Public Access to Governmental Records and Meetings in Arizona

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Aristotle posited that citizens must concern themselves with the workings of their government to guarantee their continued freedom.[1] While the democracy of ancient Athens differed markedly from our representative system, both have depended on the participation of informed citizens in the governmental process.[2] But an uninformed public cannot make intelligent decisions, and the governed will remain in the dark unless they can review and evaluate the information available to their representatives.

The public's right to access is tempered, however, by legitimate governmental interests in maintaining the secrecy of certain types of information. Thus, a balancing of the public right to access and the governmental need for secrecy requires an assessment of conflicting interests. Due to the lack of common law[3] and constitutional[4] guidelines, the task of formulating standards to balance these conflicting interests

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1. "[I]f liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost." ARISTOTLE'S POLITICS 156 (B. Jowett transl. 1908).

2. This dependence is illustrated by the Founding Fathers' image of the public as a watchdog:

> It ought also to be remembered that the citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in a pernicious project.

THE FEDERALIST No. 84, at 540 (H. Lodge ed. 1888) (A. Hamilton).

3. *See* text & notes 22-28, 93-100 *infra*. For a more extended discussion of the development of common law rights of access to public records and meetings, see H. CROSS, THE PEOPLE'S RIGHT TO KNOW 25-29, 180-89 (1953).

4. The possible constitutional basis of these rights is discussed in Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Note, *Access to Official Information—A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952). *See also* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962) [hereinafter cited as Note, *Open Meeting*]; Comment, *The First Amendment and the Public Right to Information*, 35 U. PITT. L. REV. 93 (1973).

has fallen on Congress[5] and the state legislatures.[6]

Arizona is one of the states which has attempted statutorily[7] to balance the competing needs for governmental secrecy and public access to information. This Note will analyze Arizona's statutes, placing primary emphasis on their effect on county and municipal govern-

5. Freedom of Information Act, 5 U.S.C. § 552 (1970), *discussed in* Koch, *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972). For a survey of federal agency litigation, publications, and regulations under the Freedom of Information Act, see S. THURMAN, THE RIGHT OF ACCESS TO INFORMATION FROM THE GOVERNMENT (1973).

6. Forty-six states have general statutory grants of access to public records. ALA. CODE tit. 41, § 145 (1958); ALASKA STAT. § 9.25.110 (1962); ARIZ. REV. STAT. ANN. § 39-121 (1974); ARK. STAT. ANN. § 12-2804 (1968); CAL. GOV'T CODE § 6253 (West Supp. 1974); COLO. REV. STAT. ANN. § 113-2-3 (Supp. 1969); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1974-75); DEL. CODE ANN. tit. 29, §§ 3303 to -35 (Supp. 1970); FLA. STAT. ANN. § 286.011 (1975); GA. CODE ANN. § 40-2701 (Supp. 1974); HAWAII REV. STAT. § 92-4 (1968); IDAHO CODE § 9-301 (1947); ILL. ANN. STAT. ch. 116, § 43.103a (Smith-Hurd Supp. 1974); IND. ANN. STAT. § 5-14-1-3 (Burns 1974); IOWA CODE ANN. § 68A.2 (1973); KAN. STAT. ANN. § 19-2601 (1963); KY. REV. STAT. ANN. § 171.650 (1971); LA. REV. STAT. ANN. § 44:31 (1965); ME. REV. STAT. ANN. tit. 1, § 405 (1964); MD. ANN. CODE art. 76A, § 2 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 66, § 10 (Supp. 1973); MICH. COMP. LAWS ANN. § 3.560(121) (Supp. 1974); MINN. STAT. ANN. § 15.17(4) (Supp. 1974); MO. ANN. STAT. § 610.015 (Vernon Supp. 1975); MONT. REV. CODES ANN. § 59-512 (1970); NEB. REV. STAT. § 84-712.01 (1971); NEV. REV. STAT. § 239.010 (1971); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1973); N.J. STAT. ANN. § 47:1A-2 (Supp. 1974-75); N.M. STAT. ANN. § 71-5-1 (Supp. 1973); N.Y. GEN. MUNIC. LAW § 51 (McKinney Supp. 1974); N.C. GEN. STAT. § 132-6 (1964); N.D. CENT. CODE § 44-04-18 (1960); OHIO REV. CODE ANN. § 149.43 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (1962); ORE. REV. STAT. § 192.030 (Supp. 1973); PA. STAT. ANN. tit. 65, § 66.2 (1959); S.C. CODE ANN. § 1-20.2 (Supp. 1973); S.D. COMPILED LAWS ANN. § 1-27-1 (1967); TENN. CODE ANN. § 15-304 (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a(3) (Supp. 1974-75); UTAH CODE ANN. § 78-26-2 (1953); VA. CODE ANN. § 2.1-342 (Supp. 1974); WASH. REV. CODE ANN. § 39.04.100 (1972); WIS. STAT. ANN. § 19.21(2) (1972); WYO. STAT. ANN. § 9-692.2 (Supp. 1973).

Forty-five states have enacted open meeting legislation governing state and local agencies. ALA. CODE tit. 14, § 393 (1958); ALASKA STAT. § 44.62.310 (1962); ARIZ. REV. STAT. ANN. § 38-431.01 (1974); ARK. STAT. ANN. § 6-604 (Supp. 1973); CAL. GOV'T CODE § 54953 (West 1966); *Id.* § 11123 (West Supp. 1974); COLO. REV. STAT. ANN. § 3-19-1 (1963); CONN. GEN. STAT. ANN. § 1-21 (Supp. 1974-75); FLA. STAT. ANN. § 286.011 (1975); GA. CODE ANN. § 23-802 (1971); HAWAII REV. STAT. § 92-2 (1968); IDAHO CODE § 67-2342 (Supp. 1974); ILL. ANN. STAT. ch. 102, § 42 (Smith-Hurd Supp. 1974); IND. ANN. STAT. § 5-14-1-4 (Burns 1974); IOWA CODE ANN. § 28A.2 (Supp. 1974-75); KAN. STAT. ANN. § 75-4318 (Supp. 1973); KY. REV. STAT. ANN. § 61.810 (Supp. 1974); LA. REV. STAT. ANN. § 42:5 (1965); ME. REV. STAT. ANN. tit. 1, § 403 (1964); MD. ANN. CODE art. 25, § 5 (1957); *Id.* art. 41, § 14 (1957); *Id.* art. 23A, § 8 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 30A, § 11A (1973); MICH. COMP. LAWS ANN. § 4.1800(2) (1969); MINN. STAT. ANN. § 471.705 (Supp. 1974); MO. ANN. STAT. § 610.015 (Vernon Supp. 1975); NEB. REV. STAT. § 84-1401 (1971); NEV. REV. STAT. §§ 241.020, 244.080, 268.305 (1971); N.H. REV. STAT. ANN. § 91-A:2 (Supp. 1973); N.J. STAT. ANN. § 10:4-3 (Supp. 1974-75); N.M. STAT. ANN. § 5-6-17 (1974); N.Y. TOWN LAW § 267(1) (McKinney 1965); N.C. GEN. STAT. § 143-318.2 (1974); N.D. CENT. CODE § 44-04-19 (1960); OHIO REV. CODE ANN. § 121.22 (Page 1969); OKLA. STAT. ANN. tit. 25, § 201-02 (Supp. 1974-75); ORE. REV. STAT. § 192.630 (Supp. 1973); PA. STAT. ANN. tit. 65, § 252 (1959); S.C. CODE ANN. § 1-20.3 (Supp. 1973); S.D. COMPILED LAWS ANN. § 1-25-1 (1967); TENN. CODE ANN. § 8-4402 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17(2) (Supp. 1974-75); UTAH CODE ANN. § 52-4-2 (1970); VT. STAT. ANN. tit. 1, § 312 (Supp. 1974); VA. CODE ANN. § 2.1-343 (Supp. 1974); WASH. REV. CODE ANN. § 42.30.030 (1972); WIS. STAT. ANN. § 66.77 (Supp. 1974-75); WYO. STAT. ANN. § 9-692.12 (Supp. 1973).

7. ARIZ. REV. STAT. ANN. §§ 38-431 to -431.08 (1974) (open meetings); *Id.* § 39-121 (inspection of public records). In certain circumstances these general statutes are controlled by more specific provisions. *See* discussion notes 8 & 115 *infra*.

ments.[8] The ability of the statutory guidelines to accommodate both the needs for access and for confidentiality will be examined in light of the policy considerations underlying both positions.[9] Attention then will focus on the right to attend public meetings and the extent to which recently enacted legislation provides for citizen appraisal of decisions made by governmental agencies. Next, the public records statute will be reviewed, considering whether access to governmental documents is unnecessarily limited and whether the means of enforcement are inadequate. Finally, model legislation will be offered as an alternative to the present Arizona public records statute.

PUBLIC KNOWLEDGE VERSUS GOVERNMENTAL SECRECY

The interests of a government and its citizens often differ when the disclosure of information considered in the decisionmaking process is at issue. Any government requires some secrecy to protect against the revelation or premature disclosure of sensitive information. At the same time, public access to information protects against governmental misconduct by providing a basis upon which citizens can evaluate the decisions of their representatives and administrators. Ideally, the public and governmental interests should not conflict: the government should conceal only that which could ultimately be harmful to the public if disclosed, and the public's right of access should extend only to information concerning a legitimate need or interest. The problem is that the government is the custodian, controlling all means of access to its information. The public must be guaranteed a standard by which it can measure any decisions favoring secrecy. These general considerations preclude either absolute secrecy or total disclosure. The answer lies somewhere between and must be formulated in light of the underlying policy considerations.

The difficulties presented by disclosure of governmental informa-

8. Emphasis is placed on these particular levels of government because it is in these areas that an individual exerts maximum influence on his representatives. Also, the operation of many state agencies is more specifically regulated by the Arizona Administrative Procedure Act, ARIZ. REV. STAT. ANN. §§ 41-1001 to -1013 (1974), which provides more comprehensive rights than those granted by the general open meeting and open records statutes. *See id.* § 41-1002(A)(1) (prior notice of time, place, and nature of proceedings); *Id.* § 41-1002(A)(3) (prior notice of proposed action to be taken at meeting). However, county and municipal agencies are not covered by these statutes. *See* Davis, *An Administrative Procedure Act for Arizona*, 2 ARIZ. L. REV. 17, 24 (1960).

9. Due to the paucity of reported judicial decisions concerning the two statutory provisions, a brief questionnaire was sent to various Arizona agencies and county and city officials to determine their experiences with these statutes and their opinions of the statutes' efficacy. The replies from these inquiries are incorporated throughout the text and footnotes and are on file in the office of the *Arizona Law Review*. For a more empirical approach to this issue, see *Research Study—Public Access to Information*, 68 NW. U.L. REV. 177 (1973).

tion can be expressed in more concrete terms. For example, as noted by one official, the premature release of information concerning proposed governmental action could disrupt "negotiation of land acquisition or settlement of lawsuits. Many employers (sic) are reluctant to have their friends and neighbors learn their address, age, and salary from news stories. However, the friendly car salesman and insurance man are often eager to follow up such leads."[10] If other information were readily available, its release could harm individual reputations or employer-employee relations.[11] Additionally, administrators have urged that open meetings hinder decisionmaking by destroying the confidentiality necessary to permit the airing of honest opinions and the full disclosure of facts.[12] The press' alleged potential for sensational reporting coupled with an official's concern about his public image may inhibit the expression of controversial views.[13] A related concern is that time may be wasted when officials feel compelled to take advantage of the opportunity to make speeches to their constituents rather than limiting the discussion to that necessary in reaching decisions.[14]

On the other hand, if a decisionmaking body is to be responsive to the needs of the electorate, public reaction to proposed measures should be sought.[15] Public knowledge of the reasons behind regulations and decisions may promote faith in the administrative and legislative processes,[16] thus facilitating acceptance of otherwise unpalatable measures.[17] Additionally, the firsthand study of documents on which

10. Questionnaire received from the chairman, Maricopa County [Ariz.] Board of Supervisors by the *Arizona Law Review*, Oct. 2, 1973.

11. "At times the public meeting statutes preclude an individual supervisor from expressing his candid opinion in order to prevent embarrassment to a petitioner or to an employee. It is not conducive to good personnel relations for an employee to learn of a raise or disciplinary action from the newspaper." *Id.*

12. There is a natural reticence for the council to fully discuss controversial issues and to ask questions to provide meaningful input on controversial issues if they know they are going to be quoted verbatim in the newspaper. This means that sometimes decisions are made on complex matters without the members being fully satisfied that they are privy to all the facts.

Id.; *accord*, Sommers, *Kick Against the Goad*, 48 NAT'L CIVIC REV. 15, 19 (1959); Cheek, *Open Meeting Law Restores Confidence in Government*, Tucson Daily Citizen, Oct. 18, 1973, at 29, col. 1; Confidential questionnaire received from the mayor of an Arizona city by the *Arizona Law Review*, Oct. 30, 1973.

13. *See* Note, *Open Meeting, supra* note 4, at 1202-03.

14. *Id.* at 1202.

15. Comment, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 851 (1971); Note, *Open Meeting, supra* note 4, at 1200-03. Questionnaire received from the chairman, Pima County [Ariz.] Board of Supervisors by the *Arizona Law Review*, Oct. 19, 1973.

16. J. WIGGINS, FREEDOM OR SECRECY 20 (1964). "There seems to be a good public acceptance of Council procedures and action" due to the beneficial effect of a better informed public. Questionnaire received from the city manager, Mesa, Ariz., by *Arizona Law Review*, Nov. 1, 1973.

17. "If the citizenry feel that all of the actions of the council are made public they probably tend to have more confidence in the action taken whether or not they agree with the decision." Confidential questionnaire received from the mayor of an Arizona city by the *Arizona Law Review*, Oct. 30, 1973; *accord*, Griswold, *The Problem of Pub-*

decisions are based or attendance at meetings in which actions are debated are important sources of knowledge of the functioning of government.[18] Even if relatively few persons take advantage of the opportunity to attend meetings or inspect records, information concerning the workings of government will be spread to a larger segment of the community through the newsmedia.[19] Constant public scrutiny has the added benefit of preventing governmental wrongdoing by dissipating the atmosphere of secrecy which is necessary for improper actions.[20]

The interests of citizens and their elected representatives can best be served through an open exchange of information in some matters and insulation of government action from public view in others. The dilemma of state legislatures has been to devise a workable mechanism that affords maximum openness of public meetings and records, yet recognizes legitimate interests promoted by governmental secrecy.[21] It is against this background of conflicting needs that Arizona's statutes will be analyzed.

PUBLIC ACCESS TO MEETINGS

Meetings of public bodies have not always been open to the public. The traditional notions of an open democratic process as exemplified by the ancient Greek and Roman systems of the agora and plebiscite did not survive under common law. Early sessions in both houses of Parliament excluded all nonmembers, including the press,[22] to prevent interference by the Crown.[23] In colonial America, legislatures barred newsmen and prevented publication of their proceedings;[24] even the Constitutional Convention was held behind closed doors.[25]

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lic Confidence, 43 PENN. B.A.Q. 253, 257 (1972); Hanes, *Citizen Participation and Its Impact upon Prompt and Responsible Administrative Action*, 24 SW. L.J. 731 (1970).

18. Public review of information used in decisionmaking and public attendance at meetings where the information is interpreted and used serves as a check on newsmedia interpretation of events and tempers the potential effects of sensational reporting.

19. Note, *Open Meeting, supra* note 4, at 1200-01. The newsmedia has been continually involved in litigation concerning the limitations or special rights which should be granted to enforce the press' right of access. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); Philadelphia Newspapers, Inc. v. Department of HUD, 343 F. Supp. 1176 (E.D. Pa. 1972).

20. "The operation of government is generally benefitted by exposure to public light. The open door and presence of the news media reduce possibility of wrong doing." Questionnaire received from the Chairman, Maricopa County [Ariz.] Board of Supervisors by the *Arizona Law Review*, Oct. 2, 1973.

21. For a discussion of the effectiveness of access statutes in California, Florida, Iowa, and Texas, see commentaries cited in note 27 *infra*. *See also* Wickham, *Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480 (1973).

22. H. CROSS, *supra* note 3, at 181.

23. *Id.* at 180.

24. *Id.* at 182.

25. J. WIGGINS, *supra* note 16, at 9.

The right of citizens to witness the workings of government was first established in state constitutional and statutory provisions.[26] These grants have been expanded to encompass a variety of meetings where decisions are reached on the spending of public monies and where rules are made which affect community members. Because these laws cover a multitude of state, county, and municipal bodies and govern an important public right, commentators[27] have given them careful scrutiny to determine whether they effectively balance valid interests[28] in openness and secrecy.

Access to Public Meetings in Arizona

In 1962, Arizona enacted a public meetings and proceedings statute.[29] This seemingly comprehensive legislation attempted to strike a balance between the public's interest in the opportunity to attend meetings and the government's interest in operational secrecy. Unfortunately, while the legislature may have intended that the public have access to governmental discussions and proceedings,[30] the statutes were too vague to fully implement that right. In several instances, the public was excluded from discussions and permitted to view only the final voting on measures.[31] There was no way for the public to evaluate the information upon which the decisions were reached.

In 1974, the legislature attempted to rectify this problem through statutory amendments.[32] The changes, despite more specific language, still leave the scope of the open meeting legislation subject to interpretation and misapplication when viewed in light of the general statutory purpose. Specifically, questions remain concerning notice, public participation at meetings, the use of executive sessions, and the practicality of the available sanctions and remedies. This section of the Note, after briefly comparing the old statute with the amended version, will

26. *See* statutes cited note 6 *supra.*

27. For a discussion of the effectiveness of other state statutes in devising a workable legal standard, see Comment, *Access to Governmental Information in California,* 54 CALIF. L. REV. 1650 (1966); Note, *An Extension of the Public Meeting Principle,* 46 CHI.-KENT L. REV. 207 (1969); Note, *Open Meeting, supra* note 4; Comment, *The Iowa Open Meeting Act: A Right Without a Remedy,* 58 IA. L. REV. 210 (1972) [hereinafter cited as Comment, *Iowa Open Meeting Act*]; Note, *Freedom of Information—Texas Open Meeting Act,* 49 TEXAS L. REV. 764 (1971); Comment, *Government in the Sunshine: Promise or Placebo,* 23 U. FLA. L. REV. 361 (1971).

28. *See* text & notes 10-20 *supra.*

29. Ch. 138, § 2, [1962] Ariz. Sess. Laws 347, *as amended,* ARIZ. REV. STAT. ANN. §§ 38-431 to -431.08 (1974).

30. "It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly." Ch. 138, § 1, [1962] Ariz. Sess. Laws 347.

31. The use of executive sessions by the Arizona Board of Regents was a major source of public concern. See authorities cited note 45 *infra.*

32. Ch. 196, [1974] Ariz. Sess. Laws 1085.

attempt to resolve these questions, considering both statutory language and past problems. Finally, suggestions for statutory change and judicial interpretation will be set forth.

1. *Public Meetings: The Right to Attend.* Arizona's public meetings and proceedings statute provides: "All official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings."[33] Application of this provision requires an initial understanding of what is included within the terms "governing bodies" and "legal action." A governing body was defined in the original statute as the "governing bodies of the state, or political subdivision thereof, which are supported in whole or in part by tax revenues or which expend tax revenues."[34] This language was susceptible to a restrictive interpretation which would exclude advisory or ad hoc committees from the scope of the open meetings statute. The 1974 amendments avoided this possibility, however, by including within the definition "incorporated cities and towns, and all agencies, boards and commissions of the foregoing, or any committee or subcommittee thereof . . . ."[35] However, since the public is only entitled to be present at meetings in which legal action is taken, this extension of the statute is of little use unless the legal action requirement is similarly interpreted.

Legal action was not defined in the early statute. Consequently, it was determined that the public was only entitled to attend meetings where voting took place and was not allowed to hear the discussion prior to voting.[36] The expressed purpose of the statute,[37] however, indicates that public access was intended to have been granted at earlier stages in the decisionmaking process.[38] Under the 1974 amendment, the legislature attempted to rectify this problem by defining legal action as "a collective decision, commitment or promise made by a majority of the members of a governing body consistent with the constitution, charter or bylaws of such body, and the laws of this state."[39] Despite this change, the same problem remains. The definition is little more than legislative sophistry. The emphasis on a majority commitment or decision does not, by itself, prohibit private study sessions or subcommittee discussions at which information is exchanged but no resolution

33. ARIZ. REV. STAT. ANN. § 38-431.01(A) (1974).
34. Ch. 138, § 2, [1962] Ariz. Sess. Laws 347.
35. ARIZ. REV. STAT. ANN. § 38-431(1) (1974).
36. Opinion No. 73-9, 1973 OP. ARIZ. ATT'Y GEN. 18.
37. *See* ch. 138, § 1, [1962] Ariz. Sess. Laws 347, *quoted in* note 30 *supra.*
38. *See* text & notes 30-31 *supra.*
39. ARIZ. REV. STAT. ANN. § 38-431(2) (1974).

is made.[40] Absent further legislative clarification, public access to these meetings can be ensured only by proper judicial interpretation of the present statutes.

A court construing the legal action requirement should consider that the explicit legislative policy favors open discussions.[41] Additionally, in those situations where the legislature determined that private sessions were justified, it provided specific statutory exceptions.[42] These factors lead to the conclusion that, whether or not legal action is taken, all meetings of governing bodies must be public unless specifically exempted[43] by statute. Additional support for this position can be implied from the statutory provision which requires that the public receive notice of study sessions and subcommittee meetings.[44] Since the right to notice would be meaningless without the ability to attend, it appears that there is a right to attend such meetings even though they do not involve legal action. In light of the obvious contradiction between the notice provision and the legal action definition, the legislature either should remove the legal action requirement, or the court should liberally construe it consistent with the legislative policy favoring public access to proceedings and discussions of governing bodies.

2. *Executive Sessions.* Perhaps the major source of public distrust of the administrative and legislative process centers on the use of executive sessions. Such sessions have been criticized as a means of excluding the public from the decisionmaking process.[45] The fear is that decisions ratified in public session will not be based on the record but will be founded on undisclosed agreements and information.[46] Additionally, it is contended that secret meetings subvert public confidence in government and "bruise the spirit" of the law.[47]

40. The Arizona attorney general has suggested that the solution to the problem caused by closed door discussion prior to voting could be found in similar California statutes. Opinion No. 73-9, 1973 OP. ARIZ. ATT'Y GEN. 18. The Arizona legislature apparently adopted this recommendation. *Compare* ARIZ. REV. STAT. ANN. § 38-431(2) (1974), *with* CAL. GOV'T CODE § 11122 (West Supp. 1974). Unfortunately, Arizona did not fully analyze the California statutes. California has two types of public meetings: meetings open to the public and those which are closed by express provision of the law. *See* CAL. GOV'T CODE § 11123 (West Supp. 1974). Arizona statutes, on the other hand, by emphasizing "meetings at which any legal action is taken," do not resolve the issue of the open or closed status of meetings at which no legal action is taken. *See* ARIZ. REV. STAT. ANN. § 38-431.01 (1974); Opinion No. 73-9, 1973 OP. ARIZ. ATT'Y GEN. 18.

41. *See* Ch. 138, § 1, [1962] Ariz. Sess. Laws 347, *quoted in* note 30 *supra.*

42. ARIZ. REV. STAT. ANN. § 38-431.03 (1974), *discussed in* text & notes 52-57 *infra.*

43. *See* ARIZ. REV. STAT. ANN. § 38-431.03 (1974).

44. *Id.* § 38-431.02. The notice section is discussed in text & notes 61-73 *infra.*

45. *See* Arizona Daily Wildcat, Sept. 21, 1973, at 3, col. 1; Tucson Daily Citizen, Mar. 10, 1974, at 28, col. 1; Cheek, *Open Meeting Law Restores Confidence in Government,* Tucson Daily Citizen, Oct. 18, 1973, at 29, col. 1.

46. *See* K. DAVIS, DISCRETIONARY JUSTICE 111-13 (1969); Griswold, *supra* note 17, at 257; Hanes, *supra* note 17, at 734.

47. "The Board may discuss any matter it wishes in private, so long as the Board

There remains, however, a legitimate need for confidentiality in some discussions. Disclosure of information concerning sensitive matters may substantially harm individuals. For example, meetings concerning the employment, dismissal, or discipline of personnel[48] may give rise to unsubstantiated rumor and damage the reputations of those involved.[49] Other information concerning such matters as property acquisition or security measures taken to protect citizens, if revealed, could be harmful to community interests.[50] Meaningful collective bargaining is another area which could be hampered if full publicity were required at each step of the negotiations.[51]

Arizona has attempted to establish a statutory equilibrium between the public's desire for access and the agencies' needs to act in private. Executive sessions of governing bodies must now be called by a majority vote of the members constituting a quorum and can be held for *only* the following purposes: (a) personnel matters, except that an employee may demand a public meeting for discussion of salary;[52] (b) discussions of records exempt by law from public inspection;[53] (c) consultation with the governing body's attorney;[54] (d) discussions with representatives of employee organizations regarding salaries or fringe benefits;[55] and, (e) consideration of international or interstate negotiations.[56] While these subjects may be discussed in executive sessions, no final decision may be reached until the governing body has reconvened in a meeting open to the public.[57]

Although the legislature has removed the ambiguities of the earlier Arizona law[58] by specifically limiting the instances in which executive sessions may be held, the amended provision is not sufficiently comprehensive to cover all the situations potentially requiring confiden-

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does not try to take legal action. . . . It may be that this method of conducting board business bruises the spirit of the law, but it does fall within the letter of the law." Opinion No. 73-9, 1973 OP. ARIZ. ATT'Y GEN. 18.

48. *See* ARIZ. REV. STAT. ANN. § 38-431.03(A)(1) (1974); Opinion No. 63-40, 1963 OP. ARIZ. ATT'Y GEN. 59, 60.

49. Only two of 18 questionnaires received from various county and municipal agencies failed to list personnel matters as a prime reason for executive sessions.

50. *See* text & note 59 *infra*.

51. *See* Bassett v. Braddock, 262 So. 2d 425, 426 (Fla. 1972).

52. ARIZ. REV. STAT. ANN. § 38-431.03(A)(1) (1974). The reasons behind this exception also should permit an employee to request an open hearing of disciplinary charges brought against him. *See id.* § 41-785(B) (appeal to the state personnel board is open unless employee requests confidential hearing). *See also* TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(a)(1) (Supp. 1974), *quoted in* note 59 *infra*.

53. ARIZ. REV. STAT. ANN. § 38-431.03(A)(2) (1974). For a list of records exempt by statute, see note 115 *infra*.

54. ARIZ. REV. STAT. ANN. § 38-431.03(A)(3) (1974).

55. *Id.* § 38-431.03(A)(4).

56. *Id.* § 38-431.03(A)(5).

57. *Id.* § 38-431.03(C).

58. The prior statute required only that the executive session be called by a majority vote, that it not be used contrary to the purposes of the statute, and that no final action be approved in executive session. Ch. 138, § 38-431.01(A), [1962] Ariz. Sess. Laws 348,

tiality to protect legitimate public or individual interests. For example, there may be a need for closed door discussions pertaining to property acquisition, official investigations of internal matters, or the emergency implementation of security personnel or devices.[59] Even a cursory consideration of these matters reveals situations in which private discussion is desirable or necessary. No public interest can be advanced by land speculation resulting in inflated prices, and an investigation of matters relating to the internal functioning of an agency can be hampered or reputations unnecessarily harmed by premature publicity. Due to the potential loss of property and lives during riots, disasters, and other emergencies, open discussion of security measures necessary in these situations could endanger the public's interest in effective protection by law enforcement agencies. No provision is made for any of these situations in the new Arizona statutes. Thus, a governing body is faced with an undesirable decision. It can either abide by the law and discuss these matters in public or meet in private session and face the possibility of incurring a statutory penalty.[60] For these reasons, the legislature should review its determination on the limitations of executive sessions.

3. *Notice.* A meeting can hardly be termed open unless the public knows of its time and place and the subject matter to be considered. It can be argued that formal notice requirements are not necessary since most meetings are held on a regular basis, either through custom

59. Those states attempting to limit executive sessions have either provided more comprehensive exceptions or have granted discretionary power to the governing bodies enabling them to weigh the conflicting interests in each case. *Compare* ARIZ. REV. STAT. ANN. §§ 38-431.03(A)-(A)(5) (1974), *with* CAL. GOV'T CODE §§ 11126, 54957 (West Supp. 1974), [*and*] IOWA CODE ANN. § 28A.3 (Supp. 1974-75), [*and*] TEX. REV. CIV. STAT. ANN. art. 6252-17(2) (Supp. 1974-75).

The Texas statute is the best example of comprehensive, specific legislation covering executive sessions. The statute provides:

> (a) The provisions of this Act do not apply to that portion of a meeting or session of a governmental body while the governmental body is actually engaged in:
>
> (1) deliberations to consider the appointment, employment, or dismissal of a public officer or employee to hear complaints or charges brought against such officer or employee, unless such officer or employee requests a public hearing;
>
> (2) deliberations pertaining to the acquisition of additional real property; or
>
> (3) deliberations of matters affecting security. . . .
>
> (d) The provisions of this Act shall not apply to periodic conferences held among staff members of the governmental body. Such staff meetings will be only for the purpose of internal administration and no matters of public business or agency policies that affect public business will be acted upon.
>
> (e) Nothing in this Act shall be construed to require school boards to hold meetings open to the public in cases involving discipline of public school children unless an open hearing is requested in writing by a parent or guardian of the child.

Id. arts. 6252-17(2)(a), (d), (e).

60. *See* text & notes 77-92 *infra.*

or as specified by rule or statute.[61] Also, the subject matter to be discussed is often available to the public before the meeting begins through either newspaper reports or special notices provided by governing bodies.[62] In the absence of statutory requirements, however, there is no guarantee that these practices are uniformly followed by all governing bodies. In reality, agendas often are not provided to the public.[63] Additional notice problems arise in cases of emergency or rescheduled meetings and the use of subcommittees or study groups which do not provide schedules and agendas.

Many of these problems were solved when the Arizona legislature added notice provisions in its 1974 amendments to the public meetings statutes.[64] The new notice section is an initial step toward providing public awareness of governmental functioning. Unfortunately, the statute is unnecessarily vague as to what type of notice is to be given and too restrictive concerning the availability of such notice to the public. These provisions require governing bodies to post notice of their regular meetings and the meetings of subcommittees and to file a statement with a responsible official[65] designating the place of such notice.[66] While the statute does not state what information must be contained in the notice, the better rule would require that the time, place, and subject matter be provided.[67] For regular meetings, the Arizona

61. State agencies subject to the Administrative Procedure Act are required to file notice at least 20 days before the adoption of any rule. The notice includes a statement of the time, place, and nature of the proceeding as well as a summary of the proposed action. ARIZ. REV. STAT. ANN. § 41-1002 (1974).

City council meetings are regulated by city charters. County boards of supervisors and school boards have regular meeting dates. For example, TUCSON, ARIZ. CODE §§ 2-26(1), (3) (1972), provides:

> The first, second, third and fourth Mondays of each calendar month are established as the meeting dates of the mayor and council. . . . If a regularly scheduled city council meeting falls on a legal holiday, the meeting is held the next day at the same time and place. The meetings shall be open to the public.

Accord, Questionnaire received from the chairman, Cochise County [Ariz.] Board of Supervisors by the *Arizona Law Review*, Oct. 24, 1973; Questionnaire received from the president, Sunnyside School Board, Pima County, Ariz., by the *Arizona Law Review*, Oct. 29, 1973; Questionnaire received from the mayor, Tempe, Ariz., by the *Arizona Law Review*, Oct. 29, 1973.

62. The press is often informed of the subject matter of meetings either through press reports or by furnished agendas; citizens are notified by posting of proposed ordinances or periodic mailing of information in water billings. Questionnaire received from the mayor, Glendale, Ariz., by the *Arizona Law Review*, Nov. 6, 1973; Questionnaire received from the mayor, Tucson, Ariz., by the *Arizona Law Review*, Oct. 23, 1973.

63. "[T]he use of agendas is strictly a matter of Board policy, and the public has no inherent or statutory right to see a copy of the Board's agenda." Opinion No. 73-9, 1973 OP. ARIZ. ATT'Y GEN. 18, 19.

64. ARIZ. REV. STAT. ANN. § 38-431.02 (1974). The prior statute had no notice provisions.

65. Notice of meetings of state agencies is filed with the secretary of state. *Id.* § 38-431.02(A)(1). County agencies must file with the clerk of the board of supervisors. *Id.* § 38-431.02(A)(2). Municipal agencies must file the statement with the city clerk or the mayor's office. *Id.* § 38-431.01(A)(3).

66. *Id.* § 38-431.02(A).

67. *See, e.g.*, CAL. GOV'T CODE § 11125 (West Supp. 1974); FLA. STAT. ANN. §

statute requires "such public notice as is reasonable and practicable."[68] Again, the legislature has failed to provide sufficient guidelines for determining what constitues reasonable public notice.[69] Due to the filing requirement, no notice period is specified for regularly scheduled meetings. Nonscheduled meetings, with the exception of emergency meetings, must be noticed to the members of the meeting organization and the public 24 hours in advance.[70] The adequacy of this notice period is uncertain. More advance notice may better serve the purpose of the notice section without placing an undue burden on the governing bodies.[71] In the case of emergency meetings, only "such notice as is appropriate to the circumstances" is required.[72] The statute also contains notice requirements governing executive sessions. Such meetings may be held only if notice is given to all members of the meeting body, and the public must be informed of the specific statutory provision authorizing the executive session.[73] While these provisions result in the public being better able to obtain notice of the time and place of meetings, additional provisions requiring notice of the subject matter of such meetings and personal notice to interested persons would make the notice statute more meaningful.

4. *Participation.* A difficult problem not covered by the Arizona statute arises when individuals desire not only to attend and observe a meeting, but also to participate in the discussion. The merits of a proposal can best be judged when those persons who could be affected by its implementation are allowed to present their views. However, an absolute right to participate could hinder the efficiency and speed of governmental action.[74] Citizen participation in program planning could be encouraged by a compromise statutory provision which would guarantee a right to present written statements or arguments while leaving oral participation to the governing body's discretion.[75] Statutory delineation of the right to present written materials may not change

67-2343 (Supp. 1974); TEX. REV. CIV. STAT. ANN. art. 6252-17(3)(a) (Supp. 1974-75).

The Arizona legislature is currently considering a bill which would expand the notice section to require information on the subject matter to be included. S. 1079, 32d Ariz. Legislature, 1st Reg. Sess. § 38-431.02(A)(1) (1975).

68. ARIZ. REV. STAT. ANN. § 38-431.02(A) (1974).

69. California, for example, requires notice of state agency meetings to be sent to any person requesting such notice in writing. CAL. GOV'T CODE § 11125(a) (West Supp. 1974).

70. ARIZ. REV. STAT. ANN. § 38-431.02(C) (1974).

71. The legislature is currently considering whether to extend the notice time for rescheduled meetings from 24 to 48 hours. S. 1079, 32d Ariz. Legislature, 1st Reg. Sess. § 38-431.02(D) (1975).

72. ARIZ. REV. STAT. ANN. § 38-431.02(C) (1974).

73. *Id.* § 38-431.02(B). The executive session provisions are discussed in text & notes 45-60 *supra.*

74. Hanes, *supra* note 17, at 733.

75. ARIZ. REV. STAT. ANN. § 41-1002(B) (1974), provides this right in hearings before agencies governed by the Administrative Procedure Act.

some current practice,[76] but it might encourage both the public to present their ideas and the agency to consider them. The result would be an additional source of information to aid in decisionmaking.

5. *Enforcement of the Open Meeting Statute.* Without legal penalties for violations, the statutory changes already suggested would not be sufficient to ensure open meetings. Some enforcement procedure is necessary to enforce statutory rights if they are violated. Thus, the Arizona open meeting law provides both criminal[77] and civil[78] sanctions for its violations. Since the purpose of the open meeting statutes is to ensure public access to the meetings of governing bodies, any sanctions should be designed to advance that purpose. Arguably, a criminal penalty, whether a fine or a jail term, serves a deterrent function. However, in public meeting legislation the emphasis must be on the smooth functioning of government. To this end, sanctions emphasizing deterrence and remedial action rather than mere retribution must be favored. Arizona, however, makes it a crime for an official to take part in a closed meeting which should have been open to the public; such action is punishable by a fine or imprisonment or both. This sanction may deter officials from using unnecessary secrecy. Its effectiveness is questionable, however, because it is seldom applied,[79] and because this type of statute may serve only to punish officials acting in ignorance of a violation. Deterrence is not advanced by the punishment of those acting without knowledge of a violation of the statutory requirements. Thus, unless violations are frequently repeated or involve willful or knowing misconduct, the criminal sanction appears severe and civil sanctions may provide a more appropriate and effective remedy.

Similarly, the criminal sanction should not be applied against officials participating in illegal meetings when their sole purpose in attending is to protect the public's interest in the disclosure of what transpires at such meetings. This exception is necessary to give full effect to the

76. For example, the Arizona Board of Regents recently amended its policy to permit the public to present oral statements during its meetings. Under the new rules, the first 10 persons submitting written requests are allowed to address a meeting of the Board. Arizona Daily Star, Feb. 16, 1975, § A, at 7, col. 1. Under the old rules, persons wishing to communicate with the Board were encouraged to do so in writing. A unanimous vote of the Board was required before a member of the public could speak at the meeting. *See* Opinion No. 73-9, 1973 OP. ARIZ. ATT'Y GEN. 18.

77. ARIZ. REV. STAT. ANN. § 38-431.06 (1974) (fine of not more than $100, or imprisonment for not more than 30 days, or both).

78. *Id.* § 38-431.04 (meeting may be opened to the public by writ of mandamus); *Id.* § 38-431.05 (business transacted at a meeting held in violation of the act shall be null and void); *Id.* § 38-431.07 (equitable relief available to require compliance with or to interpret application of statutes).

79. *See* Comment, *Access to Governmental Information in California*, 54 CALIF. L. REV. 1650, 1662 (1966); Note, *Freedom of Information—Texas Open Meeting Act*, 49 TEX. L. REV. 764, 773 (1971).

civil remedy of voiding actions taken at illegal meetings. Obviously, without knowledge of what has transpired at a closed meeting, a court would have difficulty enforcing the civil remedy. Thus, the existence of the criminal penalty may in fact deter divulgence of the occurence of an illegal meeting. This difficulty could be overcome by limiting criminal sanctions to knowing, willful, or intentional conduct. This would provide maximum deterrence while protecting participants who object to an illegal private session but who participate solely to protect the public's interest.[80]

The Arizona open meeting statute explicitly authorizes use of the writ of mandamus to compel the opening of a meeting;[81] however, issuance of this writ is discretionary rather than mandatory.[82] Arizona courts require that the petitioner must be a "beneficially interested" party[83] who has demanded that an official perform the act or duty at issue.[84] The statutory limitation on who may bring a mandamus action raises serious questions as to the effectiveness of this remedy as a means of enforcing the public meeting statute. Even absent the standing limitation, the effectiveness of mandamus is questionable since the remedy is predicated on the ability of the petitioning party to discover an intended violation, demand that the violation be corrected, and bring the action. Occurrence of secret, emergency, rescheduled, or executive sessions is not easily ascertainable beforehand and may be particularly difficult to discover when the statutory notice provisions are not

80. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 4(a) (Supp. 1974) (misdemeanor fine for one willfully calling or participating in an illegal meeting). For a discussion of the practicality of dismissal of government employees found violating public records laws, see text & notes 134-35 *infra*.

81. ARIZ. REV. STAT. ANN. § 38-431.04 (1974). A person also may seek equitable relief to require compliance with or to determine the applicability of the open meeting statute to matters or decisions of a governing body. *Id.* § 38-431.07. Equitable relief has the advantage of permitting the court to require the governing body to pay reasonable attorney's fees to a successful plaintiff. *Id.* The problems involved in seeking other forms of equitable relief, such as an injunction, are similar to those involved in a mandamus proceeding. See text & notes 82-86, 120-23 *infra*.

82. *See* ARIZ. REV. STAT. ANN. § 38-431.04 (1974).

83. *Id.* § 12-2021. Equitable relief is also available to "any person affected by a decision of a governing body." *Id.* § 38-431.07. The term "beneficially interested party" is discussed in note 124 *infra*.

Writs of certiorari, mandamus, and prohibition are now referred to as special actions. The questions raised and considered in regard to each writ are unaffected by the rule authorizing special actions. ARIZ. R.P. SPECIAL ACTIONS 1(b). For an analysis of mandamus actions in Arizona, see Davis, *Administrative Mandamus*, 9 ARIZ. L. REV. 1 (1967); Lesher, *Extraordinary Writs in Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1956); Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, 11 ARIZ. L. REV. 413 (1969).

84. *See* Kaufman v. Pima Junior College Governing Bd., 14 Ariz. App. 475, 484 P.2d 244 (1971). It has been suggested that where a statute establishes a public duty, such as holding an open meeting or providing notice of the meeting, the statute is deemed to be a substitute for an express demand and the failure to perform that duty is considered to be the equivalent of a refusal to perform. Comment, *Iowa Open Meeting Act, supra* note 27, at 220, *citing* Iowa v. Bailey, 7 Cole 390, 395 (Iowa 1858), [*and*] Iowa v. County Judge of Marshall County, 7 Cole 186, 202-03 (Iowa 1858).

complied with.[85] Thus, the practical value of mandamus is limited to regular meetings sought to be held behind closed doors in spite of public knowledge and protest.[86]

The open meeting law also provides for the voiding of any action taken at meetings held in violation of the statute.[87] While there is no specific standing requirement for those seeking to enforce this provision, it may be assumed that a petitioner would be governed by the general equitable relief provision of the open meeting statute.[88] As with the mandamus action, only limited standing is granted— the petitioner must show that he is "affected by a decision of a governing body."[89] Such a limitation does not appear to serve any significant public, governmental, or judicial interest, and a less restrictive standing provision is recommended.

Another apparent difficulty is created by the mandatory nature of this remedy. While the open meeting statute generally provides that equitable relief[90] is discretionary, this section simply states that business transacted at illegal meetings "shall be null and void."[91] If construed as mandatory, the automatic invalidation of action taken during illegal meetings could raise unusual problems. For example, compliance with zoning ordinances or housing codes which are invalidated subsequently could cause substantial financial hardship to those detrimentally relying on their validity. This could be ameliorated either by imposing a statute of limitations on invalidation actions or by allowing for judicial discretion to evaluate any detrimental effects that would result in a decision to declare the act void. Additionally, where decisions are voided because of the lack of public exposure to the facts behind the decisions, provision must be made to prevent mere re-run voting by the governing body.[92] Thus, judicial discretion should be invoked to require a full hearing on the matter voided.

Where meetings are held in violation of the open meeting statute, the primary concern must be with the public interest in knowing what

85. The notice requirement is discussed in text & notes 61-73 *supra*.

86. In Dobrovolny v. Reinhardt, 173 N.W.2d 837 (Iowa 1970), a writ of mandamus to enjoin a school board from implementing a school district attachment plan was denied. The plaintiffs alleged that the meeting was convened in violation of a state statute requiring notice. The court held that mandamus would not be available unless a demand had been made prior to the illegally held meeting even though no notice was given. The case is criticized in Comment, *Iowa Open Meeting Act, supra* note 27.

87. ARIZ. REV. STAT. ANN. § 38-431.05 (1974).

88. *Id.* § 38-431.07.

89. *Id.*

90. The statute states: "The court *may* order such equitable relief as it deems appropriate under the circumstances." *Id.* (emphasis added).

91. *Id.* § 38-431.05.

92. For a discussion of re-run voting sessions, see Wickham, *supra* note 21, at 492-93.

transpired and in ensuring that the governing body will comply with the statute. The available civil remedies are too limited to fully effectuate these goals. The present standing requirements should be stricken in favor of making the remedy available to any person. Also, due to the potential hardships caused by judicial voidance of administrative acts, greater discretion must be given to the courts to determine whether community interests would be advanced by invalidation. These civil remedies should serve as the enforcement method of the open meeting law and criminal sanctions should exist only to deter potential wrongdoing. Criminal penalties should be designed to punish only that conduct which is undertaken with the intent to avoid the open meeting statute. The formulation of criminal penalties should involve the recognition that fines may be more appropriate than jail terms, since the civil remedies permit the public interest to be vindicated by requiring full rehearings on subjects improperly considered.

Summary

Legislation will never be able to completely prevent acts intentionally done to escape public knowledge of governmental actions. Doubtless some secret meetings and private agreements will still occur. However, where questions exist as to the line between political horsetrading and illegal meetings, specific legislative delineation of prohibited acts simplifies administrative determinations on the propriety of closed sessions and ensures maximum public exposure to meetings involving public interests. While Arizona's recent statutory amendments are a step in this direction, the legal action, executive session, and notice provisions should be reviewed to determine whether greater specificity would minimize future problems and clarify the apparent legislative intent of providing maximum public access to the decision-making process.

PUBLIC ACCESS TO RECORDS

The common law has never provided a general right to inspect government documents.[93] Early English law only allowed disclosure of documents which were to be used as evidence or which contained information that was needed in order to maintain or defend a court action.[94] Although the English courts did not specify any other circumstances in which document inspection would be allowed, their action was not

93. H. CROSS, *supra* note 3, at 25.
94. *Id.* at 26.

intended to preclude inspection under other conditions.[95] Later, as access to official records was sought for purposes other than litigation, the English courts recognized that the rule was not an exclusive grant of a public right and allowed access to governmental records for other purposes.[96]

The first American courts to consider the question adopted the common law rule prohibiting access to documents unless it was shown that they were needed for litigation.[97] As in England, however, the public interest in government documents expanded beyond mere access for legal purposes. Information contained in deeds, tax regulations, wills, and title abstracts was sought, motivating the courts to enlarge the right of access.[98] Thus, the common law rule was expanded, and the use of a document as evidence was not a prerequisite to access when a person could show some interest in the document and when the disclosure would not be detrimental to the public interest.[99] Even though inspection of public documents under these circumstances is now considered a common law right, most states and the federal government have passed legislation in an attempt to define further the right to examine public documents.[100] The provisions of these statutes vary greatly depending on which records are encompassed within the definition of inspectable "public documents," to whom the right is accorded, and what remedial process is available to redress statutory violations.

Arizona's access to public records statute[101] has remained unchanged since its enactment in 1901.[102] It provides: "Public records and other matters in the office of any officer at all times during office hours shall be open to inspection by any person."[103] Due to the statute's general wording, the lack of subsequent legislative refinement, and the dearth of judicial treatment, it is difficult to ascertain the scope of this right. In spite of the broad legislative language, the only appellate case construing the statute, *Mathews v. Pyle*,[104] did little more than apply the common law rule.

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95. *Id.*
96. *Id.*
97. *See, e.g.*, Amos v. Gunn, 84 Fla. 285, 94 So. 2d 615 (1922); Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833 (1967); Disabled Police Veterans Club v. Long, 279 S.W.2d 220 (Mo. 1955); Local 180, UAW v. Gooding, 251 Wis. 362, 29 N.W.2d 740 (1947).
98. H. CROSS, *supra* note 3, at 28.
99. *See, e.g.*, Fayette County v. Martin, 279 Ky. 387, 130 S.W.2d 838 (1939); Nowack v. Auditor Gen., 243 Mich. 200, 219 N.W.2d 749 (1928); State v. Nix, 195 Okla. 176, 155 P.2d 983 (1944). *See generally* H. CROSS, *supra* note 3, at 26-29.
100. See authorities cited note 5 *supra*.
101. ARIZ. REV. STAT. ANN. § 39-121 (1974).
102. *Compare id., with* Ariz. Rev. Stat., Civil ¶ 285 (1901).
103. ARIZ. REV. STAT. ANN. § 39-121 (1974). Some records are statutorily exempt.
104. 75 Ariz. 76, 251 P.2d 893 (1952).

Public Records Defined

Mathews involved a newspaper editor's attempt to inspect an investigative report sent to the Arizona governor by the state attorney general. In determining whether the report was open to inspection, the Supreme Court of Arizona delineated three categories of public records. First, the court stated that a public record is "one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as memorial of official transactions for public reference."[105] This circular definition was supplemented by further reference to a public record as a document required by law to be kept or necessary to be kept in the discharge of a legal duty or "directed by law to serve as a memorial and evidence of something written, said or done."[106] The third definition included any "written record of transactions of a public officer, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provisions of law or not."[107] In applying these standards, the court noted that the investigative report was neither a record of the governor's official acts nor a report required by law to be made by the attorney general and implied that, since it was not an actual transcription by the governor, the report could not fit within any of the definitions of public records.[108] Although the governor was required by statute to keep the report in his office, the supreme court did not perceive any legislative intent that all documents received by the governor in his official capacity were to be considered public records.[109]

The court then turned to that portion of the public access statute which provides for access to "other matters." Other matters, the court

105. *Id.* at 78, 251 P.2d at 895, *citing* People v. Purcell, 22 Cal. App. 2d 126, 70 P.2d 706 (Ct. App. 1937); People *ex rel.* Stenstrom v. Harnett, 131 Misc. 75, 226 N.Y.S. 338 (Sup. Ct. 1927); State *ex rel.* Romsa v. Grace, 43 Wyo. 454, 5 P.2d 301 (1931).

106. 75 Ariz. at 78, 251 P.2d at 895, *citing* Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922); Robison v. Fishback, 175 Ind. 132, 93 N.E. 666 (1911); Steiner v. McMillan, 59 Mont. 30, 195 P. 836 (1921).

107. 75 Ariz. at 79, 251 P.2d at 896, *citing* People v. Purcell, 22 Cal. App. 2d 126, 70 P.2d 706 (Ct. App. 1937); State v. Ewert, 52 S.D. 619, 219 N.W. 817 (1928).

108. 75 Ariz. at 79, 251 P.2d at 896.

109. Ariz. Code § 4-102 (1939), provided:

> The governor shall keep a record of his official acts; an account of his official expenses and disbursements, including the incidental expenses of his department; a register of all appointments made by him, with date of commission, names of the appointee and predecessor, *and shall keep in his office all documents received by him in his official capacity.*

(Emphasis added.) The Arizona supreme court reasoned that the legislature intended to make a distinction between those acts recited in the first part of the section—"The governor shall keep a record"—and those in the second part of the section, concerning the documents "received by him in his official capacity" which were required to be kept in his office. "We are of the opinion that the latter were not intended by the legislature to be classified as public records." 75 Ariz. at 79, 251 P.2d at 896; *accord*, ARIZ. REV. STAT. ANN. § 41-102 (1974).

concluded, are those records " 'which are not required by law to be filed as public records, but which relate to matters essential to the general welfare of taxpayers, such for example as matters of taxation, revenue, and the proceedings for the carrying out of governmental projects at public expense . . . .' "[110] Since the report of the attorney general was received by the governor in his official capacity,[111] it was deemed to come within the definition of other matters. The court held that documents classified as other matters were subject to inspection unless confidential or of such a nature that it would be against the best interests of the state to permit disclosure.[112]

Since the *Mathews* court found that the attorney general's report was not a public record in the custody of the governor, it did not specify that the confidentiality or balancing of interests limitations applied to public records. However, since the investigative report was a record of the transaction of the attorney general and thus could be construed as a public record of the attorney general under the court's third definition,[113] it is assumed that the court would have used a similar analysis had the report been sought from that office. It must be concluded, then, that there is no absolute right to inspect governmental documents in Arizona. The reasoning of *Mathews* indicates that the right to inspect any document, whether deemed public record or another matter, is subject to an initial administrative determination of confidentiality and the interests involved in disclosure. This result is consistent with the common law right which subjects all records to a similar balancing of interests test.[114] Due to the broad statutory language and the court's lack of specificity as to which documents can be inspected or what interests should be weighed, the true nature of the right of inspection must be determined not by the definitions of public documents but by application of the confidential matter and balancing of interests tests.

The Right of Inspection

The right to inspect public documents in Arizona is tempered by three restrictions. First, *Mathews* requires that the public writing not be confidential. Confidential documents are of two types. One type involves information which is statutorily exempt, while the other requires a judicial declaration that the communication or record is privileged as a matter of public policy. Statutorily exempted docu-

110. 75 Ariz. at 80, 251 P.2d at 896, *quoting from* Runyon v. Board of Prisons, 26 Cal. App. 2d 183, 79 P.2d 101 (Ct. App. 1938).
111. Ariz. Code § 4-102 (1939). See note 109 *supra.*
112. 75 Ariz. at 80, 251 P.2d at 896.
113. *See* text accompanying note 107 *supra.*
114. *See* text accompanying note 99 *supra.*

ments are nominally public records in that they are prepared or maintained by an official as a convenient and appropriate method of discharging his duties. Due to their subject matter, however, their availability is totally restricted or limited by specific nondisclosure statutes.[115] These statutes reflect a legislative determination that information contained in these documents requires confidentiality to ensure the free flow of information used by governing bodies. The information is considered so sensitive or personal that it would not be readily supplied if it were not privileged. An individual would be less likely, for example, to submit a truthful, accurate, and complete welfare application or traffic accident report if the possibility existed that the information contained in them would be readily available to lawyers and creditors. Unfortunately, these statutes are not uniformly treated or assembled so only a thorough reading of the laws gives notice of what is considered confidential.

Access to the second type of confidential documents, those deemed privileged as a matter of public policy, requires a case-by-case determination of the need for confidentiality. These documents, although not exempted by specific statutes, may nevertheless contain information which necessitates nondisclosure. Regulations promulgated by governing bodies for their own operation and intraoffice or interagency communications may fall within this exemption, but the need for confidential treatment must outweigh the public interest in disclosure.[116] Thus, access to all nonstatutorily exempt documents is conditioned on balancing the relative interests in confidentiality and public disclosure. The net effect of this balancing test is to place a second limitation on public access to government documents—access will be granted only if it best serves the governmental interests involved.

The current judicial standard used in balancing the potential harms involved in disclosure favors governmental secrecy. In determining whether disclosure would be detrimental to the government, even a slight state interest may be sufficient to defeat a demandant's right to access.[117] The legitimacy of this standard lies in the question-

115. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-519(B) (1974) (records of all child welfare agencies to be confidential); *Id.* § 15-153(A) (Supp. 1974-75) (public school records open only to parent or guardian); *Id.* § 28-673 (1956) (automobile drivers accident reports are confidential and for administrative use only); *Id.* § 36-404 (limiting disclosure of state department of health records); *Id.* § 43-145(B) (regulating disclosure of state income tax returns); *Id.* § 46-135 (requiring state department of public welfare to make rules regarding confidentiality of records and forbidding county departments to make such rules).

116. The *Mathews* court rejected the governor's contention that his determination of the confidentiality of the document and the state's best interests was conclusive. The initial judgment on whether to release a document was left with the custodial agent, subject to judicial review. 75 Ariz. 76, 80-81, 251 P.2d 893, 897-98 (1952).

117. In Linder v. Eckard, 261 Iowa 216, 152 N.W.2d 833 (1967), the court denied

able premise that the government's interest in operational secrecy is superior to the public's interest in scrutinizing all phases of the decisionmaking process.[118] If a government exists as the servant of public needs, the only valid state interest in secrecy is that which is necessary to protect its citizens. When an official or a court is asked to determine the availability of an item to the public, the only element it should consider is the individual or community harm which might result; a presumption favoring operational secrecy and allowing potential self-serving agency interests to predominate is contrary to the considerations underlying public access statutes. If the government is the servant of the public, a presumption should exist favoring public inspection of all governmental information.

A third limitation on public access is the opinion of the Arizona attorney general which suggests that the party seeking access must be a "citizen" who has a "sufficient interest" in the record or information.[119] While this may be consistent with the common law rule,[120] it is clearly contrary to the statutory right granted to "all persons."[121] By requiring an initial showing of the demandant's interest in the particular document sought, the attorney general has created a presumption favoring nondisclosure. Unless the demandant can demonstrate some pecuniary or legal effect which the document will have, the government is not required to show any justification for nondisclosure. Thus, requiring a showing of the demandant's interest places an additional

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a taxpayer access to city-commissioned land appraisal reports on the ground that his interest was unjustified and premature since the reports were preliminary matters of investigation. The court said that the nature and purpose of the documents overrode the taxpayer's interest in knowing the basis of the decision that was to be reached. Under this reasoning, a taxpayer has no interest in reviewing information until final action has been taken; thus, the basis of the decision could not be questioned. In addition to questioning the taxpayer's interest in the document, the court said that although the reports were made at the request of the city council, they were not public records since they had not been prepared by a public officer nor by anyone under his control. This case has been criticized as foreclosing the public's right to know the decisional premises, "thus hampering intelligent evaluation of official policy." Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records But Were Afraid to Ask*, 57 IA. L. REV. 1163, 1169 (1972). The commentator concluded that the only "relevant concern in defining the term 'public records' is whether the document in question is in the legal possession of a public official." *Id.* It was also suggested that the public's interest in disclosing official wrongdoing may be defeated by a showing of the disruption and embarrassment to the government that would result. *Id.* at 1167-69.

118. *Compare* Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952), *with* MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413 (1961). In *MacEwan*, the demandant's interest in the governmental writing was required to outweigh the interest of the *community* in preventing disclosure; *Mathews* emphasized the *state* interest.

119. Opinion No. 66-6, 1966 OP. ARIZ. ATT'Y GEN. 12, 14; *cf.* Mathews v. Pyle, 75 Ariz. 76, 80, 251 P.2d 893, 896 (1952). *See also* discussion note 124 *infra*. Some states statutorily require that the demandant be a "citizen." *See, e.g.*, CAL. GOV'T CODE § 6253 (West Supp. 1974); IOWA CODE § 68A.2 (1973); PA. STAT. ANN. tit. 65, § 66.2 (1959).

120. *See* text accompanying note 99 *supra*. The common law rule limits inspection to lawful, proper, or legitimate purposes. H. CROSS, *supra* note 3, at 35-36.

121. ARIZ. REV. STAT. ANN. § 39-121 (1974).

burden on parties seeking disclosure and acts to unnecessarily insulate the government from the people it represents.[122]

Remedies

A right to inspect public records is meaningless if it cannot be enforced. In analyzing the scope and consequences of public access, the final question, then, inquires into the legal remedies available in cases of statutory violations. There are three possible remedies currently available in Arizona. Courts can force disclosure through a special action in the nature of mandamus or prevent improper disclosure by injunction; officials violating the statutes can be punished through civil or criminal sanctions; and damages may be recovered in tort actions against officials who improperly deny or disclose information.

No specific remedy is set forth in the Arizona public records statute; however, a mandamus action was permitted in *Mathews.* The first requirement of this remedy is that the petitioner show a beneficial interest in the document sought.[123] Although this requirement has been liberally construed,[124] an interest founded solely on the demandant being a "person," as provided in the public records statute,[125] may not be sufficient to gain access to all government materials.[126] The mandamus action also requires that the petitioner have demanded access to the document or records sought.[127] Difficulty may arise when the party is unable to specify the document or information with enough particularity for the court to determine what information and, thus, what interests are involved.[128] In spite of these difficulties, mandamus can

122. *See* discussion note 117 *supra.*

123. ARIZ. REV. STAT. ANN. § 12-2021 (1974). For an analysis of mandamus actions in Arizona, see commentaries cited note 83 *supra.*

124. *See* Barry v. Phoenix Union High School Dist., 67 Ariz. 384, 387, 107 P.2d 533, 536 (1948). "One is beneficially interested in a proceeding if one has a special right in the matter involved so that the decision affects it even adversely for one has a right to have the right protected." *Id., quoting from* Nelson v. Ecklund, 68 N.D. 724, 729, 283 N.W. 273, 275 (1938).

125. ARIZ. REV. STAT. ANN. § 39-121 (1974).

126. *See* text & note 117 *supra.*

127. The general rule is that an individual must exhaust his administrative remedies before seeking judicial review of an administrative act. Kaufman v. Pima Junior College Governing Bd., 14 Ariz. App. 475, 484 P.2d 244 (1971). *But see* discussion note 84 *supra.*

128. *Cf.* Industrial Comm'n v. Holohan, 97 Ariz. 122, 397 P.2d 624 (1964); City of Phoenix v. Peterson, 11 Ariz. App. 136, 462 P.2d 829 (1969). Both cases involved proceedings for writs of prohibition to restrain the enforcement of orders for inspection of documents to be used as evidence in court. The courts dealt with one condition necessary for the production and inspection of documents—that the material requested be designated with reasonable definiteness and particularity. Prohibition was granted in each case upon findings that the requests were too broad in scope because the petitioners had failed to exclude privileged and irrelevant materials.

be a speedy method of enforcing rights for those willing and financially able to go to court.

Arizona's criminal penalties applicable to public documents provide limited assurance that the information sought will be divulged. Sanctions can be applied against officials supplying falsified documents[129] or willfully concealing documents[130] sought for evidentiary purposes. A penalty of this type cannot be applied, however, unless the seeking party knows of the existence and truth of the information sought or has reason to suspect that the document supplied has been altered. The effectiveness of these sanctions is further limited since they are available only when the document is sought as evidence in a trial or pursuant to an investigation authorized by law.[131] Consequently, the effectiveness of these sanctions is extremely limited when access to public documents is sought for purposes other than litigation. To be effective as a deterrent against improper secrecy, criminal penalties must be applicable to willful actions of public officials and must govern all requests for records rather than being limited to cases of court-authorized discovery.

Although most actions relating to public records are likely to be directed towards gaining access, there may be instances in which private interests in nondisclosure may be predominant. In such a case, if disclosure cannot be prevented, damages in tort may be recoverable.[132] This action should be allowed only in cases involving official acts done in bad faith or with malice.[133] To allow damages for good faith disclosure of records would make officials unnecessarily wary of any potential harm that could result from their acts. Excessive caution would limit the right to access since the initial determination of the current statutory right relies on the freely applied discretion of the records custodian.

An additional remedy not available in Arizona but provided for by statutes in four states allows removal of an official from office for

129. ARIZ. REV. STAT. ANN. § 13-547(A) (1974) (felony to supply false document represented as genuine where document is to be used as evidence in a trial or in an investigation authorized by law).

130. *Id.* § 13-547(B) (misdemeanor to willfully conceal a document sought as evidence in a trial or in an investigation authorized by law).

131. *Id.* § 13-547.

132. *See* Elder v. Anderson, 205 Cal. App. 2d 329, 23 Cal. Rptr. 48 (Ct. App. 1962). Legislation subsequent to the *Elder* case excused error on the part of public employees acting with due care. *See* discussion note 133 *infra.*

133. CAL. GOV'T CODE § 820.4 (West 1966), provides: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law." Section 820.2 provides: "[W]hether or not . . . discretion be abused" a public employee will not be liable for injury resulting from an exercise of discretion vested in him. The beneficial effect on access to records of limiting liability in this way is discussed in Comment, *supra* note 79, at 1678-79.

improperly withholding or disclosing a governmental document.[134] The viability of this penalty is questionable,[135] especially since the courts rarely, if ever, apply the sanction. Courts attempting to enforce this type of sanction are faced with two considerations which mitigate against its use. First, since the statutory provisions governing disclosure are so vague, it is difficult to penalize an official so severely for failing to properly weigh the competing interests involved. This difficulty may be overcome through safeguards for officials who act in good faith and by limiting prosecutions to repeated offenders. A second consideration—the severity and disruptive effect of the sanction—also negates this remedy's usefulness. Where adequate procedures exist to compel disclosure, the public interest in viewing governmental information appears to be sufficiently protected. Additionally, penalties are available to serve as a deterrent to willful conduct and to satisfy any need for retribution without also requiring removal of the custodial official who refuses to release documents. If the violation is excessive, the election process, coupled with public pressure, should provide adequate protection of public interests. This would avoid the possible administrative disruption and official caution that would result from the fear of premature removal from office.

Copying and Access

Any request for documents involves the practical considerations of locating and supplying them and of providing a means for the demandant to copy the desired information. Nevertheless, these practical concerns are not covered by the Arizona public records statute. While it is difficult to imagine a public right to inspect public documents without a corresponding right to copy them, Arizona has no such provision. Arizona's apparent refusal[136] to imply a right to copy or photocopy public records is inconsistent with the usual construction of general access statutes.[137]

Another difficulty in this area is that the Arizona statute grants

134. *See* FLA. STAT. ANN. § 119.02 (1960); KAN. STAT. ANN. § 45-203 (1963); MO. ANN. STAT. § 109.180 (Vernon 1966); NEB. REV. STAT. § 84-712.03 (1971).

135. However, one commentator recommends removal as the most effective method of ensuring enforcement of public access statutes. Wickham, *supra* note 21, at 498-99.

136. "Unless specific legislation provides otherwise, a public officer need not make or furnish copies of records in his office to the public. The right of inspection is merely that, and is confined to times during office hours." Opinion No. 70-1, 1970 OP. ARIZ. ATT'Y GEN. 1, 4. California, on the other hand, provides that a copy of any identifiable public record will be furnished upon request and payment of a reasonable fee. CAL. GOV'T CODE §§ 6256, 6257 (West Supp. 1974).

137. *See, e.g.*, Whorton v. Gaspard, 239 Ark. 715, 393 S.W.2d 773 (1965); Gibson v. Peller, 34 Ill. App. 2d 372, 181 N.E.2d 376 (1962); Direct-Mail Service v. Registrar of Motor Vehicles, 296 Mass. 353, 5 N.E.2d 545 (1937); Moore v. Board of Chosen Freeholders, 39 N.J. 26, 186 A.2d 676 (1962).

the right of inspection "at all times during office hours"[138] with little regard for the protection of records from loss and destruction or the potential disruption of the office routine. While courts generally recognize reasonable restrictions on public access,[139] a provision for agency rules concerning timing and expense of inspection and duplication would benefit the functioning of agencies and consummate the statutory right.

Summary

Legislative redefinition of the public's right of access to government documents is necessary in Arizona. Current standards leave too much discretion in agencies whose administrators may feel that business involving the public is not the public's business. Greater statutory specificity is required to guide public requests for access and the determinations of the public officials and the courts in granting these requests. Valid interests in nondisclosure should be recognized statutorily by subject matter, and a corresponding presumption favoring public access should be placed on all other governmental records, leaving a heavy burden on the custodial agent to show the need for secrecy.

The solution of these problems is best attained through legislative rather than judicial action. Judicial interpretation of the public records act already has resulted in unnecessary burdens on public access to governmental records by limiting who may seek disclosure, thus creating an implied presumption in favor of nondisclosure. Reversal of this trend requires legislative recognition of the public's right to know of information which serves as the basis for governmental decisions.

CONCLUSION

Legislative resolution of the difficulties involved in applying Arizona's statutes concerning access to governmental meetings and records is necessary to remove the existing restrictions imposed upon the public's search for information.[140] Although legitimate interests in the functioning of government sometimes will require confidentiality, restrictions on access are best stated in specific statutory exceptions

138. ARIZ. REV. STAT. ANN. § 39-121 (1974).

139. *See, e.g.*, Whorton v. Gaspard, 239 Ark. 715, 393 S.W.2d 773 (1965); Pressman v. Elgin, 187 Md. 446, 50 A.2d 560 (1947); Direct-Mail Service v. Registrar of Motor Vehicles, 296 Mass. 353, 5 N.E.2d 545 (1937); Petterson v. Ayers, 171 Ohio St. 368, 171 N.E.2d 508 (1960).

140. For an argument that the development of rules granting public access to governmental information is purely a local matter, see Sato, *"Municipal Affairs" in California*, 60 CALIF. L. REV. 1055, 1081-84 (1972).

rather than generally worded provisions. Specific statutes will serve as better guidelines by which administrators can balance the community interests in governmental secrecy against the public's right to know of the workings of its government. This could lessen the possibility of improper secrecy by providing notice of the limits of governmental privilege. Specific statutory delineation of policy also might serve to reduce litigation and, where litigation is unavoidable, serve as a guide for judicial interpretation. Lengthy delay in court proceedings and appeals, coupled with the high cost of litigation, can serve only to discourage the assertion of rights even where the eventual result is obvious. Sanctions, if applied, must address themselves to actual, willful conduct in order to avoid compounding the problems involved in public reliance on regulations or punishing unintentional acts and good faith attempts of public officials to abide by the laws.

APPENDIX

The following Model Public Records Act is intended to serve as a guide for future legislation. The preceding analysis of existing legislation shows both the inadequacy of current statutory provisions and the need for specific delineation of the public right of access to governmental records. These considerations are coupled with provisions from other states' statutes[141] to provide a model act which specifically protects governmental interests requiring confidentiality while raising a presumption of availability in all other areas.

MODEL PUBLIC RECORDS ACT

§ 1. *Declaration of Policy*

It is the intent of the Legislature that these provisions be construed liberally to provide every person with access to information concerning the conduct of governing bodies.

§ 2. *Definitions*

A. "Public record" includes the portion of any written or recorded material, regardless of physical form, which contains information on: the receipt or disbursement of funds by a governing body; its acquisition, use, or disposal of property; any action by a governing body fixing the rights, privileges, immunities, duties, or obligations of any persons; or its dispensation or termination of services.

B. "Governing body" includes any individual or group within the executive or legislative department of the state or any of its political subdivisions, which is supported in whole or in part by public funds or is authorized to spend public funds, and also includes any advisory board or subcommittee or other subordinate group of the above bodies.

§ 3. *Public Records Open to Inspection*

Except as hereafter provided, public records are open to inspection by any person during the normal office hours of a governing body. Every governing body may adopt reasonable regulations stating the procedures to be followed when making its records available in accordance with this Act.

141. *See* CAL. GOV'T CODE §§ 6250-60 (West Supp. 1974); IOWA CODE ANN. §§ 28A.1-.8 (Supp. 1974); MD. ANN. CODE art. 76A (Supp. 1973); TEX. REV. CIV. STAT. ANN. §§ 6252-17 to -17(a) (Supp. 1974).

§ 4. *Public Records: Right to Copy; Fee*

Any person may receive a copy of any identifiable public record or copy thereof upon payment of either a reasonable fee or deposit as established by the governing body or, where applicable, a prescribed statutory fee.

§ 5. *Records Exempt from Disclosure Requirements*

A. Nothing in this Act requires disclosure of records that are:

1. Records deemed confidential by statute.
2. Records pertaining to pending litigation:
   (a) if the governing body is or may be a party; or
   (b) if an officer or employee of the governing body is or may be a party in his official capacity; and
   (c) if the attorney general or the respective attorneys of the parties have determined that the records should be withheld from public inspection.
3. Personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, provided, however, that all information in personnel files of an individual employee within a governing body is to be made available to that individual employee or his designated representative.
4. Correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy.
5. Student records at educational institutions funded, wholly or in part, by state revenue, but such records shall be made available upon request by educational institution personnel, the student involved or his agent, or that student's parents or guardian if he is under the age of majority.
6. Geological and geophysical information and plant production data and similar information which is obtained in confidence from any person or business.
7. Information pertaining to the use or acquisition of property for public purposes before public announcement of the project, and information pertaining to appraisals or purchase price of property for public purposes before the formal award of contracts therefor.
8. Records of law enforcement agencies that deal with the detection and investigation of crime, and the internal records and notations of such law enforcement agencies which are maintained

for internal use in matters relating to law enforcement; however, records of current and prior arrests and convictions shall be public records.

B. The governing body must justify withholding any record by demonstrating that the record in question is exempt under express provision of this Act or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

C. Nothing in this section is to be construed as preventing a governing body, after a proper determination that disclosure would serve the public interest, from opening its records to public inspection.

§ 6. *Enforcement*

Any person aggrieved by a violation of this Act may bring a special action to enforce its provisions in the superior court of the county where the violation has taken place or will take place. The court shall grant disclosure of the specific public record unless, after an in camera review of the information, it finds that such disclosure is forbidden by specific provision of law or would substantially and irreparably injure any person. In a suit brought under this section, a successful plaintiff shall receive his reasonable attorney fees to be paid by the defendant governing body.

§ 7. *Penalties*

Any person who willfully discloses or withholds a record in violation of this Act is guilty of a misdemeanor punishable by a fine of not less than $100 nor more than $500. Reasonable delay by any person in order to seek an injunction is not a violation of this section if such person believes in good faith that he is entitled to an injunction restraining the examination of such record.

§ 8. *Severability*

The provisions of this Act are severable to the extent that the invalidity of any provision of this Act or the application thereof to any person or circumstances does not affect other provision or applications of the Act which can be given effect without the invalid provision or application.