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Compensation of Public Employees Disclosable to Union Official Under Freedom of Information Law

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entry was not an issue to be proved by the prosecution or rebutted by the defendant,[133] it seems that the refusal to require the disclosure of such information was clearly within the trial court's discretion.[134]

Notwithstanding that, in light of its definitive interpretation of the burglary statute, the Court's finding that no abuse of discretion occurred appears sound, it is submitted that the *Mackey* Court erred in failing to promulgate guidelines to which the lower courts could refer in exercising such discretion in the future. Indeed, the majority's acknowledgment that the denial of the defendant's motion may have been erroneous had it "demanded the basis upon which the People would contend that he intended to commit a crime,"[135] suggests that the Court has implicitly sanctioned the practice of penalizing a defendant who asks the wrong question. Clearly, in the wake of *Iannone* and *Fitzgerald,* which placed the onus on the defendant to seek clarification of a deficient indictment by requesting a bill of particulars, the Court's failure to require that such requests be liberally construed increases the possibility that a defendant may be unfairly surprised at trial and consequently rendered incapable of rebutting the prosecution's evidence.[136]

Richard V. Silver

PUBLIC OFFICERS LAW

Compensation of public employees disclosable to union official under Freedom of Information Law

New York's Freedom of Information Law (FOIL)[137] was enacted to ensure public access to all records generated and compiled by state governmental agencies.[138] Specifically exempted from

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[133] *See* note 115 and accompanying text *supra.*

[134] *See generally* People v. Iannone, 45 N.Y.2d 589, 597-98, 384 N.E.2d 656, 662, 412 N.Y.S.2d 110, 115-16 (1978); People v. Rubin, 170 Misc. 969, 971, 11 N.Y.S.2d 405, 407-08 (N.Y.C. Gen. Sess. N.Y. County 1939).

[135] 49 N.Y.2d at 280, 401 N.E.2d at 402, 425 N.Y.S.2d at 291 (citation omitted).

[136] *See* note 111 and accompanying text *supra.*

[137] N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1979-1980).

[138] Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465, 419 N.Y.S.2d 467, 470 (1979); Gannett Co. v. County of Monroe, 59 App. Div. 2d 309, 311, 399 N.Y.S.2d 534, 535 (4th Dep't 1977), *aff'd,* 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978); D'Allessandro v. Unemployment Ins. Appeal Bd., 56 App. Div. 2d 762, 763, 392 N.Y.S.2d 433, 435 (1st Dep't 1977). *See also* Baumgarten v. Koch, 97 Misc. 2d 449, 450-51, 411

FOIL's disclosure requirement, however, is any material that "if disclosed would impair present or imminent . . . collective bargaining negotiations."[139] Recently, in *Doolan v. BOCES*,[140] the Court of Appeals strictly construed the collective bargaining exemption, ordering disclosure to a union official of salaries and fringe benefits of public employees, despite their apparent usefulness in labor negotiations.[141]

Doolan, the president-elect of a statewide school administrators' union,[142] sought disclosure of an annual report detailing salary and fringe benefit data for teachers and administrators in one Suffolk County school district.[143] The custodian of the study, the Board of Cooperative Educational Services (BOCES), denied access on the ground that it was prepared as a service to member school districts and distributed only on a subscription basis.[144] The Supreme Court, Suffolk County, ordered the release of the report to Doolan,[145] concluding that it was a "factual tabulation" subject to disclosure under FOIL.[146] The Appellate Division, Second Department, reversed, however, finding that the study was strictly a service performed by BOCES for its subscribers and therefore not

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N.Y.S.2d 487, 489 (Sup. Ct. N.Y. County 1978); Marino, *The New York Freedom of Information Law*, 43 FORDHAM L. REV. 83, 83 (1974). Section 87 of the new Freedom of Information Law was enacted in 1977 as a broad disclosure provision aimed at promoting a more open government and greater public participation in the decisionmaking process. *See* Miracle Mile Assocs. v. Yudelson, 68 App. Div. 2d 176, 181, 417 N.Y.S.2d 142, 146 (4th Dep't), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979); N.Y. PUB. OFF. LAW § 84 (McKinney Supp. 1979-1980). *See generally* Marino, *supra*. For a discussion of the Federal Freedom of Information Act upon which the New York statute was modeled, see Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROBS. 342 (1966).

[139] N.Y. PUB. OFF. LAW § 87(2)(c) (McKinney Supp. 1979-1980). Other records exempted from disclosure under the statute include: (1) Those records specifically exempted under state or federal law; (2) records which if disclosed would constitute an invasion of privacy; (3) trade secrets; (4) records compiled for law enforcement purposes; (5) records which if disclosed would endanger human life or safety; and (6) examination questions and answers. *Id.* § 87(2) (McKinney Supp. 1979-1980).

[140] 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979), *rev'g*, 64 App. Div. 2d 702, 407 N.Y.S.2d 538 (2d Dep't 1978).

[141] 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 932.

[142] *Id.* at 344, 398 N.E.2d at 535, 422 N.Y.S.2d at 929.

[143] *Id.* at 343-44, 398 N.E.2d at 534-35, 422 N.Y.S.2d at 929. Doolan commenced this article 78 proceeding when BOCES denied his request for the salary data. *Id.* at 344, 398 N.E.2d at 535, 422 N.Y.S.2d at 929.

[144] *Id.*

[145] *Id.*

[146] *Id.*

a disclosable "report" within the directives of the statute.[147]

On appeal, a divided Court of Appeals reversed,[148] holding, *inter alia,* that compensation data of public employees could not be protected from disclosure by the common-law "governmental interest" privilege.[149] In an opinion authored by Judge Meyer,[150] the *Doolan* majority dismissed BOCES contention that by disclosing the report at a nominal transcript fee, the court effectively would undermine the cost-allocation provisions of the Education Law.[151]

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[147] 64 App. Div. 2d at 703, 407 N.Y.S.2d at 539. The supreme court correctly applied FOIL's predecessor statute, *see* Ch. 578, § 2, [1974] N.Y. Laws 1538-42 (as amended by Ch. 579, § 1, [1974] N.Y. Laws 1542-43), the effective law at the time of its decision. Former section 88 was superceded by the present statute six months prior to the appellate division's determination. Yet, the appellate division decided the case in accordance with the repealed law, which contained no collective bargaining exception. *See* 64 App. Div. 2d at 703, 407 N.Y.S.2d at 539.

[148] 48 N.Y.2d 341, 398 N.E.2d 533, 422 N.Y.S.2d 927 (1979). The Court of Appeals determined that the new FOIL rather than former section 88 applied in *Doolan,* but concluded that the statutory changes did not require a different result under the facts of the case. *Id.* at 344 n.1, 398 N.E.2d at 535 n.1, 422 N.Y.S.2d at 930 n.1 (citing Demisay, Inc. v. Petito, 31 N.Y.2d 896, 292 N.E.2d 674, 340 N.Y.S.2d 406 (1972)). *Compare* Delaney v. Del Bello, 62 App. Div. 2d 281, 405 N.Y.S.2d 276 (2d Dep't 1978) *and* Baumgarten v. Koch, 97 Misc. 2d 449, 450 n.2, 411 N.Y.S.2d 487, 488-89 n.2 (Sup. Ct. N.Y. County 1978) *with* McAulay v. Board of Educ., 61 App. Div. 2d 1048, 403 N.Y.S.2d 116 (2d Dep't 1978), *aff'd,* 48 N.Y.2d 659, 396 N.E.2d 1033, 421 N.Y.S.2d 560 (1979).

[149] 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931; *see* note 156 *infra.*

[150] Chief Judge Cooke and Judges Gabrielli, Wachtler and Fuchsberg concurred in the majority opinion. Judges Jasen and Jones dissented.

[151] 48 N.Y.2d at 346, 398 N.E.2d at 536, 422 N.Y.S.2d at 931. New York's Education Law, N.Y. EDUC. LAW §§ 1950(1), 1951(1) (McKinney Supp. 1979-1980), provides that local school districts may jointly establish a cooperative board for the purpose of sharing the benefits and costs of administering educational services. *Id.* § 1950(1). While FOIL requires payment of, or an offer to pay the prescribed statutory fee of "twenty-five cents per photocopy . . . or the actual cost of reproducing," N.Y. PUB. OFF. LAW §§ 87(1)(b)(iii), 89(3) (McKinney Supp. 1979-1980), the statute contains no cost-allocation requirement. BOCES, therefore, suggested that a conflict with the cost-allocation policy of the Education Law would arise if the plaintiff was permitted access to a BOCES service at the nominal cost prescribed by FOIL. The Court reasoned, however, that while the potential for statutory conflict existed, it was not an issue in the case since cost allocation applies only to school districts. 48 N.Y.2d at 346, 398 N.E.2d at 536, 422 N.Y.S.2d at 931. The Court further suggested that any such statutory conflict should be resolved by the legislature. *Id.*

Additional grounds advanced by BOCES to support nondisclosure included a claim that the salary report was not "final agency policy" subject to disclosure under section 87(2)(g)(iii) of the statute and that disclosure was contrary to article VIII, § 1 of the state constitution, which provides that "[n]o . . . school district shall give or loan any money or property to or in aid of any individual, or private corporation or association," N.Y. CONST., art. VIII, § 1. 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931. Addressing the first of these arguments, the Court held that the "final agency policy" exception did not include agency material comprised of "statistical or factual tabulations." *Id.* at 345-46, 398 N.E.2d at 536, 422 N.Y.S.2d at 930-31 (quoting N.Y. PUB. OFF. LAW § 87(g)(i) (McKinney Supp.

Noting that the burden of proving an exemption from FOIL's disclosure requirements is on the agency resisting disclosure,[152] the Court determined that BOCES bare assertion that the requested data was within the collective bargaining exemption was insufficient to meet that burden.[153] Since the more analytical portion of the report dealing with "negotiating developments" was not requested,[154] the purely factual compilation of compensation data was within FOIL's disclosure requirements.[155] Finally, the majority concluded, the common-law "governmental interest" privilege could not constitute a bar since disclosure was mandated by the statute.[156] Two dissenting judges of the Court of Appeals voted to

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1979-1980)). The Court also rejected BOCES constitutional argument, reasoning that access to government records at the statutory cost of copying did not constitute a gift or waste of public funds. To conclude otherwise, the Court asserted, would effectively limit access to agency records "except on a cost-accounting basis." *Id.* at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931.

[152] *See* Miracle Mile Assocs. v. Yudelson, 68 App. Div. 2d 176, 179, 417 N.Y.S.2d 142, 145 (4th Dep't), *appeal denied*, 48 N.Y.2d 706, 397 N.E.2d 758, 422 N.Y.S.2d 68 (1979). Because FOIL was intended by the legislature to advance the principles of a free society, *see* note 138 *supra*, its disclosure mandate is construed broadly while the exclusion provisions are interpreted narrowly. Zuckerman v. New York State Bd. of Parole, 53 App. Div. 2d 405, 407-08, 385 N.Y.S.2d 811, 813 (3d Dep't 1976). Accordingly, the agency claiming nondisclosure must prove that disclosure would jeopardize the public interest. In Fink v. Lefkowitz, 47 N.Y.2d 567, 393 N.E.2d 463, 419 N.Y.S.2d 467 (1979), the Court of Appeals determined that a resisting agency is required to articulate particularized and specific justifications for exemption and, if necessary, submit the requested materials to an *in camera* inspection. *Id.* at 571, 393 N.E.2d at 465, 419 N.Y.S.2d at 470; *see* Church of Scientology v. State, 46 N.Y.2d at 906, 907, 387 N.E.2d 1216, 1216, 414 N.Y.S.2d 900, 901 (1979); *cf.* Dunlea v. Goldmark, 54 App. Div. 2d 446, 449, 389 N.Y.S.2d 423, 425 (3d Dep't 1976), *aff'd*, 43 N.Y.2d 754, 372 N.E.2d 798, 401 N.Y.S.2d 1010 (1977) (budget examiner's file partially exempt under former law only upon detailed proof). As a practical matter, however, *in camera* inspection rarely will be necessary since a description of the material and its intended purpose is usually sufficient. *See* Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 119, 316 N.E.2d 301, 304, 359 N.Y.S.2d 1, 6 (1974). *But cf.* Walker v. City of New York, 90 Misc. 2d 565, 394 N.Y.S.2d 797 (Sup. Ct. Queens County 1977), *rev'd in part*, 64 App. Div. 2d 980, 408 N.Y.S.2d 811 (2d Dep't 1978) (lower court order for disclosure of all prior complaints against police officer reversed and remanded for *in camera* review as to whether disclosure would reveal confidential information regarding criminal investigation).

[153] 48 N.Y.2d at 346-47, 398 N.E.2d at 536, 422 N.Y.S.2d at 931.

[154] *Id.*

[155] *Id.; cf.* Pooler v. Nyquist, 89 Misc. 2d 705, 706, 392 N.Y.S.2d 948, 951 (Sup. Ct. Albany County 1976) (statistical data generally discoverable under former section 88).

[156] 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931. Under the common-law privilege for confidential governmental records, a public agency could avoid disclosure if it satisfied the court that nondisclosure served the public interest. *See* Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 117, 316 N.E.2d 301, 303, 359 N.Y.S.2d 1, 4 (1974); W. RICHARDSON, EVIDENCE § 456 (Prince 10th ed. 1973); 8 J. WIGMORE § 2378 (McNaughton rev. ed. 1961). In *Cirale*, the Court of Appeals stated: "The hallmark of this privilege is that it is applicable

affirm the appellate division determination, however, and adhered to that court's rationale.[157]

Doolan is the first Court of Appeals decision to define the scope of FOIL's collective bargaining exemption since the enactment of the statute in 1977.[158] By excluding objective compensation data from its coverage, the Court appears to have struck a balance between the integrity of the collective bargaining process and the traditional rule permitting access to payroll data of public employees.[159] Moreover, in holding that BOCES had failed to meet its statutory burden of proving "present or imminent" impairment of collective bargaining, *Doolan* ensures that a resisting agency will be unable to avoid disclosure by making conclusory allegations that an exemptive provision applies or merely suggesting that future labor negotiations are inevitable.

Perhaps more significantly, the *Doolan* Court has clarified the role of the common-law "governmental interest" privilege in light of the comprehensive disclosure required by FOIL. Under the common-law privilege, confidential government records were shielded from public disclosure where nondisclosure tended to serve the public interest.[160] The Court reasoned, however, that all public policy regarding disclosure of governmental records has been embod-

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when the public interest would be harmed if the material were to lose its cloak of confidentiality." 35 N.Y.2d at 117, 316 N.E.2d at 303, 359 N.Y.S.2d at 4; *see* People v. Keating, 286 App. Div. 150, 153, 141 N.Y.S.2d 562, 565 (1st Dep't 1955). *See generally* Marino, *supra* note 138.

[157] 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 932 (Jasen, J., and Jones, J., dissenting); *see* note 147 and accompanying text *supra*.

[158] Previously, in Trauernicht v. BOCES, 95 Misc. 2d 394, 394-95, 407 N.Y.S.2d 398, 398-99 (Sup. Ct. Nassau County 1978), the Supreme Court, Nassau County, considered a similar request by the executive director of a school administrators' union for disclosure of an employee salary report. The *Trauernicht* court denied access under the collective bargaining exemption, however, reasoning that "disclosure would only serve an inequitable one-sided negotiating ploy," rather than the informational purposes for which FOIL was intended. *Id.* at 396, 407 N.Y.S.2d at 399. Further, the court recognized that disclosure would cause "irreparable harm" to the cost-allocation system created by the Education Law. *Id.; cf.* Police Benevolent Ass'n v. Helsby, 84 Misc. 2d 17, 19, 374 N.Y.S.2d 262, 264 (Sup. Ct. Albany County 1975) (names of employees who support rival union may not be disclosed to incumbent union). *See also* NLRB v. J.I. Case Co., 201 F.2d 597, 600 (9th Cir. 1953).

[159] *See* Miller v. Incorporated Village of Freeport, 81 Misc. 2d 81, 82, 365 N.Y.S.2d 444, 445 (Sup. Ct. Nassau County 1975), *aff'd*, 51 App. Div. 2d 765, 379 N.Y.S.2d 517 (2d Dep't 1976); Marino, *supra* note 138, at 87-88 & n.31; *cf.* Gannett Co. v. County of Monroe, 59 App. Div. 2d 309, 311-12, 399 N.Y.S.2d 534, 535-36 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978) (names, job titles and salaries disclosable under former law).

[160] *See* note 156 *supra*.

ied in the statute.[161] Since government statistics are specifically accessible under FOIL,[162] common-law policy arguments will no longer support nondisclosure of any material which the statute requires to be disclosed. In short, the common-law public interest privilege has been subordinated to FOIL. It appears, therefore, that *Doolan* will encourage strict compliance with FOIL's directive for disclosure of statistical data.

Maureen A. Glass

UNIFORM COMMERCIAL CODE

N.Y.U.C.C. § 2-207: Existence of agreement to arbitrate may be implied from evidence of prior course of dealing or trade usage

Section 2-207 of the Uniform Commercial Code (Code) provides in part that additional terms contained in a written confirmation will become part of a contract between merchants unless, among other things, the additional terms materially alter the contract.[163] Previously, in New York, it had been held that an arbitration clause contained in an acceptance or confirmation is a material variance of the terms of a prior offer or agreement and thus not part of the contract in the absence of express agreement thereto by the parties.[164] Recently, in *Schubtex, Inc. v. Allen Sny-*

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[161] 48 N.Y.2d at 347, 398 N.E.2d at 537, 422 N.Y.S.2d at 931. The Court stated: "The public policy concerning governmental disclosure is fixed by the Freedom of Information Law; the common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed." *Id.*

[162] *See* N.Y. PUB. OFF. LAW § 87(g)(i) (McKinney Supp. 1979-1980).

[163] N.Y.U.C.C. § 2-207 & Official Comment 2 (McKinney 1964).

[164] Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 333, 380 N.E.2d 239, 242, 408 N.Y.S.2d 410, 413 (1978). The decision in *Marlene* resolved a split that previously had existed in New York as to whether an arbitration clause contained in an acceptance constituted a material alteration of a contract. Although there was some lower court precedent foreshadowing the Court of Appeals' holding in *Marlene, see, e.g.*, Doughboy Indus. Inc. v. Pantasote Co., 17 App. Div. 2d 216, 223, 233 N.Y.S.2d 488, 495-96 (1st Dep't 1962), neither the Code nor the comments of its draftsmen suggested that an arbitration clause is a material alteration within the meaning of § 2-207. *See* N.Y.U.C.C. § 2-207 & Official Comments 3-4 (McKinney 1964). Moreover, other New York courts had indicated that they might take judicial notice that arbitration is a common practice in the textile industry, *see, e.g.*, Lehigh Valley Indus., Inc. v. Armtex, Inc., 53 App. Div. 2d 582, 582, 384 N.Y.S.2d 837, 838 (1st Dep't 1976) (mem.); Loudon Mfg., Inc. v. American & Efird Mills, Inc., 46 App. Div. 2d 637, 638, 360 N.Y.S.2d 250, 251 (1st Dep't 1974) (per curiam), and at least one court concluded that in such industries an arbitration provision is not a material alteration within the meaning of § 2-207(2)(b) of the Code. *See* Gaynor-Stafford Indus., Inc. v. Mafco Textured Fibers, 52 App. Div. 2d 481, 485, 384 N.Y.S.2d 788, 791 (1st Dep't 1976).

In addition, prior to *Marlene*, some New York courts had attempted to validate arbitra-