

**CONNECTICUT FOUNDATION FOR OPEN GOVERNMENT
WHITE PAPER**



PRIVACY AND THE PUBLIC'S RIGHT TO KNOW

CONTENTS

	<u>PAGE</u>
Executive Summary	1
The Connecticut Foundation for Open Government, Inc.	2
Introduction	3
Freedom of Information in Connecticut	6
The Right to Privacy	9
Conclusion	14
Appendix	16
List of Privacy-Based Exemptions in Connecticut's Freedom of Information Act	

EXECUTIVE SUMMARY

The Connecticut Foundation for Open Government, Inc. (CFOG) is a tax-exempt, not-for-profit educational organization, whose mission is to promote the open and accountable government essential in a democratic society.

This paper provides an informational context in which to consider the interface between personal privacy and the public's right to know what its government is doing. The paper presents an overview of the state's experience with Freedom of Information (FOI) followed by an exposition on what is commonly referred to as the "right to privacy." It also addresses pertinent public policy issues involving these two fundamental legal constructs, before offering its conclusion.

Both the right to privacy and FOI are considered fundamental human rights.

FOI generally refers to laws and policies dealing with people's access to government records or information. It also may impose requirements for open public meetings. The purpose of all FOI laws is to provide "transparency" in government, so that people can understand what their government is doing. Democratic societies require the accountability of government officials to the people who elect them.

From questions of abortion to the secret taping of conversations by law enforcement agencies, invasion of privacy is a serious matter for many people. The word "privacy" itself, however, means different things to different people. It often invokes strong, almost visceral feelings. For the right to privacy is supposed to protect people from unwarranted intrusions into their personal lives. Yet the right to privacy does not generally cover information for which there is a legitimate public interest in disclosure.

Courts place constitutional privacy rights under two general headings. The first is the "autonomy branch" and treats the right to be free from *unwarranted* governmental intrusions in areas specified in the Bill of Rights. This branch also implicitly curtails government control and action in matters involving the most intimate aspects of people's lives, such as marriage, procreation and child rearing. The second heading is the "confidentiality branch," which limits the dissemination of sensitive personal information kept in government files, such as medical and financial records.

Today, either by statutory or common law, courts remedy invasions of privacy for acts that are so outrageous as to offend a person of ordinary sensibilities, including the disclosure of embarrassing personal facts that are highly offensive to a reasonable person and that are not of legitimate public concern.

CFOG believes that it is important to understand what is included in the right to privacy – and what is not. It also believes that it is important to understand the importance of FOI laws to the continuation of a viable democratic society. People must understand how a claim of privacy can be abused by those seeking to monopolize information – including government officials – so they can maintain or increase their power over society. Armed with this knowledge, hopefully society can meet this threat and thereby preserve the personal independence and freedom of its members, while also ensuring that society as a whole is being well-served by its governments.

THE CONNECTICUT FOUNDATION FOR OPEN GOVERNMENT, INC.

The Connecticut Foundation for Open Government, Inc.¹ (CFOG) is a tax-exempt, not-for-profit educational organization, whose mission is to promote the open and accountable government essential in a democratic society. It seeks to achieve this by educating policymakers and citizens in general on the need for a free flow of information on all public policy matters.

CFOG's programs are carried out by a volunteer Board of Directors drawn from the media, academe, the law, business and government. CFOG sponsors an annual conference for Connecticut's state and municipal officials on Freedom of Information issues. It has underwritten the costs of surveys of government agencies designed to measure compliance with Connecticut's Freedom of Information laws. It sponsors an annual essay contest for high school students on Right to Know and First Amendment issues. It periodically honors with its Walter Cronkite Award a national figure who embodies Open Government principles. Recipients have included Mr. Cronkite, Louis Boccardi, former president of the Associated Press, Jim Lehrer, former executive editor and anchor of the NewsHour on Public Television, and Seymour Hersh and Bob Woodward, noted journalists and authors.

CFOG also holds public policy symposia, such as the first ever "*National Privacy and Public Policy Symposium*;" "*Striking the Balance: Open Government in the Age of Terrorism*;" "*The Need for Connecticut to Enact a News Media Shield Law*;" and most recently "*The Right to Record: Examining the Public and the Media's Right to Record Police Activities*." In addition, CFOG publishes public policy papers, such as this one, on topics related to its mission.

CFOG's funding comes from its membership, contributions from the public, fees from its programs, and grants from the National Freedom of Information Coalition and the John S. and James L. Knight Foundation.

¹ Visit The Connecticut Foundation for Open Government website at www.ctfog.org.

INTRODUCTION²

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights.³

Article 12 of the Declaration reads:

“No one shall be subjected to *arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*”⁴

Article 19 of the same document reads:

“Everyone has the right to freedom of opinion and expression; *this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*”⁵

Thus, both the right to privacy and Freedom of Information (FOI) are deemed to be fundamental human rights, which may not be *arbitrarily* abridged by government.

Historically in the United States, the public – including the news media – had very limited rights under the law to gain access to government information – even that which is important for citizens to know in their capacity as electors in a democratic society.⁶ Because of these long-standing holes in American law, the Congress and state legislatures - particularly after the so-called “Watergate” scandals of the 1970s - decided to pass statutes that gave greater rights to the public – including the news media – to gain access to government records and proceedings. In the United States, these laws are called FOI Acts.⁷

FOI generally refers to laws and policies dealing with people’s access to government records or information. FOI laws usually consist of an open public records component, which provides the right to access most records of government bodies, and they may contain an open public meetings component (sometimes called a “Government in the Sunshine” law), which provides the right to attend most meetings of most public bodies.⁸

² Much of the material in this White Paper comes directly from the book *Piercing the Veil of Secrecy: Lessons in the Fight for Freedom of Information* (New Britain, CT: LawFirst Publishing, 2010) by Mitchell W. Pearlman (hereinafter “Pearlman”), Lecturer in Law and Journalism at the University of Connecticut, and is republished here with the author’s permission. The opinions and conclusions stated herein, however, reflect the views of CFOG, as approved by its board of directors.

³ Found at <http://www.un.org/en/documents/udhr/index.shtml>, visited August 23, 2013.

⁴ Id.

⁵ Id.

⁶ Robert Trager, Joseph Russomanno and Susan Dente Ross, *The Law of Journalism and Mass Communication*, 3rd ed. (Washington DC: CQ Press, 2012), 322; Pearlman, *supra* at 30.

⁷ Trager et al., id. at 348-350; Pearlman, id. at 30.

⁸ Pearlman, id. at 9.

The purpose of all FOI laws is to provide “transparency” in government, so that people can see and understand what their government is doing.⁹ This purpose was best articulated by James Madison, fourth President of the United States, who wrote:

“A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.... A people who mean to be their own Governor, must arm themselves with the power which knowledge gives.”¹⁰

Simply stated, democratic societies require the accountability of government officials to the people who elect them.

Thus, under all FOI laws, there is a presumption that government information is open to the public, unless specifically exempt from disclosure.¹¹ The burden is on the party seeking to avoid disclosure (usually the government) to prove that the information should not be disclosed; the burden is *never* on the requester to prove that he/she is entitled to the information.¹²

A necessary corollary to the presumption of openness is that exceptions to public disclosure must be interpreted narrowly.¹³ While some exceptions to disclosure are mandatory by law, and the subject information must be kept confidential, other exemptions to disclosure are merely discretionary.¹⁴ Information that is discretionarily exempt can be disclosed – and should be disclosed – unless there is a good reason not to disclose it.

From questions about abortion to the secret taping of conversations by law enforcement agencies, invasion of privacy has become a serious matter for many people. For the right to privacy supposedly protects people from unwarranted intrusions into their personal lives.

The word “privacy” itself means different things to different people. It often invokes strong, visceral feelings. Much of the visceral feelings about privacy, however, derives from a desire to be invisible to potential malefactors in an increasingly violent world.

The Declaration of Independence speaks of the “unalienable rights” to “life, liberty and the pursuit of happiness.” This expressed the concern of our country’s founders for the right to be left alone. And although the word “privacy” itself does not appear in the Constitution, concern for it is manifested throughout the Bill of Rights. The First Amendment, for instance, bans the establishment of state religions and prohibits government from interfering with our practice of religion. And the Fourth Amendment forbids unreasonable searches and seizures.

⁹ Id.

¹⁰ James Madison, Letter to W.T. Barry, August 4, 1822, cited at Pearlman, *Piercing the Veil of Secrecy*, supra at 11.

¹¹ E.g., *Board of Trustees of Woodstock Academy v. Freedom of Information Commission*, 181 Conn. 544, 550 (1980).

¹² *Wilson v. Freedom of Information Commission*, 181 Conn. 324, 329 (1980).

¹³ E.g., *Perkins v. Freedom of Information Commission*, 228 Conn. 158, 167 (1993).

¹⁴ Pearlman, supra at 15.

Until fairly recently, however, little attention has been paid to what is now called “informational privacy” and invasions of privacy by a person against another person. As the nation’s society changed from one consisting of mainly smaller, more rural communities to one of larger, more urban and impersonal ones, questions of non-governmental invasions of privacy seemingly became more important. Some people felt that the mass circulation news media had gone too far in prying into private lives and in publishing articles which, though essentially true and therefore not libelous, proved embarrassing and harmful to the reputations of upstanding citizens.¹⁵

This was the case in 1890 when Louis Brandeis and Samuel Warren published what was to become the seminal article, entitled “The Right to Privacy,” in the *Harvard Law Review*,¹⁶ in which they advocated the creation of a new tort (civil wrong) for the publication of truthful but embarrassing information harmful to the reputations of good citizens.¹⁷

The purpose of this White Paper is to provide an informational context in which to consider the interface between personal privacy and the public’s right to know what the Government of the State of Connecticut is doing in the public’s name and under the sovereign authority the citizens of that state have delegated to their government.

The paper will present an overview of this state’s experience with FOI followed by an exposition on what is commonly referred to as the “right to privacy.” The paper will then address some of the pertinent public policy issues involving these two fundamental legal constructs, before offering its conclusion.

CFOG hopes that the contents of this paper will assist Connecticut policy-makers and citizens in reaching appropriate judgments in their attempt to enhance access to government information – the cornerstone of democracy – while respecting the legitimate concerns of those who seek to protect personal sensibilities.

¹⁵ Id. at 54.

¹⁶ *Harvard Law Review*, V. IV, No. 5, December 1890.

¹⁷ Id.

FREEDOM OF INFORMATION IN CONNECTICUT

The Connecticut FOI Act was passed by the General Assembly unanimously and signed into law by Governor Ella Grasso as a signature piece of legislation in 1975.¹⁸ It was a total revision of a previous "Right to Know" law originally enacted in the 1950s.¹⁹

The rationale behind the law is perhaps best expressed in what was to be the preamble to the act:

"The legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy, that the people have a right to be fully informed of the action taken by public agencies in order that they may retain control over the instruments they have created; that the people do not yield their sovereignty to the agencies which serve them; that the people in delegating authority do not give their public servants the right to decide what is good for them to know and that it is the intent of the law that actions taken by public agencies be taken openly and their deliberations be conducted openly and that the record of all public agencies be open to the public except in those instances where a superior public interest requires confidentiality."²⁰

When Connecticut passed its FOI Act in 1975, it contained just 10 exemptions to disclosure.²¹ As of this date, the act now contains more than 27 exemptions.²² And this does not take into account the untold number of exclusions and exceptions to public disclosure legislated in other parts of the General Statutes.²³

In addition to the creation of a multitude of statutory exemptions to the FOI Act, Connecticut – like every other jurisdiction – has a bureaucratic culture of secrecy. All one need do is read how poorly government personnel in Connecticut performed in responding to surveys of FOI compliance by state agencies.²⁴ And the results of these surveys generally agree with other surveys and audits conducted elsewhere in the country.²⁵

¹⁸ P.A. 75-342.

¹⁹ See legislative history of Conn. Gen. Stat. §1-210 (formerly Conn. Gen. Stat. §1-19).

²⁰ 18 CONN. S. PROC., Pt. 5, 1975 Sess. 2323-2324 (May 21, 1975) (remarks of Senator Julianelle) 18 CONN. H. R. PROC. Pt. 8, 1975 Sess. 3911 (May 16, 1975) (remarks of Representative Burke).

²¹ P.A. 75-342, §2(b), Conn. Gen. Stat. §1-210 (b) (formerly Conn. Gen. Stat. §1-19(b)).

²² Conn. Gen. Stat. §1-210(b). See the Appendix for a list of privacy-based exemptions to public disclosure in Connecticut's FOI Act.

²³ E.g., the legislature specifically exempted the University of Connecticut Foundation from the disclosure provisions of the FOI Act. See Conn. Gen. Stat. §4-37f (9).

²⁴ See "Access to Public Records in Connecticut: A Survey of Compliance by State Agencies with the Freedom of Information Act" (2001), found at http://www.state.ct.us/foi/Access_Survey/2001%20Public%20Access%20Survey/Survey%20-%20Section%201.htm, visited August 23, 2013.

²⁵ See National Freedom of Information Coalition web site, found at <http://www.nfoic.org/search/node> (enter keyword: "audits"), visited August 23, 2013.

It is in the enforcement aspect of FOI, however, that Connecticut has become a world leader with the creation of its first-of-its-kind Freedom of Information Commission.²⁶ There was nothing particularly unique about the access to information provisions of Connecticut's FOI Act when it was enacted in 1975.²⁷ What was unique about the law was that it for the first time established an independent administrative tribunal, comprised of citizen-commissioners, and empowered that tribunal to issue orders enforcing disclosure of government information.²⁸ The commission then organized itself so that it could be used by average people, without lawyers, to provide a relatively speedy and inexpensive mechanism to resolve FOI disputes.²⁹

According to its web site:

"The FOI Commission hears complaints from persons who have been denied access to the records or meetings of public agencies in Connecticut. Any person denied the right to inspect, or to get a copy of a public record, or denied access to a meeting of a public agency, may file a complaint against the public agency within 30 days of the denial. The FOI Commission will conduct a hearing on the complaint, which hearing is attended by the complainant and the public agency. A decision is then rendered by the FOI Commission finding the public agency either in violation of the FOI Act or dismissing the complaint if the public agency is found not to have violated the FOI Act. If the public agency has violated the FOI Act, the FOI Commission can order the disclosure of public records, null and void a decision reached during a public meeting, or impose other appropriate relief. In many instances, a hearing is not necessary as the parties are able to resolve their differences with the assistance of an FOI staff attorney, who acts as an ombudsman.

The FOI Commission also conducts educational workshops and speaking engagements for public agencies throughout the State of Connecticut [and the] ... Commission's legal staff is authorized to represent the Commission in all matters affecting the Commission, and to defend Commission decisions that are appealed, in the superior and appellate courts."³⁰

Although many officials do not like the idea of having such an independent oversight body to redress secrecy in government, the public and their advocates have embraced this approach and the work of the commission.³¹ Over time, government officials and the news media throughout the United States became aware of the Connecticut experience.³² And where other jurisdictions' systems to guarantee FOI rights failed because such systems were essentially illusory,

²⁶ Mitchell W. Pearlman, *Connecticut and the World of FOI*, The Connecticut Lawyer, vol.14, no. 3, p. 22 (New Britain CT: Connecticut Bar Association, November 2003).

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ See <http://www.ct.gov/foi/cwp/view.asp?a=3171&q=488272>, visited August 23, 2013.

³¹ Pearlman, *Connecticut and the World of FOI*, supra.

³² Id.

politically-based, or too expensive and time-consuming, Connecticut was held up as the model of a successful open government regime because of its enforcement agency, the FOI Commission.³³

³³ Id.

THE RIGHT TO PRIVACY

From questions of abortion to the secret taping of conversations by law enforcement agencies, invasion of privacy is a serious matter for many people. For the right to privacy supposedly protects people from unwarranted intrusions into their personal lives.

Courts place constitutional privacy rights under two general headings.³⁴ The first is the “autonomy branch” and treats people’s right to be free from unwarranted governmental intrusions in areas specified in the Bill of Rights.³⁵ This branch also implicitly curtails government control and action in matters involving the most intimate aspects of people’s lives, such as marriage, procreation and child rearing.³⁶ The second heading is the confidentiality branch³⁷ and limits the dissemination of sensitive personal information kept in government files, such as medical and financial records.³⁸

Today, by either statutory or common law, courts are employed to remedy invasions of privacy which strike at human dignity.³⁹

Privacy lawsuits can be brought against another person for such actions as:

- The use of a name or likeness without permission
- Intrusion into a person’s seclusion, solitude or private affairs
- Publicity that places a person in a false light⁴⁰
- The publication of embarrassing personal facts

Of particular interest is the publication of embarrassing personal facts. This tort differs from libel in two major respects:

- First, the privacy tort requires that the publicity be to a large number of people⁴¹
- Second, the information communicated must be true⁴²

In addition, the person who claims an invasion of privacy must prove that the information was indeed private before there was publicity.⁴³ If the information is shown to have been private,

³⁴ Pearlman, *supra* at 53.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Trager et al., *supra* at 228.

⁴⁰ *Id.*

⁴¹ *Id.* at 265.

⁴² *Id.* at 259.

⁴³ *Id.* at 262.

that person must then prove that the material is (1) highly offensive to a reasonable person (not an overly sensitive one) *and* (2) is not of legitimate public concern.⁴⁴

The following questions have been held to be relevant to determine what highly offensive material is:

- How much public interest or importance is there in the material
- How deeply do these facts intrude into an individual's privacy
- How public or private is the individual in the story⁴⁵

It is often difficult to prove that published material does not relate to a matter of public interest or concern. On the other hand, it is interesting to note that the Associated Press Media Editors (APME) Ethical Principles state: "The newspaper should uphold the right of free speech and freedom of the press and should respect the individual's right to privacy."⁴⁶ And the National Press Photographers Association Code of Ethics reads: "Treat all subjects with respect and dignity. Give special consideration to vulnerable subjects and compassion to victims of crime or tragedy. Intrude on private moments of grief only when the public has an overriding and justifiable need to see."⁴⁷

In addition, Congress and state legislatures have enacted numerous laws that theoretically protect the right to privacy. Some of these laws promise confidentiality for certain government-kept documents, like tax, welfare and education records.⁴⁸ Others proscribe electronic surveillance, except in specified circumstances.⁴⁹ And there are now statutes permitting individuals to see some private, and most government, records about themselves.⁵⁰

Thus, many American states (including Connecticut⁵¹), the federal government, and many nations and groups of nations internationally, including the European Union, have enacted so-called "Personal Data" or "Privacy" Acts.

In general, these laws provide for the security of government (and in some instances non-government) records that contain "Personal Data" or "Personal Information."⁵² The definition of "Personal Data" or "Personal Information" typically includes any information about a person's education, finances, medical or emotional condition or history, employment or business history,

⁴⁴ Id. at 260; *Perkins*, supra at 172.

⁴⁵ Trager et al., supra at 259-269.

⁴⁶ APME Statement of Ethical Principles (adopted 1994 as revision to APME Code of Ethics), found at <http://www.apme.com/?page=EthicsStatement&hhSearchTerms=privacy>, visited August 26, 2013.

⁴⁷ National Press Photographers Association Code of Ethics, found at https://nppa.org/code_of_ethics, visited August 26, 2013.

⁴⁸ Pearlman, supra at 54.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ See Conn. Gen. Stat. §4-190 et seq.

⁵² E.g., Conn. Gen. Stat. §4-193.

family or personal relationships, reputation or character which because of name, identifying number, mark or description can be readily associated with a particular person.⁵³

Among other things, “Personal Data” laws typically give the data subjects certain rights, including the right to see all records about them and demand that inaccurate records be corrected.⁵⁴ If the holder of the record refuses to correct the record, the holder must then disclose the record-subject’s version of what the record should properly state to any person to whom the record is disclosed.⁵⁵ The subject of the Personal Data may also sue in court for any violation of the law.⁵⁶

As noted above, however, the right to privacy does not generally cover information for which there is a legitimate public interest in disclosure.⁵⁷ Of course, what is or is not of legitimate public interest is often a matter of dispute. Everyone might agree there is a legitimate public interest in knowing of an outbreak of a highly communicable disease. But there are conflicting opinions over whether the public should know the names of those individuals afflicted with that disease, even though they might pose a health risk to those who come into contact with them.

The right to privacy, at least as to facts of a personal nature, also depends on the subject’s position or status. Those who occupy positions of public prominence, or who thrust themselves (or are thrust) into the public eye, are called “public figures.”⁵⁸ There is even such a thing as an “involuntary public figure,” who by virtue of unforeseen or unintended circumstances, is thrust into the role of a public figure.⁵⁹ As the spectrum of public prominence is traversed from average citizens to the most notable public figures, the corresponding right to privacy diminishes.⁶⁰

Today, the disclosure of personal information has taken on a new, more troublesome dimension as governments are becoming ever more intrusive into people’s personal lives. Indeed, technology has made government surveillance activities more pervasive by means of surreptitious communications intercepts, security cameras, electronic and satellite tracking devices and computer-assisted analysis of personal business transactions.⁶¹

Ostensibly, these intrusions have been authorized under laws – such as the USA PATRIOT ACT⁶² – for security and law enforcement reasons. But they nonetheless have resulted in the collection in government databases of massive amounts of personal information about innocent people (who often do not even know that the information has been collected) that have been disclosed intentionally and unintentionally, legally and illegally. The contents of these databases are uncannily reminiscent of the dossiers kept by such notorious secret police as the East German *Stasi*.⁶³

⁵³ E.g., Conn. Gen. Stat. §4-190(9).

⁵⁴ E.g., Conn. Gen. Stat. §4-193.

⁵⁵ E.g., Conn. Gen. Stat. §4-193.

⁵⁶ E.g., Conn. Gen. Stat. §4-195.

⁵⁷ See *supra*, fn. 43.

⁵⁸ Trager et al., *supra* at 170; Pearlman, *supra* at 55.

⁵⁹ Trager, *supra* at 172.

⁶⁰ Pearlman, *supra* at 55.

⁶¹ *Id.* at 106.

⁶² Public Law 107-56 (Oct. 26, 2001), as amended and reauthorized, 115 Stat. 356

⁶³ Pearlman, *supra* at 89-90.

It seems that all too frequently the public's instinct for privacy is being invoked as a shield to block disclosure of government information to which the public is legitimately entitled. Many government officials prey upon this instinct by using the terminology of privacy to justify keeping information from the public that the public has a right to know. Sometimes they even employ the word "privacy" when they are talking about something entirely different – such as personal security issues. Thus, the perception and reality of what actually constitutes privacy are issues that must be addressed and properly reconciled with the public's right to know.

In the United States, the word "privacy" is often used to describe laws seemingly designed to keep information confidential. But information is no longer truly private when it has been disclosed to a government agency or private entity through legal or economic compulsion – or even voluntarily (for example, to gain some benefit such as a price discount).⁶⁴

People are frequently asked to provide such personal information as name, address, date and place of birth, marital and parental status, race, employment history, as well as telephone, bank account, credit card, social security or other identifying numbers. This information exists in government documents, such as vital statistics certificates, drivers' licenses, passports and tax records. They also exist, however, in the records of non-governmental entities with which people do business on a daily basis, such as stores, credit bureaus, real estate and mortgage companies, banks, utilities, and employers.⁶⁵

Although most Personal Information maintained by government is supposed to be kept confidential, some information such as date of birth, marital status and date and cause of death are generally considered public facts that have legal and social consequences in the community. Therefore, they are routinely disclosed publicly.⁶⁶ In the United States, it is left mainly to the private sector to set confidentiality – or so-called "fair information practices" – policies as they see fit.⁶⁷ These organizations are not required to adhere to a defined set of statutory duties. In other countries, the protection of "Personal Data" often is obligatory by law in both the public and private sectors.⁶⁸ But the difference in the nomenclature of our laws and the laws of other countries illuminates the essential point here.

In other countries, such laws typically use the term "data protection" rather than "privacy" to describe them.⁶⁹ This is a more accurate expression for what these laws are supposed to do – i.e., keep personal information secure from further unauthorized disclosure. "Data protection" does not implicate a misleading notion of "privacy" that is meant to appeal to some visceral sense of the word.

So, in one way or another, much personal information is available in the public domain – legally or illegally. In reality then, so-called "privacy" laws and policies provide relatively little practical protection. But by defining "personal Information" or "Personal Data" broadly under the rubric of protecting personal privacy, these laws and policies go well beyond their purported purpose of

⁶⁴ Trager et al, *supra* at 261.

⁶⁵ Pearlman, *supra* at 107.

⁶⁶ *Id.*

⁶⁷ See "Consumer Privacy," The Center for Democracy & Technology found at <https://www.cdt.org/issue/baseline-privacy-legislation>, visited August 23, 2013.

⁶⁸ See, for example, The European Union's Data Protection Directive found at <http://www.dataprotection.ie/docs/EU-Directive-95-46-EC--Chapter-1/92.htm>, visited August 23, 2013.

⁶⁹ *Id.*

keeping information confidential that might cause embarrassment or harm to private citizens. They are written so that they cover virtually all information about any human being, even if that information is publicly available from other sources or – more grievously – even if its disclosure would reveal the incompetence, mistakes, or unethical or criminal conduct, of government officials, employees and others.

CONCLUSION

Why are there so many exceptions to the right to privacy and yet also so many privacy-based exceptions to our FOI laws? The answer, of course, is that neither privacy nor FOI exists in a vacuum. Each is subject to competing values and principles.

For instance, the constitutional prohibition against unreasonable searches and seizures has as a competing interest the desire for effective law enforcement. As a result, the courts have taken this important law enforcement value and tried to balance it against the right to privacy. This is why courts have created a reasonable expectation of privacy condition in search and seizure cases. This is also why they have viewed the expectation of privacy so narrowly as to permit intrusion into people's automobiles, their trash as well as their bank and telephone records.

The right to privacy likewise faces an important competing value when it would prevent disclosure of information about which there is a legitimate public interest. The notion of an informed and knowledgeable electorate is one of the cornerstones of our country's democratic tradition. As the Connecticut Supreme Court put it, quoting in part from the U.S. Supreme Court, "the right to privacy must give way when balanced against the publication of matters of public interest, in order to ensure the 'uninhibited, robust and wide-open' discussion of legitimate public issues."⁷⁰

This position obviously reflects related free speech and press considerations – values that sometimes compete with the right to privacy as well. It also implicates FOI. For without access to information, free speech and press rights would be rendered substantially meaningless. So line-drawing between the competing principles of privacy on the one hand, and an informed and knowledgeable electorate on the other, becomes all the more crucial.

Free speech and press rights also help explain the public figure limitation to privacy. This limitation extends beyond the public lives of government and political leaders and raises, at least in some respects, questions of newsworthiness. For example, tabloids regularly publish sensational stories about the private lives of politicians and other celebrities. To the extent the facts on which these stories are based are true, they are usually immune from successful libel or invasion of privacy lawsuits. This is because courts are generally unwilling to dictate what constitutes good taste, newsworthiness and public interest, lest in doing so they impermissibly infringe on the rights to free speech and of a free press.

Some argue the loss of privacy is the cost people must pay for more efficient government and a modern system of commerce. Given the choice between greater security, lower consumer prices, interest rates and taxes, on the one hand, or greater privacy rights on the other, many would opt for the former. The desire for good government and economic well-being though is only part of the reason people accept so little privacy in their lives.

To a large extent, current privacy law reflects people's ambiguity about privacy itself. The truth is they actually enjoy reading, seeing and hearing about the private lives of others. This phenomenon may be a cultural imperative common to all humankind. Or it may be a case of national nosiness. Or perhaps it is a conditioned response to the many personal stories we are exposed to by a sometimes insensitive media.

⁷⁰ *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 116 (Conn. 1982); citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

As long as the publication of embarrassing facts is not about “me” personally, people tend not to think in terms of invasion of privacy or the pain it may cause others. To the contrary, they tend to support law enforcement agencies, even when they rummage through the garbage of others, search their cars, bank and telephone records, illegally wiretap their private conversations and hack into their computers. People also continue to patronize the most scandalous tabloids and boost the ratings of TV’s equivalent programming.

What is more, because information itself is a source of power, those who have it are typically reluctant to disclose it, or even to admit they have it. Thus, government officials and others collect, both overtly and clandestinely, vast amounts of information about their own people. Some of this information is necessary, and some of it is not. Then those controlling the information forthrightly assert they cannot reveal that information under FOI laws, for to do so would be an invasion of privacy.

The invasion, if any, however, occurred when the information was collected in the first place. In this situation, the right to privacy often becomes a façade to hide behind so that information in which there is an important public interest need not be disclosed. And the power it can exert need not be shared.

Understanding what the right to privacy entails is important to everyone. It is important to understand what is included in the right, and what is not. More important, people must understand how a claim of privacy can be abused by those seeking to monopolize information – including government officials – so they can maintain or increase their power over society. Armed with this knowledge, hopefully society can meet the threat and thereby preserve the personal independence and freedom of its members, while also ensuring that society as a whole is being well-served by its government.

APPENDIX

Sec. 1-200 (6) "Executive sessions" means a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting;

(E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210.

Sec. 1-206 (b) (1). ...In the case of the denial of a request to inspect or copy records contained in a public employee's personnel or medical file or similar file under subsection (c) of section 1-214, the commission shall include with its notice or order an order requiring the public agency to notify any employee whose records are the subject of an appeal, and the employee's collective bargaining representative, if any, of the commission's proceedings and, if any such employee or collective bargaining representative has filed an objection under said subsection (c), the agency shall provide the required notice to such employee and collective bargaining representative by certified mail, return receipt requested or by hand delivery with a signed receipt. A public employee whose personnel or medical file or similar file is the subject of an appeal under this subsection may intervene as a party in the proceedings on the matter before the commission.

Sec. 1-210 (a) Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

(b) Nothing in the Freedom of Information Act shall be construed to require disclosure of:

(2) Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy;

(3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of said records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known, (B) the identity of minor witnesses, (C) signed statements of witnesses, (D) information to be used in a prospective law enforcement action if prejudicial to such action, (E) investigatory techniques not otherwise known to the general public, (F) arrest records of a juvenile, which shall also include any investigatory files, concerning the arrest of such juvenile, compiled for law enforcement purposes, (G) the name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, or (H) uncorroborated allegations subject to destruction pursuant to section 1-216;

(5) (B) Commercial or financial information given in confidence, not required by statute;

(8) Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with such licensing agency to establish the applicant's personal qualification for the license, certificate or permit applied for;

(10) Records, tax returns, reports and statements exempted by federal law or the general statutes or communications privileged by the attorney-client relationship, marital relationship, clergy-penitent relationship, doctor-patient relationship, therapist-patient relationship or any other privilege established by the common law or the general statutes, including any such records, tax returns, reports or communications that were created or made prior to the establishment of the applicable privilege under the common law or the general statutes;

(11) Names or addresses of students enrolled in any public school or college without the consent of each student whose name or address is to be disclosed who is eighteen years of age or older and a parent or guardian of each such student who is younger than eighteen years of age, provided this subdivision shall not be construed as prohibiting the disclosure of the names or addresses of students enrolled in any public school in a regional school district to the board of selectmen or town board of finance, as the case may be, of the town wherein the student resides for the purpose of verifying tuition payments made to such school;

(12) Any information obtained by the use of illegal means;

(13) Records of an investigation or the name of an employee providing information under the provisions of section 4-61dd;

(14) Adoption records and information provided for in sections 45a-746, 45a-750 and 45a-751;

(17) Educational records which are not subject to disclosure under the Family Educational Rights and Privacy Act, 20 USC 1232g;

(21) The residential, work or school address of any participant in the address confidentiality program established pursuant to sections 54-240 to 54-240o, inclusive;

(22) The electronic mail address of any person that is obtained by the Department of Transportation in connection with the implementation or administration of any plan to inform individuals about significant highway or railway incidents;

(23) The name or address of any minor enrolled in any parks and recreation program administered or sponsored by any public agency;

(25) The name, address, telephone number or electronic mail address of any person enrolled in any senior center program or any member of a senior center administered or sponsored by any public agency;

(26) All records obtained during the course of inspection, investigation, examination and audit activities of an institution, as defined in section 19a-490, that are confidential pursuant to a contract between the Department of Public Health and the United States Department of Health and Human Services relating to the Medicare and Medicaid programs;

(27) Any record created by a law enforcement agency or other federal, state, or municipal governmental agency consisting of a photograph, film, video or digital or other visual image

depicting the victim of a homicide, to the extent that such record could reasonably be expected to constitute an unwarranted invasion of the personal privacy of the victim or the victim's surviving

Sec. 1-213 (a). The Freedom of Information Act shall be:

(2) Construed as requiring each public agency to disclose information in its personnel files, birth records or confidential tax records to the individual who is the subject of such information.

(b) Nothing in the Freedom of Information Act shall be deemed in any manner to:

(2) Require disclosure of any record of a personnel search committee which, because of name or other identifying information, would reveal the identity of an executive level employment candidate without the consent of such candidate; or

Sec. 1-214 (a). Any contract of employment to which the state or a political subdivision of the state is a party shall be deemed to be a public record for the purposes of section 1-210.

(b) Whenever a public agency receives a request to inspect or copy records contained in any of its employees' personnel or medical files and similar files and the agency reasonably believes that the disclosure of such records would legally constitute an invasion of privacy, the agency shall immediately notify in writing (1) each employee concerned, provided such notice shall not be required to be in writing where impractical due to the large number of employees concerned and (2) the collective bargaining representative, if any, of each employee concerned. Nothing herein shall require an agency to withhold from disclosure the contents of personnel or medical files and similar files when it does not reasonably believe that such disclosure would legally constitute an invasion of personal privacy.

(c) A public agency which has provided notice under subsection (b) of this section shall disclose the records requested unless it receives a written objection from the employee concerned or the employee's collective bargaining representative, if any, within seven business days from the receipt by the employee or such collective bargaining representative of the notice or, if there is no evidence of receipt of written notice, not later than nine business days from the date the notice is actually mailed, sent, posted or otherwise given. Each objection filed under this subsection shall be on a form prescribed by the public agency, which shall consist of a statement to be signed by the employee or the employee's collective bargaining representative, under the penalties of false statement, that to the best of his knowledge, information and belief there is good ground to support it and that the objection is not interposed for delay. Upon the filing of an objection as provided in this subsection, the agency shall not disclose the requested records unless ordered to do so by the Freedom of Information Commission pursuant to section 1-206. Failure to comply with a request to inspect or copy records under this section shall constitute a denial for the purposes of section 1-206. Notwithstanding any provision of this subsection or subsection (b) of section 1-206 to the contrary, if an employee's collective bargaining representative files a written objection under this subsection, the employee may subsequently approve the disclosure of the records requested by submitting a written notice to the public agency.

Sec. 1-215 (a). Notwithstanding any provision of the general statutes to the contrary, and except as otherwise provided in this section, any record of the arrest of any person, other than a juvenile, except a record erased pursuant to chapter 961a, shall be a public record from the time of such arrest and shall be disclosed in accordance with the provisions of section 1-212 and subsection (a) of section 1-210, except that disclosure of data or information other than that set forth in subdivision (1) of subsection (b) of this section shall be subject to the provisions of subdivision (3) of subsection (b) of section 1-210. Any personal possessions or effects found on a person at the time of such person's arrest shall not be disclosed unless such possessions or effects are relevant to the crime for which such person was arrested.

Sec. 1-216. Except for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records.

Sec. 1-217 (a). No public agency may disclose, under the Freedom of Information Act, from its personnel, medical or similar files, the residential address of any of the following persons employed by such public agency:

(1) A federal court judge, federal court magistrate, judge of the Superior Court, Appellate Court or Supreme Court of the state, or family support magistrate;

(2) A sworn member of a municipal police department, a sworn member of the Division of State Police within the Department of Emergency Services and Public Protection or a sworn law enforcement officer within the Department of Environmental Protection;

(3) An employee of the Department of Correction;

(4) An attorney-at-law who represents or has represented the state in a criminal prosecution;

(5) An attorney-at-law who is or has been employed by the Public Defender Services Division or a social worker who is employed by the Public Defender Services Division;

(6) An inspector employed by the Division of Criminal Justice;

(7) A firefighter;

(8) An employee of the Department of Children and Families;

(9) A member or employee of the Board of Pardons and Paroles;

(10) An employee of the judicial branch;

(11) An employee of the Department of Mental Health and Addiction Services who provides direct care to patients; or

(12) A member or employee of the Commission on Human Rights and Opportunities.

(c) (1) Except as provided in subsections (a) and (d) of this section, no public agency may disclose the residential address of any person listed in subsection (a) of this section from any

record described in subdivision (2) of this subsection that is requested in accordance with the provisions of said subdivision, regardless of whether such person is an employee of the public agency, provided such person has (A) submitted a written request for the nondisclosure of the person's residential address to the public agency, and (B) furnished his or her business address to the public agency.

(2) Any public agency that receives a request for a record subject to disclosure under this chapter where such request (A) specifically names a person who has requested that his or her address be kept confidential under subdivision (1) of this subsection, shall make a copy of the record requested to be disclosed and shall redact the copy to remove such person's residential address prior to disclosing such record, (B) is for an existing list that is derived from a readily accessible electronic database, shall make a reasonable effort to redact the residential address of any person who has requested that his or her address be kept confidential under subdivision (1) of this subsection prior to the release of such list, or (C) is for any list that the public agency voluntarily creates in response to a request for disclosure, shall make a reasonable effort to redact the residential address of any person who has requested that his or her address be kept confidential under subdivision (1) of this subsection prior to the release of such list.

(3) Except as provided in subsection (a) of this section, an agency shall not be prohibited from disclosing the residential address of any person listed in subsection (a) of this section from any record other than the records described in subparagraphs (A) to (C), inclusive, of subdivision (2) of this subsection.

(d) The provisions of this section shall not be construed to prohibit the disclosure without redaction of any document, as defined in section 7-35bb, any list prepared under title 9, or any list published under section 12-55.

Sec. 1-219 (c). Notwithstanding any provision of chapter 55, or any provision of section 11-8 or 11-8a, any military discharge document filed by or on behalf of a veteran with a public agency before, on or after October 1, 2002, except a military discharge document recorded before October 1, 2002, on the land records of a town, shall be retained by the agency separate and apart from the other records of the agency. The contents of such document shall be confidential for at least seventy-five years from the date the document is filed with the public agency, except that:

(1) The information contained in the document shall be available to the veteran, or a conservator of the person of the veteran or a conservator of the estate of the veteran, at all times;

(2) Any information contained in such military discharge document which is necessary to establish, or that aids in establishing, eligibility for any local, state or federal benefit or program applied for by, or on behalf of, the veteran, including, but not limited to, the name of the veteran, the veteran's residential address, dates of qualifying active or reserve military service, or military discharge status, shall be available to the public at all times; and

(3) In addition to the information available under subdivision (2) of this subsection, any other information contained in the document shall be available to (A) any person who may provide a benefit to, or acquire a benefit for, the veteran or the estate of the veteran, provided the person needs the information to provide the benefit and submits satisfactory evidence of such need to the agency, (B) the State Librarian as required for the performance of his or her duties,

and (C) a genealogical society incorporated or authorized by the Secretary of the State to do business or conduct affairs in this state or a member of such genealogical society.

Sec. 1-225 (e). No member of the public shall be required, as a condition to attendance at a meeting of any such body, to register the member's name, or furnish other information, or complete a questionnaire or otherwise fulfill any condition precedent to the member's attendance.