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Administrative Law-Disclosure of Protected Records under the Missouri Sunshine Law

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RECENT CASES

ADMINISTRATIVE LAW–DISCLOSURE OF PROTECTED RECORDS UNDER THE MISSOURI SUNSHINE LAW

Wilson v. McNeal[1]

In August, 1975, Joseph Lee Wilson died while in police custody. The Internal Affairs Division of the St. Louis Police Department launched an investigation into Wilson's death. Upon completion of this investigation, the Wilson report was reviewed by the Board of Police Commissioners, who concluded that there was insufficient evidence to either prove or disprove whether St. Louis police officers were responsible for Wilson's death.[2] The Pulitzer Publishing Company and Wilson's widow then demanded to inspect the report; the Board refused both requests.

Pulitzer, already suing for access to other police documents, amended its petition in that suit, and requested that the Board be enjoined from denying it access to completed Internal Affairs reports.[3] Barbara Wilson also petitioned for an injunction against the Board, and sought access to both the report and the records of the investigation from which the report was prepared. In both cases the trial court granted plaintiffs' motions for summary judgment and permanently enjoined the Board from denying inspection of such records, and ruled in the *Pulitizer* case that after the matter is finally closed the completed inspection reports should be open to the public.

The cases were consolidated on appeal and the Missouri Court of Appeals, St. Louis District, reversed the trial court and remanded the case with instructions to dissolve the injunctions. The court held that the Wilson report was excepted from disclosure under Missouri's Sunshine Law as "a report . . . relating to the 'firing' of personnel."[4] Under this characterization the records could remain permanently closed at the discretion of

1. 575 S.W.2d 802 (Mo. App., D. St. L. 1978) (consolidated with *Pulitzer Publishing Co. v. McNeal* on appeal).

2. Under Board rules, the charge was termed "not sustained." *Id.* at 804.

3. Pulitzer's original petition sought access to certain arrest records, arrest registers, and police reports of the St. Louis Police Department. While suit was pending the Board changed its policy, and opened arrest records to public inspection. These records were not in issue on appeal. *Id.*

4. *Id.* at 806.

the Board even though no action would be taken against any personnel as a result of the report.[5]

Before the passage of legislation granting the right to inspect public records, the common law controlled the question of access and imposed strict requirements on anyone seeking to examine such records.[6] Although cases involving the right of individuals to inspect and copy documents held by governmental entities had occasionally arisen in Missouri, both at common law[7] and under Mo. Rev. Stat. sections 109.180 and 109.190 (1978),[8] the General Assembly's enactment of the Sunshine Law in 1973 was a significant development in this area.[9] However, little information about the effect of this law is available since it has only rarely been considered by the courts.[10] Thus, the discussion in *Wilson* serves to indicate some of the possible limits of the statute; it also illustrates some of the law's defects.

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5. *Id.* RSMo § 610.025(4) (1978) provides: "Any . . . meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote." The statute is silent as to the duration of the exemption for such records.

6. The basic requirement at common law was that the citizen seeking access to the records demonstrate an interest in the records such that he could bring or defend a legal action based on them. *See, e.g.*, State *ex rel.* Halloran v. McGrath, 104 Mont. 490, 67 P.2d 838 (1937); Daluz v. Hawksley, 116 R.I. 49, 351 A.2d 820 (1976). Ironically, Mrs. Wilson might have been better off under the common law, which has been accepted in Missouri. *See* authorities cited note 7 *infra*.

7. State *ex rel.* Kavanaugh v. Henderson, 350 Mo. 968, 169 S.W.2d 389 (1943) (noting that agency must allow access to records filed in its office by law or agency regulation); State *ex rel.* Conran v. Williams, 96 Mo. 13, 8 S.W. 771 (1888) (allowing copying of voter registration lists); State *ex rel.* Thomas v. Hoblitzelle, 85 Mo. 620 (1885) (allowing inspection of voter registration lists); Disabled Police Veterans Club v. Long, 279 S.W.2d 220 (St. L. Mo. App. 1955) (allowing access to records of St. Louis police retirement system).

8. RSMo § 109.180 (1978) provides that "Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall . . . be open for a personal inspection by any citizen of Missouri. . . ." RSMo § 109.190 (1978) permits copying of these records. *See* Drey v. McNary, 529 S.W.2d 403 (Mo. 1973); Kirkwood Drug Co. v. City of Kirkwood, 387 S.W.2d 550 (Mo. 1965); State *ex rel.* Collins v. Donelson, 557 S.W.2d 707 (Mo. App., D.K.C. 1977).

9. RSMo §§ 610.010-.030 (1978). The major change resulting from enactment of the Sunshine Law is a much broader right of access to public records than RSMo § 109.180 (1978) provides. While the older statute requires disclosure of only those records "kept pursuant to statute or ordinance," the Sunshine Law permits access to "any record retained by or of any public governmental body." The Act contains a broad definition of "public governmental body," which includes "any constitutional or statutory governmental entity, including any state . . . agency . . . or any political subdivision of the state, of any county, or of any municipal government." RSMo § 610.010(2), (4) (1978).

10. Herald Co. v. McNeal, 553 F.2d 1125 (8th Cir. 1977) (staying consideration of newspaper's suit for access to certain St. Louis police records pending outcome of state litigation on similar issue by Pulitzer Co.); Cohen v. Poelker, 520 S.W.2d 50 (Mo. En Banc 1975) (Sunshine Law does not violate Missouri Constitution); Carrothers v. Beal, 565 S.W.2d 807 (Mo. App., D. Spr. 1978) (suit dismissed as moot); State *ex rel.* Churchill Truck Lines v. Public Serv. Comm'n, 555 S.W.2d 328 (Mo. App., D.K.C. 1977) (PSC's violation of Sunshine Law in acting on application was merely a procedural error).

Although the final result of the court's decision, allowing these internal police investigative records to remain closed, accords with the usual treatment given such materials in other states,[11] the court's reasoning is open to question. The analysis appears to defeat the very purpose of the Sunshine Law, which is to allow broad access to public records.[12] While it was necessary for the court to characterize the reports as personnel records to fit them within the exemption from disclosure provided by section 610.025 (4),[13] the actual status of the records is debatable. The relation of these materials to any hiring, firing, or promotion of personnel is remote at best. Apparently they could just as well be called the records of a criminal investigation by the police. The uncertainty is compounded by the court's use of arguments appropriate to criminal investigations to support its conclusion.[14]

Sunshine laws are clearly remedial in nature,[15] and in Missouri it is well settled that remedial legislation is to be broadly construed so as to prevent the harm at which it is directed.[16] Further, exceptions to such

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11. *See, e.g.*, Whittle v. Munshower, 221 Md. 258, 155 A.2d 670 (Ct. App. 1959), *cert. denied*, 362 U.S. 981 (1960) (holding police investigative records confidential). *Cf.* Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893 (1952) (access to investigation report of Arizona Attorney General to be denied if the material was confidential); Runyon v. Board of Prison Terms and Paroles, 26 Cal. App. 2d 183, 79 P.2d 101 (1938) (no right to inspect material furnished to Board inquiry in expectation of confidence); Atchison, T. & S.F. Ry. v. Kansas Comm'n on Civil Rights, 215 Kan. 911, 529 P.2d 666 (1974), *aff'd*, 535 P.2d 917 (1975) (administrative agency not required to open its investigative files).

12. The several sections of Chapter 610, considered together, speak loudly and clearly for the General Assembly that its intent in enacting the Sunshine Law . . . was that . . . meetings of members of public governmental bodies . . . at which the peoples' business is considered must be open to the people and not conducted in secrecy, and also that the records of the body and the votes of its members must be open.

Cohen v. Poelker, 520 S.W.2d 50, 52 (Mo. En Banc 1975). Because the purposes of open records and open meetings laws are much the same, the statement of legislative purpose from another state is also instructive:

> [I]t is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. . . . The people insist on remaining informed so that they may retain control over [their government]. To that end, the provisions of this Act shall be liberally construed. . . .

TEXAS REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Vernon Supp. 1978).

13. See note 5 *supra* for the pertinent language of the statute.

14. "The report contains hearsay and unverified information, some of it obtained from confidential sources. Witnesses were told their interviews were confidential. Disclosure of the report would inhibit officers and citizens from divulging information in the future. Confidential sources and investigative techniques would be revealed. . . ." 575 S.W.2d at 811.

15. *See* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968); Brown v. State, 245 So. 2d 41 (Fla. 1971); Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969).

16. *See* City of St. Louis v. Carpenter, 341 S.W.2d 786 (Mo. 1961); *In re* Tompkin's Estate, 341 S.W.2d 866 (Mo. 1960); Decker v. Deimer, 229 Mo. 296,

legislation are generally to be narrowly construed.[17] The court, however, gave little consideration to the harm of non-disclosure of these public records. Neither did its decision to characterize the records as relating to personnel appear to be a narrow interpretation, especially when they could be categorized differently, perhaps as a routine police criminal investigation. While the court must of course construe the statute as it is written,[18] the purpose of the statute is also of importance.

The court devoted considerable space to an examination of the duration of the exemption for records. This question does not appear to have arisen before in Missouri or in other states, but it has come up several times under the Federal Freedom of Information Act.[19] The results in federal courts have been mixed, some cases holding that the privilege is absolute and without a time limitation,[20] others allowing access to the records in certain instances.[21] In general, it seems that the federal courts are more willing to allow only an exemption of limited duration where, as in *Wilson,* no action is initiated as a result of the report.[22]

Although the court in *Wilson* does seem to adopt a strict and literal interpretation of the statute, its conclusion may have been motivated by a covert balancing of the interests in this particular case. If that is so, the

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129 S.W. 936 (1910); B-W Acceptance Corp. v. Benack, 423 S.W.2d 215 (St. L. Mo. App. 1967).

17. *See* 73 AM. JUR. 2d *Statutes* § 313 (1974).

18. United Air Lines, Inc. v. State Tax Comm'n, 377 S.W.2d 444 (Mo. En Banc 1964), *cited in* Wilson v. McNeal, 575 S.W.2d at 809.

19. 5 U.S.C. § 552 (1976), *as amended by* Pub. L. No. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225 (1978).

20. SEC v. Frankel, 460 F.2d 813 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972); Wellman Indus., Inc. v. NLRB, 490 F.2d 427 (4th Cir.), *cert. denied,* 419 U.S. 834 (1974); Evans v. Department of Transp., 446 F.2d 821 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972); Center for Nat'l Policy Review v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974); Rural Hous. Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (D.C. Cir. 1974), *supplemented by* 511 F.2d 1347 (D.C. Cir. 1974); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.), *cert. denied,* 419 U.S. 974 (1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); Green v. Kliendienst, 378 F. Supp. 1397 (D.D.C. 1974); Koch v. Department of Justice, 376 F. Supp. 313 (D.D.C. 1974); Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971).

21. Moore-McCormack Lines, Inc. v. I.T.O. Corp., 508 F.2d 945 (4th Cir. 1974); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973); Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970); Philadelphia Newspapers, Inc. v. Department of Justice, 405 F. Supp. 8 (E.D. Pa. 1975); United States v. Imbrunone, 379 F. Supp. 256 (D. Mich. 1974); Black v. Sheraton Corp., 371 F. Supp. 97 (D.D.C. 1974).

22. *Compare* Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied,* 400 U.S. 824 (1970) (agency must show prospect of future enforcement proceeding before exclusion will be made) *and* Black v. Sheraton Corp., 371 F. Supp. 97 (D.D.C. 1974) (without reasonable prospect of enforcement, 10-year-old FBI record ordered disclosed) *with* Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974) (investigatory records protected even though no enforcement proceedings contemplated).

result may not be as harsh as it seems, but the possibility of narrow interpretation of such important legislation is still troubling.

In large part the uncertainty in this area is due to the Sunshine Law's form. Entire classes of records are covered by stated exemptions from disclosure[23] without provision for allowing access when there is great need for the documents or when there is no compelling reason to keep them secret.

While Missouri's Sunshine Law is certainly broad enough to allow access to most public records, having fewer exceptions than several similar acts,[24] its exemptions are still disturbing. That entire classes of records can never be disclosed without harm to the public interest seems an unwarranted assumption of sensitivity, especially since the exempted classes do not appear very remarkable. This blanket coverage seems out of keeping with the purposes of such legislation, which is to provide broad access to information of public concern.[25]

Although the exemptions do not appear large, they do raise the possibility of abuse. Experience with the Federal Freedom of Information Act has shown that government agencies may be less than eager to allow access to their records,[26] often using the sunshine laws as a means of withholding the information.[27] There is no reason to suppose the situation in Missouri will be different.

As the law presently stands it is not clear that such behavior would be prevented by the courts. The Act is ambiguous with regard to matters such as who has the burden of proof as to potentially exempted documents, whether *in camera* inspection is permissible, whether a court has the power to order selective disclosure, and whether a court could order disclosure of a record which falls within one of the statutory exemptions but does not merit such protection. While not expressly denying the courts the ability to open exempted records, the statute certainly does not encourage that since its exemptions do appear absolute. The role of the courts in carry-

23. RSMo § 610.025 (1)-(5) (1978) sets out five groups of records exempted from disclosure: (1) records of jury and grand jury proceedings, juvenile court proceedings, and certain other court proceedings; (2) records concerning legal actions involving a governmental body, and records concerning pending real estate deals; (3) records of the state militia or national guard; (4) records of nonjudicial mental health proceedings, certain scholastic matters, welfare cases, and the hiring, firing, or promotion of personnel; and (5) records exempted by other statutes.

24. *See, e.g.,* 5 U.S.C. § 522 (b) (1976) (9 categories of exempted material under Federal Freedom of Information Act); CAL. GOV'T CODE § 6254 (West Supp. 1978) (16 classes exempted); CONN. GEN. STAT. ANN. § 1-19 (b) (West Supp. 1975) (11 exemptions listed); OR. REV. STAT. § 192.500 (1973) (20 exceptions).

25. *See* authorities cited note 12 *supra.*

26. *See* Engel, *Introduction: Information Disclosures Policies and Practices of Federal Administrative Agencies,* 68 NW. U.L. REV. 184, 195-207 (1973).

27. *Hearings on U.S. Government Policies and Practices--Administration and Operation of the Freedom of Information Act, Before a Subcommittee of the House Committee on Government Operations,* 92d Cong., 2d Sess., pt. 5, at 1375 (1972).

ing out the purposes of the statute is practically ignored,[28] as is the possibility that certain public records within the exempted classes should not be protected. Neither the statute nor the *Wilson* decision sheds light on these important questions.

That there are several possible solutions to the problems presented by the *Wilson* case can be seen by looking at the approaches other jurisdictions have taken. One possibility is that the Missouri courts could simply declare that they were going to read a weighing requirement into the statute, and balance the interest involved in each case to determine whether the records should be opened. This sort of judicially imposed balancing test has arisen elsewhere under public disclosure laws,[29] but not under a law as complete as Missouri's.[30] Alternatively, the courts could choose, as the New Hampshire Supreme Court has done,[31] to follow the provisions of the Federal Freedom of Information Act regarding disclosure of investigative records.[32] Although this approach has not been adopted

28. RSMo § 610.030 (1978) provides merely that "[t]he circuit courts of this state shall have the jurisdiction to insure injunctions to enforce the provisions of sections 610.010 to 610.030 and 610.100 to 610.150."

29. In Oregon, OR. REV. STAT. § 192.010 (repealed 1973) provided: "Every citizen of this state has a right to inspect any public writing of this state, except as otherwise expressly provided by statute." The Oregon Supreme Court concluded that although the legislature has not provided for any sort of judicial weighing of interests to determine "whether the records should be made available for inspection . . . the court must balance the interest of the citizen [seeking access] . . . against the interest of the public having the business of government carried on efficiently." MacEwan v. Holm, 226 Or. 27, 45, 359 P.2d 413, 421 (1961).

30. It is noteworthy that OR. REV. STAT. § 192.010 (repealed 1973) was a statute much like RSMo § 109.180 (1978), merely providing access to public records in a general, non-specific manner. A court interpretating such legislation obviously had considerable discretion. RSMo §§ 610.010-.030 (1978), on the other hand, are much more specific in their definitions of terms, classes of records covered, classes of records exempted, and so forth. This gives a court a smaller gray area in which to read in requirements, such as a balancing test.

31. Lodge v. Knowlton, 118 N.H. 574, 391 A.2d 893 (1978) (in interpreting New Hampshire's Right to Know Law, N.H. REV. STAT. ANN. § 91-A:4 (Supp. 1973), which provides only that "Every citizen . . . has the right to inspect all public records . . . [of bodies defined by § 91-A:1] except as otherwise provided by statute. . . ," the court found the federal provisions so useful that it adopted them).

32. 5 U.S.C. § 522 (b) (7) (1976), provides that disclosure is not required of:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. . . .
>
> . . . .
>
> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

elsewhere, it at least substitutes an explicit list of factors for complete ambiguity.

Another solution would be for the legislature to specifically exempt police records or investigative materials from disclosure. Several other states have done so, either through an exception within their public disclosure law[33] or by separate statute.[34] Although this would avoid the need for courts to stretch existing exceptions to encompass police records they do not want to open, this solution is not desirable. While it would permit some such records to properly remain closed, an absolute exemption might well act to prevent disclosure of materials which should be opened. In addition, exemption of investigative reports would do nothing about other records which might just as appropriately warrant protection. Of course, the legislature could try to specify every type of record which should be allowed to remain closed, as other states have done.[35] In general, though, those schemes have proved complicated, confusing, and difficult to apply,[36] hardly the ideal for legislation designed to aid the public.

The best solution probably would be found in some type of legislatively mandated balancing test.[37] This would be especially suited to the public disclosure area since neither the courts nor the legislature alone can provide the solution. The courts do not have any basis in the common law for requiring the broad disclosure that characterizes sunshine laws, while the legislature cannot enforce the laws it enacts nor provide in its legislation for every situation that will come before the courts. In addition, the interests at issue are of the kind courts are often called on to assess: the importance of the desired information to the plaintiff, the public's interest in having access to the information, the interest of the government in maintaining the secrecy of the materials, and the potential harm to third parties of disclosure.

There are two sorts of balancing tests which could be created. First, a general balancing test could be adopted which would in effect provide

33. *See, e.g.*, IOWA CODE ANN. § 68A.7 (5) (West 1973); LA. REV. STAT. ANN. § 44:3 (West 1970).

34. *See, e.g.*, ALASKA STAT. § 12.45.050 (1978).

35. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 6252-17 (a) (3) (Vernon Supp. 1978) (16 categories of exceptions).

36. *See* Comment, *The Texas Open Records Act: A Section-by-Section Analysis*, 14 HOUS. L. REV. 398 (1977); Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 SW. L.J. 431 (1975).

37. *See* OR. REV. STAT. § 192.450 (1973) providing that "any person . . . may petition the Attorney General to review the public record to determine if it may be withheld from public inspection. The burden is on the agency to sustain its action." OR. REV. STAT. § 192.490 (1) (1973) states that in court proceedings "the court has jurisdiction . . . to order the production of any records improperly withheld from the person seeking disclosure . . . [and] the burden is on the public body to sustain its action." Thus, for a public body in Oregon to claim an exemption from the open records law, "it must show that the record falls within one of the eight defined exceptions *and* that the public interest does not require disclosure of that record." Comment, *The Right to Inspect Public Records in Oregon*, 53 OR. L. REV. 354, 360 (1974) (emphasis added).

that government records should be made open upon request if it was in the public interest to do so.[38] In litigation following an agency refusal of such a request, this test would operate much like the common law approach, examining the interest of each plaintiff to see if it merited opening the record to him. Since one of the objects of public disclosure laws was to avoid the requirement that anyone seeking access to a record show the necessity of disclosure and to avoid the inevitable challenges the agencies would make, this sort of balancing test does not seem preferable.[39] In the event this form of test were adopted, however, the legislation should at least clearly place the burden of proof on the government to demonstate the need for non-disclosure;[40] otherwise the situation would resemble the common law requirements placed on the plaintiff in the past.[41]

The second form of balancing test would be much like existing legislation in setting out classes of exempted materials and covered materials. However, it would also provide for disclosure of even otherwise exempted material if a court found that disclosure was appropriate. Unlike a more general balancing test, this approach would avoid the need to examine the interest of a plaintiff in any record sought, reserving this consideration for those seeking access to records in exempted categories.

The advantages of such a balancing test are obvious. The intent of sunshine legislation could be better achieved since the public would have access to the broadest amount of information not harmful to the general welfare. Further, truly sensitive material that should not be divulged could more easily be judicially protected than at present. An explicit weighing of the interests at stake would seem more acceptable than distorting the statute to reach the court's desired result based on a covert weighing.

A balancing test requirement would also prevent some of the improper closure of records that is possible at present, since the agency would have to show that the substance of the material should not be disclosed, not merely that the records were of a certain type. In this matter, it would also be useful to have an express authorization for an *in camera* inspection of the records in issue. At present, the propriety of such an examination is not clear, though it would obviously aid the court in

38. In effect, this would be much like the situation in Oregon after *MacEwan* but before the 1973 Records Inspection Act, OR. REV. STAT. §§ 192.410-.500 (1973), was passed. *See* authorities cited note 29 *supra*.

39. It has been observed that the general balancing test approach such as was created judicially in Oregon by MacEwan v. Holm, 226 Or. 27, 359 P.2d 413 (1961), even if it does place the burden upon the agency to show why the records should not be disclosed, is still ambiguous enough to result in "gross uncertainty as to whether examination would be allowed." Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records but Were Afraid to Ask*, 57 IOWA L. REV. 1163, 1175 (1972).

40. *See* IOWA CODE ANN. § 68A.8 (West 1973) (allows district court to restrain examination when the agency demonstrates "that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons"). *See also* authorities cited note 37 *supra*.

41. *See* authorities cited note 6 *supra*.