The Right to Be Able to Know

Public Access to Public Information

A report by the N.C. Center for Public Policy Research

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Preface

This report is about the flow of power between government officials and ordinary citizens—the power that comes from knowing and being able to know what the government is doing. It is not so much a guidebook for obtaining access to government information as it is a study of the dynamics in which access does, and does not, occur. The premise of the following discussion is rather simple—that secrecy in government usually serves the best interests of neither the government nor the people and is only rarely justified—but the policy questions which underlie such a view are hardly uncomplex. Does the public have a *right* to know what is going on inside government at the federal, state, county, and city levels? Is the interest of ordinary citizens in having information about government activities always compatible with the need to protect the privacy of individuals, including public officials? Do state open meetings laws serve the purpose of broadening citizen access, or do they instead establish false justifications which permit officials to conduct public business in private? Is the press sufficiently equipped by law to obtain information for disclosure to the public, and adequately protected from government interference in the performance of that task? Should state laws governing access to documentary information and to government meetings be amended, and, if so, in what ways?

These and other questions will be addressed on the following pages, and some will be answered. The purpose of this study, however, is to stimulate interest in the issues as well as to propose changes in the laws which control the flow of information to and from the government. Limitations on official secrecy and the opening of government files and records involve several practical questions: who, what, when, and where? But the difficult policy question—why?—is most important of all if the people are to be satisfactorily informed and officials are to be put to the high test of working under public scrutiny which is sufficiently knowledgeable to guarantee effective and efficient government.

F. H.

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Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes to be right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns. Why should any man be allowed to buy a printing press and disseminate pernicious opinion calculated to embarrass the government?

—Nikolai Lenin [1]

PART ONE

The Opportunity to Know

All governments, even those led by apparently well-intentioned people, require constant scrutiny.

— David Burnham
Contemporary political writer

Information is power, and the balance of power between government and people depends on how much information about each the other has. For nearly 200 years the American people have been disputing their government, at both the state and federal levels, for access to the information it routinely compiles, collects, produces, catalogues, and uses to shape and control their lives. Until recently the conflict has been more theoretical than real. Early federalism produced a government that was decentralized and relatively unintrusive. There was no income tax, no Selective Service, no Federal Bureau of Investigation, no Central Intelligence Agency. For a long time there was only the census and the small bureaucracy in Washington, distant threats to the free spirit of pioneers settling in hostile and remote territories.

But as the United States became a force in global affairs and a more complex society after World War I, the government became more centralized and more powerful. Depression-era programs expanded the influence of the federal government over the economy, and therefore over virtually every aspect of daily life. The Cold War exacerbated concerns about sedition as well as surprise attack, and modern technology gave authorities the means to spy on almost anyone, almost anywhere. Federal and state agents and local police, sometimes with knowing disregard for the rights of individual citizens, began in the 1950s the vast and systematic collection of information that eventually resulted in what author David Wise described as *The American Police State* in a 1976 book subtitled *The Government Against the People*.[2]

This recent and unprecedented tension between the government and the ordinary citizen is not a struggle between evenly matched adversaries. There are today few legal constraints and even fewer practical limita-

tions on the government's prerogative to collect and make use of data. Yet private individuals have little or no power to monitor the government's data collection, or to find out how such data is used. Federal laws providing for access to government information are limited by broad exceptions and subject in application to the whims of a thousand bureaucrats. State "public" records laws, in North Carolina and elsewhere, are vague and for all practical purposes unenforceable against state officials intent on suppression. The flow of information *to* the government at all levels has steadily increased during the past thirty years, while in some ways the flow of information from the government has slowed to a trickle.

"Secrecy in government (has become) as American as apple pie," said Herman Kahn of Yale University several years ago.[3] Indeed, a temptation to secrecy has long typified the activities of all governments, but the slide into widespread and virulent secrecy in the United States is a relatively recent phenomenon, characterized by a manifest loss of public confidence in government and by acerbic clashes among the press, public officials, and the courts. Secrecy in government became a volatile political issue in the hands of Sen. Joseph McCarthy during the 1950s, and a matter of public debate as early as 1961. A prominent politician warned then that the growing "concept of a return to secrecy in peacetime demonstrates a profound misunderstanding of the role of a free press as opposed to that of a controlled press," and that the "plea for secrecy could become a cloak for errors, misjudgments and other failings of government."[4] The speaker was Richard Nixon.

Secrecy in government does affect the press, of course, but in a larger and more profound way it affects every citizen. The suppression of information can cloak not only "failings of government" but also the steady erosion of democratic ideals. Secrecy without sound justifications, secrecy for the sake of secrecy, inevitably impedes what retired Supreme Court Justice William O. Douglas called the "wide open and robust dissemination of ideas and counterthought" which is fundamental to the maintenance of liberty:

> The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government

> becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it. Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.[5]

1. The Right to Know

The "tragedy" Justice Douglas spoke of was a decision by the United States Supreme Court which, in his view, sapped some of the strength from what he and others called "the people's right to know."[6] Yet it is unclear, even after nearly 200 years of constitutional debate and analysis, whether there is in this country a "right" to obtain information from and about government. The existence of such a right has been asserted by some journalists, scholars, and Supreme Court justices, but it has been denied by others. "Where is there a right to know in the Constitution?" asked Carl Stern, a lawyer and law commentator for NBC News, at a recent press law seminar in Chapel Hill.[7] In fact, no such right, whether "unalienable" or otherwise, is mentioned either in the Declaration of Independence or the Constitution. The First Amendment does prohibit the making of a law which abridges the "freedom of speech, or of the press," but what is "speech" and what is "the press?" What, for that matter, is "freedom?"

Even at the outset, the First Amendment was an enigma. Was its inclusion in the Bill of Rights a statement of philosophy reaching back to Rousseau's *Social Contract*[8] and to the views of Thomas Hobbes, the seventeenth-century thinker who had originated the very idea of individual rights?[9] Or was it nothing more than a limitation on the government's power to control publishers through licensing and stamp taxes similar to those which had been imposed by the lately rejected English monarchy? Even the framers seemed unsure, as Publius had testified in the *Federalist Papers* prior to the ratification of the Constitution:

> What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations

> may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all . . . must we seek for the only solid basis of all our rights.[10]

On the strength of such views, Publius (who was in reality the cynical Federalist Alexander Hamilton) had persuaded a majority of delegates to ignore those like Charles Pinckney of South Carolina who wanted to specify certain "natural" rights such as freedoms of speech, press, and assembly in the Constitution. But time soon proved the political wisdom of Pinckney's position. Ratification debates made it apparent that there was wide support for the constitutional protection of individual rights, and within four years ten amendments called Articles were appended to the original 1787 document. The first of these Articles guaranteed that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

These first ten amendments, the Bill of Rights, generally defined limits on the federal government's power over individuals. Others ratified later reshaped the very concept of constitutional federalism, especially the Fourteenth Amendment, ratified in 1868, which stipulated in part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." During this century the "due process" and "equal protection" clauses of the Fourteenth Amendment have been applied in various United States Supreme Court opinions to extend the freedoms of speech, press, and assembly to the states.[11] No longer is only Congress prohibited by the Constitution from abridging such freedoms. State legislatures and courts, as well as derivative government bodies such as county commissions and municipal school boards, are now clearly required to respect the language and the intent of Article I.

The First Amendment guarantees of free speech and free press apply

to all citizens, to those who listen and read as well as to those who speak and publish. For this reason, questions about public access to government information inevitably raise profound First Amendment issues and require an effort to determine what the language of the First Amendment actually means. While the Bill of Rights acknowledged that certain "rights" do exist, the terms used in the Bill of Rights were not defined. Article I and its corollary, Article XIV, have had the probably unintended effect of vesting in the nine justices of the United States Supreme Court almost exclusive power (limited only by popular indignation) to interpret the meaning and effect of the term "freedom of speech, (and) of the press."* The provocative language of the First Amendment means what they say it means at any given time, and over the years different judges have had different ideas about what it means. Justice Hugo L. Black argued that First Amendment guarantees were absolute, that no restrictions on them could ever be tolerated. Few other jurists, and for that matter few journalists, have subscribed to Black's absolutist view. "The most stringent protection of free speech," wrote Justice Oliver Wendell Holmes in 1919, "would not protect a man in falsely shouting fire in a theatre and causing a panic."[12] Justice William O. Douglas, a fiery advocate of free expression, conceded in 1951 that there does come "a time when even speech loses its constitutional immunity."[13] The constitutionality of libel and slander laws is beyond question, though they are certainly "abridgments" on unfettered free speech and free press, and all newspapers today are subject to laws, taxes, and postage rates like any other business.

Recent Supreme Court opinions, those with a majority nucleus composed of Nixon appointees, have focused not on exploring the breadth of the First Amendment but on drawing its limits. Even so, the meaning

*Freedom of speech and freedom of the press are different concepts, of course, and are interpreted differently in court opinions. Free speech may mean just the sometimes limited freedom to voice opinions, but free press means more than merely the freedom to *print* opinions. Today it includes, at the very least, considerations about the process of gathering information as well as about the power of the government to prevent its dissemination through various communications media. These very distinct First Amendment issues are, however, sometimes jointly referred for convenience as freedoms "of expression."

of the term "freedom . . . of the press" is no less uncertain. This year in a 5-3 decision, the majority (four Nixon appointees plus Justice Byron White, a Kennedy appointee) held that the First Amendment does *not* "forbid (search) warrants where the press (is) involved."[14] In a dissenting opinion, Justice Potter Stewart said "it seems to me self-evident that police searches of newspaper offices burden the freedom of the press." In 1972 the Court ruled by a 5-4 vote (with the same justices in the majority) that Article I does *not* afford journalists a privilege to withhold confidential information or the names of sources from a grand jury.[15] Justice Stewart, again with the minority, called this a "crabbed view of the First Amendment" which "reflects a disturbing insensitivity to the critical role of an independent press in our society."

These cases, and others involving the press which have been decided since the appointment of Warren Burger as Chief Justice, raise constitutional issues about the relationship of Article I to other parts of the Bill of Rights, especially the Fourth Amendment prohibition against "unreasonable searches and seizures" and the Sixth Amendment guarantee "to a speedy and public trial, by an impartial jury." In a broader sense, though, such cases raise public policy questions about whether the public has a "right to know" and whether the press is an instrumentality through which any such right should be exercised. Lately, at least as far as public policy finds expression in opinions of the United States Supreme Court, the answer to both questions has been "No."

2. The Need to Know

It is certain, irrespective of these sometimes strained Supreme Court dialogues, that the First Amendment does establish as a constitutional priority the free flow of opinions and ideas in this country. "The language of the First Amendment is to be read not as barren words found in a dictionary," wrote Justice Felix Frankfurter, "but as symbols of historic experience illumined by the presuppositions of those who employed them."[16] In other words, history is more important than semantics when questions arise about freedoms of speech and press. The men who wrote the Constitution

and the Bill of Rights had *something* in mind when they used these ambiguous terms, at the very least attitudes or ideals fundamental to the endurance of the government they had formulated. "Full and free discussion has indeed been the first article of our faith," wrote Justice Douglas in 1951. "We have founded our political system on it."[17]

Opinions and ideas are not necessarily information, however, and merely reading the First Amendment does not always answer the questions it provokes. Does this constitutional endorsement of full and free discussion presuppose *access* to most or all information about government, or only the casual acquisition of such information as is generally available?

Both colonial and contemporary writers have advanced the view that an informed electorate is essential in democracies, that there is inherent in the democratic system a *need* to know. "When each man is given a right to rule society," wrote Alexis de Tocqueville, "clearly one must recognize his capacity to choose between the different opinions debated among his contemporaries and to appreciate the various facts which may guide his judgment."[18] Media expert Hillier Krieghbaum, considerably less sanguine than de Tocqueville, wrote in a 1973 book called *Pressures on the Press* that "if our democratic society is to survive under the vast tensions to which it is currently subjected, then the American people have not only the right, but the overwhelming need, to know the facts."[19]

Out of this presumed "need to know," this assumption about the importance of information in the maintenance of the democratic social compact, has come the notion that there is a "right to know" built into the First Amendment. Thomas Jefferson linked an informed electorate with the press when he called "the opinion of the people" the "basis of our government" and said, "Were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter."[20] Calling "an enlightened citizenry" the "only effective restraint upon executive policy and power," Justice Potter Stewart opined in a landmark 1971 press case that "without an informed and free press there cannot be an enlightened people."[21] In another case the following year, Justice Douglas asserted that the "press has a privileged position in our constitutional system . . . not to set newsmen

apart as a favored constitutional class, but to bring fulfillment to the people's right to know." [22]

It is unclear, however, that a First Amendment "right to know" such as Douglas perceived actually arises out of the public's "need" for information, no matter how vivid that need may be. Not all of Jefferson's contemporaries shared his idealistic views about the common man as the "basis" of the government, and some were quite skeptical of the role the press might play in public affairs. Urging New Yorkers to give the proposed Constitution of 1787 "sedate and candid consideration," Alexander Hamilton as Publius recalled the recommendations of "the Memorable Congress of 1774" and lamented about "how soon the Press began to team with Pamplets and weekly Papers against those very measures." [23] None of the pre-Revolutionary philosophers had postulated an "unalienable right" to be informed, and modern scholars have perceived in the writings of these men a notion that any "unalienable" right to know would have implied an equally "unalienable" right not to know, which contradicts the argument that an informed public is a democratic prerequisite. Even John Locke, sometimes referred to as the spiritual father of American democracy, pioneered the idea not of a citizen with certain rights, but of a sovereign with less than unlimited powers. [24]

Locke and the other philosophers, as well as the philosophical politicians who wrote the Bill of Rights, were men of their times, not ours. If there is a "need to know" justification for access to government data, it has evolved quite recently and only in spite of, rather than out of, the history of "freedom . . . of the press" in this country. Until this century the First Amendment was generally construed only as a barrier to "prior restraint," a limit on the government's power to prevent publication based on the English common law model embodied in Blackstone's *Commentaries*. "The liberty of the press is indeed essential to the nature of a free state," Blackstone wrote, "but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." [25] Therein, however, lay seeds for press subjugation. Under the Blackstonian approach editors were repeatedly thrown in jail for seditious libel (criticism of the government) both before and after the Revolution.

In the early 1800s publishers were sent to prison for libel even though what they printed had been *true*, and later in the century restraints on the press cropped up in the form of "constructive contempt of court" (criticism of judges), civil libel (criticism of public officials using "gutter language"), legislation in Southern states outlawing criticism of slavery, falsehood (fake presidential proclamations during the Civil War), and "national security" (suppression of newspapers for publishing news of troop movements, even though the reports were untrue).

Only in 1931 did the Supreme Court first venture beyond this primitive "prior restraint" view of the First Amendment in a landmark case called *Near v. Minnesota.*[26] "Immunity from previous restraint . . . cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions," wrote Chief Justice Charles Evans Hughes in declaring unconstitutional a state statute which prohibited publication of "malicious, scandalous and defamatory" material. "The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions'; and that 'the liberty of the press might be rendered a mockery and a delusion and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publication.' "

Since the decision in *Near v. Minnesota*, press cases have usually involved an effort to decide what the words "freedom . . . of the press" mean *beyond* the "mere exception from previous restraint," though the borders of Article I have not been pushed outward very far from the narrow view which dominated First Amendment thinking for nearly 150 years. Precedent has been established to prevent constraints on the distribution of printed matter as well as on the printing of it,[27] and various forms of state censorship and prior restraint have been deemed unconstitutional.[28] During the same period, however, the Internal Security Act of 1950 (McCarran Act) was declared constitutional even though it placed great constraints on "free expression,"[29] and the Court ruled that mere expression could be punished under certain circumstances if the government's interest in doing so was sufficiently important.[30] In 1963 the Supreme Court ruled, in a case involving free speech issues, that restraints on First

Amendment rights might be justified by an "overriding and compelling . . . immediate, substantial and subordinating state interest."[31] The "Pentagon Papers" case,[32] a defeated effort by the government to impose prior restraint, nevertheless exposed the willingness of some justices to believe that "a very immediate danger" to national security might justify such restraints in the future.

Many of the most important press cases of the past two decades have involved questions not about prior restraints or the printing and distributing of news, but about the gathering of news itself. Freedom of the press, it has been argued, implies a degree of freedom in the operations of the press. In such cases journalists and press lawyers have tended to rely at least in part on the contention that the public's right to know justifies a liberal or "living" construction of the language of Article I, but the argument has never been successful. A lower federal court ordered compulsory disclosure of confidential news sources in 1958, conceding forthrightly that such disclosures "may entail an abridgement of press freedom by imposing some limitation upon the availability of news."[33] In 1972 the U. S. Supreme Court formally adopted the same viewpoint in the *Branzburg* decision. The "need to know," the 5-4 majority said in effect, is not so important as to override the "public interest in law enforcement and in ensuring effective grand jury proceedings."

3. The Need to be Able to Know

History and philosophy provide only partial justification for those like Stewart and Douglas who argue that access to government information is not only essential and desirable, but also mandatory. The validity of a "people's right to know," at least as a constitutional premise, is open to question on theoretical grounds and the existence of a "need to know" as a democratic constitutional necessity is debatable since even informed voters apparently do not always make the "right" decisions or the "best" choices among alternatives given to them on election day. But there is another, practical basis for the views propounded by these Supreme Court justices and others who support openness in government. It is clear that there is, in

this and every other democracy, a need *to be able* to know, not necessarily as an unalienable right but certainly as a fact of political life.

Political systems can be, and perhaps as *1984* [34] approaches must be, defined and classified according to the way in which information flows within them and how accurate and complete that information is. The difference between democracy and tyranny is little more than the difference between an informed public and a public informed.[35] Totalitarian regimes maintain themselves by the suppression of dissent and by the central formulation of political and social "realities." A democratic government, on the other hand, must continually cultivate the voluntary support and enthusiasm of its people. Without sufficient and reliable information, or at least the perceived opportunity to obtain it, public confidence in government and in government officials inevitably withers in a "free" society. Expectations are dashed, and alienation overtakes popular support. Richard Nixon was forced to resign because he lost the confidence of the people when he tried to suppress information, not because impeachable offenses were proven against him. The resignations of two state banking officials in North Carolina during 1978 touched off a controversy not about the circumstances of their reassignments (which were generally known) but about the withholding by government agencies of detailed information about the matter. Classical democracy may or may not be a system in which citizens have an unalienable "right to know," but it must be a system in which individuals have the political (i.e., the *legal*) right to be able to know if they so desire.

Information is the currency of democracy, a medium of exchange between the government and the people. Each is both a producer and a consumer, and the press is an instrument, perhaps the primary instrument, through which the exchange takes place. Writing about the importance of the independent and decentralized press in America, de Tocqueville observed that it

> causes political life to circulate through all parts of that vast territory. Its eye is constantly open to detect the secret springs of political designs, and to summon the leaders of all parties to the bar of public opinion. It rallies the interests of the community round certain principles and draws up the creed of every party; for it affords a means of intercourse between those who hear and address each other without ever coming into immediate contact.[36]

Much has changed since the early 1800s when de Tocqueville's *Democracy in America* was written, but the role of the press and the implications of the First Amendment as a statement of policy remain the same. Freedom *of* the press is guaranteed, if not freedom for the press. The power of public officials to plug the conduit of opinions and ideas is at least limited, though the extent of the limitation still depends, as Alexander Hamilton predicted, on "the general spirit of the people and of the government."

That spirit has recently, perhaps inevitably, grown more and more acrimonious. The government has become ever more intrusive, the press more querulous, the public more skeptical of public officials. "Future Shock" [37] arrived in the 1960s at both the state and the federal level. The "return to secrecy" produced both Pentagon Papers and Watergate capers, as well as SBI files on political protestors and illegal wiretaps by city police in Raleigh and Charlotte and, perhaps, other cities in North Carolina. "We are faced with and have faced a crisis in credibility and an ever widening gap in communication," wrote then N. C. Attorney General Robert Morgan in 1970. "Access to information about the government is required for the democratic system to work successfully. In order to maintain a government run by an informed people, secrecy must be minimized and the flow of accurate facts maximized." [38]

This "crisis of credibility" has only intensified since 1970, and access seems to have become more difficult even as the need for it has increased. The *policy* of the First Amendment, designed perhaps to avoid just such a development, is being both abused and ignored. In federal courts a journalist's prerogative to protect confidential sources is glibly deemed unessential to the gathering of news, while the U. S. Attorney General refuses to reveal the names of police informants because of the harmful effect such disclosures would have on law enforcement. In the Supreme Court of North Carolina, the state's open meetings law is gutted in a convoluted majority opinion that barely acknowledges the portion of the statute which reads: "it is the public policy of this State that the hearings, deliberations and actions of (government) bodies be conducted openly." [39] At the state and federal level bureaucrats daily seek to suppress information about malfeasance and misfeasance, both apparent and real. A Washington

auditor is criticized publicly for revealing multi-million dollar cost overruns in the Department of Defense, while in Raleigh a state secretary is fired---not reassigned—after complaining that her on-the-job duties included work for an active political candidate.

To reverse this "trend toward secrecy," there must be significant changes not only in the laws and court opinions which are the manifestations of First Amendment policy, but also in the attitudes of individual citizens and public officials about the roles and responsibilities of the entity called "government." Debate about public access inevitably focuses on the issue of how much the public, usually through the press, can be permitted to know. But the question *should* be how much information, and for how long and in what manner, the government can be permitted, for reasons of sound public policy, to withhold. If the Constitution betrays no clear evidence of a "public's right to know," neither does it establish or even imply a "government's right to suppress." Exceptional policy considerations might justify government control over some information, but not the presumptive control now generally exercised over all information.

The spirit of both the people and the government must undergo this change. Government officials need to recognize the obligations as well as the benefits of maximum disclosure, for it is up to them alone to resolve the "crisis of credibility" they now face. At the same time private individuals, especially journalists, must begin regularly to exercise their power as consumers of information by using the means available for obtaining government data, the laws already enacted which have become the public's "tools of access."

PART TWO

Butterflies Are Free, But Not Information

Public officials, whether career civil servants, elected, or political appointees, seem all too often to have one thing in common: they like secrecy.

— Southern Regional Council Report, 1975

1. The Tools of Access

Richard Nixon undertook perhaps the most notorious effort by a United States president to manipulate government information, but certainly not the first. George Washington withheld copies of his farewell address from newspapers which had criticized him while he was in office. Thomas Jefferson and his political cronies founded papers in various localities to insure the uncritical presentation of his viewpoints. Andrew Jackson had his own news advisor—the first to be on the federal payroll—and a Kentucky editor of the day described him as Jackson's "lying machine!" Abraham Lincoln leaked tips to friendly papers.

In this century the formal presidential news conference, a guileful way to manipulate the presentation of data, originated during Woodrow Wilson's administration. Franklin Roosevelt held 998 press conferences while in office, one of which he used to award the Nazi Iron Cross to a reporter whose work Roosevelt felt had hurt the war effort. Harry Truman, too, was usually open with the press though often unhappy with the results. But by the end of Truman's term the Cold War had begun, and during the administration of Dwight Eisenhower the "return to secrecy" commenced under the pall of atomic doom. Eisenhower prohibited the members of his staff from testifying before a Senate committee, and after Frances Gary Powers was shot down he personally presided over the government's embarrassing efforts to deny responsibility for U-2 flights over the Soviet Union. After Eisenhower, his successors continued the trend. John Kennedy lied about the Bay of Pigs. Lyndon Johnson lied about the Gulf of Tonkin. Richard Nixon and his top aides lied, or seemed to be lying, about virtually

everything.

But the suppression of accurate and complete government information does not always arise from "national security" concerns or take place only on a presidential scale. State and local governments, through benign policies as well as misguided officials, often seem prone to withhold even information which is obviously a part of the public record. Authorities in major cities like New York, Minneapolis, and San Francisco, as well as in small towns such as St. Matthews, Kentucky, Findlay, Ohio, Cumberland, Maine, and Wayland, Massachusetts, have recently tried to suppress such matters as arrest reports, the names of people involved in auto accidents, and land-purchase records. In 1978, state officials in North Carolina have denied public access to reports funded with tax money and prepared by government employees, including reports on such important subjects as the need (or lack of it) for a school of veterinary medicine. Community officials across the state, according to local journalists, have denied or obstructed efforts by the press to cover the activities of county commissions, city councils, and other public bodies.

All of this has occurred despite *apparent* trends toward liberalizing the laws of access at the federal and state levels. "Common law" made by courts required justification for the release of government information by any citizen who requested it. The sovereign was viewed, both in England and in this country, as an authority to be revered in deference rather than as the repository of the public's trust and property. But that archaic view seemed to shift in North Carolina in 1935 with the enactment of legislation to "make systematic provision for the preservation and availability of public records,"[40] and it changed abruptly in 1966 at the federal level with the passage of the Freedom of Information Act.[41] Prior common law was swept aside, according to a congressional report on the federal law, by a statute "based upon the presumption that the government and the information of government belong to the people" and "the notion that the proper function of the state in respect to government information is that of custodian in service to society."[42]

The 1935 North Carolina state law had not gone so far. Its basic intent was archival, to prevent further losses of records "from fire, water,

rats and other vermin, carelessness, deliberate destruction, sale, gifts, loans, and the use of impermanent paper and ink . . . to the lasting detriment of effective governmental operation and of family, local and state history." But to accomplish this purpose the new law opened the records of state and local government to "any person" who wanted either to study such documents or to obtain "certified copies thereof." By doing so it thrust North Carolina, perhaps inadvertently, into the mainstream of those states with "public records" laws. By 1977 only Rhode Island and Mississippi had no legislation opening at least some documents to the public on a demand basis.[43]

Still, the North Carolina statute proved to be less than a salutary substitute for the common law. "The wording of the statute and the lack of judicial decisions under it raise serious questions as to whether the right of access is not a hollow one," said a report on the N. C. public records law by the Southern Governmental Monitoring Project (SGMP) in 1975.[44] The statute did have serious drawbacks. It was both wordy and vague, failing even to specify which records were public documents and which were not. "Ironically, the North Carolina statute is so loosely written that some information that most people would agree ought to remain confidential, at least for a period of time, might be required to be released," concluded the SGMP report. Of course, the converse was—and still is—also true. The obtuse language of the statute does not always prevent the arbitrary suppression of documents which, except for political or personal reasons, government officials might otherwise release.

The North Carolina public records law was amended by the 1975 General Assembly, and some but not all of the defects mentioned in the SGMP study were corrected. Even so, the state's statutory approach to public access remained a low rumble compared with the thunderous opening of federal government documents accomplished by amendments to the Freedom of Information Act which were passed in 1974. The original act had lifted the individual's common law burden of proof of need, substituting instead an onus on the government to justify secrecy. But the law had been a compromise between competing political views, and was passed without sufficient enforcement procedures to prevent obfuscation and

delay. The 1974 amendments simplified procedures for FOIA requests, provided for uniform fees, shortened the government's time for making a response, directed courts to expedite FOIA cases, and provided for the recovery of attorney fees when petitioners prevailed in litigation over the denial of an FOIA request. It also made more specific the substantive language of the statute, especially the wording of an exemption provision which had been frequently applied to prevent rather than expedite disclosure. The effect was easily gauged. FOIA requests went up, while denials remained relatively steady or went into a slight decline. In 1977 the Defense Department received 45,255 FOIA petitions, nearly 4,000 more than had been filed the previous year and many more than had been received prior to 1974. During the same year the Justice Department received more than 30,000 FOIA requests, and spent more than $10 million in compliance activities. In the spring of 1978, Quinlan J. Shea, Jr., chief of the Justice Department's Office of Information and Privacy Appeals, told a Judiciary Subcommittee that FOIA requests had become a costly burden which interfered with his department's law-enforcement mission, but he also reported that compliance with FOIA requests had increased public confidence in its investigative and enforcement capabilities.[45] The expense, Shea seemed to be suggesting, had been worth it.

As the increasing intrusiveness of government sparked interest in laws to provide access to public records, it also spawned recognition of the individual's right to privacy, to be "left alone" as it was described by the legal scholars who first perceived its existence around the turn of the century.[46] Most government files contain information about *people*, and it is not always good public policy or necessary from a practical standpoint to disclose everything the government knows about someone. Privacy laws have been passed in every state,[47] some to stem the flow of essentially personal information into the public domain and others to provide access for individuals to files about themselves. Various North Carolina laws, for example, inhibit disclosure of certain medical and welfare information,[48] certain arrest and conviction records (by court expunction),[49] and a great deal of information contained in the personnel files of state employees.[50] Congress passed an omnibus privacy act in 1974,[51] according federal

statutory recognition to the right of privacy for the first time and complementing the aims of the Freedom of Information Act by giving individuals access to *their* files and by requiring that such files be kept up-to-date and accurate.

While privacy acts and open records laws can be complementary—both may provide for access to government information—one individual's right of privacy eventually runs headlong into another's desire for more information. As a result, the balance to be struck between such laws is delicate indeed, and facile interpretations can lead to ludicrous results. The FBI fired a high-ranking official who was being investigated for improper handling of government money and equipment in 1976, and then refused to provide reporters with his photograph on the grounds that doing so would violate his "privacy." In 1977 the Department of Health, Education, and Welfare released a list of physicians who had received more than $100,000 in Medicare funds during 1976. In 1978 the medical profession went to court to prevent further disclosures about doctors who receive these enormous payments of public money, arguing that the release of such information violates the doctors' rights under the Privacy Act of 1974.[52] In North Carolina, the state Personnel Privacy Act has created controversy because of sweeping provisions that prevent the disclosure of even minimal information about the performance of state employees in their government jobs. These ostensible privacy statutes were amended in 1975, 1977, and 1978, but remain the object of much criticism. "The personnel privacy act," said *Durham Morning Herald* Managing Editor Michael Rouse recently, "not only allows far too much secrecy in the transaction of public business but is also unfair to the employees themselves."[53]

The Freedom of Information Act, the North Carolina public records statute, the Privacy Act of 1974, the various privacy laws sprinkled throughout the General Statutes—these are the tools of access to documentary government information in this state. Taken together, and properly respected by public officials, they are formidable weapons indeed in the citizen's struggle with government for the power that information can provide. But misunderstood or abused, they can just as quickly become barriers to access, impediments to satisfying the public's need to be able to know.

2. The Freedom of Information Act

> The preoccupation with secrecy in Government, documented by the Watergate scandal, is not so remote that we can allow congressional vigilance of implementation of the Freedom of Information Act to abate. Certainly, we have made great strides in opening up Government information to the public since the 1974 amendments. More information has since been released under the act. The Carter administration's expressed commitment to openness, coupled with the Attorney General's specific directive last May to increase compliance with the spirit and letter of the act, provide a basis for optimism about the future of the Freedom of Information Act.
>
> —Senate Subcommittee Report, 1977 [54]

Whatever the future of the Freedom of Information Act, its past has been both illuminating and controversial. Since 1966, and especially during the past four years, hundreds of thousands of formerly suppressed documents have been released under the provisions of this law. The operations of the federal government have come under closer scrutiny than ever before, and citizens have learned for the first time that officials in Washington, both elected and appointed, could engage while on the public payroll in assassination, burglary, arson, wiretapping, eavesdropping, blackmail, lying, cheating, stealing, and other sordid acts of misfeasance and malfeasance. The cost of FOIA disclosures has been high, both in terms of money and public confidence in government. But the experience has been cathartic, and hopefully productive. With the Freedom of Information Act we still have the most functional representative democracy in history. Without it, we might have had instead COINTELPRO, "plumbers," and what David Wise called "the American police state."

The Freedom of Information Act is an "access" statute. It requires the administrative agencies of the executive branch (the law does not apply to Congress or the judiciary) to make available information which is requested, but not to analyze or interpret such information. There are, in addition, certain exemptions written into the law which permit government officials to withhold specific *types* of data.

Any "person" can make a request for information under the Act,

and far more private citizens do so than reporters and others with professional interests in government operations. The procedure is relatively simple, requiring only a letter to the appropriate federal agency indicating what information is being sought. For practical reasons the file desired must be "reasonably" described, but the law does not require an applicant to specify documents by official title or name. No justification for an FOIA request is necessary.

Information obtained under the Freedom of Information Act is not always free. The law permits agencies to charge reasonable fees for searching through files and for making copies of documents, and such fees vary from one agency to another. According to a 1977 report by the Reporters Committee for Freedom of the Press,[55] the Office of Management and Budget charged $5 to $8 an hour for searches, the Central Intelligence Agency $4 to $8, the Department of Defense $6.50 to $13.00, and the Atomic Energy Commission $5.70 to $16.00. Most agencies will make an initial search without cost, however, and will inform the petitioner before running up high bills in response to a request. The law permits a waiver of fees, or a reduction, when furnishing the requested information "can be considered as primarily benefiting the general public."*

It is not the procedures for making FOIA petitions that are complex, but the exceptions in the statute which permit the withholding even of information that has been properly requested. The law contains nine broad exemptions which are specified in section (b):

(1) Classified documents, those stamped TOP SECRET, SECRET, or CONFIDENTIAL according to guidelines established by an executive order. Dissatisfaction with this portion of the law prompted a tightening of the language in 1974, but even under FOIA the Pentagon Papers would not be divulged today upon request. Courts are empowered to review such documents and determine whether they have been properly classified, but no

*Detailed instructions for filing FOIA requests can be found in several government publications, including *A Citizen's Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents*, which is available from the U. S. Government Printing Office, Washington, D. C. 20402.

court has ever forced the disclosure of classified material because of an FOIA suit. "As currently worded," wrote Fielding McGehee of the Military Audit Project in 1978, "the exemption carries its own self-fulfilling prophecy. The Executive Order which is the authority to classify is the same as the authority to withhold classified records."[56]

(2) Personnel rules and practices, including departmental regulations, some organizational materials, and internal management manuals. This innocuously worded provision has been used to suppress some rather innocuous information, including the official telephone directory of the FBI.[57] But instructional manuals are not exempt, and recently the government dropped efforts to suppress a thirteen-page how-to wiretapping manual in use by the Department of Defense, the Department of Justice, and other agencies.[58]

(3) Documents and records exempted from disclosure by other statutes, primarily tax returns and welfare records.

(4) "[T]rade secrets and commercial or financial information obtained for a person and privileged or confidential." This exemption covers proprietary information submitted to the government, rather than documents prepared by the government, and permits suppression when disclosure would cause substantial competitive injury to the person or company which supplied the data. Exemption (4) has been the subject of litigation, and some businesses have charged that their competitors are using the FOIA in an effort to gain valuable information despite this explicit prohibition.

(5) Inter-agency and intra-agency memoranda and letters which would not otherwise be available except to a party engaged in litigation with the agency. The most often used exemption, this is also the most difficult to interpret. It probably means that "working papers," staff memos proposing or recommending policy changes, and preliminary drafts of papers and reports can be withheld.[59] Factual documents and finished reports apparently could not be suppressed, however, unless some other exemption applied.

(6) Personnel and medical files *if* disclosure would "constitute a clearly unwarranted invasion of personal privacy." Here the balance between access and privacy must be struck. The 1975 Southern Governmental Moni-

toring Project called this exemption "self-explanatory," but subsequent experience has proved the observation naive. In response to an FOIA request by Fred Graham of CBS News during the summer of 1978, the Department of Justice refused under exemption (6) to reveal whether its records showed that Spiro Agnew, John Ehrlichman, John Dean, Anthony "Tony Pro" Provenzano, or Charles Colson had ever been arrested, indicted, or convicted of a crime.[60] Agnew, of course, was charged with tax evasion in Maryland. Ehrlichman, Dean, and Colson were all convicted in connection with Watergate and served time in prison. Provenzano is reputed to have been involved in the disappearance of Jimmy Hoffa. "If ever there was an example of the capacity of government to give a good word a bad name," said Graham, "consider the word privacy."

(7) [I]nvestigatory records compiled for law enforcement purposes, *but only to the extent that the production of such records would--*

"(A) interfere with enforcement proceedings,

"(B) deprive a person of a right to a fair trial or an impartial adjudication,

"(C) constitute an unwarranted invasion of personal privacy,

"(D) disclose the identity of a confidential source . . . or confidential information furnished only by the confidential source,

"(E) disclose investigative techniques and procedures, *or*

"(F) endanger the life or physical safety of law enforcement personnel." (Emphasis added)

Investigatory files of closed cases and cases on which the statute of limitations had run out, for example, would not be exempt. This provision is troublesome because the term "investigatory records" is not precisely defined, but it has been used to disclose horrendous examples of government abuse, including break-ins by FBI agents, illegal wiretapping, surveillance of prominent figures, and the maintenance of files with personal data such as sexual activity and political affiliations. The distinguished economist John Kenneth Galbraith, once ambassador to India and counselor to several presidents, discovered that the FBI had an extensive dossier on him, "a massive thing, good for several days' reading."[61] According to *Ms.* magazine, the FBI amassed a file of 1,377 pages between 1969 and 1973 under the

heading "Women's Liberation Movement."[62] Documents requested pertaining to COINTELPRO, the FBI's program of "dirty tricks," produced information about a bureau investigation of "the love life of a group leader for dissemination to the press" which was eventually recognized as the beginnings of an effort to discredit civil rights leader Dr. Martin Luther King, Jr.[63]

(8) Reports prepared by federal bank examiners; and

(9) Geological and geophysical information. Both exemptions (8) and (9) are redundant, and were included more in response to heavy lobbying by banking and oil interests than for policy reasons justifying suppression of information about financial institutions and oil companies.

Even with these exemptions, the federal Freedom of Information Act represents a "charter for disclosure" more comprehensive and far reaching than any similar state statute. Yet *because* of these exemptions the law has had the ironic effect of reinforcing in some ways the "trend toward secrecy" so apparent in this country during the past thirty years. There are still more than a hundred federal statutes which require executive agencies to withhold data from the public and the exemption for classified information has produced, according to Fielding McGehee, a "codified loophole . . . large enough for the Hughes *Glomar Explorer* to sail through."[64] Perhaps no law will ever completely eradicate unnecessary secrecy in government, at least in part because the practice of conducting government affairs in secret has great political utility, just as the abuse of secrecy carries enormous political risks. But even if the FOIA has not proved to be an ultimate solution to what political scholar G. Bruce Doern has called "the ambivalent principles and contradictory practices that surround government secrecy in contemporary democratic politics,"[65] it is at least a striking model law of access, an unprecedented step toward limiting not disclosure but the traditional secrecy in government which former Chief Justice Earl Warren once described as "the incubator for corruption."

3. North Carolina "Public Records" Law

> "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.
>
> —N. C. General Statutes, 132-1

Apparently the assault by "rats and other vermin" has abated. The North Carolina General Statutes no longer mention them as a hazard in the maintenance and disclosure of public records. But there are other problems with the state's public records law. It grows longer with each amendment—the last occurred in 1975—but no less oblique in its treatment of the issues inevitably raised by any such legislation. Which records are *not* public, and for what reasons? How is the public to obtain access, and at what cost? Must the applicant justify a request, or the government its secrecy?

The statute seems laudably all-inclusive at first glance. "Public records" are described with almost numbing breadth in G. S. 132-1 to include "*all* documents . . . regardless of physical form or characteristics," and G. S. 132-6 requires that "[e]very person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law." The only exemption in the North Carolina open records law pertains to "written communications" to a government body by an attorney representing that body in a legal dispute of some kind. [66] *

*Oddly, this exemption does not embrace written communications going the other way, *from* the government body to its attorney.

But in the law's seeming attributes lie its worst defects. The definition of records is so sweeping that neither courts nor public officials will take it seriously. "All documents" cannot be public records, because various other state statutes specifically prohibit the disclosure of many such documents.[67] In several instances, moreover, state courts and state officials have arbitrarily decided that certain records are not public. The Court of Appeals did so in 1972, ruling that prison inmate records are not public documents and cannot be disclosed even to the inmates themselves in a decision that simply ignored the existence of the G. S. 132-1.[68] The Attorney General has issued an opinion stating that investigative reports of police and sheriffs departments are not public records, although the only specific statutory exception pertaining to law enforcement records refers exclusively to the State Bureau of Investigation.[69]

Nor does the language of section 132-6 insure prompt access, or even delayed access, to those government records which are not mentioned in other statutes. The law requires "[e]very person" having custody of a document to permit inspection and, if desired, copying. Yet officials of both the Legislative Services Commission and of the Department of Administration have recently delayed or denied access to government documents for reasons without apparent justification in the law. Written inquiries in the winter of 1977 about a state government study brought this reply (but not a copy of the paper) from Marvin K. Dorman, Jr., Deputy State Budget Officer:

> In response to your request to get a copy of a paper concerning a veterinary school for North Carolina prepared by Mr. Jim Porto of this division, *we do not consider this paper to be an official document of this office nor does it reflect the position of this administration . . .* Copies of this paper are outside this office. If you receive a copy through other sources, we would appreciate any reference to this office in its use being omitted. (Emphasis added)

The study, prepared in 1976 by a program analyst in the Division of State Budget and Management, was critical of the proposal to build a veterinary school in North Carolina, as were several other reports prepared both within

and outside state government. At the time, however, the Administration was urging the appropriation of millions of dollars to establish just such a school. Further efforts to secure the report brought an additional denial from John A. Williams, State Budget Officer and Executive Assistant to the Governor, the most powerful bureaucrat in North Carolina:

> . . . [W]e disclaim any connection with this document other than the fact that it was prepared by an employee . . . . It would be . . . accurate to state that the Division of State Budget and Management has never taken (the) position (with regard to a vet school reached by the Porto study), has never agreed with it, and still does not agree.

But comportment with the current views of bureaucrats and elected officials is not the standard for determining which documents are open to the public, even under North Carolina's loosely written law. Though conceding that the report "might be a public document," Williams steadfastly refused to release it and reacted defensively when he learned that its existence might become common knowledge. "We regret very much that readers of this document may have been misinformed as to its source, authority and conclusions," Williams said in a letter he wrote "to advise Legislative Leaders, members of the 1976 Advisory Budget Commission, the Board of Governors and the Chancellor of N. C. State University about this issue . . . ."*

A similar effort during 1977 and early 1978 to obtain a Legislative Services Commission report that was admittedly "public" did finally produce the desired document, but only after months of delay and with ludicrous consequences. A lengthy exchange of letters preceded the disclosure and resulted in prickly instructions to submit further such matters in writing for the approval of the "Co-Chairmen" of the Commission, Senate President Pro Tempore John T. Henley and Speaker of the House Carl J. Stewart. The law, however, says that "[e]very person having custody of public records

*A copy of the Porto study was eventually obtained, from a source who asked to remain anonymous! The 1978 General Assembly appropriated $7.3 million to build a veterinary school in North Carolina.

shall permit them to be inspected . . . ," and does *not* require either written requests or requests to others except those actually having custody of the desired documents. The *ad hoc* procedures Henley and Stewart tried to impose, while not specifically prohibited by statute, nevertheless ran contrary to the clear mandate of the public records law and gave evidence of an insensitivity to the larger issue of general public access. Any requirement to submit requests "for approval" implies a prerogative to deny such requests.

Eventually these procedures were modified, though not without delay, expense, and some confusion. A private legal interpretation of the procedures imposed by Henley and Stewart, as well as an opinion of counsel regarding the public records law, had to be submitted along with a request for reconsideration. Three weeks later came the following reply:

> We have your letter of October 5, 1978 and we feel that it is unfortunate that you are dissatisfied with our procedure for making documents available to your organization. Frankly, the procedure was not established to deny access to documents available to the public, but rather was established to make sure that such would not happen.
>
> The copy of the letter from your attorney which you provided is most interesting and, while we do not know what was contained in your letter to him, we feel he has simply stated in his words that which we know and agree with.
>
> Documents or papers available to the public are certainly available to your organization and always have been. However, to help remove any possible lingering doubts on your part with regard to this matter, we assure you in writing that the Legislative Services Officer and the Director of Fiscal Research will be glad to receive your request to see "public records" "at reasonable times and under his supervision."

But the matter is still somewhat unclear. If Henley and Stewart "already know and agree with" the provisions of G. S. 132, why then impose extra-legal procedures for obtaining documents in the first place? How could unusual and time-consuming "application" procedures be viewed as making easier the task of obtaining information, and by what authority were such procedures first advanced? Have these procedures actually been changed so as to conform to the present law, or is the requirement now simply that requests be channeled through the Legislative Services Officer to them, a

twist on what they call "our procedure?" What is the public to do with assurance that the Legislative Services Officer will be "glad to receive" such requests, when the law seems to require him to respond whether he is happy about it or not? What, as far as Henley and Stewart are concerned, are "public records"?

Lamentable as it may be that powerful bureaucrats and experienced state legislators might delay the release of analytical information without apparent justifications for doing so, the legal risks they would run are indeed negligible. One of the state public record statute's most glaring defects is the absence of clear procedures for compelling compliance and punishing unresponsiveness. Prior to 1975 the law stipulated that any "public official who refuses to perform any duty required of him by this chapter shall be guilty of a misdemeanor and upon conviction fined not more than twenty dollars ($20.00) for each month of such neglect." "This section would seem to encourage compliance with the law," said the SGMP report published in 1975, "but because of the broad and ambiguous language of the statute itself, this section never has been, and most probably never will be, applied."[70] That same year the legislature made sure SGMP's prediction would come true by amending the statute to read:

> Any person who is denied access to public records for purposes of inspection, examination, or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure and the court shall have jurisdiction to issue such orders.[71]

Ironically, the federal Freedom of Information Act had been changed the year before to *add* procedures for reviews of FOIA requests and penalties for unjustified failures to disclose government information. Under the old federal law, and under current state law, disclosure might have been politically, professionally, or personally risky—but refusing to disclose or delaying disclosure was not. Predictably, the absence of penalties had not served the express purpose of the federal law. Just as predictably, the removal of penalties from the state public records law could not have been reasonably expected to encourage compliance. Paltry sums were involved perhaps, but there were penalties nonetheless. Under the current law the unresponsive-

ness of public officials to requests for government data under G. S. 132 carries no sanction whatsoever.

The procedural amendment of 1975 might even be viewed as having had a substantive impact on the whole public records statute, since it probably imposes the burden of justification for access on the applicant who goes to court. In any case it is the private citizen in North Carolina, not the government or the miscreant official, who must bear the expense of appealing even an unwarranted denial of access. On the other hand, the Freedom of Information Act clearly states that "the burden is on the (federal) agency to sustain its action" when the denial of a FOIA request is appealed. The federal law also provides for the assessment of attorneys fees and expenses against the government when it loses, as well as procedures for determining whether the denial was "arbitrary and capricious" and for the imposition of a contempt citation "in the event of noncompliance with the order of the court." In June, 1978, the Department of Justice settled a suit under these provisions and paid the plaintiffs, the sons of Julius and Ethel Rosenberg, $195,802.50 as "reasonable attorney fees and other litigation costs" incurred in their eventually successful efforts to obtain more than 100,000 pages of documentation pertaining to their parents, who were convicted of espionage and electrocuted in 1953.[72] The cost of obstruction became high at the federal level in 1974, but fell to nothing in North Carolina the following year.

Despite its broad descriptive language, the North Carolina public records law is not truly an access statute and does not afford the public protection from officials who would seek to suppress information. Fundamental to G. S. 132-1 *et. seq.* is the premise that only certain government documents are "public records," and that only "public records" need be made available to the public. While such an approach may appear to encourage disclosure, the term "public records" is actually defined to mean only "all documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business . . . ." Because the words and phrases used in G. S. 132-1 are not themselves defined in the statute, such a definition cannot be interpreted without referring to common law,

to the pre-1935 judge-made law which presumed the sovereign's right to withhold information unless some justification could be shown for its release.

The 1935 statute referred only to records "made and received in pursuance of law," a term which before 1935 probably meant little more than records that were themselves required by law to be kept for purposes of public notice, such as deeds, mortages and, perhaps, birth certificates. The phrase "in connection with the transaction of public business," added in 1975, probably broadened the statute to cover records not always required by law but ordinarily kept and used in the course of a public official's work. In fact, no one can be certain exactly what these terms mean, and the phrase "in connection with the transaction of public business" could be viewed with equal logic as further narrowing the definition of "public records." The language used in the statute has never been construed by a North Carolina court, either before or since 1935, and an interpretation of the law prepared by the Institute of Government in Chapel Hill during 1977 observed that "certain ambiguities can be found in attempting to fit North Carolina's definition into one of the common law classifications."[73]

The "access" issue is made even trickier in North Carolina because of implied and explicit statutory exceptions to the public records law which are not mentioned in G. S. 132, and because of the propensity mentioned earlier of courts and public officials to ignore the statute with impunity. Juvenile court records must be kept secret according to G. S. 7A-287, but what about juvenile *arrest* records? Analysts at the Institute of Government suggest that a court would deny access to such documents, though no statute exempts them from the definition of "public records."[74] G. S. 114-15 exempts "all records and evidence collected and compiled" by the SBI and stipulates that such materials "may be made available to the public only upon an order of a court of competent jurisdiction," a catch-22 of sorts since one cannot ask for records without formally knowing of their existence and cannot confirm their existence without formally asking for them in court.* Tax records are deemed confidential by a separate stat-

*Both the current Attorney General and the current director of the SBI have said they would *consider* disclosing the existence of files upon request.

ute,[75] as are some state and county employee personnel records[76] and some social services records.[77] But all contain "documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business."

North Carolina's public records law is half a loaf at best in terms of providing access to state government information, and perhaps not much better than no loaf at all. It provides "some modest assistance" in obtaining records, said Claude Sitton, editor of the Raleigh *News and Observer*, a newspaper that has frequently become embroiled in disputes involving efforts to get information from state and local government officials. With ambiguous definitions, G. S. 132-1 has had the effect of limiting rather than broadening the chances for disclosure. By withholding rather than imposing penalties on public officials who capriciously deny access to government documents, G. S. 132-6 and 132-9 actually strengthen the impulses to secrecy in which government misfeasance and corruption can breed. G. S. 132 serves well neither the public nor public officials, and it should be struck from the books in favor of legislation that will insure both prompt access and the efficient management of government business.

4. To Be Left Alone

In connection with access to government information, statutory privacy provisions include both those to prevent disclosure and those to permit it. At the federal level the Freedom of Information Act and the Privacy Act of 1974 require access to a great deal of information compiled by the government, but also prohibit disclosures that would "constitute a clearly unwarranted invasion of personal privacy." The federal privacy law was passed expressly to give private citizens *more* control over government files containing personal information. It affords "an individual" access to records "pertaining to him," records which might not be generally available under the provisions of the Freedom of Information Act.

North Carolina has no comprehensive privacy legislation, nor do many other states. While various provisions of the General Statutes prohibit the general disclosure of certain records, none specifically requires officials to give an individual access to information about himself. Probation records

cannot be released to an offender without a court order, for instance, and district attorneys using SBI investigative reports to prosecute criminal cases are not required to divulge the contents to a defendant.

North Carolina's State Personnel Act, G. S. 126-24 *et. seq.*, may represent the most extensive and absurd effort by the General Assembly to legislate in the area of privacy. Personnel records of people on the state payroll are, for all practical purposes, closed not only to the public but to the employees themselves. Since 1975 the legislature has been tussling with these statutes. Access to the files was first choked off by removing them from the inspection provisions of G. S. 132-6, even though the files themselves were not taken out of the definition of "public records" in G. S. 132-1. Then, also in 1975, amendments were passed to permit access to certain portions of the records, and in 1977 further complexities were added which strained credulity when the law had to be applied in controversial circumstances.

Early in 1978 a state patrolman stopped a car near Southern Pines and gave a speeding ticket to former North Carolina Governor James Holshouser. Not long afterward the trooper was transferred out of the county where Holshouser lived, but patrol officials could not explain why. Inquiries about the transfer went nowhere because of secrecy provisions in the personnel act,[78] and information about other incidents involving patrolmen was also soon being suppressed because of the recently revamped law.[79] The collective effect of the new amendments, it turned out, was to prevent even the disclosure of misconduct by public employees. "Look," one state official told a reporter in February, 1978, "if (State Treasurer) Harlan Boyles had an assistant state treasurer to embezzle $8 million from this state's treasury and Harlan fired him this afternoon, he couldn't say why the man was fired."[80] The example proved somewhat prophetic. Less than two months later a state banking commissioner and a deputy banking commissioner resigned after an SBI investigation into their activities, but information about the investigation leading to their departures was suppressed until Governor James Hunt released a summary of the SBI's report on the matter, itself a secret document under another provision in the law.[81]

Access and privacy statutes must strike a balance between disclosure of public information and protection of individual rights. Most officials agreed after these developments that the State Personnel Act failed to do so. "That's a terrible law," said Governor Hunt when he heard about the incidents involving the troopers.[82] "Dammit, you're entitled to know," groused Crime Control and Public Safety Secretary Phil Carlton when reporters asked him about his disposition of the matters.[83] "I think we should always look toward opening up the affairs of government," remarked Attorney General Rufus Edmisten, after issuing an opinion that state personnel trial boards and grievance hearings were closed to the public by the tangle of privacy provisions in the General Statutes. "I can see that this law . . . could inadvertently contribute to cover-ups."[84] During the 1978 session of the General Assembly, therefore, the law was amended, but only to permit the discretion of the department head (rather than to require on public demand) the disclosure of the reasons for any promotion, demotion, suspension, or dismissal, and to allow limited access to the personnel files of state employees.

These convoluted personnel privacy statutes must, and inevitably will, be further revised if the law is to serve either the public or public officials. But the state legislature still has to address an even larger privacy issue, one which affects every citizen in the state whose name goes into a government file. Though settled at the federal level by the Privacy Act of 1974, the right of individuals to know what government files say about them and to insure that such files are accurate is still evolving at the state level as an aspect of questions about general access to information and control over the government's burgeoning power. In conjunction with a proposed Uniform State Information Practices Act, the National Conference of Commissioners on Uniform State Laws considered at its 1978 annual meeting the latest draft of a Uniform Privacy Act designed for adaptation by state legislatures. According to Elmer Oettinger, a faculty member at the Institute of Government and chairman of the Committee on [a] Uniform Privacy Act, the Conference plans to issue a final version of the proposed uniform law in 1979. When it does, consideration of new comprehensive privacy legislation could begin without great delay or expense. If the work of the National Conference can be translated into an effective state privacy statute,

a citizen's "right to be left alone" will have been acknowledged in North Carolina for the first time, a right U. S. Supreme Court Justice John Harlan called "implicit in the concept of ordered liberty."

PART THREE

Government in the Shade

Open meetings invite enlightened politics.

— Robert Morgan
Then N.C. Attorney General, 1970

> All official meetings of the governing and governmental bodies of this State and its political subdivisions, including all State, county, city, and any subdivisions, subcommittee, or other subsidiary or component part thereof which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest shall be open to the public.
>
> N. C. General Statute 143-318.2, repealed Oct. 1, 1978

> *All official meetings open to the public.* --(a) Except as provided in G. S. 143-318.3, G. S. 143-318.4, and G. S. 143-318.5, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.
>
> N. C. General Statute 143-318.2, effective Oct. 1, 1978

Access involves more than the opportunity to get documentary evidence of past government decisions. It includes as well the opportunity to take part, if only as an observer, in the processes of government decision-making. The concept of "open meetings" is historically fundamental, arising out of the colonial town meeting approach to determining laws and policies. It is also politically essential, crucial to the satisfaction of every person's "right to be able to know" not just what government has done, but also what government is doing.

North Carolina has had an open meetings or "sunshine" law since 1971, when legislation was passed declaring it to be the public policy of the state for "[a]ll official meetings" to be "conducted openly."[85] Well, most meetings. Actually, *some* meetings . . . and then only if the news that they were going on just happened to get around. The 1971 statute contained no prior notice provisions whatsoever, and most of the language of the law dealt not with its stated policy but with "[e]xecutive, closed and private sessions" and with "[e]xceptions" to the requirement for conducting

meetings "openly." The legislature protected itself from public oversight by excepting all "study, research and investigative commissions including the Legislative Services Commission," as well as any "committee or subcommittee of the General Assembly" (which could hold executive sessions "when it is in the best interest of the State"). But there were other exceptions as well for a group of state and local agencies "so extensive," according to the Southern Governmental Monitoring Project's 1975 study, "that it might have been simpler to list those bodies covered by the law rather than those exempted." The "agencies or groups . . . excluded" entirely from the requirement to hold open meetings included:

- The Council of State
- The Board of Awards
- The North Carolina State Board of Paroles
- The State Probation Commission
- All law-enforcement agencies
- Grand and petit juries
- All state bodies "exercising quasi-judicial functions" (insofar as a meeting was held for the purpose of making a "quasi-judicial" decision)
- All professional licensing boards (except where public hearings were already required by statute)
- The Advisory Budget Commission "when actually preparing the budget," and
- The appropriations committees of both houses.

Government agencies not included in the list of exceptions were still permitted under certain circumstances to meet behind closed doors, to "hold an executive session and exclude the public while considering:"

- Acquisition, lease, or alienation (sale or gift) of property
- Negotiations between public employees and their employers
- Medical matters dealing with patients, staff, or employees of clinics and hospitals
- Matters within doctor-patient, lawyer-client, or other "privileged" relationships
- Conferences with legal counsel and "deliberations concerning"

litigation and any other judicial action in which the agency will be affected directly.

Finally, any "citizen denied access to a meeting required to be open," that is, one held for reasons *other than* those listed above by an agency *not* specifically exempted from the statute, was given only "a right to compel compliance" by "application to a court of competent jurisdiction for a restraining order, injunction or other appropriate relief." As experience in Charlotte and elsewhere would show, the burden here as in the public records law--both legal and financial--was thrust not on officials who ignored it but on "citizens" who sought to enforce it.*

By almost any measure, the 1971 open meetings statute was a mediocre piece of legislation. The consolidated product of two proposed House bills, it emerged as a watered-down committee substitute only to be pounded by amendments first in the House and then in the Senate (where, according to then Representative, now Speaker Carl Stewart, a similar proposal in 1967 "fell into evil hands").[86] At the time, even the need for such a bill seemed dubious to some people. "I don't know of any secret meetings," said State Senator Ruffin Bailey during debate on the measure, expressing "grave doubts" about whether such a law would be "good public policy."[87]

As weak as the statute was, it proved to be beneficial if only by dispelling any doubts Senator Bailey and others might have had about the potential impact of an effective "sunshine" statute. It soon became apparent that "secret meetings" had been going on for some time, and that they would continue to occur despite the new law. Compliance suits under the 1971 legislation began to crop up frequently in state courts, and stories about denials of access became almost regular newspaper features. The Jackson County Board of Commissioners was sued for holding numerous closed meetings and for withholding public records.[88] The Iredell County

*Apparently, valid objections could have been raised if a group or corporation rather than a person sued for compliance, though the term "citizen" is unclear. The public records law, on the other hand, gives any "person" a right to compel compliance, and "person" is a juridical term that lately has been stretched to include both human beings and corporate entities. The distinction, though procedural, is important because proposed amendments to the 1971 statute have retained the more limited term "citizen" rather than the broader term "person."

Commissioners were accused of going behind closed doors to discuss "politically sensitive" matters.[89] The Wake County School Board excluded the public from a meeting to discuss a pay raise for the superintendent of schools and even from a conference to discuss compliance with the open meetings law.[90] The Carrboro Board of Aldermen adopted a policy of routinely meeting as a "committee of the whole," which, said the chairman, justified exclusion of the public.[91] And the Charlotte-Mecklenburg School Board began to meet regularly in unannounced executive sessions. Chagrined local journalists sued in Mecklenburg Superior Court in 1973 and obtained an injunctive order against *future* violations of the open meetings law (past violations were beyond the reach of the statute). In 1977, contempt citations were issued against members of the Board and fines of $50 apiece were imposed because of their continuing failure to comply with the law in spite of the judge's order, the only instance in which penalties have been imposed on public officials involved in an open meetings dispute in North Carolina.[92] *

The year 1977 proved to be a watershed for the state's "sunshine" statute, not because the Charlotte order appeared to give it life but because the North Carolina Supreme Court killed it. Justice I. Beverly Lake, never known as an advocate of government openness or individual rights, rendered the statute thoroughly impotent in an opinion difficult to understand from either a practical or a policy standpoint.[93] It contained such semantically unsound and legally questionable insights as, "The wisdom or lack of wisdom, practicability or impracticability of (the open meetings law's) provisions are matters for the Legislature, not the courts once the meaning of its provisions is judicially determined," and held that only bodies both "governing and governmental" were even subject to the statute. Lake's interpretation stunned practically everyone in the state (except all but one of the other learned justices), and left attorneys and public officials alike

*Even this order was overturned on appeal, leaving the plaintiffs with little to show for the time and money they had invested trying to force recognition of the law on the Board. The school board members used public money, not private funds, to defend themselves against the suit.

more rather than less uncertain about the law's applicability.* "Writing for the majority," said one newspaper, "Justice I. Beverly Lake did not so much clarify the law as smash it."[94]

Indeed, the Supreme Court had for all practical purposes "judicially determined" the open meetings law out of existence. But like the 1971 bill itself, the seemingly adverse ruling ultimately had a positive effect on efforts to install a genuine "sunshine" provision in the General Statutes. New legislation, sponsored by Speaker Carl Stewart and State Representative Patricia Hunt, had already been introduced during the 1977 session of the General Assembly.[95] The proposed law would have completely revised the existing statute by:

1) eliminating most of the exceptions;

2) imposing misdemeanor criminal penalties of six months in jail and fines of up to $250 on public officials convicted of attending illegally closed meetings;

3) permitting civil penalties of up to $200 for violators;

4) providing that actions taken at unauthorized closed meetings could be declared "void;"

5) prohibiting conference telephone calls from becoming "official" meetings; and

6) requiring notice of all public meetings.

The proposed law got hammered, of course, and survived only because adroit parliamentarians were able to shunt it aside to a legislative commission for "further study."[96]

Then came Lake's opinion, so niggling in its interpretation and so embarrassing in its consequences that something had to be done during the short General Assembly session of 1978. Members were hastily appointed to the Legislative Study Commission for State Policies on the Meetings of Governmental Bodies, a series of hearings were held (in public,

*David Lawrence, associate professor of public law and government at the Institute of Government and an expert on legal provisions in open meetings laws, had written a 53-page law review article in 1976 analyzing the state's statute. He concluded that the coverage of the law was "very broad," and never mentioned the theretofore meaningless phrase "governing and governmental." 54 *North Carolina Law Review* 777 (1976).

though they did not have to be under the provisions of the current law), and on May 31, 1978, the Commission formally proposed amending the existing statute to plug the holes shot in it by the Supreme Court.[97] Those amendments were eventually adopted, though not without serious but unsuccessful efforts by the N. C. Hospital Association and the University of North Carolina to insert *additional* exceptions. The revised law became effective October 1, 1978.

In general, the new statutory language (1) redefined the state and local government agencies subject to the law by substituting the term "public bodies" for "governing and governmental bodies," and (2) instituted specific notice requirements for regular, special, and emergency meetings by agencies of state and local government. In effect, however, it did little except reconstitute and in some ways strengthen the law as it had stood between 1971 and 1977. Even the new notice requirements merely codified a concept which had already been judicially grafted onto the old statute by earlier, less literal interpretations. (Lake had ignored the "sunshine" purpose of the law and held that the absence of specific notice provisions simply obviated the necessity of any notice at all, whereas various Superior Court and Court of Appeals judges had previously viewed some notice requirement as implicit in the act. The new law's 48-hour notice requirement for special meetings and the specifics of its notice provisions for regular meetings, however, had not previously been judicially incorporated in the statute by any court.) As a "sunshine" statute, therefore, the amended law now in effect is only a bit better than the original version was. It is still rife with exceptions and exemptions, more a blueprint for closing meetings than a legislative imperative for holding them in the open.

Closed meetings, wrote an editorialist recently, "can be a breeding ground for misfeasance." Indeed, the impulse of public officials to hold executive sessions seems so strong, and the dangers of the practice so apparent, that the federal government and all fifty states have enacted some sort of "sunshine" law to quell it.[98] Justifications for closed meetings abound, but *legitimate* justifications are few. The Tennessee legislature passed a "sunshine" law prohibiting *any* closed meeting except as provided

for in the state's constitution.[99]

A 1974 nationwide survey of state open meetings laws* found that such statutes vary greatly in language and coverage, but identified eleven "ideal characteristics," some or all of which the laws had in common:

1) A statement of policy in support of openness;
2) Provisions opening legislatures;
3) Provisions opening legislative committees;
4) Provisions opening meetings of state agencies;
5) Provisions opening agencies of counties and towns;
6) Open county boards;
7) Open city councils;
8) Provisions forbidding closed executive sessions;
9) Provisions for enforcing compliance;
10) Provisions to declare null and void actions taken at meetings held in violation of the law; and
11) Penalties for public officials who violate the law.[100]

In a comparative sense, North Carolina's law was deemed to be "above average," lacking only a prohibition for closed executive sessions and provisions nullifying actions taken at an illegally closed meeting and penalties for officials participating in such meetings. But North Carolina's relatively high rating was deceptive for several reasons. Provisions for enforceability, including nullification as well as criminal and civil penalties, are at the heart of any effective open meetings statute. Yet the survey results were obtained by assigning equal weight to each of the eleven characteristics and without drawing distinctions between those states with enforceable laws and those with essentially passive statements of policy. The survey was conducted, moreover, before North Carolina's supreme court obliterated the statute's public policy provision, in effect dropping the law into "least acceptable" status since bodies "government and governmental" excluded many state and local boards and agencies. The survey also originally omitted at least one characteristic which is both necessary and "ideal," notice provisions to assure the public a reasonable opportunity to attend. (A notice

*Conducted by Dr. John B. Adams, dean of the School of Journalism at the University of North Carolina.

criterion was later added.) At least three-quarters of the states have laws which contain notice provisions. North Carolina's statute did not until its amendment in 1978.

In an absolute rather than a comparative sense, however, neither North Carolina's law nor the law of most other states rose to the "ideal" standard. "Subjectively, it must be concluded that the status of Open Meetings laws in most states is marginal," wrote the author of the survey. "Very few states, by law at least, go beyond minimal provisions for openness . . . ."

For this reason among others, efforts are still underway to replace the current open meetings law with a more effective and functional state statute in North Carolina. The Legislative Study Commission for State Policies on the Meetings of Governmental Bodies has held frequent hearings since the 1978 session, during which its mandate was extended so that it could:

> (1) review and evaluate the effectiveness of the current statutes relating to meetings of governmental bodies; and
> (2) using original House Bill 522 (the open meetings statute proposed in 1977) as a basis for study of the revision of the present statutes, report . . . findings and recommendations with respect to policies that should govern the meetings of governmental bodies within the State.

The results of the Commission's work will not be known until next year, when new proposed legislation is submitted to the 1979 General Assembly. It has already tentatively adopted proposals to remove certain exceptions from the existing law (including meetings of the Council of State, which last year approved in executive session the purchase for $750,000 of "gameland" in Currituck County even though the land had an apparent market value of barely half that amount).[101] Under the guidance of commission counsel David Lawrence, however, the members have been asked to consider not just the contents of House Bill 522 but also an array of sample provisions culled from open meetings statutes in other states, and as a result they have also tentatively adopted proposals for new exceptions, including one for meetings to "consider and adopt contingency plans

for dealing with strikes, slowdowns, and other collective employment interruptions."

On the other hand, many crucial issues have not yet been faced, including the controversial matter of incorporating stiff penalties for violations of the law by public officials. William Sturges, an attorney representing the Charlotte-Mecklenburg School Board, appeared at the Commission's early September hearings to testify against the inclusion of any penalties. Sturges submitted a resolution from the board asking the Commission to clarify the current open meetings law and to include in the proposed bill a section which would read: "If lay persons can reasonably differ in the interpretation of a provision or [this] statute, no public body or member thereof shall be held to have violated that provision."[102]

"Do you propose that seriously?" asked Commission member Jack Aulis, a former newspaperman. "There's not a statute on the books on which two people couldn't disagree."

Sturges admitted to reporters after the meeting that the proposal was "rather unique," but the concern of the school board members was only a variation on the most often advanced argument against penalty provisions, one stated succinctly by Robert Clemmons of Greensboro when the new statute was first proposed in 1977: "I must say that this bill would discourage anyone from running for public office in local government."[103] That has not proven to be the case, however, in the majority of states which have "sunshine" statutes with tough enforcement provisions. "After all," observed press-law expert William Chamberlin of the University of North Carolina School of Journalism, "all they (public officials) are asked to do is obey the law."

The immediate question in North Carolina now is: what will "the law" turn out to be? The answer depends, again, on the "spirit of the people and of the government." Governor James Hunt, Lieutenant Governor James Green (who is also president of the Senate), and Speaker of the House Carl Stewart are all on record favoring revisions in the open meetings law, though Green's enthusiasm for the matter has not been ringing. There is strong support for the measure in the state press, and from various public interest groups such as Common Cause and the League of Women Voters.

But there is also powerful opposition to the law, primarily from some officials in organizations and agencies which would be required by statute to hold formerly closed meetings in the open.* Leading legislative opponents of past open meetings provisions will be back in Raleigh in 1979, but Robert Jones, chairman of the Legislative Study Commission for State Policies on the Meetings of Governmental Bodies, will not. In the Senate the bill may have no certain champion. In the House, where open meetings statutes originated in 1967, 1971, and 1977, there are powerful foes to the very idea of openness in government and even the Speaker could not push through his own bill in the 1977 General Assembly.

Still, there is some hope that a stronger and more dependable open meetings law will be enacted by the 1979 legislature. The Commission will have recommendations to submit, and the senators and representatives in Raleigh during the next session will not be able to ignore them. Political winds can change even in two short years, as have the names of about one-fourth of those who will sit in the upcoming General Assembly. The difference those new members can make is enormous; the difference they *will* make is as yet unknown.

"Sunshine is the best disinfectant," wrote a U. S. Supreme Court justice in support of the principle of open meetings statutes, and indeed it would seem difficult for politicians to oppose such laws without embracing the contrary notion that public business should be conducted in private. A larger question facing the members of the upcoming General Assembly is whether their own impulse toward secrecy will again overwhelm their obligation to represent the best interests of the people of North Carolina rather than the petty fears of its public officials, including themselves. The current open meetings law leaves those officials comfortably in the shade. It is past time for them all to come out into the bright sunshine.

*Representatives of the University of North Carolina, the N. C. Hospital Association, and other groups have appeared before the Commission to object to the opening of *their* meetings, for instance.

PART FOUR

The Eyes and Ears of the Public

> *... [T]he right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source.*
>
> — *Potter Stewart*
> *U.S. Supreme Court Justice*

Freedom of the press is a tattered banner these days, largely because few judges seem to share the views of Potter Stewart and William O. Douglas, who once referred to journalists as members of "a favored constitutional class." The Supreme Court has ruled in a series of cases since 1972 that the First Amendment is not even first among equals, that it must give way, at least under some circumstances, to others such as the Fourth and the Sixth. In the Court's most recent term the press lost five of six major cases and two dozen minor appeals, including decisions limiting the government's duty to supply certain information to the public, permitting judges to bar reporters from pre-trial hearings, and allowing arbitrary censorship of school newspapers. "The press and its lawyers are feeling beleaguered," wrote *Washington Star* law reporter Lyle Denniston at the end of the spring 1978 Court session. "The abiding impression that the people have a right to know about their government, enforceable by the press and the public against secrecy-prone officials, may well have been erased this term." [104]

Indeed, the Supreme Court and various lower courts have been busily eroding this "abiding impression" for some time. Newspaper offices are now, by Supreme Court fiat, subject to surprise searches by policemen who ***think*** they may find evidence of some crime there.[105] Gag orders, especially in highly publicized criminal trials, are becoming commonplace. Reporters are being thrown in jail and newspapers are being fined without first being given an opportunity to argue the "search and seizure" issues raised by sweeping court orders for papers and notes.[106] And a reporter's "privilege" to protect confidential sources has been called into question even in states which have "shield" laws designed to avoid disclosure of

such information.[107]

Half the states have some sort of shield law, and another (Michigan) has a statute which accords limited protection for reporters. Such laws typically provide that a journalist cannot be held in contempt of court for refusing to disclose either confidential information or the sources for such information, or both. Maryland adopted the first shield law in 1896.[108] North Carolina has never had one.

Shield laws are based on public policy considerations more than on the First Amendment's provision for freedom of the press. Although the Nebraska law [109] and some others cite the First and Fourth Amendments as a basis for their statutory privilege, the constitutionality of such laws has never been tested in the Supreme Court and no such privilege has yet been found *in* the First Amendment itself.* Proponents of such laws nevertheless insist that freedom of the press implies the uninhibited flow of information, and that without protection from disclosure confidential news sources will simply dry up. Opponents of shield statutes contend that other policy considerations such as "fair" trial and "effective" law enforcement are more important than protecting journalists' sources, and that reporters have no special exemption from ordinary civic duties. In the middle are many journalists and press-law experts who agree with the policies which underlie shield laws but feel that such statutes are ineffective, and a few who even disagree with the underlying policies.

The most salient fact about shield laws—the one practically everybody agrees on—is that they do not work to give reporters an immunity from disclosing their sources. Courts have shown remarkable ingenuity when interpreting such statutes, almost always finding ways to circumvent them. Both the U. S. Supreme Court and various state courts have held that "law enforcement" priorities outweigh the same First Amendment policy considerations which typically underlie shield laws,[110] and newsmen have been

*There was no reporter's privilege in common law. The Supreme Court ruled that no absolute privilege is inherent in the First Amendment in *Branzburg v. Hayes*, a controversial decision handed down in 1972 in which one justice who voted with the majority said nevertheless that a reporter is not "without constitutional rights with respect to the gathering of news in safeguarding sources."

ordered to jail in New Jersey,[111] California,[112] and Kentucky[113] despite the fact that those states have strong shield statutes.

The most recent and spectacular shield law "failure" occurred this year in New Jersey, where *The New York Times* was fined $285,000 and *Times* reporter Myron A. Farber spent forty days in jail because he refused to turn over his notes on a murder case to a state court judge. Farber had written a series of newspaper stories which led to the reopening of an old murder investigation and eventually to the indictment of Mario E. Jascalevich, a physician. At trial, the defendant subpoenaed virtually all of Farber's notes. Farber refused to comply with the subpoena, as well as with the judge's order to permit an inspection in chambers of the materials, and along with his newspaper was cited for both civil and criminal contempt. New Jersey had a shield law which gave reporters a "privilege to refuse to disclose . . . the source (and) any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." Farber claimed on appeal that the shield law justified his refusal to disclose the contents of his notes, but the New Jersey Supreme Court in effect declared the law subordinate to the defendant's fair trial rights under the Sixth Amendment. New Jersey's shield law, said to be one of the toughest in the country, simply was not tough enough to withstand judicial delimitations.

Shield laws go to the essence of values embodied in the concept of a free press which acts as the eyes and ears of the public. The ability of the press to function, even as the conduit of opinions and ideas, depends on the opportunity reporters have to gather and disseminate information without fear of government reprisals. Direct repression of the media is a remote possibility in this country, but indirect repression is too often a fact of life. Reporters cannot print the news if they cannot gather it because people are afraid to talk. The power to unlock a journalist's secret sources is but a subtle form of prior restraint.

Yet the value of any shield law is limited by the policy context in which it is applied. Protection of sources and information in the possession of investigative reporters may only require public officials to work harder

and do their jobs better. But protection of sources at the expense of a criminal defendant may cost a life, or a part of it spent—perhaps unnecessarily—in prison.

The Farber case presented what is perhaps the most difficult situation in which shield laws can be justified from a policy standpoint. The defendant, on trial for murder, claimed that Farber, the reporter whose investigation resulted in his indictment, had information which might prove his innocence. Farber denied that he had such information but refused to reveal what he did have in order to verify his position. Though the defendant was eventually acquitted and the reporter was released from jail, the constitutional and policy questions raised by Farber's refusal to comply with the court's order remain to be solved. What if the defendant had been convicted instead—would Farber's continued "protection" of confidential sources have been justified even under the most liberal interpretation of the First Amendment? Should the trial have gone on once Farber refused to produce the material requested by the defense, which claimed it was essential? One North Carolina newspaper, the *Durham Morning Herald*,[114] suggested editorially that the release of the defendant would have been preferable to the compulsory disclosure of Farber's sources. But wouldn't such an approach permit virtually any defendant—criminal or civil—to abort a trial by claiming that a reporter had information vital to the case?

Shield law issues can arise in many other situations: when a reporter is subpoenaed by a district attorney (making the reporter, in effect, an "arm of the state"); when one party to a civil suit requires the testimony of a journalist; when the informant seeks to compel disclosure of information earlier given in confidence (unlike common law privileges, which generally run to the person divulging information such as a doctor's patient or a lawyer's client, the shield privilege belongs to the one who has *received* information, the reporter); when the government seeks further information during inquiries prompted by news stories produced from undisclosed sources. The applicability of any shield law will change in every situation as various policy considerations are weighed against the specific protection afforded by the statute to reporters and to those from whom they get information.

Most shield laws are quite complex (a notable exception is the New Jersey statute), and at times this complexity can defeat the overall purpose of protecting news sources. Those who draft such statutes face seemingly insurmountable problems in (1) defining the term "newsman" or "reporter" or "journalist" so as to stipulate who can assert the privilege; (2) describing *what* the privilege protects; (3) explaining circumstances in which the privilege can be waived; (4) limiting the ways in which the privilege may be inadvertently waived; and (5) clarifying whether the privilege is absolute or qualified. Some states use job titles to describe who is covered (e.g., Michigan's statute which applies to "reporters of newspapers and other publications," leaving uncertain the status of editors, television and radio personnel, and freelance writers). Other states employ an "association" test (e.g., Ohio's law which protects persons "engaged in, connected with or employed by news media," again leaving out freelance writers and perhaps amateurs, and skirting past one of the most serious problems, the status of *formerly* employed reporters now in other lines of work). Some shield laws protect only the names of sources (e.g., Kentucky), while others extend the protection as well to information (e.g., Delaware). Some attempt to create an absolute privilege (e.g., New Jersey), but others limit the situations in which the privilege applies (e.g., Rhode Island, which does not extend the privilege to sources of information concerning proceedings such as a grand jury hearing which are required by law to be kept secret).[115]

The popularity of shield laws may be difficult to understand, therefore, in the face of their complexities, their slippery applicability, and their repeated failures to stand up in court. They seem to be more highly favored by lawyers and legislators than by reporters and editors. The North Carolina Press Association has never proposed passage of a statutory privilege,* and a recent poll conducted informally among the editors of the largest papers

*The NCPA did, however, support one of four press privilege bills introduced during the 1973 General Assembly and brought to the Senate floor as a committee substitute. Though the organization had not been instrumental in preparing any of the proposed bills, a memorandum submitted to the legislature at the time indicated that the NCPA "has gone on record in favor of legislation to protect news reporters and their confidential informants." The committee substitute, S. B. 160, failed in the Senate by a vote of 16 to 28.

in the state disclosed none who favored the adoption of such a law. Many journalists view "shields" as a detriment to freedom of the press rather than as a reconfirmation of it. "There is no way to get an all-encompassing shield law through a legislature," observed Dr. John Adams, a press-law scholar. "There will always be exceptions in such a law, making it easier to add other exceptions later."

Yet shield laws can serve a very important function in the protection of press freedom, even when (as in New Jersey) they are ineffective in themselves to prevent the compulsory disclosure of news sources. Whether qualified or absolute, simple or complex, shield laws always become a first line of defense for reporters without limiting their prerogative to assert additional rights or privileges under the First Amendment. Exceptions enumerated in any such statute stand in no worse position than they would if the statute did not exist, and the very existence of a shield law amounts to a public policy recognition that some journalists have special protection under some circumstances. Even in rejecting the argument that New Jersey's law justified Myron Farber's refusal to disclose the contents of his notes, the New Jersey Supreme Court recognized the "legislative intent" of the law "to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey." The court held, in fact, that a balancing test had to be met before any reporter could be forced to disclose confidential material, and that the party seeking disclosure had to prove that the material being sought was material, relevant, and unobtainable from any other source.* At the very least, therefore, shield laws become a procedural tool which reporters can use in an effort to prevent the disclosure of confidential information, as well a peg on which to hang arguments in state courts that jour-

*Many of those involved in the Jascalevich-Farber case, including James C. Goodale, executive vice president of the New York Times Company, therefore view the holding as a partial victory rather than as a defeat. The "balancing" test adopted in New Jersey had been propounded first in a U. S. Supreme Court case called *In re Caldwell*, a companion case to *Branzburg*, and is favored by many journalists, press lawyers, and press scholars as the most practical interpretation of the policy protections for reporters

nalists are entitled to have strict procedural protection before the disclosure of confidential material can be compelled.

North Carolina courts have never been faced with a tough case such as the one in New Jersey involving Myron Farber and *The New York Times*, but reporters in several cities here have refused to disclose confidential sources even in the absence of statutory justification for doing so. After exposing a kickback scheme involving Fayetteville policemen, reporters for the *Fayetteville Observer* declined to reveal their sources to a Cumberland County grand jury. Two *Charlotte Observer* reporters were subpoenaed by a Mecklenburg County grand jury during an investigation of wiretapping by local police, but refused to reveal where they got the information for a series of stories on the case.

None of these reporters, nor any others in the state, have been cited for contempt or arrested for failing to disclose confidential sources or information. Relations between members of the press and the judiciary have long been cordial in North Carolina, and differences over constitutional and public policy issues have been resolved so far without confrontations and without a shield law. Yet prior circumstances are no guarantee of future harmony between reporters and judges. There is no reason to assume that courts in North Carolina are immune to the animus against journalists which is now sweeping through the federal judiciary and through some other state courts as well. "The fact that no reporter in the state has been jailed . . . does not relieve the uneasiness felt by many newsmen," William Chamberlin of the UNC School of Journalism observed recently. "They are concerned that perhaps the next time they promise confidentiality they will be . . . ." [116]

which are implicit in the First Amendment. Many states have adopted such a test, including Virginia, where the supreme court held that reporters had not a right but a privilege "related to the First Amendment" which required the satisfaction of a balancing test to establish that the justifications for compulsory disclosure outweighed the reporter's interest in maintaining confidentiality. Virginia has no shield law.

PART FIVE

Recommendations

The balance of power between the government of North Carolina and the people of North Carolina is weighted heavily against the opportunity for ordinary citizens to obtain information either for themselves or through the press. The state's "public records" law is archaic and unsuitable as an access statute. Its "open meetings" law, while now being revised, is all too likely to be weakened by amendments that will render it barely effective against the tendency of officials to conduct the public's business behind closed doors. Its privacy statutes are complex and confusing, serving neither public officials nor private citizens.

As steps to begin rectifying this imbalance of power between the state and the people of the state, the following measures are recommended:

1) Passage of a comprehensive state freedom of information act (based on the federal act as a model) which applies to all three branches of government and insures access to all state and local data, not merely to "public" records, by requiring prompt disclosure upon request (and upon the payment of reasonable fees, where necessary). Types of data to be withheld under certain circumstances (juvenile court records, for example) should be specified in the law and kept to a minimum. Administrative and judicial appeal procedures should be set up, and the burden of justifying the withholding of data should be placed on the government. Provisions should be included for the recovery of reasonable expenses associated with the appeal of a denial of information which cannot be justified, as well as penalties against an offending official when an unjustified denial of access is shown to have been capricious or arbitrary.

2) Passage of a comprehensive law which guarantees that all government meetings will be open to the public except those held for limited and specific purposes stipulated within the law itself. No state, county, or local agencies, bodies, or boards should be exempted from the statute, and there should be no presumption inherent in the statute that certain agencies,

bodies, or boards must meet in secret under any circumstances. Administrative and judicial appeal procedures should be set up to settle disputes over the closing of meetings, and the burden for justifying the closing of the meeting of any agency, body, or board should be placed upon its members. Provisions should be included for voiding actions taken at illegally closed meetings and for the recovery of reasonable expenses associated with the appeal of the closing of any such meeting, and such appeals should be allowed by any person whether or not such person was individually denied access. Additional provisions should be included for the imposition of penalties against those members who voted affirmatively for the unjustifiable closing of a meeting when such closing is shown to have been capricious or arbitrary. Votes to hold all closed sessions should be recorded in public, and penalties resulting from the unjustified closing of a meeting should be applied only against those members who voted affirmatively for the closing in question.

3) Passage of revisions in the state Personnel Privacy Act to prohibit the withholding of all information about the professional performance of public employees except information the disclosure of which would constitute an invasion of privacy to the detriment of both the individual *and* the public.

4) Appointment of a legislative study commission to become familiar with the work of the National Conference of Commissioners on Uniform State Laws with regard to the proposed Uniform Privacy Act, and to plan and prepare for the adaptation of the Uniform Privacy Act in the North Carolina General Statutes.

5) Passage of a "shield" law (based on the New Jersey statute as a model) which accords to journalists, as a matter of public policy, a "First Amendment related" privilege to withhold from compulsory disclosure the names of confidential sources and the contents of confidential information, at least until after there has been a hearing before a judge in which the party seeking disclosure has proved that the information being sought is material and relevant to the matter in dispute and is unobtainable from any other source.

Footnotes

[1]H. L. Mencken, *A New Dictionary of Quotations on Historical Principles*, 1946; cited in Whalen, *Your Right to Know*, Vintage Books, 1973, p. 112.

[2]David Wise, *The American Police State: The Government Against the People*, Vintage Books, 1976.

[3]Quoted in *None of Your Business: Government Secrecy in America*, edited by Norman Dorsen and Stephen Gillers, Penguin Books, 1975, p. 5.

[4]*The New York Times*, May 10, 1961.

[5]*Branzburg v. Hayes, et. al., Judges, In re Pappas,* and *U. S. v. Caldwell*, 408 U. S. 665 (1972). (Cited *Branzburg*).

[6]*Branzburg.*

[7]News Media - Courts Seminar (17th Annual), Sept. 29-30, 1978, Institute of Government, Chapel Hill, North Carolina.

[8]Jean Jacques Rousseau, *The Social Contract*, cited in "Political Theory and the People's Right to Know," P. D. Bathory and W. C. McWilliams, *Government Secrecy in Democracies*, Harper Colophon Books, 1977, p. 5.

[9]See generally, Frank M. Coleman, *Hobbes and America: Exploring the Constitutional Foundations*, University of Toronto Press, 1977.

[10]*The Federalist Papers*, selected and edited by Roy P. Fairfield, Anchor Books, 1966, No. 84, p. 263.

[11]See generally, Dowling and Gunther, *Constitutional Law*, Foundation Press, 1965, pp. 725-760 and pp. 901-1127.

[12]*Schenck v. U. S.*, 294 U. S. 47 (1919).

[13]*Dennis et. al. v. U. S.*, 341 U. S. 494 (1951) (cited *Dennis*).

[14]*Zurcher v. Stanford Daily*, 3 Media Law Reporter 2377 (1978), (cited *Zurcher*).

[15]*Branzburg.*

[16]Quoted in *None of Your Business: Government Secrecy in America.*

[17]*Dennis.*

[18]Alexis de Tocqueville, *Democracy in America*, translation by George Lawrence, edited by J. P. Mayer, Anchor Books, 1969, p. 181.

[19]Hillier Krieghbaum, *Pressures on the Press*, Thomas Y. Crowell Co., 1973, p. 1.

[20]*The Papers of Thomas Jefferson*, Vol. XI, p. 49 (1955), cited in *Your Right to Know.*

[21]*New York Times Co. v. U. S., U. S. v. Washington Post Co.*, 403 U. S. 713 (1971).

[22]*Branzburg.*

[23]*The Federalist Papers*, No. 2 (see footnote 10), p. 8.

[24]John Locke, *Two Treatises of Civil Government* (1924; reprint edition: London: J. M. Dent, 1949). Discussed in "Access to Political Knowledge is a Human Right," Christian Bay, *Government Secrecy in Democracies*, pp. 22-39.

[25]Blackstone's *Commentaries*, discussed generally in *Near v. Minnesota*, 283 U. S. 697 (1931).

[26]283 U. S. 697 (1931).

[27]*Lovell v. Griffin*, 303 U. S. 444 (1938).

[28]*Freedman v. Maryland*, 380 U. S. 51 (1965); *Santos v. California*, 361 U.S. 147 (1959).

[29]*Communist Party v. Subversive Activities Control Board*, 367 U. S. 1 (1961). A later decision deemed portions of the act unconstitutional.

[30]*Dennis*. This extremely broad interpretation of government power has not been relied on in later decisions.

[31]*Gibson v. Florida Investigating Committee*, 372 U. S. 539 (1963).

[32]*New York Times Co. v. U. S.* (see footnote 21).

[33]*Garland v. Torre*, 259 F. 2d 545 (2nd Cir.); *cert. denied*, 388 U. S. 910 (1958).

[34]George Orwell, *1984*, Harcourt, 1949.

[35]"There is more than a semantic difference, after all, between an 'informed public' and 'a public informed,' for an 'informed public' has presumably heard and learned what a 'public informed' has merely been *told*," P. D. Bathory and W. C. McWilliams, "Political Theory and the People's Right to Know," in *Government Secrecy in Democracies*, p. 4.

[36]Alexis de Tocqueville, *Democracy in America* (see footnote 18).

[37]Alvin Toffler, *Future Shock*, Random House, 1970, a book about the effects on people of urbanization and modern technology.

[38]Robert Morgan, "Keeping the Public Informed," *Popular Government*, Feb. 1970, p. 10.

[39]*Student Bar Association v. Byrd*, 293 N. C. 594 (1977).

[40]North Carolina General Statutes, Chapter 265.

[41]5 U. S. C. 552.

[42]*A Citizens Guide on How to Use the Freedom of Information Act and the Privacy Act in Requesting Government Documents*, Thirteenth Report by the Committee on Government Operations, 1977.

[43]*A Summary of Freedom of Information and Privacy Laws of the 50 States*, Access Reports, 1977, p. 2.

[44]R. L. Plesser and P. J. Petkas, *Government in the Sunshine, Emphasis: North Carolina,* Southern Governmental Monitoring Project, Southern Regional Council, 1975, p. 11.

[45]*Access Reports*, vol. 4 no. 6, March 21, 1978.

[46]See "Carrying Privacy a Bit Too Far," by Fred Graham, *Herald Tribune International, The New York Times, The Washington Post*, Sept. 10, 1978.

[47]Access Reports (see footnote 43).

[48]North Carolina General Statute 122-8.1.

[49]North Carolina General Statute 90-96.

[50]North Carolina General Statutes 126-24, *et. seq.*

[51]5 U. S. C. 522a.

[52]Fred Graham, "Carrying Privacy a Bit Too Far," (see footnote 46).

[53]Responses to Center inquiry to newspaper editors.

[54]*Freedom of Information Act*, "Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary," United States Senate, Sept. - Nov., 1977, p. 1.

[55]"How to Use the New 1974 FOI Act," Reporters Committee for Freedom of the Press, Washington, D. C.

[56]Fielding M. McGehee III, "Exemption 1: F.O.I.A.'s Catch-22," *Columbia Journalism Review,* March/April, 1978, p. 18.

[57]*The New York Times*, Sept. 7, 1975.

[58]"Wiretaps, Anyone?," *Science*, Feb. 17, 1978, p. 750.

[59]Reporters Committee (see footnote 55).

[60]Fred Graham, "Carrying Privacy a Bit Too Far," (see footnote 46).

[61]John Kenneth Galbraith, "My Forty Years with the F.B.I.," *Esquire*, Oct. 1977, p. 122.

[62]Letty Cottin Pogrebin, "The FBI Was Watching You," *Ms.*, June 1977, p. 37.

[63]Robert Ellis Smith, "Sexual Privacy," *Juris Doctor*, Jan. 1978, p. 19.

[64]Fielding M. McGehee III, "Exemption 1: F.O.I.A.'s Catch-22," (see footnote 56).

[65]G. Bruce Doern, "Canada," in *Government Secrecy in Democracies*, p. 143.

[66]North Carolina General Statute 132-1.1.

[67]See, e.g., N. C. G. S. 114-15.

[68]*Goble v. Bounds*, 13 N. C. App. 579 (1972).

[69]44 N. C. A. G. 340.

[70]Plesser and Petkas, *Government in the Sunshine*, (see footnote 44), p. 17.

[71]North Carolina General Statute 132-9.

[72]*The New York Times*, June 21, 1978.

[73]*Local Government Law Bulletin Number 10*, Institute of Government, March 1977.

[74]*Ibid.*

[75]See, e.g., N. C. G. S. 105-259 (Department of Revenue records).

[76]See, e.g., N. C. G. S. 153A-98 (county employee records).

[77]See, e.g., N. C. G. S. 111-28 (records of aid to the needy blind).

[78]*Greensboro Daily News*, "Hunt Unhappy with Privacy Law," Feb. 26, 1978.

[79]Raleigh *News & Observer*, "Trooper Fired Following Party," Jan. 14, 1978.

[80]*Greensboro Daily News*, "Hunt Unhappy with Privacy Law," Feb. 26, 1978.

[81]North Carolina General Statute 114-15.

[82]*Greensboro Daily News*, "Hunt Unhappy with Privacy Law," Feb. 26, 1978.

[83]*Ibid.*

[84]Raleigh *News & Observer*, "Opinion May Limit Access to Personnel Cases," Feb. 9, 1978.

[85]North Carolina General Statutes 143-318.2 *et. seq.*

[86]*Durham Morning Herald*, "Law Weak From the Start," Feb. 13, 1978.

[87]*Ibid.*

[88]Raleigh *News & Observer*, "Board is Sued, Accused of Closing Its Meetings," Aug. 27, 1977.

[89]*Winston-Salem Journal*, "Iredell Board Plans to Adopt Higher Valuation," Nov. 19, 1977.

[90]Raleigh *News & Observer*, "Board Accused of Illegal Act," April 23, 1977.

[91]*Durham Morning Herald*, "Committee Plan Darkens Public to Town Affairs," Jan. 18, 1978.

[92]*Charlotte Observer*, "School Board Gets Contempt Citations," April 16, 1977.

[93]*Student Bar Association v. Byrd*, 293 N. C. 594 (1977).

[94]*Durham Morning Herald*, "A Narrow Ruling but a Plausible One," Feb. 13, 1978.

[95]H. B. 522 (1977).

[96]*Report of the Legislative Study Commission for State Policies on the Meetings of Governmental Bodies*, May 31, 1978.

[97]*Ibid.*

[98]*Ibid.*

[99]Ch. No. 442 of 1974 session, House Bill Number 1486.

[100]Dr. John B. Adams, *State Open Meetings Laws: An Overview,* Freedom of Information Foundation, 1974, p. 4.

[101]*This Land is Your Land: Here's How the State Buys and Sells It*, N. C. Center for Public Policy Research, 1977.

[102]Raleigh *News & Observer*, "Official Asks Leeway to 'Differ' with Law," Sept. 16, 1978.

[103]*Greensboro Daily News*, letter to the editor, April 30, 1977.

[104]*Washington Star*, reprinted in the Raleigh *News & Observer*, "Recent Supreme Court Decisions Bode Ill for Press," July 3, 1978.

[105]*Zurcher.*

[106]*In the Matter of Myron Farber and The New York Times*, – N. J. – (1978).

[107]*Ibid.*

[108]Md. Code Ann., Art. 35, Sec. 2 (1957).

[109]*Nebraska Revised Statutes*, Sec. 1, 20-144, Sec. 2, 20-145, Sec. 3, 20-146, Sec. 4, 20-147.

[110]See, e.g., *Branzburg* majority opinion by White, J.

[111]*Farber* (see footnote 106).

[112]*William Farr v. Superior Court of California*, petition for a *writ of certiorari*, U. S. Supreme Court, October Term, 1971, No. 71-1642.

[113]*Branzburg.*

[114]*Durham Morning Herald*, "Press Freedom Takes A Drubbing," Sept. 23, 1978.

[115]A thorough discussion of shield laws appears in *Shield Laws: A Report on Freedom of the Press, Protection of News Sources, and the Obligation to Testify*, The Council of State Governments, 1973.

[116]Bill F. Chamberlin, "Protection of Confidential News Sources: An Unresolved Issue," *Popular Government*, Vol. 44 No. 2, Fall 1978, p. 21.

Appendices

Freedom of Information Act

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public–

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying–

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such

index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if–

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provisions of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is

warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall–

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request–

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the application time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to com-

plete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with

requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a) (4) (F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Proposed Uniform Privacy Act

SECTION 1. [*Definitions.*] As used in this Act:

(1) the term "agency" means every unit of government of this State or any political, geographic, or governmental subdivision or combination of subdivisions thereof, including every department, office, officer, official, institution, board, commission, bureau, council, county, metropolitan district, municipal corporation, or other authority of government of the State and its subdivisions and every government-controlled corporation or any other establishment owned, operated, or otherwise managed by or on behalf of the government of the State or any of its subdivisions, except that the term agency shall not include the legislature or the courts of this State;

(2) the term "individual" means a natural person;

(3) the term "record" means any item, collection, or grouping of information about an individual and includes:

(i) normal directory information, such as the individual's name, address, telephone number, business address, or similar information,

(ii) numbers, symbols, fingerprints, voiceprints, photographs, or other identifying particulars assigned to, or associated with, the individual,

(iii) information relating to the individual's background, education, finances, health, criminal history, or employment history, and

(iv) any other attributes, affiliations, or characteristics associated with, or assigned to, the individual;

(4) the term "individually identifiable record" means a record or any portion of a record which could be reasonably expected to be identified with the individual or individuals to whom it pertains;

(5) the term "research or statistical record" means an individually identifiable record which is collected or maintained by a government agency or pursuant to a government research contract or grant for a research or statistical purpose only and which when collected was not meant to be used in individually identifiable form to make any decision or to take any action directly affecting the individual to whom the record pertains;

(6) the term "accessible record" means a record, except a research or statistical record as defined in Section 7, which is:

(i) systematically filed, stored, or otherwise maintained according to some established retrieval scheme or indexing structure and accessed by reference to the retrieval scheme or indexing structure for the principal purpose of retrieving the record, or any portion thereof, on the basis of the identity of, or so as to identify, an individual, or

(ii) otherwise readily accessible because:

(A) the agency is able to access the record without an unreasonable expenditure of time, money, effort, or other resources, or

(B) the individual to whom the record pertains provides sufficiently specific locating information to render the record accessible by the agency without an unreasonable expenditure of time, money, effort, or other resources;

(7) the term "system," or the term "subsystem," means any collection or grouping of individually identifiable records which are maintained as accessible records;

(8) the term "maintain" means hold, possess, preserve, retain, or store;

(9) the term "routine use" means the use or disclosure of an individually identifiable record for a purpose that is,

(i) compatible with the purpose for which the information in the record was collected or obtained, and

(ii) consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected, or obtained.

SECTION 2. [*Access to Records.*] Each agency that maintains, or exercises administrative control or constructive custody of, any accessible record shall make that record available to the individual to whom it pertains as follows:

(1) Except as provided under paragraphs (4) and (6), after an agency receives a request, which reasonably describes an accessible record, from the individual to whom the record pertains and after the agency obtains satisfactory assurance that the requesting individual is who he purports to be, the agency shall make the record available to the individual in an understandable form, in particular, providing the individual with a translation into common terms of any machine readable code or any code or abbreviation employed for internal agency use. A copy of the record, or any portion, shall be made available for the individual to keep at his request. Each agency may establish reasonable fees to be charged, if any, to an individual for making copies of a record.

(2) Upon request by an individual who has been granted access to an accessible record pursuant to paragraph (1), an agency shall inform the individual of the purpose or purposes for which the record is maintained and used and of the disclosures of it to recipients outside the agency made within the three years before the request, as follows:

(i) the agency shall provide the individual with an accounting of all previous recipients of the record of whom the agency could be reasonably expected to be aware; and

(ii) in providing this accounting the agency shall take reasonable affirmative steps to inform the individual, in a form comprehensible to him, of:

(A) the date, nature, and purpose of each disclosure, and

(B) the name and address of the person or agency to whom the disclosure was made.

An agency is not required to maintain accounting of disclosures under this paragraph for a record which is specifically maintained for the purpose of making information available to the general public.

(3) Whenever an agency grants an individual access to an accessible record or an accounting of the uses and disclosures of the record, the individual to whom the record pertains may be accompanied by a person of his own choosing, but the agency may require the individual to furnish a written statement consenting to discussion or disclosure of his record, or its uses and disclosures, in the accompanying person's presence.

(4) An agency is not required to grant an individual access to information within a record, or that accounts for the uses and disclosures of a record, which is:

(i) investigative information compiled for the investigation of a violation of law, if disclosure would:

(A) interfere with an ongoing investigation or enforcement proceeding,

(B) disclose the identity of a confidential source,

(C) disclose investigative techniques and procedures, or

(D) endanger the life or physical safety of law enforcement personnel;

(ii) information that accounts for the use and disclosure of a record, if it would reveal the existence of an ongoing investigation of a violation of law;

(iii) information prepared in reasonable anticipation of litigation or trial;

(iv) information which does not relate directly to the individual and which, if disclosed, would constitute a clearly unwarranted invasion of another individual's privacy;

(v) testing or examination material used solely to determine individual skills or qualifications, if disclosure would compromise the objectivity or fairness of the testing or examination process; or,

(vi) information authorized to be withheld from the individual to whom it pertains by [list appropriate statutory sections].

(5) If an agency is authorized by statute to withhold information in an accessible record from the parent or legal guardian of the individual to whom the record pertains, this section does not require the agency to grant access to that information to a parent or legal guardian acting as the legal representative of the individual.

(6) Any reasonably segregable portion of an accessible record must be provided to an individual requesting the record after deletion of portions exempt under paragraph (4).

(7) Upon receipt of a request for access to a record, an agency shall:

(i) determine promptly and in any event within [10] working days after receiving the request whether it will comply with the request;

(ii) at the time of the determination, notify the individual making the request of the determination, including written notification of the reason for denying any part of the request and the procedures for judicial review of the determination under Section 10; and,

(iii) make available to the individual within a reasonable period of time, not exceeding [30] days, records and accountings the agency determines it will provide.

Failure of the agency to comply with the applicable time limit provisions of this paragraph constitutes a denial of the request in which case the requesting individual is deemed to have exhausted his administrative remedies.

(8) If an individual requests access to a record and information within it may be withheld from him by the agency under paragraphs (4)(i)(A), (4)(ii), (4)(iii) or (5), the agency is not required to inform the individual of the existence of the information which it is authorized to withhold, nor is the agency required to comply with the provisions of paragraph (7)(ii), except that those provisions must be complied with

(i) for information withheld under (4)(i)(A) and (4)(ii) upon the conclusion of the investigation which justified the denial of access, and

(ii) for information withheld under (4)(iii) upon the conclusion of the contemplated litigation which justified the denial of access or upon a decision not to litigate.

SECTION 3. [*Amendment of Records.*] An individual to whom an accessible record pertains may request correction or amendment of that record from the agency which is primarily responsible for maintaining it or which exercises administrative control over it.

(1) Not later than [5] working days after receiving a request from an individual to correct or amend an accessible record pertaining to him, an agency shall acknowledge the request in writing, and promptly

(i) make the requested correction or amendments, or,

(ii) inform the individual of its refusal to correct or amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for review of the refusal, and the title and business address of the official to contact in order to initiate review;

(2) Not later than 30 working days after an individual requests review of an agency refusal to correct or amend his record, the agency shall complete the review and make a final determination unless, for good cause, the agency extends the review for an additional 30-day period.

(3) If, after the review pursuant to paragraph (2), the agency refuses to correct or amend the record in accordance with the individual's request, the agency shall:

(i) permit the individual to file in his record a concise statement setting forth the reasons for his disagreement with the refusal of the agency to correct or amend it, and

(ii) notify the individual of the procedures for judicial review under Section 10.

(4) In any disclosure containing information about which an individual has filed a statement of disagreement pursuant to paragraph (3), the agency shall:

(i) clearly identify any portion of the information disclosed which is disputed,

(ii) furnish to those to whom the disputed information is disclosed copies of the individual's statement, and,

(iii) if the agency deems it appropriate, furnish to those to whom the information is disclosed copies of a concise statement of the reasons of the agency for not making the amendments requested;

(iv) if the agency discloses the concise statement permitted by subparagraph (iii) to any person it must simultaneously transmit a copy to the last known address of the individual to whose record the statement pertains.

SECTION 4. [*Limitations on Disclosure.*] No agency may disclose any individually identifiable record by any means of communication to any agency or person other than the individual to whom the record pertains unless the disclosure would be:

(1) pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains;

(2) required under [the State Freedom of Information Act];

(3) of information collected and maintained specifically for the purpose of creating a record available to the general public;

(4) to officers and employees of the agency who have a need for the record in the performance of their duties, if the disclosure is a routine use;

(5) to an agency of this State if the disclosure is:

(i) necessary and proper for the performance of the agency's duties and functions, and

(ii) a routine use;

(6) pursuant to a statute of this State or a Federal Statute that expressly authorizes the disclosure;

(7) to the State Archives;

(8) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States, or to a foreign government if specifically authorized by treaty or statute, for a civil or criminal law enforcement activity if the activity is authorized by law and the agency or instrumentality has made a written

request to the agency maintaining the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(9) to a criminal law enforcement agency of this State, another State or the Federal Government, if the information disclosed is limited to:

(i) identifying information respecting the individual, including only his name or other identifying particulars, his address, his former addresses, his place of employment or his former places of employment, and

(ii) information respecting the legal status of the individual, including the existence of any outstanding warrants or unfulfilled obligations imposed by the final judgment of a court;

(10) pursuant to a showing of compelling circumstances affecting the health or safety of any individual, if upon disclosure notification thereof is transmitted to the last known address of the individual to whom the record pertains;

(11) by subpoena to either House of the Legislature or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, if the request is pertinent to a legitimate legislative inquiry and notification of the subpoena is transmitted to the last known address of the individual to whom the record pertains;

(12) pursuant to an order of a court of competent jurisdiction if notification of the order is transmitted to the last known address of the individual to whom the record pertains;

(13) notwithstanding the provisions of paragraphs (1) through (12), for a research or statistical purpose, if the agency:

(i) determines that the use or disclosure is consistent with the conditions or reasonable expectations of use and disclosure under which the information in the record was provided, collected, or obtained;

(ii) determines that the research or statistical purpose for which the disclosure is to be made:

(A) cannot be reasonably accomplished unless the information is provided in individually identifiable form; and

(B) warrants the risk to the individual which additional exposure of the information might bring;

(iii) takes reasonable affirmative steps to assure that the recipient,

(A) will comply with the requirements of Section 5(5); and

(B) will remove or destroy the individual identifier or identifiers associated with the record at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research or statistical project;

(iv) prohibits any subsequent use or disclosure of the record in individually identifiable form without the agency's express authorization; and

(v) secures a written statement attesting to the recipient's understanding of, and willingness to abide by, the conditions of this paragraph in instances in which the recipient is not an officer or employee of the agency; or

(14) to authorized officials of a department or agency of the Federal government for the purpose of auditing or monitoring an agency program that receives federal monies, if the audit or review is expressly authorized by law and the records will be disclosed in individually identifiable form only upon written certification by an authorized Federal official that the identification is necessary to perform the audit or review.

Nothing in this Section authorizes any disclosure otherwise prohibited by law.

SECTION 5. [*Collection and Maintenance of Information.*] Each agency that collects, receives or maintains individually identifiable records shall:

(1) collect information to the greatest extent practicable directly from the individual to whom the information pertains;

(2) take affirmative steps to enable individuals from whom it requests information about themselves, or other persons, to decide whether to supply the information in as informed and uncoerced a manner as is reasonably possible. If information is collected either through use of a form or in order to complete a form, the agency collecting the information shall notify the individual, unless the individual has already been notified within a reasonable period of time before the request, of the following:

(i) the authority for the collection of the information,

(ii) with respect to each item of information, whether disclosure is mandatory,

(iii) the likely consequences to the individual of not providing the information,

(iv) whether the information collected and the identity of the person providing it will be accessible to the individual to whom the information pertains,

(v) the principal purpose or purposes within the agency for which the information is intended to be used,

(vi) any known or foreseeable interagency or intergovernmental transfer which may be made of the information,

(vii) the title, business address, and business telephone number of a responsible agency representative who can assist an individual in his decision or answer any questions which he may have, and

(viii) if information is collected for use as a research or statistical record,

(A) the possibility, if any, that the information may be used or disclosed in individually identifiable form for additional research or statistical purposes,

(B) any requirements for disclosure of the information in individually identifiable form for other than research or statistical purposes, and

(C) that if any required disclosure is made for other than a research or statistical purpose, the individual will be promptly notified pursuant to Section 7 (1)(iii);

(3) collect or maintain in its records only the information about an individual which is relevant and necessary to accomplish a purpose of the agency authorized to be accomplished by State or Federal statute, by ordinance, or by Executive Order;

(4) maintain all records that are used by the agency in making any determination about any individual with accuracy, timeliness, completeness, and relevance reasonably necessary to assure fairness in the determination, although this provision does not prohibit any agency or component thereof which performs as its principal function any activity relating to the enforcement of criminal laws, from maintaining potentially inaccurate, untimely, incomplete, or irrelevant information, if the informaion is identified clearly as such to all users or recipients of the information;

(5) establish reasonable administrative, technical, and physical safeguards to assure the integrity, confidentiality, and security of individually identifiable records.

SECTION 6. [*Propagation of Corrections.*] Each agency that maintains individually identifiable records shall take reasonable steps to furnish the correction to any error in

an individually identifiable record to the sources and the previous recipients of the information in that record who, within a reasonable period of time, have provided information to, or received information from, the record, if those corrections could be reasonably expected to affect the outcome of any determination on the individual and if the sources and recipients of the erroneous information could not be expected by the agency otherwise to become aware of those corrections.

SECTION 7. [*Research or Statistical Records.*]

(1) No agency may use or disclose a research or statistical record, without the authorization of the individual to whom the record pertains, unless:

(i) the agency reasonably believes that the use or disclosure will forestall continuing or imminent physical injury to an individual, and the information disclosed is limited to the information necessary to secure the protection of the individual who may be injured; or,

(ii) the record is furnished in compliance with a judicial order, including a search warrant or lawfully issued subpoena, and the purpose of the judicial order is to assist inquiry into an alleged violation of law by a researcher or an institution or agency maintaining research or statistical records, but:

(A) any record so disclosed may not be used as evidence in any administrative, legislative, or judicial proceeding against anyone other than the researcher or research entity,

(B) any record so disclosed may not be used as evidence (or otherwise made public) in a manner by which the subject of the research may be identified, unless identification of an individual research subject is necessary to prove the violation of law, and

(C) an individual identified in any record to be made public in individually identifiable form must be given notice before disclosure and may contest the necessity of the disclosure before the administrative, legislative, or judicial tribunal authorizing the disclosure, pursuant to Section 10; or

(iii) the record is disclosed in individually identifiable form for the purpose of auditing or evaluating a research program, the audit or evaluation is expressly authorized by statute, and no subsequent use or disclosure will be made by the auditor or evalutor.

(2) Each agency that collects or maintains research or statistical records shall take reasonable affirmative steps to notify an individual whenever a research or statistical record pertaining to him is disclosed in individually identifiable form without:

(i) a prohibition of further disclosure, and

(ii) assurance that the record will not be used to make any decision or take any action directly affecting the individual to whom it pertains.

SECTION 8. [*Public Notice of Agency Recordkeeping Policies and Practices.*]

(1) Each Agency shall report each year to the Director of the Privacy Protection Agency at his direction, and on a form provided by him describing in detail the systems and subsystems of records the agency maintains. The report must include:

(i) the name and location of each system or subsystem;

(ii) the legal authority for the maintenance of the system or subsystem;

(iii) the categories of individuals on whom records are maintained in the system or subsystem;

(iv) the categories of information or data items maintained in the system or subsystem;

(v) the uses and disclosures of the records contained in the system or subsystem, including the categories of users and the purposes of the uses and disclosures;

(vi) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the information maintained in the system or subsystem;

(vii) the title, business address, and business telephone number of the agency official responsible for the system or subsystem;

(viii) the agency procedures whereby an individual can request:

(A) access to records pertaining to him in the system or subsystem, and

(B) amendment of those records; and

(ix) the categories of sources of information in the system.

(2) Agency reports made pursuant to subsection (1) must be compiled by the Director of the Privacy Protection Agency and made available for public inspection, except to the extent that reported material would be information to which an individual would be denied access under subsections 4(i) and (ii) of Section 2.

SECTION 9. [*Agency Implementation.*]

(1) The head of each agency or his designee shall:

(i) issue instructions or guidelines necessary for the implementation of this Act, and

(ii) take steps to assure that all agency employees and officials responsible for the collection, maintenance, use, and dissemination of individually identifiable records are aware of the requirements of this Act and the agency requirements and procedures adopted pursuant to subsection (2).

(2) In order to carry out the provisions of this section, each agency that maintains, or exercises administrative control or constructive custody of, individually identifiable records must establish:

(i) reasonable requirements for identifying any individual who requests access to an individually identifiable record;

(ii) procedures for disclosing to an individual, upon his request, records pertaining to him;

(iii) procedures for acting upon a request from an individual concerning the amendment of any record pertaining to him, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for additional means necessary for each individual to exercise fully his rights under this section; and

(iv) reasonable fees to be charged, if any, to an individual for making copies of records pertaining to him, excluding the cost of any search for and review of the records.

SECTION 10. [*Civil Remedies.*]

(a) Any aggrieved individual may bring and maintain an action for relief for violation of this Act. In pursuing the action, an individual may seek both equitable relief pursuant to subsection (b) and damages pursuant to subsections (c) and (d) in the _____ courts of this State.

(b) In an equitable action brought under this section,

(1) If an agency engages in any practice or procedure in violation of Sections 3 through 9 of this Act, the court, hearing the matter de novo, may order the agency to cease the unlawful practice or procedure and provide any other appropriate relief.

(2) If an agency refuses to comply, in whole or in part, with an individual's request under paragraphs (1) and (2) of Section 2, the court, hearing the matter de novo, may [enjoin] [prohibit] the agency from withholding the records, or the accounting of the uses and disclosures thereof, and order the production to the complainant of any agency records or other information improperly withheld from him. The court may examine the contents of any agency records *in camera* and outside the presence of the individual requesting access to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in Section 2. The burden of proof is on the agency to sustain a claim of exemption.

(3) If the complainant substantially prevails in any action brought under this subsection, the court may assess against the agency reasonable attorney's fees and reasonably incurred litigation costs.

(c) In any action brought under this section in which the court determines that the agency violated any provision of Sections 2 through 7 of this Act, the court may order the agency to comply with the Act, and, in addition, the agency shall be liable to the individual in an amount equal to the sum of special and general damages sustained by the individual as a result of the action of the agency.

(d) Any person, including an employee or officer of an agency, who engages or participates in a knowing violation of any provision of Sections 2 through 7 of this Act, shall be liable to the individual in an amount equal to the sum of special and general damages sustained by the individual as a result of the action of the agency.

(e) If the complainant substantially prevails in any action brought under subsections (b), (c), or (d) of this Act, the court may assess against the losing party reasonable attorney's fees and reasonably incurred litigation costs.

(f) An action to enforce any liability created under this section may be brought within 2 years after the date on which the [claim for relief] [cause of action] arises, but if the agency has willfully misrepresented any information required under this Act to be disclosed to an individual and the information so misrepresented is material to the establishment of the liability of the agency or any person under this section, the action may be brought within 2 years after discovery by the individual of the misrepresentation. By virtue of this enactment, the defense of sovereign immunity may not be asserted in any action for damages under subsections (c) or (d). This section does not authorize any civil action by reason of any injury sustained as the result of a disclosure of a record before the effective date of this Act.

SECTION 11. [*Suspension or Discharge for Willful Violations.*] A willful violation of any provision of this Act by any employee or officer of an agency shall be cause for suspension without pay or discharge.

SECTION 12. [*Criminal Penalties.*]

(a) Any officer or employee of an agency who has possession of, or access to, agency records that contain individually identifiable information the disclosure of which is prohibited by this Act, and who, knowing that disclosure of the material is so prohibited,

willfully discloses the material in any manner to any person or agency not entitled to receive it, is guilty of a misdemeanor [and upon conviction is subject to a fine not exceeding _____ or imprisonment for no longer than _____].

[(b) Any person who requests or obtains any record concerning an individual other than himself from an agency under false pretenses or by means of bribery or theft is guilty of a misdemeanor [and upon conviction is subject to a fine not exceeding _____ or imprisonment for no longer than _____].]

SECTION 13. [*Government Contractors and Grantees.*]

(1) Any contractor or recipient of a government grant, or any subcontractor thereof, who performs any function on behalf of an agency that requires the contractor or grantee to maintain individually identifiable records is subject to the provisions of this Act, but this section does not apply to:

(i) the employment, personnel, or other administrative records the contractor or grantee maintains as a necessary aspect of supporting the performance of the contract or grant but which bear no other relation to the performance of the contract or grant; or

(ii) individually identifiable records to which all of the following conditions apply:

(A) the collection or maintenance of the records is neither required nor implied by the terms of the contract or grant,

(B) no representation of State sponsorship or association is made for those records, and

(C) except for authorized audits or investigations, those records will not be submitted or otherwise provided to the agency with which the contract or grant is established.

(2) The agency with which the contract or grant is established, consistent with its authority, is responsible for ensuring that the contractor or grantee complies faithfully with the provisions of this Act.

(3) For any contract or grant to which subsection (1) applies:

(i) the contractor or grantee, for purposes of the civil remedies of Section 10, is deemed to be an agency, but damages, attorney's fees, and litigation costs under Section 10 must be assessed against the contractor or grantee instead of against the State; and,

(ii) no official or employee of any agency may include, or authorize to be included, in any contract or grant any provision indemnifying the contractor or grantee for losses suffered as a result of its liabilities under Section 10.

SECTION 14. [*Report on New Systems.*] Each agency shall provide adequate advance notice to the Director of the Privacy Protection Agency of any proposal to establish or alter any system or subsystem, whether the change would be physical (such as the procurement of new data processing or communications capabilities) or administrative, in order to permit an evaluation of the probable or potential effect of the proposal on the privacy rights of individuals.

SECTION 15. [*Mailing Lists.*] An individual's name and address may not be sold or rented by an agency unless that action is specifically authorized by law. This section does not require the withholding of names and addresses otherwise permitted to be

made public.

SECTION 16. [*Privacy Protection Agency.*]

(1) The Privacy Protection Agency is hereby established as an executive authority of the State of _____ [at the Seat of Government].

(2) The Governor shall appoint [with the advice and consent of the Legislature] a Director of the Privacy Protection Agency. The Director is the head [chief executive officer] of the Privacy Protection Agency.

(3) All functions of the Privacy Protection Agency are vested in the Director.

(4) The Director from time to time may authorize the performance by any other officer or employee of the Privacy Protection Agency of any function of the Director.

(5) The Director has the following powers, duties, and functions, in addition to the internal ordering and administration of the Privacy Protection Agency:

(i) He shall review each year the official acts, records, policies, and procedures of the official designated for each agency pursuant to Section 9.

(ii) He may assist agencies in complying with any of the provisions of this Act.

(iii) He may provide, upon request, an interpretive ruling for an agency concerning any question arising out of the execution of the provisions of this Act.

(iv) He may recommend to an agency any changes in policy, procedure or practice that he determines would carry out better the provisions of this Act and protect the privacy of individuals.

(v) He may conduct inquiries into agency compliance with this Act and investigate possible violations of the Act by any officer, employee, contractor, [grantee] or agent of any agency.

(vi) Where appropriate, he may recommend criminal prosecution of violations of this Act to the appropriate officials.

(vii) He shall have the authority to examine the records of any agency and the power to enforce that authority in the courts of this State.

(viii) He shall receive complaints from and actively solicit the comments and concerns of the public regarding:

(a) the practices and policies pursued by agencies in collecting information, in particular any complaints regarding collection practices or the gathering or maintenance of items of information which are neither relevant nor necessary to accomplish the lawful duties and responsibilities of the agency, and

(b) the attention of agencies to the spirit, as well as the specific provisions, of this Act.

(ix) He shall transmit to the Legislature and the Governor each year a report detailing the complaints, comments, and concerns he has received.

(x) He may recommend legislation to the [Governor and] Legislature which would limit collection of items of information or restrict collection practices that he has determined to be inappropriate or unnecessary, or legislation which would otherwise protect individual privacy.

(xi) He shall review all new systems reports, evaluating the potential effect of the proposed action on individual privacy.

(xii) He may conduct any other investigations, pursue any other inquiries, and prepare and publish any other reports and recommendations he determines necessary

to protect individual privacy against incursions by government.

[(xiii) He may sue other agencies on behalf of aggrieved individuals or classes of individuals if he determines there has been and continues to be systematic abuse of rights of personal privacy under this Act or any other laws.]

North Carolina Open Meetings Law

143-318.1. *Public policy.* --Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of this State and its political subdivisions exist solely to conduct the people's business, it is the public policy of this State that the hearings, deliberations, and actions of these bodies be conducted openly.

143-318.2. *All official meetings open to the public.* --(a) Except as provided in G. S. 143-318.3, G. S. 143-318.4, and G. S. 143-318.5, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members and

(1) exercises or is authorized to exercise any legislative, policy-making, quasi-judicial, administrative, or advisory function; and

(2) is established by (i) the State Constitution, (ii) an act or resolution of the General Assembly, (iii) a resolution or order of a State agency, pursuant to a statutory procedure under which the agency establishes a political subdivision or public corporation, (iv) an ordinance, resolution, or other action of the governing board of one or more counties, cities, school administrative units, or other political subdivisions or public corporations, or (v) an Executive Order of the Governor or formal action of the head of a principal State office or department, as defined in G. S. 143A-11 and G. S. 143B-6, or of a division thereof.

In addition, "public body" means a committee of a public body and the governing board of a "public hospital," as defined in G. S. 159-39. This provision shall not apply to committees which are not policy making bodies of public hospitals.

(c) "Public body" does not include and shall not be construed to include meetings among the professional staff of a public body, unless the staff members have been appointed to and are meeting as an authority, board, commission, committee, council, or other body established by one of the methods listed in subdivision (b)(2) of this section.

(d) "Official meeting" means any meeting, assembly, or gathering together at any time or place of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body; provided, however, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

143-318.3. *Executive, closed and private sessions.* --(a) A public body, by the votes of a majority of its members present, may, during any regular or special meeting when a quorum is present, hold an executive session and exclude the public while considering:

(1) Acquisition, lease, or alienation of property;

(2) Negotiations between public employers and their employees or representa-

tives thereof as to employment;

(3) Matters dealing with patients, employees or members of the medical staff of a hospital or medical clinic (including but not limited to all aspects of admission, treatment, and discharge, all medical records, reports and summaries, and all charges, accounts and credit information pertaining to said patients; all negotiations, contracts, conditions, assignments, regulations and disciplines relating to employees; and all aspects of hospital management, operation and discipline relating to members of the medical staff);

(4) Any matter coming within the physician-patient, lawyer-client or any other privileged relationship;

(5) Conferences with legal counsel and other deliberations concerning the prosecution, defense, settlement or litigation of any judicial action or proceeding in which the public body is a party or by which it is directly affected.

(b) This Article shall not be construed to prevent any public body from holding closed sessions to consider information regarding the appointment, employment, discipline, termination or dismissal of an employee or officer under the jurisdiction of such body and to hear and consider testimony on a complaint against such employee or officer; provided, however, that final action on the discharge of any employee for cause after hearing shall be taken in open session if such discharge is within the exclusive jurisdiction of the public body. Nor shall this Article be construed to prevent any board of education or governing body of any public educational institution, or any committee or officer thereof, from hearing, considering and deciding in closed session (1) disciplinary cases involving students and (2) questions of reassignments of pupils under G. S. 115-178.

(c) When any county board of commissioners or the governing body of any municipal corporation or board of education is faced with the existence of a riot or with conditions indicating that a riot or public disorders are imminent, within the territorial jurisdiction of such board of governing body, the board of commissioners of such county or the governing body of such municipal corporation or board of education, as the case may be, may meet in private session with such law-enforcement officers and others invited to any such meeting, excluding other members of the public, for the purpose of considering and taking appropriate action deemed necessary to cope with the existing situation during any such emergency.

143-318.4. *Exceptions.* --The agencies or groups following are excluded from the provisions of G. S. 143-318.2:

(1) The Council of State

(2) The Board of Awards

(3) The Department of Correction

(4) The Judicial Standards Commission

(5) All law-enforcement agencies

(6) Grand and petit juries

(7) All study, research and investigative commissions and committees including the Legislative Services Commission.

(8) All State agencies, commissions or boards exercising quasi-judicial functions during any meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding.

(9) Every board, commission, council or other body, or any committee thereof,

authorized by statute to investigate, examine and determine the character and other qualifications of applicants for license to practice any occupation or profession in this State, or authorized to suspend or revoke licenses of, or to reprimand or take disciplinary action concerning any person licensed to engage in the practice of any occupation or profession in this State; provided, however, that nothing in this Article shall be construed to amend, repeal or supersede any statute, now existing or hereafter enacted, which requires a public hearing or other practice and procedure in any proceeding before any such board, commission or other body, or any committee thereof.

(10) Any committee or subcommittee of the General Assembly has the inherent right to hold an executive session when it determines that it is absolutely necessary to have such a session in order to prevent personal embarrassment or when it is in the best interest of the State; and in no event shall any final action be taken by any committee or subcommittee except in open session.

(11) Any public body that is specifically authorized or directed by law to meet in executive or confidential session, to the extent of the authorization or direction.

143-318.5. *Advisory Budget Commission and appropriation committees of General Assembly; application of Article.* --(a) The provisions of this Article shall not apply to meetings of the Advisory Budget Commission held for the purpose of actually preparing the budget required by the provisions of the Executive Budget Act (Article 1, Chapter 143, General Statutes of North Carolina), but nothing in this Article shall be construed to amend, repeal or supersede the provisions of G. S. 143-10 (or any similar statutes hereafter enacted) requiring public hearings to secure information on any and all estimates to be included in the budget and providing for other procedures and practices incident to the preparation and adoption of the budget required by the State Budget Act.

(b) Nothing in this Article shall be construed to amend, repeal or supersede the provisions of G. S. 143-14, relating to the meetings of the appropriations committees of the House of Representatives and the Senate of the General Assembly of North Carolina, and subcommittees thereof.

143-318.6. *Mandamus and injunctive relief.* --Any citizen denied access to a meeting required to be open by the provisions of this Article, in addition to other remedies, shall have a right to compel compliance with the provisions of this Article by application to a court of competent jurisdiction for restraining order, injunction or other appropriate relief.

143-318.7. *Disruptions.* --Any person who willfully interrupts, disturbs, or disrupts any official meeting required to be open to the public by this Article and who, upon being directed to leave such meeting by the presiding officer thereof, willfully refuses to leave such meeting shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment for not in excess of six months, pay a fine of two hundred fifty dollars ($250.00), or by both such fine and imprisonment.

143-318.8. *Public notice of official meetings.* --(a) If a public body has established, by ordinance, resolution, or otherwise, a schedule of regular meetings, it shall cause a current copy of that schedule, showing the time and place of regular meetings, to be kept on file as follows:

(1) for public bodies that are part of State government, with the Secretary of

State;

(2) for the governing board and each other public body that is part of a county government, with the clerk to the board of county commissioners;

(3) for the governing board and each other public body that is part of a city government, with the city clerk;

(4) for each other public body, with its clerk or secretary, or, if the public body does not have a clerk or secretary, with the clerk to the board of county commissioners in the county in which the public body normally holds its meetings.

If a public body changes its schedule of regular meetings, it shall cause the revised schedule to be filed as provided in subdivisions (1) through (4) of this subsection at least seven calendar days before the day of the first meeting held pursuant to the revised schedule.

(b) If a public body holds an official meeting at any time or place other than a time or place shown on the schedule filed pursuant to subsection (a) of this section, it shall give public notice of the time and place of that meeting as provided in this subsection.

(1) If a meeting is an adjourned or recessed session of a regular meeting or of some other meeting, notice of which has been given pursuant to this subsection, and the time and place of the adjourned or recessed session has been set during the regular or other meeting, no further notice is necessary.

(2) For any other meeting, except an emergency meeting, the public body shall cause written notice of the meeting (i) to be posted on the principal bulletin board of the public body or, if the public body has no such bulletin board, at the door of its usual meeting room, and (ii) to be mailed or delivered to each newspaper, wire service, radio station, and television station that has filed a written request for notice with the clerk or secretary of the public body or with some other person designated by the public body. This notice shall be posted and mailed or delivered at least 48 hours before the time of the meeting. The public body may require each newspaper, wire service, radio station, and television station submitting a written request for notice to renew the request annually and may charge a reasonable fee, not to exceed ten dollars ($10.00) annually, to cover the cost of mailed or delivered notice.

(3) For an emergency meeting, the public body shall cause notice of the meeting to be given to each local newspaper, local wire service, local radio station, and local television station that has filed a written request, which includes the newspaper's, wire service's, or station's telephone number, for emergency notice with the clerk or secretary of the public body or with some other person designated by the public body. This notice shall be given either by telephone or by the same method used to notify the members of the public body and shall be given immediately after the notice has been given to those members. This notice shall be given at the expense of the party notified. An "emergency meeting" is one called because of generally unexpected circumstances that require immediate consideration by the public body. Only business connected with the emergency may be considered at a meeting

to which notice is given pursuant to this subdivision.

(c) This section does not apply to the General Assembly. Each house of the General Assembly shall provide by rule for notice of meetings of legislative committees and subcommittees.

New Jersey Shield Law

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 21 of P. L. 1960, c. 52 (C. 2A:84A-21) is amended to read as follows:

21. Rule 27. Newspaperman's privilege. Subject to Rule 37, (concerning waiver of privilege), a person engaged on, *engaged in*, connected with, or employed by [a newspaper] *news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated* has a privilege to refuse to disclose, *in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere* . . . .

a. The source, author, means, agency or person from or through whom any information [published in such newspaper] was procured, obtained, supplied, furnished, *gathered, transmitted, compiled, edited, disseminated,* or delivered; *and*

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

2. (New section) Unless a different meaning clearly appears from the context of this act, as used in this act:

a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.

b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.

c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week, [and has done so for at least 1 year,] and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.

d. "Magazine" means a publication containing news which is published and distributed periodically, [and has done so for at least 1 year,] has a paid circulation and has been entered at a United States post office as second class matter.

e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.

f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.

g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.

h. "In the course of purusing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage.

3. This act shall take effect immediately.

Signed by Governor Byrne
October 5, 1977

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- **The Right to Know**
- **The Need to Know**
- **Freedom of Information Act**
- **North Carolina Public Records Law**
- **Shield Laws**
- **Open meetings**