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Author(s)

Patricia Brady

Performing Organization Name and Address:

Virginia Transportation Research Council
Box 3817, University Station
Charlottesville, Virginia 22903-0817

Sponsoring Agencies' Names and Addresses

Virginia Department of Transportation
1401 E. Broad Street
Richmond, Virginia 23219

University of Virginia
Charlottesville
Virginia 22903

Supplementary Notes

Abstract

With the increasing demand for the release of information gathered by governmental agencies, tension has arisen between the desire to disseminate public records and the desire to withhold an individual's personal information. The purpose of this paper is to examine the relationship between the freedom of information acts (FOIA) and the privacy acts with respect to the personal information maintained by state departments of motor vehicles (DMV). First, the general statutory framework of an FOIA is discussed with Virginia's FOIA used as a model. Next, even though state DMVs are not governed by federal FOIAs, federal case law is analyzed because of the large amount of federal litigation in this area and the guidance given by Supreme Court decisions. New York and Massachusetts case law is also analyzed because these states represent the extremes of restricted access and full disclosure, respectively. Finally, Virginia's case law is analyzed in relation to the approaches taken in New York, Massachusetts, and on the federal level. It is noted that state legislative reform is needed to protect individuals from the unwarranted release of their names and addresses. By expanding the definition of "personal information" to encompass facts that can be used to identify a particular individual, private citizens can better be protected against unsolicited mail, telephone calls, and press reports.

FINAL REPORT

THE TENSION BETWEEN FREEDOM OF INFORMATION AND PRIVACY PROTECTION ACTS FOR STATE DEPARTMENTS OF MOTOR VEHICLES

Patricia M. Brady
Graduate Legal Assistant

(The opinions, findings, and conclusions expressed in this report are those of the author and not necessarily those of the sponsoring agencies.)

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ABSTRACT

With the increasing demand for the release of information gathered by governmental agencies, tension has arisen between the desire to disseminate public records and the desire to withhold an individual's personal information. The purpose of this paper is to examine the relationship between the freedom of information acts (FOIA) and the privacy acts with respect to the personal information maintained by state departments of motor vehicles (DMV). First, the general statutory framework of an FOIA is discussed with Virginia's FOIA used as a model. Next, even though state DMVs are not governed by federal FOIAs, federal case law is analyzed because of the large amount of federal litigation in this area and the guidance given by Supreme Court decisions. New York and Massachusetts case law is also analyzed because these states represent the extremes of restricted access and full disclosure, respectively. Finally, Virginia's case law is analyzed in relation to the approaches taken in New York, Massachusetts, and on the federal level. It is noted that state legislative reform is needed to protect individuals from the unwarranted release of their names and addresses. By expanding the definition of "personal information" to encompass facts that can be used to identify a particular individual, private citizens can better be protected against unsolicited mail, telephone calls, and press reports.

FINAL REPORT

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Patricia Brady
Graduate Legal Assistant

INTRODUCTION

All state and federal agencies operate within the confines of the freedom of information acts (FOIA). The federal FOIA, codified at 5 U.S.C. 552, was enacted in 1966 (with major amendments in 1972) for the purpose of opening inspection of government activities by citizens. The amount and kinds of data housed in various government agencies are now large and varied. Simultaneously, the number of investigative reports by journalists are increasing, swelling the demand for release of information.

There are two distinct issues in the area of personal privacy with respect to government agencies. The first, which is not addressed in this report, concerns the amount and kinds of information an agency can legitimately collect. This is what concerns many people when they think about government invading privacy: the specter of "Big Brother" gathering information on their private life. The second issue, which is the focus of this report, concerns the control of the information once collected. Should it be open to all who request it, open only to the subject about whom it was collected, or kept entirely confidential by the agency?

Ironically, it is most often the agencies themselves that have tried to protect individuals by refusing to disclose information, claiming that it falls under an exemption of the FOIA. Despite the popular image of big government as "Big Brother," it is the bureaucracies that have refused to turn over information to journalists, commercial concerns, or others. Because of this, the agencies are open to the charge that their desire to withhold information frustrates citizens who wish to observe the inner workings of the government.

PURPOSE

The two purposes of this report are (1) to detail the FOIA requirements that pertain to state departments of motor vehicles (DMV) with respect to the personal

information they house and (2) to target general areas of statutory reform that would enhance the protection of personal information. To accomplish these ends, the general statutory framework of an FOIA is explained with Virginia used as a model. Next, federal case law regarding the release of personal information is analyzed. The statutory and case law of New York and Massachusetts is also analyzed because these states represent the extremes of restricted access and full disclosure, respectively. Finally, Virginia statutory and case law is compared to federal, New York, and Massachusetts law; this is followed by general suggestions for statutory reform.

STATUTORY RESTRICTIONS

Freedom of Information Acts

The federal FOIA was enacted in 1966 and substantially amended in 1972 to facilitate oversight of governmental activities by the citizenry. P.L. 89-554, codified at 5 U.S.C. 552. The act requires federal agencies to disclose information to any person who requests it unless the information falls within one of nine categories of exemptions. Because the minimal amount of information that might be sought from DMVs would be the names and addresses of drivers or vehicle owners, this report focuses primarily on Exemption 6, which deals with this issue. Exemption 6 permits the withholding of "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

The purpose of the FOIA is to ensure that governmental decisions, as well as the procedures that led to the decisions, are exposed to public scrutiny. Since the law applies to federal agencies, state DMVs are not directly bound by it. However, most state FOIAs are modeled on the federal act, and courts regularly rely on the interpretation of the federal law as a means of understanding state FOIAs with similar language. There is also the argument that state agencies which receive federal funds and/or perform federal functions to a significant degree might be directly subject to the federal FOIA, but this has not yet been considered by a court.

The federal FOIA specifies that information covered by the act is available to "any person" or the "general public." Some of the state FOIAs nominally restrict the release of information to citizens of the state, but courts that have considered requests under FOIAs have concluded that "citizen" is a broad enough term to encompass entities such as corporations, associations, citizen groups, etc. In addition, some state FOIAs specifically include members of the press. For example, under Virginia law, state agencies must comply with a request from "any citizens of this Commonwealth, representatives of newspapers and magazines with circulation in this Commonwealth, and representatives of radio and TV stations broadcasting in or into this Commonwealth." Va. Code 2.1-342(A), 1950 Code, 1989 Supp. In addi-

tion, Virginia, like many other states, specifically provides that the statute as a whole be liberally construed (Va. Code 2.1-340.1), so it is unlikely that a request would ever be denied solely on the basis of the identity of the requestor.

The Virginia FOIA, like the FOIAs of other states, applies to all state agencies. "Agency" is given a very broad definition by the statute. It includes "other organizations, corporations, [and] agencies in the Commonwealth supported wholly or principally by public funds." Va. Code 2.1-341. It applies to information held by the agencies "regardless of physical form or characteristics" and regardless of the origin of the information: "prepared, owned, or in the possession of a public body." Va. Code 2.1-341.

Like the federal FOIA, most state statutes provide categories of exempt information. The federal FOIA has 9 main exemptions, and the Virginia statute has 39 exemptions. Va. Code 2.1-342(B). The exemptions include criminal investigations, applications for licenses, educational and medical records, income tax returns, documents prepared for litigation, and details of the operation of the state lottery, among others. The exemptions are permissive, not mandatory, which means that the custodian of the information may release material that falls within one of the exemptions if he or she believes disclosure to be appropriate. Under Virginia law, when an agency refuses to disclose requested information, it must inform the requestor within 5 days of the reason it is not releasing the information, citing the specific statutory exemption. If the requestor believes that his or her rights under the FOIA have been violated, he or she may petition the court to compel the agency to produce the records.

Privacy Protection Acts

Counterbalancing the FOIAs are the privacy protection acts, which also exist at both the federal and state level. 5 U.S.C. 552a. Va. Code 2.1-377 *et seq*. The purpose of these statutes is to protect individuals from harm that might be caused by release of information maintained by the government, in contrast to FOIAs, which were designed to permit oversight of governmental activity by citizens. The privacy act itself does not protect against disclosure that is otherwise required by the FOIA. 5 U.S.C. 552a(b)(2).

The Virginia privacy act specifically mentions the finding of the General Assembly that "extensive collection, maintenance, use and dissemination of personal information" directly affects an individual's privacy. Va. Code 2.1-378. The legislature also found that the increasing use of computers magnifies the harm that can occur. The statute establishes standards for the collection, maintenance, and dissemination of information about individuals by government agencies. For example, no information system can be secret: the head of each agency must make public the existence and purpose of any such system, and dissemination of information to other agencies is restricted. Section 2.1-382 establishes the rights of individuals (1) to be informed at the time of supplying information about the possible

consequences of providing or refusing to provide the information; (2) to be allowed to review and, if necessary, challenge or correct the information maintained on him or her; and (3) to be protected from the release of test scores and certain other information related to evaluation. The state can always release statistical abstracts of data with identifying details deleted. Taken as a whole, the Virginia privacy protection act establishes procedural safeguards on the collection, maintenance, and dissemination of information but places no substantive limits on what may be collected or disclosed.

Motor Vehicle Laws

In addition to the statutes that regulate the information collected and maintained by all government agencies, the Virginia Commissioner of Motor Vehicles has additional responsibilities under the statutes governing motor vehicles. Va. Code 46.2-208 through 216 (revised 1989). The statute reflects differing approaches to driving records and vehicle registration information, with the former more protected.

All driving records are considered "privileged public records," which can only be released subject to regulations promulgated by the commissioner. The statute provides 10 categories of conditions under which information about driving records may be released. Va. Code 46.2-208. Four of these exemptions pertain to information released to other governmental agencies, and the other 6 deal with information released to the public. Parents and guardians can obtain information about their children or wards. Va. Code 46.2-208(B)(1). Abstracts of driving records showing convictions are available only to insurance carriers and prospective employers when the driver is being considered for a position that involves the operation of a motor vehicle. In the latter case, the DMV needs written permission from the driver in order to release the information. Va. Code 46.2-208(B)(2) and (6). Any business official who provides the commissioner with an individual's driver's license number can receive the name and address of the individual but no information about violations. Va. Code 46.2-208(B)(3). Accident reports may be inspected. Va. Code 46.2-208(B)(8). Finally, driving records may be provided to prospective employers without the written permission of the drivers where the request involves a commercial license. Va. Code 46.2-208(B)(10).

In addition to the provisions of section 208, the statute provides that the commissioner can release information for research purposes. For this purpose, information can be released with individual identifying material deleted or "in other cases wherein, in [the commissioner's] opinion, highway safety or the general welfare of the public will be promoted." Va. Code 46.2-209. In such cases, the recipient of the information must specify in writing that the information will not be used for any purpose other than the one for which it was furnished. Thus, if a researcher or journalist wanted to check the driving records of particular individuals, the information could be released if the commissioner believed that disclosure would promote highway safety or the general public welfare. Both of these rationales are suf-

ficiently amorphous that a commissioner could invoke them to justify refusal to comply with almost any request.

Under the Virginia motor vehicle laws, information relating to vehicle registrations is less restricted than information related to driving records. In fact, the statute permits the commissioner to prepare a list of registrations and titles and offer it for sale to the general public. Va. Code 46.2-210. Any person may receive from the commissioner, upon request, a certificate of the license plate or distinguishing number of a vehicle with the name and address of the owner of the vehicle. Va. Code 46.2-213. This gives anyone the right to obtain the name and address of anyone whose tag number he or she knows. Reasonable fees may be charged for furnishing any of the information except when the request comes from the state, local, or federal officials.

COURT DECISIONS

Federal Law

As state agencies, DMVs are governed by state FOIAs, not federal law. However, in evaluating state statutes, courts regularly look to the results of federal cases because the purpose of the laws and the issues involved are so similar. Also, since the amount of litigation regarding any particular state law is usually not extensive, federal cases are used as analogies in the interpretation of state laws.

The Supreme Court cases that have considered the FOIA have all dealt with statutory interpretation of the federal law, not constitutional issues. Strictly speaking, the decisions are not binding on state courts interpreting state laws. However, to the extent that the language in a state statute is similar to that in the federal law, it is likely that the protection provided by the state legislation will be interpreted by courts to be similar to the protection under federal law. Of course, should a state statute violate constitutional protections of privacy, the statute would be invalidated. The existence or extent of a general constitutional right to privacy is currently a very unsettled area of the law and beyond the scope of this report.

Although the federal FOIA has nine exemptions to the disclosure policy, the Supreme Court ruled in 1979 that these exemptions are permissive, not mandatory; that is, a public official may release information even though it falls under an exemption if he or she believes disclosure to be in the public interest. *Chrysler v. Brown*, 441 U.S. 281, 293 (1979). As a government contractor, the Chrysler Corporation had to furnish reports about its affirmative action practices in hiring to the Department of Labor. When a third party requested the information from the Department of Labor, Chrysler sought to enjoin the department from disclosing it, claiming it fell under the FOIA's Exemption 4, which protects trade secrets. The Court rejected Chrysler's claim, reasoning that Congress' concern had been with the

agency's need or preference for confidentiality and that individual interests in privacy are protected only to the extent that the agency holding the information endorses those interests. In other words, a federal agency must release material that does not fall within one of the exemptions and may release material that does fall within an exemption. The exemptions themselves are to be narrowly construed; that is, in case of ambiguity, the exemptions do not apply. *United States Department of Justice v. Julian*, 486 U.S. 1 (1988).

The cases that have been litigated involving the release of names and addresses have invoked Exemption 6. To determine if the exemption applies, a two-pronged test is used: (1) Is the information sought within a "similar file"? (2) If so, would its disclosure result in a "clearly unwarranted invasion" of privacy? These cases typically involve a plaintiff's request for a list of names and addresses that government agencies refuse to provide, claiming the information is a "similar file." The early decisions upholding the refusals stressed the idea that if the release of particular information could be embarrassing to an individual, as the disclosure of a medical or personnel file could be, the information is a similar file. Thus, the reason the names and addresses were on the list was considered personal information, in addition to the names and addresses themselves.

In one of the earliest cases, the Third Circuit held that having one's name appear on a list of amateur wine makers (who had applied to the IRS for a home-wine-making exemption to the required permit to produce alcohol) could be embarrassing and therefore upheld the agency's refusal to disclosure. *Wine Hobby USA, Inc. v. Internal Revenue Service*, 502 F.2d 133 (3rd Cir., 1974). But the First Circuit Court ordered the Department of Health and Human Services to release a list of names of unsuccessful applicants for research grants despite possible embarrassment to those on the list. *Kurzon v. Department of Health and Human Services*, 649 F.2d 65 (1st Cir., 1981).

The D.C. Circuit has consistently ruled that names and addresses are not entitled to exemption, regardless of the information that the fact of being on such a list disclosed. *See, e.g., Getman v. National Labor Relations Board*, 450 F.2d 670 (D.C. Cir., 1971), authorizing release of names and addresses of union members for scholarly research on union elections; *Ditlow v. Shultz*, 517 F.2d 166 (D.C. Cir., 1975), authorizing release of names and addresses of all airline passengers from Australia or Asia during a 4-month period; and *Disabled Officers' Association v. Rumsfeld*, 428 F.Supp. 454, *aff'd mem. sub nom. Disabled Officers' Association v. Brown*, 574 F.2d 636 (D.C. Cir., 1978), authorizing release of names and addresses of service officers retired with a disability. In addition, the court felt that home addresses were not "similar" to medical or personnel records because the information could be obtained from other sources. Also, in the court's opinion, any intrusion resulting from the disclosure would be minor, such as unsolicited mail or telephone calls, and would not be a source of public embarrassment.

Prior to 1982, most of the cases involving Exemption 6 of the FOIA focused on whether or not the disclosure was potentially embarrassing: if so, it was a "similar file." The Supreme Court addressed the meaning of the "similar file" exemption

in 1982 and gave it a very broad interpretation. *Department of State v. Washington Post*, 456 U.S. 595 (1982).

In the *Washington Post* case, the newspaper wanted to know if two Iranian nationals living in Iran held U.S. passports. Under the facts of the case (which suggested that some danger existed for American citizens living in Iran at the time and thus disclosure of the information could imperil the individuals), the Court could have decided it within the "embarrassing" definition that lower courts had used. However, the Court applied a broad definition and held that "similar" does not refer to specific types of information (e.g., intimate, embarrassing, nonpublic), but rather to "detailed government records which can be identified as applying to [one] individual." *Id.* at 602, quoting H.R. Rep. No. 1497 at 11, 89th Cong., 2nd Sess. (1966). Because the name and address of an individual clearly identify the individual, cases involving the disclosure of addresses meet the threshold requirement of Exemption 6 under this reasoning.

The Court went on to address the second prong of the exemption: "disclosure of which would constitute a clearly unwarranted invasion of personal privacy." To determine if an invasion of personal privacy was "unwarranted," the Court ruled that the individuals' interest in secrecy must be weighed against the public interest in disclosure. The case was remanded for a balancing of the two interests, but with little guidance as to how to weigh them. There have, therefore, been conflicting interpretations by the circuit courts in subsequent cases. After the *Washington Post* decision, several circuits had occasion to reexamine the application of Exemption 6 to the release of names and addresses. The focus of the courts' inquiries shifted to the second prong. To determine what is "clearly unwarranted," the courts attempted to balance the private and public interests.

In *DiPersia v. United States Railroad Retirement Bd.*, 638 F. Supp. 485 (D.Conn., 1986), a district court upheld the refusal to disclose the names and addresses of recently retired railroad employees to an attorney who wished to send them information concerning their legal rights. The court held that because the attorney had alternate means of reaching the retirees, his interest did not outweigh their interest in being free from harassing telephone calls and literature. When a district court in Washington, D.C., was faced with a very similar factual situation—an association of retired federal employees who wanted to contact potential members to inform them of rights and lobby on their behalf—the court required disclosure, ruling that the privacy interest in not receiving unsolicited mail is very small and not at all embarrassing. In addition, the court found it plausible that some retirees might be pleased to learn of the plaintiff's services. *National Association of Retired Federal Employees v. Horner*, 633 F. Supp. 1241 (D.D.C.), rev'd 879 F.2d 873 (1989), *cert. denied*, 110 S.Ct. 1805 (1990).

The D.C. District Court considered a request from medical researchers who wanted to contact veterans who had been exposed to atomic testing. *National Association of Atomic Veterans v. Director, Defense Nuclear Agency*, 583 F. Supp. 1483 (D.D.C., 1984). The researchers' purpose was both to acquire information from the veterans and provide them with the current state of medical knowledge. The court

readily admitted that the names and addresses constituted a "similar file" for the purposes of Exemption 6, then went on to a balancing test. Finding that the public benefit clearly outweighed the "mere potential for invasion of privacy," the court held that the names should be released. The agency's argument that disclosure would reveal medical matters was rejected as "unsubstantiated speculation" about what might occur if their names and addresses were released. *Id.* at 1487.

In 1989, the Supreme Court twice considered the FOIA and its exemptions. The first of these decisions, reported in June, is causing the circuit courts to reinterpret their understanding of the exemptions to the FOIA. *United States Department of Justice v. Reporters' Committee for Freedom of the Press*, 109 S.Ct. 1468 (1989). The second decision was decided in late December, so its impact is not yet known. *John Doe Agency v. John Doe Corp.*, 110 S.Ct. 471 (1989), *reh'g denied*, 110 S.Ct. 884 (1990). Both decisions upheld agencies' refusals to disclose.

In *Reporters' Committee*, a unanimous Court upheld the Justice Department's decision to withhold an individual's Federal Bureau of Investigation (FBI) "rap sheet" from the press under Exemption 7(C). Exemption 7(C) protects against disclosure of information that "could reasonably be expected to constitute an *unwarranted* invasion of personal privacy." *Reporters' Committee* at 1480, quoting 5 U.S.C. 552 [emphasis in opinion]. Exemption 6 refers to a "clearly unwarranted" invasion; the Court found the deletion of the word "clearly" important in its interpretation of Exemption 7: there is less ambiguity, so the exemption is broader.

The specific information sought in the case was FBI rap sheets, compilations of information from several agencies, including state, local, and federal enforcement agencies and penal institutions. Rap sheets contain physical descriptions and date of birth, as well as arrests, charges, convictions, and incarcerations. A rap sheet is typically maintained until its subject is 80 years of age; it is therefore conceivable that rap sheets contain information that is decades old. Few other documents maintained by government agencies would have information so potentially damaging to an individual's reputation. It is readily understandable that the Court, using a balancing test, found the privacy interest to far outweigh the public interest. The Court went beyond that and gave some indications of what should be considered in evaluating the "public interest" under both Exemptions 6 and 7.

Stressing the original purpose of the FOIA—opening the process of the government to public scrutiny—the Court held that the only public benefit to enter the balance is that which relates to public scrutiny of government actions. Release of rap sheets would shed no light on how the government actually operated in charging and prosecuting the subjects of the rap sheets. The Court reasoned that release of information contributes nothing to the public's understanding of governmental processes when the government is merely a repository of the information and, therefore, that such information need not be disclosed under the FOIA. At the same time, the Court ruled that the purpose of the particular requestor is irrelevant to striking the balance between public and private interests. Basing disclosure on the particular use to which a particular requestor would put the information could produce the anomalous result that the same files could be disclosed to some and not to

others. The Court adopted the posture that information which is open to anyone is open to everyone. Therefore, even if a particular requestor's proposed use of the information would not lead to an invasion of personal privacy, an agency is justified in refusing the request if the information could be put to a use that would result in an unwarranted invasion.

Taken together, the two rationales of *Reporter's Committee* can lead to sharply curtailed access to government information. The *John Doe* decision may also lead to restricted access in that it expanded the definition of what constitutes a "law enforcement record." Although the statute refers to information "compiled for law enforcement purposes," the Court's decision protected information that had originally appeared in correspondence but was later transferred to the FBI pending an investigation. The majority reasoned that "compiled" does not necessarily mean "originally compiled." In a stinging dissent, Justice Scalia, joined by Justice Marshall, criticized the holding for two reasons. The decision not only contravenes the previous interpretations that resolved the ambiguity in favor of disclosure but also opens the door for possible abuse by agencies: any information an agency does not want to disclose can be swept into a law enforcement file.

In the wake of the *Reporters' Committee* case, the D.C. Circuit Court, which had most consistently upheld the release of individuals' names and addresses, has reversed its practice. Relying explicitly on *Reporters' Committee*, the D.C. Circuit Court reversed its decision to release names and addresses in *NARFE v. Horner*, discussed earlier. 879 F.2d 873 (D.C. Cir., 1989). The court first found the privacy interest in names and addresses to be significant because the fact that an individual is on the list of retired federal employees conveys the information that the individual is retired or disabled (or the survivor of such a person) and receives a monthly check from the government. The court felt that such people would be likely targets for a barrage of commercial solicitations and that disclosure of the information "would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes." *Id.* at 876.

Applying the *Reporters' Committee* definition of "public interest" (disclosure that reveals governmental actions to public scrutiny) to the request, the court found the public interest to be nil. A list of the annuitants simply conveys nothing about "what the government is up to." The balance between private and public interests clearly tips in favor of privacy when no public interest is involved. *Id.* at 879.

There is a long line of federal cases involving the release of names and addresses because of unions' attempts to obtain such lists. Under federal law, private employers are required to give the names and addresses of employees to their employees' official bargaining unit. *National Labor Relations Board v. Associated General Contractors*, 633 F.2d 766, 773 (9th Cir., 1980), *cert. denied*, 452 U.S. 915 (1981), citing 29 U.S.C. 158(a)(5). For public employers, the Federal Labor Relations Act requires the employer to disclose information "necessary" for full and proper discussion and negotiation of contracts. The Federal Labor Relations Authority (FLRA) interpreted this broadly to include the names and addresses of em-

ployees, but many federal agencies resisted, claiming the information was protected by the FOIA exemptions.

The Fourth Circuit upheld an agency's refusal to disclose to the union a list of employees' addresses, finding that government employees had a strong privacy interest in their address. *American Federation of Government Employees, Local 1923 v. Department of Health and Human Services*, 712 F.2d 931 (4th Cir., 1983). In addition, the court stated that names and addresses of employees were not "agency records" at all because they had nothing to do with the department's work and their disclosure could not shed light on the agency's workings. The names and addresses of the agency's own employees, therefore, did not even come within the ambit of the FOIA requirement of disclosure. But the Second Circuit, in a case with almost identical facts, allowed the disclosure of employees' names and addresses, criticizing the Fourth Circuit's cursory treatment of the issue. *American Federation of Government Employees, Local 1760 v. Federal Labor Relations Board*, 786 F.2d 554 (2nd Cir., 1986). In balancing the competing interests, the court found that the employees' "modest privacy interest" in their address was outweighed by the union's need to communicate with those it represents. It noted congressional declarations that collective bargaining is in the public interest. *Id.* at 557.

In 1988, the Eighth Circuit considered a case of refusal to disclose employees' names and addresses and struck a compromise. *United States Department of Agriculture v. Federal Labor Relations Board*, 836 F.2d 1139 (8th Cir., 1988), vacated and remanded, 488 U.S. 1025 (1989), dismissed as moot, 876 F.2d 50 (1989). The court found that the "employees have a cognizable privacy interest in their home addresses" but that the public interest in collective bargaining should also be accommodated. *Id.* at 1143. Its solution was a "workable formula" that allowed for the release of names and addresses of those employees who had not requested that the employer keep the information confidential. *Id.* at 1144. This solution was sharply criticized by the dissenting judge, who noted that it permits employees to exempt employers from compliance with the law. After the agencies involved voluntarily promulgated regulations requiring the release of names and addresses of employees to the union without exception, the Eighth Circuit dismissed the case as moot.

After the *Reporters' Committee* decision, the courts again considered the release of names and addresses to collective bargaining units. *Federal Labor Relations Authority v. U.S. Department of the Treasury, Financial Management Services*, 884 F.2d 1446 (D.C. Cir., 1989), *cert. denied*, 110 S.Ct. 863-864 (1989). Again faced with a request for names and addresses of employees sought for collective bargaining purposes, the court upheld the agency's refusal to disclose. The court analyzed the request under both the FOIA exception and the privacy act. Its conclusion was that "federal employees have privacy interests in their names and home addresses that must be protected and that the relevant public interest in disclosure, though not nothing, is outweighed." *Id.* at 1453. After the *Reporters' Committee* decision, the public interest in collective bargaining cannot enter the balancing: "it falls outside the ambit of the public interest that the FOIA was enacted to serve, i.e., the interest in advancing public understanding of the operation or activities of the gov-

ernment.'" *Id.* at 1457, J. Ginsburg, concurring. Judge Ginsburg stressed that this result, clearly at odds with the historical importance of collective bargaining in the United States and the requirements laid upon private employers, could not have been intended by Congress and should be explicitly reconsidered by them.

The Fifth Circuit relied on the restrictive definition of "public interest" in *Halloran v. Veterans Administration*, 874 F.2d 315 (5th Cir., 1989). In this case, the Veterans Administration had complied with an FOIA request by releasing edited transcripts, with names and medical information deleted. The trial court reviewing this decision ordered that full transcripts be released. On appeal, the circuit court reversed the decision because there was no significant public interest relevant to the purpose of the FOIA.

The inherent tension in the reasoning in *Reporters' Committee* is that in balancing public interests and private interests, the only public interest to be considered is that which furthers the purposes of the FOIA, but the private interest is not limited to the particular purpose of the requestor. This appears to leave courts the task of speculating whether there is any conceivable use of the information that would further the aims of the FOIA. Because of this tension, the issue is ripe for legislative reform.

Massachusetts Law

Like most states, Massachusetts has an FOIA statute closely modeled after the federal statute. Mass. Gen. Laws Ann. ch. 4, sect. 7 (West 1986). It defines "public records" broadly, including information in any physical form made or received by any employee of any agency, board, bureau, etc. of the Commonwealth or any of its subdivisions. There are currently 11 categories of exemptions. Exemption (c) deals with "personnel and medical files or information; also, any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." *Id.*

Traditionally, the Massachusetts court has interpreted the exemption narrowly, permitting access in most cases. Automobile registrations and driver's licenses were held to be public records, open to anyone, even for commercial purposes. *Direct-Mail Serv, Inc. v. Registrar of Motor Vehicles*, 296 Mass. 353, 5 N.E.2d 545 (1937). Accident reports maintained by the registrar were also found to be public records, open to any person. *Lord v. Registrar of Motor Vehicles*, 347 Mass. 608, 199 N.E.2d 316 (1964).

The exact differences between the federal and the Massachusetts cases were summarized by the court in *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 446 N.E.2d 1050 (1983). In that case, a newspaper and a reporter sought the names of persons receiving disability pensions, the date of the disability award, the amount of the pension, the department from which the pension came, and the medical reason for granting the disability. The court ordered the release of all the information with the exception of the medical reason and enjoined the board from releasing that. The newspaper appealed the injunction.

In finding that the medical records were not required to be disclosed, the court placed great emphasis on the differences between the federal and the state statutes, specifically identifying as important the placement of the semicolon after "personnel and medical files or information." This punctuation, according to the court, clearly severed medical and personnel files from the requirement of "unwarranted invasion of personal privacy." *Id.* at 431. It therefore declared medical and personnel files to be absolutely exempt from public disclosure, regardless of whether the release would invade personal privacy. Thus, any information in medical or personnel files can be withheld from public disclosure if it is identifiable to a particular individual. (The court noted, however, that records falling within the exemption are not subject to *mandatory* protection; they may still be disclosed under some circumstances.)

In *Brogan v. School Committee of Westport*, the Massachusetts Supreme Court revisited the issue of release of personal information. 401 Mass. 306, 516 N.E.2d 159 (1987). In that case, the town selectmen asked the local school board for the absenteeism record of public school teachers and the generic reasons for absences. The board first released aggregate data, then released individual records, with the names deleted. The selectmen persisted in wanting more data, however, and the court ultimately agreed that the information should be released. The court found that *Globe* does not apply because the information was not "personal" in the way in which disabilities are; the information has the "potential to embarrass its subjects only insofar as evidence of excessive absenteeism may lead to further inquiry and discovery of abuses." *Id.* at 309, 516 N.E.2d at ____. The court seemingly equated invasion of privacy and embarrassment, although it may have been more swayed by the fact that the information sought related to government operations, namely, the presence or absence of individual teachers.

Like the federal courts, the Massachusetts court decided that the motive of a particular requestor cannot determine whether or not the records fit one of the exemptions. *Allen v. Holyoke Hosp.*, 398 Mass. 372, 381, 496 N.E.2d 1368, ____ (1986), citing *Torres v. Attorney General*, 391 Mass. 1, 460 N.E.2d 1032 (1984). In terms of motor vehicle records, it appears that the holdings in *Lord* and *Direct-Mail Serv* are undisturbed in Massachusetts. Lists of names and addresses of drivers and motor vehicle owners would be disclosable under both the statute and case law. This is contrary to the way the federal courts are interpreting the federal FOIA since the *Reporters' Committee* decision. Because state courts' interpretations of state statutes cannot be disturbed by the Supreme Court, both interpretations can stand. Federal agencies would most likely not be required to comply with requests for disclosure of names and addresses, but Massachusetts agencies would.

New York Law

New York's FOIA statute differs from the federal law and that of most states in that it provides a partial definition of "unwarranted invasion of personal privacy." The statute provides:

An unwarranted invasion of personal privacy includes, but shall not be limited to:

i. disclosure of employment, medical or credit histories or personal references of applicants for employment;

ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;

iii. sale or release of lists of names and addresses if such lists would be used for commercial or fundraising purposes;

iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or

v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency.

N.Y. Pub. Off. Law, sect. 89(2)(b) (McKinney 1988).

The statute also expressly creates an exception for the home address of employees, former employees, and retirees of state government; in some instances, such information is available to employee organizations recognized as bargaining units. *Id.*, sect. 89(7).

With such detailed exemptions, it is not surprising that there are fewer cases on this topic reported in New York than in Massachusetts. For the most part, the New York courts have upheld agencies' refusals to disclose. *See, e.g., Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 491 N.Y.S.2d 289, 480 N.E.2d 1071 (1985), requiring the names and addresses of accident victims to be deleted from the motor vehicle accident reports maintained by a police department prior to inspection by a private law firm that states its intention is direct mail solicitation; *Person-Wolinsky Associates, Inc. v. Nyquist*, 84 Misc.2d 930, 377 N.Y.S.2d 897 (1975), upholding an education commissioner's refusal to supply lists of applicants for a certified public accountant examination to a private firm offering an examination preparation course; *Goodstein v. Shaw*, 119 Misc.2d 400, 463 N.Y.S.2d 162 (1983), denying release of first names and addresses of persons filing complaints with the Division of Human Rights to a private attorney.

In a case where the petitioner did not offer any explanation or reason for a request for names and addresses of college students, the court ruled that release was properly denied because the petitioner did not show that the purpose was not commercial or for fundraising. Because the petitioner had not demonstrated any need for the information, he was not entitled to court-ordered access. *Krauss v. Nassau Community College*, 122 Misc.2d 218, 469 N.Y.S.2d 553 (1983). Admitting that this was an exception to the general rule that the requestor's purpose is irrelevant, the court found nevertheless that the statutory language compels this result.

Those cases in which the New York courts have granted the release of names and addresses typically involve some public purpose, either alone or in addition to fundraising. In *Smigel v. Power Authority*, an individual was granted the names and addresses of property owners who would be affected by a proposed power transmission line to inform them of how high-voltage transmission lines might affect the use and enjoyment of their property. 54 A.D.2d 668, 387 N.Y.S.2d 962 (1976). Because the petitioner's avowed purpose was to provide information to the property owners, the court authorized the disclosure as being harmonious with the general policy behind the FOIA.

A teacher's retirement system was required to permit a nonprofit corporation to copy a list of the system's beneficiaries in *New York Teachers Pension Association, Inc. v. Teachers' Retirement System of City of New York*, 98 Misc.2d 1118, 415 N.Y.S.2d 561, *aff'd* 71 A.D.2d 250, 422 N.Y.S.2d 389 (1979), *appeal denied*, 426 N.Y.S.2d 1025, 403 N.E.2d 187 (1980). Because the association's principal purpose was to investigate legislation and other governmental action affecting pension funds and inform its members, the court felt this was in keeping with the policy of the FOIA. Although the court considered it highly likely that the petitioner would use the information to recruit new members, it felt that such solicitation should not be construed as "fundraising" within the meaning of the statute. 98 Misc.2d at 1119. In contrast to *Krauss*, the court held that the agency had the burden of establishing that the information would be used for commercial or fundraising purposes in order for the exemption to apply.

Although it appears to be settled under New York law that lists of names and addresses are generally not to be released under the FOIA, the motor vehicle law has specific provisions dealing with release of such information by the Commissioner of Motor Vehicles. N.Y. Veh. & Traf. Law, sect. 202(3)(b), 354, and 508. The cumulative effect of these laws is that information from driver's licenses, vehicle registrations, and accident reports are open to the public. Section 354 of the motor vehicle law requires the commissioner to furnish the operating record, including convictions, of any driver to an insurance carrier or "any person." Section 202 provides for the commissioner to sell to the highest bidder the registration information from a given territory for 5 years or from the entire state for one registration period. The information to be auctioned includes the name and address of the owner and the make, model, year, license number, and other information about the vehicle. This seems in direct conflict with the public policy behind the "commercial" exception to the general FOIA law, but the FOIA is not to be construed to "limit or abridge any otherwise available right of access." N.Y. Pub. Off. Law, sect. 89(6). In other words, the New York motor vehicle law overrides the FOIA with regard to disclosure.

Virginia Law

Although the list of exemptions to Virginia FOIA is very lengthy, it does not include a provision about "unwarranted invasion of personal privacy," as do the fed-

eral, Massachusetts, and New York statutes. The Virginia privacy protection act focuses almost exclusively on the procedures by which the state can collect and maintain data on individuals and on the right of the individual to inspect and challenge such information; little protection is provided to prevent dissemination.

The Virginia Supreme Court has considered the Virginia FOIA and privacy act. In *Hinderliter v. Humphries*, the court held that the privacy act does not generally prohibit dissemination of information; it merely establishes procedural safeguards for such dissemination. 224 Va. 439, 297 S.E.2d 684 (1982). This case upheld the release of a police department's internal investigation of a police officer. The investigative body had reached a decision that the officer was not at fault in the incident under investigation, so the privacy interest at stake was arguably lower than in other cases in terms of embarrassment to the individual. In addition, the result of criminal investigations is one of the specific exemptions in the Virginia FOIA, and the court may have considered a police investigation to be similar to a criminal investigation. For types of information not explicitly covered by any of the exemptions, it appears that the Virginia Supreme Court would permit release as long as the appropriate procedures were followed.

The *Reporters' Committee* decision distinguished between the purpose of finding out "what the government is up to" and finding out about specific individuals, but the Virginia Supreme Court has ruled that the motive behind a request for information is irrelevant under the Virginia FOIA. *Associated Tax Service, Inc. v. Fitzpatrick*, 236 Va. 181, 372 S.E.2d 625 (1988). The proper questions, according to the court, are whether the requestor is a citizen of the Commonwealth, whether the requested documents are official records, whether any exemption applies, and who will pay the cost of producing the records. The request in *Fitzpatrick* was from a commercial institution (Associate Tax Service, or ATS) that served mortgage lenders by compiling the real estate taxes owed by all their mortgagees, simplifying payment by the lenders. ATS had requested the 1985 Land Books Master Record from the Treasurer of the City of Norfolk. In this case, the court ruled that the privacy act provided no protection because the statute itself exempts real estate assessment information from the definition of "personal" information. *Id.* at 188, 372 S.E.2d at 629, quoting Va. Code 2.1-379(2).

Based on the Virginia Supreme Court's interpretations, it appears that, in Virginia, the FOIA takes precedence over the privacy act when the two appear to conflict. Although the General Assembly in enacting the latter declared itself concerned about the threat to individual privacy posed by government record-keeping systems, the court's interpretation is that information may be disclosed as long as proper procedures are followed and none of the specified exemptions applies.

When faced by a request concerning an individual, the duties of the Commissioner of Motor Vehicles are fairly straightforward, as spelled out in Title 46.2. Unless the requested information is specifically covered in the exemptions to the FOIA, Title 46.2 provides all the protection the individual receives. With a request for driver's license information, names and addresses can be released to any business person who has the driver's license number. More information, including

convictions, can be furnished to insurance carriers and employers if the individual is being considered for a position that includes driving. Anyone with the license number of a vehicle can receive the name and address of the owner of the vehicle, and anyone willing to pay the price can purchase a list of all the vehicle registrations. Researchers may obtain information with either the identifying details deleted or the details included if the commissioner feels the research will contribute to highway safety.

CONCLUSIONS AND RECOMMENDATIONS

The public policy behind the FOIA is generally well accepted: in a democracy, citizens should have the right to inform themselves about governmental action. Such oversight often necessitates review of agency data in order to understand the basis on which decisions were made. Agencies that deal with individual citizens, such as DMVs, amass great quantities of information that directly identify those individuals. To the extent the public wishes to review the agency's decisions, it must be allowed access to the data on which decisions are based. At the same time, individual members of the public may suffer an invasion of privacy when such data are made public.

The reasoning adopted by the U.S. Supreme Court in *Washington Post* and *Reporters' Committee* could be the basis for legislative reform at the state level. The definition of "personal" information as that which can be used to identify a particular individual is a rational and objective means of distinguishing information that has a cognizable privacy interest. Names and addresses of employees, clients, or applicants clearly identify particular individuals. Analyzing whether or not to release such information in terms of FOIA purposes would, in many cases, prohibit disclosure or permit it only with identifying details deleted. This would provide individuals with protection against unsolicited mail, telephone calls, and press reports.

Of the three states examined, only one, New York, currently provides for this result, but its DMV (and perhaps other agencies, as well) is specifically excepted by separate laws. If the DMV commissioner in any of the three states is asked for the names and addresses of individuals on whom files are maintained, he or she must comply. To protect individuals in such situations, legislative reform prohibiting the unwarranted release of names and addresses is needed.