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R. D. Woodson

Ricki Lewis Tannen

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FEDERAL CONSTITUTIONAL PRIVACY AND THE FLORIDA PUBLIC RECORDS LAW: RESOLVING THE CONFLICT

R. D. WOODSON*
RICKI LEWIS TANNEN**

INTRODUCTION

Given the appropriate opportunity, the Fifth Circuit will probably declare the Florida Public Records Law[1] an unconstitutional invasion of privacy. This prognostication is based upon the current federal recognition of disclosural privacy and the recent Fifth Circuit opinion in *Fadjo v. Coon*,[2] which conflict with the Florida Public Records Law as interpreted by the Florida courts. In *Fadjo*, the court questioned the continued viability of the Florida Public Records Law stating, "The legislature cannot authorize by statute an unconstitutional invasion of privacy."[3]

The state attorney's office subpoened Donald Fadjo in connection with a criminal investigation into the disappearance of his business associate. Assured that his testimony was absolutely privileged under Florida law, Fadjo willingly provided information concerning "the most private details of his life."[4] Coon, the state investigator, subsequently revealed the information to an insurance investigator. The insurance company used the information to contest Fadjo's claims as the named beneficiary on several policies insuring Rawdin's life.

The issue before the court was whether Fadjo had alleged deprivation of a constitutional right in order to confer federal jurisdiction under 42 U.S.C. §1983.[5] Fadjo contended that the defendant's actions violated his constitutional right to avoid government disclosure of private information to the public. The Fifth Circuit held that Fadjo had a valid claim under the confidentiality branch of the federal right to privacy.[6]

*Associate Director, Center for Governmental Responsibility, University of Florida College of Law. B.C.E., Auburn University, 1972; J.D., University of Florida, 1975; M.S., Auburn University, 1977.

**Research Coordinator, Center for Governmental Responsibility. B.A., University of Florida, 1975; M.Ed., University of Florida, August 1981; J.D., University of Florida, August 1981.

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1. FLA. STAT. §§119.01-.12 (1979).
2. 633 F.2d 1172 (5th Cir. 1981).
3. *Id.* at 1176 n.3.
4. *Id.* at 1174.
5. 42 U.S.C. §1983 (Supp. 1979).
6. 633 F.2d at 1175.

The *Fadjo* case illustrates the conflict between the individual's constitutional right to prevent public disclosure of private information and the Florida Public Records Law, which opens *all* government records to the public, absent specific exemptions.[7] The Fifth Circuit's endorsement of a balancing test in a line of cases examining statutorily mandated public disclosure of private information, intimates difficulty for future application of the Florida Public Records Law.[8] In the Florida courts, the conflict between the public's right to know and the individual interest in avoiding disclosure of private information has been resolved consistently in favor of the public's right to know, without resort to the balancing of interests test.

Courts and commentators have expressed concern over the effect on individuals of the increasing collection of private information at all levels of government.[9] At the same time, the public right of access to government records must be "assured in law and fact."[10] Florida has thus far failed to consider the public's right to know in light of the "increasing expectations of citizens and government of one another, the proliferation and spread of individually identifiable records, and the effects of rapid computerization."[11]

The law on privacy and open records is evolving rapidly.[12] There have been

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7. At the time the *Fadjo* litigation began, the law in Florida was controlled by Widener v. Croft, 184 So. 2d 444 (Fla. 4th D.C.A. 1966), which held that information compelled by the use of an investigatory subpoena is absolutely privileged and cannot be disclosed to anyone. In *Fadjo*, the state argued that Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979) (issued before *Fadjo* reached trial), nullified *Widener* by holding that exemptions to the Public Records Law could be provided only by statute and not by judicial decision. Fadjo argued that an amendment to the law, passed prior to the trial, 1979 Fla. Laws, ch. 79-187 (codified at FLA. STAT. §119.07(2)(c), (i) (1979)), in effect affirmed the holding in *Widener* and was controlling. *See* 633 F.2d at 1175-76 n.3.

8. DuPlantier v. United States, 606 F.2d 654 (5th Cir. 1979); Plante v. Gonzalez, 575 F.2d 1119. See text accompanying notes 64-73 *infra*.

9. A. S. Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 22 J. PUB. L. 3, 9-15 (1973); A. R. Miller, *The Privacy Revolution: A Report from the Barricades*, 19 WASHBURN L.J. 1, 8-9 (1979) [hereinafter cited as *Report from the Barricades*]. The confusion between the Millers should not obscure the fact that both have made significant contributions in privacy literature. The "other" Miller, A.S., was a visiting scholar at the Center for Governmental Responsibility in 1980, and initiated a year of research in privacy. This article is a result of that research and the Center's history of research in the Sunshine Law. *Computers and the Rights of Citizens* (1973); *Federal Data Banks, Computers, and the Bill of Rights: Hearings Before the Sub-Committee on Constitutional Rights, Committee on the Judiciary*, 92d Cong., 1st Sess. (1971); *Privacy, the Census and Federal Questionnaires: Hearings Before the Subcommittee on Constitutional Rights, Committee on the Judiciary*, 91st Cong., 2d Sess. (1969); HOUSE COMM. ON GOVERNMENT OPERATION, PRIVACY AND THE NATIONAL DATA BANK CONCEPT, H.R. REP. NO. 1842, 90th Cong., 2d Sess (1968). *See also Project: Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975) [hereinafter cited as *Project*]; *Projects: The Computerization of Government Files: What Impact on the Individual?*, 15 U.C.L.A. L. REV. 1371 (1968) [hereinafter cited as *The Computerization of Government Files*].

10. UNIFORM INFORMATION PRACTICES CODE, iii. (1980).

11. *Id.* at ii.

12. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 973 (1978). See notes 28, 30 & 45 *infra* for citation to commentary on the evolution of privacy; notes 102-125 *infra* for citation to commentary on evolution of open records; notes 40-45 and accompanying text, *infra*.

numerous cases in the state and federal courts in the last three years,[13] and the Florida Legislature amends the Public Records Law almost annually to accommodate the needs of access and privacy.[14] In 1980, the citizens of Florida adopted a constitutional amendment to protect privacy, but the amendment as drafted does not affect access to public records.[15]

This article analyzes the status of the federal constitutional right of disclosural privacy and the Florida Public Records Law, and addresses the conflict between the two concepts. Recommendations will be made for reconciling the conflict between two competing goals: the individual's right to privacy and the public's right to know.

FEDERAL CONSTITUTIONAL PRIVACY

The right to privacy is protected by the state[16] and federal[17] constitutions. In the sixteen years since *Griswold v. Connecticut*,[18] the courts,[19] state legisla-

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13. See text accompanying notes 52-100 *infra*.

14. *See, e.g.*, 1980 Fla. Laws, ch. 80-1 (codified at FLA. STAT. §119.0115 (Supp. 1980)); 1979 Fla. Laws, ch. 79-187 (codified at FLA. STAT. §§119.011, .7, .72 (1979)).

15. FLA. CONST. art. 1, §23.

16. *See, e.g., Id.*

17. U.S. CONST. amend. IV.

18. 381 U.S. 479 (1965).

19. The cases and commentary on privacy are voluminous. For general discussion of the constitutional foundations of the privacy right, *see* Roe v. Wade, 410 U.S. 113 (1973) (statutory scheme prohibiting all abortions except to save the mother's life held invalid; the right to privacy included the right to have an abortion, although that right was not absolute); Katz v. United States, 389 U.S. 347 (1967) (right to privacy extends to a person's reasonable expectation of privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (statutory scheme making use of contraceptives a criminal offense held an unconstitutional invasion of privacy). For an examination of recent federal cases, see *Report from the Barricades, supra* note 9. For a discussion of Florida cases on privacy, see Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 671 (1978); Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631 (1977). For an excellent examination of the federal and Florida cases on privacy, see Byron, Harless, Schaffer, Reid & Assoc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 91-96 (1st D.C.A. 1978), *rev'd sub nom,* Shevins v. Byron, Harless, Schaffer, Reid & Assoc., 379 So. 2d 633 (Fla. 1980). For an excellent discussion of the federal right to privacy and its application to dissemination of criminal information, see Doe v. Webster, 606 F.2d 1226, 1238-40 (D.C. Cir. 1979). This case also includes commentary on state judicial and legislative pronouncements on the subject of expungement of criminal records. *Id.* at 1230-31. On the subject of privacy and criminal records, see BUREAU OF GOVERNMENTAL RESEARCH AND SERVICE, AN ASSESSMENT OF THE SOCIAL IMPACTS OF THE NATIONAL CRIME INFORMATION CENTER AND COMPUTERIZED CRIMINAL HISTORY PROGRAM (1979); ZENK, PROJECT SEARCH: THE STRUGGLE FOR CONTROL OF CRIMINAL INFORMATION IN AMERICA (1979); Beaser, *Computerized Criminal Justice Information Systems: A Recognition of Competing Interests*, 22 VILL. L. REV. 1172 (1977); Forst & Weckler, *Research Access into Automated Criminal Justice Information Systems and the Right to Privacy*, 5 SAN FERN. V.L. REV. 321 (1977); Rehnquist, *Is an Expanded Right of Privacy Consistent with Effective Law Enforcement? or Privacy You've Come a Long Way Baby*, 23 KAN. L. REV. 1 (1974); Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); Note, *Expungement of Arrest Records: Police Retention of Data v. Individual Freedom from Governmental Interference*, 4 RUT.-CAM. L.J. 378 (1973).

tures,[20] Congress,[21] and the electorate[22] have expanded the right to privacy beyond its traditional fourth amendment restrictions[23] to shield the individual from unwarranted governmental intrusion into intimate decision making,[24] and from unwarranted governmental disclosure of private information collected legitimately.[25] The rapid development of the right to disclosural privacy is based upon the duality inherent in human personality; the need to both share and withhold information about one's self.[26]

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20. The following states have adopted a constitutional right of privacy which supplements and expands federal-type fourth amendment privacy protections: ALASKA CONST. art. I, §22; ARIZ. CONST. art. II, §8; CAL. CONST. art. I, §1; HAWAII CONST. art. I, §5; ILL. CONST. art. I, §12; LA. CONST. art. I, §5; MASS. GEN. LAWS ANN. ch. 214, §1(B) (West 1974); MONT. CONST. art. II, §10; S.C. CONST. art. I, §10; WASH. CONST. art. I, §7; WIS. STAT. ANN. §1 895.50 (West 1977); see R. SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (1976).

21. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896-910 (codified at 5 U.S.C. §552a (1974)) provides in relevant part: "[t]he Congress finds that . . . the right to privacy is a personal and fundamental right protected by the Constitution of the United States." For commentary on the Privacy Act, see Bigelow, *The Privacy Act of 1974*, 21 PRAC. L. 15 (1975); Hanus & Relyea, *A Policy Assessment of the Privacy Act of 1974*, 25 AM. U.L. REV. 555 (1976); Comment, *The Privacy Act of 1974: An Overview and Critique*, 1976 WASH. U.L.Q. 667. For commentary on the interplay between the Privacy Act and the federal Freedom of Information Act, see Belair, *Agency Implementation of the Privacy Act and the Freedom of Information Act: Impact on the Government's Collection, Maintenance and Dissemination of Personally Identifiable Information*, 10 JOHN MAR. J. PRAC. & PROC. 465 (1977); O'Brien, *Privacy and the Right of Access: Purposes and Paradoxes of Information Control*, 30 AD. L. REV. 45 (1978); Singleton & Hunter, *Statutory and Judicial Responses to the Problem of Access to Government Information*, 1 DET. L. REV. 51 (1979); Note, *Protecting Privacy from Government Invasion: Legislation at the Federal and State Levels*, 4 MEM. ST. L. REV. 783 (1978).

22. The voters of Florida passed a privacy amendment to the constitution in the 1980 General Election. The amendment reads: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, §23. *See also*, L. HARRIS & ASSOCS., *Dimensions of Privacy, A National Opinion Research Survey of Attitudes Toward Privacy* (1978) (unpublished remarks made at the presentation of Harris Poll on Privacy in America by A. Westin (1979)).

23. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). In *Katz* the Court overruled its prior decision in Olmstead v. United States, 277 U.S. 438 (1928). Although in *Olmstead* the Court held that evidence gathered by a listening device did not violate the fourth amendment, it later repented in *Katz* protecting a reasonable expectation of privacy. 389 U.S. at 353.

24. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). See text accompanying notes 40-44 *infra*.

25. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Whalen v. Roe, 429 U.S. 589 (1977). See text accompanying notes 58-60 *infra*.

26. *See* Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1188-90 (1965); THE COMPUTERIZATION OF GOVERNMENT FILES, *supra* note 9, at 1412-16. This need for sharing is a result of the fact that, "Man always experiences the world in some mode . . . he is always involved in some form of communication with other people." Jourard, *Some Psychological Aspects of Privacy*, 31 L. & CONTEMP. PROB. 307, 307 (1966). The need to share has a counterpart. The desire for privacy is the "[o]utcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future. *Id. See generally* E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); J. SARTRE, BEING AND NOTHINGNESS (1956); Derlega & Chaiken, *Privacy and Self-Disclosure in Social Relationships*, 33(3) J. SOC. ISSUES 102 (1977).

It is because of the existential nature of privacy[27] that it has proved to be a conundrum to the courts and commentators,[28] with the term regularly "invoked rather than defined."[29] But even an enigmatic interest such as privacy is given legal protection when it originates as "a response to deeply felt social needs, that emerge, at least originally, in the form of actual conflicts, in the form of lawsuits."[30] Disclosural privacy has emerged as a constitutionally protected right, but because the right is not absolute, courts have developed a balancing approach.

The balancing standard has evolved because privacy interests conflict with the fundamental prerequisite of government by consent of the governed. An informed electorate must have knowledge of its government's processes and decision making, and therein lies the conflict to be resolved: both privacy and open records are necessary for coexistence of individuals and their government.

The interests asserted under the privacy label can be grouped into three strands which are functionally separate but theoretically interwoven. These strands are drawn from the Bill of Rights and have been identified by the Supreme Court as emanating from the first,[31] fourth,[32] and ninth[33] amendments,

27. For a discussion of the philosophical perspective on privacy see Breckenridge, *Personal Privacy and the Public Interest*, 11 HUMANITAS 75 (1975); Gerrett, *The Nature of Privacy*, 18 PHILOSOPHY TODAY 263 (1974); Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 L. & CONTEMP. PROB. 272 (1966); McCloskey, *The Political Idea of Privacy*, 21 PHILOSOPHICAL Q. 303 (1971); Margulis, *Conceptions of Privacy: Current Status and Next Steps*, 33(3) J. SOC. ISSUES 5 (1977); Rachels, *Why Privacy Is Important*, 4 PHILOSOPHY & PUB. AFF. 323 (1975); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 L. & CONTEMP. PROB. 281 (1966).

28. *See generally* Whalen v. Roe, 429 U.S. 585 (1977); Roe v. Wade, 410 U.S. 113 (1969); Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Olmstead v. United States, 277 U.S. 438 (1928); Boyd v. United States, 116 U.S. 616 (1886); A.R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS (1971); A. WESTIN, PRIVACY AND FREEDOM (1967); Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587 (1977); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Comment, *Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1448 (1976). See note 9 *supra*.

29. A. WESTIN, *supra* note 28, at 7. Westin defined privacy as control over information about the person. In 1967 he called for delineation of the term by the social, behavioral, and legal disciplines. Subsequently, the literature on privacy increased greatly and several cogent definitions have been proposed. For a compendium of privacy definitions found in the legal literature, see Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 276 (1974). For additional attempts to define the term in a legal context, see Gerety, *Redefining Privacy*, 12 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 233 (1977); Benn, *Privacy, Fredom and Respect for Persons* in PRIVACY, NOMOS XIII 8 (J. Pennock & J. Chapman eds. 1971). For a survey of social science definitions of privacy, see, Margulis, *supra* note 27.

30. Beaney, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROB. 253, 255 n.8 (1966).

31. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969); NAACP v. Alabama, 357 U.S. 449, 462 (1958), Watkins v. United States, 354 U.S. 178, 187-88 (1957).

32. *See, e.g.*, Katz v. United States, 389 U.S. 347, 350 (1967); Berger v. New York, 388 U.S. 41, 53 (1967). *See* Bazelon, *supra* note 28, at 604-11. For a theoretical analysis of *Berger* and *Katz* suggesting a two-prong test for privacy in fourth amendment cases, see Comment, *supra* note 28, at 1459-62.

33. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring). The ninth amendment declares "[t]he enumeration in the Constitution of certain rights shall not

as well as from the penumbras of amendments one through eight.[34] The Court has also found the right to privacy implicit in the concept of liberty.[35]

The first strand originates in the fourth amendment protection against unreasonable search and seizure, which is the closest the Constitution comes to explicitly vesting an individual with a right to privacy. This fourth amendment strand protects individual freedom from government surveillance.[36] Originally, the fourth amendment concept of privacy accommodated only common law property analysis,[37] but in *Katz v. United States*,[38] the Supreme Court held that the fourth amendment protects people, not places, and extended constitutional protection to an individual's reasonable expectation of privacy.[39]

Unlike the first strand, the second protected privacy strand finds no explicit support in the Constitution. Nevertheless, under various interpretations, most notably the penumbra theory advanced by Justice Douglas in *Griswold*,[40] the Court has found that individual decisions of an intimate nature relating to bodily integrity and autonomy are to be given constitutional protection. To date, this strand has protected marriage,[41] procreation,[42] contraception,[43] child-rearing, and education.[44] Essentially, the second strand protects the value of autonomy in intimate decision making.

These two strands, surveillance and autonomy, are firmly established.[45]

be construed to deny or disparage others retained by the people." U.S. CONST., amend. IX. *See generally* B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975). Redlich, *"Are There Certain Rights . . . Retained by the People?"* 37 N.Y.U.L. REV. 787 (1962); Comment, *Unenumerated Rights — Substantive Due Process, The Ninth Amendment and John Stuart Mill*, 1971 WIS. L. REV. 922.

34. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). See note 40 *infra*.

35. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); Roe v. Wade, 410 U.S. 113, 153 (1969). In *Roe* the Court found the right to privacy inherent in "the Fourteenth Amendment's concept of personal liberty and restriction upon state action." *Id.* at 153. *See generally* Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212.

36. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961); Rochin v. California, 342 U.S. 165 (1952); Boyd v. United States, 116 U.S. 616 (1886). Although *Boyd* contains a broad view of fourth amendment protection, subsequent cases have limited the fourth amendment guarantee against unreasonable searches and seizures to searches involving trespass and seizures of material. *See generally* O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment Protected Privacy*, 13 NEW ENG. L. REV. 662 (1978); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

37. Olmstead v. United States, 277 U.S. 438, 468 (1928). See note 23 *supra*.

38. 389 U.S. 347 (1967).

39. *See* O'Brien, *supra* note 36, at 705.

40. 381 U.S. at 484. The right to privacy was part of a "penumbra" formed from the emanations of amendments one, three, four, five and fourteen. *Id.* For discussion of this penumbral theory see, Clark, *Constitutional Sources of a Penumbral Right to Privacy*, 9 VILL. L. REV. 833 (1974); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

41. Loving v. Virginia, 388 U.S. 1 (1967).

42. Skinner v. Oklahoma, 316 U.S. 535 (1942).

43. Eisenstadt v. Baird, 405 U.S. 438 (1972).

44. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

45. The following authors provide exhaustive citation to the majority of scholarly com-

Strands one and two form the analytic framework applicable to strand three; the individual's interest in non-disclosure of personal information, or the "disclosural strand." The focus of the protected privacy interests developed in the two strands is the erection of a constitutional shield between the individual and his government.

Since World War II, government institutions have become leviathan,[46] and legal protections[47] have evolved to insulate the individual from increasing encroachment by big government. As every level of government has grown, so too has its appetite for information about those it governs. The development of computer technology has accelerated both the government's hunger for information and its capacity to collect and store such information.[48] Admittedly, there are legitimate governmental objectives involved in the collection of personal information, but as Justice Douglas pointed out, the effect on the individual and his relationship to his government may be fundamentally altered.

> Even if the individual is able to adapt psychologically to the computer as a source of self identity and can accept what the computer says about him, there is a depersonalizing effect inherent in the use of computers. The computer extracts the human element in the traditional relations one has with government.[49]

The individual's interest that Douglas spoke of is not concerned with statistical or innocuous[50] information, the disclosure of which would pose no significant threat to the individual. Rather, the individual's interest in disclosural privacy is triggered when the government has, or attempts to collect, sensitive information.[51] It is the potential public disclosure of this individually identifiable, private information which has engaged the federal courts and fostered development of a functional balancing test to resolve the conflict between the individual's right to privacy and the public's right to know.

Judicial Interpretation of Disclosural Privacy

Explicit constitutional protection has been extended to the individual interest in non-disclosure of private information to the public. Nevertheless, the case of *Paul v. Davis*[52] is usually cited for the proposition that a right to

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mentary on privacy: L. TRIBE, *supra* note 12, §15-1 to -4; A. WESTIN, *supra* note 28, at 445-58; Gerety, *supra* note 29; *Report from the Barricades, supra* note 9. For additional citation see note 19 *supra.*

46. Miller, *Reason of State and the Emergent Constitution of Control,* 64 MINN. L. REV. 585, 621 (1980).

47. E. EHRLICH, THE FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1936); Ehrlich is cited by A.S. Miller. Miller, *supra* note 9, at 15, n.40.

48. *See The Computerization of Government Files, supra* note 9, at 1348-49.

49. *Id.* at 1419 & n.24.

50. *Id.* at 1427. Use of the term "innocuous" to describe a person's social security number is a misnomer because in today's computerized society the social security number is the key to access.

51. For example, in Whalen v. Roe, 429 U.S. 589, 591 (1977), the statutory scheme under attack was a New York law requiring the collection and retention of certain pharmaceutical prescriptions for a period of five years.

52. 424 U.S. 693 (1976). *But see* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)

disclosural privacy does not exist in the federal Constitution. In *Paul*, Justice Rehnquist, speaking for a divided court, held that public disclosure of an arrest record did not deprive the plaintiff of a right to disclosural privacy. A vigorous dissent by Justice Brennan, joined by Justices Marshall and White, pointed out the decision's clear retreat from previous holdings which declared that "a person's interest in his good name and reputation falls within the broad term 'liberty' and clearly requires that the government afford procedural protections before infringing that name and reputation by branding a person as a criminal."[53] Justice Brennan noted that, since the issue of disclosural privacy had not been substantially argued, the majority's opinion was premature and "must surely be a short lived aberration."[54]

Justice Brennan's focus on the lack of consideration given to Davis' privacy claims correctly emphasizes the limited weight to be given *Paul*'s privacy dicta.[55] *Paul* turns not on a privacy claim, but on the procedural considerations of 42 U.S.C. §1983 actions[56] and state remedies for invasion of privacy under common law tort.[57] Subsequent Court holdings have vindicated the *Paul* dissent by expanding the constitutional protection available to asserted disclosural privacy interests.

Whalen v. Roe[58] involved a challenge to the New York statute on reporting of prescriptions, and *Nixon v. GSA*[59] involved the Presidential Records and Materials Act. The Supreme Court found, in each case, a legitimate privacy interest in non-disclosure, but held that the challenged statutes involved no substantial risk of public disclosure. Inherent in the Court's reasoning is the concept that public disclosure of private information, though collected for legitimate governmental needs, necessitates giving greater weight to the individual's interests in a balancing test. Justice Stevens, speaking for a unanimous Court in *Whalen*, defined the privacy claim as an "individual interest in avoiding disclosure of personal matters."[60]

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where the Court granted a cause of action to challenge the "posting" of names of excessive drinkers. The lower court in *Paul* relied on *Constantineau*.

53. 424 U.S. at 731.

54. *Id.* at 735.

55. "If the Court's denial that *Paul v. Davis* involved any substantively protected interest had been truly authoritative, the Court's careful canvassing of the procedural safeguards . . . would have been quite unnecessary in *Whalen v. Roe*. . . . Assuming, therefore, that *Paul v. Davis* must be understood as a case about federalism-based limits on the remedial powers of a federal court acting under §1983 rather than a repudiation of deep substantive principles under the fourteenth amendment, constitutional review of information-gathering and information-dissemination practices remains very much a possibility in subsequent cases." L. TRIBE, *supra* note 12, at 971 (citations omitted).

56. *See generally* C. WRIGHT, FEDERAL COURTS (3rd ed. 1976).

57. 424 U.S. at 712.

58. 529 U.S. 589 (1977).

59. 433 U.S. 425 (1977).

60. 429 U.S. at 599. In a revealing note the Court quoted with approval Professor Kurland's analysis of the "Three Facets" of constitutional privacy: "There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his

The Fifth Circuit, relying on *Whalen* and *Nixon,* developed a functional balancing approach[61] for disclosural privacy in a line of cases which culminated in the 1981 *Fadjo* decision.[62] The Fifth Circuit first considered the right to disclosural privacy in the 1978 case of *Plante v. Gonzales.*[63] In that case, five state senators challenged the financial disclosure section of Florida's Sunshine Amendment, asserting that the public's right to know violated their constitutional right not to be known. The senators, in arguing that disclosure of personal financial information would adversely affect their familial affairs, attempted to place financial disclosure within the constitutionally protected autonomy strand of intimate decision making. The Fifth Circuit rejected this argument, stating that financial privacy does not fall within the autonomy right on its own.[64] The court next considered the applicability of the disclosural strand of privacy. In reviewing *Whalen,* the *Plante* court concluded that the Supreme Court did not establish a standard of review for disclosural privacy, because it considered *public* disclosure unlikely.[65] The Fifth Circuit noted that, unlike the *Whalen* decision, the Supreme Court in *Nixon* determined that a balancing standard was appropriate. The *Nixon* decision had recognized the former President's legitimate expectation of privacy, but found that, on balance, the importance of the countervailing public interest justified the limited intrusion.[66] The *Plante* court noted, however, that the *Nixon* case did not deal with public disclosure as in *Plante,* but involved, instead, the screening of historical documents by trained archivists. The *Plante* court went on to identify the appropriate balancing approach when a disclosural privacy interest is asserted. The court rejected both the strict scrutiny analysis applicable to fundamental constitutional rights and the rationality standard applied to determine the constitutional validity of state statutes not regulating fundamental rights. The court found the rationality standard inappropriate in light of *Whalen* and *Nixon,* and determined that a balancing approach should be used instead. The court weighed the state interests to be promoted by the legislation and the actual achievement of state goals under the existing statutory framework against the individual's legitimate expectation of disclosural privacy. The court found that the financial disclosure statute at issue in *Plante* properly promoted the public's right to know. The court also noted that the senators chose to run for office[67] and are not ordinary, private citizens. As public officials they do not lose all constitutional protection, although public office does place limits on their reasonable expectations of privacy.[68]

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private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." *Id.* at n.51. (quoting from Kurland, *The Private I,* U. CHI. MAGAZINE 7,8 (Autumn 1976)).

61. *See also* Bazelon, *supra* note 28, at 600. Judge Bazelon develops a balancing approach.

62. 633 F.2d 1172.

63. 575 F.2d 1119 (5th Cir. 1978).

64. *Id.* at 1130.

65. *Id.*

66. Nixon v. Administrator of Gen. Servs., 433 U.S. at 465.

67. 575 F.2d at 1135.

68. *Id.*

Essentially, the *Plante* court announced a middle tier balancing approach for evaluating statutory enactments that infringe upon constitutionally protected interests in non-disclosure of private information. In so doing, the court specifically articulated the differing expectations of privacy available to public and private individuals which are worthy of constitutional protection.

In a later case, *DuPlantier v. United States*,[69] the Fifth Circuit examined the application of the Ethics in Government Act of 1978[70] to the federal judiciary. The act, like the one in *Plante* one year earlier, required public officers to file a financial disclosure statement. The plaintiffs argued, as had the plaintiffs in *Plante*, that financial disclosure would infringe upon their constitutionally protected right to autonomy in intimate decision making. The court's analysis initially questioned whether financial disclosure was a protected area of family life, and found that, as in *Plante*, it was not.[71] Further, the court focused on confidentiality rights, finding them to be a more difficult problem, because the federal judges were not elected officials as in *Plante*, but were appointed for life.

In reviewing *Plante*, the *DuPlantier* court determined that judges, while not elected like state senators, voluntarily accept public office and, as such, are in that group of public figures having limited expectations of privacy. The court found support for circumscribing the judiciary's privacy in Supreme Court rulings that place appointed officials in the class of public figures afforded only minimal protection from unwelcome public scrutiny.[72]

The *Plante* and *DuPlantier* courts drew a sharp distinction between public and private expectations of privacy in non-disclosure of personal information. The *DuPlantier* court adopted the *Plante* test as the most appropriate method of balancing an individual's right to disclosural privacy against the public's right to know. Finding a lesser legitimate interest in disclosural privacy for public officials and a statutory scheme which furthered the legitimate governmental interest of informing the public, the court upheld the act's applicability to the federal judiciary.

The *Plante* and *DuPlantier* distinction between the public and private individual's legitimate expectation of disclosural privacy and the public's right to know came to rest in *Fadjo v. Coon*.[73] In *Fadjo*, the court questioned both the Florida supreme court's interpretation of disclosural privacy and the continued viability of the Florida Public Records Law when it is in conflict with disclosural privacy expectations.

Fadjo brought an action in federal district court under 42 U.S.C. §1983, alleging that the state, through the state attorney conducting the investigation, a credit investigator, and six life insurers, conspired to abridge his constitu-

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69. 606 F.2d 654 (5th Cir. 1979).

70. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, 18, 28 U.S.C.).

71. 606 F.2d at 669.

72. *Id.* at 670-71 n.35 (citing Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). See New York Times v. Sullivan, 376 U.S. 254 (1964).

73. 633 F.2d 1172.

tionally protected rights to privacy and free speech. The district court dismissed for lack of subject matter jurisdiction. On appeal, the Fifth Circuit held that Fadjo had alleged the requisite facts for consideration of his claims before a federal court. Following the reasoning in *Plante* and *DuPlantier*, the court reversed and remanded wth directions to balance the alleged privacy invasion against any legitimate interests proven by the state.[74] The court specifically approved the use of a balancing standard where privacy rights are invoked to protect confidentiality.[75]

The court then reviewed the balancing approach used by the Supreme Court in *Whalen* and *Nixon*, and noted that only after careful analysis have courts upheld state actions which intrude upon an individual's disclosural privacy.[76] In addition, the court declared that disclosure of private information is improper unless a legitimate state interest exists which outweighs any threat to individual privacy interests.[77] *Fadjo* places the burden of proof upon the state when a possible infringement of the individual's interest in disclosural privacy is at stake.

The court rejected the state's argument that *Paul v. Davis* mandated dismissal of Fadjo's complaint, by noting that *Paul* must be read in light of the *Whalen* and *Nixon* holding that the privacy interest extends beyond marriage, procreation, contraception, familial relationships, child-raising, and education.[78] The court also noted that the dicta in *Paul*, interpreted by federal and state courts to limit disclosural privacy, had been qualified by the *Whalen* court.

In reversing the district court's dismissal for want of a substantial federal question, and in remanding for a balancing analysis, the Fifth Circuit has given firm support to an individual's disclosural privacy rights in the absence of a substantial countervailing public interest in disclosure. However, the *Fadjo* court's rejection of the state's argument that the information obtained during the investigation was public under the Florida Public Records Law, calls into question the Florida view of an individual's right to disclosural privacy. The court stated that the reliance placed upon the Florida supreme court's holding in *Wait v. Florida Power & Light*[79] was "misplaced"[80] in that "it is clear that the legislature cannot authorize by statute an unconstitutional invasion of privacy."[81]

In *Wait*, the Florida supreme court held that exemptions to the Florida Public Records Law must be by statute only and, absent a specific exemption, all governmental records were open under Chapter 119. The *Wait* court did not consider any privacy issue, determining that the issue was not properly

74. *Id.* at 1191.
75. *Id.*
76. *Id.*
77. *Id.* at 1192.
78. *Id.* at 1176 (quoting Whalen v. Roe, 429 U.S. 589, 600 n.26 (1977)).
79. 372 So. 2d 420 (Fla. 1979).
80. 633 F.2d at 1190 n.3.
81. *Id.*

before the court.[82] The Fifth Circuit pointed out, however, that the *Wait* holding sharply altered ordinary expectations of privacy.[83]

The Florida supreme court recently considered the conflict between an individual's right to disclosural privacy and the Florida Public Records Law in *Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc.*[84] Jacksonville Electric Authority (JEA) employed Byron, Harless, a consulting firm of psychologists, to evaluate candidates for the director's position. Under a pledge of confidentiality, applicants during interviews divulged highly personal information.[85] A local television station requested access to the firm's papers relating to the search. The request was denied, and the attorney general filed for a writ of mandamus to compel disclosure under the Florida Public Records Law. The circuit court found that the papers were public records. The First District Court of Appeals reversed,[86] holding that there was a right to disclosural privacy in the federal and state Constitutions. The court relied upon the articulation of that right in *Whalen* and *Nixon.*

In tracing the development of the federal constitutional right to disclosural privacy, the court's reasoning closely parallels that of the Fifth Circuit in *Fadjo* a year and a half later. Both opinions call for a balancing approach when an individual's right to disclosural privacy is involved. Like the *Fadjo* court, the DCA emphasized that the information had been obtained under an express promise of confidentiality[87] and was, therefore, entitled to protection from public disclosure, absent an overriding state interest.[88]

The *Byron, Harless* district court opinion anticipated the Fifth Circuit's holding in *Plante* on the criteria to be used in applying the balancing approach as endorsed by the Supreme Court in *Nixon.*[89] The court's standard required the state to demonstrate a compelling interest in the revelation of otherwise private information. Further, the state's interest must be implicated "at the point where those interests collide."[90]

The district court, in establishing criteria for a balancing approach, identified two major problems inherent in the Florida Public Records Law: It is too broadly drawn, and has been construed to exclude judicial balancing of competing interests.[91] The court certified to the Florida supreme court the question whether either a state or federal constitutional right of disclosural privacy

82. 372 So. 2d at 422 n.1.

83. 633 F.2d at 1190 n.3.

84. 379 So. 2d 633 (Fla. 1980). *See generally* Comment, *Constitutional Law: Individual's Right to Disclosural Privacy as Limited by the Public Records Act,* 10 STETSON L. REV. 376 (1981).

85. 379 So. 2d at 635.

86. Byron, Harless, Schaffer, Reid & Assoc. v. State *ex rel.* Schellenberg, 360 So. 2d 83 (Fla. 1st D.C.A. 1978), *rev'd sub. nom,* Shevin v. Byron, Harless, Schaffer, Reid & Assoc., 379 So. 2d 633 (Fla. 1980).

87. 360 So. 2d at 96.

88. *Id.*

89. The district court opinion was handed down on June 1, 1978; the Fifth Circuit opinion in *Plante v. Gonzalez* was handed down June 30, 1978.

90. 360 So. 2d at 97 n.39.

91. *Id.* at 97.

rendered the Florida Public Records Law unconstitutional. The supreme court reversed, holding that the lower court had relied on an amorphous federal right to privacy.[92] The court held that neither the state nor federal cases supported a federal privacy right preventing public disclosure.[93]

The Florida supreme court apparently ignored *Whalen*, which explicitly stated that an individual has a privacy interest in preventing disclosure of personal information. The court admitted that disclosural privacy is "the newest and least defined" privacy interest, having been explicitly mentioned by the [United States] Supreme Court only twice.[94] The Florida supreme court, therefore, seems to rationalize that because disclosural privacy is a newly emerging right, it should not yet be protected. Once the United States Supreme Court has announced that an interest is of constitutional stature, as it did in *Whalen* and *Nixon*, lower courts must follow that decision. The Florida supreme court, however, stated that until the Supreme Court gives additional substance to and guidance in similar factual situations, the interest in non-disclosure of private information will not be protected in cases involving the Florida Public Records Law.

The court also ignored the balancing test used in *Nixon*, and refined by the Fifth Circuit in *Plante*. While admitting that "just as in *Whalen*, the Court in *Nixon* acknowledged that such a privacy interest exists,"[95] the court refused to effectuate the intent of the United States Supreme Court and Fifth Circuit. The court convoluted the *Whalen* and *Nixon* holdings, concluding that neither case expressly held that privacy rights could bar government dissemination of private information to the public.[96] Apparently, the Florida supreme court missed the import of *Whalen* and *Nixon* which the Fifth Circuit did not — the right to disclosural privacy is not absolute, but requires a balancing of the competing interests involved.

Having decided that the disclosural privacy strand was underdeveloped, despite recent Supreme Court and circuit court rulings which explicitly established the applicable standard of review[97] and criteria for evaluation,[98] the court relied on dicta from *Paul v. Davis*. The court found *Byron, Harless* and *Paul*, "strikingly similar" despite the fact that *Paul* involved the disclosure of a valid arrest record, while *Byron, Harless* involved information gained under a pledge of confidentiality.[99] The Adkins dissent correctly pointed out the

92. 379 So. 2d at 636. "In essence, the district court formulated a general federal right to privacy the core of which is described as the 'inviolability of personhood.'" *Id.* The lower court drew the phrase from the article usually considered seminal in establishing a right to privacy, see Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). The term used in the article was the "inviolate personality." *Id.*

93. 379 So. 2d at 636.

94. *Id.* at 637.

95. *Id.*

96. *Id.*

97. Whalen v. Roe, 429 U.S. at 597-98.

98. Plante v. Gonzalez, 575 F.2d at 1134.

99. 379 So. 2d at 638 (citations omitted). *Fadjo* and *Byron, Harless* both involved a pledge of confidentiality made by the person obtaining information for the state. The promise is mentioned in both opinions, but is given no legal significance. 633 F.2d at 1186; 379 So. 2d at 635.

error of the sharply divided *Byron, Harless* court in overriding the First District Court opinion:

> Since *Griswold*, the 'right to privacy' said to inhere in the 'penumbras' of the first nine amendments has been an expanding concept. . . . The U.S. Supreme Court has recognized in both *Whalen* and *Nixon* that interest which is founded as held in Roe v. Wade, in the fourteenth amendments' concept of personal liberty. Nevertheless . . . the majority declines to accept an interpretation of that privacy interest which is broad enough to encompass the rights of the job applicants here to keep this highly personal and intimate information from public perusal. . . . I can envision few circumstances where the individual's interest in preventing involuntary disclosure of personal matters can be more acutely demonstrated nor where the nature of the information invokes a less compelling state interest in its disclosure.[100]

OPEN RECORDS: THE PUBLIC'S RIGHT TO KNOW

Like privacy, the concept of open records lies at the core of societal coexistence of citizens and government.[101] Both privacy and open records are necessary if individual citizens are to exist in a cooperative manner under the rule of an elected government. Privacy permits individuals some freedom from government, and from other people. Open records, on the other hand, permit individuals the freedom to rely on other people to govern them.

The purpose of open records, as the concept has developed in the United States, is to allow the public to determine whether public officials are honestly, faithfully, and competently conducting the affairs of state.[102] The republican form of self-government depends on access to information, for self-government can operate effectively only where the governed have complete access to information concerning their government's activities.[103] As Attorney General of the United States Ramsey Clark said on the passage of the Freedom of Information Act:

> If government is to be truly of, by and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.[104]

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100. 379 So. 2d at 642. The Florida Legislature reacted to the *Byron, Harless* decision by placing an explicit constitutional right to privacy on the ballot. The provision was approved by the voters in the 1980 General Election.

101. *See generally* N. ANGELL, THE PRESS AND THE ORGANIZATION OF SOCIETY (1922); H. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950).

102. *See generally* Hennings,*The People's Right to Know*, 45 A.B.A.J. 667 (1959).

103. *Id.* at 668. *See generally* J. HALL, LIVING LAW OF DEMOCRATIC SOCIETY (1949).

104. FREEDOM OF INFORMATION CLEARINGHOUSE, SUMMARY OF STUDY OF STATE FREEDOM OF INFORMATION LAWS (1972) [hereinafter cited as FREEDOM OF INFORMATION].

The legal standard of disclosure of government information supports the political notion of self-government[105] by providing a check on government and the leaders of society. If no information is available, there can be no basis upon which the government can be evaluated. Politicians can be voted out of office, but if there is no information, the right to vote is worthless. If public opinion which guides leaders is to have any validity, then the public needs access to information.[106] Responsiveness by leaders to the public necessitates a legal standard which gives access to public records.

The increasing complexity of society and government has resulted in an increase in the value of the right of personal privacy.[107] This complexity assures increased importance of public access to records.[108] There is a tendency of "Big Government" to withhold information from the public.[109] "The cumulative impact of irresponsible and unwarranted secrecy and confidentiality in its various forms may undermine our basic institutions and endanger national security."[110] Secrecy fosters suspicion and resentment, and may encourage the public official to adopt distorted, self-serving views of reality.[111] Computers have increased the information available to government officials for decision making purposes.[112] But that information should also be available to the public to check the tendency of public officials to operate in secrecy.[113]

History of Open Records Laws

Although open records are currently seen as necessary to counteract the tendency towards government secrecy, public access to government held information has long been recognized as a right in this country.[114] It has been argued that public access, or freedom of information, is inherent in the Constitution.[115] Although the first amendment speaks specifically to freedom of the press, freedom of information is a right of the public generally.[116] Neither the courts nor Congress have recognized a constitutional obligation of disclosure, but legislatures have been permitted to require disclosure.[117] The constitutional basis for self-government in this country also serves as the basis for the "freedom

105. Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209, 212 (1951).

106. *Id.* at 210.

107. *See Report from the Barricades*, *supra* note 9, at 7-18.

108. See text accompanying notes 46-49 *supra*, text accompanying note 186 *infra*.

109. Note, *supra* note 105, at 210.

110. Parks, *The Open Government Principle: Applying the Right to Know under the Constitution*, 26 GEO. WASH. L. REV. 1, 3 (1957).

111. *Id.* at 22.

112. *See* STATEWIDE INFORMATION POLICY COMMITEE A FINAL REPORT OF THE CALIFORNIA STATE ASSEMBLY STATEWIDE INFORMATION POLICY COMMITTEE, 21, *reprinted in* APPENDIX TO JOURNAL OF THE ASSEMBLY, Reg. Sess. (1970).

113. Note, *supra* note 105, at 210.

114. Hennings, *supra* note 102, at 668.

115. Parks, *supra* note 110, at 12. *See* Black Panther Party v. Kehoe, 42 Cal. App. 3d 646, 654, 117 Cal. Rptr. 106, 112 (1974).

116. Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505-06 (1974).

117. *Id.* at 1511.

of the mind" necessary to sustain self-government.[118] During the Constitutional debates, Patrick Henry justified open government and access by stating,

> The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them. . . . [T]o cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man.[119]

The right to know in America developed incrementally, partially in response to the secrecy of English Government.[120] The eighteenth century English system suppressed information through proscription of books, licensing printing, Star Chamber proceedings, and secrecy in Parliament.[121] Part of this system was transported to colonial America. Gradually, however, first amendment freedoms developed, licensing of the press was abandoned, and legislative and judicial proceedings were opened to the public.[122] A common law right to inspect public records provided limited access until codification of the right of access began. The statutory embodiment of the concept of access developed in the various states and in the federal Freedom of Information Act.[123] Florida first enacted a public records law in 1909, a statute which simply stated, "All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida."[124] This statute, one of the first in the country, was used as a model for other states in a campaign for nationwide enactment by the journalism organization, Sigma Delta Chi.[125] The initial Florida statute survived without amendment until 1967 when the language was changed to "Every person having custody of public records shall permit them to be inspected . . . by any person."[126] The present version was adopted in 1975: "It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection."[127]

The scope of the right of access to government information is largely determined by three factors: the definition of public records, the number and substance of exemptions, and the interest required by the person desiring

118. C. BECKER, FREEDOM AND RESPONSIBILITY IN THE AMERICAN WAY OF LIFE 41 (1945).

119. Patrick Henry addressing the Convention of the Commonwealth of Virginia (June 9, 1787) *reprinted in* 3 ELLIOT'S DEBATES 150, 170 (J. Elliot, ed. 1788).

120. Note, *Privacy of Information in Florida Public Employee Personnel Files*, 27 U. FLA. L. REV. 481, 481 (1975).

121. *See* Grosjean v. American Press Co., 297 U.S. 233, 245-48 (1946). The Court discusses the English attempt to establish a right of access to government information and similar attempts in colonial America. *Id.*

122. *See generally* J. WIGGINS, FREEDOM OR SECRECY (1956).

123. 5 U.S.C. §552 (1976). Forty-four of the fifty states have enacted Public Records Laws. FREEDOM OF INFORMATION, *supra* note 104, at 2. For a list of state provisions, *see* Kraemer, *Exemptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida*, 8 FLA. ST. U.L. REV. 264, 264 n.4 (1980). For a general discussion of informational privacy see O'Brien, *supra* note 37, at 727-37.

124. 1909 Fla. Laws, ch. 5942, §1.

125. FREEDOM OF INFORMATION CENTER, ACCESS LAWS: DEFEATS 2 (1962).

126. 1967 Fla. Laws, ch. 67-125, §7.

127. FLA. STAT. §119.01 (1979). Since 1975 the statute has been amended several times to provide additional exemptions.

access.[128] Determination of the extent of the conflict between privacy and the Florida Public Records Law requires that Florida law be examined in light of these factors.[129]

Florida has significantly broadened the common law definition of public records. The focus under the statute is on the source of the materials rather than the content. Under the common law, a public record was defined as a "written memorial made by a public officer. . . . [I]t is one required by law to be kept, or necessary to be kept in the discharge of duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done."[130] This interpretation was more restrictive than in states which, under common law, required disclosure of any writing, whether or not it was required to be kept.[131] The 1967 Florida amendment adopted this less restrictive interpretation, with actual content much less important than whether the material is in the hands of a government official.[132] The current Florida interpretation is very liberal, and differs from those of other states.[133] The present definition is more expansive than previous judicial definitions, and may "create paper mountains, stifle creative pencilwork and exhilarate warehousers."[134] The public currently has access to anything which is a record, that is, material prepared pursuant to government business and intended to communicate knowledge.[135] Although the definition of public record is broadly defined by statute, it is determined on a case-by-case basis.

Determining who can obtain information is another factor useful in examining public records law. At common law, only a very limited class had access to information, as an interest had to be demonstrated.[136] Some states continue to require that an interest be shown, while others require that the requesting party have a proper purpose.[137] But most states, including Florida, make the right of inspection available to any person, regardless of interest or purpose.[138]

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128. H. CROSS, THE PEOPLE'S RIGHT TO KNOW 6-7 (1953). Cross suggested two additional factors which will not be considered here: procedure for enforcement, and sanctions for violations.

129. For another approach using different factors, see Note, *supra* note 120. That author suggests the use of factors based on the protection of privacy rather than on the protection of access.

130. Amos v. Gunn, 84 Fla. 285, 343, 94 So. 615, 634 (1922).

131. H. CROSS, *supra* note 128, at 42-45.

132. *See* [1971] FLA. ATT'Y. GEN. ANNUAL REP. 344, 344-45.

133. *See Project, supra* note 9, at 1166.

134. Byron, Harless, Schaffer, Reid & Assoc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 89 (1st D.C.A. 1978), *rev'd sub. nom*, 379 So. 2d 633 (Fla. 1980).

135. Shevin v. Byron, Harless, Schaffer, Reid & Assoc., 379 So. 2d 633, 640 (Fla. 1980) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1898 (3d ed. 1968)). See FLA STAT. §119.011(1) (1979).

136. H. CROSS, *supra* note 128, at 25-29.

137. *See Project, supra* note 9, at 1179. The reason behind a request for the examination of a public record is still important in Louisiana, at least where a balancing of interests is required. *See* Webb v. City of Shreveport, 371 So. 2d 316, 320 (Ct. App.), *cert. denied*, 374 So. 2d 657 (La. 1979).

138. 1975 Fla. Laws, ch. 75-225.

A third factor is the number and type of exemptions to the access law. Exemptions may be either statutory or judicial, and either general or specific. Under common law, courts usually established exemptions for public policy reasons, particularly for records that were private, secret, privileged or confidential.[139] Exemptions were provided by Florida courts until 1935, when the Florida supreme court held that future exemptions could only be statutory.[140] The court waited two years before reversing itself, establishing an exemption for police records.[141] The status of judicial exemptions remained unclear well into the 1970's. The legislature validated some exemptions and rejected others, reacting to judicial decisions by permitting an exemption to stand or by passing an amendment expressly eliminating the effect of a holding.[142]

The 1967 amendment to the Florida Public Records Law provided a general exemption in the statute for records "deemed by law" to be exempt.[143] This was changed in 1975 to allow exemptions "provided by law."[144] The district courts of appeal disputed the meaning of this change, with the second district favoring judicial exemptions for public policy reasons, and the fourth district rejecting them.[145] The supreme court adopted the view of the fourth district and allowed only statutory exemptions to the Public Records Law;[146] thus, public policy exemptions by the courts are no longer accepted.

Most state public records laws have statutory exemptions which protect against an invasion of privacy.[147] While these exemptions may be specific, they are usually general statements requiring courts to balance the importance of public access against the harm which might result from disclosure.[148] This statutory balancing test is really an extension of common law balancing for public policy purposes. Florida has not chosen to create an exemption for privacy protection, and there is no general exemption which would permit a court to establish an exemption for reasons of public policy. The Florida statute is very liberal in providing for open records, but allows no interpretive

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139. H. CROSS, *supra* note 128, at 75. Exemptions were derived through judicial balancing tests in which the courts weighed the importance of access against the harm of disclosure. *See Project, supra* note 9, at 1170-71.

140. State *ex rel.* Cummer v. Pace, 118 Fla. 496, 159 So. 679 (1935).

141. Lee v. Beach Pub. Co., 127 Fla. 600, 173 So. 440 (1937).

142. In State *ex rel.* Tindel v. Sharp, 300 So. 2d 750 (1st D.C.A. 1974), *cert. denied*, 310 So. 2d 745 (Fla. 1975), the court narrowly defined "agency" for purposes of the Public Records Act. The Legislature expanded the definition to include persons acting on behalf of any public agency. 1975 Fla. Laws, ch. 75-225. The court established an exemption for police reports in Glow v. State, 319 So. 2d 47 (Fla. 2d D.C.A. 1975), which was codified by the Legislature in 1979 Fla. Laws, ch. 79-187. *See generally* Kraemer, *supra* note 123.

143. 1967 Fla. Laws, ch. 67-125.

144. 1975 Fla. Laws, ch. 75-225, §4.

145. *Compare* Wisher v. News-Press Publishing Co., 310 So. 2d 345 (2d D.C.A. 1975), *rev'd.*, 345 So. 2d 646 (Fla. 1977) *with* State *ex rel.* Veale v. City of Boca Raton, 353 So. 2d 1194 (4th D.C.A. 1977), *cert. denied*, 360 So. 2d 1247 (Fla. 1978). See text accompanying notes 150-56 *infra*.

146. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).

147. *See, e.g.*, TEX. REV. CIV. STAT. ANN., art. 6252-17a, §3(a) (Vernon 1974); CAL. GOV'T. CODE §6255 (West 1975). *See Project, supra* note 9, at 1172 nn. 1218 & 1219.

148. *See* Research Study, *Public Access to Information*, 68 NW. U.L. REV. 177, 237 (1973).

latitude for judicial protection of privacy interests. Exemptions to the statute have proliferated in recent years in response to problems created by application of the law, but the exemptions are drawn narrowly.[149]

The status of the Public Records Law in Florida can be roughly summarized as granting anyone access to anything, subject to a few narrow exemptions. Public records are defined more broadly in Florida than in most states, more parties have access to them, and exemptions can only be provided by the Legislature.

Judicial Interpretation of the Florida Public Records Law

The current status of the Florida Public Records Law must be examined in light of judicial interpretation of the law in the past decade. The three factors used for evaluation of the law in the previous section (definition of records, who has access, and exemption to the law) will be used in this analysis of decisions.

Interpretations of the records law conflicted throughout the seventies due to differing approaches in two districts, the second and fourth. The supreme court eventually resolved the conflict in favor of the Fourth District's view.

The view of the second district is best typified by *Wisher v. News-Press Publishing Co.*,[150] where the court held that a county employee's personnel record was a public record not exempted by statute. Nonetheless, the court stated that an exemption existed as a matter of public policy, citing two earlier cases which included a 1937 Florida supreme court case allowing judicial exemptions for public policy reasons.[151] This construction, allowed the judiciary to create exemptions, and was consistent with the early common law view in Florida and other states.

The Florida supreme court reversed the decision of the Second District in *Wisher* in 1977, although on rather narrow grounds.[152] The court declined to determine how much of the personnel record was exempt, finding that the information requested was generated in a public meeting. Only that portion of the document was ordered to be made public. The supreme court, in effect, upheld the 1935 opinion of *State ex rel. Cummer v. Pace*,[153] which had been ignored in the 1937 case cited by the second district. In *Pace*, the court had provided that "where the legislature has preserved no exception to the provisions of the statute, the courts are without legal sanction to raise such exceptions by implication."[154] The supreme court in *Wisher* did not elaborate on

149. *See, e.g.*, 1979 Fla. Laws, ch. 79-187, which provided an exemption for criminal intelligence and investigative information.

150. 310 So. 2d 345 (2d D.C.A. 1975), *rev'd.*, 345 So. 2d 646 (Fla. 1977).

151. Lee v. Beach Publishing Co., 127 Fla. 600, 173 So. 440 (1937) (exempted certain police department records); Patterson v. Tribune Co., 146 So. 2d 623 (Fla. 2d D.C.A. 1962) (exempted court docket entries reflecting plaintiff's commitment as a narcotic).

152. 345 So. 2d 646.

153. 118 Fla. 496, 159 So. 679 (1935). The court required a city to release records involving municipal docks and terminals to a corporation competing with the city.

154. *Id.* at 501, 159 So. at 681.

the 1975 amendment to the statute which changed the general exemption section to permit those exemptions "provided by," rather than "deemed by" law.[155]

The fourth district had no difficulty following the 1975 amendment in *State ex rel. Veale v. City of Boca Raton*.[156] The court decided that the pre-1975 phrase "deemed by law" permitted exemptions through judicial opinions, whereas the 1975 amendment phrase "provided by law," permitted only statutory exemptions.[157] In the fourth circuit's view courts were not permitted to create exemptions for public policy reasons.

This view was expressly endorsed by the supreme court in *Wait v. Florida Power & Light Co.*[158] A local government declined to disclose information which, it claimed, was protected by an attorney-client privilege. The court held that the 1975 amendment waived any common law privilege of confidentiality, and that only the legislature could create a new exemption for this purpose.[159] *Wait* firmly rejected judicial balancing of the public's interest in disclosure against the resulting harm to an individual from disclosure. This determination, the court held, can be made only by the legislature through an amendment providing for a specific exemption to the policy of disclosure. This view differs from those of other states that permit judicially created exemptions in individual cases to protect the confidentiality of sensitive records. The Texas open records law, for example, includes an exemption for "information deemed confidential by law, either constitutional, statutory, or by judicial decision."[160]

The supreme court recently restated the *Wait* holding in *Rose v. D'Alessandro*.[161] The Second District, prior to *Wait*, but after *Veale*, had again recognized an exemption for public policy reasons, here for products of a state attorney investigation.[162] The supreme court realized the substantial damage that would be done if a state attorney's files were open to the person under investigation, but relied on a legislative amendment enacted after the lower court decision to establish the exemption rather than the public policy approach taken by the second district.[163]

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155. FLA. STAT. §119.07(2)(a) (1979).

156. 353 So. 2d 1194 (4th D.C.A. 1977), *cert. denied*, 360 So. 2d 1247 (Fla. 1978). Information concerning irregularities in the city's building department which had been uncovered in a report by the assistant city attorney was at issue in this case. *Id.* at 1194-95. The city claimed an exemption under the attorney-client privilege. *Id.* at 1195. *See also* Browning v. Walton, 351 So. 2d 380 (Fla. 4th D.C.A. 1977), where the court, following *Wisher*, denied an exemption of county personnel files.

157. 353 So. 2d at 1196.

158. 372 So. 2d 420 (Fla. 1979).

159. *Id.* at 424. The Legislature later adopted a statute to create an exemption for the attorney-client privilege. FLA. STAT. §90.502(1) (1979). This exemption was upheld in Aldredge v. Turlington, 379 So. 2d 125 (1st D.C.A.), *cert. denied*, 383 So. 2d 1189 (Fla. 1980).

160. TEX. REV. CIV. STAT. ANN., art. 6252-17a, §3(a) (Vernon 1974). *See generally* Hill, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 SW. L.J. 431 (1975).

161. 380 So. 2d 419 (Fla. 1980).

162. 364 So. 2d 763 (2d D.C.A. 1978), *aff'd on other grounds*, 380 So. 2d 419 (Fla. 1980).

163. 380 So. 2d at 420. The court relied on 1979 Fla. Laws, ch. 79-187 (codified in FLA. STAT. §119.07 (1979)).

After *Wait*, Florida courts cannot create an exemption to the general rule of open records, but disclosure can be forbidden if a valid constitutional claim is presented.[164] Claims of confidentiality for personal privacy reasons have been denied in the seventies, although common law privacy was generally held substantial enough to require non-disclosure.[165] Florida courts have stated that an individual's desire for privacy is not enough to shield his records.[166] Privacy in Florida, in the context of the Public Records Law, has been recognized as a viable constitutional right only to the extent that the affected interest involves "[m]arital intimacy, procreation, and the like."[167] The supreme court in *Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*[168] held that a disclosural privacy interest was insufficient to prevent access to public records.

An argument in Florida for non-disclosure for privacy reasons would not yield a judicially created exemption because *Wait* and *Byron, Harless* rejected such constitutional claims for disclosural privacy. But there is some hope for protection of privacy due to the narrowing of the definition of public records in *Byron, Harless*. As discussed earlier, the definition of public records has been extremely broad in Florida.[169] The lower court in *Byron, Harless* suggested that the current definition of public records in section 119.011(1), and the prohibition of destruction of records in section 119.041, make any material held by the government accessible to the public. The supreme court narrowed this view from "almost everything generated or received by a public agency" to more formal material prepared in connection with agency business.[170] The court distinguished as non-public rough drafts, preparatory notes and dictation tapes, but stated that further classification would have to be made on a case-by-case basis.[171] Rejected was the statement by the lower court that "The encompassing definition made by section 119.011(1) and the proscription of section 119.041, if scrupulously observed, will require more government warehouses than wastebaskets."[172]

The definition of public record, and thus accessibility, appears to hinge on whether the document has been formalized. The Florida supreme court left room for lower courts wishing to protect personal privacy,[173] as access can be denied to private information in any document not considered formal. This narrowing of the definition, however, may frustrate effective application of the law. If an open records policy purports to allow the public to discover whether government officials are honestly and competently performing their duties, then limiting access to the end result of the decision making process, rather

164. *Wait* reserved the determination of whether the right of privacy provided limits to the Public Records Act. 372 So. 2d at 422 n.1.

165. H. CROSS, *supra* note 128, at 75.

166. *See* Browning v. Walton, 351 So. 2d 380 (Fla. 4th D.C.A. 1977).

167. Miami Herald Publishing Co. v. Marko, 352 So. 2d 518, 520 n.4 (Fla. 1977).

168. 379 So. 2d 633 (Fla. 1980). See text accompanying notes 84-100 *supra*.

169. See text accompanying notes 130-135 *supra*.

170. 379 So. 2d at 640.

171. *Id.*

172. 360 So. 2d at 88.

173. For a thorough discusion of *Byron, Harless* and the effect on the definition of public records, see Comment, *supra* note 84.

than exposing the whole process, tends to limit openness. Nonetheless, a privacy claim seldom involves a government official or decision, but rather an individual,[174] and a more restrictive definition of public record may permit such a claim.

The question of who has access to records has received little judicial attention in Florida. The 1975 amendment to the Public Records Law changed the statute to provide access to "any person" rather than "any citizen of Florida."[175] The previous interpretation of citizen had been broad as compared to the common law requirement of interest on the part of the requesting person.[176] The current statute is very broad, with the issue of access rarely considered in Florida public records cases.[177]

Federal cases indicate that privacy protection can depend on the nature of disclosure, that is, the nature of the person obtaining information. The United States Supreme Court, in *Whalen v. Roe*, distinguished disclosure to state employees from disclosure to the public.[178] This implied that a statute permitting disclosure to agency personnel, but not to the public generally, might satisfy the privacy interest, although at the expense of effective self-government. The Fifth Circuit in *Plante* rejected such an argument, choosing instead to improve the electoral process by requiring broader financial disclosure instead of limited disclosure to an ethics commission.[179] The Supreme Court also mentioned improving the electoral process in *Buckley v. Valeo*.[180] Although both *Buckley* and *Plante* involved elected officials, the public interest in disclosure extends to affairs of government generally. Thus, the question of who has access must be considered in reconciling the interest in personal privacy and public access.

Some Problems with the Florida Public Records Law

An overly broad statute and strict judicial interpretation have distorted the original purpose of open records and access in Florida. Florida's definition of a public record allows access by anyone, and permits exemptions only by legislative amendment. The state courts have refused to establish exemptions in light of the statute, and have not determined that disclosural privacy is a legitimate constitutional right which would override the state interest. There are three problems with this current application of Florida law.

Government files hold information comprised of both public business and

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174. *See* Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922).

175. 1975 Fla. Laws, ch. 75-225 (codified in FLA. STAT. §119.01).

176. *See* State *ex rel.* Cummer v. Pace, 118 Fla. 496, 500, 159 So. 679, 681 (1935) (allowing competitor corporation access to records involving municipal docks and terminals); State *ex rel.* Davidson v. Couch, 115 Fla. 115, 118, 155 So. 153, 154 (1934) (allowing certified public accountant access to city records and books of account). *But see* [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 588, 489-90 (a person requesting access to a state licensing board file is required to show interest). See text accompanying note 136 *supra*.

177. *See* OP. ATT'Y GEN. FLA. 075-175 (1975).

178. 429 U.S. 589, 602 (1977).

179. 575 F.2d at 1137.

180. 424 U.S. 1, 66-67 (1976).

private revelations.[181] The policy behind open records and access to information is to allow citizens to obtain information about the operations and policies of government. This intent is distorted where the public records concept is used to gain information only about an individual, as in the *Fadjo* case.[182] The privacy interest involved should not yield to an overly broad open records statute and statutory interpretation.[183]

In examining the importance of personal privacy, A. R. Miller has said,

> Knowingly or unknowingly, those who believe themselves watched will modify their behavior to be pleasing in the eyes of the watcher if there is any fear that they are vulnerable to the will of that watcher. It does not even matter that there actually be a watcher; all that is necessary is that people believe there is.[184]

This statement could be used either to argue against access to records for privacy reasons, or to justify access to records for the ideal of effective self-government. Privacy and open records can be compatible, but accommodation requires acknowledging the value of each. The right to know demands public exposure of recorded official action, but that right should apply with less force to personal information supplied by private citizens. "If citizenship in a functioning democracy requires general access to government files, limited but genuine interests also demand restricted areas of nonaccess."[185]

Another problem of the Florida Public Records Law is common to all records laws: Increasing computerization makes more information available, and improves storage and access. More information can be compiled about individuals and remain easily accessible for long periods of time.[186] The concept of open records developed prior to computer technology, and emphasized that *all* government records be open. This statutory direction remains unchanged, notwithstanding the proliferation of government records about individuals. New technology may now require, in the interest of personal privacy, that a distinction be made between records about government and government records about individuals.[187]

A third problem of the Florida records law concerns the lack of attention given to the individual's interests in the legislative and judicial determination to maintain a broad right of access. Many states have accommodated the right of privacy within the open records law. California law, for example, exempts

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181. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 651, 117 Cal. Rptr. 106, 109 (1974).

182. See text accompanying notes 2-7 & 73-81 *supra*.

183. *See* Byron, Harless, Schaffer, Reid & Assoc. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 97 nn.13 & 14 (Fla. 1st D.C.A. 1978).

184. *Report from the Barricades, supra* note 9, at 17-18.

185. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 655, 117 Cal. Rptr. 106, 112 (1974).

186. See text accompanying notes 46-49 *supra*.

187. The complexity of records may create difficulty in separating information about the government from information about an individual. *See generally* STATEWIDE INFORMATION POLICY COMMITTEE, *supra* note 113.

disclosure where the "public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."[188] Current judicial interpretations render such a balancing of interests impossible in Florida. This is not an argument for the primacy of privacy, but a suggestion that there are competing interests which must be considered. Given the importance of open records, the protection of privacy cannot be absolute. It is reasonable to require disclosure of individual records if the inquiring person's need to know outweighs the interest of the individual whose privacy is at stake. The fact that there may be legitimate individual interests which are protected does not mean that no information should be disclosed.[189]

It is interesting to note that the Florida Constitutional Revision Commission recognized the competing claim of privacy when considering whether to include the Public Records Law in the revised constitution. The commission considered a constitutional amendment for open records which included an exemption for "privacy interests."[190] However, the 1980 constitutional amendment establishing a state right of privacy by its own terms does not affect the application of the Public Records Law.[191] Attention should now be given in Florida to a statutory accommodation of privacy within the Public Records Law, or judicial recognition of the federal constitutional right of disclosural privacy.

RESOLVING THE CONFLICT

Florida law must protect the important rights of personal privacy and access to public records. The problem lies not in justifying the value of either concept, but in resolving the conflict between the two interests in a situation where both appear to be implicated. The Fifth Circuit in *Fadjo* articulated a balancing test to weigh these interests. But the Florida supreme court rejected a balancing approach after comparing the strong public interest in disclosure manifested in the Public Records Law to what, in the court's opinion, was an unformed and amorphous right of personal privacy. Nevertheless, Florida

188. CAL. GOV'T CODE §6255 (West 1975). *See* Comment, *Informational Privacy and Public Records*, 8 PAC. L.J. 25, 36 (1977). For the balancing approach in Louisiana, see Trahan v. Larivee, 365 So. 2d 294 (La. Dist. Ct. App. 1978). In a dispute over access to city employee performance ratings, the court balanced the state constitutional right of privacy against the state public records law, and held against disclosure. *Id.* at 300. LA. CONST. art. I, 5; LA. REV. STAT. ANN. §44 (West 1940). The court found that "the public interest in efficient government is better served by keeping these evaluations confidential." 365 So. 2d at 300. In contrast, a balancing resulted in disclosure in Webb v. City of Shreveport, 371 So. 2d 316 (Ct. App.), *cert. denied*, 374 So. 2d 657 (La. 1979) (involving a computer print-out of names and addresses of municipal employees).

189. *The Computerization of Government Files*, *supra* note 9, at 1425.

190. Cope, *supra* note 19, at 730. Proposal No. 138 provided that: "no person shall be denied the right to examine any public record made or received in conjunction with the public business by any nonjudicial public officer or employee in the state or by persons acting on their behalf. The legislature may exempt records by general law where it is essential to protect privacy interests or overriding governmental purposes." *Id.* The second sentence was deleted by the Commission prior to placing the amendment on the ballot. *Id.* at 736.

191. See note 22 *supra*.

courts must eventually recognize the right of disclosural privacy in deference to *Fadjo*'s holding that disclosural privacy is a legitimate third strand of the constitutionally protected right of privacy.

The Florida Legislature considered the conflict in formulating the state constitutional right of privacy adopted in 1980, but decided to give priority to the right of access. The final sentence of the amendment, "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law," was added to prohibit use of the privacy amendment to impede public access to public information.[192] The legislature designed the amendment to control collection of information rather than disclosure.[193] Once information is in the hands of government, however, the conflict between privacy and access remains.

The Florida Public Records Law must be changed to accommodate the value of disclosural privacy.[194] The right to privacy, as it has developed, is not absolute, and acknowledges the necessity of disclosure in certain circumstances. Justices Brandeis and Warren recognized that any rule of liability must be flexible enough to take account of the varying circumstances of each case.[195] The right of public access to government information, as it has developed, recognizes the need for non-disclosure in certain circumstances. At common law, and in most states today, this recognition extends to protect personal privacy where that interest outweighs the public's need to know.[196] Florida provides a number of exemptions to the Public Records Law, but does not accommodate the privacy interest.

Florida law can accommodate privacy in a manner similar to other states and the federal Freedom of Information Act. Attention should be given to three aspects of the law which follow the factors discussed in the previous section. First, and most important, a general exemption should be added to the Florida law, enabling the courts to balance privacy and access on a case-by-case basis. Second, the definition of public records should be narrowed to distinguish between information about government and information about individuals. This latter type of information should not be considered public except for certain narrow purposes.[197] Third, access to records containing personal information should be granted not to any person, but only to those with a legitimate interest in the personal information. The conflict in *Fadjo* arose not because the government had access to personal information, but because disclosure was made to a private party without furthering the policy underlying the public's right to know.

A General Exemption

Existing amendments to the Florida Public Records Law limit access for

192. PUBLIC ADMINISTRATION CLEARING SERVICE, PROPOSED AMENDMENTS TO FLORIDA CONSTITUTION TO BE ON BALLOT ON OCTOBER 7, 1980, AND ON NOVEMBER 4, 1980 ELECTIONS 17 (1980).
193. *Id.*
194. A different conclusion is reached in Comment, *supra* note 84, at 395.
195. Brandeis & Warren, *supra* note 92, at 215.
196. See text accompanying notes 139-149 *supra.*
197. See text accompanying notes 208-221 *infra.*

certain specific reasons. But the Florida supreme court in *Wait* held that only the legislature can establish exemptions. Even where a valid public policy reason exists, as in *Fadjo*,[198] the courts depend on the legislature to establish the exemption. Under common law, and prior to 1975, the courts could establish exemptions in the interest of public policy. Under current law, the list of exemptions will increase in a piecemeal fashion to protect the interest of the state.[199] This approach will fail to accommodate the individual's interests in privacy.

A general exemption in the law, such as that in the California Public Records Act,[200] will accommodate individual interests in privacy. The California statute was modeled after the Freedom of Information Act, and includes an exemption for records where the public's interest in non-disclosure clearly outweighs the public's interest in diclosure.[201] The presumption is in favor of disclosure, but the exemption permits agency and judicial discretion to favor privacy where required by the public interest. The exemption requires the public agency and reviewing court to balance the interests involved.[202]

A similar balancing is desirable in Florida, but the middle-tier balancing test enunciated by the Fifth Circuit in *Plante* and *Fadjo* gives no presumption to disclosure. Rather than place the burden of demonstration on the proponent of confidentiality, the Fifth Circuit treats the interests of disclosural privacy and access to records as roughly equal. Therefore, disclosure is allowed only where a legitimate state interest is demonstrated that outweighs the privacy threat to the plaintiff.[203] This formulation of the balancing test suggests language for the Florida Public Records Law different than that used in California. Section 119.07 should include an exemption for personal information where disclosure would be an unwarranted invasion of personal privacy, unless the public interest in a particular case compels disclosure.[204]

Unfortunately, this approach erodes the right of public access. But this erosion is slight, entailing only a return to the pre-1975 judicial public interest exemptions. This amendment would limit judicial exemptions to situations where privacy is involved, rather than permit an exemption any time the public

198. The Legislature amended the Public Records Law to provide a specific disclosure exemption for the information at issue in *Fadjo*. 1979 Fla. Laws, ch. 79-187 (codified at FLA. STAT. §119.07(3) (Supp. 1970)).

199. *See* A.S. Miller, *supra* note 9, at 17. The author makes the point that it is "only when the state itself does not feel threatened by assertions of privacy that constitutional law reflects a judicial desire to protect it." *Id.* The legislative exemptions to the Public Records Law also advance the interests of the state rather than the individual.

200. CAL. GOV'T CODE §§6350-65 (West 1980).

201. *Id.* §6255. For a description of the balancing undertaken pursuant to application of the Freedom of Information Act, see Note, *Freedom of Information and the Individual's Right to Privacy: Department of Air Force v. Rose*, 14 CAL. W.L. REV. 183 (1978).

202. Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 657, 117 Cal. Rptr. 106, 114 (1974). For an analysis of the judicial interpretation of the California Public Records Act, see Comment, *supra* note 188, at 36.

203. Fadjo v. Coon, 633 F.2d at 1176.

204. This language is suggested by FREEDOM OF INFORMATION CLEARINGHOUSE, DRAFT OF MODEL LEGISLATION, STATE FREEDOM OF INFORMATION ACT 6 (no date).

interest requires. It is difficult to decide where the personal right of privacy ought to yield to the public's right to know the workings of government. The authors propose that the Florida Legislature permit the courts to assist in making that decision.

Beyond Balancing

It is apparent from the holding in *Fadjo* that the Fifth Circuit will not countenance an impermissible statutory invasion of constitutionally protected privacy. Nonetheless, the Florida Legislature can go beyond the Fifth Circuit's balancing test and provide meaningful standards of judicial review while simultaneously accommodating the goals of public access and individual privacy. Refinement of the definitional and access provisions of the Public Records Law would allow public access to government information, while assuring the individual citizen that private information would be free from public disclosure absent a compelling, countervailing public interest in disclosure.

Enactment of these recommended proposals would allow the Florida Legislature to implement four desirable objectives. Modification of the present Florida Public Records Law would accomplish the first objective of preventing the statute from being declared an unconstitutional invasion of protected privacy. The second objective, accommodating the conflicting goals of public access and individual privacy, assures the fulfillment of the first objective. If the Florida Public Records Law provides a legitimate individual right to disclosural privacy, it will not be declared unconstitutional. The third objective is to provide legislative guidance and authority for the courts. The final objective allows the legislature to employ its greater capacities and resources for discerning public opinion and weighing competing interests[205] in acting as an intermediary between the various branches of government and those whom they govern.[206]

The exemption for judicial balancing suggested previously does not take into account two of the three factors[207] that determine the scope of the right of access to government information. Modification in the definition and access provisions allows implementation of a statutory scheme which properly responds to both claims of public access and individual privacy made against the government by its citizens.

The Uniform Information Practices Code (UIPC)[208] provides the most comprehensive approach to reconciling the right of public access to government information with the individual's right to disclosural privacy. The Code's objective is to accommodate the two fundamental interests by establishing "a

205. Beaney, *The Right to Privacy and American Law*, 31 L. & CONTEMP. PROB. 253, 269 (1966).

206. *Id.*

207. See text accompanying note 128 *supra*.

208. UNIFORM INFORMATION PRACTICES CODE (1980). The Code was approved and recommended for enactment in all states at the 89th annual A.B.A. conference, August 1, 1980. The ABA House of Delegates voted in February, 1981, to defer action until the individual states had examined the provisions. 8 FLA. B.J. 4 (1981).

broad right of public access to governmental records"[209] which yields when the claim to individual privacy has "greater magnitude."[210]

The Code definition of government record pertains to information maintained by an agency in written, aural, visual, electronic or other physical forms.[211] The other critical definitions in Article 1 are found in sections 1-105(5) and 1-105(8)[212] which deal with an individually identifiable record and a personal record. These provisions are important because they trigger the applicability of Article 3, which limits public access to information in government records about individuals. The test used to trigger the individual's right to privacy is objective: 1) does the record on its face identify the individual; and 2) can the requestor identify the individual by known or readily available extrinsic facts. The test is disjunctive; if either criteria is met, the individual's file is presumed, in the absence of a specific exemption, a non-government record. Article 3 defines the specific limitations on public disclosure, allowing access only to individually identifiable information that does not constitute invasion of personal privacy upon disclosure.[213] The only information that may be freely disclosed is primarily job related.[214]

The information may also be disclosed if taken from a public meeting or authorized by statute, court order, subpoena or on a showing of compelling circumstances.[215] The provision, therefore, allows disclosure of job related information, information gathered in a public meeting, and information needed pursuant to law, but generally limits disclosure of personally identifiable information to the individual it pertains to or when it is not a "clearly unwarranted" privacy invasion.[216] This is a balancing approach for case-by-case application.[217] The criteria to use, and an elaboration of examples of unwar-

209. UNIFORM INFORMATION PRACTICES CODE §1-102, Comment (1980).

210. *Id.*

211. *Id.* §1-105, Comment. The Uniform Information Practices Code is in accord with the "formalize" rule announced in *Byron, Harless*, 379 So. 2d 633 (1980). The Official Comment states that "the personal recollection of an agency employee would not be a 'government record' but his handwritten notes summarizing an event or conversation would." UNIFORM INFORMATION PRACTICES CODE §1-105, Comment (1980). The Comment further states that the definition of government record is "the key operative definition in Article 2 of [the] Code," triggering "the general public right of access to information established in §2-101 and §2-102." *Id.*

212. UNIFORM INFORMATION PRACTICES CODE §1-105(5) (1980) states: "Individually identifiable record means a personal record that identifies or can readily be associated with the identity of an individual to whom it pertains." The text of §1-105(8) reads: " 'Personal record' means any item or collection of information in a government record which refers, in fact, to a particular individual, whether or not the information is maintained in individually identifiable form." *Id.* §1-105(8).

213. *Id.* §3-101, Comment. The Comment provides the underlying rationale for the structure of article 3.

214. *Id.* §3-101(1).

215. *Id.* §3-101(3)(10).

216. *Id.* §3-101(10). The Comment to this section provides the justification for the language "clearly unwarranted of personal privacy." UNIFORM INFORMATION PRACTICES CODE §3-102, Comment (1980).

217. The Comment bases its support of this approach upon "the premise that case-by-case determinations will ultimately produce a fairer and more refined accommodation of these

ranted invasions, are contained in section 3-102.[218]

The information in which an individual has a significant privacy interest can be disclosed only when there is an assessment of the *public* need for the information rather than the interest of a particular requestor.[219] This provision complements the concept of public access to public records by correctly restricting the public's access to private records held by the government. The statutory wording, "clearly unwarranted invasion of privacy," may appear imprecise, but the Comment to Article 3 provides ample justification for rejecting specific enumeration of protected privacy interests because privacy and access issues are seldom accorded such categorical treatment. The Comment opts, instead, for examples which allow for analogy and "regard to context."

The UIPC has an unwieldy format due to a bifurcated structure containing separate provisions for Freedom of Information[220] and Disclosure of Personal Records.[221] The differing interests identified and accommodated provide, nevertheless, an excellent model for modification of the Florida Public Records Law. The Code's distinction between public and private records accommodates both a policy of access to governmental records and protection of individual privacy when the public interest in disclosure does not outweigh the privacy interest. Florida should enact definitions for government and personal records that assimilate the policies and distinctions of UIPC article 1 and article 3.

The scope of access may undergo continual refinement on a case-by-case basis, with adequate accommodation of the public and private interests evolving only after further delineation of the asserted claims and appropriate protections. The Code attempts to articulate legitimate public and private claims and, therefore, provides a model for consideration.

The access provisions of the UIPC are divided into two categories; public and inter-agency. Article 2, section 2-102, allows liberal access to governmental records subject to the specific limitations of section 2-103, which designates twelve categories of government information exempt from mandatory disclosure. Entire record systems are not exempt as such; only segregable sections of otherwise fully accessible government records are exempt from disclosure. The exemptions[222] protect three important public interests, beginning with the effectiveness and integrity of certain essential governmental processes. This is

interests. Disclosure of an individually identifiable record under this subsection, therefore, is permissible only if the public interest in disclosure outweighs the privacy interest of the individual. The initial judgment under the standard lies with the agency administrator. Ultimately, however, the courts, exercising *de novo* review, will determine the scope of this standard on a case-by-case basis." UNIFORM INFORMATION PRACTICES CODE §3-102, Comment (1980).

218. UNIFORM INFORMATION PRACTICE CODE §3-102 (1980).

219. The Comment on Subsection (b) states: "The enumeration is not intended to be exhaustive. But once a subsection (b) or comparable privacy interest is demonstrated, the agency will have to assume the burden of carefully balancing such an interest with the public interest and need for access to those documents. If one of the nine examples applies to a request, there is a strong privacy interest in not publicly releasing the records." *Id.* §3-102, Comment.

220. *Id.* art. 2.

221. *Id.* art. 3.

222. *Id.* §2-103.

accomplished by exempting from mandatory disclosure certain law enforcement and inter/intra-agency communications which are predecisional. These deliberative communications are exempt from immediate, though not ultimate disclosure. Exemptions in this category also protect the integrity of agency administered licensing examinations as well as agency procurement and bidding processes.

The exemption also protects public interest in the reliance of persons who submit confidential information either voluntarily or under compulsion.[223] The Comment on this confidentiality exemption focuses on agency collection of information necessary to effectively regulate business. The enumeration of specific examples of justifiably confidential information, however, narrows considerably the exemption's broad language.[224] This section demonstrates that an agency, in order to fulfill its purposes in the public interest, may need to withhold certain information.

Finally, the restrictions on public access to government records address the individual's interest in privacy. The important provisions are found in article 2, sections (a)(12), (b), and (c), which establish notice procedures. These procedures are triggered when a government agency makes a decision to disclose information that may fall within an exemption. Under the notice provisions, the decision to disclose is considered tentative until reasonable efforts are made to inform the interested parties and provide them the opportunity to present objections.[225] The procedures ensure full agency appraisal of considerations favoring non-disclosure before disclosure is made.[226] Interested parties are those who submitted the arguably exempt information or those who requested notice of a possible disclosure prior to a request being made.

The exemptions must be read in light of the Code's general segregation of information principles which extend the exemptions only to categories of information, thereby requiring the agency to delete all non-disclosural information and provide public access to the remainder of the record.

The major drawback to article 2, section 2-103 is that it gives agencies wide discretion in deciding whether an exemption applies; for the Code provides no mandatory exemptions. Once the agency decides to disclose and gives notice of that intention, the objector must bring an independent state action to enforce non-disclosure. Article 2, section 2-103 does not create a right to enjoin agency disclosure of arguably exempt information. This provision places too great a burden on the agency. There are certain classes of records, which should carry a presumption of non-disclosurability, which is then rebuttable through standardized procedures. The UIPC provision, as written, places excessive discretion in the individual government agency without providing concomittant procedural safeguards for asserted individual privacy interests. The Code authors

223. For an opposing view on the need to insert a "confidentiality" consideration to assure public access and reasonable personal privacy, see text accompanying note 100 *supra*.

224. See note 222 *supra*.

225. For a discussion of the reasons for inclusion of notice and consent procedures to protect privacy interests see Vache & Makibe, *Privacy in Government Records: Philosophical Perspectives and Proposals for Legislation*, 14 GONZ. L. REV. 515, 555 (1979).

226. UNIFORM INFORMATION PRACTICE CODE §2-103, Comment.

justify this procedure as one which furthers the primary policy of access to all governmental records.

If article 2, however, is read in conjunction with article 3, there is a rebuttable presumption of non-disclosure of certain categories of information. The problem is that the bifurcated structure of the Code establishes different standards for non-disclosure and disclosure depending on the initial determination of placement within article 2 or article 3. The policies of public access and individual privacy can be better accommodated by a less confusing statutory framework.

The UIPC provisions on segregation and notice should be adopted in Florida. The segregation principle isolates justifiably exempt information from the general policy of access. This provides for the accommodation of conflicting legitimate interests, while retaining a general policy of open access to government-held information. The notice provision adequately provides for the assertion of privacy interests through the adversary system. Under the UIPC notice provisions, the individual affected by a threatened disclosure, or another party with a recorded interest in the non-disclosure of government-held information, has the opportunity to argue against disclosure. This procedure adequately protects an individual's privacy interest while still favoring the presumption of free access.[227]

UIPC section 3-103 concerns accessibility of individually identifiable information between government agencies. The Code recommends a general policy of disclosure of personal information between agencies when the requested information is certified as pursuant to, and in furtherance of, the requesting agency's "performance of its duties and functions."[228] This exemption to the general policy of non-disclosure of personal information supports the overriding policy of disclosure made in the public interest. In addition, there are specifically enumerated provisions which allow disclosure of personal information to the state archives for historical preservation, law enforcement and judicial investigations, authorized audits of the agency and census activity. Nevertheless, section 3-103(b) still provides protection for the individual's interest in privacy by subjecting the receiving agency to the same disclosural restrictions placed upon the originating agency.[229] This section significantly qualifies the no notice standard applicable to inter-agency transfer, and provides protection for individual private interests.

There is a problem inherent in this provision, however, which requires modification before adoption can be recommended. In the section's present wording on inter-agency disclosure, an individual would have no notice of the

227. The following states have enacted legislation limiting access to and subsequent dissemination of government held information that is individually identifiable: ARK. STAT. ANN. §16-804 (1977); CAL. CIVIL CODE §1798.1(c) (West 1977); CONN. GEN. STAT. ANN. §§4-190 to 4-197 (West Supp. 1980); IND. STAT. ANN. §4-1-6 (Burns 1978); KY. REV. STAT. ANN. §§61.870-884 (Baldwin Supp. 1980); MINN. STAT. ANN. §15.16 (West 1979); OHIO REV. CODE ANN. §§1347.01-.99 (Page 1977); OKLA. STAT. ANN. tit. 74, §118.17 (West Supp. 1980); UTAH CODE ANN. §§63.2-85.4(6) (1979); VA. CODE §§2.1-377, 386 (1976); WASH. REV. CODE ANN. §§43.105.041(4)-.070 (1973). *See* R. SMITH, *supra* note 20.

228. UNIFORM INFORMATION PRACTICES CODE §3-103(1), Comment (1980).

229. *Id.* §3-103(b).

transfer between government agencies until a request for disclosure triggered the notice requirements of article 2, section 2-102.[230] This deficiency can be remedied by a simple notice procedure which would accomplish two objectives: allow for disclosure of personal information between agencies only for valid governmental purposes, and inform the interested individual of which agencies hold personal information that would be subject to the limitations placed on public disclosure.

The UIPC provision on inter-agency confidentiality is commendable if the confidentiality presumption is limited to specified categories of government held information, such as the integrity of the competitive bidding process. This provision, if adopted, should consist only of statutorily enumerated exemptions. The individual agency should be given no discretion, for discretion promotes the withholding of information to which the public has a legitimate right of access. An inter-agency confidentiality exemption may require case-by-case adjudication before courts can develop cogent standards that allow public access to government information.

With the modification suggested in the notice requirement, the UIPC provisions on access, establishing different standards for public and inter-agency disclosure, are recommended for consideration as a model. Because the proposed definitional and access modifications interact and complement each other, they constitute an acceptable accord between the conflicting objectives of public access and individual privacy which accommodates the values necessary for co-existence in a collection-oriented society.[231]

CONCLUSION

> Contrary to the assumption of some proponents of privacy protection and advocates of information control, interests in privacy and access are not contradictory. They are, rather, complementary. Legislation safeguarding informational privacy registers the concern that privacy is in important ways related to individuals' decisions as to their self-government. Alternatively, legislation supporting the public's right to know through legal rights of access acknowledges that in a free society citizens must be informed about their government's decisions and practices. Therefore, the rights of privacy and access are actually political correlates; both involve the right of individuals to control information to their self-government.[232]

The conflict in Florida between personal privacy and the public's right to know can be resolved. At the very least, the Florida Legislature should adopt a general exemption to the public records law which recognizes the interest in

230. *Id.* §2-102.

231. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION §45 (1970). "Generally speaking, the concept of a right to privacy attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which he can think his own thoughts, have his own secrets, live his own life, reveal only what he wants to the outside world. The right of privacy, in short, establishes an area excluded from the collective life, not governed by the rules of collective living." *Id. See also* Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199.

232. O'Brien, *supra* note 36, at 84.

personal privacy and permits the Florida courts to balance that interest against the interest in access to public records. The legislature may choose to go beyond establishing a balancing standard for judicial application and delineate the scope of access and define records so as to assist the agencies and the courts in reconciling the conflict between privacy and access.