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LIABILITY WAITING TO STRIKE: VIOLATION OF AN EMPLOYEE'S PRIVACY THROUGH DISCLOSURE OF RECORDS

I. INTRODUCTION

Lurking all but unnoticed in the daily routine of California's private employers is a common act which may inflict substantial cost without warning. Some employers readily release an employee's personal records without realizing that, in so doing, they may be violating that individual's right of privacy.

With the elevation of privacy in California to the status of an inalienable right¹ the tort of invasion of privacy has been greatly expanded. The courts have already recognized causes of action for the unauthorized disclosure of financial, medical and student records. Although the area of employee records has not yet been addressed by the judiciary,* it is probable that given the highly personal nature of information in personnel files, these documents will also be accorded constitutional protection, thereby imposing liability on offending employers.

This comment will explore the scope of the tort of invasion of privacy in California today, and will focus on its ramifications upon unauthorized disclosures by private² employers. Situations where compelling interests require the release of information will be discussed. Finally, this comment will analyze the movement toward federal legislation in the area of employee privacy.

II. ANALYSIS

A. *Development of the Right to Privacy in California*

1. The common law

Generally, the right to privacy has been left to the individual states to define and protect.³ California, in adopting the common law ap-

1. Article I, section 1, of the California Constitution was amended in 1972 to include privacy as an inalienable right. See note 15 *infra* for the text of the provision as it currently reads.

* See POSTSCRIPT *infra*.

2. The public sector is regulated in this area by legislation at both the federal and state levels. Privacy Act of 1974, § 3, 5 U.S.C. § 552a (1976); Information Practices Act of 1977, CAL. CIV. CODE §§ 1798-1798.76 (West Supp. 1981). Thus, this comment is restricted to the potential liability of the private employer.

3. *Katz v. United States*, 389 U.S. 347, 350-51 (1967). The vast topic of privacy was

proach, has recognized four separate invasions,⁴ all of which encroach upon the "right to be let alone."⁵

Of these four categories, public disclosure of private facts comes closest to describing an individual's interest in preventing disclosure of records containing personal information.⁶ A cause of action under this theory requires three elements: 1) a public disclosure, 2) of private, rather than public, facts, and 3) "the matter made public must be one which would be offensive and objectionable to a reasonable person."⁷

To be actionable under the common law, the offending disclosure

succinctly divided into three types in *Crain v. Krehbiel*, 443 F. Supp. 202, 207-08 (N.D. Cal. 1977). According to the *Crain* court, the first category involves the right of individuals to be secure from unreasonable government searches and surveillance under the fourth amendment to the United States Constitution. The second category, which the district court referred to as the "right of selective disclosure," concerns one's right to determine when, how and to what extent information about oneself is communicated to others. The final category, which the court termed "the right of autonomy," encompasses the individual's freedom to make certain kinds of important decisions. This type of privacy has been generally limited by the courts to "matters involving marriage, procreation, contraception and family relationships." *Id.* at 208 (citation omitted).

The *Crain* court recognized that privacy protection under the Federal Constitution is available only with respect to the first and third categories. The court stated that: "In these areas, the Constitution secures the right of privacy because that right is 'indispensable' to some other Constitutional right [citations omitted]. The critical questions are whether and how involuntary disclosure of private information affects the exercise of a right independently secured by the Constitution." *Id.* at 209.

The second type of privacy, that involving selective disclosure, is largely a matter of state tort law. *Id.* at 208. The *Crain* court suggested the possible applicability in this area of the common law tort of public disclosure of private facts. *Id.* For a discussion of this tort, see notes 6-14 *infra* and accompanying text.

4. The four torts recognized at common law were:

1) Intrusion upon one's seclusion or solitude. *E.g.*, *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (defendant's employees photographed plaintiff in his office, and electronically recorded and transmitted his conversations without his consent).

2) Public disclosure of private facts. *E.g.*, *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (rehabilitated prostitute's past was revealed in a motion picture).

3) Placing one in a false light in the public eye. *E.g.*, *Gill v. Curtis Publishing Co.*, 38 Cal. 2d 273, 239 P.2d 630 (1952) (plaintiff's photograph appeared in a magazine article about love based on lust).

4) Appropriation of one's name or likeness. *E.g.*, *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (defendant circulated an advertisement claiming that plaintiff was a satisfied user of defendant's product).

For a discussion of the development of these common law actions as well as their limitations and defenses, see Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) [hereinafter cited as Prosser].

5. According to Prosser, this phrase, coined by Judge Cooley (COOLEY, TORTS 29 (2d ed. 1888)), has become accepted as representative of what is encompassed by the right of privacy. Prosser, *supra* note 4, at 389.

6. *Crain v. Krehbiel*, 443 F. Supp. at 208.

7. *Forsher v. Bugliosi*, 26 Cal. 3d 792, 808-09, 608 P.2d 716, 725, 163 Cal. Rptr. 628, 637 (1980) (discussing the conflict between the freedom of the press and the right to privacy).

has to be made to the public at large.⁸ A communication to an individual or to a small group is not protected.⁹ This requirement was addressed recently by a California court of appeal in *Porten v. University of San Francisco*.¹⁰ Upon seeking admission as a transfer student to the University of San Francisco (USF), the plaintiff furnished the school with his grades from Columbia University.¹¹ He received assurances that the transcripts would be used only for the purpose of evaluating his application and would not be released to third parties without his permission.¹² Porten alleged that USF had disclosed his Columbia grades to the State Scholarship and Loan Commission without his authorization and that in doing so USF had invaded his privacy.¹³ The court held that because such disclosure was neither to the public in general nor to a large number of persons, Porten's complaint failed to state a cause of action for public disclosure of private facts.¹⁴ Thus, the common law protection for unauthorized disclosure continues to be limited in scope by the size of the audience to whom the disclosure is made. Under the common law, an unauthorized disclosure of employee records would only be actionable if such release were to the general public or at least to a very large group of people.

2. Extension of the right to privacy in California by constitutional amendment

The California Constitution was amended by the electorate in 1972 to include privacy as an inalienable right.¹⁵ The elevation of pri-

8. Prosser, *supra* note 4, at 393.

9. *Id.*

10. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

11. *Id.* at 827, 134 Cal. Rptr. at 840.

12. *Id.*

13. *Id.*

14. *Id.* at 828-29, 134 Cal. Rptr. at 841. However, Porten's complaint was found to state a cause of action for invasion of privacy under the California Constitution. *Id.* at 832, 134 Cal. Rptr. at 843. For further discussion, see text accompanying notes 38-40, *infra*.

15. CAL. CONST. art. I, § 1 currently reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (emphasis added).

The "moving force" behind this constitutional amendment was the advent of the computer age. *White v. Davis*, 13 Cal. 3d 757, 774, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975). According to the California Supreme Court, the primary purpose of the provision was to protect the individual against increased surveillance and data collection by government and business. *Id.* Quoting the language of the amendment's proponents as published in the Proposed Amendments to Constitution, Propositions and Proposed Laws Together With Arguments, at 26 (California Election Pamphlet, General Election (Tuesday, Nov. 7, 1972)) [hereinafter cited as *Election Brochure*], the *White* court stated that

vacancy to constitutional status has been viewed by the courts as an expansion of the common law right.¹⁶ However, the scope of the amendment has never been carefully delineated.¹⁷

One of the "mischiefs"¹⁸ at which the amendment was directed was "the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party."¹⁹ Elaborating on the need for constitutional protection in this area, proponents of the amendment stated:

*'Fundamental to our privacy is the ability to control circulation of personal information. [Italics in original.] This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.'*²⁰

The words quoted above evidence the voters' intent to protect individuals from privacy violations by private persons, as well as from violations by the government. The courts have so interpreted the amendment, holding that members of the private sector may be held responsible for invasions of privacy.²¹ Additionally, the constitutional

"[c]omputerization of records makes it possible to create 'cradle-to-grave' profiles of every American." 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105. The increasing use of computers was also one of the reasons given by the California legislature for the enactment of the Information Practices Act of 1977, CAL. CIV. CODE §§ 1798-1798.76 (West Supp. 1981), which regulates employers in the public sector. See note 72 *infra*.

In *White*, the California Supreme Court recognized the propriety of relying on an election brochure as the only legislative history available to aid in the interpretation of a constitutional amendment adopted by the electorate. 13 Cal. 3d at 775 n.11, 533 P.2d at 234 n.11, 120 Cal. Rptr. at 106 n.11. Thus, the voter's pamphlet is quoted extensively in *White* and in *Porten*, as well as in other cases interpreting the privacy amendment.

16. *Porten v. University of San Francisco*, 64 Cal. App. 3d at 829, 134 Cal. Rptr. at 841. As support for this proposition, the court in *Porten*, quoting the *Election Brochure*, *supra* note 15, at 28, stated that "[t]he right to privacy is much more than 'unnecessary wordage.' It is fundamental to any free society. Privacy is not now guaranteed by our State Constitution. This simple amendment will extend various court decisions on privacy to insure protection of our basic rights." *Id.* at 829, 134 Cal. Rptr. at 841-42 (emphasis in original).

17. *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 656, 542 P.2d 977, 979, 125 Cal. Rptr. 553, 555 (1975) ("[T]he amendment is new and its scope as yet is neither carefully defined nor analysed by the courts . . .").

18. The evils at which the amendment was aimed have been called "mischiefs" by the courts because this was the term utilized in the election brochure.

19. *White v. Davis*, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

20. *Id.* at 774, 533 P.2d at 234, 120 Cal. Rptr. at 106 (emphasis in original) (quoting *Election Brochure*, *supra* note 15, at 27).

21. *E.g.*, *Porten v. University of San Francisco*, 64 Cal. App. 3d at 829, 134 Cal. Rptr. at

provision is "self-executing";²² thus, no further legislative or judicial action is necessary to secure what has become a legally enforceable right.²³

However, this constitutional right of privacy is not absolute. An intrusion into one's privacy must be justified by a compelling interest.²⁴ When an individual claims that his privacy has been invaded, the court balances the individual's right to privacy against the interests of the intruding party.²⁵ Thus, even if the constitutional right to privacy protects employee records, there are certain situations where a compelling interest may require release of the information.²⁶

B. Expansion of the Concept of Disclosure of Personal Facts

Based on the constitutional amendment, the courts have recognized causes of action for the non-public disclosure of personal records in three different contexts.²⁷ In so doing, the courts have expanded the common law tort of public disclosure of private facts. These cases provide examples of liability for nonconsensual release of data to an individual or to a small group, rather than to the public. Careful analysis of these cases indicates that a cause of action also exists for any unauthorized disclosure of employee records.

1. The recognition of a new cause of action

An individual has a cause of action under the constitutional amendment when his reasonable expectation of privacy as to certain

842 ("Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.").

22. *White v. Davis*, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

23. *Id.*

24. *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 657-58, 542 P.2d 977, 979-80, 125 Cal. Rptr. 553, 555-56 (1975) (focusing on the civil litigant's interest in seeking discovery of relevant facts); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 679-80, 156 Cal. Rptr. 55, 61 (1979) (discussing the state's interest in the quality of health and medical care received by its citizens).

25. *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d at 657, 542 P.2d at 980, 125 Cal. Rptr. at 555. For further discussion of the balancing test, see text accompanying notes 77-86 *infra*.

26. See notes 75-89 *infra* and accompanying text.

27. *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) (release of financial data); *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979) (hospital's obligations as custodian of medical records); *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976) (disclosure of student records). For a detailed discussion of these cases, see notes 28-42 *infra* and accompanying text.

information about himself has been violated.²⁸ The determination that there is a reasonable expectation of privacy rests upon the intimate nature of the data.²⁹ For example, in *Valley Bank of Nevada v. Superior Court*,³⁰ the defendant sought, in connection with discovery, the plaintiff bank's loan records of several non-parties. The bank objected to the disclosure, asserting that the information requested was confidential and that disclosure would violate its customers' rights of privacy.³¹ The court concluded that a person has a reasonable expectation of privacy in his banking records.³²

In *Board of Medical Quality Assurance v. Gherardini*,³³ the court of appeal recognized an individual's reasonable expectation of privacy in his medical records. *Gherardini* involved an administrative subpoena for the hospital records of five non-party patients. The hospital, asserting the privacy rights of the absent patients, refused to surrender the records. The court, comparing the situation before it to those in which a right of privacy had already been acknowledged,³⁴ concluded that "[a] person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas [bank and student records] already judicially recognized and protected."³⁵ Of special concern to the court was the possibility of humiliating the patient upon disclosure of his ailments, as well as the fear that if medical information were not protected, then patients would be reluctant to disclose fully their symptoms, thereby frustrating proper diagnosis and

28. *Porten v. University of San Francisco*, 64 Cal. App. 3d at 832, 135 Cal. Rptr. at 843.

29. *Board of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d at 678, 156 Cal. Rptr. at 60.

30. 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

31. *Id.* at 655, 542 P.2d at 978, 125 Cal. Rptr. at 554.

32. *Id.* at 656, 542 P.2d 979, 125 Cal. Rptr. at 555. For this conclusion the court relied on *Burrows v. Superior Court*, 13 Cal. 3d 238, 243, 529 P.2d 590, 593, 118 Cal. Rptr. 166, 169 (1974), in which the California Supreme Court held that a bank's disclosure of financial data received from a customer violated the California Constitutional provision against unreasonable searches and seizures (CAL. CONST. art. I, § 13) because of the customer's reasonable expectation of privacy in the information.

33. 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979).

34. *Id.* at 678, 156 Cal. Rptr. at 60-61. Among the privacy interests already recognized were those in bank records (*Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975); *Burrows v. Superior Court*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974)), student information (*Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976)), medical, psychological and political histories (*Britt v. Superior Court*, 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978)); and telephone conversations (*Tavernetti v. Superior Court*, 22 Cal. 3d 187, 583 P.2d 737, 148 Cal. Rptr. 883 (1978)).

35. 93 Cal. App. 3d at 678, 156 Cal. Rptr. at 60.

treatment.³⁶ The *Gherardini* court held, therefore, that medical records maintained by a hospital were within the species of protected information.³⁷ *Valley Bank* and *Gherardini* indicate that a reasonable expectation of privacy may arise as to records which contain intimate and personal information.

*Porten v. University of San Francisco*³⁸ demonstrated that a reasonable expectation of privacy may, alternatively, be founded upon an expression by the custodian of the records that such materials would remain confidential. In *Porten*, USF had assured the plaintiff that his Columbia University grades would be kept confidential and would not be disclosed to third parties without his authorization.³⁹ Without the plaintiff's permission, USF released his grades to the state scholarship and loan commission. The court in *Porten* did not discuss the personal nature of student records. Instead, the court relied upon the promise of confidentiality made to Porten.⁴⁰ Thus, a reasonable expectation of privacy may be based either upon the personal nature of the information, or upon expressions by the custodian that the data will be kept confidential.

The concept of a "reasonable expectation of privacy" closely resembles the common law element which requires the facts disclosed to be offensive and objectionable to the average person.⁴¹ As is true at common law, consent vitiates a claim of unauthorized disclosure of personal records.⁴²

There have been situations in which courts have refused to find an actionable invasion of privacy. For example, in *Stackler v. Department*

36. *Id.* at 678-79, 156 Cal. Rptr. at 61.

37. *Id.* at 679, 156 Cal. Rptr. at 61.

38. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976). See text accompanying notes 4-14 *supra* for a discussion of why the common law afforded the plaintiff no cause of action in this case.

39. *Id.* at 827, 134 Cal. Rptr. at 840.

40. *Id.* at 832, 134 Cal. Rptr. at 843. Additional support for this concept appears in *Valley Bank*, where the court noted that other jurisdictions have held that a bank *impliedly* agrees not to divulge information without the customer's consent. 15 Cal. 3d at 657, 542 P.2d at 979, 135 Cal. Rptr. at 555 (citing *First Nat'l Bank in Lenox v. Brown*, 181 N.W.2d 178, 183 (Iowa 1970), in which the court recognized a bank's obligation not to disclose customers' confidential affairs; *Milohnich v. First Nat'l Bank of Miami Springs*, 224 So. 2d 759, 762 (Fla. App. 1969), where the court held that the plaintiff bank had an implied contractual duty of confidentiality; 10 AM. JUR. 2d *Banks* § 332 (1963); Annot., 92 A.L.R. 2d 900 (1963)).

41. See text accompanying note 7 *supra*.

42. Board of Medical Quality Assurance v. *Gherardini*, 93 Cal. App. 3d at 678, 156 Cal. Rptr. at 60. The *Gherardini* court stated that the ability to control circulation of information about oneself is essential to the right of privacy. *Id.*

of *Motor Vehicles*,⁴³ the plaintiff asserted that the presence of his photograph on a driver's license was an invasion of his privacy.⁴⁴ The court held, however, that there can be no reasonable expectation of privacy in that which is already public, in this case, his appearance.⁴⁵ Thus, the plaintiff failed to state a cause of action under the California Constitution.⁴⁶

Similarly, the plaintiff in *Lehman v. City and County of San Francisco*⁴⁷ claimed an invasion of his privacy due to the disclosure by the Jury Commissioner that he was a prospective juror.⁴⁸ The court stated that the appearance of one's name on a list of jurors revealed nothing about the individual.⁴⁹ Therefore, such a release was not of a personal nature and could not support a claim of a reasonable expectation of privacy.⁵⁰ Thus, the courts have not recognized a cause of action where the information disclosed is already public or where it reveals nothing personal about the individual.

With this background as to the circumstances under which the California courts have allowed an action for invasion of privacy, this comment will now explore how the constitutional expansion of the common law can affect the interests of the employee in his personnel file.

2. Application of the tort to employee records

As the cases have demonstrated, for a cause of action to arise, it is necessary that the individual have a reasonable expectation of privacy in the information disclosed. This expectation may be founded either upon the nature of the information or upon expressions by its custodian that the records will be kept confidential.

In applying these theories to employee records, it is useful to consider what such records usually entail. An employee's personnel file is a collection of many different types of data. It includes information elicited from the employee himself, such as past employment, medical,

43. 105 Cal. App. 3d 240, 164 Cal. Rptr. 203 (1980).

44. *Id.* at 242, 164 Cal. Rptr. at 204.

45. *Id.* at 247, 164 Cal. Rptr. at 207. The court also pointed out that the plaintiff maintained control over the license. *Id.* at 246, 164 Cal. Rptr. at 206.

46. *Id.* at 248, 164 Cal. Rptr. at 207. This holding is a reaffirmation of the second element of the common law tort of public disclosure of private facts. *See note 7 supra* and accompanying text.

47. 80 Cal. App. 3d 309, 145 Cal. Rptr. 493 (1978).

48. *Id.* at 312, 145 Cal. Rptr. at 494.

49. *Id.* at 313, 145 Cal. Rptr. at 495.

50. *Id.*

educational and family data. Additionally, it contains material collected about the employee while at work: for example, payroll data, job performance reports, documentation of medical problems and disciplinary actions. References, recommendations, psychological information and comments on attitude may also find their way into personnel files.⁵¹ It is this diverse variety and large quantum of information which attracts information seekers to employee records.⁵²

There are many similarities between personnel records and financial and medical information. Like bank and hospital records, the records held by an employer are a compilation of materials collected from the individual himself and materials generated by the custodian institution. Much of this data is not public. All three types of records contain some information which individuals themselves do not readily reveal to anyone other than intimate friends.⁵³ Additionally, personnel files contain some financial and medical data. Logically, if this information is confidential within the confines of a bank or hospital, it should also be protected elsewhere. In *Valley Bank*, the California Supreme Court stated that "we may safely assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life."⁵⁴ Personnel files, which document a large portion of an employee's life, fall within this latter category. Therefore, like bank and medical records, personnel records should receive protection based upon their personal nature.

Information in employee records has, on several occasions, been recognized as private. For example, in an address opening the public hearings on workplace privacy, the Secretary of Labor classified the employment relationship as "one of the largest sources of sensitive personal information about individuals available in the private sector."⁵⁵

The discussion of the appellate court in *Board of Trustees v.*

51. Comment, *Employee Privacy Rights: A Proposal*, 47 FORDHAM L. REV. 155, 157 (1978) [hereinafter cited as *Proposal*]; Westin, *Privacy and Personnel Records: A Look at Employee Attitudes*, 4 CIV. LIB. REV. 28, 31 (Jan./Feb. 1978) [hereinafter cited as *Attitude Survey*]. Thus, employee records may include medical, financial and educational information, which the California courts have already declared within the protected confines of the privacy right. See notes 28-42 *supra* and accompanying text.

52. PRIVACY PROTECTION STUDY COMMISSION, EMPLOYMENT RECORDS 1 (1977) [hereinafter cited as EMPLOYMENT RECORDS].

53. For example, many employee records contain information about salaries, account balances and medical history.

54. 15 Cal. 3d at 656, 542 P.2d at 979, 125 Cal. Rptr. at 555.

55. Address of Ray Marshall, Secretary of Labor, U.S. Department of Labor hearings on Workplace Privacy (Jan. 7, 1980).

*Leach*⁵⁶ is also instructive as to the confidential nature of employee records. In *Leach*, the court stated that

it is common knowledge that such matters [employee personnel files] are among the most confidential and sensitive records kept by a private or public employer, and their use remains effective only so long as the confidence of the records, and the confidences of those who contribute to those records, are maintained.⁵⁷

Based on this need to protect the privacy of this information, the court held that the employee records of a school district were not subject to grand jury inspection when no investigation of willful or corrupt misconduct was pending.⁵⁸

The court's characterization of personnel records as sensitive was echoed by employees themselves in a survey of their attitudes toward information compiled by employers.⁵⁹ Fifty-five percent of those responding considered the privacy of their records to be "very important."⁶⁰ An overwhelming ninety percent felt that they should be notified by their employer before any personal data was released to anyone outside the company.⁶¹ Thus, this survey indicates strong feelings on the part of the responding employees as to the privacy of their personnel records.

Finally, the California legislature has also acted to protect employee rights, thus showing that it, too, recognizes the importance to the employee of personnel information. Section 1198.5 of the California Labor Code requires employers to permit employees upon request to inspect personnel files, when such files are to be used to determine that employee's qualifications for employment, promotion, additional compensation or disciplinary action.⁶² California is one of only two states

56. 258 Cal. App. 2d 281, 65 Cal. Rptr. 588 (1968). *Leach* was decided four years before privacy was recognized as an inalienable right under the California Constitution.

57. *Id.* at 288, 65 Cal. Rptr. at 593.

58. *Id.* The court held that CAL. PENAL CODE § 933.5 (West 1978), which authorized the grand jury to examine books and records of a special purpose taxing district, was not broad enough to allow such an investigation.

59. *Attitude Survey, supra* note 51. Unfortunately, the sampling covered only an infinitesimal fraction of the national work force. The number responding to the questionnaire was only 240 out of the 750 to whom copies were mailed. Perhaps a more comprehensive study will be undertaken in the future.

60. *Id.* at 30.

61. *Id.* at 32. The *Attitude Survey* discusses many issues of employee rights not addressed in this comment. They include the use of polygraphs by employers, intrusive questioning into non-work matters, and misuse of information within the company.

62. CAL. LAB. CODE § 1198.5 (West 1979), which reads:

with such an inspection statute.⁶³

The legislature also enacted the Information Practices Act of 1977,⁶⁴ governing information held by public agencies within the state. This Act details protections to be given to "personal information."⁶⁵ The statute sets forth notification,⁶⁶ maintenance,⁶⁷ disclosure,⁶⁸ and access⁶⁹ requirements. It also authorizes civil⁷⁰ and criminal⁷¹ penalties for violations of its terms. In spite of its limited applicability, this statutory scheme evidences the importance the state legislature has placed on the protection of personal information,⁷² including that which concerns employment.

Aside from the personal nature of employee records, an individual may also have a reasonable expectation of privacy based upon representations of confidentiality made by his employer. In *Porten*, express assurances by the defendant gave rise to a cause of action for violation

Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.

Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee.

This section does not apply to the records of an employee relating to the investigation of a possible criminal offense. It shall not apply to letters of reference.

63. Maine is the other state with an inspection statute. PRIVACY PROTECTION STUDY COMMISSION, *PRIVACY LAW IN THE STATES 17* (1977) [hereinafter cited as *PRIVACY LAW*].

64. CAL. CIV. CODE § 1798 (West Supp. 1981).

65. "[P]ersonal information' means any information in any record about an individual that is maintained by [a public] agency, including, but not limited to, his or her education, financial transactions, medical or employment history." *Id.* § 1798.3(b). Of these four categories, only employment records have not yet been considered and protected by the courts in the private sector as well. See notes 28-40 *supra* and accompanying text.

66. CAL. CIV. CODE § 1798.9-.10 (West Supp. 1981).

67. *Id.* § 1798.14 - .23.

68. *Id.* § 1798.24 - .28.

69. *Id.* § 1798.30 - .43.

70. *Id.* § 1798.45 - .53.

71. *Id.* § 1798.56.

72. The following findings of the legislature support this conclusion:

(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

Id. § 1798.1.

of the plaintiff's privacy.⁷³ Similarly, if an employer informs an employee that his records will be confidential and will not be disclosed to third parties, failure to live up to this promise should be an actionable violation of the employer's privacy.

Comparison of employee records with those types of information already protected by the constitutional privacy right indicates that similar treatment will probably be afforded to personnel records. Adding support to this projection are the two recent legislative enactments which further employee rights in similar ways.⁷⁴ An employee has a reasonable expectation of privacy in his personnel file and a violation of this privacy expectation should give rise to a cause of action under the California Constitution.

C. *Balancing Privacy Rights with Compelling Interests*

In spite of a person's reasonable expectation of privacy in his personal records, such records do not enjoy absolute protection under the California Constitution.⁷⁵ Even the proponents of the privacy amendment recognized that there would be situations where the release of confidential information might be required by a compelling public interest.⁷⁶ When such a reason exists, the court must balance the need for disclosure against the individual's right to privacy.⁷⁷

In the context of discovery, for example, where a demand for the release of confidential information is likely to arise, the state has a well-recognized interest in facilitating the ascertainment of truth in connection with legal proceedings.⁷⁸ Generally, information is discoverable if it is unprivileged and relevant to the subject matter of the action.⁷⁹

73. See text accompanying notes 38-40 *supra*.

74. See notes 62-72 *supra* and accompanying text.

75. Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d at 680, 156 Cal. Rptr. at 61.

76. White v. Davis, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106 (quoting the *Election Brochure*, *supra* note 15, at 27: "This right should be abridged only when there is a compelling public need.>").

77. Valley Bank of Nevada v. Superior Court, 15 Cal. 3d at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555.

78. Fults v. Superior Court, 88 Cal. App. 3d 899, 904, 152 Cal. Rptr. 210, 213 (1979) (paternity suit defendant, through interrogatories, sought names and addresses of all of the mother's sexual partners).

79. CAL. CIV. PROC. CODE § 2031 (West Supp. 1981), which reads in pertinent part:

(a) Any party may serve on any other party a request (1) to identify such documents, papers, books, accounts, letters, photographs, objects or tangible things, of a category specified with reasonable particularity in the request, which are relevant to the subject matter of the action, or are reasonably calculated to discover admissible evidence relating to any matters within the scope of the examination permitted by subdivision (b) of Section 2016 of this code [protecting privileged information]

Relevancy is liberally interpreted in discovery.⁸⁰ Thus, in the discovery context, an employer may find himself faced with conflicting obligations: the duty of confidentiality to his employee and an obligation to respond to a discovery request which may be compelled by a court of law.

An analogous situation existed in *Valley Bank*, where the loan records of several non-parties were sought from the plaintiff financial institution.⁸¹ The bank objected to the disclosure, claiming the confidentiality of the data, and sought a protective order.⁸² Thus, the bank called upon the court to balance the right of the civil litigants to discover relevant facts against the right of the bank customers to maintain privacy in their financial affairs.⁸³

The *Valley Bank* court found that “despite the exclusivity of the [California] Evidence Code⁸⁴ on the subject of privileges and the ab-

and which are in the possession, custody, or control of the party upon whom the request is served, and to produce and permit the inspection and copying or photographing of the same, by or on behalf of the party making the request

See also *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d at 655, 542 P.2d at 978, 125 Cal. Rptr. at 554. There are some statutory privileges protecting certain kinds of information. CAL. EVID. CODE §§ 900-1070 (West Supp. 1981). While no such privilege covers the employer-employee relationship, CAL. EVID. CODE § 1043 (West Supp. 1981) provides specific procedures for the disclosure of peace officer personnel records.

80. *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d at 656, 542 P.2d at 978, 125 Cal. Rptr. at 554.

81. *Id.* at 655, 542 P.2d at 978, 125 Cal. Rptr. at 554.

82. *Id.* A protective order is a flexible, discretionary tool through which the court may restrict the scope and/or manner of discovery, thereby protecting a party or witness from annoyance, embarrassment or oppression. CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1981) reads, in pertinent part:

Upon motion seasonably made by any party or by the person to be examined or notified to produce books, documents, or other things and upon notice, or upon the court's own motion and after giving counsel an opportunity to be heard, and in either case for good cause shown, the court in which the action is pending may make an order . . . that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, books, documents, or other things, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

83. 15 Cal. 3d at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555.

84. “It is clear that the privileges contained in the Evidence Code are *exclusive* and the courts are not free to create new privileges as a matter of judicial policy.” *Id.* at 656, 542 P.2d at 978-79, 125 Cal. Rptr. at 554-55 (emphasis in original). See CAL. EVID. CODE § 911 (West 1966), which reads, in pertinent part, that “[e]xcept as otherwise provided by statute . . . (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object or other thing.”

sence of either a common law or statutory authority, overriding constitutional considerations may exist which impel us to recognize some limited form of protection for confidential information"⁸⁵ The court concluded that before disclosing confidential customer information, the bank was obligated to notify the customer to allow him to take steps to protect his own privacy interests.⁸⁶ In so deciding, the court reasoned that "[t]he protection of such right should not be left entirely to the election of third persons who may have their own personal reasons for permitting or resisting disclosure of confidential information received from others."⁸⁷

In sending the action back to the trial court for a proper balancing of the interests involved, the supreme court suggested several procedural devices which would be useful in the fashioning of an appropriate protective order through which disclosure could be accomplished while confidentiality was preserved.⁸⁸ These devices include deleting the customer's name, sealing the data until further order of the court, and holding *in camera* hearings.⁸⁹ Thus, through a properly drafted protective order, the court suggested a way to compromise between the conflicting interests of discovery and privacy.

Therefore, when an employer is confronted with a discovery request for confidential information, he should seek a protective order asserting his employee's right of privacy. Additionally, the employee should be notified so he may personally assert his interests. Through the flexibility of a court fashioned protective order, it is possible to reach a compromise whereby discovery is allowed with only minimal intrusion into the employee's privacy.

85. 15 Cal. 3d at 656, 542 P.2d at 979, 125 Cal. Rptr. at 555. The court was referring specifically to the amendment to article I, section 1.

86. "[T]he bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his interests by objecting to disclosure, by seeking an appropriate protective order, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." *Id.* at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.

87. *Id.* at 657, 542 P.2d at 979, 125 Cal. Rptr. at 555.

88. *Id.* at 658, 542 P.2d at 980, 125 Cal. Rptr. at 556.

89. *Id.* *In camera* hearings make disclosure possible but restrict the audience exposed to the release of information. Another way to frame an effective protective order is by restricting disclosure to counsel only. See *Richards v. Superior Court*, 86 Cal. App. 3d 265, 272, 150 Cal. Rptr. 77, 81 (1978) (a party upon request was presumptively entitled to a protective order when financial information was sought for the purposes of determining punitive damages).

D. *The Possibility of Future Federal Legislation*

California is one of only nine states which has an explicit constitutional provision protecting the right to privacy.⁹⁰ California has also been a forerunner in employee rights, statutorily providing both an employee's right to inspect his own personnel file⁹¹ and an entire set of procedures protecting personal information which is gathered by state agencies.⁹² However, a private employee in other states is left virtually unprotected.⁹³ It is this void which has stimulated federal legislative attempts and investigative hearings in this area.

Early in 1980, the Department of Labor held public hearings on workplace privacy. The purpose of the investigation was to evaluate and find ways to accelerate the adoption by private employers of the policies and practices set forth by the Privacy Protection Study Commission (Commission) in 1977.⁹⁴ The Commission was created pursuant to the Privacy Act of 1974⁹⁵ to examine individual privacy rights in many institutional contexts, including employment.⁹⁶ After extensive hearings, the Commission delineated the obligations of an employer to protect employees' privacy, but ultimately opted for *voluntary* adoption of the Privacy Act's principles by private employers.⁹⁷ Thus, direct statutory controls were rejected. There were two reasons for such a voluntary plan.⁹⁸ The first was the desire to avoid the massive and

90. PRIVACY LAW, *supra* note 63, at 1. The other states are Alaska, Arizona, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington.

91. CAL. LAB. CODE § 1198.5 (West Supp. 1981). Only Maine has a similar statute. PRIVACY LAW, *supra* note 63, at 17.

92. CAL. CIV. CODE §§ 1798-1798.76 (West Supp. 1981).

93. *Proposal*, *supra* note 51, at 156.

94. 44 Fed. Reg. 57537 (1979). The findings of the Labor Department hearings have not yet been published. For an unofficial reporting of a portion of the proceedings, see Hendricks, *Labor Dept. Ends Hearings on Workplace Privacy*, 3 ACCESS REPORTS 7 (March 25, 1980).

95. 5 U.S.C. § 552a (1976). The Privacy Act of 1974, much like the Information Practices Act of 1978 in California (CAL. CIV. CODE § 1798 (West 1977)), controls the process of collection, maintenance, use and dissemination of information by agencies of the federal government. House Bill 1984 in 1975 was designed to extend the protection of the Privacy Act of 1974 to the private sector. H.R. 1984, 94th Cong. 1st Sess. (1975). It was never enacted, however, due to its poor drafting, along with the compliance problems which some anticipated that it would create. For an in-depth discussion of H.R. 1984 and its shortcomings, see Comment, *Let Industry Beware: A Survey of Privacy Legislation and its Potential Impact on Business*, 11 TULSA L.J. 68, 76-81 (1975).

96. 44 Fed. Reg. 57537 (1979).

97. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 274 (1977) (hereinafter cited as PRIVACY REPORT). Besides the employment relationship, the report considered, among other things, privacy as it affected consumer credit, mailing lists, medical care, investment reporting, insurance and taxes.

98. EMPLOYMENT RECORDS, *supra* note 52, at 33.

unwieldy government program which would be required to administer a statutory approach.⁹⁹ The second was the Commission's reluctance to change drastically the character of the employee-employer relationship by interjecting governmental requirements.¹⁰⁰

The Commission did recommend that employers voluntarily assume a duty of confidentiality to each employee, former employee and applicant about whom they had collected information.¹⁰¹ This obligation, as outlined by the Commission, would require the prohibition of external disclosure without the individual's explicit authorization.¹⁰² Exceptions to this general rule include release of directory information¹⁰³ and disclosure for law enforcement purposes. However, the employee must be put on notice as to these special types of disclosures.¹⁰⁴

It is compliance with this voluntary model for private employers with which the Department of Labor hearing dealt. By providing this public forum, the Department refocused attention on employee privacy rights. The voluntary movement in the direction of privacy protection may be accelerated by such action. However, it seems doubtful that legislation will be generated from this renewed interest because of the two reasons such legislation has been rejected in the past: the reluctance to create a new large-scale government program and to change dramatically the character of the employee-employer relationship.¹⁰⁵ An additional factor is the movement, espoused by the Reagan Administration, favoring less government regulation of private enterprise. However, a simple federal statute, patterned after the California Constitutional amendment asserting the individual's right to privacy in personal records, would provide protection without the necessity of administrative red tape. By authorizing a cause of action by those whose right of privacy has been infringed, the Congress could leave the policing of private employers to the employees involved.

III. CONCLUSION

The common law tort of public disclosure of private facts is lim-

99. *Id.* The Commission was concerned with the great number of records to be reviewed, as well as the variety of records used by different employers.

100. *Id.* The Commission did not feel competent to evaluate the possible effects of this type of government intervention.

101. PRIVACY REPORT, *supra* note 97, at 270-73.

102. *Id.*

103. Directory information is 1) the fact of past or present employment, 2) dates of employment, 3) title or position, 4) wage or salary, and 5) location of job site. *Id.* at 272.

104. *Id.* at 270.

105. EMPLOYMENT RECORDS, *supra* note 52, at 33.

ited in its application because of the requirement that the disclosure be made to the public. The elevation of a privacy right to the status of an inalienable right in California, by amendment to the state constitution, has expanded this cause of action, making actionable unauthorized disclosures to individuals and to small groups. Protection under the constitutional amendment is based on one's reasonable expectation of privacy in records which pertain to him. Thus far, the courts have found such an expectation in the personal nature of financial and medical records. Based upon the intimate nature of employee information, it is probable that employee records, too, will be constitutionally protected from unauthorized disclosure. The courts have not yet had the opportunity to address this issue.*

If an expectation of privacy exists in employee records, it is incumbent upon employers to protect the confidentiality of such data. Court protective orders are effective tools. Additionally, the employer may have the duty to notify his employee of any pending hearing on the disclosure of his records so that the employee may personally protect his privacy rights.

Although California, through its constitution and various statutes, recognizes some employee rights, other states are not as progressive. Thus, there has been a movement at the federal level to provide privacy protection. Recently, the Department of Labor held hearings on this subject. However, federal action will probably only amount to public exposure of the problems, as opposed to legislation, due to the large bureaucracy that might be needed to administer a statutory scheme. Therefore, private employees in California will continue to enjoy privacy protections that their counterparts in most other states do not share.

Michele Patterson Ahrens

* See POSTSCRIPT *infra*.

POSTSCRIPT

While this comment was being printed, a California court for the first time addressed the issue of whether the right of privacy protects employee records from unauthorized disclosure. In *Board of Trustees v. Superior Court*,¹ the appellate court sought to reconcile the strong public policy in favor of discovery with California's constitutionally-confirmed inalienable right to privacy.² The court's analysis and conclusions confirm the premise of this comment. Personnel information is protected from unauthorized disclosure by the state constitution.

The *Board of Trustees* case arose from a feud between two faculty members at Stanford University's School of Medicine. Dr. Eugene Dong and Dr. Zoltan Lucas charged each other with research misconduct which led to University investigations of both men. Although never disciplined, Dr. Dong brought suit against the University, several University officials and Dr. Lucas, claiming that he had been defamed.³ During discovery, he sought: 1) the personnel, tenure, and promotion files of Dr. Lucas, 2) all documents with respect to Dr. Lucas' research, 3) all documents utilized in, and giving the conclusion of, the committee investigating him, and 4) his personnel, tenure and promotion file.⁴ The superior court ordered the release of all data requested except letters of reference written at the time Dr. Dong was hired.⁵ The University petitioned the appellate court for an extraordinary writ of mandate, annulling the lower court order.⁶

Thus, the appellate court was faced with the conflict⁷ between the state's interest in discovery versus a non-party's right to privacy in his employment records. *Board of Trustees* illustrates the point that an employer has the duty to resist an attempt to compel production of personal documents within his control.⁸ "[T]he custodian of such private information may not waive the privacy rights of persons who are constitutionally guaranteed their protection."⁹

Approaching the four requests one-by-one, the court first discussed Dr. Lucas' personnel, tenure, and promotion files. The court

1. 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981).

2. *Id.* at 552, 174 Cal. Rptr. at 162. See discussion in text accompanying notes 75-85 *supra*.

3. *Id.* at 552-53, 174 Cal. Rptr. at 163.

4. *Id.* at 524, 174 Cal. Rptr. at 163-64.

5. *Id.*

6. *Id.*

7. See text accompanying notes 78-85 *supra*.

8. See text accompanying notes 86-87 *supra*.

9. 119 Cal. App. 3d at 526, 174 Cal. Rptr. at 165.

found the documents were private to Dr. Lucas and were maintained in confidence by the University.¹⁰ No direct relevance to the issue of defamation was found.¹¹ More significant, because of the guidance it will give future tribunals, is the court's belief that even if the records were directly relevant, "a proper balancing of competing values would *here* necessarily weigh in favor of Dr. Lucas' right of privacy."¹² The same conclusion was reached for the group of documents relating to the medical research of Dr. Lucas.¹³ The third category, materials used by the committee in the investigation of Dr. Dong, was found to have been gathered under a University policy which guaranteed confidentiality.¹⁴ They were also deemed not directly relevant to Dr. Dong's defamation action.¹⁵ Thus, none of the requested information in the first three groups was deemed discoverable.

Lastly, the court considered the interesting question of whether Dr. Dong should be able to compel production of his own personnel file. The focus of the examination was on the letters of reference which the lower court excluded from its discovery order. Again, the appellate court reiterated the University policy of confidentiality with respect to faculty peer evaluation to enhance candor and honesty.¹⁶ Note was taken of section 1198.5 of the California Labor Code which gives an employee access to his own personnel file with the exception of "letters of reference."¹⁷ The lower court had held this to mean only documents used in the initial hiring of Dr. Dong.¹⁸ Feeling the need to interpret the phrase, the court determined that the "manifest purpose" of the section was "to insure privacy of *all* furnishers of confidential information used to determine an 'employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.'"¹⁹ However, no compelling purpose was seen in the maintenance of the contents of the letters of reference, just the identification of the authors.²⁰ Thus, the court suggests disclosure with dele-

10. *Id.*

11. *Id.*

12. *Id.* (emphasis in original).

13. *Id.* at 526-27, 174 Cal. Rptr. at 165.

14. *Id.* at 527, 174 Cal. Rptr. at 165-66.

15. *Id.* at 527, 174 Cal. Rptr. at 166.

16. *Id.* at 528, 174 Cal. Rptr. at 166.

17. *Id.* at 530, 174 Cal. Rptr. at 167. For the text of CAL. LAB. CODE § 1198.5, see note 62 *supra*.

18. *Id.* at 530, 174 Cal. Rptr. at 167.

19. *Id.* at 531, 174 Cal. Rptr. at 168 (quoting CAL. LAB. CODE § 1198.5 (West Supp. 1981)).

20. *Id.* at 532, 174 Cal. Rptr. at 168.

tion of names and other identifying data in order to safeguard privacy.²¹ This is another example of the use of protective orders, as discussed in the comment.²²

Thus, the analysis and conclusions of this comment have rapidly, even before publication, been confirmed. *Board of Trustees* is judicial recognition that employee records are protected from unauthorized release by the California Constitution. The law now clearly imposes the duty on employers to keep personnel files confidential. Failure to do so will surely provide grounds for a liability action.

21. *Id.*

22. See text accompanying notes 88-89 *supra*. See also note 82 *supra* for the statutory provision for protective orders.