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Workmen's Compensation Claims Must Be Disclosed under the Texas Open Records Act, but Certain Data May Be Withheld to Avoid Tortious Invasion of Privacy.

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orce.⁷¹ The only conclusion that can be drawn from these restrictions is that Congress intended that the ex-wife should not have an interest in her former husband's retired pay and, therefore, retired pay is not properly subject to state community property laws.

Although the Texas Supreme Court in *Cearley* relieved the prior inequities inherent in the classification of military retirement benefits in divorce cases, the actual application of the rule could become so complicated as to be infeasible. Another serious concern is that a great many divorce decrees apportioning prospective military retirement benefits according to the *Cearley* rule may be overturned should the United States Supreme Court eventually determine they conflict with federal law. For the present, however, district court judges in Texas have been granted wide discretionary powers in dividing military retirement benefits upon divorce.⁷²

Mary Elizabeth Carmody

**CONSTITUTIONAL LAW—Records—Workmen's Compensation
Claims Must Be Disclosed Under the Texas Open Records
Act, but Certain Data May Be Withheld to Avoid
Tortious Invasion of Privacy**

Industrial Foundation v. Texas Industrial Accident Board,
540 S.W.2d 668 (Tex. 1976).

Eight days after the Texas Open Records Act¹ became effective, the Industrial Foundation of the South² requested that the Industrial Accident Board furnish it with certain information concerning all workmen's compensation claims filed with the Board. Uncertain whether the information should be released, the Board requested an opinion of the Texas Attorney

71. S. REP. NO. 1480, 90th Cong., 2d Sess. (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 3294, 3297-98.

72. See generally *Constance v. Constance*, 544 S.W.2d 659, 660 (Tex. 1976) (upheld judgment awarding all of military retirement pension to husband); *Mial v. Mial*, 543 S.W.2d 736, 738 (Tex. Civ. App.—El Paso 1976, no writ) (court does not have to divide community property equally, as long as the division is equitable).

1. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Supp. 1976-1977). The Open Records Act, formally entitled "Access by Public to Information in Custody of Governmental Agencies and Bodies," became effective June 14, 1973. The purpose of the act is to allow public access to information concerning governmental affairs. *Id.*

2. The Industrial Foundation of the South is a nonprofit corporation composed of approximately 282 member companies which employ workmen in the southwestern part of the United States.

General.³ The resulting opinion declared that the workmen's compensation claims did not qualify under any exemption from disclosure provided by the Open Records Act.⁴ Nevertheless, the Industrial Accident Board refused the Foundation's request for access to the claims information. The Foundation then brought suit seeking a writ of mandamus compelling disclosure. The trial court granted summary judgment for the Foundation, ordering that the writ should issue. The Beaumont Court of Civil Appeals reversed and remanded, holding that although the information was not covered by any exception to the Open Records Act, the Board was entitled to question the Foundation's motives in attempting to acquire the information.⁵ This was particularly true, the court held, because this information might be used to discriminate against workmen filing claims should any of them become job applicants at one of the companies which comprise the Foundation.⁶ The Board appealed to the Texas Supreme Court. Held—*Affirmed*. With the exception of data that if released would cause a tortious invasion of privacy, Workmen's Compensation files must be disclosed under the Texas Open Records Act.⁷

The Texas Open Records Act, adopted in 1973, expanded the common law right of access to information. A majority of the states have enacted similar legislation within the past decade.⁸ The Texas act is based upon the principle that the government is the people's servant and not their master, and that, unless expressly excepted, all persons are entitled to complete access to information regarding the affairs of government and the actions of state officers and employees.⁹ At the same time, the Act "recognizes the right of citizens to privacy in their affairs."¹⁰ Moreover, the Texas Attorney General has stated that a constitutional or common-law right of privacy may prevent forced public disclosure of records not protected by

3. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7(a) (Supp. 1976-1977). This section provides that upon receipt of a written request for information a governmental body may request the attorney general to determine whether the information falls within a § 3 exception.

4. TEX. ATT'Y GEN. OP. NO. O.R.D.-8 (1973). The Texas Open Records Act lists 16 exceptions to the general rule that "all information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (Supp. 1976-1977).

5. *Texas Indus. Accident Bd. v. Industrial Foundation*, 526 S.W.2d 211, 216 (Tex. Civ. App.—Beaumont 1975), *aff'd*, 540 S.W.2d 668, 688 (Tex. 1976).

6. *Id.* at 216.

7. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

8. See *Project, Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1163 (1975).

9. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Supp. 1976-1977).

10. TEX. ATT'Y GEN. OP. NO. H-90 (1973). Texas case law only recently established a cause of action in tort for the unwarranted invasion of the right to privacy. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973) (installation of wiretap device).

statutory law.¹¹

In *Industrial Foundation v. Texas Industrial Accident Board*¹² the Texas Supreme Court was required to determine whether workmen's compensation claim files held by the Industrial Accident Board constituted "public information" subject to disclosure under the Open Records Act.¹³ Before reaching that question, however, the court was faced with the issue of whether a court may use its discretion in denying a writ of mandamus, and if so, whether it might inquire into the intent and purpose of the party in seeking information by such a writ. The majority held that neither the use of discretion nor the inquiry into intent were proper.¹⁴ Despite the equitable principles governing the writ,¹⁵ the court determined that the clear intent of the legislature in enacting the Open Records Act was to make information available to the public, and to make any information not specifically excluded by its terms generally available.¹⁶ The court concluded that any discretion as to what should be disclosed does not lie with the judiciary, but rather that it is the duty of the legislature to balance the individual's right of privacy against the public's right to knowledge of governmental affairs.¹⁷ The courts should merely enforce the public's right of access granted by the Act.¹⁸

Following this initial policy decision, the court turned to a series of arguments presented by the Board which attempted to distinguish their files from those deemed "public information" and subject to disclosure. The Board argued that the policy of the Act was to make information available concerning the affairs of the government rather than those of individuals and that its files dealt largely with the latter.¹⁹ The majority

11. TEX. ATT'Y GEN. OP. NO. H-390 (1974). In *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), the Houston Court of Civil Appeals for the 14th District stated that "great weight would be given to opinions of the attorney general," since the Act entrusted him with the duty of interpretation. The court reversed the lower court finding that parts of the Texas Open Records Act were unconstitutional. 531 S.W.2d at 188. This opinion contains an historical outline of the development of the right of privacy. *Id.* at 188.

12. 540 S.W.2d 668 (Tex. 1976).

13. *Id.* at 672; see TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a) (Supp. 1976-1977).

14. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 674-75 (Tex. 1976).

15. *Callahan v. Giles*, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (1941); *Lacy v. State Banking Bd.*, 118 Tex. 91, 99, 11 S.W.2d 496, 499 (1928); *Westerman v. Mims*, 111 Tex. 29, 39, 227 S.W. 178, 181 (1921).

16. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 674-75 (Tex. 1976). The court cited several sections of the Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(b), 5(b), 14(a), 14(b) (Supp. 1976-1977).

17. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 675 (Tex. 1976).

18. *Id.* at 675.

19. *Id.* at 675-76.

noted that the Open Records Act provided for the preservation of individual privacy,²⁰ but stressed that the Act was to be liberally construed in favor of granting any request for information.²¹ As such, the court held that unless information was specifically excluded by one of the Act's exceptions, it would be available as "public information."²²

In an attempt to exempt its files from disclosure, the Board relied on the Act's first exception. That provision protects "information deemed confidential by constitutional law, or by legislative or judicial decision."²³ Rule 9.040²⁴ of the Industrial Accident Board was cited as a restriction on the dissemination of file information and was said to have the same status as statutory law. The court rejected this contention by explaining that although there are many statutes granting the status of confidentiality to state agency records,²⁵ there is no such provision in the Workmen's Compensation Act, and rule 9.040 does not fill that void.²⁶

20. *Id.* at 676; see TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3(a)(1), (2), (9), (10) (Supp. 1976-1977).

21. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676 (Tex. 1976); see TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 14(d) (Supp. 1976-1977).

22. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676 (Tex. 1976).

23. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Supp. 1976-1977).

24. *Industrial Accident Board Rule 9.040* (1961, Rev. 1974), cited in *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 675 (Tex. 1976), states that a prerequisite to the furnishing of information on a claimant is a workmen's compensation claim open or pending before the Board or on appeal to a court of competent jurisdiction at the time of the request for information.

25. See TEX. REV. CIV. STAT. ANN. art. 695j-1, § 10, art. 4445c, § 4, and art. 5547-12a (Supp. 1976-1977).

26. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). The court of civil appeals reviewed two court holdings giving administrative rules the same force and effect as law. *Clawson v. Texas Employers' Ins. Ass'n*, 469 S.W.2d 192, 195 (Tex. Civ. App.—Houston [14th Dist.] 1971), *aff'd*, 475 S.W.2d 735 (Tex. 1972); *Galacia v. Texas Employers' Ins. Ass'n*, 348 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1961, writ *ref'd n.r.e.*). The court stated that these authorities are weakened by *Clawson v. Texas Employers' Ins. Ass'n*, 475 S.W.2d 735 (Tex. 1972), which repudiated the basic holding in each case. But the theory that administrative rules have the same force as legislation was reestablished in a decision nearly contemporaneous with *Industrial Foundation*, *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976). Thus the supreme court could not deny rule 9.040 statutory force *per se*. Further, the court did not hold that the Open Records Act required disclosure despite any "rule," because TEX. ATT'Y GEN. OP. No. H-626 (1975) held that the Texas Employment Commission's rules of disclosure did not conflict with the Open Records Act. The majority, in order to force disclosure, determined that the Industrial Accident Board's rule-making authority is not so specific as to apply to rules of disclosure. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). The Board is empowered to make rules not inconsistent with the workmen's compensation statute for implementing and enforcing its provisions. TEX. REV. CIV. STAT. ANN. art. 8307, § 4 (1967). The court's reasoning apparently threatens the effectiveness of every state agency rule that lacks the support of a specific grant of authority for its promulgation. See also *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702 (Tex. 1968). "In exercising the powers and the broad

The Board also argued that the claim files were protected from disclosure by the constitutional right to privacy. The court agreed that numerous decisions by the United States Supreme Court have established a constitutional guarantee of privacy.²⁷ The Texas court, however, following *Palko v. Connecticut*,²⁸ held that this guarantee was limited to intimate personal relationships or activities.²⁹ The court reasoned that the immediate case did not involve such relationships or activities since workmen's compensation claims information does not usually concern matters as personal as marriage, procreation, contraception, or family relationships.³⁰ While acknowledging that the possibility of disclosure might discourage a workman from exercising his right to file a claim, the court nonetheless found no infringement upon the zone of privacy.³¹

The Board also failed in its attempts to qualify the file information as confidential by reason of judicial decision. Relying on the judicial construction of the Federal Freedom of Information Act,³² the Board urged that the Texas courts should balance the individual's right of privacy against the public's interest in disclosure in dealing with the Texas Open Records Act. The Texas Supreme Court distinguished the two acts and concluded that the Open Records Act has no exception covering personnel, medical, and similar files as does exception six of the Federal Act.³³ The

authority granted by the legislature, the only requirement is that rules and regulations must be consistent with the Constitution and Statutes of the State." *Id.* at 706. Another case held that the determining factor as to whether a particular administrative agency has exceeded its rule-making powers is that the rule's provisions must be in harmony with the general objectives of the act involved. *Kee v. Baber*, 157 Tex. 387, 393, 303 S.W.2d 376, 380 (1957).

27. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 678 (Tex. 1976), citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (first amendment), *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (fourth amendment), and *Katz v. United States*, 389 U.S. 347, 350 (1967) (fourth and fifth amendments).

28. 302 U.S. 319 (1937). That case stated that the guarantee of personal privacy extends only to rights deemed fundamental or implicit in the concept of ordered liberty. *Id.* at 325.

29. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976). See generally *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (contraception); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (child rearing and education).

30. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 680-81 (Tex. 1976).

31. *Id.* at 681.

32. 5 U.S.C. § 552 (Supp. V 1975) (amending 5 U.S.C. § 552 (1970)). The Freedom of Information Act was enacted in 1967 and amended in 1974. See generally *Katz, The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970).

33. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 681 (Tex. 1976); see 5 U.S.C. § 552(b) (Supp. V 1975) (amending 5 U.S.C. § 552 (1970)). Exception 6 provides that the Freedom of Information Act (FOIA) does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552(b)(6). The term "similar files" has been broadly

Texas courts are therefore not free to balance equities in denying disclosure.³⁴

*Billings v. Atkinson*³⁵ was cited by the Board to support the contention that its files were confidential by judicial decision. That case recognized a remedy in tort law for the "unwarranted invasion of the right of privacy."³⁶ Because the precise requirements for substantiating such an invasion have not been clearly defined by case law, the court turned to the generally recognized criteria for recovery³⁷ and concluded that disclosure is not required of information contained in the workmen's compensation claim files "if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public."³⁸ The court remanded the case to the district court for in camera inspection of the files, directing the lower court to delete any private facts before making the files available for general inspection.³⁹

Two Texas Supreme Court justices wrote concurring opinions. Justice Daniel expressed his belief that while article 6252-17a did not truly represent the legislature's intent, it was that body's task to rectify the situation with statutory amendments.⁴⁰ Until then, he felt the courts were bound to construe and apply the statute as written.⁴¹ Justice Johnson's opinion is significant because of its criticism of the majority's conclusion that rule 9.040 was invalid as a defense against disclosure. He reasoned that "information deemed confidential by [statutory] law" is broad enough to include information made confidential by administrative rules if there is statutory authority for the formulation of such a rule and if the goals of the legislature, as expressed in the statute, cannot be fulfilled without such

interpreted by the federal courts. See *Robles v. EPA*, 484 F.2d 843, 845 (4th Cir. 1973). It has been construed to imply a congressional intent that the courts apply a balancing test. *Department of the Air Force v. Rose*, ___ U.S. ___, 96 S. Ct. 1592, 1604, 48 L. Ed. 2d 11, 28 (1976); *Getman v. NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971).

34. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 681-82 (Tex. 1976).

35. 489 S.W.2d 858 (Tex. 1973) (involving the installation of a wiretap device).

36. *Id.* at 860.

37. See *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 11 (5th Cir. 1962) (disclosure must be public); *Melvin v. Reid*, 297 P. 91, 92-93 (Cal. Dist. Ct. App. 1931) (must be offensive and objectionable to a reasonable man of ordinary sensibilities); *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942) (facts must be private facts); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117, at 809 (4th ed. 1971).

38. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

39. *Id.* at 686. The dissent objected to the majority opinion on the grounds that the claims are similar to law suits, thus the information cannot be deemed confidential. *Id.* at 692 (dissenting opinion).

40. *Id.* at 688 (concurring opinion).

41. *Id.* at 688.

rule.⁴² The purpose of the rule was to reduce the risk of employment discrimination against claimants. Justice Johnson cautioned that the majority opinion might frustrate the purpose of the Workmen's Compensation Act.⁴³

*Industrial Foundation v. Texas Industrial Accident Board*⁴⁴ demonstrates the fact that the Texas Open Records Act necessarily encompasses countervailing policy considerations. The public's right to know definitely conflicts with the personal right of privacy.⁴⁵ The majority opinion concedes that the claim files may contain highly personal data that should be deleted before disclosure, but states that the filing of a claim is not of itself confidential.⁴⁶ In answer to one of the two interrogatories allowed by the trial court, the Foundation admitted that the information would aid a member company in its determination of the truthfulness of a prospective employee's application for employment.⁴⁷ Expanding upon the Board's argument before the court of civil appeals, it seems reasonable to say that the mere disclosure of a claimant's name could prejudice his future employment prospects.⁴⁸ Texas statutes expressly prohibit blacklisting and discrimination against an employee who has made an application for compensation in good faith.⁴⁹ The Texas Open Records Act may conflict with the policies underlying those statutes because it prohibits inquiry into the motives of a solicitor of information. Had the majority changed the focus of its statutory interpretation in any of the several sections analyzed, potentially prejudicial disclosures might have been avoided. Such a decision would certainly have adequate support. The exemption for "information deemed confidential by [statutory] law" is sufficiently broad to include administrative rules,⁵⁰ and the use of the equitable principles which govern the issuance of a writ of mandamus⁵¹ would have allowed a balancing of

42. *Id.* at 689-90 (concurring opinion).

43. *Id.* at 688.

44. 540 S.W.2d 668 (Tex. 1976).

45. See Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 Sw. L.J. 434 (1975).

46. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 686 (Tex. 1976).

47. *Id.* at 672.

48. See *Texas Indus. Accident Bd. v. Industrial Foundation*, 526 S.W.2d 211, 215 (Tex. Civ. App.—Beaumont 1975), *aff'd*, 540 S.W.2d 668 (Tex. 1976).

49. TEX. REV. CIV. STAT. ANN. arts. 5196c, 5196d, 8307c (Supp. 1976-1977).

50. Justice Johnson's concurring opinion argues that administrative rules on confidentiality are valid if promulgated pursuant to a statutory grant of rule-making authority and that the Industrial Accident Board has authority to promulgate such rules as demonstrated by TEX. REV. CIV. STAT. ANN. art. 8307, § 9 (1967) providing for the delivery of copies of file information to those *entitled thereto*. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 689 (Tex. 1976) (concurring opinion).

51. *Callahan v. Giles*, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (1941); *Lacy v. State Banking Bd.*, 118 Tex. 91, 99, 11 S.W.2d 496, 499 (1928); *Westerman v. Mims*, 111 Tex. 29, 39, 227 S.W. 178, 181 (1921).

the right to privacy against the right to disclosure.⁵² Finally, had the majority placed greater emphasis on the Act's statement that the "government is the servant of the people, and not the master of them,"⁵³ it might not have disregarded the argument that workmen's compensation claim files need not be disclosed because they deal with the affairs of private individuals rather than with the affairs of government.

The majority should not be criticized for their failure to exempt the claim files from the far-reaching effects of the Act. There is ample authority to support the decision to apply the Act in consonance with the legislative intent and to leave any balancing of interests to the legislature.⁵⁴ The significance of this decision is its signal to the legislature that the Texas Open Records Act needs further clarification and amendment.⁵⁵ The majority opinion contained only a limited analysis of the Freedom of Information Act,⁵⁶ which shares a common purpose with the Open Records Act—to create a system of governmental information with a clear emphasis on openness.⁵⁷ The protection of the right to disclosure granted by the Freedom of Information Act has been counterbalanced by the Privacy Act,⁵⁸

52. The 1974 amendments to the Freedom of Information Act provided for in camera inspection of contested documents and increased the extent of judicial involvement in the balancing of competing interests. 5 U.S.C. § 552 (Supp. V 1975); see Note, *The Freedom of Information Act Amendments of 1974: An Analysis*, 26 SYRACUSE L. REV. 951, 956 (1975). It is arguable that the Texas Supreme Court, by remanding to the trial court for in camera inspection, is balancing competing interests. In fact, the decision merely directed the lower court to delete confidential information. The names of the claimants, however, will not be barred from disclosure. One federal decision ordered disclosure of change in employment status information only after the parties had deleted the identifying characteristics of name, address, and telephone number. *Sears, Roebuck & Co. v. General Servs. Administration*, 402 F. Supp. 378, 384 (D.D.C. 1975).

53. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Supp. 1976-1977).

54. See, e.g., *State v. Shoppers World, Inc.*, 380 S.W.2d 107, 110-11 (Tex. 1964); *Second Injury Fund v. Keaton*, 162 Tex. 250, 254, 345 S.W.2d 711, 714 (1961); *Dolan v. Walker*, 121 Tex. 361, 365, 49 S.W.2d 695, 697 (1932).

55. An analysis of the California Public Records Act, CAL. GOV'T CODE § 6254 (Deering Supp. 1976), may be beneficial to the Texas Legislature. The California Act contains no provision directing a liberal construction of the disclosure provisions or a narrow construction of the exemptions. A record need not be disclosed if it falls within one of the Act's 14 exemptions or if the government can demonstrate that it is protected by public policy. See Comment, *The California Public Records Act: The Public's Right of Access To Governmental Information*, 7 PAC. L.J. 105, 110 (1976). The California Act accommodates both the right to know and the right to privacy in CAL. GOV'T CODE § 6250 (Deering 1973), which sets forth the right of access to information while conscious of the individual's right to privacy. *Id.* § 6254(c) (Deering Supp. 1976) provides an exception similar to that of the Freedom of Information Act for personnel, medical, or similar files which, if disclosed, would constitute an "unwarranted invasion of personal privacy."

56. See 5 U.S.C. § 552 (Supp. V 1975) (amending 5 U.S.C. § 552 (1970)).

57. See Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-C.L. L. REV. 1 (1970); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1022 (1975).

58. 5 U.S.C. § 552a (Supp. V. 1975).

which promotes governmental respect for the privacy of individuals by regulating the collection and dissemination of personal information by federal agencies.⁵⁹ As one writer has noted, if the individual states do not keep abreast of the federal legislation protecting informational privacy, the United States Government will mandate such action.⁶⁰

Texas was slow to acknowledge the right of privacy⁶¹ and is still in the process of defining its parameters.⁶² In *Billings v. Atkinson*⁶³ Justice Denton stated that a "judicially approved definition" of the privacy right included freedom from publication of private affairs which are not of legitimate concern to the public.⁶⁴ One court of civil appeals decision⁶⁵ weighed the need for information against the interest of individual privacy and denied the news media access to personal history and arrest record information under the Open Records Act exception for law enforcement agency records.⁶⁶

Industrial Foundation proposes a two prong test to determine whether information should remain confidential: it must be highly embarrassing and not of legitimate public concern.⁶⁷ Because the Texas Open Records Act bars any inquiry into the motive of a solicitor of information,⁶⁸ it is foreseeable that Texas courts will be handicapped in attempts to determine whether ordinary data might be used in an embarrassing manner, or whether the public truly has a legitimate interest in the requested facts. A statutory amendment allowing judicial inquiry into a solicitor's motives would resolve this apparent conflict. In pursuit of a more equitable balance between the right to know and the right to privacy, and following the

59. See Symposium, *Foreward: Openness in Government: A New Era*, 34 FED. B.J. 279 (1975). See also Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L. L. REV. 596 (1976); Note, *The Right to Information and the FOIA: Shredding the Paper Curtain of Secrecy*, 11 HOUS. L. REV. 717 (1974); Note, *An Introduction to the Federal Privacy Act of 1974 and Its Effect on the Freedom of Information Act*, 11 NEW ENG. L. REV. 463 (1976).

60. Note, *Informational Privacy: The Concept, Its Acceptance and Affect on State Information Practices*, 15 WASHBURN L.J. 273 (1976).

61. See Note, 5 ST. MARY'S L.J. 345, 348 (1973), citing *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973).

62. See Comment, *The Privacy Action in Texas: Its Characterization, and a Determination of Applicable Statutes of Limitations*, 29 SW. L.J. 928, 935 (1975).

63. 489 S.W.2d 858 (Tex. 1973).

64. *Id.* at 859.

65. See *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.], 1975) writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976).

66. *Id.* at 188. The court knew why the information was sought. The information was excepted under TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (Supp. 1976-1977).

67. *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

68. See TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 5(b) (Supp. 1976-1977).