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### **1. General Filing Requirements**

Judges and many other elected state and local officials must file a financial disclosure form with a state agency. In some jurisdictions, employees that earn over specified salary also have to file a form.

In [Barry v. City of New York](#), #83-7010, 712 F.2d 1554 (2nd Cir. 1983) a three-judge panel upheld a requirement that various city officials and employees file a financial disclosure form. An employee could make a claim of privacy with respect to any item of information sought by writing reasons for his or her request.

The panel wrote that “the City’s interest in public disclosure outweighs the possible infringement of plaintiffs’ privacy interests.”

The following year a federal judge in Rochester, NY, upheld a requirement that city employees answer a questionnaire disclosing ownership of all real estate

owned within the city limits, except for a single family residence. He rejected a privacy suit filed by the president of the police union. There was a concern that police officers and firefighters who owned rental property might receive “preferential treatment in regard to building code violations.” [Evangelista v. City of Rochester](#), #CIV-83-758, 580 F.Supp.1556 (W.D.N.Y. 1984).

It should be noted that at least ten states recognize a right to privacy in their state constitution. {N. 1} In those states, courts could expand on federal privacy rights in favor of employees.

## **2. Special Assignment Transfers**

A few law enforcement officers have been convicted of taking bribes or stealing drugs. This has prompted some agencies to insist that officers seeking assignment to specified functions must complete a financial questionnaire, such as officers that are assigned to:

1. Investigate misconduct allegations;
2. Conduct field audits and inspections;
3. Investigate organized crime;
4. Enforce unlawful gambling and prostitution offenses; and
5. Enforce drug laws and seize unlawful substances.

As one court noted, there is a “strong public interest in avoiding corruption among officers assigned to a unit designed to perform investigations in areas traditionally susceptible to corruption ...” [812 F.2d 117]

## **3. Philadelphia FOP Litigation (1987-88)**

In Philadelphia, the police union sued after management required officers seeking transfer to the Special Investigations Unit to complete a multiple interest questionnaire.

The U.S. District Court held that portions of the questionnaire seeking information concerning an applicant’s medical history, gambling habits, alcohol consumption, financial status, organizational memberships and arrest records violated the officers’ constitutional rights of privacy and association. The court enjoined management from including these items in the questionnaire. The City appealed.

Several issues were before the Third Circuit. Management claimed that officers seeking transfer to the SIU were volunteers, and thus the application was voluntary. The panel rejected that claim, saying, “it is illusory to treat all SIU

applicants as volunteers.”



Moreover, current members of the three divisions being phased out would be required to comply with the SIU application procedures to retain equivalent positions in the SIU. Failure to comply would result in a return to normal duty “which could subject some of these officers ... to reprisals.”

On the substantive claims, the panel explained that there is no absolute protection against disclosure. “Disclosure may be required if the government interest in disclosure outweighs the individual’s privacy interest.”

#### **A. Medical Information**

The panel said that the medical information requested was “directly related to the interest of the police department in selecting officers who are physically and mentally capable of working in dangerous and highly stressful positions,” and that the medical questions did not unconstitutionally impinge upon the applicants’ privacy interests.

#### **B. Financial Information**

Applicants were asked if they are “presently behind in payments on unpaid bills or loans,” and whether they received any income in addition to their salary. The panel noted that the Commissioner sought to avoid assigning officers with large debts to narcotics and vice operations, “where the temptation is tremendous and corruption is pervasive.”

Additionally, the Commissioner sought income and gift information to insure that money obtained by SIU members “was received in an appropriate manner and was not received from any illicit or illegal enterprise.” The three-judge panel concluded that the SIU questions were related to those goals. They wrote:

“We conclude that the strong public interest in avoiding corruption among officers assigned to a unit designed to perform investigations in areas

traditionally susceptible to corruption outweighs police officers' limited privacy expectations in the financial information sought by the SIU questionnaire."

### **C. Behavioral Information**

A third group of questions sought information of a personal nature about an applicant's behavior, and the arrest record of the applicant's family. The panel noted that an officer's privacy expectations in nondisclosure of information relating to gambling and alcohol consumption are significantly reduced, and "there is also a strong public interest in assuring the effectiveness of the officers who investigate vice and corruption."

In summary, the panel concluded that although most of the information requested in the eleven questions was entitled to privacy protection, "the questions are specific, relevant, and permissible because the City's need for the information overrides the applicants' rights not to disclose it." [Fraternal Order of Police L-5 v. City of Philadelphia](#), #86-1407, 812 F.2d 105 (3d Cir. 1987).

### **D. Information Safeguards**

The appellate court was troubled by the absence of any procedure to prevent unwarranted disclosure of this information. "... neither the City nor the Commissioner has undertaken to promulgate confidentiality directives or regulations regarding the responses." The panel declined to overturn the injunction "until the City, the Commissioner, or other appropriate official establishes written, explicit, and binding rules that contain adequate safeguards against unnecessary disclosure of the confidential information elicited in response to the SIU questionnaire." [Fraternal Order of Police L-5 v. City of Philadelphia](#), #88-1073, 859 F.2d 276 (3rd Cir. 1988).

### **E. Self Incrimination Claims**

A year later, a different panel of appellate judges examined the self incrimination claims raised by the FOP. The district court had found that the application process was coercive. The appellate court reversed:

"The privilege against self-incrimination applies to compelled incrimination. We do not agree with the district court that the police officers in this case are compelled within the meaning of the fifth amendment to fill out the application for the SIU. ...

"Because the decision not to participate in the SIU application process does

not carry with it any diminution of a police officer's income or a demotion in rank, we find that the Department's application process is not coercive, and that the information an officer provides in his or her answers on the questionnaire is not compelled within the meaning of the fifth amendment."

The judges then took the union to task, writing, "it is regrettable that the police department has been confronted with so many specious arguments in their efforts to deal with ... a recent history of corruption within the department." [859 F.2d 284]

## **F. Vagueness Defense**

In an unrelated Pennsylvania case, a public employee was terminated for failing to list real estate holdings in his ethics form. On appeal, he claimed the instructions were ambiguous. His employing agency had more specific instructions, but the appellant claimed they were invalid because the state law did not delegate interpretative guidance to his employing entity.

The appellate court rejected the defense. [Colston v. Comm. of Penna.](#), #2622 C.D. 1987, 121 Pa. Commw. 179, 550 A.2d 292 (1988).

## **4. Federal Employees Litigation (1993-94)**

In [National Treasury Employees Union v. U. S. Dept .of Treasury](#), 838 F.Supp. 631 (D.D.C. 1993) the District Court enjoined the use of a questionnaire because the Customs Service was "hard pressed to demonstrate that it had a compelling interest in collecting the type of information demanded in the questionnaire." Judge Harold Greene wrote "the government is attempting to justify its intrusions into very personal matters of literally thousands of non-sensitive employees based on the fact that four carry guns and some have access to computer information."

Shortly thereafter, the D.C. Circuit addressed similar issues in [National Federation of Federal Employees v. Greenberg](#), 983 F.2d 286 (D.C. Cir. 1993). The plaintiffs challenged the constitutionality of the Defense Department's National Agency Questionnaire. Civilian employees with secret "security clearances were told that a failure to furnish the requested information could result in a clearance or access revocation.

The District Court had granted an injunction at the request of several unions. The Circuit Court reversed. As to the self-incrimination challenge brought under the Fifth Amendment, the panel wrote:

The Fifth Amendment does not forbid the government from asking questions and it does not forbid the government from taking the answers. What is forbidden is compelling an individual to testify against himself. Even so, “answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying,” [citing [Gardner v. Broderick](#), 392 U.S. 273 at 276 (1968)].

As for the privacy challenge, the panel found the questions to be job-related.

“Surely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse. ...

“Consequently, any employee who occupies a position of public trust is aware of his employer’s elevated expectations in his integrity and performance. He is thus charged with a diminished expectation of privacy concerning his past personal history that is relevant to this elevated expectation, including his alcohol and illegal drug abuse history. In short, public trust employees know that they have diminished rights to withhold personal information that compromises the right of the public to repose trust and confidence in them.”

[National Treasury Employees Union v. U. S. Dept .of Treasury](#), #92-8597, 25 F.3d 237 (D.C. Cir. 1994).

### **5. Executive Order 12968 (1995)**

Secrecy clearance procedures are established under Presidential Executive Orders, and as a condition to view classified documents, federal employees must answer questions about their personal finance.

Standard Form 713 provides a notice that:

“Information reported on this release may be provided to financial agencies, financial institutions, holding companies, consumer reporting agencies, and other commercial entities holding financial, consumer credit, or foreign travel records pertaining to you.”

Part III of the form authorizes financial entities to release information about deposits, withdrawals, and account balances; copies of checks and other negotiable instruments; and foreign funds transfers. It also authorizes the release of foreign

travel records.

Access to Classified Information, [Executive Order 12968](#), 60 (151) Fed. Reg. 40245 (Aug. 7, 1995).

## **6. Specimen Disclosure Forms**

- Florida [Ethics Commission Form 1](#)
- Florida Dept. of Law Enforcement, [Supplemental Employment Application](#)
- North Carolina [Statement of Economic Interest](#) form
- [U.S. Executive Branch Disclosure Report](#), U.S. Office of Government Ethics Form 450, OMB No. 3209-0006
- GSA [Standard Form 713](#), Consent for Access to Records

### **Notes:**

1. State constitutions recognizing privacy rights:

*Alaska* art. I, §22: The right of the people to **privacy** is recognized and shall not be infringed. The legislature shall implement this section.

*Arizona* art. II, §8: No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law.

*California* art. I, §1: 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**.

*Florida* art. I, §12: Every natural person has the right to be let alone and free from governmental intrusion into the person's **private life** except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

*Hawaii* art. I, §§6 & 7: The right of the people to **privacy** is recognized and shall not be infringed without the showing of a compelling state interest.

*Illinois* art. I, §6 & art. 12 §6: The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, **invasions of privacy** or interceptions of communications by eavesdropping devices or other means.

*Louisiana* art. I, §5: Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or **invasions of privacy**.

*Montana* art. II, §10: The right of individual **privacy** is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest

*South Carolina* art. I, §10: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable **invasions of privacy** shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.

*Washington* art. I, §7: No person shall be disturbed in his **private affairs**, or his home invaded, without authority of law.

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