

INSPECTION AND DISCOVERY OF STATE RECORDS IN ALASKA

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I. INTRODUCTION

Attempts to inspect the records of the State of Alaska can be frustrating for the public, the press, and government officials because of the uncertainty in Alaska as to what records are available for inspection. This frustration arises because Alaska, unlike most states and the federal government,¹ does not have a comprehensive public records act that clearly identifies what records are exempt from disclosure. Instead, Alaska Statutes sections 09.25.110 and 09.25.120² specify that all public writings and records, with a few noted exceptions, are available for inspection.

In contrast, evidentiary privileges in Alaska are relatively straightforward. There is, however, one constitutional privilege that has just been recognized in Alaska and is deserving of close scrutiny. That privilege, the "deliberative process privilege," protects from discovery "predecisional" documents prepared by members of the executive branch that reflect the decisionmaking, or deliberative process, of government officials.³

Exemptions under the records inspection statutes are quite distinct from evidentiary privileges. A record that is exempt from disclosure under the public records statutes is not necessarily privileged

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1. See *infra* note 45 and the Freedom of Information Act, 5 U.S.C. § 552 (1982).

2. ALASKA STAT. §§ 09.25.110, 09.25.120 (1983). See *infra* text accompanying notes 13-14.

3. Most courts and commentators refer to this as the "executive privilege." See *infra* note 23. This reference is confusing, however, because the term also may be used to refer to the narrower privilege held by the chief executive of the government. See *infra* note 101. The Alaska Supreme Court has just recently recognized the "executive privilege" of the governor to withhold from discovery documents that reflect his predecisional mental processes. *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska 1986). Although it is not entirely clear, the court apparently intended to recognize what is referred to in this article as the "deliberative process privilege," rather than the narrower executive privilege held by the governor alone. See *infra* notes 160-61 and accompanying text.

from discovery in litigation.⁴ Similarly, evidentiary privileges are not state laws requiring records to be kept confidential under a particular statute.⁵

Government records must be made available for inspection by the public or produced in discovery unless there is an applicable exception or privilege authorizing nondisclosure. The issue that arises most frequently, and thus the major focus of this article, is whether authority exists for withholding a document from inspection or discovery.⁶ If, however, disclosure or production is prohibited by statute,⁷ or would violate an individual's right of privacy,⁸ a state agency *must* withhold the document. Accordingly, an agency must consider carefully *all* requests for inspection of public records and production of records in discovery.

Section II of this article briefly compares exceptions to the records inspection statutes with evidentiary privileges. Because the exceptions and privileges are governed by separate principles, they must be clearly differentiated before each is analyzed in detail. Section III discusses Alaska's records inspection statutes. First, this section presents background information necessary for a complete understanding of the statutes and Alaska's position on access to public records. This discussion will include an examination of the statutory language employed by the Alaska Legislature and a discussion of an analogous statute that provides a useful point of reference, Alaska's Open Meetings Act. Section III next discusses the exceptions to the general rule of disclosure. These include express and implied statutory exceptions, exceptions required by the Alaska Constitution, and the common law "public interest" exception. This section finally discusses special issues that arise when a public official determines that a document should not be inspected. These issues include the point in time at which a document ceases to be confidential, whether government agencies can share confidential records, and the procedural requirements that are applicable when an agency has determined that a record should not be inspected. Finally, section IV addresses the deliberative process privilege, examining first its development in other jurisdictions and then its probable application in Alaska. This article concludes that the deliberative process privilege will not be interpreted as broadly in Alaska as it has been in other jurisdictions because of Alaska's commitment to allowing the fullest possible access to government records.

4. See *infra* note 12 and accompanying text.

5. See *infra* note 25 and accompanying text.

6. See *infra* sections III(B) and IV.

7. See *infra* sections III(B)(1) and III(B)(2).

8. See *infra* section III(B)(3).

II. EXCEPTIONS TO THE RECORDS INSPECTION STATUTES COMPARED WITH EVIDENTIARY PRIVILEGES

The inspection of government records by the public is governed by Alaska Statutes sections 09.25.110 and 09.25.120⁹ and the implementing regulations.¹⁰ The right of the public to inspect records must be distinguished from the right of parties in litigation to discover certain documents, which is governed primarily by Alaska Evidence Rule 501.¹¹ Limitations on the two are not co-extensive and thus terminology is important. Public writings and records are subject to inspection unless they fall within one of the exceptions enumerated in section 09.25.120. If an exception applies, the records are *exempt* from disclosure. On the other hand, relevant materials are subject to discovery unless they are *privileged*. In Alaska, exceptions to the public records statutes are not treated as evidentiary privileges and, likewise, evidentiary privileges are not recognized as exceptions to the records inspection statutes.¹²

A. Records Inspection Statutes

Section 09.25.110, which states the general rule that public records are available for inspection, provides as follows:

Unless specifically provided otherwise, the books, records, papers, files, accounts, writings and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record.¹³

Section 09.25.120 restates the general rule of availability, but sets out four exceptions. The section provides in relevant part as follows:

Every person has a right to inspect a public writing or record in the state, including public writings and records in recorder's offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS [Alaska Statutes]

9. See *infra* text accompanying notes 13-14.

10. ALASKA ADMIN. CODE tit. 6, §§ 95.010-.050 (Apr. 1984), 95.060-.900 (Jan. 1983).

11. See *infra* note 21 and accompanying text.

12. Various statutes address separately the confidentiality of a document under the records inspection statutes and its privilege from discovery. See, e.g., ALASKA STAT. § 08.24.250 (1987) (information is confidential, but may be introduced in evidence); *id.* § 09.25.100 (1983) (information shall be kept confidential except when production required in investigation or court proceeding); *id.* § 18.23.030 (1986) (information is both confidential and not subject to subpoena or discovery).

13. ALASKA STAT. § 09.25.110 (1983).

18.50.010 — 18.50.380; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law.¹⁴

The first three exceptions are clear and thus do not warrant discussion. In contrast, the fourth and broadest exception requires close scrutiny, especially because its contours have not yet been defined by the Alaska Supreme Court.

The term "state law," used in the fourth exception, obviously refers to any statute requiring records to be kept confidential.¹⁵ The term also refers to any constitutional provision, most notably the right of privacy,¹⁶ which requires confidentiality.¹⁷ Finally, as the Alaska Supreme Court has twice indicated in recent opinions,¹⁸ the reference to "state law" in this statute also includes the common law.¹⁹ The common law on public inspection of government records, as developed in other jurisdictions and acknowledged in Alaska, provides that inspection should be denied when such an inspection would be against the "public interest."²⁰

B. The Deliberative Process Evidentiary Privilege

Alaska Evidence Rule 501 governs evidentiary privileges and provides, in relevant part, as follows:

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to . . . refuse to produce any object or writing . . .²¹

The evidentiary privileges created by statutes and court rules are relatively straightforward. The "deliberative process" privilege,²²

14. *Id.* § 09.25.120 (1983).

15. *See infra* sections III(B)(1), III(B)(2).

16. ALASKA CONST. art. I, § 22.

17. *See infra* section III(B)(3).

18. *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316 (Alaska 1982); *Carter v. Alaska Pub. Employees Ass'n*, 663 P.2d 916 (Alaska 1983).

19. *See infra* section III(B)(4).

20. *Id.*

21. ALASKA R. EVID. 501.

22. *See generally* *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Ethyl Corp. v. EPA*, 478 F.2d 47 (4th Cir. 1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); S. STONE & R. LIEBMAN, *TESTIMONIAL PRIVILEGES* (1983); Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 HARV. L. REV. 1047 (1973); Annotation, *Construction and Application, Under State Law, of Doctrine of "Executive Privilege"*, 10 A.L.R. 4TH 355 (1981).

frequently identified by courts and commentators as the "executive privilege,"²³ however, deserves extended comment. This privilege arises under the separation of powers provisions of the state constitution and, when necessary to protect the public interest, shields from discovery in litigation recommendations and opinions exchanged in the course of governmental decisionmaking.²⁴

Evidentiary privileges are not per se recognizable as exceptions to the records inspection statutes.²⁵ Nevertheless, a record privileged from discovery under the deliberative process privilege probably also would be exempt from public inspection under the common law "public interest" exception to the records inspection statutes.²⁶

III. THE RECORDS INSPECTION STATUTES

As in all other states,²⁷ the right of the public to inspect government records in Alaska is governed by statute. Alaska's records inspection statutes, sections 09.25.110 and 09.25.120, are facially very

23. See, e.g., *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 353 (1979); *Ethyl Corp. v. EPA*, 478 F.2d 47, 51 (4th Cir. 1973); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark* (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Hamilton v. Verdow*, 287 Md. 544, 553-54, 414 A.2d 914, 920 (Md. 1980); Annotation, *Construction and Application, Under State Law, of Doctrine of "Executive Privilege"*, 10 A.L.R. 4TH 355 (1981).

24. See *infra* section IV.

25. See *Playboy Enterprises v. Department of Justice*, 677 F.2d 931, 936 (D.C. Cir. 1982), wherein the court stated:

We reject the argument that because the government's claim of privilege with respect to the Rowe Report had been sustained in discovery proceedings in other cases the District Court ought to have given 'controlling weight' to those determinations [T]he issues in discovery proceedings and the issues in the context of a FOIA action are quite different. That for one reason or another a document may be exempt from discovery does not mean that it will be exempt from a demand under FOIA.

Id. See also *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979) ("If the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the [public records] statute."). Accordingly, ALASKA ADMIN. CODE tit. 6, § 95.010(b) (Apr. 1984), is misleading in stating that records are not subject to inspection if nondisclosure is "authorized by . . . a privilege . . . recognized by the courts."

26. This is because both involve a balancing test that weighs the interest in disclosure against the public interest in nondisclosure. See *infra* sections III(B)(4) and IV. Inasmuch as a party has an identifiable interest in the discovery of documents in litigation and the public has only a general, albeit important, interest in the inspection of government records, if a particular document would be privileged from discovery under the deliberative process privilege, it is likely that the document would also be exempt from disclosure under the public interest exception. *Id.*

27. See, e.g., CAL. GOV'T CODE §§ 6250-6267 (West 1980 & Supp. 1987); ILL. ANN. STAT. ch. 116, paras. 43.4.28, 43.101.103a, 43.113 (Smith-Hurd Supp. 1987); N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1987); PA. STAT. ANN. tit. 65,

broad. They provide that *every* public writing or record in the state is available for inspection by the public *unless* an identifiable exception exists.²⁸ Given their obvious importance, these statutes will be analyzed in detail.

A. Background

1. *Statutory Terms.* Section 09.25.110 contains two terms that are particularly important. The first is, naturally enough, "public records." The second is the term "reasonable rules," referring to the conditions that the government may place upon the exercise of the right to inspect public records. Almost all public records acts contain a similar provision, dictating that inspection is to be permitted at reasonable times or under reasonable conditions.²⁹ Generally speaking, how a state defines "public records" and how it interprets a "reasonable conditions" provision is indicative of how narrowly or broadly the remaining portions of the state's public records act will be interpreted.

Only "public records" or "writings" are subject to inspection under public records acts. Several states have interpreted these terms narrowly so as to disallow the inspection of various documents.³⁰ In

§§ 66.1-4 (Purdon 1959 & Supp. 1987); *see also* other statutes cited in 2 B. BRAVERMAN & F. CHETWYND, INFORMATION LAW 1113-17 app. (1985).

28. *See supra* notes 13-14 and accompanying text.

29. *See* statutes cited in 2 B. BRAVERMAN & F. CHETWYND, *supra* note 27, at 1113-17.

30. *See, e.g., Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952); *Butera v. Commonwealth*, 29 Pa. Commonw. 343, 370 A.2d 1248 (1977). *See generally* Annotation, *What Are "Records" of Agency Which Must Be Made Available Under State Freedom of Information Act*, 27 A.L.R. 4TH 680 (1983).

Under federal law, only "agency records" are available for inspection. The test of what constitutes an "agency record" focuses on both the physical possession of the document and its intended use. In one of the leading cases on this point, the United States Supreme Court ruled that notes of Henry Kissinger's telephone conversations in the possession of the State Department were not "agency records." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980). The Court summarily rejected any claim to notes that had once been in the possession of the State Department but had subsequently been transferred to a private entity. *Id.* at 150. With respect to those notes in the physical possession of the State Department, the Court concluded that the records were of conversations that occurred while Dr. Kissinger worked within the office of the President, an office not covered under the Freedom of Information Act. *Id.* at 156.

Lower federal courts have similarly concluded that mere physical possession is not sufficient to transform a document into an "agency record," and have thus extended the *Kissinger* analysis to focus on the agencies' intended function or use of the document. *See, e.g., Illinois Inst. for Continuing Legal Education v. United States Dep't of Labor*, 545 F. Supp. 1229, 1234-35 (N.D. Ill. 1982). Applying this analysis, a federal court recently ruled that telephone message slips reflecting both business and

Alaska, this possibility has been foreclosed by the legislature, which has defined "public records" in section 09.25.110 to include "the books, records, papers, files, accounts, writings and transactions of all agencies and departments." This listing clearly was intended to establish a broad definition for the term "public record."

The term "public records" has also been addressed by the Alaska Supreme Court and in the state's regulations. In one case, the Alaska Supreme Court noted that if "the records [are] kept by a public entity, they [are] subject to disclosure."³¹ One of the regulations implementing section 09.25.110 similarly defines "records" to include all materials "developed or received under law or in the transaction of official business."³² Although the legislature intended a broad definition of "public records," these statements may nonetheless be too broad. It is conceivable that some materials in the government's possession are not public records. Thus, given an unusual situation, it may be appropriate to question whether the requested materials are public records subject to disclosure under section 09.25.110. Generally, however, almost anything kept by an agency to document a communication, including a draft document, is a "public record."³³

Section 09.25.110 provides that inspection is to be permitted under "reasonable rules." Presumably, this term means at reasonable times and under reasonable conditions. Some courts have used similar provisions to temper their public records acts' mandate of disclosure. For example, in *State v. Public Employees Relations Commission*,³⁴ the Florida Court of Appeals held that the government may postpone public disclosure of its investigatory materials for a "reasonable time" until it has either dismissed the charge as groundless or has determined that there is substantial evidence of a violation of law.³⁵

personal calls, as well as personal appointment calendars created for the personal convenience of a government official, were not "agency records" subject to disclosure under federal law. *Bureau of National Affairs v. United States Dep't of Justice*, 742 F.2d 1484, 1495-96 (D.C. Cir. 1984).

31. *Carter v. Alaska Pub. Employees Ass'n*, 663 P.2d 916, 919 (Alaska 1983).

32. ALASKA ADMIN. CODE tit. 6, § 95.900(4) (Jan. 1983).

33. The records inspection statutes, however, have no bearing on whether or not the agency has a duty to *preserve* the records. That duty must be analyzed separately under the archival statutes. See ALASKA STAT. §§ 40.21.010-150 (1971). The records inspection statutes merely provide that an agency must disclose the public records it has unless the record is exempt from disclosure. If a record has been lawfully destroyed in accordance with an approved records retention schedule, it need not, and indeed cannot, be available for inspection.

34. 341 So. 2d 1000 (Fla. Dist. Ct. App. 1976).

35. *Id.* at 1003. The court stated: "The Public Records Act does not contemplate that the public and interested parties are entitled to dog the investigator's footsteps and peer at his notes as they are written. Nothing short of an explicit statutory imperative should require the Commission's preliminary investigation to be so compromised." *Id.*

The apparent purpose of the provision, however, is to grant some latitude to agencies in how quickly they must respond to a request for inspection and the degree of effort they must expend to identify and produce the records sought for inspection. This interpretation is reflected in the regulations implementing the inspection of public records in Alaska.³⁶ Without such latitude, requests for inspection could become disruptive to the operation of government.

Although the procedural benefits of the "reasonable rules" provision in section 09.25.110 are significant, the provision does not constitute a substantive exception to the disclosure mandate in Alaska.³⁷ For example, although no one has the right under section 09.25.110 to hover over the shoulders of a public official and demand to inspect a document as it rolls off the printer, a request for inspection cannot be denied simply because the document sought is not yet in final form.

2. *Records Inspection Statutes Compared with the Open Meetings Act.* A close relative of the records inspection statutes is the Open Meetings Act,³⁸ which specifies when government meetings must be conducted in public and when closed sessions are permissible. While there is no direct relationship between the two, the Open Meetings Act is closely analogous to the records inspection statutes because both recognize that circumstances exist when full disclosure would be contrary to the public interest. Furthermore, the circumstances in which the legislature has specified that closed meetings are permissible provide guidance as to the kinds of subject matter in documents that probably should be withheld from public inspection under the common law public interest exception. For example, section 44.62.310 specifies that "matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit," may be discussed in an executive or closed session.³⁹ Accordingly, an argument can be made that *documents*, "the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit," are exempt from inspection by the public because disclosure would be contrary to the public interest.

36. See ALASKA ADMIN. CODE tit. 6, §§ 95.070-900 (Jan. 1983).

37. A brief review of the legislative history of Alaska's records inspection statutes, as presented by the Alaska Supreme Court in *City of Kenai v. Kenai Peninsula Newspapers*, also makes it clear that the statute's terms are not to be construed so as to provide loopholes for nondisclosure. In this decision, the court pointed out that Alaska has consistently favored broad access to government records. In the course of deciding that the records inspection laws apply to the inspection of municipal as well as state records, the *Kenai* court highlighted the legislature's intent to create a broad presumption in favor of disclosure. *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1319-25 (Alaska 1982).

38. ALASKA STAT. §§ 44.62.310-.312 (Supp. 1987).

39. *Id.* § 44.62.310(c)(1).

The greater significance of the Open Meetings Act, however, may be its recognition of Alaska's high degree of commitment to open government. When discussing the public's right to inspect records, the Alaska Supreme Court has referred to the legislature's statement of policy in the Open Meetings Act. In *City of Kenai v. Kenai Peninsula Newspapers*,⁴⁰ the Alaska Supreme Court quoted from Alaska Statute section 44.62.312(a): "(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know,"⁴¹ and "(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created."⁴² The Alaska Supreme Court found this policy statement to be indicative of the "strong public interest in [the] disclosure of the affairs of government"⁴³ that must be borne in mind when analyzing public records issues.

B. Exceptions to the Requirement of Public Disclosure

Exceptions to the general requirement of disclosure exist because government cannot operate effectively if the public is given unbridled access to all records. Furthermore, unrestricted access can infringe upon the rights of individuals discussed in the records. Accordingly, exceptions to the mandate of disclosure must and do exist.

Alaska is one of only a few states⁴⁴ that has not enacted a comprehensive public records act setting out a definitive list of exceptions to the general rule of disclosure or expressly recognizing common law exceptions.⁴⁵ Instead, the exceptions to the requirement of disclosure are as follows:

40. 642 P.2d 1316 (Alaska 1982).

41. *Id.* at 1324 (quoting ALASKA STAT. § 44.62.312(a)(4) (Supp. 1987)).

42. *Id.* (quoting ALASKA STAT. § 44.62.312(a)(5) (Supp. 1987)).

43. *Id.* at 1323.

44. ALA. CODE § 36-12-40 (Supp. 1986) ("Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."); ARIZ. REV. STAT. ANN. § 39-121 (1985) ("Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."); IDAHO CODE § 59-1009 (1976) ("The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state."); MO. ANN. STAT. §§ 109.180-190 (Vernon 1966); MONT. CODE ANN. §§ 2-5-101 to -111 (1985); NEV. REV. STAT. §§ 239.010-.080, 378.290-300 (1986); N.J. STAT. ANN. §§ 47:1A-1 to :1A-4 (West 1987); N.M. STAT. ANN. § 14-2-1 (Supp. 1986); N.D. CENT. CODE §§ 44-04-01 to -18 (1978 & Supp. 1987).

45. CAL. GOV'T CODE §§ 6250-6267 (West 1980 & Supp. 1987); COLO. REV. STAT. §§ 24-72-201 to -206 (1974); CONN. GEN. STAT. ANN. §§ 1-19 to 1-21K (West 1969 & Supp. 1987); DEL. CODE ANN. tit. 29, §§ 10001-10005 (1983 & Supp. 1986); FLA. STAT. ANN. §§ 119.01-.14 (West 1982 & Supp. 1987); ILL. ANN. STAT. ch. 116, paras. 201-211 (Smith-Hurd Supp. 1987); IND. CODE ANN. §§ 5-14-3-1 to -10 (Burns

(1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS [Alaska Statutes] 18.50.010-18.50.380; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law.⁴⁶

The first three exceptions listed in section 09.25.120, relating to vital statistics and adoption proceedings, juvenile records, and medical and public health records, are self-explanatory and require no discussion. The fourth exception, however, which exempts "records required to be kept confidential by a federal law or regulation or by state law,"⁴⁷ warrants extensive discussion. It is beyond the scope of this article to analyze applicable federal laws and regulations.⁴⁸ Instead, the following discussion will focus on state laws that prevent the disclosure of certain records. These include express statutory provisions, implied statutory provisions, constitutional provisions, and the common law.⁴⁹

Before turning to these specific exceptions, however, one last matter deserves comment. Section 09.25.120 specifies that all records are

1987); IOWA CODE ANN. §§ 22.1-.12 (West Supp. 1987); KAN. STAT. ANN. §§ 45-201 to -225 (1986); KY. REV. STAT. ANN. §§ 61.870-884 (Baldwin 1985); ME. REV. STAT. ANN. tit. 1, § 408 (1979); MD. STATE GOV'T CODE ANN. §§ 10-611 to -624 (1987); MASS. ANN. LAWS ch. 4, §§ 7, 26 (Law. Co-op. 1987); *id.* ch. 66, § 10; MICH. COMP. LAWS ANN. §§ 15.231-.244 (West 1981); MISS. CODE ANN. §§ 25-61-1 to -17 (1986); NEB. REV. STAT. §§ 84-712 to -712.05 (1986); N.H. REV. STAT. ANN. §§ 91-A:1 to :8 (1986); OR. REV. STAT. §§ 192.410-.500 (1987); PA. STAT. ANN. tit. 65 §§ 66.1 to 66.4 (Purdon 1987); R.I. GEN. LAWS §§ 38-2-1 to -12 (1986); S.C. CODE ANN. §§ 30-4-10 to -90 (1986); TENN. CODE ANN. §§ 10-7-503 to -508 (1986); TEX. CIV. CODE ANN., art. 6252-17a (Vernon Supp. 1987); VT. STAT. ANN. tit. 1, §§ 315-320 (1985); VA. CODE ANN. §§ 2.1-340 to -346.1; WASH. REV. CODE §§ 42.17.250-.940, 42.18.130-.300 (Supp. 1987); W. VA. CODE §§ 29B-1-1 to -6 (1986); WIS. STAT. ANN. §§ 19.25-.39 (West 1986 & Supp. 1986); WYO. STAT. §§ 16-4-201 to -205 (1982).

46. ALASKA STAT. § 09.25.120 (1983).

47. *Id.*

48. It should be noted, however, that a record is "required to be kept confidential by a federal law or regulation," ALASKA STAT. § 09.25.120(4) (1983), only if the federal law or regulation is specifically applicable to the record.

49. Rules promulgated by the Alaska Supreme Court pursuant to article IV, section 15, of the Alaska Constitution may also have the force and effect of law. Thus, for example, Alaska Bar Rule 22(b), which provides that disciplinary and disability proceedings are confidential prior to the initiation of formal proceedings, constitutes an exception to the disclosure requirements of ALASKA STAT. § 09.25.120 (1983).

In contrast, regulations are never "state laws" that can, in and of themselves, authorize an agency to keep materials confidential. A regulation providing for the confidentiality of designated documents is valid only if the requirement of confidentiality is supported by a statute, by the constitution, or by the common law. Furthermore, the regulation must be reasonably necessary to carry out the purpose of the authorizing statute or other state law. ALASKA STAT. § 44.62.030 (1984).

subject to inspection "except . . . records *required* to be kept confidential by . . . law."⁵⁰ This phrase presumably means required to be kept confidential by law *under the particular circumstances* because there are various statutes that authorize, rather than require, confidentiality, and these statutes could not be given effect unless section 09.25.120 were so interpreted.⁵¹

1. *Express Statutory Exceptions.* The exception to the records inspection statute for records required to be kept confidential by "state law" clearly includes statutes that require or authorize nondisclosure of government records. There are more than 100 such statutes.⁵² When a request is made to inspect a document, the confidentiality or disclosure of which appears to be addressed by a statute, the provisions of the statute must be examined. In almost all situations, the statute will be dispositive.

Some statutes expressly require the custodian of the records to perform this type of balancing test when a request for disclosure is made. For example, one statute requires the Alaska Department of Law, as the governmental body responsible for prosecuting criminal offenses, to make the determination as to whether information about suspected arson is disclosable.⁵³ The vast majority of statutes, however, are more facially absolute. Indeed, some statutes are remarkably

50. ALASKA STAT. § 09.25.120(4) (1983) (emphasis added).

51. *See, e.g., id.* § 21.06.130 (1986) (authorizing the director of insurance to withhold certain records from public inspection "for so long as the director considers the withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest"). *See also Id.* § 21.89.050(f) (1984); *id.* § 34.45.290 (Supp. 1987); *id.* § 38.06.060 (1984); *id.* § 42.05.671 (1983).

52. The only practicable means by which to discover these statutes is to gain access to the state's computer network, which contains a data base that includes the text of all statutes. (This database is referred to as "STAIRS.") A search can then be performed for all statutes containing words such as "disclosure," and "confidential." The effort that this requires demonstrates one of the serious disadvantages of the state not having a comprehensive public records act.

53. ALASKA STAT. § 21.89.050 (1984). The statute provides in pertinent part as follows:

An authorized agency shall share with the insurer all relevant information relating to an instance of suspected arson when (1) the Department of Law has determined that release of the information would not jeopardize the success of an ongoing investigation and that there are adequate safeguards to insure the confidentiality of the information

Id. § 21.89.050(f).

Another statute, ALASKA STAT. § 21.06.150 (1984), provides as follows: "The director may withhold from public inspection an examination or investigation report for as long as the director considers the withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest." *Id.* § 21.06.150(e).

detailed in expressing what types of disclosure are prohibited. An example of this is the statute prohibiting the "misuse of public assistance lists and records," which provides as follows:

Except for purposes directly connected with the administration of general assistance, adult public assistance, the day care assistance program authorized under AS [Alaska Statutes] 44.47.250 — 44.47.310, or aid to families with dependent children, and in accordance with the regulations of the department, a person may not solicit, disclose, receive, make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of, a list of or names of, or information concerning, persons applying for or receiving the assistance directly or indirectly derived from the records, papers, files, or communications of the department or subdivisions or agencies of the department, or acquired in the course of the performance of official duties.⁵⁴

The legislative intent to restrict severely the disclosure of this type of information could hardly be clearer. There are other statutes, such as the one relating to parole reports, which also attempt to address every conceivable situation:

(a) Except as provided in (b) of this section, the parole reports listed in AS [Alaska Statutes] 33.16.110, and other information obtained and used by the board under this chapter are confidential and may not be disclosed to anyone other than the board, the sentencing judge, the prosecuting and defense attorneys, the prisoner, the prisoner's attorney, the attorney for the board, the staff of the board, or others granted access to this information under this chapter.

(b) Notwithstanding (a) of this section and AS [Alaska Statutes] 33.16.130(b), in a parole proceeding under AS [Alaska Statutes] 33.16.130 the board may not disclose to the prisoner or the prisoner's attorney

(1) diagnostic opinions that, if made known to the eligible prisoner, could lead to serious disruption of the prisoner's institutional program;

(2) portions of a document that reveal sources of information obtained upon a promise of confidentiality; or

(3) other information that, if disclosed, may result in physical harm to any other person.

(c) When the board withholds information from a prisoner or the prisoner's attorney under (b) of this section, the board shall provide the prisoner with an excised copy of the material or a summary of the material withheld containing as much specificity as the circumstances allow.⁵⁵

In a few instances, a public official may reasonably conclude that the express statutory exception was not intended to govern the situation at hand. In such a situation, that official must then balance the

54. *Id.* § 47.05.030 (1984).

55. *Id.* § 33.16.170 (1986).

interest in disclosure against the interest in nondisclosure under the common law public interest exception.⁵⁶ One example can be derived from the statute specifying that traffic accident reports filed with the Division of Motor Vehicles are "confidential and private."⁵⁷ The statute does not address whether the persons involved in the accident may obtain copies of the report. A plausible interpretation of the statute is that the express confidentiality provision is intended to protect the privacy interests of those involved in the accident, rather than to hinder those persons from ascertaining the contents of the accident report. Thus, the provision might be interpreted as prohibiting only disclosure of the reports to the general public. In that case, it would be appropriate, under the common law public interest exception, to balance the interests of the persons involved in the accident against the government's interest in confidentiality. This interpretation would be consistent with the policy that "exceptions to the disclosure requirements of the public records statute are to be construed narrowly."⁵⁸

2. *Implied Statutory Exceptions.* In rare instances, an examination of an entire statutory scheme may reveal that the legislature did not intend certain records to be made available for public inspection, even though there is no statute expressly requiring or authorizing the confidentiality of the documents. One example of this is information relating to collective bargaining under the Public Employment Relations Act.⁵⁹ There is no statutory provision addressing the confidentiality of various documents relied upon during the collective bargaining process. The entire statutory scheme, however, makes apparent the fact that the legislature did not intend section 09.25.120 to be used by employee organizations to obtain records that would inhibit the state's ability to engage in good faith bargaining.

Implied statutory exceptions to sections 09.25.110 and 09.25.120, however, should not be common. It is altogether too easy to imagine situations in which an agency official, reluctant to disclose a particular

56. See *infra* section III(B)(4).

57. ALASKA STAT. § 28.15.151(f) (1984).

58. Doe v. Alaska Superior Court, 721 P.2d at 622. See *infra* section III(B)(4).

In Grodjek v. Faghani, 198 N.J. Super. 449, 456, 487 A.2d 759, 762 (1985), the court held that a person who was investigated by the government should be able to discover after the investigation who the complainant was. Similarly, in Louisiana *ex rel. Delcuze*, 407 So. 2d 707, 710-11 (La. 1981), the court held that a child's parents were entitled to the reports and records alleging their parental neglect, even though the records were normally considered confidential.

59. ALASKA STAT. §§ 23.40.070-260 (1984).

document, would be tempted to conclude that the legislature "intended" certain records to be kept confidential. Before an implied exception to the public inspection statutes is found, the conclusion must be clearly warranted.⁶⁰

3. *Constitutional Exceptions.* The reference to exceptions required "by state law" includes any constitutional requirement that a document be kept confidential. The most frequently applicable constitutional provision is the right of privacy, which is protected by article I, section 22, of the Alaska Constitution.⁶¹ The relationship between an individual's right of privacy and the public's right to the disclosure of records has twice been addressed by the Alaska Supreme Court.

In *Falcon v. Alaska Public Offices Commission*,⁶² the Alaska Supreme Court discussed the relationship between the right of privacy and the public's interest in the disclosure of certain types of information communicated in the context of a physician-patient relationship.⁶³ The *Falcon* case involved an appeal by a physician from a ruling that, as a member of a school board, he was statutorily required to disclose the names of patients from whom he had received more than a certain amount of income. The physician argued that the statute, which had

60. Once again, recall the admonition of the Alaska Supreme Court in *Doe v. Alaska Superior Court*, 721 P.2d 617, 622 (Alaska 1986), that the interpretation of statutes must be consistent with the policy expressed by the legislature in favor of open government.

61. Another state law premised on the state constitution that requires records to be kept confidential is the "executive privilege" of the governor to fulfill the duties of his office without being subjected to the same degree of scrutiny as the rest of the state government. The term "executive privilege," when used to describe an exception to the records inspection statutes, is unfortunate because it should be reserved for reference to evidentiary privileges that are applicable in litigation. See *infra* section IV.

The governor's executive privilege arises from the separation of powers provisions in the state constitution. In *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975), the Alaska Supreme Court acknowledged the existence of the separation of powers doctrine as follows:

Although the Alaska Constitution does not expressly address itself to the doctrine of separation of powers, we have noted that often what is implied is as much a part of the constitution as what is expressed. The state constitution is divided into a number of separate articles. Since Article III concerns the executive branch, it can fairly be implied that this state does recognize the separation of powers doctrine.

Id. at 950 (citation omitted). See generally *United States v. Nixon*, 418 U.S. 683 (1974).

62. 570 P.2d 469 (Alaska 1977).

63. *Falcon* sought declaratory relief from the provision of the Alaska "conflict of interest" law, which requires candidates for public office to identify persons from whom they received more than \$100 in income during the past calendar year. ALASKA STAT. §§ 39.50.010-200 (1987).

the effect of requiring him to reveal the identities of his patients, violated their constitutional rights of privacy. In response, the court indicated that even when privacy interests are implicated, full public disclosure for valid governmental purposes is not automatically prohibited. Instead, a balancing test must be applied to determine whether the degree of intrusion outweighs the public's interest in disclosure.⁶⁴

The relationship between the right of privacy and full disclosure was also discussed in *Doe v. Alaska Superior Court*.⁶⁵ In *Doe*, the Alaska Supreme Court elaborated on what types of information implicate the right to privacy. The court noted that the "common thread woven into our decisions is that privacy protection extends to the communication of 'private matters,' . . . or, phrased differently, 'sensitive personal information,' . . . or 'a person's more intimate concerns.'"⁶⁶ The court then stated that "[t]his is the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety."⁶⁷ In accordance with these standards, the *Doe* court held that "the right of privacy is not implicated when an individual voluntarily sends an unsolicited letter to a public official commenting on a public issue such as the appointment of a state officer,"⁶⁸ because the letter was intended to influence the official's decision on an issue of public concern.

These decisions indicate that the right to privacy is an important exception to the statutory mandate that the public be allowed to inspect government records. They also indicate, however, that the right to privacy is not per se more important than the public's right to know what the government is doing. Instead, when the right to privacy is implicated, a balancing test must be performed to establish which interest, under the particular circumstances, weighs more heavily.

If a state agency determines that the degree of intrusion that would occur outweighs the public's interest in disclosure, the document must be withheld from inspection. Disclosure of the document under such circumstances would constitute an impermissible violation

64. *Falcon*, 570 P.2d at 476-78. The court ultimately concluded that, in most situations, the public's interest in disclosure would outweigh the patient's rights of privacy, but that the agency should adopt regulations recognizing exceptions to this. *Id.* at 480.

65. 721 P.2d 617 (Alaska 1986).

66. *Id.* at 629 (citations omitted).

67. *Id.* These are all paraphrases of the ultimate standard, eloquently expressed in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), which holds that the right of privacy protects information that is "none of [anyone else's] business." *Id.* at 504. *Ravin* further explained that "[w]hen a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated." *Id.*

68. *Doe*, 721 P.2d at 629.

of the individual's right of privacy. If, on the other hand, an agency determines that the public's interest in disclosure outweighs the individual's right of privacy, the agency should notify the affected individual so that he or she has the opportunity to seek judicial review before release of the record occurs.⁶⁹ Although this process may cause delay in responding to the request for inspection, there are no other adequate means available to protect the privacy interest of the person referred to in the documents. In short, an improper disclosure cannot be undone.

4. *Common Law Exceptions.* A distinct pattern among state courts can be discerned whereby the less specific a state's public records act is the more likely it is that the state court will recognize the authority of the judiciary and the executive to determine that some documents should not be subject to immediate inspection by the public.⁷⁰ Although some courts have achieved this result by defining narrowly the term "public record," or using a stretched interpretation of

69. See 2 ALASKA ADMIN. CODE tit. 2, § 50.100 (Apr. 1986) (adopted by the Alaska Public Offices Commission in response to the court's decision in *Falcon*). This regulation outlines the procedures to be followed when a person claims that information required to be disclosed under the public interest laws is exempt from such disclosure under the right of privacy.

70. Compare *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981) ("It would be helpful for the legislative department to provide the limitations by statute as some states have done. Absent legislative action, however, the judiciary must apply the rule of reason.") (citation omitted); *Church of Scientology v. City of Phoenix Police Dep't*, 122 Ariz. 338, 339, 594 P.2d 1034, 1035 (1979) (holding that courts generally should determine if release of certain information would have "an important and harmful effect upon the official duties of the official or agency") (citation omitted); *Nero v. Hyland*, 76 N.J. 213, 221, 386 A.2d 846, 851 (1978); *New Mexico ex rel. Newsom v. Alarid*, 90 N.M. 790, 797, 568 P.2d 1236, 1243 (1977) ("It would be helpful to the courts for the Legislature to delineate what records are subject to public inspection and those that should be kept confidential in the public interest. Until the Legislature gives us direction in this regard, the courts will have to apply the 'rule of reason' to each claim for public inspection as they arise."), with *State ex rel. Div. of Indus. Safety v. Superior Court*, 43 Cal. App. 3d 778, 783, 117 Cal. Rptr. 726 (1974) (emphasis placed on the "specific exceptions to the general policy that are enumerated in the [California Public Records] Act"); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 425 (Fla. 1979) (if common law privileges are to be included as exemptions, legislature must amend statute); *Cleveland Newspapers v. Bradley County Memorial Hosp. Bd. of Directors*, 621 S.W. 2d 763, 765 (Tenn. Ct. App. 1981) ("only the legislature can declare certain records to be confidential").

One exception to this pattern is Idaho. The operative provision of its public records act merely states: "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." IDAHO CODE § 9-301 (1979) (emphasis added). There is no listing of exceptions in the act itself. Instead, various provisions are scattered throughout the statutes relating to confidentiality. In *Dalton v. Idaho Dairy Products Comm'n*, 684 P.2d 983 (Idaho 1984), the Supreme Court of Idaho interpreted this statute and held that it was not at

“reasonable conditions,”⁷¹ the sounder method is to recognize the common law “public interest” exception to the records inspection statutes.⁷² In accordance with a well-established line of authority that has been recognized twice with approval by the Alaska Supreme Court,⁷³ it seems clear that the phrase “except as provided by . . . state law,” used in section 09.25.120, also includes the common law “public interest” exception to the general requirement of disclosure.

After examining the legislative history of sections 09.25.110 and 09.25.120, the Alaska Supreme Court in *City of Kenai v. Kenai Peninsula Newspapers*⁷⁴ concluded that the history “demonstrates that the coverage of the common law [on public records] has consistently been accepted by the legislators of this state.”⁷⁵ Following an examination of the common law of other jurisdictions, the court then indicated that it would recognize an exception to the requirement of disclosure whenever a demonstrable need for confidentiality outweighs the public interest in disclosure.⁷⁶

The essence of this “public interest” exception is that in some situations the need for confidentiality outweighs the public’s right to know what its government is doing. Thus, to determine whether documents are exempt under this exception, a balancing test must always be performed. In discussing this balancing test, the Alaska Supreme Court quoted with approval the standard enunciated by the Oregon Supreme Court in *MacEwan v. Holm*.⁷⁷ The *MacEwan* court stated:

In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen’s proprietary interest in public property,

liberty to recognize the common law “public interest” exception; instead, only statutory exceptions can be recognized. *Id.* at 988.

71. See *supra* notes 30-35 and accompanying text.

72. See, e.g., *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981); *New Mexico ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977).

In *Stone*, the court stated:

Recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure. Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference.

404 So. 2d at 681 (citation omitted).

73. See *infra* notes 74-81 and accompanying text.

74. 642 P.2d 1316 (Alaska 1982).

75. *Id.* at 1319.

76. *Id.* at 1323-24.

77. 226 Or. 27, 359 P.2d 413 (1961).

against the interest of the public in having the business of government carried on efficiently and without undue interference. The initial decision as to whether inspection will be permitted must, of course, rest with the custodian of the records. And since the justification for a refusal to permit inspection will depend upon the circumstances of the particular case, we can offer no specific guide for that administrative decision

In balancing the interest referred to above, the scales must reflect the fundamental right of a citizen to have access to the public records and the incidental right of the agency to be free from unreasonable interference. As the required burden of proof in this type of case indicates, however, the citizen's interest is the predominant one. In short, the burden is cast upon the agency to explain why the requested records should not be furnished. Ultimately, of course, the courts decide whether the agency explanation is reasonable and weigh the respective benefits of non-disclosure and access.⁷⁸

With respect to this balancing test, the Alaska Supreme Court then stated: "In striking a proper balance[,] the custodian of the records in the first instance, and the court in the next, should bear in mind that the legislature has expressed a bias in favor of public disclosure. Doubtful cases should be resolved by permitting public inspection."⁷⁹ In *Carter v. Alaska Public Employees Association*,⁸⁰ in which a university appealed from a judgment ordering it to provide a union with a list of employees, the Alaska Supreme Court again briefly addressed this issue and once more discussed approvingly the *MacEwan* balancing process. The *Carter* court noted that the "balancing process that precedes disclosure would protect information . . . on a showing that disclosure would ultimately harm the public welfare."⁸¹

The *MacEwan* court correctly noted the impossibility of stating definitively what documents should not be disclosed as a matter of public interest.⁸² Nonetheless, a few examples can be identified: pending investigations,⁸³ information received in confidence by a public officer,⁸⁴ drafts and working notes of agencies acting in their quasi-

78. *City of Kenai*, 642 P.2d at 1323 (quoting *MacEwan v. Holm*, 226 Or. at 45-46, 359 P.2d at 421-22 (citations omitted)).

79. *Id.*

80. 663 P.2d 916 (Alaska 1983).

81. *Id.* at 921 n.15.

82. *MacEwan*, 26 Or. at 46-47, 359 P.2d at 421.

83. *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952).

84. *Pantos v. City & County of San Francisco*, 151 Cal. App. 3d 258, 198 Cal. Rptr. 489 (1984). As the court noted in *New Mexico ex rel. Newsome v. Alarid*, 90 N.M. 790, 798, 568 P.2d 1236, 1244 (1977), however: "The promise of confidentiality standing alone would not suffice to preclude disclosure. The promise would have to coincide with reasonable justification, based on public policy, for refusing to release the records"

judicial capacity,⁸⁵ and confidential attorney-client communications.⁸⁶ Once again, however, these materials are not automatically exempt from disclosure. Instead, a balancing test must be applied to determine whether withholding the materials from public inspection is appropriate.⁸⁷ Furthermore, the public interest exception cannot be used to ignore a statutory mandate of disclosure or nondisclosure. Any statute requiring public records to be kept confidential or requiring public records to be made available for inspection supersedes a common law analysis.⁸⁸

C. Some Practical Considerations Relating to Confidential Documents

The determination that a document is confidential and cannot be made available for inspection under section 09.25.120 may raise as many issues as it resolves. These issues include the point in time at which documents cease to be confidential, whether an agency can disclose confidential documents to other government agencies, and the procedures that should be followed by an agency if it determines that a requested document contains confidential information.

1. *When Documents Cease to be Confidential.* One of the most unsettled questions in the area of public records is whether documents that are exempt from disclosure at one point in time become subject to inspection at a later date. If confidentiality was claimed pursuant to a statute requiring the material to be kept confidential, the material is presumably confidential for all time.⁸⁹ Similarly, if confidentiality

85. *United States v. Morgan*, 313 U.S. 409 (1941) ("The integrity of the administrative process must be . . . respected.").

86. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968). *But see* *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) (in which the court held that the judicially created privileges for attorney-client communications and "work product" do not constitute exceptions to the state's records inspection statutes).

87. Special comment may be appropriate regarding draft documents. The disclosure of the vast majority of draft documents prepared by public employees will not ultimately harm the public welfare. There may, however, be very unusual circumstances in which the disclosure of a draft document would cause substantial and adverse effects to the public welfare. In these situations, if the harm associated with disclosure outweighs the public's interest in knowing what its government is doing, the request for inspection should be denied under the public interest exception.

88. ALASKA STAT. § 01.10.010 (1982).

89. *See* *Hiss v. Department of Justice*, 441 F. Supp. 69 (S.D.N.Y. 1977) (even though grand jury proceeding occurred more than 30 years ago, record of proceedings remains confidential). Several states have statutes specifying a period of time after which all confidential records become subject to disclosure. *See, e.g.*, IND. CODE ANN. § 5-14-3-4(e) (Burns 1987) (75 years, with the exception of adoption records); NEV. REV. STAT. ANN. § 378.300 (Michie 1986) (50 years). In Alaska, the only such

arose under the right of privacy, the records cannot be disclosed to the public without the consent of the affected individual for as long as the right of privacy continues to be implicated.⁹⁰ If, however, confidentiality were claimed pursuant to a statute authorizing nondisclosure, or pursuant to the common law "public interest" exception, the records probably do become disclosable at some time. The answer to the question of when such documents become available lies in the same balancing test that was used to determine confidentiality in the first instance. Specifically, with the passage of time, has the public's interest in knowing the contents of the records become greater than the government's interest in nondisclosure? If so, the document should be made available for inspection.

2. *Disclosure of Confidential Records to Other Agencies.* The proper analysis to be used in determining whether an agency may share confidential information with other agencies depends upon the law providing for such confidentiality.⁹¹ The common law "public interest" exception to the records inspection statutes requires agencies to deny a request for inspection when disclosure of the records would ultimately harm the public welfare. Necessarily, then, if the exception is found applicable, the records should not be released to the public. On the other hand, it also follows that government agencies have the authority to disclose these records to other agencies when such disclosure is in the public's interest. An example of this is the records of the telemetry radio frequencies of animals collared by the Alaska Department of Fish and Game. Disclosure of these records to the general public is against the public interest because of the substantial possibility that the information will be used to hunt the animals. Disclosure to federal agencies with which the department cooperates on various tracking projects, however, is permissible because this sharing of information would assist the department in its research and management efforts.

When an agency concludes that disclosure is prohibited by the constitutional right of privacy, that agency cannot release the records

statute is ALASKA STAT. § 18.50.310 (1986), which specifies that birth records become subject to inspection under ALASKA STAT. § 09.25.120 after 100 years, and death, marriage, divorce, dissolution of marriage and annulment records become subject to inspection after 50 years.

90. See *Church of Scientology v. City of Phoenix Police Dep't*, 122 Ariz. 338, 340, 594 P.2d 1034, 1036 (1979) (records over 20 years old available for inspection because, with passage of time, disclosure would not impair any investigation or invade the privacy rights of persons discussed).

91. Obviously, when the source of the law providing for confidentiality is a statute, the terms of the statute govern the release of the information both to the public and to other agencies.

to the public without the permission of the affected individual.⁹² Under certain circumstances, however, agencies may share this type of confidential information with each other.⁹³ The most important considerations are whether this sharing of information will be helpful in achieving an important public purpose and whether confidentiality can be maintained by the receiving agency. The determination as to whether one agency may share with another information that implicates a person's right of privacy must be made individually in each case, taking into account the particular circumstances.

3. *Procedural Issues.* When a member of the public requests to see records under section 09.25.120, the agency having custody of the documents should follow the procedures outlined in the regulations implementing the records inspection statutes.⁹⁴ An agency official must review the documents to determine whether they contain confidential material. If the file contains both disclosable information and confidential material, the confidential information should be deleted, and the remaining information released.⁹⁵

The regulations do not address how nondisclosable information should be deleted. When only a portion of a document is determined not to be disclosable, the obvious practical solution is for that page to be photocopied with the confidential information covered. If, however, the entire document is nondisclosable, then the document should be removed from the file while the file is being inspected. Under either circumstance, however, the person seeking disclosure should be informed when material is being withheld and be given an explanation of the reason for the withholding. Thus, if a member of the public requests in writing to see a file that contains nondisclosable information, a written statement should be prepared stating something to the effect that, "under applicable law, certain information has been deleted from the file because its disclosure (at this time) would (violate a person's right of privacy) (violate a specified statute) (be against the public interest insofar as . . .)." The explanation, moreover, should be as detailed as possible.⁹⁶

92. See *Lopez v. Fitzgerald*, 76 Ill. 2d 107, 121-22, 390 N.E.2d 835, 841 (Ill. 1979) (owner of property must be given notice and opportunity to be heard before building inspection records released).

93. See *Hinderliter v. Humphries*, 224 Va. 439, 449, 297 S.E.2d 684, 689 (1982) (not improper for records to have been disclosed by police chief to county executive and then by county executive to county board of supervisors).

94. ALASKA ADMIN. CODE tit. 6, § 95.010(d) (Apr. 1984).

95. *Id.* § 95.080 (Jan. 1983).

96. An agency's final decision to deny inspection of public records or writings is reviewable by the courts, as is any final administrative decision. This would be accomplished by an administrative appeal of the determination not to allow inspection. See

D. Summary

Although public inspection of government records in Alaska is the standard, the applicable statutes are not clear in identifying the exceptions to this rule of disclosure. After listing exceptions for vital statistics and adoption proceedings records, records pertaining to juveniles, and medical and related public health records, section 09.25.120 almost blithely provides another exception for "records required to be kept confidential by a federal law or regulation or by state law." The exception for records required to be kept confidential by state law presents several complex issues. There are more than 100 scattered statutes that require or authorize designated records to be kept confidential. In addition, there are a few implied statutory exceptions to the requirement of disclosure. Furthermore, the constitutional right of privacy may prohibit the disclosure of various documents. Finally, the common law public interest exception prohibits the disclosure of records when a demonstrable need for confidentiality outweighs the public interest in disclosure.

These numerous exceptions, however, do not render the records inspection statutes meaningless. In fact, the vast majority of documents are available for inspection. It is only when a specific exception can be identified that a document may be withheld from the public. Moreover, many statutes, as well as the right of privacy and the common law public interest exception, require a balancing test to be performed which may lead to the conclusion that the document should be disclosed.

IV. THE DELIBERATIVE PROCESS PRIVILEGE

Evidentiary privileges are quite distinct from exceptions to the records inspection statutes. Whether a government record is privileged from discovery in litigation is governed in the first instance by the Alaska Rules of Evidence. Alaska Evidence Rule 501 provides as follows:

Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to . . . refuse to produce any object or writing . . .⁹⁷

ALASKA ADMIN. CODE tit. 6, § 95.120 (Jan. 1983); ALASKA STAT. § 44.62.560 (1984); ALASKA APP. R. 601-611.

97. ALASKA R. EVID. 501. This means that privileges recognized at common law are not applicable in this state unless they have been adopted in the Alaska Rules of Evidence or by statute or they are required to be recognized under the state or federal constitution. The common law public interest exception to the records inspection statutes has not been recognized in the Alaska Rules of Evidence, or in any statute,

The privileges for documents recognized in the Alaska Rules of Evidence generally speak for themselves.⁹⁸ Whether a statute creates an evidentiary privilege for a government record depends upon its terms.⁹⁹ Furthermore, there are few constitutionally based privileges that can affect the discovery of government records. Thus, there is little need to analyze the vast majority of privileges that may be invoked to resist discovery.¹⁰⁰ The constitutionally based deliberative process privilege, however, is worthy of extensive review, given its complicated nature and recent recognition in Alaska.

The executive or, better termed, deliberative process privilege¹⁰¹ can be claimed only by the government in limited circumstances.¹⁰² Broadly speaking, the privilege protects from discovery "predecisional" documents prepared by members of the executive branch that reflect the decisionmaking or deliberative process of the government.¹⁰³ The applicability of the privilege arises, however, not from the nature of the documents as drafts, but instead from other additional circumstances surrounding the situation that make nondisclosure necessary.¹⁰⁴ The purpose of the deliberative process privilege is to encourage candor and the free flow of information in the process of

and it is not constitutionally based. Accordingly, it cannot be claimed as a privilege to shield government records from discovery in litigation.

98. See, e.g., ALASKA R. EVID. 502 ("Required Reports Privileged by Statute"); ALASKA R. EVID. 503 ("Lawyer-Client Privilege"); ALASKA R. EVID. 509 ("Identity of Informer").

99. Various statutes specifically indicate that certain materials are privileged. See, e.g., ALASKA STAT. § 21.27.120 (1984) (information contained in a notice of termination of an appointment by an insurer is "privileged and is not admissible as evidence in an action or proceeding against the insurer"); *id.* § 13.26.109 (1985) (statements of a ward or respondent made in the course of evaluations and examinations under ALASKA STAT. § 13.26.090-.155 (1985 & Supp. 1987) are "privileged, confidential, and not admissible" without the ward's or respondent's consent except in proceedings under these statutory sections).

100. A good source of general information on evidentiary privileges is S. STONE & R. LIEBMAN, *supra* note 22.

101. Most jurisdictions have labeled this privilege the "executive privilege" for deliberative process documents. See *supra* note 23. This term is confusing, however, because over the years it has been used to refer to many different things, including privilege from testifying, *Elson v. Bowen*, 83 Nev. 515, 520, 436 P.2d 12, 15 (1967), and privilege from suit for defamation, *Barr v. Matteo*, 360 U.S. 564 (1959); *Sheridan v. Crisona*, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (N.Y. App. 1964). Furthermore, the governor's "executive privilege," as the chief executive of the state, is broader than the privilege for other members of the executive. For example, many of the governor's notes are privileged even if they are not "deliberative." *Hamilton v. Verdow*, 287 Md. 549, 563-66, 414 A.2d 914, 924-25 (1980). Accordingly, in this article the term "deliberative process privilege" is used whenever possible, reserving the term "executive privilege" for discussions of privileges special to the governor.

102. See S. STONE & R. LIEBMAN, *supra* note 22, at 497-99.

103. *Id.* at 506.

104. *Id.*

shaping policies and making decisions.¹⁰⁵ Nonetheless, the privilege is qualified, rather than absolute. It therefore cannot be claimed unless the state's need for confidentiality exceeds the litigant's need to know the contents of the documents.¹⁰⁶ Accordingly, the proper balancing test must be performed before the privilege is claimed.¹⁰⁷

Over the years, the deliberative process privilege has received considerable attention from federal and many state courts. In Alaska, however, it has just recently received recognition.¹⁰⁸ In light of Alaska's avowed commitment to open government,¹⁰⁹ Alaska courts probably will take a narrower view of the privilege than have some other courts.¹¹⁰ Before discussing the limitations that Alaska courts are likely to place on the privilege, however, an examination of the privilege as it has been recognized by other jurisdictions is appropriate.

A. Recognition by Federal Courts

For decades, federal courts have recognized the deliberative process privilege as a common law evidentiary privilege.¹¹¹ Currently, the privilege is addressed most frequently in the context of whether the documents being sought are exempt from disclosure under the provisions of the Freedom of Information Act,¹¹² one section of which provides an exemption from disclosure for an "inter-agency or intra-agency memorandum which would not be available *by law* to a party."¹¹³

105. *Id.* at 508-09.

106. *Id.* at 507-08.

107. *Id.* at 508.

108. *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska 1986).

109. *See* ALASKA STAT. §§ 44.62.310-.312 (Supp. 1987); *Doe*, 721 P.2d at 622.

110. *See infra* section IV(D).

111. *See* *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

Because federal courts recognize common law evidentiary privileges (unlike Alaska and some other states), they have not had much occasion to focus on whether the deliberative process privilege is constitutionally based. The United States Supreme Court, however, has specifically ruled that the President's *executive privilege* is "inextricably rooted in the separation of powers under the [Federal] Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

112. 5 U.S.C. § 552 (1982).

113. *Id.* § 552(b)(5) (emphasis added). This phrase has been interpreted by the federal courts as creating an exception for documents that would be privileged from discovery in litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 26 (1983); *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 359 (1979).

The rationale for the deliberative process privilege, however, was discussed more generally in *Kaiser Aluminum & Chemical Corp. v. United States*¹¹⁴ as follows:

Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

There is public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.¹¹⁵

The United States Supreme Court has also commented on the privilege and has emphasized that documents that are covered by the privilege remain protected even after a final decision is reached in the matter.¹¹⁶ The rationale for this conclusion is that “disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency.”¹¹⁷

Commentators Stone and Liebman capture the essence of this privilege, as recognized by the federal courts, as follows:

The privilege belongs to the government, rather than to individual officeholders

The primary rationale for the privilege for intragovernmental opinions is that effective and efficient governmental decision making depends on the free and uninhibited flow of ideas, and that candor will be stifled if officials know that their advice may be revealed to outsiders. A subsidiary rationale, derived from the constitutional doctrine of separation of powers, is that the judiciary is not authorized to probe the mental processes of an executive or administrative officer. Thus, a document is protected if its disclosure would reveal “the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others.” It follows from this second rationale that as “a general rule, the lower the level of abstraction in the writing, the less the need for the privilege.” Of course, documents compiled by lower officials are more likely to be factual in nature and compiled prior to the start of any policy oriented deliberative process. Hence, such documents are less likely to require protection under either of the two rationales underlying the privilege.

The ultimate purpose of the privilege is “to prevent injury to the quality of agency decisions.” Its particular purposes are (1) to

114. 157 F. Supp. 939 (Ct. Cl. 1958).

115. *Id.* at 945-46 (footnote omitted).

116. *Federal Open Mkt. Comm.*, 443 U.S. at 360.

117. *Id.*

encourage open, frank discussions on policy matters between subordinates and their superiors by assuaging fear of public ridicule or criticism; (2) to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and (3) to protect against confusing the issues and misleading the public by disclosure of reasons that were not in fact the actual reasons for the agency's actions. . . .

The paradigm of a document clearly within the scope of the privilege would be a memorandum containing an exhaustive examination of alternatives in a particular policy area prepared for a high agency official at the final stages of an agency's deliberations. The scope of the privilege is not so narrowly confined, however. It has been held to extend to "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinion of the writer rather than the policy of the agency."¹¹⁸

B. Recognition by State Courts

Several state courts have recognized the deliberative process privilege as an evidentiary privilege. Probably the first state to discuss fully the deliberative process privilege was New Jersey. In *Nero v. Hyland*,¹¹⁹ the New Jersey Supreme Court held that the privilege applies to information gathered at the request of the governor concerning a potential appointee, who wanted to see the file following the governor's decision not to appoint him.¹²⁰ The court, which held that the privilege is qualified and that a balancing test must be used, concluded that the need for effective pre-appointment screening was more important than the possibility that the unappointed person had been unjustly censured.¹²¹ The court noted that confidentiality would not only protect the sources who supplied information, but also enhance the effectiveness of the investigatory procedures.¹²² Discussing the privilege in general, the court stated:

A vital public interest is clearly involved in the effectiveness of the decision-making and investigatory duties of the executive. . . . A qualified privilege for communications relating to the executive function promotes the effective discharge of these constitutional duties while ensuring that, in appropriate circumstances, disclosure of the privileged material will be forthcoming.¹²³

118. S. STONE & R. LIEBMAN, *supra* note 22, at 508-10 (footnotes omitted).

119. 76 N.J. 213, 386 A.2d 846 (1978).

120. *Id.* at 227, 386 A.2d at 853.

121. *Id.* at 226, 386 A.2d at 853.

122. *Id.* at 225, 386 A.2d at 853.

123. *Id.* at 226, 386 A.2d at 853 (citations omitted).

Without addressing the issue, the New Jersey court simply assumed that the privilege extends to a private individual's communications with members of the executive branch.¹²⁴ Finally, the *Nero* court also noted that the statement made by the governor at a press conference that the appointment was not recommended because of information obtained as a result of the investigation was not a waiver of the privilege, nor did it justify release of the material.¹²⁵

Another state that has judicially recognized the deliberative process privilege is Maryland. In *Hamilton v. Verdow*,¹²⁶ the Maryland Court of Appeals equated the governor to the President of the United States and concluded that the governor has similar privileges under the state constitution.¹²⁷ The court cited *United States v. Aaron Burr*,¹²⁸ authored by Chief Justice Marshall, as the beginning of the deliberative process privilege. The Maryland court concluded that the privilege arises both under the common law and the state constitution and is a part of the law of the state under its constitutional separation of powers provisions.¹²⁹

Another decision, that of the New Mexico Supreme Court in *New Mexico ex rel. Attorney General v. First Judicial District Court*,¹³⁰ is particularly instructive because New Mexico has adopted the same rule on evidentiary privileges as Alaska. In New Mexico, as in Alaska, a privilege that is not set out in the evidence code or in a statute will not be recognized unless such recognition is required by the state or federal Constitution.¹³¹

The dispute before the New Mexico Supreme Court arose over the attempts by several litigants to discover an investigatory file prepared by the attorney general's office at the request of the governor, on the cause of a riot at the state penitentiary. Using a separation of powers analysis, the court held that in order to safeguard the decisionmaking process of the government it was required to recognize the deliberative process privilege under the state constitution.¹³² The court then concluded that the attorney general is a member of the executive department, and as such has the right to claim the privilege. This conclusion reflects the court's belief that the privilege extends to other high-ranking members of the executive department, and not just

124. *See id.* at 225-26, 386 A.2d at 852-53.

125. *Id.* at 227, 386 A.2d at 853.

126. 287 Md. 544, 414 A.2d 914 (1980).

127. *Id.* at 556, 414 A.2d at 921.

128. 25 Fed. Cas. 187 (C.C. Va. 1807).

129. 287 Md. at 562, 414 A.2d at 924.

130. 96 N.M. 254, 629 P.2d 330 (1981).

131. *Id.* at 257, 629 P.2d at 333.

132. *Id.* at 257-58, 629 P.2d at 333-34.

the governor.¹³³ The court emphasized, however, that the privilege is not absolute and requires a balancing of interests.¹³⁴

Surprisingly, the court in *New Mexico ex rel. Attorney General* held that the privilege does not extend to communications between the attorney general and persons who are not members of the executive branch.¹³⁵ The court concluded that these communications were protected only by the common law "public interest" privilege, which could not be recognized because of the rule in New Mexico's evidence code that common law privileges are inapplicable in the state.¹³⁶ This holding has been criticized by one commentator:

This restrictive definition of the scope of executive privilege is not supported by case law or commentators. It is generally understood that the privilege extends to communications from without the executive branch as well as to communications within the executive branch itself. Thus, the New Mexico court should have applied the doctrine of executive privilege here.¹³⁷

C. General Limitations on the Privilege

Significant limitations on the privilege have been noted by the United States Supreme Court. The Court has emphasized that neither an agency's final decision, nor documents that express policy determinations and interpretations that have already been adopted by the agency, are protected.¹³⁸ Similarly, instructions to staff members that affect the public, or a single member of the public, are not protected.¹³⁹

At least as importantly, factual information is not protected from disclosure, even though such information is part of a "deliberative" document.¹⁴⁰ As an exception to this, however, factual information may be kept confidential if it is inextricably linked to policymaking processes.¹⁴¹

133. *Id.* at 258, 629 P.2d at 334. *Cf.* *Morss v. Forbes*, 24 N.J. 341, 132 A.2d 1 (1957) (county prosecutor not so directly under influence of governor as to automatically qualify him as a member of executive for purpose of privilege).

134. 96 N.M. at 258, 629 P.2d at 334.

135. *Id.* at 259, 629 P.2d at 335.

136. *Id.* at 260, 629 P.2d at 336.

137. Comment, *Public Interest Privilege: From Crown Privilege to FOIA*, 23 ARIZ. L. REV. 1131, 1141 (1981) (footnotes omitted).

138. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975).

139. *Id.*

140. See *McClelland v. Andrus*, 606 F.2d 1278, 1287 (D.C. Cir. 1979); *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*, 508 F.2d 945, 948 (4th Cir. 1974); *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577, 581 (E.D.N.Y. 1979).

141. See generally S. STONE & R. LIEBMAN, *supra* note 22, at 506-08.

D. Application in Alaska

When adopting the Rules of Evidence, the Alaska Supreme Court rejected a proposal to include the common law "official information" privilege, which basically would have protected the same types of documents that are covered in other jurisdictions by the deliberative process privilege.¹⁴² The commentary to the rule indicates that the rationale for the privilege was "not convincing."¹⁴³ This commentary specifically noted, however, that the rules "do not attempt to decide whether the doctrine of separation of powers implies a constitutionally based executive privilege."¹⁴⁴ That question has subsequently been answered: "[I]t is generally acknowledged that some form of 'executive privilege' is a necessary concomitant to executive power. Such disagreement as does exist among the various authorities relates to the extent of the privilege and to the question of who decides when the privilege is being properly invoked."¹⁴⁵

In *Doe v. Alaska Superior Court*,¹⁴⁶ the Alaska Supreme Court held that the governor has a qualified "executive privilege," based on the separation of powers provisions of the state constitution, to refuse to disclose in litigation certain internal government communications that reveal his deliberative and mental processes. Although this decision is obviously significant, it is of limited usefulness in most situations likely to arise because of its blending of the executive and deliberative process privileges. In short, for all of the issues it addresses, it leaves as many unresolved.

The underlying facts of the case were as follows. In 1981, a vacancy on the State Medical Board arose, which Governor Hammond was to fill by appointment. At some point, his press secretary announced Dr. Carolyn Brown's appointment to the position. In response to this announcement, Alaska-Right-To-Life, Inc. published an article in its "hot line," urging readers to protest this appointment because of Brown's perceived pro-abortion stance. The Governor received sixty-five letters and telegrams, some of which expressed opposition to Brown's appointment. Thereafter, the Governor apologized to Brown for the "erroneous announcement" of her appointment, stating that he would be appointing a person recommended by the State Medical Association. Brown sued Alaska-Right-To-Life for

142. ALASKA R. EVID. commentary at 107.

143. *Id.*

144. *Id.* at 109-10.

145. Annotation, *Construction and Application, under State Law, of Doctrine of "Executive Privilege,"* 10 A.L.R. 4TH 355, 357 (1981).

146. 721 P.2d 617 (Alaska 1986).

defamation. In the course of discovery, she sought production of Governor Hammond's file. Both the state and the defendant objected. After the superior court ordered production, the order was challenged in a petition for review filed with the Alaska Supreme Court.¹⁴⁷

Relying on many of the authorities previously discussed, the supreme court recognized a privilege for the Governor's records, which would protect his deliberative mental processes.¹⁴⁸ The court held, however, that "[i]n each case a court must balance the government's interest in confidentiality against the need for disclosure to insure the effective functioning of the judicial system."¹⁴⁹ Applying this balancing test, the court concluded that the "internal communications" contained in Governor Hammond's file were privileged.¹⁵⁰ It concluded, however, that unsolicited letters from members of the public were not.¹⁵¹ The court noted that "[w]hen citizen letter-writers 'go public' by writing to a government official concerning a public issue, they lose their expectation of confidentiality, as do the government officials who write in response."¹⁵²

The court then addressed important procedural aspects of claiming the privilege:

It is well established that when a formal, specific claim of executive privilege is asserted, a presumptive privilege attaches However, the claim of privilege must satisfy strict procedural requirements In particular, the government must specifically identify and describe the documents sought to be protected and explain when they fall within the scope of the executive privilege. Since a court usually must rely on an affidavit of the responsible department head for information necessary to determine whether to recognize the privilege, the affidavit should be based on personal examination of the documents by the affiant official The party seeking discovery then must make a sufficient showing that the need for production outweighs the interest in confidentiality Upon such a showing, the trial court should review the documents *in camera* before deciding whether to order production. In the absence of such a showing, a claim of privilege should be honored without requiring an *in camera* inspection.¹⁵³

The court further noted that the state must "specifically identify the memoranda or papers, [and] indicate whether the documents [contain] internal opinions or recommendations."¹⁵⁴ It is not sufficient for the

147. *Id.* at 619-20.

148. *Id.* at 622-26.

149. *Id.* at 623 (footnote omitted).

150. *Id.* at 624, 625.

151. *Id.* at 625.

152. *Id.*

153. *Id.* at 626 (citations omitted).

154. *Id.*

state to focus on the file "as a whole" and assert a privilege "as to the entire contents."¹⁵⁵

Although various questions were left unanswered in *Doe*, the court did clearly indicate that it will not embrace the broadest possible scope of the privilege. It stated that "the policy embodied in the public records statute of promoting citizen access to government documents argues for limiting the scope of the executive privilege doctrine."¹⁵⁶

One specific question not decided in *Doe* is whether a letter or report directly solicited by a public official, accompanied by an implied or express promise of confidentiality, is protected from disclosure.¹⁵⁷ The court acknowledged, however, that other jurisdictions have recognized the applicability of the privilege in such circumstances.¹⁵⁸ As previously indicated, this is consistent with the rationale of the privilege.¹⁵⁹

The most significant question left unanswered in *Doe*, however, is whether the court will recognize the deliberative process privilege for lower-ranking state officials, or will instead limit the privilege to the governor and perhaps the cabinet. There are indications in the *Doe* opinion that on this issue the court is willing to accept the broader deliberative process privilege. For example, the court refers to the "deliberative and mental processes of *decision-makers*."¹⁶⁰ It also described the rationale for the privilege as being "the need to encourage candid opinions and debate among *government officials* during the decision-making process."¹⁶¹ These references to "decisionmakers" and "government officials" suggest that the court recognizes that there may be various situations in which the privilege should be recognized for lower-ranking members of the executive, as well as for the governor and the cabinet.

The easiest extension of the privilege to predict is that it will be recognized to protect from public disclosure the drafts and working notes of an agency acting in a quasi-judicial capacity. Although there is no explicit authority protecting *courts'* drafts of decisions and deliberation notes, these materials are recognized as privileged. In *United*

155. *Id.*

156. *Id.* at 625.

157. *Id.* at 630 n.19.

158. *Id.* at 625 (citing *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980) (solicited investigative report privileged); *New Mexico ex rel. Attorney General v. First Judicial District Court*, 96 N.M. 254, 629 P.2d 330 (1981) (statements of prison guards and inmates given on promise of confidentiality privileged); *Hafermehl v. University of Washington*, 29 Wash. App. 366, 628 P.2d 846 (1981) (letter from co-faculty not discoverable by professor denied promotion)).

159. See *supra* note 137 and accompanying text.

160. 721 P.2d at 622-23 (emphasis added).

161. *Id.* at 625 (emphasis added).

States v. Morgan,¹⁶² the United States Supreme Court noted: "Just as a judge cannot be subjected to such scrutiny, . . . so the integrity of the administrative process must be equally respected."¹⁶³ This analogy to the privilege that unquestionably exists for the judiciary should be a persuasive argument in favor of recognizing the deliberative process privilege for the executive branch when it is functioning in a quasi-judicial capacity.¹⁶⁴

It has been suggested that the burden of establishing the privilege should be placed on the government when the information does not "directly affect the functioning of the executive at the highest level."¹⁶⁵ This suggestion likely will be adopted by Alaska courts because it furthers the state's goal of an open government without unduly impinging upon the functioning of the executive branch. Accordingly, the state must be prepared to justify its conclusion that documents sought through discovery should not be released on the basis of this privilege.

An issue about which predictions are difficult to make is whether Alaska courts will adopt the rule recognized in other jurisdictions that predecisional documents remain privileged if not adopted by the department or agency.¹⁶⁶ There is some possibility that the courts will hold that documents must be disclosed once a final decision is reached on the issue, whether the decision embraces or rejects the discussion contained in the draft. Again, this would further the goal of open government. Arguably, however, requiring the disclosure of such documents could inhibit candid discussions on matters of considerable state importance and Alaska courts could conclude that the privilege should be recognized in such circumstances.

It is possible to identify certain examples of the types of deliberative process documents that could be encompassed by *Doe*, if the balancing test weighs in favor of nondisclosure. These examples include:

162. 313 U.S. 409 (1941).

163. *Id.* at 422.

164. One federal court has stated:

The judiciary. . . is not authorized "to probe the mental processes" of an executive or administrative officer. This statutory rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others — results demanded by the exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision — indeed, "[s]uch an examination of a judge would be destructive of judicial responsibility" — and by the same token "the integrity of the administrative process must be equally respected."

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 325-26 (D.D.C. 1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967) (footnotes omitted).

165. Annotation, *Construction and Application, under State Law, of Doctrine of "Executive Privilege"*, 10 A.L.R. 4TH 355, 358 (1981).

166. *See supra* note 116 and accompanying text.

memoranda that advocate certain positions, examine alternatives to existing policies, or express opinions on highly sensitive policy questions; analyses of public or political perception to a position; and recommendations, proposals, suggestions, and other subjective writings that reflect the personal opinion of the author rather than the policy of the state.¹⁶⁷ Clearly, documents such as these, when directed to the governor, fall within the ambit of protection. Furthermore, it is highly likely that these types of documents might also be privileged when directed to the head of a department.

Less certain is whether these documents will be afforded protection when directed to lower-ranking decisionmakers, such as deputy commissioners, directors, and deputy directors. The more removed the situation is from the classic example of the executive privilege, the more attention should be paid to the court's observation in *Doe* that there are policy reasons in this state for limiting the scope of the privilege.¹⁶⁸ The only documents certain to be found within the scope of the deliberative process privilege, regardless of the level of the executive for which they are prepared, are drafts of documents relating to a quasi-judicial matter that has not been finally decided.¹⁶⁹

Identifying the types of documents that could be subject to this privilege, however, is only the starting point in analyzing whether a document will be found privileged by the Alaska courts. Examples of documents that other courts have held to be privileged include appraisal reports,¹⁷⁰ unadopted draft proposed regulations for the Internal Revenue Service,¹⁷¹ documents reflecting negotiations for the settlement of a contract claim,¹⁷² nonbinding budgetary recommendations,¹⁷³ records reflecting the basis for a decision whether to grant furlough to a prisoner,¹⁷⁴ and letters from faculty members opposing the promotion of an associate professor.¹⁷⁵ It seems unlikely, however, that the Alaska courts would agree that all of these situations warranted recognition of the privilege because it is difficult to believe

167. See generally S. STONE & R. LEIBMAN, *supra* note 22, at 506, 509, 510-11 (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Davis v. Braswell Motor Freight Lines*, 363 F.2d 600 (5th Cir. 1966); *Mobil Oil Corp. v. Department of Energy*, 520 F. Supp. 414 (N.D.N.Y. 1981); *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577 (E.D.N.Y. 1979)).

168. 721 P.2d at 625.

169. See *supra* note 164 and accompanying text.

170. *Hoover v. United States*, 611 F.2d 1132 (5th Cir. 1980).

171. *Pies v. United States Internal Revenue Serv.*, 668 F.2d 1350 (D.C. Cir. 1981).

172. *Murphy v. TVA*, 571 F. Supp. 502 (D.D.C. 1983).

173. *Bureau of Nat'l Affairs v. United States Dep't of Justice*, 742 F.2d 1484 (D.C. Cir. 1984).

174. *Schumate v. Wilson*, 90 A.D.2d 832, 456 N.Y.S.2d 11 (Sup. Ct. 1982).

175. *Hafermehl v. University of Washington*, 29 Wash. App. 366, 628 P.2d 846 (1981).

that nondisclosure of all of these types of documents is *necessary* for effective governing or would serve any "strong public interest."¹⁷⁶

A document will only be privileged if its disclosure would reveal the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by others, and if the state's need for confidentiality outweighs the party's need for disclosure.¹⁷⁷ Determining if a writing is covered by this privilege depends ultimately on whether disclosure would cause significant adverse effects to the state and whether the need for confidentiality exceeds the opposing party's need for disclosure. In this state, in which the courts have repeatedly indicated that disclosure is the standard, and not the exception, it should be apparent that few documents will be protected by this privilege. There must be more at issue than the simple desire to avoid embarrassment or a belief that the public would misinterpret the disclosed documents.

V. CONCLUSION

Almost all government records are subject to discovery in litigation under the rules of evidence and available for inspection by the public under the state's records inspection statutes. There are, however, various laws requiring records to be kept confidential. Furthermore, there are circumstances when disclosure would be against the public interest or violate an individual's right to privacy. In these situations, the documents must be withheld from inspection. Similar limitations exist under the state's rules of evidence.

Nonetheless, to the extent that records are privileged or exempt from public disclosure, Alaska courts probably will narrowly construe the privilege or exemption and place limitations on it at least as restrictive as those developed by the courts of other jurisdictions. These limitations reflect a healthy concern that the need for effective government must be balanced with the public's right to know what its government is doing. The Alaska courts can be expected to resolve the tension between these two competing interests by placing the burden of establishing the need for nondisclosure upon the government. Thus, when determining whether a particular document is subject to inspection or discovery, the presumption lies in favor of disclosure.

176. *City of Kenai v. Kenai Peninsula Newspapers*, 42 P.2d 1316, 1323 (Alaska 1982).

177. *See Doe v. Alaska Superior Court*, 721 P.2d 617, 623-25 (Alaska 1986); S. STONE & R. LIEBMAN, *supra* note 22, at 506, 509, 510-11.