Public Inspection of State and Municipal Executive Documents: "Everybody, Practically Everything, Anytime, Except . . . ."

William Randolph Henrick

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COMMENTS
PUBLIC INSPECTION OF STATE AND MUNICIPAL EXECUTIVE DOCUMENTS:
"EVERYBODY, PRACTICALLY EVERYTHING, ANYTIME, EXCEPT . . . ."1

"Freedom of information," as a concept heralding public access to documents and data in the possession of executive agencies and departments, became a national catchword with the enactment of the federal Freedom of Information Act (FOIA) in 1966.2 Yet, FOIA is neither the first nor the last word on public inspection of government data. As early as 1849, Wisconsin had provided for a statutory right of inspection of public records3 and the annals of nineteenth century common law contain many adjudications of conflicts involving individuals seeking access to government papers.4 In the decade since FOIA, twenty-four states have enacted or substantially revised open records statutes.5 While FOIA has been cited as the model for a number of these acts,6 the experience of sister states appears to have provided a more

frequent and fertile source for most of the recent legislation.\(^7\)

As a matter of terminology, freedom of information statutes may encompass more than mere enunciation of a statutory right of public inspection. Open meeting legislation, sometimes called sunshine laws, has been enacted in conjunction with open records acts as part of a broad freedom of information framework.\(^8\) This Comment will not discuss this latter legislation. Rather, it will attempt to characterize and assess the present state of the law—governed by statute in 48 states and by common law in two—regarding rights of public

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inspection of documents, data and other information containing materials in
the possession of state and municipal executive (as opposed to legislative or
judicial) departments and agencies.

I. BACKGROUND—PUBLIC INSPECTION AT EARLY COMMON LAW

In the vast majority of states, early law on public inspection of government
documents was judicial in origin. Prior to 1940 only twelve states had
statutes which resembled those presently in force. However, even these were
usually one or two sentences in length and lacked any interpretive definitions
or guidelines. It was not until the post-war period, when the first Hoover

1975). Most of these statutes, along with a District of Columbia Commissioner's Order relative to
open records, reprinted in full and individually commented upon in Amico, supra note 3.

Idaho Code §§ 9-301, 59-1009 (1948); Iowa Code § 622.46 (1950); Act of May 15, 1851, ch. 161, §
§ 132-6 (Supp. 1974); S.D. Compiled Laws Ann. § 1-27-1 (1974); Law of May 8, 1917, ch. 178,

11. E.g., the following language Act of March 12, 1872, § 1032, printed in [1872] Cal. Pol.
Code 183 (repealed August 29, 1968) and Idaho Code § 59-1009 (1948): "The public records and
Study Report led to the enactment of the Federal Records Act of 1950,\textsuperscript{12} that impetus was given to open records statutes on a national basis.\textsuperscript{13}

The common law rules regarding public inspection rights of government-held documents developed largely in response to evidentiary requirements of litigants rather than as a monitoring process of public servants.\textsuperscript{14} Consequently, they were very narrow. The early rule emerged that there is no common law right in all persons to inspect public documents or records; and that right, if it exists, depends entirely on the statutory grant. But at common law, every person is entitled to the inspection, either personally or by his agent, of public records provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information.\textsuperscript{15}

The nature of the interest required gradually became less personal: acting on behalf of a broader public interest (such as investigating official misconduct or a taxpayer's interest in a city's financial condition\textsuperscript{16}) became sufficient.

\textsuperscript{12} 64 Stat. 583 (1950).
\textsuperscript{13} Testimony of Charles Hinds, Director of Kentucky State Department of Libraries and Archives, Hearings Before the Open Records Subcomm. of the Ky. Joint Interim Comm. on State Government, Frankfort, Ky., December 9, 1974 at 28 [hereinafter cited as Kentucky hearings]. Particular judicial expressions of common law also served as an impetus for subsequent statutory enactment. For example, the Kentucky case of City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811 (Ky. 1974), promulgated a detailed restatement of Kentucky common law on inspection rights written in almost statutory language. Id. at 815-16. This case was cited as a starting point for the revision of a series of bills previously introduced on the subject in the state. Kentucky hearings, supra at 3-5. An open records statute was in fact passed by the legislature on March 30, 1976, repealing a more limited open records act, Law of March 27, 1958, ch. 49, § 25, [1958] Ky. Acts 150, which did not apply to the facts of City of St. Matthews.
\textsuperscript{14} See generally State ex rel. Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903); Clement v. Graham, 78 Vt. 290, 63 A. 146 (1906).
Indeed, a number of jurisdictions began to abrogate the interest requirement entirely. Nevertheless, absent a statute, the requirement of an interest in the document itself generally remains a prerequisite to inspection.

Another factor limiting public access at common law was the narrow definition of "public records," again due largely to the evidentiary context in which the issue of public inspection originally arose. The record or document sought generally had to be one which was required by law to be made, necessary to be kept in discharge of a duty imposed by law, or directed by law to serve as a memorial of something written, said or done. A number of more liberal definitions—e.g., "where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office"—can be found in early case law, but they remained an exception to the majority view.

One development apart from liberalization of common law principles or the enactment of open records laws which facilitated public inspection in a limited context was the enactment of civil pretrial discovery procedures. These devices and any common law right of inspection have not been abrogated by legislation relative to general public inspection.

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18. The principle was reaffirmed in Rhode Island as recently as 1976 in Daluz v. Hawksley, — R.I. —, 351 A.2d 820 (1976), where the Rhode Island Supreme Court ruled that "this court recognizes the common law right of inspection by a proper person or his agent provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information." Id. at —, 351 A.2d at 823 (emphasis deleted).
19. See Cross, supra note 14, at 26-29; see text accompanying notes 14-15 supra.

One exception seems to be Missouri where the pre-statutory common law enunciation of both a definition of public records and the nature of the right of inspection seems to be broader than the subsequently enacted open records statute. A 1955 case, Disabled Police Veterans Club v. Long,
of a particular record or document would be well-advised to assert any common law or discovery principles which might be applicable to his particular situation.\textsuperscript{24}

A general open records act is never the only state law governing public inspection of records or documents. Rather, state codes contain numerous specific statutes declaring particular documents to be public or open to inspection, whether or not such documents meet any general definition of public records.\textsuperscript{25} There also exist equal numbers of state laws declaring certain documents to be confidential and closed, or otherwise expressly limiting general public inspection.\textsuperscript{26} All general state open records acts, by

\begin{footnotesize}
\begin{enumerate}
\item 279 S.W.2d 220 (Mo. Ct. App. 1955), defined public records as “not only papers expressly required to be kept by a public officer but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office.” Id. at 223. The right of inspection was ruled as belonging to all persons. Id. In Mo. Ann. Stat. § 109.180 (Vernon 1966), enacted originally as Law of July 19, 1961, S.B. 284, § 1, [1961] Mo. Laws 548, the right was made available only to “any citizen of Missouri” and the term public records is defined much more narrowly as “all state, county and municipal records kept pursuant to statute or ordinance . . . .” No cases have arisen subsequent to the enactment in which the seeming inconsistency has been at issue. Attorney General opinions, however, have clearly ignored the language of Disabled Police Veterans Club in favor of the legislative definition. E.g., Edwin M. Bode, Mo. Op. Atty Gen. No. 38, March 22, 1972; E. J. Cantrell, Mo. Op. Atty Gen. No. 114, January 29, 1970. For another example of a record previously available for public inspection, but closed under the terms of a subsequently enacted open records act, see Person-Wolinsky Assocs. v. Nyquist, 84 Misc. 2d 930, 377 N.Y.S.2d 897 (Sup. Ct. 1975) (lists of applicants for New York State's certified public accountant's examination).

\item 24. For a case where inspection was denied on a “public records” theory but ruled in dicta to be open in appropriate cases under the state's pretrial discovery rules, see Kottschade v. Lundberg, 280 Minn. 501, 506, 160 N.W.2d 135, 138 (1968).

\item 25. The following cases constitute examples of such statutes being applied in the resolution of specific controversies relative to inspection: Gaspard v. Whorton, 239 Ark. 849, 394 S.W.2d 621 (1965) (lists of applications for absentee ballots and related data); Providence Journal Co. v. Shea, 110 R.I. 342, 292 A.2d 856 (1972) (state water pollution control investigation records); Sigety v. Horan, 50 App. Div. 2d 779, 376 N.Y.S.2d 552 (1st Dep't 1975) (financial and inspection reports of residential health care facilities filed with or issued by the Welfare Department); Martinez v. Libous, 85 Misc. 2d 186, 378 N.Y.S.2d 917 (Sup. Ct. 1975) (Code Enforcement Bureau's investigation records of a tenant's apartment).

\end{enumerate}
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their explicit terms, defer to the latter\(^{27}\) and, either explicitly or through interpretation, to the former as well.\(^{28}\) However, these specific laws are relatively self-explanatory and will not be examined in this Comment.\(^{29}\)

II. GENERAL APPROACH AND CONCEPTUAL FRAMEWORK

In analyzing any controversy regarding an individual's right of access to a particular government document, there are four questions that must be affirmatively answered before inspection will be granted or compelled.\(^{30}\)

1. Is the document in question a "public record"?\(^{31}\)

2. If the document constitutes a public record, is the document open to general public inspection?\(^{32}\)

3. If the document constitutes a public record open to general public inspection, is the seeker within the class of individuals to whom inspection rights are accorded?\(^{33}\)

4. Is there an adequate judicial remedy (along with corresponding enforcement and penalty provisions) for unjustified denial of access to public records?\(^{34}\)


\(^{29}\) Additionally, this Comment will not consider court and legislative records, or those of consultants or other entities which have only tangential relations with government. These records are generally the subject of particular specific statutes and are not incorporated as such into the state open records acts discussed herein. Examples of such specific statutes include N.D. Cent. Code § 27-07-36 (1960) (inspection of county court records) and W. Va. Code Ann. § 51-4-2 (1966) (inspection of state court records). However, the Kentucky open records statute, Ky. Rev. Stat. Ann. § 61.870(1) (Supp. 1976), enacted in 1976, includes records of "every legislative board, commission, committee and officer; every . . . court or judicial agency . . . any other body . . . which derives at least twenty-five per cent (25%) of its funds from state or local authority" within its purview. See also note 41 infra and accompanying text.

\(^{30}\) Derived from Cross, supra note 14, at 19.

\(^{31}\) As this study is substantive rather than procedural, primary attention will be focused on questions 1-3. The vast majority of statutes provide for across-the-board nondiscretionary remedial relief. Even those which employ the traditional discretionary writ of mandamus as the vehicle to redress an aggrieved applicant's right to inspection (e.g., Neb. Rev. Stat. § 84-712.03 (1971)) have generally been interpreted as providing for an almost automatic right to obtain the writ when statutory requirements have been met. Examples include Mulford v. Davey, 64 Nev.
III. IS THE DOCUMENT A "PUBLIC RECORD"?

"Public record" may be defined as a document either specifically declared public or open to inspection by a specific state statute, or falling within the terms of a general definition of public record used by the state relative to general public inspection rights.

The classification of a document as a public record constitutes the threshold and primary issue in a particular controversy. The classification is especially important if the document can attain public record status only by meeting the terms of a general definition adopted by the state for inspection purposes. In such cases, the document will be presumptively open, and the burden will fall on the custodian to justify nondisclosure.

State statutory definitions of public records vary widely and, consequently, an attempt will be made to categorize them. However, three caveats must be noted. First, not all documents in a public body's files will constitute public records. Some documents which constitute public records under the terms of an open records statute have been exempted from disclosure. These may be available to specified individuals, may be permissibly disclosed by an

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506, 186 P.2d 360 (1947); Beckon v. Emery, 36 Wis. 2d 510, 518-19, 153 N.W.2d 501, 504 (1967) ("Mandamus is the proper remedy to test the reasons for withholding documents or records from inspection."). See also Annot., 60 A.L.R. 1356 (1929). One recent case went so far as to remove the traditional equitable discretionary maxims surrounding the writ of mandamus from the open records context. Industrial Foundation of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 674-75 (Tex. 1976), petition for cert. filed, 45 U.S.L.W. 3516 (U.S. Dec. 20, 1976) (No. 76-840) (inspection may not be denied for "unclean hands"). The statutory remedial provisions and the issues of enforcement and penalty provisions are discussed more fully in section VI infra.

32. See note 25 supra and accompanying text.

33. By the terms of the New York statute, N.Y. Pub. Officers Law §§ 85-89 (McKinney Supp. 1976), this appears unlikely. Rather than promulgate a general definition of public records presumptively open to inspection, and then statutorily demarcate specific exemptions, the New York act lists eight specific categories of documents and data which the agency must disclose as well as any additional information mandated to be open by terms of any other law. By implication, a document not within one of these categories (such as a highly specialized document of first impression) would be presumptively closed to inspection. See N.Y. Pub. Officers Law § 88 (McKinney Supp. 1976). This statutory definition is discussed further at note 49 infra.


agency, or may become available to the general public under certain circumstances. Second, a record may be public for some purposes but not for others. For example, state statutes dealing with the physical management or destruction of obsolete public records often contain definitions of public records in providing for which documents are subject to their terms. These definitions are frequently much broader than those contained in the state's open records act. Finally, not all state-affiliated organizations will meet the definition of "agency" within an open records act. Consulting firms and quasi-public corporations are most frequently outside the terms of open records acts. However, those executive and municipal agencies which are


42. See notes 29 and 41 supra and accompanying text.
the subject of this Comment will fall within the mandate of such a statute unless otherwise stated.

A. A Classification of Statutory Definitions of Public Records from Strict to Liberal

a. A Limited Class of Specifically Identifiable Documents or a General Definition of Records but Limited for Public Inspection Purposes by Specific Qualifications.

States in this category include Illinois, Michigan’s Administrative Procedures Act of 1969, Nebraska, New York, and Pennsylvania. The

43. A number of states define public records in alternative terms. These states will be classified in the broader of the categories because, as a general rule, these may be assumed to be all-encompassing of the classes narrower to them.

44. Ill. Ann. Stat. ch. 116, §§ 43.4-28, .101-.114 (Smith-Hurd Cum. Supp. 1977). The Illinois open records act contains separate provisions for state and local records. The State Records Act contains a broad general definition of records: “all [documents] . . . made, produced, executed or received by any agency in the State in pursuance of state law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the State or the State Government, or because of the informational data contained therein.” Id. § 43.5. For inspection purposes, however, public records are defined in qualified terms as “[r]eports and records of the obligation, receipt and use of public funds of the State . . . .” Id. § 43.6. The definition of local public records is similarly qualified. Id. § 43.103, .103a. A number of Illinois cases speak of a “common law right to inspect and use public records” in Illinois. E.g., People ex rel. Gibson v. Peller, 34 Ill. App. 2d 372, 374, 181 N.E.2d 376, 378 (1962). No cases have been found defining the common law right or definition of public records aside from a ruling that “some final action be taken before a record takes on the status of ‘public record,’” thus eliminating preliminary drafts and agency memoranda from the definition. People ex rel. Better Broadcasting Council, Inc. v. Keane, 17 Ill. App. 3d 1090, 1094, 309 N.E.2d 362, 365 (1973). See also People ex rel. Hamer v. Board of Educ., 130 Ill. App. 2d 592, 264 N.E.2d 420 (1970) and section III(B) infra.

A comprehensive open records statute was introduced in the Illinois General Assembly in 1975 as House Bill 452, “An Act to Require Access to Certain Information,” reprinted in Amico, supra note 3, at 96-106. The bill defined public records in broad terms (“all . . . documentary materials, regardless of physical form or characteristics, having been or being prepared, used, received, in the possession of, or under the control of any public body.”) Id. at 99. The bill was not passed through the 79th General Assembly in 1976.

common factor in these states is that a document can be a public record only if it is capable of being pegged into an established category. The universe of available documents is thus specifically limited. This approach seems to negate any presumption that a document is public as, in effect, the burden is placed on the seeker to establish its classification within the prescribed classes. Seekers of specialized and first impression documents may face an insurmountable task since established categories of documents have become increasingly inadequate to engulf all government data.49

46. Neb. Rev. Stat. § 84-712.01 (1971) which defines public records as “any state, county or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt or other record of receipt, cash or expenditure involving public funds . . . .”


49. The New York open records statute is an example. The act lists eight specific categories of documents that must be made available for public inspection and copying, in addition to any documents required to be open by the terms of another statute. N.Y. Pub. Officers Law § 88(1) (McKinney Supp. 1976). There is neither a general definition of “public records” in the statute nor any additional language to extend the mandate of availability beyond these eight limited classes. Thus, a person seeking inspection of a unique or specialized document pursuant to the act seems required to fit the item sought into one of the eight promulgated categories of public records, unless he can demonstrate disclosure is mandated elsewhere. None of the New York cases to date have called attention to this requisite and inspection has been denied on grounds of falling within the statutory exemptions from disclosure, rather than as not being classifiable within one of the eight categories of public records. E.g., Knight v. Gold, 53 App. Div. 2d 694, 385 N.Y.S.2d 123 (2d Dep’t 1976); Person-Wolinsky Assocs., Inc. v. Nyquist, 84 Misc. 2d 930, 377 N.Y.S.2d 897 (Sup. Ct. 1975); Fitzpatrick v. County of Nassau, 83 Misc. 2d 884, 372 N.Y.S.2d 939 (Sup. Ct. 1975). See also Dunlea v. Goldmark, 85 Misc. 2d 198, 380 N.Y.S.2d 496 (Sup. Ct. 1976). Only one other New York statute deals in general terms with public inspection of government documents and, although somewhat broader in definition (“papers connected with or used or filed in the office of, or with any officer, board or commission”), is limited in application to employees of local government only, with inspection available only to “any taxpayer or registered voter.” N.Y. Gen. Munic. Law § 51 (McKinney Supp. 1976).

b. Records Required to be Made by Law, Necessary to be Kept in the Discharge of a Duty Imposed by Law, or Directed by Law to Serve as a Written Memorial of Something Written, Said or Done.\(^{60}\)

States in this category include Arkansas,\(^{51}\) Hawaii,\(^{52}\) Indiana,\(^{53}\) Kansas,\(^{54}\) New Jersey,\(^{55}\) Ohio,\(^{56}\) Oklahoma\(^{57}\) and South Dakota.\(^{58}\) This definition, identical to that which tended to emerge at common law,\(^{59}\) requires that there be a specific statute mandating that a particular document be made or kept, or one which clearly implies a necessity.\(^{60}\) This category will, therefore, bring into play a battery of other statutes. It may be considered broader than category "a" as no specific placement within a class of records need be established. Additionally, any subsequent legislation relating to maintenance of documents or any creation of new document-producing agencies will automatically bring new material within the definition. The mere fact that the document is required or necessary to be made will create a presumption of office, within this state, must, upon request . . . diligently search the files . . . and either make one or more transcripts therefrom, and certify to the correctness thereof . . . or certify that a document or paper, of which the custody legally belongs to him, can not be found." Id. In connection with this former statutory right in New York, see Winston v. Mangan, 72 Misc. 2d 280, 338 N.Y.S.2d 654 (Sup. Ct. 1972) which reviews the case law and gropes for a definition of public records within this earlier law.

In its approach to defining public records open for inspection by eschewing a general definition of public records in favor of specific categories, New York alone among the forty-eight statutory jurisdictions parallels FOIA. 5 U.S.C. § 552 (Supp. V, 1975). This unique approach to defining public records for inspection purposes, common only to New York and FOIA, gives further credence to the conclusion that it is the sister state experience, and not FOIA, which has provided the basis for recent state open records legislation. See note 7 supra and accompanying text and notes 203-10 infra and accompanying text.

50. Derived from Cross, supra note 14, at 42-43.


52. Hawaii Rev. Stat. § 92-50 (Supp. 1975), which defines public record as "any written or printed report, book or paper, map or plan of the State . . . which is the property thereof, and in or on which an entry has been made or is required to be made by law, or which any public officer or employee has received or is required to receive for filing . . . ." Although there is no case law under this statute, it seems anomalous that a document not required by law to be made or kept is not open, but once made and kept voluntarily the right to inspection follows. See also 1968 Ga. Op. Att'y Gen. 741, 743; 41 N.C. Att'y Gen. Rep. 407-09 (1971).


56. Ohio Rev. Code Ann. § 149.43 (Page 1969). This definition lists specific exemptions. Id.


59. See text accompanying notes 19-20 supra.

availability. In several states, the document must originate with a public servant; privately-oriented matters filed with an agency will not ordinarily qualify as public records under this definition.  

c. Records Made or Received Pursuant to Law or as a Convenient and Appropriate Mode of Discharging the Duties of an Office.  

States in this category include Arizona, Missouri, Utah, Wisconsin and West Virginia. This category is broader than category “b” in that no particular statute mandating that the exact document in question be maintained is necessary. Apparently, however, the document must have some reference to an existing law or a customary course of conduct.


64. Mo. Ann. Stat. § 109.180 (Vernon 1966) ("all state, county and municipal records kept pursuant to statute or ordinance"). But see E. J. Cantrell, Mo. Op. Atty Gen. No. 114, Jan. 29, 1970, where the state Attorney General interpreted this language as meaning that such records must be “required by law to be kept by public officials in this state” in order to meet the definition.


66. Wis. Stat. Ann. § 19.21 (1972), as amended, Wis. Stat. Ann. § 19.21 (Cum. Supp. 1976) appears to define public records as “all property and things received from his [the custodian’s] predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.” This language was brought into this classification by judicial construction and interpretation in International Union v. Gooding, 251 Wis. 362, 369-71, 29 N.W.2d 730, 734-35 (1947).


68. State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 679, 137 N.W.2d 470, 473 (1965), modified on denial of rehearing, 28 Wis. 2d 685a, 134 N.W.2d 241 (per curiam), aff’d in part and modified in part, 32 Wis. 2d 11, 144 N.W.2d 793 (1966) (per curiam); Conover v. Board of Educ., 1 Utah 2d 375, 377, 267 P.2d 768, 770 (1954); International Union v. Gooding, 251 Wis. 362, 370-71, 29 N.W.2d 730, 735 (1947).

d. Records Made or Received in Connection with the Transaction of Public or Official Business.

States in this category include Colorado, Delaware, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, New Hampshire, New Mexico, North Carolina, Texas, Vermont, Virginia, and Wyoming. Under this definition there need be neither a specific statute to which the document is arguably related nor a prescribed or customary course of conduct of a public official. All documents made or received by a custodian are declared open, provided the record is made or received in the course of performing public or official duties. Preliminary drafts and memoranda,

70. Colo. Rev. Stat. Ann. § 24-72-202(6) (1974) ("all writings made, maintained, or kept . . . for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds").
74. La. Rev. Stat. Ann. § 44:1 (Cum. Supp. 1976) ("all [d]ocuments . . . having been used, being in use, or prepared for use in the conduct, transaction or performance of any business, transaction, work, duty or function which was conducted, transacted or performed by or under the authority of the Constitution or the laws of this state").
82. Vt. Stat. Ann. tit. 1, § 317(b) (Cum. Supp. 1976). "[W]ritten or recorded matters produced or acquired in the course of agency business . . . ." This definition lists specific exemptions. Id. The Vermont act is also limited in its definition of "public agency." The statute specifically includes "any agency, board, department, commission, committee, or authority of the state" but excludes "[t]owns, cities, counties, schools and all subdivisions thereof . . . ." Id. § 317(a).
85. The Delaware statute, Del. Code Ann. tit. 29, § 10002(b) (Supp. 1976) defines "public
which do not fall within the narrower categories, generally come within this definition of public records. 86

e. Any Writing Containing Information Relating to the Conduct of the Public’s Business.

States in this category include California, 87 Connecticut, 88 Maine, 89 Oregon, 90 South Carolina, 91 and Washington. 92 In this category, there is no requirement that the document be connected in any way with the official business of the agency; it need only relate to public affairs in general.

f. All Documentary Materials in Possession of a Public Body.

States in this category include Alabama, 93 Alaska, 94 Idaho, 95 Iowa, 96 Kentucky, 97 Massachusetts 98 and Montana. 99 Most of these statutes are one
or two sentence policy declarations lacking any effective definitions or guidelines for judicial interpretation. Thus, these laws serve merely as focal points for judicial common law definitions.\textsuperscript{100} Iowa, Kentucky and Massachusetts contain the broadest statutory definitions of public records but each statute contains large numbers of exemptions from the statutory disclosure requirements.\textsuperscript{101}

Three states, Nevada,\textsuperscript{102} North Dakota\textsuperscript{103} and Tennessee,\textsuperscript{104} have not been classified into the above scheme due to the absence of both a general definition of public records and any subsequent case-law providing such a definition. In Mississippi and Rhode Island, the two common law jurisdictions, the courts have not yet provided a definition of public records.\textsuperscript{105}

The above classification scheme may be of limited assistance in predicting whether a jurisdiction will classify a particular document as a public record. Rather, it is hoped that the classification will serve as a rough guide to the

regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency.” Id.


\textsuperscript{100} See note 11 supra and accompanying text.

\textsuperscript{101} Iow Code Ann. § 68A.7 (1973); Ky. Rev. Stat. Ann. § 61.878 (Cum. Supp. 1976); Mass. Gen. Laws Ann. ch. 4, § 7(26) (Cum. Supp. 1975). See note 35 supra and accompanying text and section IV(c) and Appendix II infra. In general, the more liberal the definition along the spectrum, the greater the number of specific statutory exemptions within the open records act. Statutory exemptions from disclosure are discussed more fully in section IV infra.

\textsuperscript{102} Nev. Rev. Stat. § 239.010 (1975). “All public books and public records... shall be open at all times... to inspection by any person...” Id.

\textsuperscript{103} N.D. Cent. Code § 44-04-18 (1960) “[A]ll records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records.” Id. A 1958 dated opinion of the Attorney General of North Dakota interpreted this language: “In my opinion this language is all-inclusive and would include records of official proceedings, reports and other documents that are required by law to be filed with an agency, and day-to-day correspondence of public officials on matters relating to their official duties.” 1956-58 N.D. Att’y Gen. Biennial Rep. 148. This opinion is also digested in 34 N.D.L. Rev. 432 (1958).

\textsuperscript{104} Tenn. Code Ann. § 15-304 (1973). However, the Tennessee Public Records Commission Law defines records for purposes of managing the disposition of state records as documentary “material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any government agency.” Tenn. Code Ann. § 15-401(2) (Cum. Supp. 1976). This category “d” definition (see notes 70-86 supra and accompanying text) might be adopted by a Tennessee court in defining public records for inspection purposes. See notes 39-40 supra and accompanying text.

\textsuperscript{105} See Logan v. Mississippi Abstract Co., 170 Miss. 479, 200 So. 716 (1941) which deals with statutory inspection rights under an act limited to records of the chancery clerk. None of the Rhode Island cases on inspection have promulgated a definition of public records. See Daluz v. Hawsley, - R.I. - , 351 A.2d 820 (1976).
range of approaches various jurisdictions have adopted to define public records and corresponding inspection rights.

In practice, any such system of neat classification will break down into fifty distinct categories subject to local needs and philosophies. Courts, in interpreting legislative intent, will be guided by various "declarations of policy" contained in a number of the acts. When present, these tend to be sweepingly liberal and provide impetus toward disclosure. Thus, although statutory definitions may be identical or nearly so, the presence or absence of such a sweeping policy declaration could be decisive in a borderline case. Another, and perhaps more compelling reason for a probable breakdown in these classifications is the equitable discretion vested in the courts. Thus, a definition, however clear and specific on its face, may be twisted or interpreted in a particular instance to do justice in different terms than its framers may have envisioned. Indeed, courts in two states having almost identical


definitions have reached different results in similar circumstances. 109

B. Do Preliminary Documents and Memoranda Constitute Public Records?

Preliminary documents and agency memoranda present a unique problem relative to defining public records and exempting certain classes thereof from disclosure. Under the common law, and in those states adopting category "a" - "c" definitions of public records, preliminary memoranda and draft documents generally will not constitute public records. For example, state laws rarely mandate specifically that preliminary material be made; thus a category "b" definition cannot encompass such documents. 110 Definition categories "d"

received "in connection with the transaction of public business and ... retained by such recipient or its successor as evidence of its activities or because of the information contained therein." N.J. Stat. Ann. § 47:3-16 (Cum. Supp. 1976). This definition would fall within category "d," as discussed in notes 70-86 supra and accompanying text, in contrast to the open records definition, "all records which are required by law to be made, maintained or kept on file . . . ." Id. § 47:1A-2 (Cum. Supp. 1976), which comes within category "b." See notes 50-61 supra and accompanying text.


109. For example, the Florida and Minnesota statutes both define public records as all documents "made or received pursuant to law or in connection with the transaction of official ['public' in Minnesota] business." Fla. Stat. Ann. § 119.01(1) (Cum. Supp. 1976); Minn. Stat. Ann. § 15.17(2) (1967). This would be a category "d" definition as discussed in notes 70-86 supra and accompanying text.

Neither statute makes specific provision as to whether preliminary memoranda and draft documents meet this definition apart from subject matter. In both states the issue was resolved judicially and, despite the identical definitions, contrary results were reached.


The Minnesota Supreme Court reached a contrary conclusion when presented with assessor's "field cards" or work sheets which, although preserved in bound ledgers, were considered preliminary to less detailed final assessment books. Kottschade v. Lundberg, 280 Minn. 501, 160 N.W.2d 135 (1968). Although conceding that the statutory language, if "read literally," would encompass these documents, the court limited public records to "official actions as distinguished from thought processes." Id. at 504, 160 N.W.2d at 138. Constituting only "information relating to the process by which an assessment is reached" rather than information relating to the assessment itself, the court denied inspection. Id. at 504-05, 160 N.W.2d at 138.

In none of these cases was the subject matter of the document or any factor other than its preliminary character a basis for reaching the decision.

110. E.g., Coldwell v. Board of Pub. Works, 187 Cal. 510, 202 P. 879 (1921) (preliminary
- "f," however, do not impose such mechanical requirements and their barriers to public record status relate rather to the substantive content of a document or its relation to a public officer. Once the procedural requirements of a relation to a specific law or standardized course of conduct are thus removed, any document in the files of a public body—preliminary or final—is potentially a public record.

In analyzing whether such documents should be subject to inspection, the focus shifts from content to the stage in the decision-making process at which the document was prepared. The public policy arguments for withholding these documents emphasize the need to protect confidentiality and discretion in administrative processes, rather than trying to determine whether the document fits within the state's definition. One court described the considerations against disclosure in these terms:

Such a result [disclosure] would impose an intolerable burden on the public officer. Such an officer must be ever ready to defend his decisions and justify his judgment, but [making preliminary documents available to inspection] . . . would be an unreasonable and harmful interference with the day-to-day conduct of public business just when such officer should, and must, be allowed some discretion in making those decisions and in exercising that judgment.

Although valid, these considerations seem outweighed by the potential for abuse. An exemption for preliminary documents enables a bureaucrat to

data did not constitute public records but was available as "other matters" under state statute making "public records and other matters" open to inspection by citizens of the state; Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833 (1967) (general rule under common law); Sanchez v. Board of Regents, 82 N.M. 672, 486 P.2d 608 (1971) (ruling under open records statute with no definition of public records); Annot., 85 A.L.R.2d 1105 (1962). Contra, MacEwan v. Holm, 226 Or. 27, 359 P.2d 413 (1961) (en banc). The MacEwan case represented a landmark departure from this traditional view and constituted the basic precedent for courts making preliminary data available for inspection in other jurisdictions both under common law and statutory definitions. E.g., Menge v. City of Manchester, 113 N.H. 533, 537, 311 A.2d 116, 118 (1973); State ex rel. Copeland v. Cartwright, 38 Fla. Supp. 6, 10-13 (Cir. Ct. 1972); Bartels v. Roussel, 303 So. 2d 833, 837-38 (La. Ct. App. 1974).

111. Categories "d" - "f" do not require specific reference to another state law or a standardized course of conduct as do "b" and "c." Compare notes 70-101 supra and accompanying text with notes 44-69 supra and accompanying text.


conceal from the public the key factors underlying a governmental action. Monitoring these processes is the crux of true freedom of information. The better approach, therefore, would be to hold such documents presumptively open and enable custodians to apply to the courts for confidentiality rulings on a case-by-case basis. Thus in those states which fall under categories "d"-"f," preliminary documents should, absent a specific exemption in the statutory definition, be held to constitute public records.

IV. IF THE DOCUMENT CONSTITUTES A PUBLIC RECORD, IS IT OPEN TO PUBLIC INSPECTION?

The right to inspect a public record includes the right to copy and take abstracts or make photographic or other mechanical reproductions. Such rights, however, are subject to an implied rule of reasonableness: the inspection is not to interfere with the ordinary business of the agency or damage the records. Additionally, disclosure may still be limited in a number of ways:


A. General Exclusion Clauses

Several of the statutes contain what may be referred to as general exclusion clauses. Often framed in terms of balancing the public interest in disclosure versus the potential harm, these clauses apply to all public records. Nondisclosure will be justified if the custodian can adequately demonstrate that the advantage of public availability will be outweighed by some harm to the public interest as described in the particular clause. General exclusion clauses may not be seized upon by the custodian to discriminate among specific individuals or groups:

The general exclusion clauses have two negative effects. First, they make it more costly and burdensome for the seeker to obtain access to public records. Implicit in these clauses is that the seeker, and not the custodian, must institute the court proceeding to compel disclosure.

Board of Chosen Freeholders, 76 N.J. Super. 396, 184 A.2d 748 (App. Div.), modified on other grounds, 39 N.J. 26, 186 A.2d 676 (1962); Matte v. City of Winooski, 129 Vt. 61, 271 A.2d 830 (1970). Restrictions on the right to make or receive copies have generally thus been imposed when harm to the records was threatened (e.g., Matte v. City of Winooski, 129 Vt. 61, 271 A.2d 830 (1970)), or when the request for copies is overly voluminous (e.g., Rosenthal v. Hansen, 34 Cal. App. 3d 754, 110 Cal. Rptr. 257 (3d Dist. 1973)). When the document is in a nonprinted form (such as a tape recording) it has generally been held that the agency may limit the form of copy provided to a printed transcript. Guarriello v. Benson, 90 N.J. Super. 233, 217 A.2d 22 (Law Div. 1966) (seeker could obtain transcript of tape recording but not re-recorded tapes); 56 Md. Op. Att'y Gen. 461-64 (1971) (department may furnish printout of data processing tape rather than supply a duplicate tape). Cf. 1970-71 Mass. Op. Att'y Gen. 43-46 (seeker may use agency computer terminal to inspect contents thereof). See also discussion of editing when a document contains both public and confidential information in section IV(D) infra.


119. E.g., Cal. Gov't Code § 6255 (West Supp. 1977). "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." Id.

120. Embarassment to a particular officer is generally not a sufficient basis to deny inspection. E.g., Wash. Rev. Code Ann. § 42.17.340 (2) (Supp. 1975); Turner v. Reed, 22 Ore. App. 177, 193, 538 P.2d 373, 381 (1975).


122. E.g., Act of June 21, 1957, no. 428, § 2, [1957] Conn. Pub. Acts 564 (repealed June 3, 1975). This provision was repealed in Connecticut in a substantial revision of the state's open records act in 1975. See notes 218-19 infra and accompanying text. Possible factors leading to the repeal arose in the hearings on the revised legislation: "I emphasize that the remedy for partial and unbalanced disclosure is not noticed in your bill at all, but it's rather a full disclosure—more disclosure. As long as you leave it within the discretion of the public agencies, police departments
statutory exclusions are limited and exclusive—summary judgment is unlikely, as the interests described in the exclusion clause must be weighed. Second, it gives the custodian, in the first instance, the power to promulgate exceptions to the state's legislative mandate. This is a power which, absent the general exclusion clause, has been traditionally reserved to and sparingly exercised by the courts.

A better approach to the general exclusion clause is that of Colorado, Iowa, Maryland and Wyoming. These statutes provide that if a custodian (and in Iowa, apparently the subject of the record as well) believes that disclosure of a particular record would do substantial harm to the public interest, he may apply to a state court for an order restricting disclosure. Such a provision places the burden of initiating court proceedings where it properly belongs—on the custodian seeking to exempt himself from an otherwise clear legislative mandate. It also eliminates the delay inherent in a procedure requiring two public interest determinations, i.e., from both the agency and the court.

The state of Washington has enacted what can be referred to as a reverse general exclusion clause. As with all open records acts, certain exemptions to the disclosure requirement are promulgated. However, Washington provides that these otherwise exempt records can be made public under certain circumstances:

Inspection or copying of any specific records, exempt under the provisions of this section, may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records, is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.

Under this provision, the seeker must apply to the court should he attempt to overcome the statutory presumption of nondisclosure. This clause does for the seeker what the general exclusion clause does for the custodian—it provides a

and others to dispense and disseminate only that information which they for their own purposes think the public should know, and you have partial disclosure. And partial disclosure is very dangerous and I think the remedy for it is full disclosure and openness.” Testimony of Charles Mackrisky, Hearings on Senate Bills 530 and 509 before the Joint Comm. on Government Administration & Policy, April 8, 1975 at 333-34 [hereinafter cited as Connecticut hearings]. The new Act contains no provision for a general exclusion clause. Conn. Gen. Stat. Ann. §§ 1-15 to -21k (Cum. Supp. 1976).


127. Id. § 42.17.310(3).
mechanism by which, under unusual circumstances, the statutory presumption (here of confidentiality) can be overcome.

Although these provisions have the effect of further complicating the process of obtaining inspection, they nevertheless do serve a public purpose. The presence or absence of a general exclusion clause—and the reverse clause of Washington—constitute a legislative realization that given the increasing specialization of governmental work, across the board characterization of an entire class of public records will not in every instance fulfill legislative intent or wise social policy. Such provisions, however, should place the burden of commencing court action to exempt the exceptional document on the party seeking to depart from the statutory norm by invoking the clause. Finally, courts—not custodians—should be the ultimate arbiters.128

B. "Official Information" Privilege

Also relevant to the confidentiality of certain public records are statutory129 or common law130 evidentiary privileges for "official information" applicable in a litigation context, i.e., information disclosed in confidence to a public officer "in the performance of [his] duties, where the public interest requires that such confidential communications or the sources should not be divulged."131

128. In the exercise of equitable authority, courts may exempt public records from disclosure, regardless of apparent statutory mandate, on public policy grounds. One example occurred in Florida where public inspection of confidential state personnel records was at issue. Such records were not specifically exempt from the terms of the Florida open records act. Fla. Stat. Ann. § 119.01-.12 (Cum. Supp. 1976). However, the state Attorney General held such records public as falling within the statutory definition of any document "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Id. at. § 119.011. E.g., 1975 Fla. Att'y Gen. Annual Rep. 11-12; 1974 Fla. Att'y Gen. Annual Rep. 396-98; 1973 Fla. Att'y Gen. Annual Rep. 82-85, 340-41. When the issue of inspection of personnel records reached the Florida courts, however, an appellate court ruled such records exempt from disclosure on public policy, and not statutory grounds: "[T]he right to know must occasionally be circumscribed when the potential damages far outweigh the possible benefits. In our opinion, to require public disclosure of personnel files of governmental employees could result in irreparable harm to the public interest and would be against the public policy.... While personnel records are not exempt from Chapter 119 [the Florida open records act] by the specific language, we believe that public policy clearly dictates that they be deemed confidential. In the absence of more specific language to the contrary, we do not believe that in enacting this chapter the legislature contemplated that the personnel records of government employees should be open for public disclosure by any citizen of this state." Wisher v. News-Press Publishing Co., 310 So. 2d 345, 348-49 (Fla. Dist. Ct. App. 1975). See also Industrial Foundation of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 683 (Tex. 1976), petition for cert. filed, 45 U.S.L.W. 3516 (U.S. Dec. 20, 1976) (No. 76-840) ("[I]f a governmental unit's action in making its records available to the general public would be an invasion of an individual's freedom from the公开izing of his private affairs, then the information in those records should be deemed confidential by judicial decision . . . ").


The "official information" privilege, which may be asserted only by the agency and not an informant or subject of the record, will usually result in a balancing of public interests by the courts on the disclosure question similar to that resulting from an application of a general exclusion clause. In California, for example, a statute codifies the privilege and provides that it is absolute if disclosure is forbidden by a federal or state statute and conditional otherwise. In the latter instance, the statute mandates a balancing of whether "there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice . . . ." Guidelines for this determination were promulgated recently by the California Supreme Court:

Implicit in each assessment is a consideration of the consequences—i.e., the consequences to the litigant of nondisclosure, and the consequences to the public of disclosure. The consideration of consequences to the litigant will involve matters . . . including the importance of the material sought to the fair presentation of the litigant's case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of such other means. The consideration of the consequences of disclosure to the public will involve matters relative to the effect of disclosure upon the integrity of public processes and procedures . . . .

Open records statutes, although supplementing any evidentiary rules relating to the inspection of government documents, defer by their terms to more specific expressions of legislative interest. Thus, as in California, when the privilege is codified, it may be assumed that the open records statute will not provide a means to defeat the privilege. Where the "official information" privilege is common law and not statutory, however, the issue is more difficult.

Two approaches have been taken to the problem of reconciling open records acts and common law evidentiary privileges such as that for "official information." The Vermont approach specifically exempts from its definition

133. See section IV(A) supra.
135. Id.; Shepherd v. Superior Court, 17 Cal. 3d 107, 123, 550 P.2d 161, 170, 130 Cal. Rptr. 257, 266 (1976) (en banc).
138. See notes 25-28 supra and accompanying text.
of public records "records which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege." New York has adopted the same approach through judicial interpretation. In Cirale v. 80 Pine Street Corp., the New York Court of Appeals took notice of the state's open records act but ruled in a footnote, without any explanation, that "it [the New York open records act] does not abolish the common law privilege for official information." Subsequent lower court decisions have reaffirmed this ruling, although not always without criticism.

Oregon, the second approach, creates, in effect, a statutory privilege for official information within the open records statute itself by exempting from disclosure:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

The goal of open records statutes is diametrically opposed to that of the official information privilege: the former provides impetus towards full disclosure while the latter helps to insure that certain information will not be divulged. It is hard to discern why Vermont, New York and Oregon have apparently determined that in all cases where privilege conflicts with the open records mandate, the policies favoring disclosure will never prevail. In such circumstances, it is submitted, courts should balance the interests involved on a case-by-case basis, assisted perhaps, by guidelines promulgated by the legislature.

C. Public Records Specifically Exempted From Inspection by the Open Records Acts

Apart from such general exclusion clauses and privileges, all open records statutes exempt specific public records from inspection. The only exemption common to all forty-eight states is the prohibition against disclosing those documents made confidential by a federal or another state law. A number of exemptions are common to many of the statutes. These may be roughly grouped as follows: Adoption, juvenile, parole, medical or mental records;

142. Id. at 117 n.1, 316 N.E.2d at 303 n.1, 359 N.Y.S.2d at 4 n.1.
146. See notes 26-27 supra.
geological information; intra or inter-agency memoranda or preliminary draft documents; invasion of privacy-type documents; investigatory information; land acquisition or disposition appraisals; licensing examination data; litigation involving a public body; personnel or student files; taxpayer information; trade secrets.\textsuperscript{147}

D. Editing Individual Documents

A particular document may contain both confidential (or privileged) and public information. In such circumstances, most states will require the custodian, if possible, to delete the privileged information and allow inspection of the balance.\textsuperscript{148} Such disclosure is, of course, subject to an implied rule of reason to protect the confidentiality of the exempt material. On the other hand, the custodian should be compelled not to delete to such a degree as to make the remaining disclosure meaningless.\textsuperscript{149} In Kentucky, Oregon and Washington, editing is mandated by statutes which provide that when a public record contains both exempt and non-exempt material, the agency must separate the two and make the non-exempt available for public inspection.\textsuperscript{150} Indeed, in interpreting the Washington provision, the state Attorney General has stated that the issue of editing must be considered before even a specifically exempt public record can be withheld from inspection.\textsuperscript{151}

V. If the Document Constitutes a Public Record Open to Inspection, is the Seeker Within the Class of Individuals to Whom Inspection Rights Are Accorded?

Although the common law litigation interest\textsuperscript{152} is no longer required, certain motives may preclude disclosure: commercial purposes, idle curiosity and maliciousness.\textsuperscript{153} Of the three, commercial purposes (\textit{i.e.}, the use of

\begin{itemize}
\item \textsuperscript{147} For a detailed charting and state-by-state comparison of these exemptions, see Appendix II infra.
\item \textsuperscript{148} Menge v. City of Manchester, 113 N.H. 533, 535-36, 311 A.2d 116, 117 (1973); State ex rel. Youmans v. Owens, 32 Wis. 2d 11, 13, 144 N.W.2d 793, 794 (1966) (per curiam); 1976 Ohio Op. Att’y Gen. No. 76-011, at 2-34. Commingling of available and confidential records presents problems analogous to editing and, in general, the same rules apply.
\item \textsuperscript{149} Turner v. Reed, 22 Ore. App. 177, 186 n.8, 538 P.2d 373, 377 n.8 (1975).
\item \textsuperscript{151} 1973 Wash. Op. Att’y Gen. Pt. 1, No. 4, at 11-12. An alternative to editing raised in a recent California case is that of disclosure on condition, \textit{i.e.}, that the person receiving the document agrees not to publish or sell it. California School Employee's Ass'n v. Sunnyvale Elem. School Dist., 36 Cal. App. 3d 46, 65-66, 111 Cal. Rptr. 433, 445 (1st Dist. 1973). This approach may provide a possible alternative balancing technique relative to right of privacy documents when overriding public interests may warrant inspection.
\item \textsuperscript{152} See notes 14-18 supra and accompanying text.
\item \textsuperscript{153} Motives such as political hostility to the ruling administration were never a basis to deny inspection otherwise available at common law. \textit{E.g.}, State ex rel. Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903).
\end{itemize}
governmental records to aid in the purely private pursuit of profit without any substantial public purpose) has received by far the most attention in the cases.

Only four statutes specifically address the issue of the seeker's purpose as relevant to inspection. Michigan requires that inspection be accorded only to "any person having occasion to make examination of them for any lawful purpose." Louisiana and Texas, conversely, permit no inquiry whatsoever by the custodian into an applicant's motives. Washington forbids an agency "to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies shall not do so unless specifically authorized or directed by law" with a limited exception applicable only to professional associations.

Only three states then, Louisiana, Texas and Washington, seem clear as to when commercial purposes will justify an inspection request. Indeed, in a recent Texas Supreme Court case, the statute's provision relating to the seeker's motive was cited as precluding an agency from denying inspection of workmen's compensation claim records despite the seeker's apparent intent to use the data to verify employment applications as a service to employers. Although no case has arisen under the Washington statute to date, the matter was the subject of a detailed Attorney General opinion in 1975. Access to certain motor vehicle department lists was denied since the seeker's purpose

154. "Commercial purposes" have been defined by the Attorney General of Washington as "an intent to use [the document] ... in such a manner as to facilitate commercial activity. ... The commercial purpose infers that there is 'profit-expecting' activity." 1975 Wash. Op. Att'y Gen. Pt. 3, No. 15 at 10, 12. See also note 157 infra and accompanying text.


157. Wash. Rev. Code Ann. § 42.17.260(5) (Supp. 1975). The Washington Attorney General has defined this provision to "prohibit an agency covered by the law from supplying the names of natural persons in list form when the person requesting such information from the public records of the agency intends to use it to contact or in some way personally affect the individuals identified on the list and when the purpose of the contact would be to facilitate that person's commercial activities." 1975 Wash. Op. Atty Gen. Pt. 3, No. 15, at 10 (emphasis deleted). For the Attorney General's definition of "commercial purpose" see note 154 supra. The Attorney General further held that "[w]here the requester's potential commercial benefit is remote and ephemeral and there is a clear purpose other than commercial benefit, the statute does not prohibit supplying the information in list form." 1975 Wash. Op. Atty Gen. Pt. 1, No. 15, at 13.


160. Id. at 674-75.
was to facilitate the organization of a trade group, to identify individuals for attempted sales and to assess credit risks and security interest holders. Different lists for a number of other non-commercial purposes were supplied for inspection. Where, as in most states, the statute is silent as to commercial purposes, public policy and equitable considerations will govern, with inspection generally favored. In New Jersey, for example, a corporation sought access to workmen's compensation files to compile claim histories of individual workers. The histories would then be sold to prospective employers. Inspection for these purposes was denied by the custodian but compelled by the state's courts which suggested that an abuse of the right to inspect should "be isolated and dealt with directly." This was accomplished when a subsequent statute was passed prohibiting inspection of workmen's compensation records for purposes of selling reports on specific individuals.

Apparently, to find opinions on inspection for purposes of maliciousness and idle curiosity dicta must be resorted to. At common law, neither purpose was sufficient to justify inspection. Under statutory interpretation, there has been some dicta indicating that inspection for such motives will not be allowed, but, until more controversies reach the courts, the issue will remain in doubt.


162. These included the identification of competitors, the solicitation of members for a nonprofit organization, the ascertaining of vehicle owners blocking emergency exits and "no parking" areas and the compilation of certain statistics without contacting specific individuals. 1975 Wash. Op. Att'y Gen. Pt. 3, No. 15.


165. Id. at 166, 215 A.2d at 532.


168. E.g., City of St. Matthews v. Voice of St. Matthews, Inc., 519 S.W.2d 811, 815 (Ky. 1974) (no right of inspection "to satisfy idle curiosity or for the purpose of creating a public scandal"); State v. Harrison, 130 W. Va. 246, 254, 43 S.E.2d 214, 218 (1947) ("There is no right of inspection of a public record when the inspection is sought to satisfy a person's mere whim or fancy, to engage in a pastime, to create scandal, to degrade another, to injure public morals, or to further any improper or useless end or purpose."); In re Caswell, 18 R.I. 835, 29 A. 259 (1893); 26 Cal. Op. Att'y Gen. 136 (1953). Contra, Butcher v. Philadelphia Civil Serv. Comm'n, 163 Pa. Super. 343, 345, 61 A.2d 367, 368 (1948).


170. Probably, as in most open records issues, the public policy and equitable authority of the
Assuming one may inspect and copy public records for these purposes, this right provides no shield or defense to an action for libel, slander or invasion of privacy. Despite an occasional opinion to the contrary, the majority view is that the mere fact that a document is a public record constitutes no conditional privilege when the document is published.

States are split between affording access to all persons or only to citizens of the state. At present, twenty-five states authorize inspection by "any person," twenty limit the right to any citizen of the state, and one, Louisiana, permits access only to any elector of the state or any taxpayer who has paid any tax collected by or under state authority if payment was made within one year of the date of application for inspection. North Dakota and West Virginia are unclear. Limiting inspection only to citizens or other courts will govern the ultimate rulings on a case-by-case basis. See generally Accident Index Bureau, Inc. v. Hughes, 46 N.J. 160, 215 A.2d 529 (1965) (per curiam), aff'd 83 N.J. Super. 293, 199 A.2d 656 (App. Div. 1964); Texas Indus. Accident Bd. v. Industrial Foundation of the South, 526 S.W.2d 211 (Tex. Civ. App. 1975), aff'd, 540 S.W.2d 668 (Tex. 1976), petition for cert. filed, 45 U.S.L.W. 3516 (U.S. Dec. 20, 1976) (No. 76-840).


subgroups seems only to narrow and frustrate the policy considerations behind an open records act. If the processes of government are mandated to be open, it is difficult to justify closing them to noncitizens of a state.

Apart from this general distinction, the subject of differentiations between subgroups rarely arises. The access of newspapers has, on occasion, been challenged, but it has been long settled that the media enjoy the same inspection rights as the general public. There have been several proposals to require the disclosure of sources or penalties for misreporting public records, but none has been enacted.

Corporations are generally considered citizens or persons within open records statutes. Other plaintiffs have included citizens groups, political parties and labor unions. Other agencies of the state have been accorded the same, but no greater, rights as the public in general in terms of public records inspection.

VI. Is There an Adequate Judicial Remedy (Along with Corresponding Enforcement and Penalty Provisions) for Unjustified Denial of Access to Public Records?

At common law, the writ of mandamus was the only procedural means to enforce the right of inspection. In addition to the hurdle of satisfying equitable defenses such as laches and unclean hands, the writ was

177. This is due, in large part, to the fact that discrimination among groups to whom access was afforded has been ruled violative of the equal protection clause. McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir.), cert. denied, 342 U.S. 894 (1951); Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).


184. E.g., Wash. Rev. Code Ann. § 42.17.020(21) (Supp. 1975) includes "federal, state or local government entity or agencies, however constituted" within its definition of person. Id. See also 56 Md. Op. Att'y Gen. 353-54 (1971). But see Ky. Rev. Stat. Ann. § 61.878(4) (Cum. Supp. 1976) which provides: "The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function." Id.

185. See Annot., 60 A.L.R. 1356 (1929).


187. E.g., Texas Indus. Accident Bd. v. Industrial Foundation of the South, 526 S.W.2d
wholly discretionary.188 This led one commentator to conclude that "the right of inspection of the most public of records is 'absolute in theory' but 'qualified in practice.'"189

Today, mandamus has either lost much of its discretionary character or been replaced by statutory procedures to compel inspection.190 Generally, only in those states having one or two sentence open records statutes is the extraordinary writ the only means of enforcing inspection.191

Among the jurisdictions which have provided for statutory remedial procedures, a number of alternatives have been promulgated, often in varying combinations. These include, preliminarily, the exhaustion of various administrative remedies, such as demanding a written explanation from the custodian of reasons for denial,192 or applying either to a freedom of information commission193 or to the state's Attorney General.194 Appeal to specific state courts to obtain an injunction or order compelling disclosure is allowed.195


189. Cross, supra note 14, at 31, citing State ex rel. Weliford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903).

190. In some states, a declaratory judgment constitutes a possible alternative. E.g., Department of Health v. Evansville Printing Corp., 332 N.E.2d 829 (1975); Minneapolis Star & Tribune Co. v. State, 282 Minn. 86, 163 N.W.2d 46 (1968); Deputy Sheriffs Mutual Aid Ass'n v. Deputy Sheriffs Merit Comm'n, 24 Utah 2d 110, 466 P.2d 836 (1970).

191. See notes 10-11 supra and accompanying text. Today, the states in which such statutes do not make any provision for redress or enforcement, and thus rely on mandamus in its traditional discretionary form, include Ala. Code tit. 41, §§ 145-47 (1959); Mont. Rev. Codes Ann. §§ 59-512, 93-1001-6 (1970;)

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190. In some states, a declaratory judgment constitutes a possible alternative. E.g., Department of Health v. Evansville Printing Corp., 332 N.E.2d 829 (1975); Minneapolis Star & Tribune Co. v. State, 282 Minn. 86, 163 N.W.2d 46 (1968); Deputy Sheriffs Mutual Aid Ass'n v. Deputy Sheriffs Merit Comm'n, 24 Utah 2d 110, 466 P.2d 836 (1970).

191. See notes 10-11 supra and accompanying text. Today, the states in which such statutes do not make any provision for redress or enforcement, and thus rely on mandamus in its traditional discretionary form, include Ala. Code tit. 41, §§ 145-47 (1959); Mont. Rev. Codes Ann. §§ 59-512, 93-1001-6 (1970;)

192. Cross, supra note 14, at 31, citing State ex rel. Welford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903).

193. See notes 10-11 supra and accompanying text. Today, the states in which such statutes do not make any provision for redress or enforcement, and thus rely on mandamus in its traditional discretionary form, include Ala. Code tit. 41, §§ 145-47 (1959); Mont. Rev. Codes Ann. §§ 59-512, 93-1001-6 (1970;)

194. Appeal to specific state courts to obtain an injunction or order compelling disclosure is allowed.195

195. Among the jurisdictions which have provided for statutory remedial procedures, a number of alternatives have been promulgated, often in varying combinations. These include, preliminarily, the exhaustion of various administrative remedies, such as demanding a written explanation from the custodian of reasons for denial,192 or applying either to a freedom of information commission193 or to the state's Attorney General.194 Appeal to specific state courts to obtain an injunction or order compelling disclosure is allowed.195

occasionally subject to a special statute of limitations.\textsuperscript{196} Priority on the court docket for such appeals is provided in a number of jurisdictions.\textsuperscript{197} Kentucky, Massachusetts, Oregon and Washington\textsuperscript{198} require a presumption in favor of disclosure, placing the burden of justifying confidentiality on the custodian.

The various enforcement and penalty provisions provided in state open records acts also tend to be of several varieties frequently promulgated in combinations of two or more. Only four states—Florida, Kansas, Missouri and Nebraska—provide for impeachment or removal from office for denial of public inspection rights.\textsuperscript{199} A range of fines and alternative imprisonment sentences are by far the most common provisions, with some states merely defining refusal of inspection as a misdemeanor subject to penalties as provided elsewhere in the statutory code.\textsuperscript{200} Such provisions should serve as a clear deterrent to concealment; alternative fine and imprisonment, offering remedial flexibility to the judiciary, seem best suited to this purpose.

Provisions for the recovery of attorney fees have become increasingly prevalent in much of the recent legislation.\textsuperscript{201} Such provisions are to be applauded for reasons emphasized in a recent ruling of the New Hampshire Supreme Court:

\begin{enumerate}
\item Iowa, Massachusetts, Nebraska and Texas provide for redress by writ of mandamus. However, the mandamus process in this context is clearly intended by the statutes to be mandatory and not discretionary when the statutory prerequisites have been met. See also notes \textsuperscript{31} and \textsuperscript{191} supra and accompanying text.
\item See Appendix II infra.
The provision for the award of attorney's fees is critical to securing the rights guaranteed by the statute. Without this provision, the statute would often be a dead letter, for the cost of enforcing compliance would generally exceed the value of the benefit gained. The attorney fee provision was enacted so that the public's right to know would not depend upon the ability of individuals to finance litigation.202

VII. SUMMARY—THE TREND TOWARD LIBERALITY

Freedom of information, as it relates to public inspection of state executive documents, seems to be a continually burgeoning field with no sign of abatement. The numerous statutes and modifications in the past decade203—no statute has been repealed in this period unless superceded by a more comprehensive enactment—evidence the trend. Among the highlights of this period was the enactment in California of a comprehensive open records act in 1968.204 This was the first statute to encompass "all writings containing information relating to the conduct of the public's business," in its definition of public records.205 This is "e," the second broadest of the definitional categories in as much as it does not require "official" or "public" business of the agency as an essential factor.206 Other states adopted this definition207 and the similarity between some of these laws and that of California is clear.208 Thus, it appears that, with the exception of New York,209 the sister state experience—and not FOIA210—has been of upmost importance in

202. Bradbury v. Shaw, — N.H. —, 360 A.2d 123, 126 (1976). See also Douglas, The New Hampshire Right to Know Law—An Analysis, 16 N.H.B.J. 227, 244-45 (1975). Ohio, which has no provision in its open records act for recovery of attorney fees, seems to have judicially established a unique "public benefit" test to permit the recovery of attorney fees as well as a "bad-faith" exception to the state's general rule that in the absence of statutory provision, attorney fees are not recoverable. Compare State ex rel. White v. Cleveland, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973) with State ex rel. Grosser v. Boy, 46 Ohio St. 2d 184, 347 N.E.2d 539 (1976) (per curiam).

A different viewpoint on the issue of attorney fees is that of Connecticut. In specifically rejecting that such a recovery provision be included in the 1975 modification of its open records statute, the Committee on Government Administration and Policy concluded that such a provision, especially when the fees would be awarded at the discretion of the Freedom of Information Commission, could become a "two-way street . . . . That the citizen, if it were the discretion of the Freedom of Information Commission, would have to pay the State's or the Municipality's attorneys fees . . . . [T]his would have a chilling effect upon the exercise of the rights granted under this Act by ordinary citizens . . . ." Hearings on Calendar 0910, 18 Conn. House Proceedings, Pt. 8, at 3898-99 (1975).

203. See note 5 supra and accompanying text.
206. See notes 87-92 supra and accompanying text.
207. See notes 88-92 supra and accompanying text.
209. See note 49 supra.
heralding a more open approach to public inspection of government documents across the nation. Finally, one indication of public support for a liberal open records policy is the enactment, in 1972, of the Washington statute through a public referendum.\(^{211}\)

Even when statutes were not significantly altered or amended, minor changes in wording and redefinitions also reflected the liberal trend. Massachusetts, in 1973, redefined the term public records from category "b"\(^{212}\) ("any written or printed book or paper . . . in or on which any entry has been made or is required to be made by law")\(^{213}\) to category "f"\(^{214}\) ("all [documents] made or received by any officer or employee of any agency")\(^{215}\), a broad-scale leap across the definitional spectrum.

Virginia and Connecticut, by repealing pre-existing clauses, also took giant steps toward liberality. In Virginia, a 1974 enactment\(^{216}\) repealed the qualifying phrase "having a personal or legal interest in specified records" from its proclamation that public records are open to inspection by any citizen.\(^{217}\) In Connecticut, a general reform of the state open records act in 1975\(^{218}\) repealed a general exclusion clause which had permitted a custodian to refuse permission to inspect "if such inspection or copying would adversely affect the public security or the financial interests of the state or any of its political subdivisions or if such denial is necessary to provide reasonable protection to the reputation or character of any person."\(^{219}\)

Of the recent statutes, among the most comprehensive is that of Kentucky.\(^{220}\) The act was given impetus by the decision in \emph{City of Saint Matthews v. Voice of Saint Matthews},\(^{221}\) which overruled much of the earlier restrictive Kentucky law on open records.\(^{222}\) The statute covers most of the points discussed above relative to the issue of public inspection of records. It promulgates a category "f" definition of public records\(^{223}\) ("all [documents] . . . regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a public agency").\(^{224}\) After providing that inspection and copying rights shall be afforded to "any person,"\(^{225}\) the

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statute demarcates specific exemptions which may, however, "be subject to inspection only upon order of a court of competent jurisdiction." Editing, under applicable circumstances, is provided for, and enforcement and penalty provisions, with the burden of proof placed upon the custodian to sustain the withholding of the document. A final provision allows any person access to any public record relating to or mentioning himself subject to the exemptions so provided in general.

VIII. MODEL ACT

As a final summary of this study, a model state open records act appears in Appendix I. This act is offered as one possible approach to solving many of the problems and issues that have been discussed above. The model has been drawn largely from what is perceived to be the best statute to date, Kentucky's 1976 Act, and two pre-existing model acts drafted by researchers in the field of freedom of information. Given the divergence of existing

226. Id. at § 61.878(1). Included are preliminary drafts and certain preliminary memoranda. Id. at §§ 61.878(1)(a),(g),(b). This provision for a judicial order of inspection covers the issue of a reverse general exclusion clause, discussed in notes 126-27 supra and accompanying text. Implicit in the statutory mandate and the holding in City of St. Matthews is that the broad equitable powers vested in the courts continues to act as a general exclusion clause for denying inspection. See section IV(A) supra and accompanying text. The statute also exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the general assembly." Ky. Rev. Stat. Ann. § 61.878(1)(j) (Cum. Supp. 1976). This provides, in effect, a legislatively-oriented general exclusion clause should the legislature so choose to act. For a case where the legislature of New Jersey did so act to overcome a previous court decision opening Workmen's Compensation claim records to public inspection see Accident Index Bureau, Inc. v. Male, 95 N.J. Super. 39, 229 A.2d 812, aff'd, 51 N.J. 107, 237 A.2d 880 (1968) (per curiam), appeal dismissed, 393 U.S. 530 (1969).


228. Ky. Rev. Stat. Ann. §§ 61.880, .882 (Cum. Supp. 1976). Review by the state Attorney General is provided as an administrative alternative to judicial action. Id. at § 61.882(2). This procedural device has a positive effect in two senses: first, it screens clearly erroneous withholdings, thereby reducing the caseload of the courts. Second, it provides a relatively quick and inexpensive remedy to the denied applicant.

229. Id. at § 61.882(5). If the violation of the statute was willful, a prevailing applicant may be awarded all costs including reasonable attorney fees. It is also within the discretion of the courts to award up to $25 per day to the applicant for the period during which inspection or copying rights were denied. Id.

230. Id. at §§ 61.880(2), .882(3) (unless, of course, the document is specifically exempted).

231. Id. at § 61.884. Although at first glance this provision may seem unnecessary (being a member of the general public, he would be able to obtain access anyway), it defeats an attempted defense by an agency relative to special circumstances or possible peculiar harm resulting from the subject of the record seeking inspection.

232. Hereinafter referred to as Model Act.


234. These are the Southern Governmental Monitoring Project Model State Freedom of Information Statute and the Freedom of Information Center Model State Freedom of Information Statute. Both are reprinted in their entirety in Amico, supra note 3, at 51-60.
state statutes on specific records, the needs and philosophies of particular localities, and realistic political factors, the uniform promulgation of such an act across the various jurisdictions may be unlikely at best. However, it is hoped that this specific model will serve as a starting point for additional legislation which would attempt to resolve the problems and issues raised in the case law to date.

Unlike any of the forty-eight current statutes, or the two earlier models, this proposed act assumes no absolutes in terms of classes of records being open or closed. Although records are defined in most broad—category "f"—terms as documents "prepared, owned, used, retained by or . . . in the possession of a public body,"235 a custodian may, under section 7(e), apply within ten days of the request for a court-ordered exemption on public policy grounds if he believes "the public interest in nondisclosure . . . clearly outweighs the public interest in disclosure."236 The burden of proof in such a situation is intended to be high: the custodian must clearly demonstrate that "on the facts of the case the public interest in nondisclosure clearly outweighs the public interest in disclosure."237 A strong "Declaration of Policy," requiring that any exceptions to the open records mandate be "strictly construed,"238 should further work to limit the application of this provision to the exceptional case. Section 7(e) comes into play only after there has been a specific request for a document and calls for an alternative proceeding to be instituted by the custodian. It may not be asserted by way of defense or counterclaim.

Conversely, none of the exceptions to the open records policy, which are promulgated in section 5(a), are absolute. In what is perhaps the act's most innovative feature, a procedure is established for a particular seeker to overcome the statutory presumption of confidentiality of the specifically exempted public records.239 A "section 5(a) proceeding" constitutes the procedure and, in such an action (which may be brought before the state Attorney General or the state courts at the seeker's option),240 the burden of proof relative to availability is shifted from the custodian to the seeker.241 However, the seeker's burden is not as strong—whereas the custodian must establish that the public interest in nondisclosure "clearly outweighs" that of disclosure, the word "clearly" is dropped from the seeker's burden. He must merely demonstrate by a bare preponderance of credible evidence that the public interest in disclosure outweighs that in nondisclosure.242 Additionally, the seeker is aided by the strong Declaration of Policy favoring openness as a guideline for judicial construction.243 In short, it will be easier for the seeker

236. Model Act, supra note 232, at § 7(e). Such a clause is discussed at section IV(A) supra and accompanying text.
237. Model Act, supra note 232, at § 7(e).
238. Id. at § 1.
239. Id. at § 5(a).
240. See generally id. at §§ 6, 7.
241. Id. at § 5(a).
242. Id.
243. Id. at § 1.
to rebut the specific presumption of confidentiality where the act so provides
than for the custodian to rebut the general presumption of availability for a
nonexempt public record.

Procedurally, the denied seeker has an alternative of remedies. He may
apply for a quick (and presumably less expensive) determination by the state
Attorney General relative to the merits of disclosure or he may proceed
directly with court action. Should he choose the Attorney General option,
only to be denied again in his application for inspection, he may nevertheless
institute court proceedings for a de novo judicial determination. The
Attorney General mechanism is intended only as a swift, inexpensive alterna-
tive to the applicant. An agency may appeal the decision of either the
Attorney General or the trial court, but a successful applicant in such
subsequent proceeding shall be awarded all court costs and reasonable
attorney fees from the agency. Fees may be awarded even if the applicant
is unsuccessful if the custodian continues to wrongfully withhold the docu-
ment and does not initiate proceedings on his own pursuant to the act.

Whenever an applicant seeks review of an agency’s denial of inspection of a
government document—whether made to the Attorney General or the
courts—a preliminary determination must be made as to whether the action
of the seeker constitutes a section 5(a) proceeding, i.e., whether the document
being sought constitutes a public record and "clearly falls within one of the
exempted categories of public records enumerated in sections 5(a)(1)-(10)."
If the categorization of the public record is doubtful or uncertain, the action
shall not constitute a section 5(a) proceeding and the burden of proof shall
remain with the custodian. To avoid delay, this initial determination, pre-
liminary to full hearing on the merits, may not be appealed as a final order
and may in no circumstances be considered apart from the merits by a higher
court. It merely constitutes a determination of the procedural and remedial
framework in which the trial on the merits will be conducted. As discussed
above, it seems only proper that the party seeking to rebut the statutory
presumption of availability or nondisclosure should bear the burden of
proof.

Provisions for editing, severability in the event of judicial declaration of
partial invalidity, and access to records concerning oneself are provided.
The specific exemptions enumerated in section 5(a) are merely suggestive, and

244. Id. at § 6.
245. Id. at § 7.
246. Id. at §§ 7(a)-(b).
247. Id. at § 7(d).
248. Id. at § 7(f).
249. Id.
250. Id. at §§ 6(a), 7(b).
251. Id.
252. See text following note 127 supra.
253. Model Act, supra note 232, at § 5(c).
254. Id. at § 10.
255. Id. at § 9.
One final innovative provision of the model act concerns the problem of the
classical law "official information" privilege discussed above. All privileges are not automatically abrogated by this act but, rather, may be deferred
to in an action brought by the custodian to assert the privilege within ten days
after a request to inspect has been made (common law privilege may not be asserted by way of defense of counterclaim in a proceeding brought by a seeker to compel inspection because, again, the burden of instituting a proceeding attempting to rebut the statutory mandate of disclosure should rest with the custodian). To sustain nondisclosure by virtue of the privilege, the custodian must demonstrate that the privilege is clearly applicable to the document in question and that "on the facts of the particular case the public interest in nondisclosure outweighs the public interest in disclosure."

Note that this action available to the custodian is separate and apart from the
general "public policy" appeal of section 7(e), and relates only to the issue of privilege. Given the history of judicial acceptance of the privilege as a basis to deny inspection of public records, the burden of proof required to sustain nondisclosure on the basis of privilege is lower than that of the general exclusion clause of section 7(e). The custodian must only demonstrate that the public interest in nondisclosure pursuant to the privilege "outweighs" that of disclosure, not, as in section 7(e), that the latter is "clearly outweigh[ed]."

IX. Conclusion

The open records issue in the states amounts essentially to a balancing of
the public's right to know and to monitor the conduct of its public servants on
the one hand against the need to maintain confidentiality in government
processes and to protect the reputation and privacy of individuals on the
other. From all appearances, the balancing has tended to become more of a
groping—a response to the successes and failures of sister states with individ-
ual modifications tailored to local conditions which in turn serve as models for
subsequent legislation. The explosion of freedom of information in the past
decade in no way constitutes the culmination of the process or even its most
efficient and socially useful form. The open records policy will always reflect
the priorities and values of the society-at-large and be a function thereof. The
common law jurisdictions of Mississippi and Rhode Island—as well as those

256. Id. at § 5(b). See section IV(B) supra.
257. Model Act, supra note 232, at § 5(b).
258. See text following note 127 supra.
259. Model Act, supra note 232, at § 5(b).
260. Id.
261. Id. at § 7(e).
which have enacted only limited legislation—should continue to benefit from the ongoing developments in this area. Liberalization of statutory and common law in these jurisdictions seems only a matter of time.

William Randolph Henrick

APPENDIX I

Model State Open Records Act

SECTION 1. Declaration of Policy.

The Legislature of ___, although mindful of the right of individuals to privacy, hereby finds and declares that access to information concerning the conduct of public servants in conducting the people's business is a fundamental and necessary right of every person in this State. It is thereby declared to be the public policy of ___ that public records shall be readily accessible for examination and copying by any person, with certain exceptions provided under this Act for the protection of the public interest.

Courts shall take into account the policy of this Act that free and open examination of public records is a fundamental and necessary right of every person and in the public interest. Such exceptions provided for by this Act or otherwise provided by law shall be strictly construed, even though examination of public records may cause inconvenience or embarrassment to public officials or others. Courts may examine any public record in camera in any proceeding brought under this Act.

SECTION 2. Definitions.

As used in this Act:

"Business days" means all calendar days excluding Saturdays, Sundays and legal public holidays.

"Custodian" means the official custodian or any authorized person having personal custody or control of a public record.

"Official custodian" means the chief administrative officer or other employee of a public body who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual custody or control.

"Person" means any individual, corporation, partnership, firm, organization or association, regardless of citizenship or residence in this state.

"Person in interest" means the person who is the subject of a public record, or mentioned in any identifiable manner therein, or any representative designated by said person, except that if such person be under a legal disability, the term "person in interest" shall mean the parent or duly appointed legal guardian.
“Public body” means every state or local officer, agency, department, division, bureau, board, commission and authority; every legislative board, committee, commission and officer; every county, city and municipal governing body, council, school district board, special district board, municipal corporation and any board, department, commission, committee, subcommittee, ad hoc committee, council or agency thereof; and any other body which is created by state or local authority in the executive or legislative branches of government, or which derives at least twenty-five per cent (25%) of its funds from state or local authority.

“Public record” means any book, writing, paper, map, photograph, card, tape, disc, sound recording, drawing, film or other documentary or information-containing material, data or recording, regardless of physical form or characteristics, which has been prepared, owned, used, retained by or is in the possession of a public body.

SECTION 3. Public Records Open to Inspection and Copying by any Person.

(a) Any person shall have the right to inspect or copy any public record of any public body during the regular office hours of the public body except as otherwise expressly provided by Section 5 of this Act (exceptions). The exercise of this right may be subject only to such reasonable limitations established by the custodian for the physical protection of the records themselves or so as not to unreasonably disrupt the essential functions of the public body. The custodian may require written application describing the records to be inspected.

(b) Any public body, upon request for the inspection of public records pursuant to this Act, shall within ten business days of the receipt of such request, notify the person making the request of the public body's determination and, if denying inspection or copying, state the reasons therefore, including a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld. Such statement shall constitute the final opinion of the public body as to the public availability of the requested document and a copy shall be forwarded immediately to the state Attorney General by the public body.

(c) If the public employee to whom the application for inspection is directed does not have custody or control of the public record requested and is not the official custodian, such employee shall so notify the applicant and shall furnish the name and location of the custodian of the public record, if such facts are known to him.

(d) If the public record is in active use, in storage, or not otherwise immediately available, the official custodian shall notify the applicant within five business days from receipt of the application and shall designate the earliest practical date and time, and arrange a mutually convenient place, for inspection of the public record.

(e) Upon inspection, any person shall have the right to make abstracts of the public records and memoranda thereof, and to obtain copies, transcripts or print-outs from the public body. Such copies shall be provided as soon as is
reasonably practical. No person shall remove original copies of public records from the office of any public body without the written permission of the official custodian.

(f) The public body may establish and collect reasonable fees for making copies not to exceed the actual cost thereof, not including the cost of staff required. Fees shall not be charged for examination or review to determine if such documents are subject to disclosure.

SECTION 4. Public Body to Adopt Rules and Regulations.

(a) Each public body shall adopt rules and regulations in conformity with the provisions of this Act to provide full access to public records, to protect public records from damage and disorganization, to prevent excessive disruption of its essential functions, to provide assistance and information upon request and to insure efficient and timely action in response to applications for inspection, and such rules and regulations shall include, but shall not be limited to:

1. The principal office of the public body and its regular office hours;
2. The title and address of the official custodian of the public body's records;
3. The fees, to the extent authorized by this Act or otherwise provided by law, to be charged for copies;
4. The procedures to be followed in requesting public records.

(b) Each public agency shall display a copy of its rules and regulations pertaining to public records in a prominent location accessible to the public.

SECTION 5. Public Records Exempt From Disclosure Except Upon Decision of Attorney General or Order of Court; Procedure.

(a) The public records enumerated in this subsection shall be exempt from disclosure and may be subject to inspection or copying only upon decision of the state Attorney General or an order of a court of competent jurisdiction resulting from proceedings commenced by any person seeking inspection or copying of such records in accordance with the procedural provisions of sections 6 and 7 of this Act [such a proceeding hereinafter shall be referred to as a section 5(a) proceeding]. Notice of any section 5(a) proceeding shall be given to every person in interest and to the public body. In any section 5(a) proceeding, the burden of proof shall be upon the person seeking inspection to establish that the public interest in disclosure outweighs the public interest in nondisclosure. Provisions under sections 7 and 8 of this Act relating to the recovery of costs and attorney fees, and the enumerated penalty provisions of removal or impeachment, fine, imprisonment and monetary awards to the seeker shall be inapplicable to any section 5(a) proceeding except as provided in section 7(f). The following public records are exempt from disclosure except upon such Attorney General decision or court order resulting from a section 5(a) proceeding:

1. Public records specifically exempted from disclosure by any federal or state statute;
2. Public records containing information of a purely personal nature.
where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. Examples of records which may contain this information, without limiting the application of this subsubsection to other such records, include adoption, juvenile, medical, mental, personnel and parole records;

(3) Investigatory files or records of law enforcement agencies or other public bodies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations, if the disclosure of the information would harm the public body by revealing the identity of informants not otherwise known, or by disclosing investigatory techniques not otherwise known outside the government, or by prematurely releasing information to be used in a prospective law enforcement action or administrative adjudication. This subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by this Act;

(4) Test questions, scoring keys and other data used to administer a licensing examination, examination for employment, or academic examination. However, an examinee shall have the right to review his own completed examination;

(5) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or any public body relative to the acquisition of property or any interest in property for public use, or to prospective public supply and construction contracts, until such time as title to the property has been acquired or the property interest has passed to the state or a public body, provided the law of eminent domain shall not be affected by this provision;

(6) "Trade secrets" which may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to facilitate, produce or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it;

(7) Records pertaining to pending claims or litigation to which the public body is a party until such claim or litigation has been finally adjudicated or otherwise settled, provided no other inspection or discovery rights relating to the production of documents in claims or litigation to which the public body is a party shall be effected by this provision;

(8) The specific details of bona fide research projects being conducted by a state institution;

(9) Library, museum or other charitable contribution material contributed by private persons, to the extent of any limitations placed thereon as conditions of such contributions;

(10) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the Legislature.

(b) In accordance with the procedures provided in section 7, and notwithstanding the specific exemptions of subsection (a) of this section, any
custodian of any public record may seek to restrict or deny disclosure of such public record in whole or in part on the ground that such record or information therein falls within a common law privilege of confidentiality. The burden of instituting such proceedings shall fall upon the official custodian of the public record by applying to the ___ Court within ten business days for an order permitting him to restrict disclosure on grounds of such privilege. Such order will not issue and inspection will not be denied unless the official custodian demonstrates the clear applicability of the privilege and that on the facts of the particular case the public interest in nondisclosure outweighs the public interest in disclosure. Notice of such action shall be given to the person seeking inspection, the public body and every person in interest. The provisions of this subsection relating to common law privilege may not be asserted as a defense or counterclaim to any action brought by a person to compel disclosure but, rather, must be asserted in a separate previous action instituted by the official custodian.

(c) The exemptions provided in this section shall be inapplicable to the extent that information, the disclosure of which is excepted by this section, can be deleted from the specific records sought. In such a case, the public body shall separate the exempted and make the nonexempted material available for examination. The fact that a document has been edited shall be noted conspicuously on its face and sections where deletions have been made shall be marked by "...".


(a) Any person denied inspection of any public record pursuant to the terms of this Act may appeal within thirty business days to the state Attorney General for a review of the denial. Within ten business days, the Attorney General shall issue a written opinion to the public body and the applicant stating whether such public body acted consistently with the provisions of this Act and shall either affirm, reverse or modify the public body's decision to withhold the document. The Attorney General may seek additional documentation from the public body and may examine the document in camera before making his determination. Preliminarily, the Attorney General must make a determination as to whether the applicant's request constitutes a section 5(a) proceeding. If the Attorney General finds that the record sought clearly falls within one of the exempted categories of public records enumerated in sections 5(a)(1) - (10) of this Act, he shall declare the request a section 5(a) proceeding and make further determinations on the merits of the application in accordance with the rules enumerated in section 5(a) relative to burden of proof. In no instance may the Attorney General award court costs, attorney fees or penalize the custodian or public body in any manner. A determination by the Attorney General that the seeker's request constitutes a section 5(a) proceeding shall not be appealable in and of itself but rather may be reviewed in any subsequent court proceedings only in conjunction with a full determination on the merits. The determination of the character of the proceeding shall be ruled upon preliminarily and summarily by the court in any subse-
sequent court proceedings brought after the Attorney General has rendered his final decision, as a basis to determine the character of the primary proceeding on the merits of public inspection.

(b) In the event a person feels the intent of this Act is being subverted by an agency short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may complain in writing to the Attorney General and the complaint shall be subject to the same adjudicatory process as if the record had been denied.

(c) In order for the __ Courts of this state to exercise their jurisdiction to enforce the provisions of this Act as provided in section 7, it shall not be necessary to have forwarded any request for documents to the Attorney General pursuant to this section. A denied applicant may employ directly the judicial procedures provided in section 7.


(a) The __ Courts of this state shall have jurisdiction to enforce the purposes of this Act by injunction, declaratory judgment or other appropriate order on the application of any person either directly, or for a de novo trial after a determination from the Attorney General pursuant to section 6. The __ Courts shall also have jurisdiction to deny inspection when proper under the specific provisions of this Act on the application of any public body as provided in this section or subsection 5(b). Except as otherwise provided by law or rule of court, proceedings arising under this Act shall take precedence on the docket over all other cases and be assigned for trial at the earliest practicable date. In any proceeding not declared by the court to be a section 5(a) proceeding, the burden of proof shall be on the public body to justify its act of nondisclosure.

(b) Any person denied inspection of any government document by a public agency may apply to the __ Court for a de novo trial seeking an order to enforce his rights to inspect or receive a copy of any public record under the terms of this Act. Such proceeding must be brought within thirty business days of receipt of the public body's notification of denial, or within thirty business days of receipt of an affirmance or modification of such denial by the state Attorney General pursuant to section 6 of this Act, or within sixty business days if the public body has wrongfully withheld the public record or any part thereof by continuing to refuse inspection and not instituting court proceedings within ten business days pursuant to subsection (e) of this section or section 5(b) of this Act after a determination by the state Attorney General that disclosure of the public record or any part thereof is required by the terms of this Act. Such court shall preliminarily and summarily determine de novo whether the record sought clearly falls within one of the exempted categories of public records enumerated in sections 5(a)(1) - (10). If the court so finds, it shall declare the primary proceeding on the merits to be a section 5(a) proceeding and subject to the provisions of section 5(a) of this Act. Such preliminary determination shall not be appealable to the __ Court as a final
order but rather may be reviewed on appeal only in conjunction with a full determination on the merits. Any noncompliance with the order of the court may be punished as contempt of court.

(c) In the event a person feels the intent of this Act is being subverted by a public body short of denial of inspection, including but not limited to the imposition of excessive fees or the misdirection of the applicant, the person may institute proceedings for injunctive, declaratory or other appropriate relief in the Court and such proceeding shall be subject to the same adjudicatory process as if the record had been denied.

(d) Any public body determined by the state Attorney General or Court, pursuant to section 6, to be wrongfully withholding any public record or portion thereof from public inspection in accordance with the provisions of this Act shall comply with such determination in full by producing such documents for inspection within ten business days, unless within the ten day period the public body issues notice of its intention to institute proceedings for injunctive, declaratory, appellate, or other appropriate relief with the Court. Copies of the notice shall be sent to the Attorney General and, by certified mail, to the petitioner at the address stated on the petition. The public body shall institute proceedings within ten business days after it issues its notice of intention to do so.

(e) If, in the opinion of the custodian of any public record, the public interest in nondisclosure of the particular record clearly outweighs the public interest in disclosure, notwithstanding the fact that such record might otherwise be available to public inspection, he may apply to the Court within ten business days of the request for inspection for an order permitting him to restrict such disclosure. After a hearing, with notice given to the seeker who shall have the right to appear and be heard, the court may issue an appropriate order restricting disclosure upon a finding that on the facts of the case the public interest in nondisclosure clearly outweighs the public interest in disclosure. The provisions of this subsection relating to nondisclosure on public interest grounds may not be asserted as a defense or counterclaim to any action brought by a person to compel disclosure but, rather, must be asserted in a separate previous action instituted by the official custodian.

(f) If any person seeking the right to inspect or receive a copy of any public record prevails in any proceeding brought pursuant to this Act, such person shall be awarded all costs of litigation including reasonable attorney fees, except as provided in section 5(a). If such person prevails in part, the court may in its discretion award him reasonable attorney fees or an appropriate portion thereof except as provided in section 5(a). However, irrespective of the character of the proceeding, if such person has instituted proceedings to compel inspection after a public body has wrongfully withheld the public record or any part thereof by continuing to refuse inspection and not filing notice of its intention to institute court proceedings within ten business days pursuant to this section or section 5(b) of this Act, and/or has not in fact so instituted such proceedings within ten additional business days after a determination by the state Attorney General that disclosure of the public record or
any part thereof is required by the terms of this Act, such person shall be awarded all costs of litigation including reasonable attorney fees whether or not he prevails in such proceeding.

SECTION 8. Penalties.

(a) Any custodian who willingly and knowingly violates the provisions of this Act shall be subject to suspension, removal or impeachment. He shall also be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500) or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.

(b) In addition, when any person seeking the right to inspect any public record prevails against a public body in any court action, in full or in part, it shall be within the discretion of the court to award such person an amount not to exceed twenty-five dollars ($25) for each day that he was denied the right to inspect such public record. The costs or award shall be paid by such custodian or public body as the court shall determine is responsible for the violation.


Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of section 5(a).

SECTION 10. Severability.

If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof.
## APPENDIX II

### Summary of State Open Records Acts

<table>
<thead>
<tr>
<th>Remedies</th>
<th>Penalties</th>
<th>Exemptions</th>
<th>Copy Fees</th>
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<tbody>
<tr>
<td>administrative review</td>
<td>judicial review</td>
<td>attorneys fees paid</td>
<td>fine</td>
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</table>

- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- D.C.*
- Florida
- Georgia
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi

** no statute **
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<th>Penalties</th>
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<td>Law enforcement exam data</td>
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* District of Columbia Commissioner's Order No. 71-370, reprinted in Amico at 87-91.