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THE PUBLIC'S RIGHT OF ACCESS TO GOVERNMENT INFORMATION UNDER THE FIRST AMENDMENT

It is an uncontestable pre-condition of democratic government that the people have information about the operations of their government in order to make informed choices at the polls. For such information to be withheld or manipulated by those holding public office amounts to little more than tampering with the electoral process and a denial of the ultimate sovereignty that resides in the American people.¹

In a political climate predominated by public distrust and alienation from the operation of the American political system, it is crucial to rehabilitate adherence to the principles of open government by our elected and appointed officials.² Secrecy and misinformation have so permeated the government on both national³ and local⁴ levels that the public's right of access to government information must not only be preserved but must be fostered by our legal system.

Inasmuch as legal rights and duties do not exist in a vacuum, it is necessary to examine and explore the legal foundations of the public's right to access to government information in the context of state and federal statutes and court decisions. This examination will lead to the conclusion that implicit within our particular democratic form of constitutional government is the principle that the public as well as the individual has a right of access to information within the control and custody of the government. It is the pur-

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¹ S. Ervin, Jr., Controlling Executive Privilege, 20 LOYOLA L. REV. 1 (1974). Senator Ervin has espoused this same sentiment in other writings.

When the people do not know what their government is doing, those who govern are not accountable for their actions—and accountability is basic to the democratic system. By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public opinion. Secrecy in a Free Society, 213 The Nation 454, 456 (1971) quoted in Gravel v. United States, 408 U.S. 606, 640-41 (Douglas, J., dissent).

² The displeasure felt by the American people toward government secrecy is reflected by a Harris Poll showing that 71 per cent of the people agree with this statement: "A lot of the problems connected with government could be solved if there weren't so much secrecy on the part of government officials." Read into the Congressional Record by Senator Kennedy, 120 CONG. REC. § 4903 (daily ed. April 1, 1974).

³ The “Watergate Affair” attests to the degree of secrecy which prevails on the national level.

⁴ A research study conducted by the Northwestern University Law Review and the Northwestern Center for Urban Affairs concerning access to information in Illinois indicates the difficulties in gaining access to information. The study seems to indicate that access to information depends upon who asks for it and what is asked for. Agencies seem to display an unwillingness to divulge information that would tend to damage the agency and to grant access to self serving data. Research Study - Public Access to Information, 68 NW. U.L. REV. 175, 282 (1974).
pose of this article to demonstrate that such a principle is embodied within the first amendment freedom of speech and press clause. It should be emphasized that the author recognizes that in the interest of national security, individual privacy and good government there are instances where access to governmental information must be restrained for the public's safety and welfare.\(^5\) The scope of this paper, however, is to advocate a constitutional doctrine heretofore not expressly recognized by the United States Supreme Court, and not to address itself with any particularity to those obvious and specific situations which could limit this right. The proposition which this article advocates is that where such interests of public access are in conflict with other rights, it is within the province of the court to balance these rights. A viable democracy cannot permit an official or government agency whose self interest is at stake to make decisions regarding freedom of access to information.

**DEFINING GOVERNMENT INFORMATION**

Before exploring the issue of whether there is a first amendment right of access to governmental information, an operating definition of the term governmental information is necessary. Government information should include that information which is under the “custody and control” of the government. This concept of information encompasses both recorded and unrecorded types of data. Unrecorded information would refer to a purely observational exposure to the functioning of governmental units as an evaluative or monitoring model. Recorded information would include *all* data (finished or raw, tape recorded, computer taped, etc.) which preserve information and are retrievable.

The first class of governmental information is the unrecorded type. This class of information is the type sought by citizens for the purpose of assessing and participating in the operation of governmental units. One example of unrecorded government information is information regarding the daily operation of prisons and jails. It is only through direct observation that unbiased information about these institutions can be gleaned. In *Burnham v. Oswald*,\(^6\) a federal district court in upholding the rights of the press

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5. There can be little question that there are instances where the government in order to protect the welfare of the whole as well as the privacy of the individual must deny the public access to information. The only proper justification for denying access must be to better serve the people. In discussing the balance between open government on the one hand and government secrecy on the other, former Attorney General Elliott Richardson stated:

> We are agreed, I think, that our form of government presupposes openness and an informed citizenry. This is reflected by the First Amendment. We are also agreed . . . that there are, on occasion, circumstances which dictate that public exposure of certain data be at least deferred if not denied—not to deceive the public, but to better serve it.


and prisoners to communicate said:

Prisons are public institutions, the conduct and conditions of which are legitimate public concern. Yet, 'the right of the public to hear' . . . and 'the public's right to be informed' . . . depend to a very large degree upon the right of the press to gather information and to have access to news sources. The right of access to information was treated as a first amendment right encompassing an amalgamation of the prisoner's right to speak, the press' right to gather information and the public's right to receive information. Another example of unrecorded information is the proceedings of governmental bodies. In the past two decades, a majority of state legislatures have responded to public demands for open meeting legislation by passing open meeting acts. Such legislation has ranged from guarantying limited access to providing complete public access to governmental meetings. The main deficiency attributed to such legislation has been in the weakness


8. While courts have found that an inmate's freedom of expression survives his incarceration they have not been uniform in application of this right. Compare Adams v. Carlsen, 352 F. Supp. 882 (E.D. Ill. 1972) (upholding freedom of mail communication except where there is a compelling interest to be preserved by the prison in limiting this right); Martinez v. Procurier, 354 F. Supp. 1092 (N.D. Calif. 1973) (any restrictions on mail must meet due process standards); Palmigiano v. Trevisona, 317 F. Supp. 776, 791 (D.R.I. 1970) (upholds right of inmate to send uncensored, uninspected mail) and Carothers v. Follette, 314 F. Supp. 1014, 1023-26 (S.D.N.Y. 1970) (upholding right to send one's family mail that is critical of prison authorities) with Labat v. McKethan, 361 F.2d 757 (5th Cir. 1966) (upholding flat ban on correspondence sent by death row prisoners) and Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972) (rejecting exercise of absolute discretion on mail censorship by prison officials but recognizing that censorship is not unconstitutional per se). For a more detailed discussion of prisoner freedom of expression rights see Public and Press Rights of Access to Prisoners After Branzburg and Mandel, 82 YALE L. J. 1337 (1973); Note, The Right of Expression in Prison, 40 S. CAL. L. REV. 407 (1967); 18 CATHOLIC U. L. REV. 237 (1968).

9. See pp. 18-23 infra.

10. See pp. 16-17 infra.


of their enforcement provisions. Regardless of the deficiencies, it is important to note that through legislative sensitivity to the needs and desires of a democratic people, such rights of access have developed in an area where the common law was silent.

The second class of information, recorded information, is usually delineated in state public records acts. The state courts have traditionally interpreted public records to include only the “ultimate” official action and not those writings merely incidental to the administration of affairs of office, or a writing prepared for the purpose of making information available to the public, or a writing which serves as a memorial of some official action, “as evidence of something written, said or done.” The courts have specifically excluded: (1) all memorandums by public officials, (2) papers and memorandums not required to be kept by law but in the possession of public officials, (3) reports of private individuals to government, (4) memorandums for convenience of officials at public expense, and preliminary reports that have not been acted upon.

The Oregon Supreme Court in MacEwan v. Holm advocated a broad interpretation of public records under that state’s public records statute. The issue in this case was whether a study conducted by the state Board of Health relating to radiation sources should be available for public inspection as a public record. The court noted that the true legislative intent

14. See supra note 11. The deficiencies of such legislation seem to include (1) realistic enforcement procedures; (2) the legal effect of decisions made at closed door meetings which are in violation of the act; and (3) clear delineation of which meetings fall under the state open meetings statutes.
19. 76 C.J.S. Records § 35.
24. 226 Or. 27, 359 P.2d 413 (1960).
25. Id.
behind Oregon’s public records statute was twofold: (1) to safeguard the citizens’ right to check on governmental operations; and (2) to allow citizen use of such information for personal gain.  

Faced with the need to give a definition having legal significance to the concept of governmental information, the Oregon court rejected the contention that only ultimate records of official action fall within the category of public documents. The court stated:

For the purpose of deciding whether a writing is subject to public inspecting, we regard all data gathered by the agency in the course of carrying out its duties, irrespective of its tentative or preliminary character, as falling within the definition of ‘records and files’. . . . The drawing of a distinction between writings representing tentative action and . . . ultimate action is objectionable, not only because it is inconsistent with the principle which underlies our statute making public writings freely available for inspection, but also because it provides a device by which a public official can hinder a citizen’s legitimate attempt to obtain writings which are clearly within the strictest definition of a public record.

The Oregon court in *MacEwan* steps farther than any other court in recognizing the need for a much broader and all inclusive definition of public records.

We are of the opinion that the public interest will best be served by giving the term ‘records and files’ a broad construction embracing all writings in the custody of public officers, rendering such writings subject to inspection unless there are circumstances justifying nondisclosure. (Emphasis added.)

Therefore, the common factor between unrecorded and recorded government information is in the fact that both classes of information are within the exclusive custody and control of the government. A vital and viable democratic system of government requires that all such information be made available to public inspection.

**COMMON LAW RIGHT OF ACCESS TO AND INSPECTION OF PUBLIC RECORDS**

Under the common law of England, there exists a right of access to and inspection of public records. Such a right was limited to those situations where the one seeking inspection had a direct interest in the document, where the inspection served a useful, legitimate purpose and was

26. *Id.* at 38-39, 359 P.2d at 418.
27. *Id.* at 43-44, 359 P.2d at 420.
28. *Id.* at 48, 359 P.2d at 422.
29. Ferry v. Williams, 41 N.J. Law 332 (1879) which discusses in detail the early English cases on the right of access. See, 76 C.J.S. *Records* § 35 (1960); Cross, *The Right to Know* 25 (1953).
30. King v. Justices of Staffordshire, 6 Adolphus and Ellis 84, 96; Rex v. Lucas, 10 East 235 (K.B. 1808); Rex v. Tower, 4 M. & S. 162 (K.B. 1815).
not sought merely to satisfy the individual's curiosity.\(^{31}\)

There have been relatively few reported English cases brought by individuals seeking civil remedies compelling public officials to provide access to public documents.\(^{32}\) This was due in large measure to "the prevalence of the rule that the civil remedy for wrongs by which no private rights were peculiarly affected was usually in the name of the Attorney General acting on behalf of the public."\(^{33}\) However, where members of the public were so situated as to represent the public interest, litigation to protect the right of inspection was preserved.\(^{34}\) This was so in taxpayer suits brought for the purpose of discovering the condition of public revenues.\(^{35}\)

American case law made a significant departure from the English common law in expanding the right of access and inspection of public documents to all citizens. In the case of *Nowack v. Fuller, Auditor General*,\(^ {36}\) the Supreme Court of Michigan held that there existed a public right of access to and inspection of public records. The court declared, "if there be any rule of the English common law that denies the public the right of access to publish records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people."\(^ {37}\) Although recognizing that all citizens had a right of access and inspection, the court limited the enforcement of that right to the state attorney general or to individuals who could show a special interest beyond the public interest at large.\(^ {38}\) The court precipitated the dilemma of recognizing a right without providing a remedy for its infringement.

Paralleling English common law, American case law limited this right to reasonable regulation by governmental agencies in order to avoid public harassment and to protect administrative efficiency as well as safeguard individual privacy.\(^ {39}\)

\(^{31}\) 76 C.J.S. *Records* § 35 (1960).

\(^{32}\) Ferry v. Williams, 41 N.J. Law 332 (1879); Egan v. Board of Water Supply of City of N.Y., 203 N.Y. 147, 98 N.E. 467 (1912). See 76 C.J.S. *Records* § 35.

\(^{33}\) Ferry v. Williams, 41 N.J. Law 332, 336 (1879).

\(^{34}\) Id.

\(^{35}\) Id., e.g., Rex v. Justices of Leicester, 4 B. & C. 891 (K.B. 1825) (taxpayers granted right to inspect and make copies of materials associated with the establishment of parish rates).

\(^{36}\) 243 Mich. 200, 219 N.W. 749 (1921).


\(^{38}\) 243 Mich. 200, 204, 219 N.W. 749, 751 (1921).

\(^{39}\) See, *State ex rel. Colescotto v. King* 154 Ind. 621, 57 N.E. 535 (1900). E.g., in Bruce v. Gregory, 66 Cal. Rptr. 2d 676, 423 P.2d 193 (1967) the California court held that a tax collector could impose reasonable regulations concerning access to information in the maintenance of an orderly office. This, however, does not mean that the regulations may interfere with the right to inspect. Craemer v. Superior Court In and For County of Marin, 71 Cal. Rptr. 193, 265 Cal. App. 2d 216 (1968). The Oregon Court in *Mac Ewan v. Holm*, cited note 24 supra, recognized the propensity of governmental units to hide behind the argument of public harassment when it stated:
There is no right of inspection of a public record when the inspection is sought to satisfy a person's whim or fancy, to engage in a pastime, to create scandal, to degrade another, to injure public morals, or to further any improper or useless end or purpose.\textsuperscript{40}

In sum, it can be said that the American experience with the common law right of access to and inspection of public documents extended the class of persons entitled to this right to the citizenry at large. This was due to the state courts' recognition that our system of government as established by the founding fathers is based upon individual sovereignty and that the public interest in good government would be preserved by opening up its operation to legitimate public scrutiny. The major deficiency of the American common law in this area is its failure to secure for the public adequate provisions for the enforcement of these rights.

**Statutory Right of Access to Government Information in the United States**

A majority of states have provided for open meetings\textsuperscript{41} and have enacted statutes governing the right of access to and inspection of public records.\textsuperscript{42} While some state statutes are merely codifications of the common law as it developed in America,\textsuperscript{43} the overwhelming trend among the states is the passage of "Right to Know" statutes.\textsuperscript{44} These so called "Right to Know Statutes" or "Freedom of Information Acts" take varying forms from state to state. Their common characteristics are provisions guarantying any citizen access to public records without regard to interest and injunctive relief against officials who refuse to give such access.\textsuperscript{45} Many states have imposed specific exemptions from their access statutes by enumerating documents not available for inspection,\textsuperscript{46} while other states have given blanket

"In balancing the interests . . . the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference." (Emphasis added.) at 46.


41. See notes 11-14 supra.

42. Thirty-two states as of 1969 had access statutes. 11 Freedom of Information Digest 6 (1969).

For a discussion of one such statute see Note - Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records But Were Afraid to Ask, 57 Ia. L. Rev. 1163 (1972).

The constitution of Montana as adopted by the Constitutional Convention March 22, 1972 and ratified June 6, 1972 provides in Art. II sec. 9 "Right to Know". No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. R.C.M.A. Vol. I (Supplement 1973).

43. 76 C.J.S. Records § 35b.

44. See supra note 42.


46. E.g., Va.
right of access to all information not specifically excluded by another statute.47

The issue raised in most litigation concerning public right of access is whether the document or information sought is covered under the statutory definition of public records or is impliedly or expressly exempted.48 The courts seem to adhere to the general principle that "good public policy requires liberality in the right to examine public records."49

The Right to Know of governmental operations and to inspect public records is fundamental to the workings of a democratic society . . . Without the right to see records and documents kept by public officials, or the right to be present at proceedings, the citizen might seldom know of improprieties so as to be in a position to seek judicial remedies for illegal acts by public officials and the public might only know what the government wants it to know. That essentially 'Orwell-ian' insulation of public bodies is not the law in New York.50

However, as noted previously in this article, not all courts have taken a broad view as to what documents fall within the scope of public records acts.51

The courts seem to be unanimous in restricting rights of individual access and inspection where good public policy dictates secrecy in order to protect individual rights.52

In this regard the term 'public policy' means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good.53

These public policies are usually protected in statutes. It should be noted that a mere showing of a possibility of harm to an individual right without some statute in support of that right has been held insufficient to overcome the requirements of the right of access.54

47. E.g., California Public Records Act, WEST'S ANN. GOV. CODE § 6256 (1968).
48. See text pages 4, 5, 6 supra.
51. See notes and text supra p. 4, 6.
A difficulty posed by these statutes is the stipulation for copying of records. Most statutes provide the citizen with the right to copy information. However, the courts have developed an "implied rule of reasonableness" where the cost of copying the volume of information sought is unreasonably burdensome. The California court has held that as long as the information is available for public inspection, the access requirement is met.

The New Jersey court in Guarriello v. Benson was faced with the novel question of whether re-recordings of public hearings were under the protection of that state's Right to Know statute. The court held that since the tape recording of the public hearing was open to inspection and the transcript available to those interested, the public's right to know would not be thwarted by the prohibition of re-recording. In rendering this decision, the court enunciated its fear that it would be too easy to tamper with tapes, thereby raising the spectre of misrepresentation and misuse of the information for political purposes.

On the state level, right of access to governmental information seems to be treated as "a fundamental privilege of citizens as taxpayers." To overcome this privilege or right, the state must assume the burden of proving some substantial interest in maintaining secrecy.

The trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied. This test is identical to the test utilized in other first amendment right cases. The state courts, by recognizing right of access as a fundamental

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55. Rosenthal v. Hansen, 110 Cal. Rptr. 257, 34 Cal. App. 3d 757 (1974). Here the documents sought to be copied and inspected were open to the public under the state's access statute but the cost of copying was over $300 and the documents covered nearly 80,000 pages.

56. Id.


63. See, United States v. O'Brien, 391 U.S. 367, 377 (1968) where the United
right, have paved the way for the recognition of this right as inherent in the first amendment. In fact, the Supreme Court of Pennsylvania has acknowledged the validity of this proposition.

**Federal Legislation: Freedom of Information Act**

In 1966 after years of debate and investigation, the United States Congress passed the Freedom of Information Act (F.O.I.A.) The purpose of this Act is to remedy the inadequacies of Section 3 of the Administrative Procedure Act which "has been used as an authority for withholding, rather than disclosing information." The congressional intent behind the passage of the Act is to assure public access to the information in the custody of all federal agencies. Congress, as indicated by the Act's legislative history, felt that the withholding of information from the public endangered our system of democratic government.

A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quality and quantity of its information varies. A danger signal to our democratic society in the U.S. is the fact that such a political truism needs repeating . . . . The repetition is necessary because the ideas of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in government.

States Supreme Court held that where First Amendment rights were suppressed, the state action must "further an important or substantial government interest and that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Accord, Sherbert v. Verner, 374 U.S. 398 (1963); NAACP v. Button, 371 U.S. 415 (1963).

64. McMullan v. Wohlgemuth, note 52 supra.

65. 5 U.S.C. § 552 (1967). The Act was signed on July 4, 1966 but its effective date was July 4, 1967.


66. While in force, this act was cited as 5 U.S.C. § 1002 (1946).


The Act places an affirmative duty on every federal agency not only to provide information to the public on their operations but also to provide the means by which the public can acquire information from them.69 This information is to be published in the Federal Register and to be kept current.70 Each agency is also responsible for insuring public inspection and copying of the following: all final opinions and orders of the agency, all policy statements and interpretations adopted by the agency and not published in the Federal Register, and those staff manuals and directives that affect the citizen.71 The agency in disclosing this information may delete such data that the agency feels to be an invasion of individual privacy.72 In addition, agencies must make available to the public a current index of all information promulgated after July 4, 1967.73

Section 3(a) of the Act places an affirmative duty on every agency to make "promptly available to any person" upon request "identifiable records, made in accordance with published rules stating the time, place and fees to the extent authorized by statute."74 The Act extends jurisdiction to the federal district courts of the United States to hear cases brought by persons who are refused access to information requested.75 Proceedings are to be held de novo with the burden upon the agency to sustain its refusal.76 The district courts are given the power of injunction to force disclosure, and further, may cite the responsible employee for contempt in cases of noncompliance with a court order.77 The legislation also requires the court to place at the head of its dockets complaints under color of the act unless the district court feels that it has cases of greater immediacy before it.78

Section 4(b) lists nine exceptions to the Act exempting information: (1) specifically required by Executive Order to be kept secret in the national interest,79 (2) related to internal management of the agency,80 (3) exempted by statute,81 (4) privileged or confidential trade secrets and com-

70. 5 U.S.C. § 552(a)(2) (1967). See Engel, Introduction, supra note 65, at 190 n.34 for list of articles on this section.
72. Id.
73. Id.
74. 5 U.S.C. § 552(a)(3) (1967). See, Engel, supra note 15, at 190 n.36 and 37 for list of articles and cases dealing with this section of the act.
76. Id.
77. Id.
78. Id.
80. 5 U.S.C. § 552(b)(3). See, Engel, supra note 65, at 191 n.43 for authorities listed.
NOTES AND COMMENTS

Commercial or financial information,\(^8\) (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,\(^8\) (6) personnel and medical files which would be a clear invasion of personal privacy,\(^8\) (7) law enforcement investigatory files,\(^8\) (8) information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions,\(^8\) and (9) geological and geophysical information and data, including maps, concerning wells.\(^8\)

Ultimately the effectiveness of the F.O.I.A. must rest within the scope of the nine exceptions to the Act given by the court. Based on the legislative history of the Act, it has been observed that the courts have taken a very broad view as to agency discretion under the language of the exceptions.\(^8\) The legislative history of the act reflects the divergent attitudes taken by the House and Senate on agency disclosure under the nine exceptions. The Senate was more protective of the citizen's rights than the House.\(^8\) The House, while eschewing the noble goals of access to preserve our democratic notion of popular democracy, actually favored the agency use of discretion in disclosing information.\(^9\)

Shortly after the passage of this Act, the Attorney General issued a memorandum of procedures to be considered before taking any enforcement action under the legislation.\(^9\) The memorandum espoused wide agency discretion in the withholding of information.\(^9\) Thus some legal commentators have noted that the interpretation given the nine exceptions in the memo coupled with the House report severely constricts the purpose behind the legislation.\(^9\) Indeed, one scholar stated that "the act's nine exceptions take back most of what the first three sections gave.\(^9\)

88. Note - The Freedom of Information Act - A Critical Review, supra note 65. Indeed the courts have even expanded the non-disclosure rights of the agencies through the courts equity power. See, Engel, supra note 65, at 193-194.
90. See, Davis, The Information Act, note 65 supra. Engel, Introduction, note 65 supra at 189 n.32.
91. THE ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967).
92. Id.
94. Davis, The Information Act, note 65 supra, at 806.
In sum, the United States Congress has responded to the need for protecting the right of access to federal governmental information to balance the growth of indiscriminate governmental secrecy. However, the potency of that legislative response may be seriously questioned due to the successful ability of agencies to subvert the intent of the act through subterfuge and the broad discretion given the government in withholding information.

The First Amendment and the Right of Access to Government Information

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The founding fathers realized that to preserve and protect a popular government, the people's inherent right to know is fundamental. It was this knowledge that formed the cornerstone of the freedom of speech and press clause. Without the ability to speak freely and the means to disseminate information, democracy would be illusory. James Madison wrote:

A popular Government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Trajedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

Thomas Jefferson espoused this same sentiment:

I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion.

The Supreme Court of the United States has recognized that the public's right to know is embodied within the first amendment. The Court

95. "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." House Report, note 67 supra, at 2423.


98. 9 WRITINGS OF JAMES MADISON 103 (Hunt ed. 1909). Aristotle stressed the essential place of information in the conduct of human affairs when he stated "everything that is done by reason of ignorance is not voluntary . . . ." ARISTOTLE, 3 NICHOMADEAN ETHICS 110B (Ross translation 1916).


has held that contained within the "public's right to know" is the public's right to receive information without government interference.

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee... "speech concerning public affairs is more than self expression, it is the essence of self government"... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...\textsuperscript{101}

Governmental attempts to restrict citizen receipt of pornography,\textsuperscript{102} religious pamphlets\textsuperscript{103} and communist political propaganda\textsuperscript{104} have been declared unconstitutional. As with other constitutional rights, however, the Court has ruled that the public's right to receive information is not absolute.\textsuperscript{105}

The public's right to know cannot rest merely upon the right to receive information in a popular democracy. Receipt of information is a passive act, therefore, those who control the depositories of information can limit what is known by releasing only limited information. With this deleterious power, the entire social fabric of our country can be controlled and manipulated. This poses a threat to democracy.

Men who have lost their grip upon the relevant facts of their environment are the inevitable victims of agitation and propaganda. The quack, the charleton, the jingo and the terrorist can flourish only where the audience is deprived of independent access to information.\textsuperscript{106}

\begin{itemize}
\item IN THE U.S. (1941); A. MIEKELJOHN, FREEDOM OF SPEECH AND ITS RELATIONSHIP TO SELF GOVERNMENT (1948); H.L. CROSS, THE PUBLIC'S RIGHT TO KNOW (1953); T. EMMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1963).
\item Martin v. City of Struthers, 319 U.S. 141 (1943).
\item Lamont v. Postmaster General, 381 U.S. 301 (1965).
\item Kleindienst v. Mandel, 408 U.S. 753 (1972). In this case a group of American academicians alleged that their right to receive information was abridged when the U.S. Department of State under the IMMIGRATION AND NATIONALITY ACT of 1952 refused entry to a noted communist scholar whom they had invited to speak at a conference they were holding. The Court "in accord with ancient principles of international law of nation-states" held that Congress had the plenary power to make rules for the admission of aliens and that the appellant's first amendment rights under the set of facts presented could be abridged. The Court in weighing the conflicting rights took notice of the fact that the excluded alien's works were available in this country and that only access to the individual and not his ideas was being limited. It might be argued then that if the man's works were not available in this country, the Court might have come to a different decision. See, The First Amendment and the Public's Right to Information, 35 U. OF PITK. L. REV. 93 (1973).
\item W. LIPPMAN, LIBERTY AND THE NEWS 54 (1920). The loss of independent access to government information and the inherent dangers that it poses to democracy has been long recognized. John Locke wrote:
\end{itemize}
The recognition of the public's right of access to government information safeguards the public's right to know, thereby securing all of our other precious individual liberties. James Madison wrote, "... the right of freely examining public characters and measures, and of free communication thereon, is the only effectual guardian of every other right . . . ."107

The issue of whether there is a public right of access to government information under the first amendment has never been directly decided by the Supreme Court.108 The nearest the Court has come in addressing itself to this issue has been in the area of the press' news gathering right under the first amendment.109

It is important to note that the term "press" under this first amendment rubric is not confined to newspapers. Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals . . . . The press in its historic connotation comprehends every sort of publication

[Artificial ignorance, and learned gibberish, prevailed mightily in these last ages, but the interest and artifice of those who found no easier way to that pitch of authority and dominion they have attained, than by amusing the men of business, and ignorant with hard words, or employing the ingenious and idle in intricate disputes about unintelligible terms, and holding them perpetually entangled in that endless labyrinth. Besides, there is no such way to gain admittance, or give defense to strainge and absurd doctrines, as to guard them round about with legions of obscure, doubtful, and undefined words. Which yet make these retreats more like the dens of robbers, or holes of foxes, than the fortress of fair warriors . . . Thus learned ignorance, and this art of keeping even inquisitive men from true knowledge, hath been propagated in the world, and hath much perplexed, whilst it pretended to inform the understanding.]

LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, Ch. 10, "The Abuse of Words", § 9, 10.

107. MADISON, 6 WRITINGS OF MADISON 398 (1906).

108. The argument that there is a right of access to government information has been made by legal commentators. See, Access to Official Information: A Neglected Constitutional Right, 27 Ind. L.J. 209 (1952); Parks, The Open Government Principle: Applying the Right to Know Under the Constitution, 26 Geo. Wash. L. Rev. 1 (1957); Note-Access to Government Information and the Classification Process - Is There a Right to Know?, 17 N.Y.L.F. 814 (1971); Cross, The Right to Know (1953). See generally, Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES (1941); A. MIEKELJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF GOVERNMENT (1948); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1963).

which affords a vehicle of information and opinion."\textsuperscript{110}

Thus, pamphlets,\textsuperscript{111} leaflets,\textsuperscript{112} signs,\textsuperscript{113} books,\textsuperscript{114} motion pictures,\textsuperscript{115} non-commercial advertisements,\textsuperscript{116} as well as newspapers,\textsuperscript{117} magazines,\textsuperscript{118} radio\textsuperscript{119} and television\textsuperscript{120} have come under the protection of the freedom of press clause.

In Zemel v. Rusk\textsuperscript{121} the Court first encountered the argument that the first amendment enveloped the right to gather information. Zemel sought to invalidate two acts of Congress that inhibited him from visiting Cuba.\textsuperscript{122} He argued that as a citizen he had a first amendment right to gather information.\textsuperscript{123} The Court declared that "the right to speak and publish does not carry with it the unrestrained right to gather information,"\textsuperscript{124} and thereby turned a deaf ear to the assertion that all activities, however remotely concerned with the gathering of information, were encompassed by first amendment protections. Indeed, in this case the information sought was not in the hands of the federal government. Thus Zemel can be read to imply that the gathering of information under the first amendment is limited to information actually in the control of the government. Zemel, at most, stands for the proposition that not all attempts to acquire information are constitutionally protected.\textsuperscript{125}

In Branzburg v. Hayes,\textsuperscript{126} the issue of the right of the press to gather information was again presented to the Court. Here newsmen claimed that the first amendment gave them a testimonial privilege which shielded them

\textsuperscript{110} \textit{Id.} at 704. It is well established that the protection given to the press by the First Amendment was to preserve the free flow of information to the public. \textit{E.g., Grosjean v. American Press Co.,} 297 U.S. 233 (1936); \textit{New York Times Co. v. Sullivan,} 376 U.S. 254 (1964); \textit{New York Times v. United States,} 403 U.S. 713, 717 (1971) (Black, J., concurring).

\textsuperscript{111} Lovell v. City of Griffin, 303 U.S. 444 (1938).

\textsuperscript{112} Schneider v. New Jersey, 308 U.S. 147 (1939).

\textsuperscript{113} Thornhill v. Alabama, 310 U.S. 88 (1940).

\textsuperscript{114} Roth v. United States, 354 U.S. 476, 488 (1957) (dicta).

\textsuperscript{115} Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).


\textsuperscript{119} Red Lion Broadcasting, Co. v. F.C.C. note 101 \textit{supra} (dictum).

\textsuperscript{120} Estes v. Texas, 381 U.S. 532 (1965) (dicta).

\textsuperscript{121} 381 U.S. 1 (1965).


\textsuperscript{123} 381 U.S. 1, 4 (1965).

\textsuperscript{124} \textit{Id.} at 17.

\textsuperscript{125} Mr. Justice Stewart in his dissent in the \textit{Branzburg} decision noted that in Zemel "we held that the secretary of state's denial . . . did not violate a citizens first amendment rights. The rule was justified by the weightiest considerations of national security." The necessary implication is that some right to gather information does exist. 408 U.S. 728, n.4 (1972).

\textsuperscript{126} \textit{See} note 109 \textit{supra}.
from grand jury inquiries into the sources of their information. The news-
men argued that their ability to gather news would be damaged if their in-
formants knew that their identities might be divulged. The Court was
not convinced that the ability of the press to gather information would be
hampered by supplying the grand jury with information it needed to perform
its function. The Court refused to extend to the organized press a privi-
lege not available to other citizens thereby denying the existence of a first
amendment shield for the newsmen in grand jury proceedings. The Court
held that the grand jury's power of subpoena must be held inviolate in
order to protect the public from crime. In reaching this conclusion, the
Court cited Zemel as authority for the proposition "that the First Amend-
ment does not guarantee the press a constitutional right of special access
to information not available to the public generally."

In light of the foregoing, the extent of the first amendment right to
gather news is not entirely clear. Branzburg seems to imply that a right
to gather news does exist, further that such a right extends to every citizen
and is not unique to the organized press, and finally that this is not an unre-
strained right.

Mr. Justice Stewart’s dissent in Branzburg directly addressed itself to
the right of the press to gather information.

A corollary of the right to publish must be the right to gather news
... . News must not unnecessarily be cut off at its source, for
without freedom to acquire information, the right to publish would
be impermissibly compromised. Accordingly, a right to gather
news, of some dimensions, must exist.

Whether this view will be adopted by the majority of the Court will
be determined during the Court’s current session. The Court has granted

127. Id. at 679-80.
128. Id.
129. Id. at 693-94. "But we remain unclear how often and to what extent in-
formers are actually deterred from furnishing information when newsmen are forced to
testify before a grand jury." Mr. Justice Stewart in his dissent rejected the majority's
demand for empirical data by the newsmen showing the exact impairment on the flow
of news to the public.

The impairment of the flow of news cannot, of course, be proved with
scientific precision, as the Court seems to demand .... But we have never
before demanded that First Amendment rights rest on elaborate empirical
studies demonstrating beyond any conceivable doubt that deterrent effects
exists; we have never before required proof of the exact number of people po-
tentially affected by governmental action, who would actually be dissuaded
from engaging in First Amendment activity. 408 U.S. at 733.
130. Id. at 690.
131. Id. at 684. Accord, New York Times v. United States, 403 U.S. 713, 728-
730 (1971) (Stewart J. concurring); Tribune Review Publishing Co. v. Thomas, 254
F.2d 883, 885 (3d Cir. 1958); In the Matter of United Press Ass'n v. Valente, 308
N.Y. 71, 77, 123 N.E.2d 777, 778 (1954); McMullan v. Wohlgemuth, 453 Pa. 147,
132. Id. at 727-28.
certiorari to hear two prison cases, *Washington Post Co. v. Kleindienst*\(^{133}\) and *Hillery v. Procunier*,\(^{134}\) which involve the constitutionality of prison regulations restricting face to face newsmen-inmate interviews.

In *Washington Post* the district court for the District of Columbia held that the Federal Bureau of Prisons regulation flatly banning all face to face prisoner-newsmen interviews violated the right of the press to gather information, the prisoners' freedom of speech, and the overriding public right to know.

As this inquiry is pursued there is no need to differentiate between the rights of the press and the rights of the prisoners committed to the custody of the Bureau. News gathering and news dissemination cannot be disassociated under circumstances such as these where it is assumed there is a mutual desire to communicate and where, in the last analysis, the public right to be informed may well overshadow either of the other two considerations.\(^{135}\)

The district court rejected the Bureau's contention that sufficient access to the press was guaranteed by prison rules allowing unconfined correspondence between newsmen and inmates.\(^{136}\) The court took judicial notice of the need of the press for face to face contact with prisoners in order to evaluate the credibility of their sources of information.\(^{137}\)

The district court's decision in favor of the plaintiffs ultimately rested upon the flat ban on interviews imposed by the prison. The court reiterated that to sustain an abridgment of first amendment rights the government must demonstrate a compelling state interest and must show no other less drastic means to be available to protect the state concern given the circumstances.\(^{138}\) The Bureau failed to demonstrate these two requisites and the court ordered the Bureau to revise its regulations.\(^{139}\)

The Bureau of Prisons appealed the decision to the United States Court of Appeals for the District of Columbia on the grounds that *Branzburg* had just been decided.\(^{140}\) The Supreme Court of the United States stayed the


135. *Supra* note 133, at 773.

136. *Id.* at 781.

137. *Id.* "Reliability of such information must be determined by face to face confrontations. This is universally recognized by experienced journalists and demonstrated by the results of many confidential interviews conducted during the recent Attica investigation."


139. *Supra* note 133, at 773.

The court of appeals remanded the case to the district court for an evidentiary hearing to determine whether the *Branzburg* decision would effect the district court's decision. On rehearing the district court found that *Branzburg* supported its original decision. The court held that *Branzburg* had specifically recognized the right and that any restriction on this right absent a showing by the government of a "compelling" or paramount need was unconstitutional. Specific attention was paid to Mr. Justice Powell's concurring opinion which carried the majority. He stated that any infringement on this right was to be considered on a case by case approach with the court carefully balancing the competing rights. Again, the district court found that the government failed to show a compelling state interest in its absolute regulation prohibiting interviews.

In *Hillery* a three judge court was presented with the issues of whether the right of the press to gather information and the prisoners' freedom of speech were unconstitutionally abridged by a prison regulation prohibiting prisoner initiated interviews with the press and denying media requests for interviews with specific inmates. The court ruled that the regulation was an unconstitutional infringement of the prisoners' freedom of speech but that the regulation was not violative of the right of the press to gather information.

The court distinguished *Washington Post* in reaching its decision. In *Hillery* the prison regulation on interviews was not an absolute prohibition as it was in *Washington Post*. The press was permitted random interviews with inmates. In citing *Branzburg* as standing for the proposition that the press has no special right of access to information, the court noted that whereas the issue in *Washington Post* was not special access but some access to prisoners, in *Hillery* the court felt that this was not indicated and that the press was seeking special access.

Further, the *Hillery* court found that the prison could under certain circumstances demonstrate a sufficient interest in limiting press access to in-
mates under certain circumstances. In reaching this conclusion, the court relied upon the finding of fact in Seattle-Tacoma Newspaper Guild, Local 82 v. Parker, where the Ninth Circuit held that the prison officials were able to manifest that the press' gathering of information had a disruptive influence upon prison administration. The Ninth Circuit in its holding seemed to indicate that a rational basis and not a compelling state interest within the prison context is enough to support an infringement on the first amendment right of the press to gather information. This is a strange result given the special treatment the courts have traditionally afforded first amendment rights.

The decision of the Supreme Court of the United States in Hillery and Washington Post will have a profound impact upon the public's rights of access to government information. The prisons are public institutions within the control of the government. Because the press has no greater right to gather news than anyone else in the society, the implications of an adverse or favorable decision on the press' access to information upon the average citizen's right to gather information are far reaching. The real issue in these cases is not the right to gather information but the right of the citizen to have access to that information that is within the total control and custody of the government.

McMullan v. Wohlgemuth and the Public's Right of Access to Government Information

McMullan v. Wohlgemuth is of particular relevance to the subject matter of this paper. In McMullan the Supreme Court of Pennsylvania was presented with the issue of whether the press had a right of access to the names and addresses of welfare recipients and to the amounts each re-

154. Id. at 199. The court indicated that a finding of a disruptive influence would be grounds for limiting press access.
155. 480 F.2d 1062 (9th Cir. 1973). In this case the ban on press-prisoner interviews were justified on the grounds that (1) the prison in question, McNeil Island Penitentiary, was a maximum security institution; (2) a Bureau of Prisons Policy Statement of 1972 found that face to face interviews adversely affected prison discipline and administration; and (3) the press interviews were sought during a prison strike.
156. Id. at 1067.
157. Id. at 1066. "We have already noted that the regulation in question is rationally related to the achievement of legitimate goals of prison administration." (Emphasis added). The court ignores the least drastic means test requirement in the first amendment area which has been applied in other prison cases. E.g., Nolan v. Fitzpatrick, note 7 supra; Washington Post Co. v. Kleindienst note 133 supra; Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972); Adams v. Carlsen, 352 F. Supp. 882 (E.D. Ill. 1972); Remmero v. Brewer, 475 F.2d 179 (3rd Cir. 1972); Nat'l Prisoners Reform Assoc. v. Sharkey, 347 F. Supp. 1234 (D.R.I. 1972); the United States Supreme Court cases that require its application in the First Amendment area. See cases note 166 infra.
158. 453 Pa. 147, 308 A.2d 888 (1973). For earlier reported history of this case see 281 A.2d 836 (1971); 284 A.2d 334 (1972).
The press argued that this right was their common law right, that the state’s “Right to Know” Act assured them the right of access to this information, and that the first amendment of the United States Constitution and of the Pennsylvania Constitution guaranteed them this right of access.\textsuperscript{160}

The court cursorily rejected the contention that the press had a right to this information under the common law. It stated that the common law right of access was “limited only to persons with a ‘personal or property interest’ in the matter sought to be disclosed.”\textsuperscript{161} This holding failed to take into consideration that even under the English common law, as noted earlier in this paper, a right of access to information regarding the expenditure of public revenue is granted to every citizen.\textsuperscript{162}

The plaintiffs’ second contention that they were entitled to this information under the state’s “Right to Know” Act was also unsuccessful. While the court admitted that the statute’s language was broad enough to encompass such information, it felt that these records fell within one of the expressed exceptions to the statute which excluded from disclosure any information restricted by another statute.\textsuperscript{163}

The \textit{McMullan v. Wohlgemuth} decision demonstrates the weakness of “Right to Know” statutes in protecting individual access to government information. Rather than concentrating on the competing interests between disclosure and non-disclosure that are at issue, the court’s role is reduced to that of interpreting statutory language and the legislative history of the acts in question.

The court’s handling of the first amendment argument that was proffered is of great significance. The court stated that in its opinion the right of the press to gather news had never been directly addressed by the United States Supreme Court.\textsuperscript{164}

Nevertheless, it is perhaps logical to assume that such a right to gather news ‘of some dimensions must exist’ if the First Amendment is to have realistic vitality. . . Although we agree that such a right, emanating from the First Amendment, does exist, this right, as all other First Amendment rights, is not absolute.\textsuperscript{165}

The court concluded that it would pay deference to the legislature’s findings that welfare information should be confidential since

\begin{itemize}
\item 159. \textit{Id.} at 889.
\item 160. \textit{Id.}
\item 161. \textit{Id.} at 895.
\item 162. See note 35 supra.
\item 163. \textit{Supra} note 158, at 895.
\item 164. \textit{Id.} at 896. This demonstrates the inconclusiveness of the Branzburg decision regarding the press’ right to gather information since this decision came down after Branzburg.
\item 165. \textit{Id.} The court looked to Mr. Justice Stewart’s dissent in Branzburg as authority for the existence of the right.
\end{itemize}
NOTES AND COMMENTS

[m]aintaining the privacy of the recipient is a crucial element in its quest to preserve 'family life' and 'encourage self-respect, self-dependency, and the desire to be a good citizen and useful to society'. The statutory limitation imposed on appellees' asserted First Amendment right to compel the disclosure of those receiving assistance is no greater than necessary to protect the substantial governmental and individual interests involved.¹⁶⁶

Thus *McMullan* summarizes the present status of the public's right of access to government information. The significance of this case is the clear expression granted under the first amendment of the United States Constitution that indeed there is a right of access to government information.

CONCLUSION

The dangers inherent in secretive governmental actions are obvious. Democracy can only be said to exist through its institutions. Closed circuits, locked doors, sealed files and bugged telephones do not define a democratic environment when they are part of our governmental institutions; when these exist it is no longer a democracy which is operating. There is ample evidence that "the drafters of the Bill of Rights were aware of the vital need to keep the people informed of official operations."¹⁶⁷ "The right to speak and the right to print, without the right to know, are pretty empty."¹⁶⁸

The Supreme Court of the United States has yet to rule upon the question of whether access to governmental information is a fundamental personal right which is embodied within the first amendment of the United States Constitution. An affirmative ruling on this issue is needed.

The people have the right to know. Freedom of information about public records and proceedings is their just heritage. These rights must be raised to the highest sanction. The First Amendment points the way.¹⁶⁹

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