

## Fund Manager Opinion 1998-1

### Obligation Of The Fund Manager And Local Boards To Refuse Production Of Retiree Medical Records

Increasingly, the Fund Manager of the Arizona Public Safety Personnel Retirement System, Elected Officials Retirement Plan and Corrections Officer Retirement Plan ("the Plans"), as well as the Plans' local boards, are being asked to produce copies of member medical records to the press or third parties. While various public records laws generally require production of records held by government agencies, for the reasons that follow, and **except in unusual circumstances, local boards and the Fund Manager are cautioned not to disclose member medical records to the press or third parties, other than those records which were collected to serve as a memorial of an official transaction or for the dissemination of information about the member, such as an official written decision on a member's application for benefits, any transcript of public meetings regarding same, and any records actually relied upon by the parties and made public during the public portion of the proceedings.** The Fund Manager and local boards should then:

1) notify the member of the demand for his medical records and verify that the member protests disclosure of his medical records;

2) explain the basis of their refusal to produce the records by way of a detailed letter to the party requesting the records; and

3) offer to place the records with the State Superior or Federal District courts under seal to permit whichever court is chosen to view the documents *in camera* so that the court can make a determination whether such records should be disclosed in light of the tension between the public records law and the member's privacy interests. The Fund Manager or local boards might even offer to "interplead" the documents into court but under seal to permit the member and the party requesting the records to litigate among themselves whether the documents ought to be released, in exchange for an order discharging the Fund Manager or local boards from any liability relating to same, as well as any obligation to participate in the litigation.

#### I. Arizona's Public Records Law.

Title 39, Chapter 1 of the Arizona Revised Statutes (the "Public Records Law") sets forth the rules governing the preparation, collection, safekeeping and disclosure of records kept by public agencies in Arizona. Section 39-121, A.R.S., states the general rule:

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"Public records and other matters in the office of any officer<sup>1</sup> at all times during office hours shall be open to inspection by any person." (Emphasis added).

The Public Records Law "evinces a clear policy favoring disclosure." *Carlson v. Pima County*, 141 Ariz. 487, 490, 687 P.2d 1242, 1245 (1984). Public records are presumed open to the public for inspection. *Cox Arizona Publications v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); *Star Publishing Co. v. Pima County Attorney's Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (App. 1994). The objective of § 39-121 "is to broadly define those records which are open to the public for inspection . . ." *Id.* The Public Records Law was enacted to allow disclosure and limit secrecy, and "to provide the public with knowledge of all of the activities of a public officer and of the manner in which he conducts his office and performs his duty." *Carlson*, 141 Ariz. at 491, 687 P.2d at 1246.

Title 39 does not define "Public records" or "other matters." In *Matthews v. Pyle*, 75 Ariz. 76, 78-79, 251 P.2d 893, 895 (1952), the Court defined a "public record" as

one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference . . . \* \* \* [or] which is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a

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<sup>1</sup>Section 39-121.01(A)(1), A.R.S., defines "Officer," as "any person elected or appointed to hold any elective or appointive office of any public body and any chief administrative officer, head, director, superintendent or chairman of any public body." Subsection (2) of § 39-121.01 defines "Public body" as:

the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by funds from the state or any political subdivision thereof, or expending funds provided by the state or any political subdivision thereof.

The Fund Manager and local board members are certainly "Officers" as that term is defined in § 39-121.01(A)(1).

memorial and evidence of something written, said or done. . . \* \* \*  
[including] a written record of transactions of a public officer in his office,  
which is a convenient and appropriate method of discharging his duties,  
and is kept by him as such, whether required by the express provision of  
law or not. . . . (Bracketed material added)

In *Carlson*, however, 141 Ariz. at 490, 687 P.2d at 1245, the Court emphasized there was little reason to distinguish between "public records" and "other matters" insofar as the public's right to inspection of documents in the possession of public officials was concerned. Instead, the Court emphasized that all documents in an officer's possession, whether "public records" or not, were subject to the disclosure requirements of § 39-121. *Id.* Thus, in accordance with *Matthews* and *Carlson*, all records held by the Fund Manager and local boards relating to their consideration of a member's application for benefits are "public records or other matters" subject to disclosure under § 39-121, unless such material is privileged from disclosure by some statute, regulation or common law rule.

## II. The Various Privileges.

### A. State Statutory Privileges.

Despite the unlimited disclosure requirement expressed in § 39-121, the availability of records for public inspection is not without qualification. *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. There are numerous statutory exemptions to the general "open access" policy toward public records and information; for example: adoption records (A.R.S. §§ 8-120, -121); home address and telephone numbers of peace officers (§ 39-123); consumer fraud investigations by the State Attorney General's Office (§ 44-1525); and the records of the Department of Health Services (§§ 36-105, -136G(18), -340, -509, and -714(B)(1)). There is no state statutory exemption, however, for medical and other records used to evaluate a member's entitlement to benefits under the Plans.

### B. State Regulatory Privileges.

There are also regulatory limitations on the disclosure rules set forth in § 39-121. For example, § R2-5-105(D) of the Arizona Administrative Code specifically enumerates the employee information that the State of Arizona is authorized to release upon receipt of a Public Records Law request. That information includes an employee's name, dates of employment, current and previous titles, identity and location of each agency to which the employee was

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assigned, his current and previous salaries, and the names of his current and last known supervisors. *Id.* The list does not include medical records and evaluations. *Id.* Under the doctrine of Expressio Unius, a specific listing of items infers items of like kind not referenced are intended to be excluded. *Greves v. Ohio State Life Ins. Co.*, 170 Ariz. 66, 74, 821 P.2d 757, 765 (App. 1991). As a result, it might well be inferred that officers are not authorized to divulge any information about an employee other than that authorized to be disclosed by § R2-5-105(D). *Cf. Scottsdale Unified School District No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 265 Ariz. Adv. Rep. ¶ 17 (Ariz. 3/20/98) (suggesting that birth dates of state employees are privileged from disclosure under the Public Records Law in part because Arizona Administrative Code § R2-5-105(D) does not list birth dates among the information that the State will release upon a Public Records Law request).

However, the Fund Manager and local boards of state agencies probably cannot rely on § R2-5-105(D) as a basis for refusing a Public Records Law request. The Fund Manager is not subject to § R2-5-105(D) because it is not subject to Title 41, Chapter 4 Article 5 of the revised statutes, which sets forth the authority of the Department of Administration to adopt regulations such as § R2-5-105(D). *Compare* § 38-848(M), A.R.S. (Fund Manager and its employees not subject to Title 41, Chapter 4, Articles 4-5) *and* § 41-771(A)(2), A.R.S. (members of boards and commissions appointed by legislature and governor not subject to Title 41, Ch. 4, Art. 5-6) *with* § 41-763(6), A.R.S., which is part of Title 41, Ch. 4, Art. 5 (Director of Department of Administration is authorized to adopt rules for regulating personnel and personnel administration). Similarly, the local boards of state agencies are probably not subject to § R2-5-105(D) because a majority of their members are appointed by the governor<sup>2</sup> and A.R.S. § 41-771(A)(2) provides that members of boards and commissions appointed by the legislature or governor are not subject to Title 41, Ch. 4, Art. 5-6, which sets forth the authority of the Department of Administration to adopt regulations such as § R2-5-105(D).

### C. The Common Law Privacy Privilege.

Finally, the availability of public records for inspection by the public is qualified by common law rule. In *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991), the Court emphasized that while public records are presumed open:

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<sup>2</sup>See A.R.S. § 38-847(A)(2), which provides that three of the five members of each local board for a state agency are to be appointed by the governor.

[the] law also recognizes that an unlimited right of . . . inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold the officer or custodian may refuse inspection. Such discretionary refusal is subject to judicial scrutiny. (Emphasis added, *citing Carlson*, 141 Ariz. at 491, 687 P.2d at 1246).

Thus, the common law privilege from disclosure of public records will apply to preclude production of the requested public records if two tests are met: First, the records sought must be of a kind that the information they contain is of a "private" or "confidential" character or alternatively, is of a kind that should be withheld in the best interests of the State. *Scottsdale Unified School District*, 265 Ariz. Adv. Rep. at ¶¶ 14-19. If such records are private or confidential, or their production would injure the State, the court then must determine whether such concerns outweigh the public's right to inspection. *Id.* at ¶¶ 9, 20-25. If the State's best interests, or the identified privacy interests, outweigh the public's right to inspection, the records may be withheld. *Id.* at ¶ 9. The State has the burden of overcoming the "legal presumption favoring disclosure." *Id.*

#### 1. Determining Whether Information Is Private.

Information is "private" if it is intended for or restricted to the use of a particular person or group of class of persons and is not otherwise freely available to the public. *Scottsdale Unified School District*, 265 Ariz. Adv. Rep. at ¶ 14, *citing, United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-64 (1989). A privacy interest also extends to "the individual's control of information concerning his or her person." *Id.*

No reported Arizona decision discusses whether medical records and evaluations made in connection with an application for a pension are "private" in character. However, in a somewhat analogous case, the Arizona Supreme Court held that despite the mandates of § 39-121, personal information about an applicant for workmen's compensation benefits which is not "collected to serve as a memorial of an official transaction or for the dissemination of information is private except as to a claimant or parties. . . ." *Industrial Commission v. Holohan*, 97 Ariz. 122, 126, 397 P.2d 624, 627 (1964). The Court further emphasized that information collected and used by the Commission for the purpose of settling a claimant's compensation claim "is protected from the prying of unauthorized individuals to the same extent as the records of a private person." *Id.*

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When no Arizona statute, regulation or decision controls, the Arizona courts look to the federal "Freedom of Information Act," 5 U.S.C. §§ 552 *et seq.* ("FOIA") for guidance. *Scottsdale Unified School District*, 265 Ariz. Adv. Rep. at ¶¶ 10, 14, *citing*, *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 540-41, 815 P.2d 900, 909-10 (1991). Subsection (a) of 5 U.S.C. § 552 requires federal agencies to make available for public inspection many types of records possessed by such agencies; however, subsection (b)(6) of the statute excludes "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Thus, under federal law, personal and medical information is considered "private." *See, e.g., McDonnell v. U.S.*, 4 F.3d 1227, 1253 (3rd Cir. 1993) (living individual has strong privacy interest in withholding his medical records); *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980) (employee medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection).<sup>3</sup>

Based upon the foregoing, members of the Plans have a legitimate expectation that all medical information about them and their family contained in their retirement files is private, except any portions thereof which were "collected to serve as a memorial of an official transaction or for the dissemination of information." *Holohan*, 97 Ariz. at 126, 397 P.2d at 627. Such information is highly personal and generally "intended for or restricted to the use of a particular person or group of class of persons and is not otherwise freely available to the public." *Scottsdale Unified School District*, 265 Ariz. Adv. Rep. at ¶ 14.

However, the inquiry is not ended by the conclusion that some portions of a member's retirement file are "private." Even the "private" portions of a member's pension records must be disclosed unless such information is so highly personal, or its production would so injure the State, that the public's right to review the information is outweighed.

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<sup>3</sup>Under the Americans With Disabilities Act, 42 U.S.C. §§ 12101 to -12213, which generally prohibits discrimination against the disabled, information obtained about an employee's medical condition or history must be maintained separately from other employee files and is to be treated as a "confidential medical record" only accessible in limited circumstances, none of which are relevant to the typical inquiries received the Fund Manager and local boards. *See* 42 U.S.C. §§ 12112(d)(4)(B)-(C).

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## 2. The Balancing Test Factors.

In determining whether disclosure of a member's medical records is outweighed by his interests and/or that of the State, courts consider a number of factors, among them: 1) the requesting party's interest in the disclosure; 2) the public's interest in disclosure; 3) the degree of invasion of personal privacy or injury to the State; and 4) the availability of any alternative means of obtaining the requested information. *See, e.g., Professional Programs Group v. Department of Commerce*, 29 F.3d 1349, 1354 (9th Cir. 1994); *Church of Scientology of California v. U.S. Department of Army*, 611 F.2d 738, 746 (9th Cir. 1979). *See also Westinghouse Electric Corp.*, 638 F.2d at 578 (other factors are type of record requested, information it contains, adequacy of safeguards to prevent unauthorized disclosure to parties without the need to review records, degree of need for access, and whether there is express statutory mandate, articulated public policy, or other recognizable public interest militating toward access).

The only relevant "public interest" in disclosure is "the extent to which disclosure would . . . contribute significantly to public understanding of the operations of activities of the government." *U.S. Department of Defense v. FLRA*, 114 S. Ct. 1006, 1012 (1994). Thus, if disclosure of a member's medical records would contribute significantly to the public's understanding of government operations, this factor, at least, would strongly militate in favor of disclosure.

In contrast, medical examinations and evaluations are extremely personal in scope. Therefore, the degree of invasion of personal privacy is severe, and that strongly militates against disclosure of such examinations.

Finally, there are usually alternative sources for acquiring the medical information contained in pension plan records. For example, the records possessed by the Fund Manager and local boards concerning a member's health are usually also possessed by the member's personal and examining physicians, and may also be available to his insurers and the Social Security Administration. Moreover, the member could be medically examined by new physicians, who could then opine or report on his condition during the period in question. If a member's pension records are not the only available means of acquiring the necessary information about his medical condition, this factor militates against disclosure. *See Scottsdale Unified School District*, 265 Ariz. Adv. Rep. at ¶ 24 (availability of information through other avenues reduces the need for public disclosure of public records).

Those weighing whether to comply with a request to produce copies of a member's medical records should also determine whether the State will be injured if reports about the member's condition are disclosed. The standard "detrimental to the best interests of the state" permits an agency to refuse to disclose public records only when the effectiveness of the agency in the performance of its duties will be significantly impaired if the information contained in the records is disclosed. *Op. Atty Gen. No. I83-006*. We suspect it will be a rare case when disclosure of a member's medical records will prevent the Fund Manager or a local board from performing its mission effectively, and we doubt that such disclosure will "chill" applicants from applying for pensions based upon medical conditions, especially since some of the proceedings concerning an applicant's condition are necessarily public.

### III. Generally, Medical Records Demanded Should Be Withheld.

In view of the above, a balancing of the pertinent factors will typically lead to the conclusion that local boards and the Fund Manager should withhold production of a member's medical records, despite the legal presumption favoring disclosure, if as is typically the case, the member protests production of his medical records. Production should be limited to those records which were "collected to serve as a memorial of an official transaction or for the dissemination of information" about the member's pension claim, such as the official written decision on such claim, any transcript of the public meetings regarding same, and any records actually relied upon by the parties or provided to the public during that public portion of the proceedings. *Industrial Commission v. Holohan*, 97 Ariz. 122, 126, 397 P.2d 624, 627 (1964). Our conclusion in this regard is strengthened by five (5) additional factors:

#### A. The *Holohan* Mandate.

First, in *Holohan*, the Court emphasized that information collected and used by an agency for the purpose of determining a claim to benefits "is protected from the prying of unauthorized individuals to the same extent as the records of a private person." *Id.* This seems to imply that the medical information used by the Board of Physicians, the Fund Manager and/or local boards to evaluate the basis of a member's disability claim, including the medical reports and evaluations of the member's status and condition, are not subject to disclosure.<sup>4</sup>

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<sup>4</sup>Some medical records sought by a third party may not only reference the member, but also reference the medical condition of some of his relatives. Since the medical condition of the member's relatives has nothing whatsoever to do with issues concerning the member's

**B. Possible Violation Of § 1983.**

The member also has a constitutionally protected right to privacy, and might have a cause of action against the Fund Manager or local boards for abridging that right, under 42 U.S.C. § 1983, if the Fund Manager or local boards produce copies of the member's medical records to third parties. For example, individuals have substantial, constitutionally protected privacy interests in their medical records, including an interest in avoiding disclosure of such records. *See McDonnell v. U.S.*, 4 F.3d 1227, 1253 (3rd Cir. 1993) (individual has strong privacy interest in withholding his medical records); *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3rd Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) (information contained in medical records is constitutionally protected from disclosure); *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (employee medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection); *Caesar v. Mountanos*, 542 F.2d 1064, 1072 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) (psychotherapist-patient communications within constitutional right of privacy). *See generally Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (individual has constitutionally protected privacy interest in avoiding disclosure of personal matters). A number of courts have authorized a § 1983 action against state officials who have disclosed general medical or psychiatric records. *See, e.g., Borucki v. Ryan*, 827 F.2d 836, 844-47 (1st Cir. 1987) (recognizing legitimacy of § 1983 action against officials based upon their disclosure of psychiatric records but concluding that immunity shielded officials from liability because the right to non-disclosure was not clearly established at the time of the disclosure); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981) (plaintiff stated claim under § 1983 where state officials disclosed intimate personal information about plaintiff to third parties). Thus, even if the Fund Manager or local boards were privileged under state law to produce a member's medical records, such a disclosure might subject the Fund Manager or local boards to liability for violating the member's civil rights under 42 U.S.C. § 1983.

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health, and because information about the member's relatives is certainly "private" in character, the Fund Manager and local boards should redact all information about the relatives in any documents they decide to produce. Such a procedure has been approved by the Arizona Supreme Court and the Arizona Attorney General. *See Carlson*, 141 Ariz. at 491, 687 P.2d at 1246; *Op. Atty Gen. No. R75-721*, at 47. If material is redacted, the Fund Manager and local boards should disclose the redaction, indicating what portions have been deleted, and why. *Op. Atty Gen. No. R75-721*, at 47.

### C. Tort Action For Invasion Of Privacy.

A member might also have a tort-based cause of action against the Fund Manager or local boards if the latter two provide copies of his medical records to third parties. Arizona recognizes a cause of action for invasion of privacy, which is defined as an unreasonable intrusion upon the seclusion or private affairs of another. See §§ 652(A)-(B), *Restatement (Second) of Torts* (1971) (public disclosure of private facts may give rise to a tort claim for violation of privacy). See also *Rutledge v. Phoenix Newspapers, Inc.*, 148 Ariz. 555, 558, 715 P.2d 1243, 1246 (App. 1986) (individuals have expectation to be reasonably protected from interference with their private life).

### D. Violation Of The ADA.

Disclosure of the member's medical records also may violate the so-called "Americans With Disabilities Act," 42 U.S.C. §§ 12101 to -12213 ("ADA"), which generally prohibits discrimination against the disabled. Under the ADA, information obtained by an employer about an employee's medical condition or history must be maintained separately from other employee files and is to be treated as a "confidential medical record" only accessible in limited circumstances, none of which are relevant to the instant situation.<sup>5</sup> See 42 U.S.C. §§ 12112(d)(4)(B)-(C). While there are no cases on point, we think a reasonable argument could be made that disclosure of a member's medical records violates the ADA, thereby subjecting the Fund Manager or local boards to liability under the general liability provisions of the federal employment discrimination laws. See 42 U.S.C. § 12117.

### E. Violation Of The Physician-Patient Privilege.

Medical records are protected from disclosure by the physician-patient privilege. See A.R.S. § 12-2235 (civil proceedings) and § 13-4062(4) (criminal proceedings). In *Tucson Medical Center, Inc. v. Rowles*, 21 Ariz. App. 424, 429, 520 P.2d 518, 523 (1974), the court held that information contained in hospital files was subject to the physician-patient privilege, and that the hospital had standing and was required to assert the privilege on behalf of the

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<sup>5</sup>Medical information obtained by an employer can only be disclosed to 1) supervisors for purposes of notifying them of the employee's restrictions, and to enable them to provide the employee with reasonable accommodation of his disability; 2) first aid personnel, if the disability might require emergency treatment; and 3) government officials investigating compliance with the ADA. See 42 U.S.C. §§ 12112(d)(3)(B)(i)-(iii).

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patient in response to a civil subpoena duces tecum when neither the physician nor the patient were present. However, in *Samaritan Health Services v. City of Glendale*, 148 Ariz. 394, 397, 714 P.2d 887, 890 (App. 1986), the court held that a hospital was not obligated to assert the physician-patient privilege in response to a search warrant for patient records. Thus, in light of the fact that hospitals have a duty to assert the physician-patient privilege in circumstances where neither the physician nor patient are present in response to a civil subpoena for the patient's medical records, it is logical to assume that the Fund Manager and local boards have a similar duty to assert the privilege and withhold medical records in like circumstances.

In sum, except in unusual circumstances, the Fund Manager and local boards should refuse disclosure of a member's medical records if the member protests such production. Non-disclosure of the medical records will avoid violation of the *Holohan* mandate and the physician-patient privilege, exculpate the Fund Manager and local boards from liability under 42 U.S.C. §§ 1983 and -12112, and avoid a suit against the Fund Manager and local boards for invasion of privacy.

#### **IV. The Consequences Of Withholding Documents.**

Section 39-121.02(A), A.R.S., provides that persons refused public records may appeal that refusal by way of a special action in the superior court. Attorneys' fees may be awarded where access to public records is denied, but only if two requirements are met. First, the entity requesting access to the records must be entitled to them; and access must have been wrongfully denied; second, the custodian of records must have acted "in bad faith or in an arbitrary or capricious manner" by withholding access to the records. *See* § 39-212.02(B); *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. Agencies wrongfully withholding public records are also liable for "any damages resulting therefrom." *See* § 39-212.02(C).

#### **V. Recommendation For Action.**

To avoid being assessed any attorneys' fees for withholding a member's medical records, the Fund Manager and local boards need to demonstrate that they did not withhold the records in bad faith or for arbitrary and capricious reasons. To do this, the Fund Manager and local boards should 1) notify the member of the demand for his medical records and verify that the member protests disclosure of his medical records, 2) explain the basis of their refusal to produce the records by way of a detailed letter to the party requesting the records, and 3) offer to place the records with the State Superior or Federal District courts under seal to permit

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whichever court is chosen to view the documents *in camera* so that the court can make a determination whether such records should be disclosed in light of the tension between the Public Records Law and the member's privacy interests. The Fund Manager or local boards might even offer to "interplead" the documents into court but under seal to permit the member and the party requesting the records to litigate among themselves whether the documents ought to be released, in exchange for an order discharging the Fund Manager or local boards from any liability relating to same, as well as any obligation to further participate in the litigation.