Out of the Sunshine and into the Shadows: Six Years of Misinterpretation of the Personal Privacy Exemption of the Kentucky Open Records Act

Jerome E. Wallace
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the State and Local Government Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol71/iss4/6

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
Out of the Sunshine and into the Shadows: Six Years of Misinterpretation of the Personal Privacy Exemption of the Kentucky Open Records Act

INTRODUCTION

By passing the Kentucky Open Records Act1 (Act) in 1976, the General Assembly placed Kentucky among the great number of states which have recognized the importance of permitting public access to government records.2 As the Act's preamble states, this right of access is a "fundamental and necessary right of every citizen in the Commonwealth of Kentucky."3 However, it is not absolute. Although the legislature recognized "that free and open examination of public records is in the public interest,"4 it joined other states in recognizing the legitimate need to exclude certain records from public scrutiny,5 particularly where release might result in an invasion of privacy.6 To this end, Kentucky Revised Statutes (KRS) section 61.878(1)(a) excludes from the Act's application "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."7

This standard—the clearly unwarranted invasion—and the complex balancing of interests involved in its proper application are the subject of this Note. Kentucky has not yet had the benefit

---

4 KRS § 61.882(4) (1980).
5 See R. BOUCHARD & J. FRANKLIN, supra note 2, at 265 app. C.
7 KRS § 61.878(1)(a) (1980) (emphasis added).
of a thorough exploration of the conflict between the "public's right to governmental information" and its citizens' right to privacy. Other than a single judicial opinion and one scholarly article, the only sources of interpretation are the many written opinions of the Commonwealth's Attorney General. Statute requires these opinions to be issued at the request of persons denied


9 Ex parte Farley, 570 S.W.2d 617 (Ky. 1978). The subject of this Note does not involve Farley. The decision's only relevance to the Open Records Act comes from the Kentucky Supreme Court's refusal to adhere to certain sections of the Act, specifically KRS §§ 61.880, .878(2), because they impede the conduct of the Court's business. See 570 S.W.2d at 625.


Unfortunately, these unofficial reviews have failed to clarify the exemption standard. A major premise of this Note is that these opinions of the Office of the Attorney General (OAG) have added confusion to an already uncertain standard by applying it in a mechanical, conclusory manner.

The remaining portions of this Note set out a brief introduction to the privacy balancing test and the Act; a review of the inconsistencies in the opinions of the Office of the Attorney General; and finally, an overview of the conflicting interests at stake. Heavy reliance is placed on legislative history and judicial opinions interpreting section 552(b)(6) of the Freedom of Information Act (FOIA), which states that section 552 does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In all material aspects, this language is identical to that of the Kentucky Act. The OAG opinions and the commentator of the scholarly article mentioned above both cite the language of the FOIA when interpreting the Kentucky privacy

12 KRS § 61.880(2) (1980).
15 The primary difference between the two statutes is that the Kentucky Act's language applies the exemption to "public records" (see KRS § 61.878(1)(a) (1980)) while the FOIA privacy exemption applies to "personnel and medical files and similar files." 5 USC § 552(b)(6) (1976). In terms of the scope of documents potentially subject to a privacy exclusion, Kentucky takes a broader view so as to include any public document. Its federal counterpart, however, considers only the three mentioned categories of files: medical, personnel and "similar" files. The result of this narrow federal scope has been a large number of "similar files" cases in which defendants attempt to analogize certain records to personnel or medical files. See, e.g., Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) (FBI file on monetary benefits paid to testifying kidnap victim held similar); Washington Post Co. v. United States Dep't of State, 647 F.2d 197, 199 (D.C. Cir. 1981), rev'd, 102 S. Ct. 1957 (1982) (citizenship status is information of similar nature); Chamberlain v. Kurtz, 589 F.2d 827, 841-42 (5th Cir.), cert. denied, 444 U.S. 842 (1979) (IRS memorandum on disciplinary action against employee ordered to be produced with names and identifying information withheld under the "similar files" exemption); Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73, 76-77 (D.C. Cir. 1974) (investigatory housing discrimination report held similar).
exemption. Both sources also cite federal decisions interpreting the FOIA.

I. THE ROLE OF THE ATTORNEY GENERAL

According to KRS section 61.880(2)-(5), the Attorney General's office figures prominently in public records disclosure. The statute requires the OAG to issue a written opinion concerning an agency's denial of inspection within ten days of a request. The requestor or the agency may seek injunctive or declaratory relief in circuit court from an adverse decision. Although they are unofficial, these reviews are highly persuasive. As the OAG has recognized, courts and litigants rely on the OAG's opinions to determine the legality and practicality of releasing requested records. It is therefore vital that the OAG avoid mechanical interpretations of the Act which transform the privacy exemption into a blanket exemption.

A survey of OAG opinions issued during the past six years involving KRS section 61.878(1)(a) reveals confusing and inconsistent interpretations. Apparently, the initial opinions intended to adopt a balancing test between personal privacy and the public's right to governmental information. The manner in which the balancing test was applied in those few opinions, however, has resulted in de facto blanket exemptions for records containing home

17 See 76 Ky. Op. Att'y Gen. 717 (citing 502 F.2d at 133); Zeigler, supra note 10, at 15 n.66.
18 See KRS § 61.880 (1980).
19 KRS § 61.880(2), (1980).
20 KRS § 61.880(5), (1980).
22 See note 11 supra for a listing of opinions issued during the past six years which mention the personal privacy exemption.
addresses, marital status information and social security


When we issued OAG 76-717 the State Department of Personnel desired to maintain a policy that would keep the personnel records of state employees as private as the Open Records law would permit. We believed then, and still do, that the home addresses, social security numbers, marital status, and information on the employment application was not of public concern and was of such a personal nature that it could be withheld from public disclosure.

79 Ky. Op. Att’y Gen. 275 (emphasis added). Contra Getman v. NLRB, 450 F.2d 670, 675 (D.C. Cir. 1971) ("The giving of names and addresses is a very much lower degree of disclosure [than files which contain ‘intimate details’]; in themselves a bare name and address give no information about an individual which is embarrassing").

25 See 79 Ky. Op. Att’y Gen. 275. It is questionable how much weight this opinion’s bald statement of exemption for marital status should be afforded since the issue of marital status was not before the Attorney General in Opinion 79-275. This off-the-cuff exclusion highlights the OAG’s conclusory approach applied to personal privacy analysis in the majority of its opinions. See 79 Ky. Op. Att’y Gen. 58 ("The results of the examinations are exempt under KRS 61.878(1)(a) because such information is of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy"); 78 Ky. Op. Att’y Gen. 382 ("It is the opinion of this office that test scores of individuals applying for jobs within the classified service are matters of a personal nature within the contemplation of KRS 61.878(a) and are, therefore, exempt from the application of the State Public Records Act"); 78 Ky. Op. Att’y Gen. 133 ("we believe . . . [KRS § 61.878(1)(a) (1980)] applies only to matters entirely unrelated to the performance of public employment"); 77 Ky. Op. Att’y Gen. 99 ("This type of [property record] card probably falls under the provisions of KRS 61.878(1)(a) . . . ").

The conclusory parenthetical language does not reveal the underlying reasoning, and hence raises the danger that opinions will be founded upon undisclosed erroneous logic, inapposite judicial authority or even personal bias. Opinion 79-348, an unusually candid opinion, demonstrates that this fear is real. In Opinion 79-348, the editor of a community college newspaper had requested a review of the applicability of the Act to documents containing anonymous student evaluations of the college’s faculty. In response to this request, the Attorney General stated:

We question the fairness and value of an anonymous evaluation of a teacher by a student and do not want to compound the unfairness by saying that the evaluation should be made public. We believe that to open the results of such anonymous evaluations to the public would be an unwarranted invasion of personal privacy . . . .

79 Ky. Op. Att’y Gen. 348 (1979). The speculation concerning fairness has no place in privacy exemption analysis. How information in a public document is acquired is not rele-
numbers. Later opinions, for the most part, omit even passing reference to such a test. These reviews simply proclaim that release of a requested record would or would not be a clearly unwarranted invasion of personal privacy. The opinions rendered between 1976 and 1982 can be broadly categorized into those first few opinions that attempt, but fail, to apply properly the personal privacy balancing test, and those opinions which do not attempt to apply the test at all.
A. Opinions Improperly Applying the Balancing Test

The first major misinterpretation appears in Opinion 76-717, issued in December 1976. The Department of Personnel had requested an opinion as to whether it was required to produce a list of names and addresses of state employees sought by a commercial enterprise. Observing that state employees have a privacy interest in their home addresses, the Assistant Attorney General turned to Wine Hobby USA, Inc. v. IRS to recognize that "the phrase 'a clearly unwarranted invasion of personal privacy' compels a balancing of interests between the right of the public to know and the right of persons to their privacy." So far the opinion is flawless. Factually, Wine Hobby USA is highly persuasive since it involved a request, for commercial purposes, of the names and addresses of home wine-makers filed at the Bureau of Alcohol, Tobacco and Firearms. The confusion begins with Opinion 76-717's statement that "the Attorney General believes that a balance of the right of personal privacy against the public's right to inspect and copy records, prevents public agencies from providing copies of the records containing

32 Id. ("[a] state employee is entitled to privacy as to his personal life, including his home address"). This statement, although true, should be the starting point of analysis. However, all too often the Attorney General equates a privacy interest with exclusion so that analysis of the public interest in disclosure is foreclosed. See id. ("We have marked with a check the items we believe may be disclosed to the public and have marked with an X the items we believe are confidential . . . All the [X] . . . items come within the exemption of KRS 61.878(1)(a); 79 Ky. Op. Att'y Gen 128 ("The persons making such an [annual professor] evaluation are entitled to have their opinions and recommendations kept confidential"); 77 Ky. Op. Att'y Gen. 586 ("the records [of motel occupancy and gross revenue] are made confidential by statute and therefore exempted from the provisions of the [Act] . . .").
33 502 F.2d at 133.
35 Id. Cf. 502 F.2d at 137 ("The disclosure of names of potential customers for commercial business is wholly unrelated to the purpose behind the [FOIA] . . . and was never contemplated by Congress in enacting the Act").
36 502 F.2d at 134.
This broad language suggests that any agency—not just the Personnel Department—may properly withhold employee addresses and implies that home addresses receive a permanent per se exclusion simply because they are private and no apparent public interest existed when Opinion 76-717 was issued. The logical question then is whether the Attorney General will disregard the public interests asserted by future applicants seeking similar information.

Instead of answering the question, however, the opinion only exacerbates the confusion. The concluding paragraph states that "[i]n deciding whether a document is exempted under the Act it is the nature of the document which is controlling and not who is requesting to inspect the document or for what purpose." The opinion thus seems to abandon the balancing test described in Wine Hobby USA.

The first explanation for the confusing language of Opinion 76-717 is that the OAG has in practice adopted Robles v. Environmental Protection Agency. In this decision, the Fourth

---

38 Id. (emphasis added). Other privacy exemption opinions have used similar language. See, e.g., 79 Ky. Op. Att'y Gen. 648 (1979) ("[T]here is no distinction in the Open Records Law which would allow researchers access to records only for the purpose of auditing without allowing the obtaining of a copy. A so called researcher has no standing different from that of the general public. Under the Open Records Law the purpose of the inspection of a public record is not material to any of the exemptions provided in KRS 61.878."); 79 Ky. Op. Att'y Gen. 275 ("The only material factor in involving an exception is the nature of the record . . . the use to be made of [the requested information] . . . is of no concern to the licensing board or to the Attorney General.").

Yet, contrary to this policy, the OAG has twice speculated on the possible use of public records if released. In each case, fears of potential misuse or irrelevant use were mentioned and disclosure was denied. Opinion 76-568, reviewing the withholding of ambulance records, expressed the fear that "[i]f it is published that the person has been taken to a hospital, . . . it can . . . be misused by certain predatory types such as thieves and con artists." 76 Ky. Op. Att'y Gen. 568. In the second opinion, 78-382, the OAG reviewed the Kentucky Commission on Human Rights' request for merit system examination scores of certain individuals. 78 Ky. Op. Att'y Gen. 382. After claiming that such scores fell under the privacy exemption, the opinion examined the statutory authority by which the Commission could require disclosure. The Attorney General first noted that the statute required that the documents be relevant to the complaint in order for the Commission to require disclosure and then added: "[T]his office would be of the initial opinion that test scores would not be relevant to a complaint based on sex discrimination in light of the personnel law and rules as we understand them." Id.
39 484 F.2d 843 (4th Cir. 1973).
Circuit refused to permit the exemption of records containing radiation level readings in Colorado homes built upon uranium tailings.40 Addressing the EPA argument that disclosure should be denied due to negligible public interest, the court responded:

This argument misconceives the plain intent of the Act. Disclosure was never intended to “depend upon the interest or lack of interest of the party seeking disclosure.”

... the better reasoned authorities find no basis for this balancing of equities in the application of the Act; indeed, the very language of the Act seems to preclude its exercise.41

The court in Robles thus refused to balance interests and instead looked only at the document’s private nature to decide whether release would be clearly unwarranted.42

The Attorney General seems to apply Robles in several opinions which simply list certain records as “confidential” and thus excluded.43 In fact, Opinion 76-717 lists seven types of questions which an agency may refuse to answer due to their “confidential” nature.44 However, the OAG has never cited Robles, although it has recently reaffirmed its reliance on Wine Hobby USA.45 Significantly, the United States Supreme Court overruled Robles sub silentio in Department of the Air Force v. Rose.46 The

40 Id. at 844.
41 Id. at 847.
42 For Attorney General opinions containing “nature of the document” language, see note 38 supra. Professor Davis’ highly respected treatise on administrative law shares the same view as Robles and is in fact frequently referred to throughout the opinion. Id. at 845-47 (citing K. Davis, ADMINISTRATIVE LAW TREATISE § 3A.4, at 121 (Supp. 1970)).
43 For a listing of OAG opinions equating confidentiality with exclusion, see note 32 supra.
45 See 81 Ky. Op. Att’y Gen. 159. It is still uncertain whether this opinion indicates a rekindled devotion to a clearly reasoned policy of balancing or merely a further stepping stone to a per se exemption of library circulation records. If future opinions on library circulation records (the documents requested in Opinion 81-159) deny disclosure without analysis of the requestor’s public interest; then the OAG has simply continued the confusion which already surrounds the balancing process.
46 425 U.S. 352 (1976), aff’g 496 F.2d 261 (2d Cir. 1974). In Rose, two law review editors sought access to the case summaries of honor and ethics hearings at a military
Court held there could be no blanket exemption for personnel files in the face of Congress' desire for "a balancing of the individual's right of privacy against the preservation of the basic purpose of the . . . [FOIA] 'to open agency action to the light of public scrutiny.'"  

The second, and more probable, explanation for the apparent confusion in Opinion 76-717 is that the OAG was attempting to express an unrestricted use policy. During the early seventies, scholars became enmeshed in a debate centered around Getman v. NLRB, the first opinion to apply a balancing of interests under the FOIA. In Getman, two law professors studying union representation elections acquired from the NLRB a private company's list of employee names and addresses. In analyzing the privacy interest, the court concluded that releasing the list would result in minimal invasion of privacy caused by the professors' phone solicitations. Weighed against this slight inconvenience was the enormous potential benefit of streamlining NLRB election procedures as a result of the professors' NLRB voting study. Deciding to permit disclosure, the court held that its decision bore an implicit limitation that the released information be used only for the purpose asserted by the plaintiffs.

Critics of Getman urge that since the FOIA explicitly permits public records to be released to "any person," meaning

academy. 425 U.S. at 354-56. The district court granted summary judgment for the academy and the editors appealed. Id. at 352. At the court of appeals, an in camera inspection of the summaries was ordered along with the deletion of all identifying references. Id. at 352-53, 358. From that inspection it was determined that the summaries must be disclosed with all identifying references expunged. Id. at 354.

47 425 U.S. at 372.
48 450 F.2d at 670.
49 Id. at 671-72.
50 Id. at 675.
51 Id.
52 Id. at 677 n.24.
54 See 5 U.S.C. § 552(a)(3) (1976) states: "[E]ach agency, upon any request for records . . . shall make the records promptly available to any person." (emphasis added). The federal statute contains ample evidence that Congress intended public records to be
that a document either must be released to the public-at-large, irrespective of use, or not be released at all.\textsuperscript{55} The corollary to this interpretation is that if subsequent use is irrelevant, then the asserted use for the document also is irrelevant since upon release it may be used for any purpose. Interestingly, restricted use advocates counter with \textit{Wine Hobby USA} footnote fourteen\textsuperscript{66} and its statement that it is only nonexempt material that must be made available to "any person."\textsuperscript{57} If the OAG is touting unrestricted disclosure, reliance on \textit{Wine Hobby USA}, a restricted use decision, only multiplies the confusion.

In sum, the test the OAG has arrived at through six years of opinions is a hybrid of \textit{Robles} focus on the nature of the document and of the unrestricted use view. The public's interest in government information is conceived to be an abstract right, an interest divorced from any particular fact situation or plaintiff. As legal positivists once searched for absolute principles of law,\textsuperscript{58}
the Attorney General attempts to discover "the" public interest in any particular information. Failing this discovery, and applying the unrestricted use approach, a document containing a privacy interest is forever excluded from disclosure. Any future questions which arise about records containing similar information are quieted with a brief reference to the first opinion's finding of a lack of public interest, illustrating that the "nature of the document" reasoning is being adapted from Robles.

Finally, adoption of such a hybrid test conflicts with legislative intent implicit in both the Kentucky Act and the FOIA. If such a test for finding a clearly unwarranted invasion of personal privacy were proper, the Legislature simply could have authorized the OAG to scrutinize government documents as they were drafted, excluding from disclosure those for which an absolute public interest could not be theorized. Similarly, if Congress had intended the FOIA to be so interpreted, federal courts could avoid reanalyzing the public interest in documents involving similar information by merely recognizing earlier opinions denying any public interest in the same record.

B. Opinions Not Applying the Balancing Test

The remaining OAG opinions avoid the confusion of the hybrid balancing test but only because they do no balancing at all. These later opinions respond to requests for review with statements such as: "The results of the (test) examinations are exempt under KRS 61.878(1)(a) because such information is of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Such a declaration is meaningless. Standing alone the phrase "clearly unwarranted invasion of personal privacy" is merely conclusory. Only when it accompanies a subtle interest analysis does it become significant.

59 See, e.g., 79 Ky. Op. Att'y Gen 275 (citing 76 Ky. Op. Att'y Gen. 717 in stating: "we believed then, and still do, that home addresses, social security numbers, marital status, and information on the employment application was not of public concern . . ").


62 The Second Circuit, in deciding Rose v. Department of the Air Force, described "clearly unwarranted invasion of personal privacy" as "a wholly conclusory phrase, which
Empty statements such as the one quoted above are akin to writing the solution to an equation without revealing the equation. No one benefits from such shorthand; Kentucky circuit courts have no explanation of the OAG's reasoning on which to render a decision, litigants have no analysis to criticize or applaud and future applicants for disclosure of similar records are confronted with the denial of disclosure without explanation. However, an examination of decisions under the FOIA provides guidance toward adoption of a meaningful interpretation of the privacy exemption in Kentucky.

II. INTERPRETATION OF THE PRIVACY EXEMPTION UNDER THE FOIA

Although the draftsmanship of the FOIA has been criticized, the language of both the FOIA and the Kentucky Act favors full agency disclosure, rather than withholding. The

requires a court to apply a statutory standard without any definite guidelines.” 495 F.2d 261, 266 (2d Cir. 1974), aff'd 425 U.S. at 352.


See Department of the Air Force v. Rose, 425 U.S. at 352, 360-61 (“Congress therefore structured a revision whose basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language'”) (citing Senate Report, supra note 8, at 3).

See id. (“The revision [of the Administrative Procedure Act, 5 U.S.C. § 1002 (current version at 5 U.S.C. § 552 (1976))] was deemed necessary because 'section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute' ”) (citing Environmental Protection Agency v. Mink, 410 U.S. 73, 79 (1973)) (emphasis added). Under the APA, the FOIA predecessor, only “persons properly and directly concerned” could request information. Act of June 11, 1946, Pub. L. No. 404, ch. 324, § 3(e), 60 Stat. 237-38. Further, if an agency refused disclosure, no justification was required. Id. Finally, the APA contained no judicial remedy for wrongful withholding. H.R. Rep. No. 1497, 89th Cong., 2d Sess.
thirteen exemptions from disclosure of KRS section 61.878(1)\(^6\) and the nine exemptions of 5 U.S.C. section 552(b) (1976)\(^7\) are exclusive.\(^8\) However, even where the statute's exemptions apply, the agency may nonetheless exercise its discretion to release the exempted documents upon request.\(^6\)

The dominant objective of agency disclosure in the Kentucky Act and the FOIA may be evident, but the precise legislative intent behind the words "clearly unwarranted invasion of personal privacy" in both statutes is far from explicit. A definition of the "clearly unwarranted" invasion does not appear in the text of either statute.\(^7\) The sparse congressional history of the privacy exemption\(^7\) at best indicates that it "enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information."\(^7\) During House and Senate hearings on the bill, legislators emphasized the importance of interest balancing by refusing government agency recommendations to delete "clearly unwarranted" and thereby create a blanket exemption prohibiting any invasion

\(^2\) (1966) [hereinafter cited as HOUSE REPORT]. As the Senate Report states:

Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases as—"requiring secrecy in the public interest" or "required for good cause to be held confidential."

SENATE REPORT, supra note 8, at 3.

\(^6\) KRS § 61.878(1)(a) (1975).

\(^7\) 5 U.S.C. § 552(b) (1976).


\(^7\) In his extensive review of the FOIA, Professor Davis states: "Even though the records of the various hearings [on the FOIA] over a ten year period are voluminous, probably more than ninety-five percent of the useful legislative history is found in a ten page Senate committee report and in a fourteen page House committee report." K. DAVIS, supra note 42, at § 3A.2 (footnote omitted).

\(^7\) SENATE REPORT, supra note 8, at 9.
of privacy. Therefore, while there is confusion as to exactly what interests are to be balanced, Congress' deliberate suggestion is that application of the exemption is relative and contextual, less based upon labels and content than on circumstances. The Kentucky legislature's use of the same "clearly unwarranted" standard strongly suggests a legislative rejection of a blanket exemption in favor of public and private interests.

A. The Individual's Right to Privacy

Unlike the OAG review opinions, developing federal case law shows that the courts view the right of privacy as varied in nature, scope and degree. To say that a right of privacy exists in a particular record is to say only that the starting point of balancing analysis has been reached. Federal court decisions indicate that to arrive at that point, the OAG should determine: 1) the nature of the withheld information; 2) the degree to which that information is protected; and 3) whether other factors increase or decrease the magnitude of that protection.

1. The Nature of Private Information

Neither the House nor Senate reports on 5 U.S.C. section 552(b)(6) define the "right of privacy." Reading both reports

73 See Getman v. NLRB, 450 F.2d at 674 n.11.
76 See note 60 supra for a list of opinions not applying any balancing test.
77 See notes 78-110 infra and accompanying text for an extended discussion of federal case law and the differing aspects of personal privacy.

In the legal community, the four categories of privacy tort created by Professor Prosser have received wide acceptance in traditional tort settings. Prosser's four categories are: 1) appropriating a person's name or picture for commercial purposes, 2) intruding, 3) publicly disclosing private facts, and 4) casting a person in a false light through disclosures made out of context. Placed in the context of the FOIA, however, the categories fail to describe adequately the unique problems associated with invasion of privacy by the government. See A. MILLER, THE ASSAULT ON PRIVACY 169-209 (1971) (discussing the applicability of the four tort privacy theories to computerized record keeping, including government files); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1231-42 (1974-75) (criticizing Professor Prosser's categories in the area of government files).
together suggests only that Congress wished to protect records containing "vast amounts of personal data"79 "which can be identified as applying to . . . an individual"80 where "disclosure . . . might harm an individual."81 The federal courts have described privacy largely in terms of the content of information, frequently using the phrase "intimate details of a highly personal nature."82

Decisions involving the "similar files" language of the FOIA privacy exemption83 are of special help in defining the nature of private information since "a finding that the requested information is similar to that contained in personnel or medical files, [within 5 U.S.C. section 552(b)(6)] necessarily implies a substantial privacy interest that must be overcome before disclosure is warranted."84 The long lists of private information found in these

It has therefore become the court's responsibility to examine privacy on a case-by-case basis looking more at the qualities of private information than relying upon a stock definition. See Providence Journal Co. v. FBI, 460 F. Supp. at 784 ("The case law has defined the 'privacy' which FOIA protects largely in terms of the content of information and has tried to demarcate those informational topics which are deeply private from those which are only minimally private"). See also O'Brien, Privacy and the Right of Access: The Purpose and Paradox of Information Control, 30 Ad. L. Rev. 45, 65-75 (1978), which contains a lengthy and well reasoned investigation of the qualities of different definitions of privacy adopted by various groups of professionals.

79 Senate Report, supra note 8, at 9.


81 Id.


83 See, e.g., Brown v. FBI, 655 F.2d at 75 ("There is, to a large extent, an essential interrelationship between the question whether information to which access is denied under the aegis of Exemption 6 is 'similar' to personnel or medical files, and the inquiry whether disclosure of information would result in an unwarranted invasion of privacy . . ."); Washington Post Co. v. United States Dept of State, 647 F.2d at 198-99 ("to qualify as 'similar' files, the recorded data must incorporate 'intimate details' about an individual, information 'of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records'"). See also Sims v. CIA, 642 F.2d at 574-75; Harboldt v. Department of State, 616 F.2d 772, 774 (5th Cir. 1980), cert. denied, 449 U.S. 856 (1980); Ditlow v. Shultz, 517 F.2d 166, 169 (D.C. Cir. 1975); Wine Hobby USA, Inc. v. IRS, 502 F.2d at 135; Rural Housing Alliance v. United States Dept of Agriculture, 498 F.2d at 76-77.

84 Brown v. FBI, 658 F.2d at 75.
decisions reveal that familial,\textsuperscript{85} medical,\textsuperscript{86} financial\textsuperscript{87} and occupational\textsuperscript{88} data are four “core”\textsuperscript{89} types of information which normally are recognized as being private information entitled to possible protection. For example, the early and frequently cited decision discussing familial privacy is \textit{Rural Housing Alliance v. United States Department of Agriculture}.\textsuperscript{90} In this decision, the court refused to mandate disclosure of a housing discrimination report, noting that “information regarding marital status, legitimacy of children, identity of fathers of children, . . . welfare payments, alcoholic consumption, family fights . . . involves sufficiently similar details to be (afforded protection as) a ‘similar file’. . . .”\textsuperscript{91} A representative decision involving medical data as private information is \textit{Public Citizen Health Research Group v. HEW}.\textsuperscript{92} Although it permitted disclosure of aggregate health

\textsuperscript{85} See \textit{Rural Housing Alliance v. United States Dep’t of Agriculture}, 498 F.2d at 77.


\textsuperscript{89} The term “core,” as a qualification of highly private information, first appears in \textit{Information Acquisition Corp. v. Department of Justice}, 444 F Supp. 458, 464 (D.D.C. 1978). As used in that case, “core” personal information is that information which is so highly private that its release would \textit{normally} be an unwarranted invasion of privacy. \textit{Id.} at 464. Cited as specific examples of such information are marital status and college grades. \textit{Id.} Note, however, that release will not \textit{always} constitute a clearly unwarranted invasion. There may still be sufficiently substantial public interests to require disclosure even in the face of a core privacy interest. Too often the Kentucky Attorney General has failed to continue his analysis after finding a “core” privacy interest by examining the public interest in disclosure. See note 32, \textit{supra} for citation to Attorney General opinions equating confidentiality with exemption.

\textsuperscript{90} 498 F.2d at 73.

\textsuperscript{91} \textit{Id.} at 77.

\textsuperscript{92} 477 F. Supp. at 595.
care statistics, the court found that the confidential relationship between physician and patient as contained in the "intimate details of an individual's medical file" creates a substantial interest in nondisclosure. Indeed, the court considered protection of such files a "central goal of the privacy exemption." As for the financial privacy category, Gregory v. FDIC highlighted the vital privacy interest in banking financial records with its comment that "[t]he release of personal information such as the size of one's loans, his assets, or the collateral put up for a loan would constitute a clearly unwarranted invasion of an individual's privacy." Finally, in the occupational information category, Campbell v. United States Civil Service Commission denied federal employees access to a personnel management study of their agency. The court reasoned that disclosing matters such as an individual's job classification, salary and information as to overclassification and promotion contrary to regulations would be a serious invasion of privacy. When the requested information falls outside these four categories, the courts and the OAG must consider the intimacy of the information, the identification of individuals, and the potential harm if disclosed to guide them in their search for a privacy interest.

2. The Degree of Protection Afforded Private Information

The magnitude of a privacy interest is just as important as the recognition of the interest itself, since a substantial privacy interest will be overcome only by a greater public interest. In effect, determining the magnitude of the privacy interest is the second, or middle, step in the three step balancing of interests process. First, the court determines the existence of a privacy interest. Then it considers how substantial the interest may be. Finally, it determines

93 Id. at 603. The court in Public Citizen suggests the type of harm resulting from disclosure of medical records when it comments that "[d]isclosure of a physician's identity does nothing to intrude on his confidential relationship with patients, nor does it restrict the exercise of his professional medical judgment." Id. at 605 (emphasis added).
94 Id. at 603.
95 470 F. Supp. at 1329.
96 Id. at 1335.
97 539 F.2d at 58.
98 Id. at 62.
whether a public interest in government information exists in the
circumstances of the case that is sufficiently important to war-
rant the invasion of privacy resulting from disclosure.

Federal decisions have not been explicit in calibrating possi-
ble levels of privacy associated with various documents or
information.\footnote{As demonstrated by the decision in Providence Journal Co. v. FBI, 460 F. Supp. at 784-86, the decisions do not tend toward a highly structured analysis of privacy in-
teres. They tend instead to simply rank privacy interests as either high or low without setting out a middle ground.} The district courts tend roughly to gauge the im-
portance of protecting an individual's privacy by hypothesizing
the adverse effects of disclosure. These opinions most often men-
tion harassment, life-long embarrassment, disgrace, loss of friends
and loss of employment as significant harmful effects to be
(D.D.C. 1981); Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. at 1028.}
The weight given one or more of these harmful ef-
fects can vary according to the unique characteristics of the in-
dividuals affected. For example, in \textit{Rushford v. Civiletti},\footnote{485 F. Supp. 477 (D.D.C. 1980).} the
reputation of federal judges was considered to be their fundamental
asset which would be seriously jeopardized by the release of in-
formation that certain judges had been investigated.\footnote{\textit{Id.} at 479.} However,
the same sort of argument was rejected in \textit{Public Citizen Health}
in regard to the professional reputation of physicians.\footnote{477 F. Supp. at 603.}

Courts will find a privacy interest insubstantial unless there
is evidence that potential harm is likely to result from disclosure.
In \textit{Public Citizen Health}, the court was not persuaded by the defend-
ant agency's argument that disclosure of records reporting the
quality of Medicaid services would diminish physician participa-
tion in such public health programs since no evidence was
presented to that effect.\footnote{\textit{Id.} at 604-05.} Therefore, the court must consider the
likelihood that harm will result from disclosure as well as the nature
of the harm to determine the magnitude of a recognized privacy
interest.
3. Other Factors which Increase or Decrease the Magnitude of Privacy Protection

Courts have considered two other factors as affecting the weight given privacy interests. First, there has been some judicial discussion that a public agency's promise of confidentiality to a person submitting information should be weighed on the side of withholding. The court in Robles stated: "A promise of confidentiality is a factor to be considered, [although] it is not enough to defeat the right of disclosure . . . ." However, many courts remain uncertain whether this promise should be considered.

Several courts also have considered the availability of information from other sources in deciding whether a plaintiff has an acute need for the requested files. While the OAG has steadfastly refused to consider the special circumstances of any given applicant for public records, the federal courts have not. Representative of these decisions is Getman, in which the court specifically considered availability, stating that "[i]n striking the balance necessary to determine whether disclosure . . . would constitute a clearly unwarranted invasion of personal privacy, it is also significant that . . . [the] appellees have no other source obtaining the [requested information]."

Although the Attorney General might not consider either of these two factors, Kentucky courts are not bound by the policy

---

105 484 F.2d at 846.
107 See, e.g., Getman v. NLRB, 450 F.2d at 677; Disabled Officers Ass'n v. Rumsfeld, 428 F. Supp. at 458-59.
108 See note 38 supra for a listing of OAG opinions which refuse to consider the circumstances or need of the individual requesting disclosure.
109 See, e.g., Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d at 77 (Rural Housing is somewhat unique in that it actually includes a consideration of alternate sources in its formal statement of the balancing test); Rushford v. Civiletti, 485 F. Supp. at 479 (the defendant agency argued that the objectives of the plaintiff journalist could be satisfied by other means, implying that the plaintiff journalist had no need for the requested information); Celmins v. IRS, 457 F. Supp. at 16 ("It is also important to note that the data from these documents cannot be retrieved from any other source . . . .")
110 450 F.2d at 676-77.
111 The Attorney General's office has weighed a promise of confidentiality in favor
of unofficial review opinions. In view of the abbreviated analysis that the privacy exemption has received from the OAG, refusing to consider these additional determinants would seem shortsighted.

B. The Public Interest in Government Information

The privacy exemption of the Kentucky Act and the FOIA prevents only clearly unwarranted invasions of personal privacy, thus signaling that federal and state legislators will tolerate an invasion of privacy for the greater benefit of the public. The congressional motive behind this toleration was the abolition of agency secrecy. Therefore, the public’s right to know is limited to the right of discovering government information—facts relating directly or indirectly to the performance, policy and practice of public agencies and their employees. If not such interest exists, or, if it exists, but is of minor significance, there should be no disclosure. Neither the Act nor the FOIA was “intended to be an administrative discovery statute for the benefit of private parties.”

The court in Brown v. FBI expressed the same thought, stating that “it is the interest of the general public, and not that of the private litigant, that must be considered.” This general concept, the exclusive “public” interest in government information, lies at the core of the confusion created by the unrestricted use aspect of the Attorney General’s hybrid test. The OAG

of withholding public records in at least one request for disclosure. In Opinion 79-648, an opinion was requested by the Coordinator of the Kentucky Historical Society concerning the propriety of selling duplicate tapes of oral history interviews. 79 Ky. Op. Att’y Gen. 648. The Attorney General reminded the Coordinator that in an earlier opinion, 76-419, he had stated that the Oral History Commission could withhold the tapes if the oral interview had been given under stipulation that the tapes would be treated in a particular manner, including refusing access to the public. Id. See 76 Ky. Op. Att’y Gen. 419. See generally Information Acquisition Corp. v. Department of Justice, 444 F. Supp. at 464.

112 See Department of the Air Force v. Rose, 425 U.S. at 378.
113 See Senate Report, supra note 8, at 9.
114 See 444 F. Supp. at 464.
115 Columbia Packing Co. v. United States Dep’t of Agriculture, 417 F. Supp. at 655.
116 658 F.2d at 71.
117 Id. at 75.
118 See text accompanying notes 57-59 supra for an explanation of the hybrid balancing test and the confusion it has created.
seems to believe that information should not be released to a particular person for a specific purpose. Instead, it views the public nature of the interest as requiring information to be released, if at all, to all persons for any purpose. Thus, the OAG ignores the circumstances of individual requestors and engages in quixotic searches for "the" public interest in government data.

However, a specific person's particular need for the release of public records should routinely receive consideration. Only after the OAG decides that a facially private purpose does not directly or indirectly advance a broader public purpose should it find that no public interest exists. The absence of a public interest in one situation should not establish precedent to deny disclosure in another, except in the unlikely event that the later requestor seeks identical information for an identical purpose.\(^{120}\)

The federal courts which have accepted the unrestricted use prerequisite for disclosed information\(^{121}\) regularly examine each plaintiff's asserted purpose for requesting public records, unlike the Kentucky Attorney General. *Columbia Packing Company v. United States Department of Agriculture*\(^{122}\) is an excellent example. In *Columbia*, a meat packing company charged with bribing two federal meat inspectors sought disclosure of the inspectors' personnel records to assist in its defense.\(^{123}\) After determining that the two inspectors' privacy interests were diminished by

\(^{120}\) *Compare* Getman v. NLRB, 450 F.2d at 670 with Wine Hobby USA, Inc. v. IRS, 502 F.2d at 136. Both cases involved a request for names and addresses of persons kept on file by a public agency. In *Getman*, the requestors successfully sought the information, asserting the improvement of NLRB election procedures as the public interest their request encompassed. 450 F.2d at 675. In *Wine Hobby USA*, the requestor's sole motive was commercial solicitation; thus, its request was denied. 502 F.2d at 137. If the court took the approach to balancing that the OAG now takes, and that the decisions were switched with *Wine Hobby USA* decided first, the court in *Getman* would have reached the opposite result, since the court would merely have cited to *Wine Hobby USA* and summarily denied disclosure. This is the way the OAG cites to previous opinions to deny disclosure in subsequent ones without considering the possible different public interests in disclosure.


\(^{122}\) 417 F. Supp. at 651.

\(^{123}\) Id. at 653.
their participation in illegal activities, the court turned to the public interest in disclosure, stating:

Initially, the public interest purposes asserted by Columbia do not appear very weighty. Columbia seeks the records to assist its defense in the administrative proceedings, i.e., to advance its own private interests, not the public interest. . . . However, certain public interest purposes appear which are advanced, directly or indirectly, by the plaintiff here. First, there is a public interest in the availability of an adequate supply of wholesome meat and poultry. . . . There is the broader public interest in correct adjudication of administrative proceedings. . . . Finally, the public has an interest in whether public servants carry out their duties in an efficient and law abiding manner.

Other federal court decisions have considered as public interests such unique interests as: enhancing consumer choice among physicians rendering medicare services; improving the accountability of private individuals paid in large part from government funds; assessing employment discrimination; ensuring fair adherence to government merit promotion procedures; and monitoring government agency operations.

Among the public interests discussed above, one common public interest stands out—the public interest in ensuring honest and efficient government. The OAG should afford the highest deference to this interest, for "where government wrongdoing is in issue there is a special interest in complete, not partial, disclosure because of the 'beneficial effect upon public confidence of knowing nothing of possible relevance is being suppressed.'" Protection of this interest resulted in the release of private letters to a

124 Id. at 655.
125 Id.
130 Plain Dealer Publishing Co. v. United States Dep't of Labor, 471 F. Supp. at 1029.
131 Providence Journal Co. v. FBI, 460 F. Supp. at 787.
132 Id.
parole board in *Philadelphia Newspapers, Inc. v. United States Department of Justice*\(^{133}\) and in the disclosure of a list of unreported contributors involved in the Nixon Townhouse operation.\(^{134}\) Where charges of wrongdoing are unsubstantiated, however, the courts are less willing to disclose the identity of innocent suspects.\(^{135}\)

The lowest degree of interest, in fact no interest at all, is found in purely commercial uses for government information.\(^{136}\) Seeking information in order to solicit for customers, for example, is a purely private interest. Requesting public data to initiate or assist in personal litigation is another. Unaccompanied by a public interest, these private purposes can never require disclosure.

In summary, then, the majority of federal decisions (other than *Robles*) have not adopted the cursory approach to determining public interest taken by the Kentucky Attorney General.

**CONCLUSION**

In all fairness to the Office of the Attorney General, the present system is not well suited to discerning an individual plaintiff's purposes for disclosure. These persons probably do not include detailed descriptions of their asserted public interest in their requests for review.\(^{137}\) Nevertheless, the OAG cannot continue to look only at the nature of the document while philosophizing upon a metaphysical public interest. This hybrid balancing of the privacy interest and the public interest in government information is indefensible. The result of such misconstruction of the Kentucky Open Records Act has been a confusing heritage of blanket exemp-

---


\(^{135}\) See Rushford v. Civiletti, 485 F. Supp. at 479. The court stated: "There can be no question but that [the reputation of the judiciary] . . . would be in serious jeopardy by release of information that a great many judges have been subjected to a great many investigations, however unfounded the particular complaints may have turned out to be." *Id.*

\(^{136}\) Wine Hobby USA, Inc. v. IRS, 502 F.2d at 137.

\(^{137}\) The lack of specificity in requests for review could be remedied by requiring further information from the requestor in order to evaluate properly the public's interest as it exists in the particular situation.
tions under the "clearly unwarranted" invasion of privacy exception to disclosure. This misconstruction conflicts with interpretation of the same language in the privacy exemption of the FOIA. Unfortunately, during the past six years we apparently have strayed from the sunshine of full disclosure of public records into the shadows of unnecessary withholding. It is time to return.

Jerome E. Wallace