

PUBLIC EMPLOYEES FINANCIAL DISCLOSURE LAW REQUIRING  
DETAILED DISCLOSURE FROM LOW-ECHELON EMPLOYEES  
NOT UNCONSTITUTIONAL

*Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983).

In *Barry v. City of New York*,<sup>1</sup> the Second Circuit Court of Appeals expanded the permissible scope of public employee disclosure statutes by holding that New York City's financial disclosure law,<sup>2</sup> which requires detailed disclosure from low echelon employees,<sup>3</sup> does not violate their constitutional right to privacy.<sup>4</sup>

Local Law 48 is a comprehensive ordinance covering elected and appointed officials, as well as civil service employees whose annual salary exceeds \$30,000.<sup>5</sup> The ordinance requires these employees and their spouses to make a detailed annual disclosure of their income, assets, and liabilities.<sup>6</sup> Information disclosed pursuant to Local Law 48 be-

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1. 712 F.2d 1554 (2d Cir. 1983).

2. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 1106-5.0 (1975), amended by Local Law 48 (1979) [hereinafter referred to as Local Law 48].

3. See *infra* note 6. The district court case, *Slevin v. City of New York*, 551 F. Supp. 917 (S.D.N.Y. 1982), consolidated two class actions for trial on the merits. In the first, *Slevin v. City of New York*, No. 79 Civ. 4524, the plaintiff class consisted of Fire Department battalion chiefs, deputy chiefs, medical officers, and their spouses. In the second, *Barry v. City of New York*, No. 79 Civ. 4627, the plaintiff class consisted of New York City Police Department captains, deputy chiefs, inspectors, deputy inspectors, lieutenants, police surgeons, and their spouses. Both groups of employees represent uniformed city civil service employees earning over thirty thousand dollars annually.

4. *Barry v. City of New York*, 712 F.2d at 1564. The Barry plaintiffs claimed that the ordinance violated their first amendment rights of free speech and association, their fourth amendment right to be free from unreasonable searches and seizure, their fifth amendment right against self-incrimination, and their ninth and fourteenth amendment rights to privacy. *Slevin v. City of New York*, 551 F. Supp. 917, 924 (S.D.N.Y. 1982). The district court concluded that only the fourteenth amendment argument presented a viable claim. *Id.* at 931.

5. Local Law 48 applies to the following persons: (1) The Mayor, City Council President, City Councilman, and Borough Presidents. (2) Candidates for such positions. (3) Each head of an administration, each deputy administrator, assistant administrator, each agency head, deputy agency head, and member of any board or commission, other than a member of a board or commission who serves without compensation. (4) Each city employee who is a member of the management pay plan, or whose salary is thirty thousand dollars a year or more. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 1106-5.0(a) (1979).

6. The ordinance requires disclosure of the following information:

1. List the name, address and type of practice of any professional organization in which the person reporting or his spouse, is an officer, director, partner, proprietor or

comes public record<sup>7</sup> unless, on the basis of a privacy claim filed by the employee, the information is exempted from public disclosure.<sup>8</sup> If an

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employee, or serves in any advisory capacity, from which income of one thousand dollars or more was derived during the preceding calendar year.

2. List the source of each of the following items received or accrued during the preceding calendar year by the person reporting or his spouse.

(a) any income for services rendered, other than any source of income otherwise disclosed pursuant to paragraph one, of one thousand dollars or more;

(b) any capital gain from a single source of one thousand dollars or more other than from the sale of a residence occupied by the person reporting;

(c) reimbursement for expenditures of one thousand dollars or more in each instance;

(d) honoraria from a single source in the aggregate amount of five hundred dollars or more;

(e) any gift in the aggregate amount of value of five hundred dollars or more from any single source received during the preceding year, except as otherwise provided under the election law covering campaign contributions.

3. List each creditor to whom the person reporting or his spouse was indebted for a period of ninety consecutive days or more during the preceding calendar year in an amount of five thousand dollars or more.

4. List the identity of each investment and each parcel of real property in which the value of twenty thousand dollars or more was held by the person reporting or his spouse at any time during the preceding calendar year, based on the cost thereof or when acquired by means other than purchase, an estimate of the value at the time of receipt.

5. List the identity of each trust or other fiduciary relationship in which the person reporting or his spouse held a beneficial interest having a value of twenty thousand dollars or more during the preceding calendar year.

6. (a) Indicate if the total amount of income received from each and every source listed (1) pursuant to the provisions of paragraph one and subparagraphs a, b and c of paragraph two of this section is at least one thousand dollars but less than five thousand dollars, at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars or one hundred thousand dollars or more; and (2) pursuant to the provisions of subparagraphs d and e of paragraph two of this section is less than one thousand dollars; at least one thousand dollars but less than five thousand dollars; at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars or one hundred thousand dollars or more.

(b) Indicate if the total amount of indebtedness owed each creditor listed pursuant to paragraph three of this section was at least five thousand dollars but less than twenty-five thousand dollars; at least twenty-five thousand dollars but less than one hundred thousand dollars; at least one hundred thousand dollars but less than five hundred thousand dollars or over five hundred thousand dollars.

(c) Indicate if the total value of each investment and real property interest identified pursuant to paragraph four of this section and each beneficial interest identified pursuant to paragraph five of this section was during the reporting period, at least twenty-five thousand dollars but less than one hundred thousand dollars; at least one hundred thousand dollars but less than five hundred thousand dollars or five hundred thousand dollars or more.

*Id.* § 1106-5.0(b).

A substantial portion of the information disclosed is already made available to the individual government departments. *Slevin*, 551 F. Supp. at 931.

7. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 1106-5.0 (1979).

8. *Id.* § 5.0(d).

Local Law 48 amends a previous financial disclosure law, Local Law 1 of 1974. In *Hunter v.*

employee claims an exemption, the city Board of Ethics evaluates the claim<sup>9</sup> and determines whether to exempt the information concerned from public disclosure.<sup>10</sup>

The district court found the filing provisions under review in *Barry* constitutional.<sup>11</sup> The court held, however, that the public disclosure provisions, which permit members of the public to inspect the files upon request, violated the plaintiffs' right to privacy.<sup>12</sup> The Second Circuit affirmed the district court's holding on the filing requirement, reversed its holding on the public disclosure provision, and *held*: The city's interest in identifying conflicts of interest justified the public disclosure provision of the ordinance.<sup>13</sup> Furthermore, according to the court, the existence of a privacy claim provision mitigated any infringement of the plaintiffs' right to privacy.<sup>14</sup>

Although the United States Constitution does not expressly safeguard a right of privacy,<sup>15</sup> the Supreme Court has construed several provisions of the Constitution to protect privacy. Usually privacy interests that are corollaries of an interest protected by a specific constitutional amendment receive constitutional protection.<sup>16</sup> These

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City of New York, 58 A.D.2d 136, 396 N.Y.S.2d 186 (1977), the court found that Local Law 1 denied public employees due process because it failed to provide a mechanism for employees to file a privacy claim. Local Law 48 is intended to satisfy this requirement.

9. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 1106-5.0(d)(1). The privacy claim must be made in writing, and it must state the reasons why the information to be exempted is considered private. *Id.* § 5.0(d)(3). Evaluation of privacy claims only occurs when a member of the public requests access to the files.

10. *Id.* at d(2). The ordinance establishes three factors which the Board of Ethics must consider in evaluating privacy claims. The Board must consider whether the material to be exempted is of a "highly personal nature," whether the material involves an "actual or potential conflict of interest," and whether the material "in any way relates to the duties of the position held by the filer." *Id.* See *infra* notes 89-93 and accompanying text.

11. *Slevin v. City of New York*, 551 F. Supp. at 931.

12. *Id.* at 937-38.

13. *Barry v. City of New York*, 712 F.2d at 1560-61 (S.D.N.Y. 1983).

14. *Id.* at 1561.

15. Tort law protects the right to privacy from undue intrusion by private entities. See RESTATEMENT (SECOND) OF TORTS § 652B-E (1977). See generally, Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (treating developments in the common law tort concept of privacy); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (the original discourse from which developed most of the current tort law concerning privacy).

16. The Supreme Court has interpreted the first, third, fourth, and fifth amendments to protect privacy within specific contexts. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (first amendment protection of freedom of speech and association safeguards right of the individual to read an obscene book within the privacy of his home); *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (third amendment prohibition against unconsented peacetime quartering of a soldier in

provisions, however, do not afford a general right of privacy.<sup>17</sup>

The Supreme Court does recognize a more general right of privacy emanating from the substantive due process concept of personal liberty.<sup>18</sup> This general right of privacy encompasses both an individual's

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one's home protects the privacy and sanctity of one's home); *Mapp v. Ohio*, 367 U.S. 643, 646 (1961) (fourth amendment applies to protect individuals from invasion of the privacy of the home); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (privacy of association may be a necessary incident to protection of the first amendment right to freedom of association); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (fourth amendment prohibition of unreasonable searches is to be "liberally construed to safeguard the right of privacy"); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (principles underlying the fifth amendment privilege against self-incrimination encompass invasion of "the sanctity of a man's home and the privacies of life").

Further, some justices have interpreted the ninth amendment as providing a source of fundamental interests which, though not enumerated in the Constitution, are nonetheless safeguarded. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *id.* at 487-91 (Goldberg, J., concurring). *See also Redlich, Are There Certain Rights Retained by the People?*, 37 N.Y.U. L. REV. 787 (1962) (construing the ninth amendment as a source of protection for unenumerated fundamental rights).

For an argument that courts should not append privacy to the interests safeguarded by these constitutional provisions, see *Griswold v. Connecticut*, 381 U.S. at 509 (Black, J., dissenting) (substituting broad language which is susceptible to a variety of definitions for words explicitly provided in the Constitution is likely to result in dilution of constitutionally created rights).

The historical progression of the law of privacy made this type of argument unnecessary in *Barry*. The *Barry* court did not find it necessary to reexamine the basis for a constitutionally protected privacy right in light of current judicial acceptance of the principle. *See infra* notes 73-75 and accompanying text.

17. In *Katz v. United States*, 389 U.S. 347, 350 (1967), the Supreme Court stated that "[t]he fourth amendment cannot be translated into a general right of privacy. . . . [I]t protects individual privacy against certain kinds of governmental intrusions . . ." The Court arrived at a similar conclusion with respect to the fifth amendment in *United States v. Nobels*, 422 U.S. 225, 233-34 (1975).

18. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold* the Supreme Court struck down a Connecticut statute that banned the use of contraceptives by married persons. Justice Douglas, writing for the majority, held that the Connecticut statute violated a right of privacy derived from the penumbra formed by emanations from the specific guarantees of the Bill of Rights. *Id.* at 484-85. Although able to agree that the right of privacy exists, the majority disagreed concerning the source of that right. Consequently the justices filed six separate opinions. Justice Harlan found support for the existence of a right of privacy in "the basic values implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring). Justice Goldberg read the ninth amendment as a source of constitutionally protectible fundamental rights even though no enumeration of such rights appears in the Constitution. The right to privacy is one such protectible right. *Id.* at 491-92 (Goldberg, J., concurring). Justice White based his concurrence on the argument that the Connecticut statute deprived plaintiffs of their liberty to use contraceptives without due process of law, carefully avoiding any discussion of privacy. *Id.* at 502 (White, J., concurring).

Justices Black and Stewart filed separate dissenting opinions. They both concluded that the Constitution does not protect a general right of privacy, and therefore the Connecticut statute, however unwise, was not unconstitutional. *Id.* at 507 (Black, J., dissenting), 530 (Stewart, J., dis-

interest in making decisions free from government intrusion<sup>19</sup> and an individual's interest in maintaining the confidentiality of personal information.<sup>20</sup> The Court has confined the scope of the autonomy branch of privacy to familial concerns.<sup>21</sup> The scope of the confidentiality branch, however, remains unclear.<sup>22</sup>

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senting). See generally Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 216 (1960) (advocating a broad view of privacy right); cf. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 930 (1973) (reads *Griswold* as finding a right to privacy only within the narrow range of marital relations).

Eight years after *Griswold*, the Supreme Court held in *Roe v. Wade*, 410 U.S. 113 (1973) that "the fourteenth amendment's concept of liberty" was the source of a zone of privacy sufficiently broad to accommodate a woman's right to choose whether to terminate her pregnancy. *Id.* at 153. See also Paul v. Davis, 424 U.S. 693, 712-13 (1976) (citing *Roe* as authority for the existence of a constitutional right of privacy); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (recognizing the right to privacy as a fundamental personal right guaranteed by the fourteenth amendment).

19. *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977). This concept is referred to as the privacy interest's autonomy branch.

20. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The majority of courts evaluating disclosure statutes cite *Whalen* as evidence of Supreme Court recognition of a protectible privacy interest in nondisclosure of personal information. See *infra* note 44. A minority of courts maintain, however, that *Whalen* does not establish a confidentiality branch of privacy. See e.g., *J.P. v. Desanti*, 653 F.2d 1080, 1088-89 (6th Cir. 1981) (any discussion of a confidentiality branch of privacy in *Whalen* is dicta). A concurring opinion filed in *Whalen* supports this conclusion. Justice Stewart wrote a separate opinion to point out that he does not believe that the Constitution protects any general right of privacy, and that the decision in *Griswold* cannot be interpreted to protect an interest in nondisclosure of private information. 429 U.S. at 608-09 (Stewart, J., concurring).

21. See Paul v. Davis, 424 U.S. 693, 713 (1976) (the autonomy branch extends to matters relating to marriage, procreation, contraception, family relationships and child rearing and education). See also *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (right of privacy extends to activities relating to marriage, procreation, contraception, family relationships, and child rearing); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973) (fundamental rights of privacy protect the personal intimacies of the home, the family, motherhood, procreation, and child rearing).

Because the Supreme Court defines these familial decisions as fundamental interests, governmental actions which impinge upon them will be subject to a high level of scrutiny. See e.g., Paul v. Davis, 424 U.S. at 712-13 (there are limitations on the state's power to impinge fundamental interests); *Roe v. Wade*, 410 U.S. at 155 (where fundamental interests are involved, impinging regulations must further a compelling state interest); *Griswold v. Connecticut*, 381 U.S. at 485 (governmental actions which impinge fundamental interests must be narrowly drawn to effectuate their purpose).

Some analysts criticize this narrow construction of the scope of autonomy branch of privacy. See, e.g., Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361 (1979) (advocating an autonomy-based right of privacy which exceeds the scope of mere familial interests).

22. Courts have used the constitutional right to confidentiality in various situations in order to find protectible privacy interests. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (distribution of pornographic materials using children as subject matter violated the child's privacy

In *Whalen v. Roe*,<sup>23</sup> a class consisting of patients and doctors charged that New York State's Controlled Substances Act,<sup>24</sup> which requires disclosure of the names and addresses of persons obtaining certain prescription drugs,<sup>25</sup> violated their privacy interests.<sup>26</sup> The Supreme Court determined that the challengers failed to demonstrate that the Act posed a significant threat to their right of privacy.<sup>27</sup> In reaching its conclusion that the Act intruded minimally on the plaintiffs' privacy, the *Whalen* Court focused on the Act's safeguards against public disclosure of the collected information,<sup>28</sup> and on the limited number of New York Health Department employees who had access to the information in question.<sup>29</sup> In addition the Court noted that the plaintiffs did not have a reasonable expectation of privacy because disclosure of medical information is frequently necessary when obtaining medical care.<sup>30</sup> Finally, the Court found that the Act represented a reasonable attempt by the legislature to effectuate the legitimate purpose of inhibiting the diversion of harmful drugs into unlawful channels.<sup>31</sup> In light of the numerous justifications for the required disclosures, the *Whalen* Court

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interest); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (recognizing a confidentiality interest in nondisclosure of personal records and files); *Whalen v. Roe*, 429 U.S. 589 (1977) (patient's interest in avoiding disclosure of personal medical information is within the confidentiality branch of privacy); *Plante v. Gonzales*, 575 F.2d 1119 (5th Cir. 1978) (disclosure of personal finances implicates confidentiality interest).

23. 429 U.S. 589 (1977).

24. New York State Controlled Substances Act of 1972, N.Y. PUBL. HEALTH LAW § 3300 (McKinney, Supp. 1976-77) [hereinafter referred to as the Act].

25. *Id.* The New York legislature classified drugs into several schedules according to the drugs' potential for abuse and the extent of legal medical use of these drugs. The Schedule II classification, which includes the drugs these plaintiffs used or prescribed, consisted of drugs which have a high potential for abuse, but which may be prescribed for medical purposes.

26. 429 U.S. at 600. Plaintiffs contended that the Act violated both their autonomy and confidentiality interests. Their autonomy argument was premised on the concern that potential users of Schedule II drugs who became aware of the reporting requirement would be reluctant to accept needed medical treatment. As a result, plaintiffs argued, the Act impaired their interest in making important decisions regarding health care. The Court found this argument unpersuasive, *id.*, and concluded that the Act posed no significant threat to the plaintiffs' autonomy interests.

27. *Id.* at 603.

28. *Id.* at 594. The Act expressly prohibits public disclosure of the collected information. Health Department employees store the prescription forms in a vault and destroy them after five years. Computer tapes remain in a locked cabinet and when employees use the tapes, they run the computer "off line" to prevent tapping in. Finally, violation of the precautionary measures constitutes a criminal offense. *Id.* at 594-95.

29. *Id.* at 595.

30. *Id.* at 602.

31. *Id.* at 597-98. The facts show that abuses, such as pharmacists reusing prescriptions in order to dispense Schedule II drugs illegally, abounded. The legislature enacted the New York

found it unnecessary to determine the level of scrutiny courts should apply when disclosure requirements threaten confidentiality interests.<sup>32</sup> Nevertheless, the Court's analysis foreshadowed the development of the balancing test the Court announced in *Nixon v. Administrator of General Services*.<sup>33</sup>

In *Nixon*, former president Richard M. Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act,<sup>34</sup> which placed custody of the Nixon tapes in the director of the General Services Administration.<sup>35</sup> The Supreme Court conceded that Nixon had a privacy interest in preserving his personal records from public disclosure.<sup>36</sup> The Court, however, balanced that interest against the federal government's interest in preserving materials relating to Nixon's term in office.<sup>37</sup> The balance favored the public interest. Consequently, the Court held the Preservation Act constitutional.<sup>38</sup>

Several factors led the Court to conclude that the intrusion on Nixon's privacy would be minimal. First, the Court maintained that, "having placed himself in the public spotlight," Nixon had a lower expectation of privacy in his affairs than someone who had not entered public life.<sup>39</sup> In addition, the Court noted that only a limited number of professional archivists would view the files,<sup>40</sup> that the director would return all personal materials to Nixon, and finally that the ratio of pri-

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State Controlled Substances Act after detailed study of the abuses and consultation with other states using similar acts to meet their drug enforcement problems. *Id.* at 591-92.

32. *Id.* at 602. In his concurring opinion, Justice Brennan stated that, if it had implicated a confidentiality interest, the Act would "presumably be justified only by compelling state interests." *Id.* at 606. The strict scrutiny suggested by use of the term "compelling state interests," however, has not materialized as the applicable standard in confidentiality cases. *See infra* notes 44-46 and accompanying text. Thus confidentiality cases are subject to a less rigid level of scrutiny than autonomy cases. *See supra* note 21.

33. 433 U.S. 425 (1977).

34. 44 U.S.C. § 2107 (1982) [hereinafter referred to as the Preservation Act].

35. 433 U.S. at 425.

36. *Id.* at 457. The Court specifically noted that status alone does not negate all privacy interests of public officials. *Id.*

37. *Id.* The Court recognized several valid legislative purposes for the Preservation Act. First, it provided a means for preservation of executive papers for historical and educational purposes. Second, making these materials available for review enabled an airing of the factors which led to Nixon's resignation and thus, might facilitate rebirth of public confidence in the honesty of government officials. Finally, Congress had a legitimate interest in making the materials available to shed light on judicial proceedings then underway against Nixon. *Id.* at 452-54.

38. *Id.* at 465.

39. *Id.* at 455.

40. *Id.* at 465.

vate to nonprivate materials contained in the files was quite low.<sup>41</sup> The Court also found that substantial public interests demanded the disclosure of the nonprivate materials contained in the files<sup>42</sup> and there were no reasonable alternative means by which the government would extract from the commingled materials those in which it had a legitimate interest.<sup>43</sup>

The majority of courts addressing claims of constitutionally protected confidentiality have adopted the *Nixon* balancing standard.<sup>44</sup> In effect, these courts adopted an intermediate level of scrutiny, characterized as "something more than mere rationality,"<sup>45</sup> that will adequately screen disclosure laws so as to prevent their widespread application to "anyone in any situation."<sup>46</sup>

The proliferation of financial disclosure statutes applicable to all levels of government,<sup>47</sup> which commentators attribute in part to the post-Watergate political climate,<sup>48</sup> engendered considerable litigation

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41. *Id.*

42. *Id.* at 452-54; *see supra* note 37.

43. 433 U.S. at 465.

44. *See, e.g.,* United States v. Westinghouse Elec., 638 F.2d 570, 578 (3d Cir. 1980); Martinelli v. District Court for Denver, Colo., 199 Colo. 163, 612 P.2d 1083, 1091 (1980); Goldtrap v. Askew, 344 So.2d 20, 22 (Fla. 1976); Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 526, 315 N.E.2d 9, 17 (1974), *cert. denied*, 419 U.S. 1058 (1974); Montgomery County v. Walsh, 274 Md. 502, 512, 336 A.2d 97, 105 (1975), *appeal dismissed*, 424 U.S. 901 (1976); Lehrhaupt v. Flynn, 140 N.J. Super. 250, 261, 356 A.2d 3542 (N.J. Super. Ct. App. Div. 1976), *aff'd*, 75 N.J. 459 (1978); Evans v. Carey, 40 N.Y.2d 1008, 1010, 359 N.E.2d 983, 983, 391 N.Y.S.2d 393, 393-94 (1976); Fritz v. Gorton, 83 Wash. 2d 275, 294, 517 P.2d 911, 922 (1974), *appeal dismissed*, 417 U.S. 902 (1974).

In United States v. Westinghouse Elec., 638 F.2d 570, 578, (3rd Cir. 1980), the court scrutinized the confidentiality claim involved by considering the following: the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship which generated the record, the adequacy of the safeguards to prevent nonconsensual disclosure, the degree of need for access, and the state's interest in disclosure. Similarly, when evaluating the confidentiality claim in Martinelli v. District Court for Denver, Colo., 199 Colo. 163, 612 P.2d 1083, (Colo. 1980), the Supreme Court of Colorado followed a three-prong balancing test weighing the plaintiff's legitimate expectation of privacy, the importance of the state's interest in disclosure, and the possibility that less intrusive means of disclosure existed. *Id.* at 174-75, 612 P.2d at 1091.

45. Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

46. *Id.* *But see* Comment, *Privacy Limits on Financial Disclosure Laws: Pruning Plante v. Gonzales*, 54 N.Y.U. L. REV. 601 (1979) (advocating heightened scrutiny for both autonomy and confidentiality interests).

47. For a comprehensive compilation of state statutes, *see* Comment, *supra* note 46, at 601 n.1.

48. *See, e.g.,* Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758 (1975).



concerning the constitutionality of such statutes.<sup>49</sup> Much of this litigation focused on the constitutionality of financial disclosure statutes as applied to certain categories of government officials and employees.<sup>50</sup>

In *Plante v. Gonzalez*,<sup>51</sup> Florida state senators challenged the constitutionality of the state's financial disclosure law on grounds that it violated their right to privacy.<sup>52</sup> The Fifth Circuit acknowledged that the senators had a valid confidentiality interest in avoiding disclosure of their personal finances,<sup>53</sup> but nonetheless joined the majority view finding mandatory financial disclosure for elected public officials constitutional.<sup>54</sup> Echoing the language in *Whalen* and *Nixon*,<sup>55</sup> the court found that the senators, as elected public officials, had a low expectation of privacy in their personal affairs.<sup>56</sup> The court then balanced the plaintiffs' right to privacy against the state's concern in avoiding conflicts of interest among its officials and the public's legitimate interest in the financial affairs of their elected officials, and concluded that the statute was constitutional.<sup>57</sup>

Subsequently in *Duplantier v. United States*<sup>58</sup> the Fifth Circuit, in upholding the validity of the Judicial Ethics Act, expanded the categories of persons to whom financial disclosure laws may constitutionally apply to include non-elected federal judges.<sup>59</sup> According to the court, because the judges chose to accept public office, they have a limited

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49. See, e.g., *Goldtrap v. Askew*, 334 So. 2d 20 (Fla. 1976) (county ordinance requiring financial disclosure from elected officials held constitutional); *Illinois State Employees Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9 (1974), cert. denied, 419 U.S. 1058 (1974) (state employees' challenge constitutionality of executive order requiring financial disclosure); *Montgomery County v. Walsh*, 274 Md. 502, 336 A.2d 97 (1975), appeal dismissed, 424 U.S. 901 (1976) (action challenging the constitutionality of county financial disclosure ordinance targeting elected and appointed officials); *Lehrhaupt v. Flynn*, 140 N.J. Super. 250, 356 A.2d 3542 (N.J. Super. Ct. App. Div. 1976) (municipal ordinance requiring financial disclosure by designated officials held constitutional); *Evans v. Carey*, 40 N.Y.2d 1008, 359 N.E.2d 983, 391 N.Y.S.2d 393 (1976) (court upheld constitutionality of executive order requiring disclosure by state officials); *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (1974), appeal dismissed, 417 U.S. 902 (1974) (action seeking declaration that state disclosure law was unconstitutional).

50. See cases cited *supra* note 49.

51. 575 F.2d 1119 (1978).

52. *Id.* at 1121-22.

53. *Id.* at 1132.

54. *Id.* at 1136.

55. See *supra* notes 30, 39 and accompanying texts.

56. 575 F.2d at 1135.

57. *Id.* at 1138.

58. 606 F.2d 654 (5th Cir. 1979).

59. *Id.* at 669.

reasonable expectation of privacy, which is not altered by their status as non-elected officers.<sup>60</sup>

Few cases specifically address the constitutionality of financial disclosure statutes aimed at low echelon public employees. In *O'Brien v. DiGrazia*,<sup>61</sup> the First Circuit held that a police commissioner questionnaire that required Boston police officers to disclose personal financial information was constitutional.<sup>62</sup> In this pre-*Whalen v. Roe* decision, whether an interest in nondisclosure of personal information commanded constitutional protection remained uncertain.<sup>63</sup> The court decided to uphold the questionnaire substantially because the disclosed information would not become public.<sup>64</sup>

In *Michigan Supreme Court Advisory Opinion of Constitutionality of 1975 PA 227*,<sup>65</sup> the court explicitly discussed the effect that the status of the employee has on the allowable breadth of public employees financial disclosure statutes. The court considered the constitutionality of the state's financial disclosure law, which applied to both low echelon public employees and elected officials.<sup>66</sup> The court concluded that minor public officials performing "ministerial and routine functions" may not be compelled to disclose the same detailed information as higher echelon employees.<sup>67</sup> Other courts have indicated support for this con-

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60. *Id.* at 670.

61. 544 F.2d 543 (1st Cir. 1976).

62. *Id.* at 546. The questionnaire required the plaintiffs to disclose all sources of income for themselves and their spouses, all assets, and an estimate of their expenditures. The questionnaire also required the plaintiffs to attach copies of their state and federal income tax forms. *Id.* at 545.

63. *Id.* at 546. The court noted that there is constitutional protection for privacy within the context of specific constitutional provisions, but was uncertain about the existence of a more general protection for the confidentiality interest. See *supra* note 17 and accompanying text.

64. 544 F.2d at 546. The court found the police commissioner's suspicion of corruption among the officers relevant to a consideration of the necessity of the questionnaire. Nevertheless, the court held that the district court erred by considering the allegations of a connection to organized crime because the defendants did not allege that information in their complaints. *Id.* at 545.

65. 396 Mich. 465, 242 N.W.2d 3 (1976). Advisory opinions are not binding on the court.

66. *Id.* at 502-09, 242 N.W.2d at 18-21.

67. *Id.* at 506, 242 N.W.2d at 20. But see *Gideon v. Alabama State Ethics Comm'n*, 379 So.2d 570 (Ala. 1980). In *Gideon*, the Alabama Supreme Court upheld the constitutionality of the state's Ethics in Government Act, which requires public employees earning in excess of \$15,000 annually to file financial disclosure statements. The *Gideon* court, however, failed to recognize the confidentiality branch of privacy the Supreme Court set forth in *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), see *supra* notes 23-32 and accompanying text, and therefore based its conclusion solely on its finding that financial privacy was not an interest recognizable under the "familial" branch of privacy. A dissenting opinion in *Gideon* maintained that "the [i]nterest of the citizen in maintaining the privacy of their finances compels that a distinction be drawn between public

clusion in dicta.<sup>68</sup>

In *Barry v. City of New York*,<sup>69</sup> the Second Circuit treated low echelon employee status as material only in relation to whether that status affects the likelihood of corruption or conflicts of interest.<sup>70</sup> The court determined that low echelon employees are not immune from corruption,<sup>71</sup> and therefore found no reason to differentiate among classes of employees.<sup>72</sup>

As in earlier cases, the court acknowledged the existence of a privacy interest in nondisclosure of personal financial information,<sup>73</sup> and adopted the intermediate scrutiny balancing test as the appropriate standard of review.<sup>74</sup> The court then affirmed the district court's holding that the government's legitimate interest in detecting and preventing conflict of interest outweighs the impact of the filing requirement on plaintiffs' right to privacy.<sup>75</sup>

The public disclosure provision of Local Law 48 presented the court

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employees at large and public employees who hold positions of authority." 379 So.2d at 578 (Jones, J., dissenting).

68. See, e.g., *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978). After stating its conclusion that courts must apply a standard higher than minimum rationality to prevent widespread application to any employee, the *Plante* court specifically noted that the two cases in which a court invalidated financial disclosure statutes involved lower echelon employees. *Id.* at 1134 n.25 (citing *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1980) (financial disclosure statute overly broad because it failed to differentiate among classes of employees); *Advisory Opinion 1975 PA 227*, 396 Mich. 465, 242 N.W.2d 3 (1976) (lower echelon employees performing nonmanagerial functions should not have to disclose the same detailed financial information as upper echelon employees)); see also *Gideon v. Alabama State Ethics Comm'n*, 379 So.2d 570 (Ala. 1980) (Jones, J., dissenting) (lower level public employees have a higher reasonable expectation of privacy in their finances).

69. 712 F.2d 1554 (2d Cir. 1983).

70. *Id.* at 1563.

71. *Id.*

72. *Id.* The court found the distinction between non-policy making and policy making officials inconclusive. *Id.* at 1560 n.6.

73. *Id.* at 1559. The court expressed uncertainty regarding the scope of the interest protected, but stated that privacy of personal matters is a protected interest. *Id.*

74. *Id.* at 1559. Adoption of this intermediate standard reflects the Supreme Court's reluctance to expand the category of new fundamental interests commanding strict scrutiny review. *Id.* See also *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978).

75. *Id.* at 1560. In reaching this conclusion the court disposed of several arguments which plaintiffs presented in support of their claim that the filing mechanism was unconstitutional. First, plaintiffs argued that the information which employees must file is already available to the city through the individual departments employing the plaintiffs. *Id.* The court stated, however, that the city could establish its own central information system and need not rely on scattered departmental records. The court also rejected plaintiffs' argument that Local Law 48 fails to provide adequate safeguards to prevent disclosure. The court stated that the city has a long history of

with a more difficult problem. The court conceded that public disclosure of personal data represents a significantly greater intrusion on an individual's privacy than mere filing.<sup>76</sup> Concomitantly, the city has a weaker interest in public disclosure than it does in the filing provisions.<sup>77</sup> Nonetheless, the court reasoned that the provision for disclosure exemptions<sup>78</sup> would function to delete all sensitive information from the files. As a result, the information remaining accessible to the public would not be highly personal, and would relate to the filer's job or to a potential conflict of interest.<sup>79</sup> Thus, the court concluded that the privacy exemption mechanism adequately protects plaintiffs' reasonable expectation of privacy,<sup>80</sup> and the ordinance therefore withstood constitutional scrutiny.<sup>81</sup>

The *Barry* court correctly upheld the constitutionality of the filing requirement of Local Law 48. Disclosure of information already available to other government departments,<sup>82</sup> which will be kept in confidential files,<sup>83</sup> entails minimal intrusion on personal privacy. As a result, the government's interest in monitoring the conduct of public officials outweighs privacy concerns.

The court falters, however, in its analysis of the public disclosure provisions of the ordinance.<sup>84</sup> By considering an employee's status only in relation to the likelihood of conflicts of interest, the court disregards the apparent connection between status and reasonable expectation of privacy.<sup>85</sup> Elected officials and high level appointees may

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competently handling confidential files, and that the plaintiffs failed to demonstrate that officials would afford these files less competent treatment. *Id.* at 1561.

76. *Id.* at 1561.

77. *Id.*

78. *See supra* notes 9-10 and accompanying text.

79. 712 F.2d at 1561-62.

80. *Id.* at 1562. The court reasoned that plaintiffs' reasonable expectation of privacy exists only with respect to highly personal information not relating to their jobs. *Id.*

81. *Id.* at 1564. In responding to the plaintiffs' contention that the privacy mechanism inadequately protects their interests, the court noted that other courts have upheld the constitutionality of disclosure statutes with even weaker privacy mechanisms. *Id.* at 1563.

82. *Slevin v. City of New York*, 551 F. Supp. 917, 931 (S.D.N.Y. 1982). *See supra* note 8.

83. *See supra* note 75.

84. *See supra* notes 76-81 and accompanying text.

85. Many decisions dealing with the constitutionality of public employee financial disclosure statutes focus on the level of employment in order to determine the filer's expectation of privacy.

The Supreme Court recognizes public status as a primary determinant of reasonable expectation of privacy. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 455 (1977). Lower courts also subscribe to the public status standard for determining reasonable expectation of privacy. *See, e.g., Lehrhaupt v. Flynn*, 140 N.J. Super. 250, 261, 356 A.2d 3542 (N.J. Super. Ct. App.

reasonably anticipate more public scrutiny of their private affairs than public employees in less prominent offices.<sup>86</sup> In addition, the public's interest in disclosure is an expansive justification for intrusion that threatens to swallow the confidentiality interest unless countered by consideration of a reasonable expectation of privacy.<sup>87</sup> Reasonable expectation of privacy must, therefore, be a key element in the intermediate balancing test.<sup>88</sup>

The court's analysis is also flawed because it places considerable emphasis on the privacy exemption mechanism for protection of plaintiff's privacy,<sup>89</sup> even though the ordinance leaves the scope of protection to be given confidentiality claims to the discretion of the Board of Ethics.<sup>90</sup> The ordinance provides that the Board shall exempt material which is "highly personal," which does not "relate in any way" to the claimant's job, nor involve "an actual or potential conflict of interest."<sup>91</sup> These vague standards contrast sharply with the definitive safeguards the Supreme Court approved in *Whalen v. Roe*,<sup>92</sup> and seem an inadequate means of protecting plaintiffs' legitimate expectation of privacy.<sup>93</sup>

The protection afforded by the privacy mechanism is further diminished by the ordinance's requirement that privacy claims specify the

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Div. 1976) (by accepting public employment, officials move toward status of a public citizen and must subordinate privacy to the public's right to know); *Fritz v. Gorton*, 83 Wash. 2d 275, 294, 517 P.2d 911, 923 (1974) (candidates or public officers who enter the limelight invite greater scrutiny of their private lives); *In re Kading*, 70 Wis. 2d 508, 526, 235 N.W.2d 409, 417 (1975) (those who willingly place themselves in the public arena are subject to reasonable scrutiny and exposure).

86. See *supra* note 85. The public's right to know counters the public employee's right to privacy. See *Fritz v. Gorton*, 83 Wash. 2d 275, 298, 517 P.2d 911, 925 (1974) (the public's right to know is no less fundamental than the official's right to privacy). The balance of these two interests weighs most strongly in favor of the public's right to know when the official occupies an elective office or a high policy-making position. In such cases, the requirements of an informed voting public and protection of the public trust strongly favor disclosure of information that may indicate possible conflicts of interest. See Note, *The Constitutionality of Financial Disclosure Laws*, 59 CORNELL L. REV. 345, 354 (1974).

87. *Slevin v. City of New York*, 551 F. Supp. at 938. The public's right to know extends well beyond the disclosures necessary to create an informed voting public. If carried to its extreme, the public's right to know would justify disclosure by all persons connected with the government.

88. See *supra* note 56 and accompanying text.

89. See *supra* notes 78-81 and accompanying text.

90. NEW YORK CITY, N.Y., ADMINISTRATIVE CODE § 1106-5.0(3) (1979). The ordinance provides that the Board of Ethics shall establish procedures for consideration of the requests for exemption.

91. See *supra* notes 9-10.

92. See *supra* notes 28-29 and accompanying text.

93. See *supra* note 36 and accompanying text.

reasons for considering the information private.<sup>94</sup> The reasons are potentially more sensitive than the filed information.<sup>95</sup> Moreover, under the ordinance consideration of privacy only occurs upon a request for access.<sup>96</sup> As a result, the filer is forced to disclose private information, and then to wait indefinitely without knowing whether the Board will uphold the privacy claim. The resultant anxiety seems an added burden to an innocent employee.

Finally, the *Barry* court's reliance on *Duplantier v. United States*<sup>97</sup> as an example of the constitutionality of financial disclosure statutes with less stringent safeguards than those provided in Local Law 48<sup>98</sup> does not quiet the concern regarding the adequacy of these safeguards. The *Duplantier* plaintiffs were federal judges who, as public figures, had minimal reasonable expectation of privacy.<sup>99</sup> Consequently, the Judicial Ethics Act intruded on their privacy significantly less than does a similar act applied to lower echelon employees.

The central issue in *Barry* is the extent to which the government may legitimately intrude on employees' confidentiality interest.<sup>100</sup> Proper resolution of this issue requires the court to effect a delicate balance between the public's right to know and the employee's right to privacy.<sup>101</sup> The *Barry* decision expands the extent to which the government may impinge on the privacy right of its employees by placing unwarranted confidence in the privacy mechanism while failing to consider reasonable expectation of privacy. Only a clear Supreme Court directive defining the scope of the privacy interest's confidentiality branch will prevent other errant decisions regarding public information disclosure statutes.

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94. See *supra* notes 9-10 and accompanying text.

95. In *Slevin v. City of New York*, 551 F. Supp. at 936, the district court notes that a person losing the privacy claim must disclose the private material as well as the privately held reasons that the material is private.

96. See *supra* note 9.

97. 606 F.2d 654 (5th Cir. 1979). See *supra* notes 58-60 and accompanying text.

98. 712 F.2d at 1563. See *supra* note 81.

99. See *supra* note 60 and accompanying text.

100. This issue has produced considerable litigation. See *supra* note 49.

101. See *supra* notes 85-86.