Privileges to Protect the Government

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PRIVILEGES TO PROTECT THE GOVERNMENT

The second area of privileged communications concerns privileges which exist to protect some government interest. This area will include the privilege of an executive officer, recognized privileges which the government may claim, housekeeping privileges and the required report privilege.

THE EXECUTIVE PRIVILEGE

Some persons feel that an executive officer by authority of his office may claim that his communications are privileged and beyond the reach of judicial inquiry. The privilege is claimed to be a matter of necessity so that an executive officer may receive and give advice necessary to execute the functions of his office. Free exchange of ideas would be stifled if each idea was subject either to public criticism or to the scrutiny of a coordinate branch of government. This privilege has been invoked against congressional inquiry on many occasions.

The executive privilege was first invoked to avoid judicial inquiry in the case of United States v. Burr. The President and other officers refused to respond to subpoenas which commanded their appearance to give testimony. The court took the position that the persons who composed the executive branch of government were not above judicial inquiry, and like other persons could be compelled to appear in court. However, the subpoenas were never enforced when the information desired was made available in documentary form. Thus, the power of the court over executive officers was not determined in that case, and the issue still remains unsettled.

2 Bishop, supra note 1.
4 Wigmore does not believe that an executive privilege exists. He believes that executive officers are only excused from attending trial if attendance would interfere with their official duties. 8 Wigmore, Evidence §§ 2370 & 2371 (McNaughton rev. 1961). Wigmore's analysis may be historically correct because Jefferson never said the executive branch of government need not supply information. President Jefferson's letter answered the Court by saying he could not respond to the subpoena because his attendance would leave the government without an executive branch. The trial of Aaron Burr (Coombs ed. 1864). But Wigmore's analysis is not accepted by the present executive officials. In 1958, 5 U.S.C. § 22 was amended for the espoused purpose of preventing administrative bodies from withholding information from the public. President Eisenhower signed the act but said,

It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the executive branch is inherent under the Constitution.

The question of whether an executive privilege exists was considered recently by the United States Supreme Court in United States ex. rel. Touhy v. Ragen\(^5\) and United States v. Reynolds.\(^6\) In the Ragen case an F.B.I. agent was held in contempt of court for refusing to produce records requested by the trial court. The agent was obeying a department rule promulgated by the United States Attorney General pursuant to 5 U.S.C. § 22. The petitioner argued that the court and not the head of a department should decide the admissibility of evidence. After finding the department rule was valid, the court decided the case by saying a subordinate officer could not be held in contempt for obeying a lawful command of the Attorney General. The court found it unnecessary to decide what action could be taken against the Attorney General because he was not a party to the case.\(^7\)

The Reynolds case was a suit brought under the Federal Tort Claims Act for the death of civilian technicians killed in the crash of a military test plane. The Secretary of the Air Force refused to furnish accident reports which had been subpoenaed. The secretary claimed the executive department had inherent power under the doctrine of separation of powers to remove information from judicial inquiry.\(^8\) The case was decided in favor of the government because the court found the information was protected by the state secret privilege. The Court gave only passing recognition to the claim of executive privilege by saying it was unnecessary to answer this delicate constitutional question.

On two occasions, the privilege was asserted by state governors. In Appeal of Hartranft,\(^9\) a Pennsylvania court recognized the privilege as a necessity to the separation of powers doctrine. On the other hand a New Jersey court in Thompson v. German Valley R.R.\(^10\) took the position expressed in United States v. Burr.\(^11\) Although the opinion of the Thompson case is cited as authority for the theory that no executive privilege exists,\(^12\) the decision of the case shows the court had no intention of carrying its theory into practice. First, the court said the governor could withhold any paper or document if he decided his official duties so required. Second,

\(^6\) 345 U.S. 1, 73 S. Ct. 528 (1953).
\(^7\) Justice Frankfurter in his concurring opinion said, "... In joining with the court's opinion I assume ... the Attorney General can be reached by legal process." 340 U.S. at 472.
\(^8\) The trial court and the federal appellate court 192 F.2d 987 (3d Cir. 1951) refused to recognize the privilege granted by Congress in 5 U.S.C. § 22. When the case was taken by the Supreme Court, the executive department made it clear that it was exercising its inherent power which is protected in a constitutional system of separation of powers and was not relying on the statute. (See note 9 Majority opinion.)
\(^10\) 22 N.J. Eq. 111 (Ch. 1871).
\(^12\) City of Buffalo v. Hanna Furnace Corp., 305 N.Y. 369, 113 N.E.2d 520 (1953); 8 Wigmore, Evidence § 2371 (McNaughton rev. 1961).
NOTES AND COMMENTS

official duties may be an excuse for not appearing in some circumstances. And third, it would not entertain proceedings to hold the governor in contempt because such action would only cause conflict between coordinate branches of government.

Although the practical result of both cases may be the same, the dichotomy of ideas expressed in these initial cases explains the tenor of later decisions where subordinate executive officers have made a claim of executive privilege. In Pennsylvania, the effect is shown in the case of In Re Marks. The court agreed that the department of health is a branch of the executive authority and its officers are able to claim the right not to disclose information in their possession. Later decisions in New Jersey all but admit that an executive privilege exists for executive officers of the same status as the courts and legislature. However, these decisions carefully limit the scope of the privilege as a requirement of the separation of powers doctrine. By this doctrine there must be a claim by a coordinate branch of government not just an executive officer or part of the executive authority. In the case of State v. Cooper, New Jersey court rejected a lower court finding that a report made by a police investigating bureau "has sort of a privilege." The court said there is no privilege which puts evidence in the possession of police beyond the reach of competent process. And in Eggers v. Kenny a city commissioner could not claim an executive privilege against a legislative investigation because a city official does not have the same status as the state legislature. The privilege was further limited by Morss v. Forbes which held that a local prosecutor could not claim the executive privilege against legislative inquiry where he could not show the subject under inquiry had any connection with the governor or attorney general. The office of prosecutor, although a constitutional office, is more appropriately part of local government and is not "equal in stature" with the legislature.

If an analogy can be drawn between judicial attitudes on the executive privilege and those police records which are not made public records by some statute or ordinance, then Illinois is likely to recognize a claim of executive privilege. In Illinois, with one exception, interdepartmental

15 Accord, La Guardia v. Smith, 288 N.Y. 1, 41 N.E.2d 153 (1942). The Mayor of New York is not immune from the subpoena power of the city Council under the separation of powers doctrine. The office of mayor is not a separate and coordinate branch of government from the city Council. This is true, even though the mayor is called "the chief executive officer of the city" and the Council is "the local legislative body." The duties of each branch are not exclusive and frequently overlap. Generally, coordinate and independent branches of government are peculiar to state and federal governments.
17 Supra note 14.
18 Supra note 14.
19 The writer makes no claim that judicial treatment of confidential police records
police reports are absolutely privileged regardless of the information they contain. The courts do not prevent disclosure only where the public interest would be prejudiced if the information contained in the reports was revealed. If the courts will recognize a claim of privilege to protect communications within the police departments, then there is no reason why they should not recognize a claim of privilege for the other branches of government. And the judicial consideration given to a claim of privilege should correspond to the status of the officer making the claim.

**Recognized Privileges**

The government has two clearly recognized privileges. These are the informer's privilege and the state secret privilege. What is referred to as the informer's privilege is in reality the government's privilege. The purpose is precedent for a case involving a claim of executive privilege. It is only suggested that the attitudes within a state seem to remain consistent where comparable privileges are asserted. The judicial attitudes of New Jersey and Pennsylvania have been fairly consistent when confronted with a claim of privilege by a government official. There are other examples of consistency in the treatment of claims by government officials who claim information or records should be kept confidential. To illustrate this point, in *La Guardia v. Smith*, supra note 14, a New York court rejected a claim of privilege by a mayor to prevent the disclosure of a report. Later in *Scott v. County of Nassau*, 25 Misc. 2d 648, 252 N.Y.S.2d 135 (Sup. Ct. 1964) the court rejected a claim of privilege that a police report was an "official confidential record" and protected by a County Government Law. The court said such a claim was contrary to the policy of the state. Another example is *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 157 N.W.2d 470 (1965). Mandamus proceedings were brought against a mayor to compel the inspection of an investigative report for alleged misconduct in the police department. The court said unless the mayor could show specifically, in camera, how the public interest could be harmed, disclosure would be compelled. In *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967), the petitioner wanted to inspect confidential police reports. And the court said the *Youmans* case was controlling.

To be sure, the courts can enforce their decision where a coordinate branch of government is not asserting a claim. So a claim of privilege need not be recognized as a matter of practical necessity. In *In re Frank W. Story*, 159 Ohio St. 144, 111 N.E.2d 385 (1953), the chief of police was the subject of Habeas Corpus proceedings. He was arrested by the sheriff for refusing to produce police department records. If the Illinois courts will protect confidential police records, there is at least some indication they would accept other claims of privilege.

Illinois grants almost complete protection to police reports. As a matter of public policy and a possible requirement because of the decision in *Jencks v. United States*, 353 U.S. 669, 77 S. Ct. 1007 (1959), the courts have recently said disclosure of police reports is required where contents could be used to impeach a state's witness. In Illinois, police reports are absolutely privileged regardless of the information they contain unless disclosure is necessary for impeachment purposes. People v. Mosses, 11 Ill. 2d 84, 141 N.E.2d 1 (1957) (interdepartmental records are not public records which are subject to subpoena. But the accused now has the right to the production of documents which are contrary to the testimony of the state's witnesses). People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960) (defendant has a right to see every statement made to the police by any witness who testifies). People v. Ostrand, 35 Ill. 2d 520, 221 N.E.2d 499 (1966); People v. Bailey, 56 Ill. App. 2d 261, 205 N.E.2d 756 (1965) (police reports not available merely to obtain information); People v. Turner, 29 Ill. 2d 779, 194 N.E.2d 349 (1963) (police report given to superior officer is not available except to impeach the testimony of an officer).

is to encourage citizens to perform their obligation to communicate knowledge of criminal acts to further and protect the public’s interest in effective law enforcement. The purpose of the informer’s privilege is couched in language of good citizenship, but when the privilege is applicable, communications are absolutely privileged regardless of motive, intent or probable cause.

The informer privilege is usually invoked in a criminal proceeding, but occasionally the privilege is asserted in civil proceedings. In actions between private litigants, the court may not compel or allow a party to disclose what information he has related to a proper governmental official. The same rule applies to the subordinate officers who received the information. The parties are unable to waive the privilege of confidence because the privilege exists for the benefit of the government and only the government may waive it.

The informer privilege may belong to the government, but the privilege is clearly to protect the identity and well being of the informer. The underlying reason for the privilege limits its application. It is not the information that is protected. Where the government is a party to the action, the government may not withhold information if the information will not reveal the identity of the informer or if the identity of the informer has been disclosed.

The informer privilege is founded on public policy, but it is equally true that public policy may require disclosure to uphold the fundamental requirement of fairness. The trial court must decide if the identity of the informer is relevant or helpful to the defense of the accused. For example, the privilege must give way if the identity of the informer is necessary for a fair trial. The government must make its choice to reveal the informant’s identity or to dismiss the action. But the courts have said identity is only a necessary incident to a determination of guilt or innocence. At a preliminary hearing to determine probable cause, the identity of an informer

22 Statements made to a state’s attorney or other government prosecutors may not be privileged. For example, statements given to a prosecutor to file a complaint are not privileged. The complaint is a public record and the informer privilege which protects the identity of the informant has no justification. For other examples see 8 Wigmore, Evidence §§ 2374 & 2375 (McNaughton rev. 1961).
26 Roviaro v. United States, supra note 21; Sorrentino v. United States, 165 F.2d 627 (9th Cir. 1947) (accused knew the identity of the informer); 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961); Annot., 76 A.L.R.2d 262 (1961).
27 Portomene v. United States, 221 F.2d 582 (1955) (the person believed to be the informant had a grudge against the defendant); 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961); Annot., 76 A.L.R.2d 262 (1961).
need not be disclosed. The police may testify to the reliability of an informer to establish probable cause. Even if the police can not establish the information came from a "reliable informer," probable cause can be established without disclosing the identity of the informer if the police can show the informant's information was corroborated.

The state secret privilege can be claimed by the government where the disclosure of information would impair the strength or security of the government. This privilege is often confused with the executive privilege because the state secret privilege is usually invoked by an executive officer. Also, what is often a claim of executive privilege is more often a claim that public interest can only be protected by non-disclosure of security information. If the court is satisfied that a secret of state is involved, the information is absolutely privileged and cannot be used by private parties in a civil suit even though the government is not a party.

Secrets of states are primarily a concern of the federal government, but there is no reason why a state cannot claim this privilege in matters of internal security. The legislature has recognized that certain state militia records should be made available only through the governor or his staff. This is probably a limited recognition of the state secret privilege. The full scope of this privilege is hard to predict. At the state level and below, the state secret is seldom mentioned by name. A claim of privilege is usually phrased in terms of the public interest. Although a city could possibly support a claim that certain police, security or emergency information should be privileged to protect internal security, such restricted reasons are probably unnecessary.

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31 In United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528 (1953), the court said that the most compelling necessity cannot overcome the claim of privilege if the court is satisfied military secrets are at stake. Disclosure cannot be required to determine if the subject matter is privileged. The court can only look at the circumstances surrounding the claim of privilege and decide if confidential information could be involved. The inquiry can proceed no further. Accord, Totten v. United States, 92 U.S. 105 (1875) (no suit can be brought which may disclose secrets of state); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (government could expunge testimony on matters embodying secrets of military value in a patent infringement suit). See 8 Wigmore, Evidence § 2378 (McNaughton rev. 1961); Annot., 32 A.L.R.2d 391 (1953).
32 Ill. Rev. Stat. ch. 129, § 220.92 (1967). But Professor Wigmore feels secrets of state should not be privileged if only the internal affairs of public business are involved. 8 Wigmore, Evidence § 2378 nn.6 & 7 (McNaughton rev. 1961).
33 The meaning of state secret has become more a claim that the public interest would be adversely affected if disclosure were compelled. For example in State ex rel. Youmans v. Owens, 28 Wis. 2d 672, 137 N.W.2d 470 (1965), the court said it would accept a showing that the public interest would be harmed as a defense to disclosing a report.
Some information which the government possesses is not within the
informer or state secret privileges, but for various reasons the government
feels full disclosure is undesirable. Statutes which restrict the use of this
type of government information are referred to as housekeeping
statutes.

Their purposes are: (1) to prevent direct exertion of judicial power over
executive personnel; (2) to preserve documents from loss, deterioration, or
alteration; (3) to remove the burden of constantly making records available
for inquiry; and (4) to prevent the disclosure of opinions, advice or other
sensitive information.

Reasons two and three do not seem to justify the government’s removing
information from judicial inquiry. With modern techniques, copies can
be made without damaging the original, and they can be made admissible
as evidence with like effect as the original. If only the report is privileged,
information or testimony is available from those who compiled the information
for the report or document. Possibly preliminary reports or departmental notes also may be sources for obtaining the desired information. It is true that there is an additional burden on the agency in compiling and maintaining records if copies must be made available or if employees must testify or produce informal records. However, the burden of providing

The trial court was to balance the harm to the public interest caused by disclosure against
the public interest in permitting inspections. The court indicated that to prevent the
breach of a pledge of confidentiality, given to obtain information, would be a sufficient
public interest. Such disclosures would lead to public distrust. People v. Moses, 11 Ill. 2d
84, 142 N.E.2d 1 (1957) also indicates disclosure would not be compelled where the public
interest would be prejudiced. See 8 Wigmore, Evidence § 2378 nn.7 & 8 (McNaughton
(1953).

34 8 Wigmore, Evidence § 2387 nn.7 & 8 A Critical Examination of Some Evidentiary
Privileges: A Symposium, 56 Nw. U.L. Rev. 206, 283 (1961); Carrow, Governmental Non-

35 Special privileges of the executive branch of government have been discussed in
prior sections.

§ 7 (1967); 5 Wigmore, Evidence §§ 1630-1684 (3d ed. 1940).

37 49 U.S.C. § 1441 (1964) reads in part: “No part of any report or reports of the Board
relating to any accident or the investigation thereof, shall be admitted as evidence or used
in any suit or action for damages growing out of any matter mentioned in such report or
reports.” The courts have reasoned that the report is privileged because the reports contain
opinions and conclusions for purposes of enacting safety legislation. It would be unfair
to allow such conclusions in evidence in civil suits because it would almost be impossible
to convince the trier of fact that these findings are not conclusive. But it is almost im-
possible for litigants to obtain information involving airplane accidents. For this reason
the courts have narrowly interpreted this privilege and the testimony of investigators can
be compelled. See, Lobel v. American Airlines Inc., 192 F.2d 217 (2d Cir. 1951) (subcom-
mittee reports are also admissible if the portions which contain opinions and conclusion
are omitted because the statute only excludes the official Civil Aeronautics Board report).
Contra, Berguido v. Eastern Airlines Inc., 317 F.2d 628 (3d Cir. 1963) (court felt that in-
vestigators would be unable to obtain information if the information given to them
would be available in civil litigation).
information does not seem to be a sufficient justification to remove information from judicial inquiry. It is not always easy to determine the legislative purpose for enacting a particular housekeeping statute. But it would seem that under the Illinois statutes it is the information, not just the report, that is privileged.

The Illinois legislature has apparently adopted reason four. The legislature may feel that certain agencies can function better if their opinions and work are kept confidential. This is probably a valid argument. The policy of the legislature may have merit, but will the courts recognize legislative policy at the expense of judicial ascertainment of the truth? In an early Illinois case, the judiciary indicated it would give a narrow interpretation to the housekeeping statutes. But the courts will recognize the intention of the legislature where there is a clear expression that records are not to be used in judicial proceedings.

Although the courts will recognize legislative policy, the courts may not be bound to do so. Removal of government agency information from judicial review in the interest of public policy has been criticized. A few state courts and at least one commentator feel the federal courts have impliedly said they are not bound to recognize communications or records as privileged unless it is to preserve a recognized privilege. But the decision of


39 Ill. Rev. Stat. ch. 48, § 640 (1967) provides "Except as is hereinafter provided in this Section, information obtained from any individual or employing unit pursuant to the administration of this Act shall be confidential and shall not be published or be open to public inspection, nor be used in any court in any action or proceeding pending therein, nor be admissible in evidence in any action or proceeding other than one arising out of the provisions of this Act." Ill. Rev. Stat. ch. 51, § 102 (1967) provides: "Such information, records, reports, statements, notes, memoranda or other data shall not be admissible as evidence. . . ."

40 Compare Smith v. Illinois Valley Ice Cream Co., 20 Ill. App. 2d 312, 156 N.E.2d 361 (2d Dist. 1959) with Bell v. Bankers Life & Casualty Co., 237 Ill. App. 321, 64 N.E.2d 204 (1st Dist. 1945). In the first case, statements were privileged where statute specifically excluded their use in court. In the second case, the court said records were not privileged where there was not a specific prohibition against judicial inquiry. Accord, Marceau v. Orange Realty Inc., 97 N.H. 497, 92 A.2d 656 (1952) (statutory privilege afforded records of administrative agencies are to be strictly construed. The obligation to disclose information should not be limited without a clear legislative mandate); In re Bakers Mut. Ins. Co. of New York, 301 N.Y. 21, 92 N.E.2d 49 (1950) (where legislative intent is made clear, records will not be available); Thomas v. Morris, 286 N.Y. 266, 36 N.E.2d 141 (1941), (records are not privileged unless the intent is clearly expressed in the statute); In re Fife's Estate, 164 Ohio St. 449, 132 N.E.2d 185 (1956) (income tax returns can be used at trial where the only prohibition is against their being open to the public); Powers ex rel. Department of Employment Security v. Superior Court, 79 R.I. 63, 82 A.2d 885 (1951) (statute must specifically prohibit the use of records in court proceedings).

41 In Davis, Administrative Law Text (1959), the author argues that in United States v. Reynolds, 192 F.2d 987 (8d Cir. 1951) the lower courts refused to recognize the housekeeping privilege conferred by Congress. The Supreme Court, 345 U.S. 1, 73 S. Ct. 528 (1953), did not disapprove of the lower court's attitude, but found the claim of privilege could be upheld by invoking the recognized state secret privilege. Professor Davis feels
the federal courts may not accurately reflect the attitude of the state courts. The state courts are generally dealing with specific statutes which prohibit the use of information. The statutes reflect the legislative policy on a particular subject. By comparison, on the federal level, the administrative agencies promulgate rules for the exclusion of certain information, and Congress seldom considers the reasons, or lack of them, for removing this information from judicial inquiry.\textsuperscript{42}

There is a second reason why the state courts may not follow the decisions of the federal courts. The magnitude of the problems created in upholding housekeeping statutes is not the same on the state level. The federal government often possesses information which is unavailable from any other source. Thus, for the courts to uphold the validity of housekeeping statutes would be to deprive a private litigant of evidence necessary to prove his case.\textsuperscript{48} On the state level, the balance of interest between the public good as determined by the legislature and the harm to the individual by not having information available from governmental sources is tipped in favor of upholding the grant of privilege. The state courts are not likely to overturn legislative policy where the litigant is generally able to obtain the evidence from other sources to support his case. At this time, the courts of most states seem committed to recognize the authority of the legislature in this area.\textsuperscript{44}

their failure to overturn the lower court's decision on this point with three justices dissenting in favor of upholding the decision of the lower court implies the courts need not recognize Congressional directives. (Writers comment: It could be argued that the silence of the majority indicates nothing more than the attitude of the Supreme Court to avoid controversial issues when another solution is possible.) The same conclusion was reached by a Nevada court in \textit{Elson v. Bowen}, 83 Nev. 515, 436 P.2d 12 (1967). The court said the \textit{Reynolds} case has determined that the courts can review executive action. A claim of executive privilege or department order pursuant to Congressional authority will not prevent disclosure where the judiciary finds no public interest to be protected. See \textit{In re Story}, 159 Ohio St. 144, 111 N.E.2d 385 (1953); Hardin, \textit{Executive Privilege in the Federal Courts}, 71, Yale L.J. 879 (1962).

\textsuperscript{42} In 8 Wigmore, Evidence § 2378 n.17 (McNaughton rev. 1961), Professor Wigmore distinguishes between rules promulgated by administrative agencies under legislative authority and specific statutes enacted by the legislature. Agency rules are subject to abuse to prevent embarassing material from being disclosed without furthering social policy. The federal housekeeping rules are promulgated by agencies whereas the state statutes involved are specific and are more likely to reflect sound social policy.

In \textit{In re Bakers Mut. Ins. Co. of New York}, supra note 40, the dissenting opinion did not question the legislative power to enact statutes removing information from judicial inquiry. The opinion only questioned the city's exercise of delegated power from the legislature to make records privileged.\textsuperscript{43} See note 37 supra; United States v. Reynolds, supra note 41; Hardin, supra note 41.

\textsuperscript{43} Generally, state courts have not questioned the right of the legislature to remove information from judicial inquiry and only quibble over the wording necessary to achieve this end. See note 40 supra. But a few courts have not completely yielded to legislative authority. For example, in \textit{Marceau v. Orange Realty Inc.}, supra note 40, the court recognized the legislative desire to remove information from judicial inquiry, but the court left the door open to examine the validity of the purpose for withholding information from judicial inquiry. New York originally indicated that the courts could evaluate the legislative objective for preventing exposure of certain information. Andrews v. Cacchio, 264 App. Div. 791, 35 N.Y.S.2d 259 (1942). But the New York courts have apparently
Because housekeeping statutes are usually designed to assist the government in carrying out its functions, the privilege is for the benefit of the government. When the privilege can be waived at all, waiver is at the discretion of the governmental body. But at times information which the government possesses is given statutory protection for the benefit of the individual. The Protection of Records section of the Illinois Public Aid Code is apparently in this category. Like the informer privilege, the government may find it necessary to protect the individual to obtain information. The agency is probably able to function more efficiently with a full and frank disclosure of information. And the statute apparently confers a personal privilege to enable the agency to acquire a full disclosure of delicate information. But unlike the informer privilege, which is to protect the interests of government, this statute protects the individual. As a result, it appears the judiciary may compel the disclosure of information where it feels the need exists. This is contrary to the "true" housekeeping statute where the legislature or executive officer determines when the need for disclosure exists.

**REQUIRED REPORT STATUTES**

Required report statutes serve a function similar to the informer privilege. The government is willing to protect the individual who makes the

abandoned this attitude. In In re Bakers Mut. Ins. Co. of New York, supra note 40 the court said the reason for granting a privilege to certain information is a legislative question. They have jurisdiction over these decisions and their decisions should not be re-agitated by the courts.

Maxwell v. Sykes, 173 Cal. App. 2d 642, 343 P.2d 769 (1959) (if a privilege is for the benefit of the state to protect the public interest, then a subordinate official may not waive the privilege); Scott v. District of Columbia, 122 A.2d 579 (D.C. Mun. Ct. App. 1956) (treasury regulation prohibiting the disclosure of official information was for the benefit of the government, and Internal Revenue agents could disclose admissions in a Columbia sales tax case over the objection of defendant).

For the protection of applicants and recipients, the Illinois Department, the county departments and local governmental units and their respective officers and employees are prohibited, except as hereinafter provided, from disclosing the contents of any records, files, papers and communications, except for purposes directly connected with the administration of public aid under this Code.

In any judicial proceeding, except a proceeding directly concerned with the administration of programs provided for in this Code, or in which the applicant or recipient is a party thereto, such records, files, papers and communications, and their contents shall be deemed privileged communications.

The Illinois Department shall establish and enforce reasonable rules and regulations governing the custody, use and preservation of the records, papers, files and communications of the Illinois Department, the county departments and local governmental units receiving State or Federal funds or aid. The governing body of other local governmental units shall in like manner establish and enforce rules and regulations governing the same matters.

The contents of case files pertaining to recipients under Articles VI and VII shall be made available without subpoena or formal notice to the officers of any court, to all law enforcing agencies, and to such other persons or agencies as from time to time may be authorized by any court.


Goodman v. Gonse, 247 Iowa 1091, 76 N.W.2d 873 (1956) (the accident report priv
report in order to acquire information. To promote a full and accurate disclosure of possibly incriminating information the government makes the report privileged. However, the degree of protection the privilege may afford will vary depending on the nature of the information sought and the construction a court will give to the particular statutory wording.

There are many possible types of required report statutes. Common among these are Selective Service reports, income tax returns and health reports to promote the disclosure and treatment of social diseases. Of the numerous required report statutes, the most common on the state level is probably the required accident report statute. The Illinois required report statute is selected as an example of the government's willingness to obtain information at the price of confidentiality.

To acquire information for highway safety Illinois has made required accident reports privileged. Chapter 95 ½ section 142 provides that the Department of Public Works and Buildings shall use these reports to provide statistical information on the number and causes of traffic accidents. Copies of the reports or information derived from them can also be furnished to the Secretary of State for his confidential use. To acquire this information section 141 provides that these accident reports shall be confidential. It now becomes necessary to determine what information the state wants and what protection it is willing to give in return.

To determine what information the state desires it may be helpful to consider an early Iowa accident report statute. The statute read: "All accident reports . . . shall be without prejudice to the individual so reporting and shall be for the confidential use of the department . . . ." The courts gave a liberal construction to this section and all accident reports, including police reports, were found to be within the protection of the statute. If the privilege is in the nature of an immunity granted in return for information requested by the state; See 8 Wigmore, Evidence § 2377 n.8 (McNaughton rev. 1961).

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49 8 Wigmore, Evidence § 2377 (McNaughton rev. 1961).
50 All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the department except that the department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have made such a report, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirement that such a report be made to the department.
(b) The department may furnish to the Secretary of State copies of required accident reports or information taken from such reports. All such copies of reports or information taken from them shall be for the confidential use of the Secretary of State.
52 See note 50 supra.
report was privileged, statements and information acquired by a police officer at the scene of the accident would be privileged if they were obtained to make his report. To give effect to the privilege the officer and third parties who overheard the reporter were necessarily prohibited from testifying. Subsequent experience showed, however, that in civil suits evidence was difficult to obtain. The legislature repealed this statute and enacted another statute in 1967. Now only accident reports which are required by the motor vehicle department are privileged and police reports are available upon request for a fee of one dollar.

Turning to Illinois, the information the state desires is stated in section 141: "All required accident reports . . . shall be without prejudice to the individual so reporting and shall be for the confidential use of the department . . ." Unless an incorporated city enacts a required report ordinance, which is also within the protection of section 141, there is only one required report. This is the report filed with the Department of Public Works and Buildings. Therefore, an accident report made by a law enforcement officer is not a required report which will be considered confidential. If the report is not confidential, then information which the officer obtains either at the accident scene or later by way of observation or voluntary disclosures is not privileged. Similarly, a driver must give immediate notice of an accident if there is death or injury to any person or property damage in excess of one hundred dollars. This is not a required report, but is only a requirement to give notice of an accident; and statements made while giving notice of an accident are not within the privilege.

Only the written report is privileged. If the person who is to make the required report dictates information while another fills out the report, the person receiving the information may be required to testify to the information he received. In the usual situation, this is not a harsh result. The per-
son required to make the report is given ten days after the accident to file his report. Typically, this report is completed well after the accident when all parties are over the initial shock and in a state of relative calm. The forms are obtained at a police department, completed, and returned without any more conversation than is necessary to convey the request for a form. But there are situations where a person with an education or language barrier may seek the assistance of a second party who may be a law enforcement officer. The second party may be compelled to testify to admissions he received against the reporter's interest. The Illinois statute does not provide a solution for this situation. No cases can be found exactly in point. In the California case of Carroll v. Beavers, a driver who later died of injuries sustained in the accident, was in the hospital and possibly of necessity dictated information to a police officer who completed the driver's written report. On rehearing, the court reversed itself and found only the written report was privileged and statements made to the officer were not.

The court's construction that only the written report is privileged appears harsh in some circumstances. Although the statute could be applied with flexibility in cases of necessity, a panacea is not found in a too liberal attitude. Iowa's experience teaches us that there must be a balance between the legislative policy to obtain information and the necessity to keep information available for judicial inquiry.

After deciding what disclosures the statute will protect as an exchange for needed information, it now becomes necessary to determine the degree of protection afforded. The pertinent portion of the statute provides:

All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the department . . . . No such report shall be used in any trial, civil or criminal . . . .

First, the protection extends to both civil and criminal trials. The statutes of some states do not specifically exclude the use of the report in

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62 Ill. Rev. Stat. ch. 95 1/2, §§ 138 & 139 (1967). Provision is made for other persons to make the required report in case of physical disability but the person must have been either another occupant of the vehicle or the owner of the vehicle.

Writer's comment: The case of Ritter v. Nieman, supra note 61, was a peculiar case and its scope could be limited to the facts of the case. The sheriff apparently had a required report form in his possession and helped the driver fill out his report at the scene of the accident. The usual procedure is for the driver to obtain a required report form at a police station and file the report within ten days after the accident. The entire transaction takes place away from the scene of the accident. If the information obtained in Ritter was found privileged, the court would have condoned a procedure which would make police reports privileged contrary to the terms of the statute. The police officer would obtain the information and complete both the police report and the accident report. To protect the reporting party and keep the information he gave confidential would require both reports to become privileged. Where a person is at a police station or elsewhere and seeks advice, the policy considerations in Ritter are absent.

64 The first decision is reported in 270 P.2d 23 (1954).
criminal trials, and the courts have construed this omission to mean the required report can be used as evidence in criminal trials. 65

Second, the wording of the statute may create more than a personal privilege, which the reporter would have to claim, and it may be the report is entirely incompetent as evidence. The statute says the "report shall not be used in any trial," and sections 141 and 142 list the permitted uses of the reports. If the report were used at trial, it may be reversible error. This conclusion would be justified if the court found the statute was for the benefit of the public and the reporter only received an incidental benefit. 66 As a statute for the benefit of the people, it does not appear anyone is given authority to waive the public interest.

Even if the statute's protection is personal in nature, the presence of the report may still be the basis for reversible error. If the report found its way into the trial at the objection of the reporter, it is difficult to imagine a situation where there would be no prejudice. However, if the statute is only to protect the individual, then it would appear the reporter should be able to waive this protection as he can waive all other privileges which are for his protection. 67

The possibly absolute restriction on the use of required reports should not be a serious objection. While the document itself is privileged, no other information is removed from judicial inquiry. And any information derived from collateral sources is available as evidence. It cannot be seriously contended that the privilege removes information from judicial inquiry which would otherwise be available. Without the privilege, how many individuals would disclose information which would subject them to possible civil or criminal liability just to give the state valuable accident information?

**Conclusion**

The government has a wide range of possible privileges it may assert to remove information from judicial inquiry. In each case, the courts must


66 Herbert v. Garner, 78 So. 2d 727 (Fla. 1955) (statute provided the report shall not be used in evidence. To allow one who overheard the making of the report to establish its contents would avoid the purpose of the statute); Sprague v. Brodus, 245 Iowa 90, 60 N.W.2d 850 (1954) (statutory words for exclusion of reports as evidence similar to Illinois except police reports are also privileged. Statute is for the benefit of the public and is not a personal privilege which may be waived. Use of police report was reversible error); Lee v. Artis, 136 S.E.2d 868 (Va. 1964) (case reversed because of accident report and other errors).

67 Carroll v. Beavers, supra note 63 (a required report found its way into court, but an objection to its use was sustained. In construing a statute similar to that of Illinois, the court said, the presence of the report "was a betrayal of the confidence which the State required its maker to repose in the State's agencies." The report, if used, would probably have been reversible error); Rosenfeld v. Johnson, 161 So. 2d 703 (Fla. App. 1964) (confidential report does not exclude statements which, if otherwise admissible, are favorable to the reporting party); Williams v. Scott, 153 So. 2d 18 (Fla. App. 1963) (use of confidential accident report is not reversible error).
look at the nature of the information being withheld and the purpose which motivates the government to make a claim of privilege. The problem may be complicated by the availability of more than one reason to prevent disclosure.

The court must look at the interest of government to be protected and compare this with the need of the individual to obtain information. The weight to be given each conflicting position will necessarily vary from state to state and with the composition of the courts within a state. At this time, the Illinois courts seem to be favorable to the interests of government.

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