the students' first amendment rights).

142. *Hovet*, 419 N.W.2d at 192. *See* City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 578 (N.D. 1981). In *Grand Forks Herald* the North Dakota Supreme Court decided that personnel records were not protected by the right of privacy arising under the federal constitution because the federal right to privacy has not been recognized as applying to the particular subject of personnel files. *Id.* The court also refused to find that a right to privacy arising from the North Dakota Constitution protected a governmental employee's personnel record. *Id.* The court noted that no explicit right to privacy exists under the North Dakota Constitution and thus declined to consider whether a privacy right could be inferred under the North Dakota Constitution. *Id.* The court specifically stated in *Grand Forks Herald* that even if a right to privacy existed under the North Dakota Constitution, there would be no right of privacy "in a personnel record of a person employed by a public agency. . . ." *Id.* at 580.

143. *Hovet*, 419 N.W.2d at 192. The North Dakota Supreme Court referred to the recent decision of *Klein Independent School District v. Mattox* to illustrate that teacher's personnel files are no different from the personnel files of other governmental employees. *Id. See* Klein Indep. School Dist. v. Mattox, 830 F.2d 576, 579 (5th Cir. 1987); *cert. denied* 108 S. Ct. 1473 (1988). In *Mattox* the Court of Appeals for the Fifth Circuit discussed the possibility of applying a right to privacy where a request had been made under the Texas open records law to view a teacher's college transcript. *Id.* at 577. The Court of Appeals for the Fifth Circuit rejected the teacher's right to privacy claim under the federal

Hovet referred to the Louisiana case of *Trahan v. Larivee* to support his argument that a teacher's personnel file is protected by a privacy right.[144] In *Trahan*, the Louisiana Court of Appeal held that allowing evaluation reports of city directors to be open for public inspection would constitute an impermissible invasion of privacy.[145] However, the North Dakota Supreme Court distinguished *Trahan* because the Louisiana Constitution expressly guarantees a right to privacy in article I, section 5.[146] Thus, the supreme court concluded that because the North Dakota Constitution does not expressly guarantee a right to privacy, Hovet's personnel file was a public record open for inspection, the disclosure of which does not constitute an invasion of privacy.[147]

Hovet's final contention was that students had a privacy right which would be violated if a teacher's personnel files were open to the public.[148] The North Dakota Supreme Court declined to consider this issue, stating that even if it recognized that a student had a privacy interest needing protection, the consideration of that issue would violate the general rule that "a litigant may assert only his own constitutional rights, unless he can present 'weighty countervailing policies.' "[149] The North Dakota Supreme Court indicated that Hovet had not raised sufficient "weighty countervailing

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constitution, stating: "Without engaging in an inquiry into whether [teacher] Ms. Holt has a recognizable privacy interest in her college transcript, we believe that, under the balancing test, even if she did have an interest, it is significantly outweighed by the public's interest in evaluating the competence of its schoolteachers." *Id.* at 580. The Texas open records statute contains a provision which exempts from public disclosure the "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." TEX. REV. CIV..STAT. ANN. art. 6252-17a, § 3(a)(2) (Vernon 1988). Even though the Texas open records law had an exception for information of a private nature contained in personnel files, the court in *Mattox* required disclosure, finding that "the disclosure of a school[-]teacher's college transcript [does not rise] to the level of that information which constitutes an unwarranted invasion of personal privacy. . . ." *Mattox*, 830 F.2d at 581.

144. *Hovet*, 419 N.W.2d at 193. *See* Trahan v. Larivee, 365 So.2d 294 (La. Ct. App. 1978). In *Trahan* the court refused to allow evaluation reports of city directors to be open for public inspection even though the reports were considered public records because to do so would constitute an impermissible invasion of privacy under the Louisiana Constitution. *Id.* at 300. *See* LA. CONST. art. I, § 5 (every person shall be secure in his person, communications, and papers against unreasonable invasions of privacy). *Trahan* is discussed *supra* notes 79-83 and accompanying text.

145. *Trahan*, 365 So.2d at 300.

146. *Hovet*, 419 N.W.2d at 193. *Compare* LA. CONST. art. I, § 5 (every person shall be secure in his person, communications, and papers against unreasonable invasions of privacy) *with* N.D. CONST. art. I, § 8 (right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures).

147. *Hovet*, 419 N.W.2d at 193.

148. *Id.* Hovet indicated that the names of students may be placed in a teacher's personnel file which the public should not be allowed to inspect. *Id.*

149. *Id. See* State v. Woodsworth, 234 N.W.2d 243, 249 (N.D. 1975)(general rule is that the constitutionality of a statute cannot be challenged on the ground that it may conceivably be applied unconstitutionally to others unless there are weighty countervailing policies).

policies" to depart from the general rule.[150] The supreme court recognized that Hovet and the School District had raised strong public policy arguments for excepting teacher personnel files from the open records law.[151] However, the supreme court stated that policy considerations are to be addressed by the legislature and the law must be applied as it presently exists.[152]

The North Dakota Legislature, in enacting the open records statute, most likely left the term "record" undefined so that it would be given a broad meaning.[153] Both the North Dakota opens records law and article XI, section 6 of the North Dakota Constitution specify that "except as otherwise provided by law" public records are to be open for public inspection.[154] The phrase "except as otherwise provided by law" implies that the legislature has the authority to make certain records confidential.[155]

Because North Dakota remains one of the few states that has not enacted specific informational privacy statutes, the personal information contained in personnel files remains subject to public inspection.[156] However, as indicated by Justice VandeWalle, specially concurring in *City of Grand Forks v. Grand Forks Herald*, one should not eliminate the possibility that "such a right might exist in the future with regard to personal information contained in the records of public agencies but which information does not affect the operation of that agency as a public agency."[157]

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150. *Hovet*, 419 N.W.2d at 193. *See* State v. Woodsworth, 234 N.W.2d 243, 249 (N.D. 1975)(where sufficient countervailing policies are demonstrated, one who does not come within First Amendment protection may nevertheless attack it).

151. *Hovet*, 419 N.W.2d at 193.

152. *Id.*

153. City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 580 (N.D. 1981)(VandeWalle, J. concurring specially). Leaving the term "record" undefined also vests wide discretion in the public officer. *Id.*

154. *Id. See* N.D. CENT. CODE § 44-04-18 (1978)(governmental records are open for public inspection); N.D. CONST. art. XI, § 6. For the text of article XI, section 6 of the North Dakota Constitution, see *supra* note 9.

155. *Grand Forks Herald*, 307 N.W.2d at 580.

156. *See* 85 Op. N.D. Att'y Gen. 4 (1985)(private investigator's report, prepared at request and in possession of state college, concerning college faculty member, not exempt from North Dakota open records law).

157. *See Grand Forks Herald*, 307 N.W.2d at 580 (VandeWalle, J., concurring).