Public Interest Privilege: From Crown Privilege to FOIA

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It is presumed in this country that government documents and information shall be available to the public.[1] This presumption has been codified in the Federal Freedom of Information Act (FOIA)[2] and similar state statutes.[3] These statutes provide that government information shall be available to the public unless specific statutory exemptions apply.[4]

In addition to these exemptions, certain relationships are protected by the imposition of a common law or statutory privilege against disclosure of confidential communications.[5] The most commonly used and widely accepted privileges are those created by statute. These include privileges created to protect relationships such as husband-wife,[6] attorney-client,[7] and physician-patient.[8] In addition, privileges have been created to protect certain private information held by the government from public scrutiny, such as motor vehicle accident reports,[9] tax

1. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (judicial records); Walker v. City of New York, 90 Misc. 2d 565, 566, 394 N.Y.S.2d 797, 798 (1977) (civil litigant's access to records of complaints against police officer); Newspapers, Inc. v. Breies, 89 Wis. 2d 417, 426-27, 279 N.W.2d 179, 183-84 (1979) (press access to arrest records); *see* The Freedom of Information Act, 5 U.S.C. § 552(c) (1976); N.Y. PUB. OFF. LAW (McKinney) § 84 (Cum. Supp. 1980).

2. 5 U.S.C. § 552(c) (1976); S. REP. No. 813, 89th Cong., 2d Sess. 3 (1966); see text & notes 119-28 *infra* for a discussion of the FOIA as it relates to the public interest privilege.

3. *E.g.*, CAL. GOV'T CODE § 6250 *et. seq.* (West 1980); N.Y. PUB. OFF. LAW (McKinney) § 84 *et. seq.* (Supp. 1980); WASH. REV. CODE ANN. § 42.17.010(11) (SUPP. 1981).

4. *See* 5 U.S.C. § 552(b) (1976); *e.g.*, CAL. GOV'T CODE § 6254 (WEST 1980); N.Y. PUB. OFF. LAW (McKinney) § 87(2) (Supp. 1980); WASH. REV. CODE ANN. § 42.17.310 (Supp. 1981). Included in the exemptions are personal records, law enforcement investigatory records, and others.

5. JONES ON EVIDENCE § 21:1 (6th ed. 1972).

6. ARIZ. REV. STAT. ANN. § 12-2231 (Supp 1980); (privilege against spouses testifying against each other); *id.* § 12-2232 (1956) (marital communications privilege).

7. *Id.* § 12-2234 (1956) (providing that "an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment").

8. *Id.* § 12-2235 (Supp. 1980) (providing a privilege not to have one's doctor reveal knowledge of the patient's condition obtained by communications or personal examination).

9. *Id.* § 28-673 (1976).

returns,[10] and welfare department records.[11] Moreover, there are situations in which the disclosure of certain documents might impair the efficient operation of government.[12] In such situations our democratic political system requires that a balance be struck between the public's right to know and the government's need to keep certain information confidential.[13] Consequently, the public interest privilege may be invoked to prevent disclosure if the public interest is greater served or protected by non-disclosure than by disclosure.[14]

Balancing the conflicting interests surrounding the public interest privilege is the subject of this Note. First, the public interest privilege shall be defined, giving careful consideration to the many contexts in which it appears. Next, the balancing techniques employed in the application of the privilege shall be discussed. Finally, the public interest privilege shall be examined in light of statutes designed to assure disclosure of government documents.

Development of the Public Interest Privilege—An Historical Survey

The public interest privilege has its roots in Seventeenth Century England.[15] It originated in the feudal principle that the Crown is immune from compelled discovery.[16] Initially, the Crown privilege protected high government officials in times of social upheaval from attack in the courts by their successors.[17] Additionally, a privilege for official communications encouraged candor and gave government officials the freedom needed to carry out their tasks.[18] The Crown Privilege thus developed to protect government officials and to keep their official communications confidential.

The English courts first excluded evidence on grounds of the pub-

10. *Id.* § 42-1307 (1980).

11. *Id.* § 46-135.

12. United States v. Nixon, 418 U.S. 683, 708 (1974) (Presidential communications); *see* United States v. O'Neill, 619 F.2d 222, 229 (3d Cir. 1980) (civil rights investigation); Jackson v. Petrilli, 63 F.R.D. 152, 153 (N.D. Ill. 1974) (criminal investigation).

13. Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973); Wood v. Breier, 54 F.R.D. 7, 11 (E.D. Wis. 1972); Note, *Public Access to Governmental Records and Meetings in Arizona*, 16 ARIZ. L. REV. 891, 893 (1974).

14. For a specific application of balancing one public interest with another, see United States v. Nixon, 418 U.S. 683, 707 (1974); United States v. O'Neill, 691 F.2d 222, 227 (3d Cir. 1980); Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1973).

15. Wells, *Crown Privilege*, 3 QUEENS L.J. 126, 132 (1976).

16. Linstead, *The Law of Crown Privilege in Canada and Elsewhere*, 3 OTTAWA L. REV. 79, 86 (1968).

17. Wells, *supra* note 15, at 132; *see* Trial of Earl of Stafford (1640), 3 State Trials 1382, 1442-43 (1816) (communications between the King and his counselors); Wyatt v. Gore, 171 Eng. Rep. 250 (1816) (communications between provincial governor and attorney general). *But see* Trial of the Seven Bishops (1688), 12 State Trials 183 (1812) (privy council documents), where the privilege was denied. The privilege was poorly defined at this point and sometimes denied. Linstead, *supra* note 16, at 91.

18. Wells, *supra* note 15, at 132; GREENLEAF ON EVIDENCE (16th ed. 1899) at 386.

lic interest[19] in *Hardy's Case*.[20] There the trial court refused to order disclosure of a government informer's identity.[21] The court reasoned that confidentiality is important in the detection of crimes; and detection of crimes is important to the public.[22]

Other early cases applied this privilege to the minutes of a military board of inquiry,[23] communications between the governor and attorney general of Upper Canada,[24] and the communications of spies.[25] These cases involved determination of whether the public interest required disclosure of the information sought.[26] Thus developed the practice in English jurisprudence of balancing the discovery of truth in both criminal and civil trials with the public interest in efficient government operations.[27]

Secrecy has long been a component of government in the United States.[28] United States courts first applied the public interest privilege in *Marbury v. Madison*.[29] There, the Supreme Court held that the Secretary of State was not bound to disclose confidential official transactions.[30] Similarly, in *The Trial of Aaron Burr*[31] the Court held that presidential communications need not be disclosed where disclosure would endanger the public security.[32] This holding was in accord with the English precedents.[33]

American courts have thus developed a privilege against disclo-

19. Pearce, *Of Ministers, Referees and Informers—Evidence Inadmissible in the Public Interest*, 54 AUSTL. L.J. 127, 134 (1980).

20. The Trial of Thomas Hardy (1794), 24 State Trials 199 (1816).

21. *Id.* at 808-09.

22. *Id.* at 808.

23. Home v. Lord Bentinek, 146 Eng. Rep. 1185 (1816).

24. Wyatt v. Gore, 171 Eng. Rep. 250 (1816).

25. PHILLIPS & AMOS ON EVIDENCE 175 (8th ed. 1839).

26. See text & notes 66–117 *infra* for a discussion of balancing of the interests involved. In *Wyatt*, text & note 24 *supra*, official communications were held privileged because confidentiality was necessary in safe government operations, 171 Eng. Rep. at 251, but not if the communication is a malicious libel. *Id.* at 252. In *Home*, text & note 23 *supra*, the military board of inquiry's need for confidentiality was balanced against a litigant's need for evidence. 146 Eng. Rep. at 1193.

27. PHILLIPS ON EVIDENCE 160–61 (10th Eng. ed., 4th Am. ed. 1859).

28. *See* C. WARREN, THE MAKING OF THE CONSTITUTION 134–39 (1929) (discussing the secrecy surrounding the Constitutional Convention, felt necessary for freedom of discussion); H.R. REP. NO. 1497, 89th Cong., 2d sess. 2, *reprinted in* [1966] U.S. CODE CONG. & AD NEWS 2418, 2419 (government's 180-year-old "housekeeping" statute allowed agencies to withhold records from the public).

29. 5 U.S. 137 (1 Cranch 1803).

30. *Id.* at 138. The transactions involved the plaintiffs' commissions as justices of the peace, which the court ultimately found not to be confidential.

31. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR 186–87 (1969).

32. *Id.*, PHILLIPS ON EVIDENCE 164 n.76 (10th Eng. ed., 5th Am. ed. 1868). The same balancing was done 166 years later in United States v. Nixon, 418 U.S. 683, 707 (1973). Both cases give great deference to a Presidential claim of privilege, *id.* at 708, while recognizing the needs of the criminal justice system. *Id.* at 708–12.

33. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 215 (1974). In *Burr*, Chief Justice Marshall balanced the need for evidence with the president's need for confidentiality. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR at 186–87. This was also done in the early English cases. See note 26 *supra*.

sure of official communications when disclosure would be against the public interest. Since *Marbury* and *Burr*, American courts have applied the privilege in many different contexts. The application of the privilege will be discussed in the next section.

Application of the Public Interest Privilege

Traditionally, an individual is required to disclose, to a court or other official agency, all evidence possessed that is relevant to a judicial or administrative proceeding.[34] In order for the public interest privilege to apply, certain elements must be shown. First, the person asserting the privilege must be a public official operating in the performance of his duties.[35] Only where a public interest is asserted by a government entity or publicly sanctioned organization will the public interest privilege apply.[36] A person's or organization's private interest in confidentiality will not supersede a public interest in disclosure.

A second element required for the assertion of the public interest privilege is a particular, and not merely a generalized, claim of privilege.[37] For example, in *United States v. Nixon*[38] President Nixon asserted a general need for confidentiality in his office[39] and did not claim that any particular military, diplomatic, or national security secrets were involved.[40] The Supreme Court held that a "generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."[41]

34. Davis v. Kirby, 244 Ark. 142, 152, 424 S.W.2d 149, 154–55 (1968) (Byrd, J., dissenting) (informant's privilege); M. UDALL, ARIZONA LAW OF EVIDENCE 187 (1960); *see* United States v. Nixon, 418 U.S. 683, 708–09 (1974).

35. *See* Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973); People v. Keating, 286 App. Div. 150, 152–53, 141 N.Y.S.2d 562, 565 (1955); Lambert v. Barsky, 91 Misc. 2d 443, 444, 398 N.Y.S.2d 84, 85 (1977). In *Rizzo*, a police chief invoked an "executive privilege" to prevent disclosure of police records. 59 F.R.D. at 342. The court, however, described the purpose of this executive privilege as the prevention of disclosure when it "would be contrary to the public interest." *Id.* This is the common law doctrine of executive privilege, distinct from its constitutional dimensions dealing with separation of powers. *See* Schwartz, *Bad Presidents Make Hard Law: Richard M. Nixon in the Supreme Court*, 31 RUTGERS L. REV 22, 30 (1977); Stanton, *Executive Privilege: An Institutional Perspective*, in ESSAYS ON EXECUTIVE PRIVILEGE 19, 27 (1974). The common law doctrine of executive privilege shall be referred to in this article as the public interest privilege.

36. People v. Keating, 286 App. Div. 150, 154, 141 N.Y.S.2d 562, 566 (1955). In *Keating*, the court held that the public interest privilege could not be invoked by a citizen's Anti-Crime Committee, a private agency aiding in law enforcement. *Id.* at 155, 141 N.Y.S.2d at 564. The privilege was regarded as limited, only applying "public officers whose selection and responsibilities are determined as a part of the governmental elective or appointive system." *Id.* at 154, 141 N.Y.S.2d at 566.

37. United States v. Nixon, 418 U.S. 683, 713 (1974); United States v. Reynolds, 345 U.S. 1, 10-11 (1953); Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 118, 316 N.E.2d 301, 304, 359 N.Y.S.2d 1, 5 (1974).

38. 418 U.S. 683 (1974).

39. *Id.* at 706.

40. *Id.*

41. *Id.* at 713.

Assuming that a government official can make a particular claim of privilege, the privilege still may not apply. For example, the privilege is not applicable within a government body.[42] Thus, a police officer or other government investigator cannot claim this privilege in withholding information from his supervisor or department head. It would not be in the public interest to allow such dissension within our public entities.[43]

An anomaly arises when one government agency denies information to another agency, and both agencies assert the public interest in support of their positions. In *United States v. O'Neill*,[44] the United States Commission on Civil Rights served subpoenas on the Philadelphia Police Commissioner and Chief Inspector as part of an investigation of abuse of citizens by the police.[45] The police department refused to comply with the subpoenas.[46] They argued that their investigatory information was privileged pursuant to a public interest in effective law enforcement, which requires that an ongoing investigation remain confidential.[47] The Commission asserted that the subpoenaed material was "pertinent, relevant and nonprivileged."[48] The case was remanded for consideration of the needs of the Commission as balanced against the concerns of the city.[49] The appeals court noted that it was anomalous for the city to claim a privilege in the public interest in order to withhold information from a federal commission charged with investigating, in the public interest, the denial of equal protection by the city.[50] On remand, the trial court was instructed to determine the paramount interest under this particular set of facts—protection of civil rights or efficient law enforcement.[51]

The public interest privilege is also inapplicable in situations where its invocation would result in noncompliance with an enabling statute. For example, in 1953 the New Orleans city council passed an

42. Davis v. Kirby, 244 Ark. 142, 153, 424 S.W.2d 149, 155 (1968) (Byrd, J., dissenting).

43. *Id.* The dissent in *Davis* would take this analysis one step further and not permit a policeman (here the director of the Arkansas State Police) to claim the privilege before a grand jury. *Id.* The rationale is that a grand jury stands above a policeman in the heirarchy of law enforcement and determines when the public interest privilege will be invoked. *Id.*

44. 619 F.2d 222 (3rd Cir. 1980).

45. *Id.* at 224.

46. *Id.* at 225.

47. *Id.* at 229.

48. *Id.* at 225.

49. *Id.* at 230. The court did not approve of the city's general assertion of privilege, and required that specific claims be made on remand. *Id.* See text & notes 37–41 *supra* for a discussion of the consequences of an assertion of general privilege.

50. United States v. O'Neill, 619 F.2d 222, 230 (3d Cir. 1980). There are situations, however, where the interests invoked may be distinguished. In these situations the court will balance the interests involved. *See* text & notes 66–117 *infra*.

51. 619 F.2d at 231. Because of the change in Administration in 1981 the case was settled and the documents turned over to the commission. Telephone conversation with Ralph J. Terri, Asst. City Sol., Philadelphia, Pa., September 9, 1981.

ordinance creating a Special Citizens Investigating Committee to investigate the city's police department.[52] The committee was to "report facts and make recommendations" to the Orleans Parish Grand Jury,[53] which would then call witnesses and carry on its own investigation.[54] The committee's chief investigator was subpoenaed by the grand jury and refused to name witnesses cited anonymously in the report.[55] The grand jury claimed that such an incomprehensible report defeated the enabling statute's purpose of supplying information for the grand jury's use.[56] The Louisiana Supreme Court agreed, holding that a committee created by statute to make a full report to a grand jury cannot claim a public interest privilege against disclosing the identities of witnesses if the result would be an "incomprehensible report."[57] If compliance with an enabling statute requires that certain information be given, the public interest privilege may not be invoked to avoid it.[58]

Where the public interest privilege is applicable, mere assertion of the privilege does not determine whether the evidence at issue will be excluded from consideration in a hearing or trial. It is a qualified privilege which may be lost if disclosure is necessary to avoid the risk of false testimony or to secure useful information.[59] Consequently, after a prima facie showing of the privilege is made, the court should conduct an in camera inspection to determine whether disclosure is required.[60] The court, not the executive department, is to decide if material is privileged and to protect the public and private interests involved.[61] To achieve this autonomy, the court should make its own findings of fact and not merely assume that the assertion of privilege by the government is sufficient.[62] In so doing, the court must balance the interest advanced by disclosure against the interest served by nondisclosure.[63]

52. *In re* Kohn, 227 La. 246, 248, 79 So. 2d 81, 82, *cert. denied*, 350 U.S. 913 (1955).
53. *Id.*
54. *See id.* at 248, 79 So. 2d at 83.
55. *Id.* at 248, 79 So.2d at 82. The investigator claimed the information was received contingent on confidentiality. *Id.* at 248–49, 79 So.2d at 82.
56. *Id.* at 251, 79 So. 2d at 83.
57. *Id.*
58. *Id.* at 251, 79 So. 2d at 85.
59. United States v. O'Neill, 619 F.2d 222, 231 (3d Cir. 1980); People v. Keating, 286 App. Div. 150, 153, 141 N.Y.S.2d 562, 565 (1955); Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 119, 316 N.E.2d 301, 303, 357 N.Y.S.2d 1, 4 (1974).
60. State v. Arnold, 26 Ariz. App. 333, 336, 548 P.2d 426, 429 (1976) (state claim of privilege during trial); Church of Scientology v. State, 61 App. Div. 942, 946, 403 N.Y.S.2d 224, 228 (1978); *see* Mathews v. Pyle, 75 Ariz. 76, 81, 251 P.2d 893, 896-97 (1952); Bloomburg v. Hennessy, 99 Misc. 2d 958, 961, 417 N.Y.S.2d 593, 595 (1979).
61. Mathews v. Pyle, 75 Ariz. 76, 80-81, 251 P.2d 893, 896 (1952); State v. Arnold, 26 Ariz. App. 333, 335, 548 P.2d 426, 429 (1976); Church of Scientology v. State, 61 App. Div. 2d 942, 946, 403 N.Y.S.2d 224, 228 (1978).
62. Mathews v. Pyle, 75 Ariz. 76, 81, 251 P.2d 893, 896 (1952); State v. Arnold, 26 Ariz. App. 333, 335, 548 P.2d 426, 429 (1976).
63. United States v. Nixon, 418 U.S. 683, 711–12, United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980); Dixon v. 80 Pine St. Corp., 516 F.2d 1278, 1281–82 (2d Cir. 1975).

It is this balancing test that defines the extent and power of the public interest privilege. Special consideration may be given to certain individuals (*i.e.*, the President of the United States)[64] or to special needs for information (*i.e.*, a civil rights investigation).[65] By taking these special considerations into account, courts define the extent of the public interest privilege and, concurrently, define governmental functions deserving special deference.

Balancing the Public Interests

Litigation is the most common setting in which the public interest privilege is invoked.[66] Ordinarily, the courts are entitled to any relevant testimentary or documentary evidence one possesses.[67] Any privilege invoked to prevent full disclosure of relevant facts in court must overcome this strong presumption that the court (and through it, the parties) should have access to the full truth. Such privileges, therefore, are not "lightly created nor expansively construed, for they are in derogation of the search for truth."[68]

In general, the public interest privilege will not prevent litigants who seek to discover information from a government agency from obtaining that information.[69] Some factors considered in balancing the government's need for confidentiality against the litigant's need for information are: 1) the extent government processes will be thwarted; 2) the impact upon individuals whose identities are disclosed; 3) whether the information is factual or evaluative;[70] 4) whether the person seeking the information is an actual or potential defendant in a criminal proceeding; 5) whether a plaintiff's suit is in good faith; 6) whether the information is available elsewhere; and 7) the importance of the information to pending litigation.[71]

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64. *See* United States v. Nixon, 418 U.S. 683 (1974).

65. *See* United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980); *cf.* Fischer v. Citizens Comm., 72 Misc. 2d 595, 601, 339 N.Y.S.2d 853, 860 (1973) (no defense given to a criminal investigation), *aff'd mem.*, 42 App. Div. 2d 692, 346 N.Y.S.2d 217 (1973).

66. *See, e.g.*, Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973); Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977) (negligence suit); Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 316 N.E.2d 301, 359 N.Y.S.2d 1, (1974).

67. United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 688 (1972); M. UDALL, *supra* note 34, at 187.

68. United States v. Nixon, 418 U.S. 683, 710 (1974); *see* Wood v. Breier, 54 F.R.D. 7, 10 (E.D. Wis. 1972) (discussing the broad federal mandate for discovery in civil action in order to prevent a trial from being a game of "blindman's bluff").

69. *See, e.g.*, Wood v. Breier, 54 F.R.D. 7, 10 (E.D. Wis. 1972); Dixon v. 80 Pine St. Corp., 516 F.2d 1278, 1282 (2d Cir. 1975) (wrongful death plaintiff given access to accident report); Frankenhauser v. Rizzo, 59 F.R.D. 339, 344–46 (E.D. Pa. 1973) (civil rights plaintiff given access to police analysis of physical evidence. *But see* Brown v. Thompson, 430 F.2d 1214, 1216 (5th Cir. 1970) (civil rights plaintiffs unable to obtain police homicide investigation).

70. An agency's self-evaluation is likely to be protected, as opposed to the disclosure of factual data. Frankenhauser v Rizzo, 59 F.R.D. 339, 344–45 (E.D. Pa. 1973).

71. *Id.* at 344.

Of these seven factors, the availability of the information from other sources appears to be very important, if not determinative. For example, if a plaintiff or a criminal defendant needs information possessed by a government agency to pursue his case, and cannot obtain the information elsewhere, discovery probably will be allowed.[72] This is consistent with a broad mandate for discovery in all civil and criminal actions.[73] Results will differ, however, depending on the importance given to any of the above seven factors. For example, a person who is not a party in litigation will have less need and is therefore less likely to overcome a claim of privilege. Or, more deference might be given a claim of privilege if it is made by the President of the United States, as opposed to a lessor official.[74]

In some contexts, different public interests are weighed against one another. *Fischer v. Citizens Committee*[75] is an excellent illustration of this balancing process. In September, 1971, the prisoners of the Attica Correctional Facility at Attica, New York, rioted for 4 days, killing 43 persons.[76] The Governor of New York convened a Special Grand Jury to investigate the uprising and issue indictments for any criminal acts.[77] Shortly thereafter, the Governor stated that an exhaustive investigation of the uprising and the conditions causing it would be in the public interest.[78] Consequently, the New York State Special Commission on Attica (the McKay Commission) was formed to investigate the uprising and compile a comprehensive report.[79] The commission obtained information from more than 3,000 persons, including the Governor, prison guards, and inmates.[80] Persons giving information were assured by the commission that their identities would not be revealed to the Special Grand Jury.[81]

The commission's final report indicated that the commission had received information regarding "certain specific criminal acts."[82] Con-

72. *See* United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958); Frankenhauser v. Rizzo, 59 F.R.D. 339, 344–46 (E.D. Pa. 1973); Wood v. Breier, 54 F.R.D. 7 (E.D. Wis. 1972); Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 316 N.E.2d 301, 357 N.Y.S.2d 113, (1974).

73. United States v. Nixon, 418 U.S. 683, 709 (1974); United States v. Proctor & Gamble, 356 U.S. 677, 682 (1958); Wood v. Breier, 54 F.R.D. 7, 10 (E.D. Wis. 1972).

74. United States v. Nixon, 418 U.S. 683, 714–15 (1974).

75. 72 Misc. 2d 595, 339 N.Y.S.2d 853 (1973).

76. McKay, *Attica: The Anatomy of an Investigation*, 49 CHI.-KENT. L. REV. 139, 139 (1972).

77. 72 Misc. 2d at 597–98, 339 N.Y.S.2d at 856.

78. *Id.* at 598, 339 N.Y.S.2d at 856.

79. *Id.*

80. *Id.* at 598–99, 339 N.Y.S.2d at 857.

81. *Id.* at 599, 339 N.Y.S.2d at 857. This assurance was given pursuant to § 73 N.Y. CIV. RIGHTS LAW (McKinney 1976), providing in part that "no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public."

82. Fischer v. Citizens Committee, 72 Misc. 2d 595, 599, 339 N.Y.S.2d 853, 857, *aff'd mem.*, 42 App. Div. 2d 692, 346 N.Y.S.2d 217 (1973).

sequently, the Special Grand Jury issued a subpoena duces tecum, requesting that the commission turn over all its records and files.[83] As authority for the issuance of the subpoena, the grand jury cited its duty to consider all evidence concerning criminal acts, particularly evidence in the possession of another governmental agency.[84] The commission moved to quash the subpoena duces tecum.[85]

It is clear that both the Special Grand Jury and the McKay Commission were serving the public interest: the former in issuing indictments for criminal acts, and the latter in investigating the causes of the uprising in order to prevent its reoccurrence. The commission claimed that the public interest required confidentiality; the grand jury insisted that the public interest could only be served by complete disclosure. The *Fischer* court resolved the issue in favor of the interest in confidentiality. In granting the commission's motion to quash,[86] the court relied on two factors: the adverse effect on the commission's credibility, resulting in the inability of future investigatory commissions to guarantee confidentiality should disclosure be required;[87] and the danger to the individuals involved should their identities be revealed.[88]

Thus the McKay Commission was able to enumerate specific injuries that would result if its files were disclosed. This is vital in asserting the public interest privilege because courts show little deference to a "generalized interest in confidentiality."[89] When weighed against specific reasons and needs for disclosure, the public interest privilege supported only by vague generalizations will not prevail.[90]

A situation similar to that presented by *Fischer* has arisen in New Mexico. On February 2nd and 3rd, 1980, the prisoners of the New Mexico State Penitentiary engaged in a riot termed "the most devastating prison riot in history."[91] After the riot, the state legislature directed the attorney general to investigate the causes of the riot and recommend any necessary changes in state corrections policy.[92] The attorney

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 602, 339 N.Y.S.2d at 860.
87. *Id.* at 601, 339 N.Y.S.2d at 859; *accord*, Jones v. State, 58 App. Div. 2d 736, 736, 395 N.Y.S.2d 862, 863 (1977).
88. McKay, *supra* note 76, at 149. In addition to the danger of possible retaliation by guards and inmates, the persons interviewed by the McKay Commission were not given any *Miranda* warnings, and were in fact assured that their testimony would be kept "completely anonymous." *Id.*
89. United States v. Nixon, 418 U.S. 683, 711 (1974); Dixon v. 80 Pine St. Corp., 516 F.2d 1278, 1281 (2d Cir. 1975); Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 119, 316 N.E.2d 301, 304, 359 N.Y.S.2d 1, 5, (1974).
90. *See* text & notes 37–41 *supra*.
91. Brief of Petitioner at 3, State v. First Judicial Dist. Court, No. 13,504 (N.M. May 15, 1981).
92. *Id.* In addition, the governor directed the attorney general to investigate the riot and to initiate appropriate criminal prosecutions. *Id.*

general received funding for the investigation from the legislature and from the Federal Law Enforcement Assistance Administration.[93] A Citizen's Advisory Panel was appointed to assist in the investigation.[94]

In order to obtain full and candid testimony, and to protect the inmates and officials testifying, persons interviewed were promised complete confidentiality.[95] Plaintiffs in three civil suits arising from the riots sought access to the tape recordings and transcripts in the possession of the state.[96] The state requested the state Supreme Court's intervention to quash the discovery demands.[97]

These cases, for the first time, brought the issue of the public interest privilege before the New Mexico courts.[98] The state argued that the privilege was necessary for the efficient functioning of the investigation and for the protection of the persons interviewed.[99] To reinforce this contention, the state traced the development and use of the privilege in federal and state courts.[100]

The plaintiffs answered this assertion by using the New Mexico Rules of Evidence. Rule 501 states that there is no privilege to refuse to testify or produce any material except as required by the state constitution and provided in the rules.[101] There is no rule in New Mexico recognizing the public interest privilege.[102]

The New Mexico Supreme Court held that the material was dis-

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93. *Id.*

94. *Id.* at 5.

95. *Id.* at 5–6. N.M. R. EVID. 510(a) states:

> The United States or a state or a subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

Although it is not clear, the Attorney General apparently was relying at least partially on this rule in promising confidentiality. The New Mexico Supreme Court, however, held that this rule was inapplicable on two grounds. Slip op. at 8. First, the Attorney General was not part of a legislative committee. *Id.* at 8–9. Second, the court held that only the Attorney General himself could assert a privilege not to disclose the information under Rule 510, and the Attorney General had not done so. *Id.* at 9; *cf.* Fischer v. Citizens Comm., 72 Misc. 595, 339 N.Y.S.2d 853 (person granted the privilege by statute was the one asserting it), *aff'd mem.*, 42 App. Div.2d 692, 346 N.Y.S.2d 217 (1973).

96. Answering Brief of Real Parties in Interest at iii, iv.

97. Brief of Petitioner at 12. In addition, 78 criminal prosecutions are pending, and a motion to quash discovery of the prison study materials was denied and is being appealed along with the civil cases. *Id.* at 10.

98. *Id.* at 25.

99. *Id.* at 15–18.

100. *Id.* at 22–28.

101. N.M. R. EVID. 501 provides:

> Except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to:
> (1) refuse to be a witness;or
> (2) refuse to disclose any matter; or
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

102. *See id*; Answering Brief of Real Parties in Interest at 10.

coverable because no privilege under New Mexico law protected it.[103] While the court admitted that an executive privilege was required by the doctrine of separation of powers under the New Mexico Constitution,[104] it held that the privilege did not apply to communications between the executive department and persons outside the department.[105] This restrictive definition of the scope of executive privilege is not supported by case law or commentators.[106] It is generally understood that the privilege extends to communications from without the executive department as well as to communications within the executive branch itself.[107] Thus, the New Mexico court should have applied the doctrine of executive privilege here.

Moreover, the New Mexico Supreme Court decided that the public interest privilege is entirely separate from an executive privilege,[108] and because no public interest privilege is enumerated in the New Mexico Constitution or Rules of Evidence, the privilege is not available in New Mexico.[109] This truncation of executive and public interest privilege is not necessary. There is good support for the common law aspect of executive privilege.[110] The New Mexico court should have proceeded to balance the interests involved in this case and reach a conclusion as to which interest is paramount.

Using the factors enumerated earlier,[111] the court could have found that the public interest in the investigation was paramount and that the material was therefore privileged. As in the Attica riots, this investigation was important and confidentiality was absolutely necessary for its success. In addition, there was nothing to prevent the parties from calling the same witnesses to testify, thus eliminating the often determinative factor of availability of the information elsewhere.[112] By improperly defining the executive privilege, the New Mexico Supreme Court caused the release of information that should have remained confidential.

In contrast to New Mexico's failure to judicially recognize a common law public interest privilege, the Federal Rules of Evidence pro-

103. State v. First Judicial Dist. Ct., No. 13,504, at 3–5 (N.M. May 15, 1981).
104. *Id.* at 5.
105. *Id.* at 7.
106. *See* United States v. O'Neill, 619 F.2d 222, 228–29 (3d Cir. 1980) (seeking information gathered in police investigation); Frankenhauser v. Rizzo, 59 F.R.D. 339, 342–44 (E.D. Pa. 1973) (same); R. BERGER, *supra* note 33, at 224 (discussing the executive's privilege to withhold informers' identities to encourage communication *to* enforcement officers); Stanton, *supra* note 35, at 27 (same).
107. *See* R. BURGER, *supra* note 35, at 224, Stanton, *supra* note 35, at 27.
108. *See* slip op. at 7.
109. *Id.* at 7–8.
110. *See* note 35 *supra*.
111. See text & notes 70–71 *supra*.
112. *See* text & note 71 *supra*.

vide that privileges "shall be governed by the privileges of the common law."[113] This wording is a result of congressional intent to allow the rules of evidence to develop flexibly on a case-by-case basis.[114] Under the federal rules, the common law privilege is recognized[115] and the interests would be balanced as above, resulting in nondisclosure.[116]

Disclosure Statutes and the Public Interest Privilege

The public interest privilege is a common law doctrine involving a balancing of interests by a court to determine whether certain information held by the government should be disclosed. In recent years, the federal government and many states have passed statutes providing for disclosure of government information to the public.[117] Because such statutes may conflict with the common law public interest privilege, it is important to determine whether the privilege has been preempted by the statutes.

(1) The Public Interest Privilege and FOIA

The Freedom of Information Act (FOIA),[118] passed as an amendment to the Administrative Procedure Act, is designed to make government information available to the public and, particularly, the news media.[119] The FOIA is a "true federal public records statute" in that it requires that government information be made available to any member of the public.[120] Thus, there is no requirement that a special interest or need be shown as a requisite to receipt of information under the Act.[121]

Since invocation of the FOIA requires no specific showing of need, the justifications for nondisclosure may also be of lesser magnitude than would justify nondisclosure to a person showing need.[122] The Act

113. FED. R. EVID. 501 provides in part:
Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

114. Trammel v. United States, 445 U.S. 40, 47 (1980).

115. FED. R. EVID. 501.

116. *See* text & notes 111–12 *supra*.

117. *See, e.g.*, the Freedom of Information Act, 5 U.S.C. § 552 (1976); CAL. GOV'T CODE § 6250 *et seq.* (West 1980); N.Y. PUB OFF. LAW § 84 *et seq.* (McKinney Supp. 1980).

118. 5 U.S.C. § 552 (1976).

119. J. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 232 (2d ed. 1972).

120. H.R. REP. No. 1497, 89th Cong. 2d Sess., *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418.

121. *Id.*; *see* 5 U.S.C. § 552(a) (1976), providing that, "Each agency *shall* make available *to the public* information at follows." (emphasis added).

122. J. MCCORMICK, *supra* note 119, § 108, at 233.

provides categories of material exempt from disclosure,[123] and the government need only show that a particular exemption applies in order to prevent the application of FOIA.[124] Further, the FOIA was not intended to create new privileges against disclosure or abrogate existing privileges.[125] Thus, excluding information from disclosure under the exemptions to the Act does not create an evidentiary privilege where a party asserts a real need for the information.[126]

It is apparent, then, that the exemptions to the FOIA are not a mere codification of the common law public interest privilege. Moreover, the Act itself does not preempt the privilege. Material exempt from disclosure under the Act is not necessarily privileged.[127] Furthermore, the FOIA does not affect state laws regarding disclosure.[128] Some states may not have disclosure statutes or a common law public interest privilege. Thus, the interaction of statute and common law privilege will differ from state to state.

(2) State Disclosure Statutes

New York's Freedom of Information Law (FOIL),[129] modeled after the federal FOIA,[130] provides a good illustration of how disclosure statutes affect the common law public interest privilege. The basic rationale for the FOIL is that the public has a right to know what government is doing.[131] It lists the types of documents open to inspection and establishes a procedure for making them available.[132] The New York courts have determined that the common law privileges have not been abolished by the FOIL.[133] Even when the FOIL applies, a court will

123. 5 U.S.C. § 552(b) (1976). These categories are: secrets established by Executive order; internal personnel rules and practices; items exempted by statute; trade secrets and commercial or financial information; inter- and intra-agency communications; personnel and medical files; investigatory records compiled for law enforcement purposes; records or regulation of financial institutions; and geological and geophysical information.

124. J. MCCORMICK, *supra* note 119, § 108.

125. Chamber of Commerce v. Legal Aid Soc'y, 423 U.S. 1309, 1310-11 (1975); Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972).

126. Chamber of Commerce v. Legal Aid Soc'y, 423 U.S. 1309, 1310-11 (1975); Verrazzano Trading Corp. v. United States, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972); J. MCCORMICK, *supra* note 119, at 5-6. The most that can be said of FOIA is that it shows a "congressional expression of what areas are sensitive and does overlap with the evidentiary privileges." *Id.* at 233.

127. *See* Wisher v. News-Press Publishing Co., 310 So. 2d 345, 349 (Fla. App. 1975) (records exempted by disclosure act could be reached by person with real need).

128. FOIA applies only to federal agencies. 5 U.S.C. § 551(1), 552(a) (1977).

129. N.Y. PUB. OFF. LAW § 84 *et seq* (McKinney Supp. 1980).

130. Burke v. Yudelson, 81 Misc. 2d 870, 877, 368 N.Y.S.2d 779, 787 (1975), *aff'd*, 51 App. Div. 2d 673, 378 N.Y.S.2d 165 (1976).

131. Church of Scientology v. State, 61 App. Div. 2d 942, 946, 403 N.Y.S.2d 224, 228 (1978); *see* Walker v. City of New York, 90 Misc. 2d 565, 567, 394 N.Y.S.2d 797, 799 (1977).

132. Marino, *The New York Freedom of Information Law*, 43 FORDHAM L. REV. 83, 85-86 (1974); *see* N.Y. PUB. OFF. LAW §§ 87-89 (McKinney Supp. 1980).

133. Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 117 n.1, 316 N.E.2d 301, 303 n.1, 359 N.Y.S.2d 1, 4 n.1 (1974); Bloomburg v. Hennessy, 99 Misc. 2d 958, 960, 417 N.Y.S.2d 593, 595 (1979); Young v. Town of Huntington, 88 Misc. 2d 632, 639, 388 N.Y.S.2d 978, 984 (1976).

judge the public interest in an agency's functions and the need for confidentiality, and bar disclosure if necessary.[134] Conversely, if under the FOIL a document is exempt from disclosure, yet a person shows a real need for it (*i.e.*, for litigation), the courts will balance the interests involved and may order disclosure.[135]

New York's statutory disclosure provision therefore is not necessarily dispositive of whether certain information will be disclosed. The FOIL has, however, "largely superceded" the use of common law procedures for those seeking access to information.[136] This is so because, under the FOIL, it is not necessary to claim any particularized interest to gain access to most information.[137] The common law privilege, on the other hand, requires the showing of a particularized interest to overcome the privilege. Thus, if the FOIL applies, resort to the common law privilege with its particularized interest requirement is unnecessary.

California also has a disclosure statute—the California Public Records Act.[138] In addition, the California Evidence Code contains what is essentially a codification of the common law public interest privilege[139] in that it provides a privilege from disclosing official information when the need for confidentiality is greater than the need for disclosure.[140] California courts have held that this is the "exclusive" means for the government to claim a privilege from disclosure.[141] Exemptions contained in the Public Records Act have no application outside that Act.[142] The public interest privilege, as codified in the Evidence Code, is therefore still viable in California.

Arizona's disclosure statute,[143] adopted from California's,[144] provides that "[p]ublic records and other matters in the office of any officer at all times during office hours shall be open to inspection by any per-

134. Baumgarten v. Koch, 97 Misc. 2d 449, 451, 411 N.Y.S.2d 487, 489 (1978) (court used public interest privilege to bar disclosure of material exempt under FOIL).

135. Montes v. State, 94 Misc. 2d 972, 976–77, 406 N.Y.S.2d 664, 668 (1978); *see* Burke v. Yudelson, 81 Misc. 2d 870, 878, 368 N.Y.S.2d 779, 788 (1975), *aff'd*, 51 App. Div. 2d 673, 378 N.Y.S.2d 165 (1976).

136. Burke v. Yudelson, 81 Misc. 2d 870, 876, 368 N.Y.S.2d 779, 786 (1975), *aff'd*, 51 App. Div. 2d 673, 378 N.Y.S.2d 165 (1976).

137. *Id. Compare* N.Y. PUB. OFF. LAW § 84 *et seq* (McKinney Supp. 1980) *with* FOIA, text & notes 118–28 *supra*.

138. CAL. GOV'T CODE § 6250 *et seq*. (West 1980), providing for general disclosure of government documents with certain enumerated exceptions, similar to FOIA.

139. CAL. EVID. CODE § 1040(b) (West 1966).

140. *Id.* § 1040(b) (2).

141. Shephard v. Superior Court, 17 Cal. 3d 107, 123, 550 P.2d 161, 169–70, 130 Cal. Rptr. 257, 265–66 (1976); Pitchess v. Superior Court, 11 Cal. 3d 531, 540, 522 P.2d 305, 311, 113 Cal. Rptr. 897, 903 (1974).

142. Shephard v. Superior Court, 17 Cal. 3d 107, 123–24, 550 P.2d 161, 170, 130 Cal. Rptr. 257, 266 (1976).

143. ARIZ. REV. STAT. ANN. § 39–121 (1974).

144. *Id.* (historical note).

son."[145] This seemingly simple directive has been interpreted to mean that "public records" are open to the general public with no showing of need required.[146] It has also been held that "other matters" ("documents not required by law to be filed as public records" but relating to matters "essential to the general welfare") are subject to inspection by an "interested citizen" unless disclosure is against the best interests of the state.[147]

The effect of this statute is that there is no general privilege that may be invoked to avoid disclosure of public records.[148] Public records are defined as those records made by a public official pursuant to a duty to disseminate information to the public or to serve as an official record,[149] such as the Governor's expense records.[150] "Other matters," however, are afforded more protection from inspection. For example, documents received by a public official in his official capacity[151] are privileged from disclosure if it is in the best interest of the state to do so.[152] Moreover, "other matters" are subject to inspection only by interested citizens.[153]

As a result of this dual disclosure requirement, court decisions have turned upon whether the document involved was classified as a "public record" or "other matter" under the disclosure statute.[154] If it is the latter, the court balances the interest of the state in confidentiality against the individual's need for disclosure,[155] very much like the common law privilege applied elsewhere. Despite this shift towards common law balancing in Arizona, however, if a record is specifically made confidential by statute the court will dispense with a balancing of the interests involved.[156] Because a statute may preclude disclosure of any document the legislature feels should remain confidential, the concept of a common law public interest privilege is severely limited in Arizona.

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145. *Id.*

146. Mathews v. Pyle, 75 Ariz. 76, 80, 251 P.2d 893, 895-96 (1952); Church of Scientology v. City of Phoenix, 122 Ariz. 338, 339, 594 P.2d 1034, 1035 (Ct. App. 1979).

147. Mathews v. Pyle, 75 Ariz. 76, 80, 251 P.2d 893, 896 (1952).

148. City of Phoenix v. Peterson, 11 Ariz. App. 136, 140, 462 P.2d 829, 833 (1969) (no common law privilege against disclosure of public records in Arizona).

149. Mathews v. Pyle, 75 Ariz. 76, 78, 251 P.2d 893, 895 (1952).

150. *Id.*

151. *Id.* at 80, 251 P.2d at 896.

152. *Id.*

153. *Id.* No definition of "interested citizen" is given.

154. *See* Church of Scientology v. City of Phoenix, 122 Ariz. 338, 339, 594 P.2d 1034, 1035 (Ct. App. 1979); Mathews v. Pyle, 75 Ariz. 76, 80, 251 P.2d 893, 895-96 (1952).

155. *See* Church of Scientology v. City of Phoenix, 122 Ariz. 338, 339, 594 P.2d 1034, 1035 (Ct. App. 1979); City of Tucson v. Superior Court, 25 Ariz. App. 512, 514, 544 P.2d 1113, 1115 (1976).

156. *See* Industrial Comm'n v. Superior Court, 122 Ariz. 374, 377, 595 P.2d 166, 169 (1979); Fenton v. Howard, 118 Ariz. 119, 121, 575 P.2d 318, 320 (1978).

Conclusion

The public interest privilege is still a viable doctrine today despite statutory provisions that seem to usurp much of its power. These statutory provisions may affect how the courts deal with balancing the need for disclosure with the need for confidentiality, but state statutes generally do not abrogate the common law privilege. Moreover, in situations not covered by the statutes, courts will still resort to the common law doctrine. In addition, the common law doctrine allows courts more flexibility in balancing the interests involved because there is no strict statutory directive that must be followed. For these reasons the public interest privilege is still a necessary, valuable doctrine today.