

# It's your right to know

*12 essays  
on the  
importance of  
access to  
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meetings and  
records in  
Rhode Island*

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## Foreword

This booklet is intended to foster a greater understanding of the importance of unfettered citizen access to the records and processes of government. The focus is Rhode Island; the lessons are universal. Cynics are often quick to dismiss the “Right to Know” as the narrow concern of media malcontents and petulant gadflies. That is akin to dismissing airline safety as the narrow concern of pilots. We would do better to remember that the stakes are high for all of us.

Most citizens are at least vaguely familiar with one or more of the five First Amendment freedoms: religion, speech, press, assembly and petition. We are proud to articulate these rights as essentials of our democracy — principles that many people around the world only dream of enjoying. Fewer of us are aware that the Right to Know is embedded in the First Amendment. Fewer still realize that this principle enables the media to report on the activities of government: from the local school committee to the U.S. Congress, from the local police blotter to the troops at war. Extinguish this principle and the process of government becomes one grand secret; participatory citizenship becomes a myth.

“Democracies die behind closed doors,” said Judge Damon J. Keith of the U.S. Court of Appeals, Cincinnati, for the Sixth Circuit. The courts have defined the principle of public access over the years, with rulings that sometimes reach back to common law. Federal and state statutes have been enacted to achieve these principles. Yet, there is no overarching standard, and agencies and officials across the land share a universal, and unfortunate, infatuation with secrecy. Only the impact is consistent.

Again from Keith: “When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.”

These pages convey the experience and expertise of 12 authorities on your right to know. Individually, each writer brings a unique perspective. We are confident that this collection will empower leadership, scholarship and citizenship — in Rhode Island and beyond.

— *Tom Heslin*

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## About Access/RI

Access/RI is a broad-based non-profit coalition dedicated to advancing freedom of information through education and advocacy.

Founded in 1996, Access/RI is affiliated with the A. Alfred Taubman Center for Public Policy and American Institutions at Brown University.

Access/RI has sponsored numerous forums and conferences on open government and access to public records, and supported research by Brown University and the University of R.I. on municipal compliance with public access laws.

<http://www.accessri.org>

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# Freedom of information and the importance of auditing

by Ross Cheit

**H**ow well does the Open Records Law work in Rhode Island? How well does the Open Meetings Law work? Nobody really knows. There are anecdotes, complaints, and occasional lawsuits, but no overall figures. The freedom of information laws in Rhode Island are enforced by the Office of the Attorney General. But the Attorney General conducts no systematic surveys or spot checks to insure that the law is being enforced. Instead, the office relies entirely on complaints. There are also laudable efforts to educate public officials and citizens. But whether those translate into the kind of open government required by law is not clear.

In 1996, a group of students from Brown University's Taubman Center for Public Policy designed the first statewide effort to examine the implementation of the Open Records Law and the Open Meetings Act in Rhode Island's cities and towns. The open records portion of the study sought to test the accessibility of various documents and compliance with the statutory limit for photocopying charges (15 cents per page). The field work, a massive scavenger hunt of sorts, was done by journalism students from the University of Rhode Island working in conjunction with the students from Brown. The researchers recorded the responses to all requests for documents and assessed how they were treated in the process. The attitudinal portion of that assessment was subjective, but the study was designed to include multiple observations from every office surveyed in order to assure that no jurisdiction would be rated poorly without multiple bad experiences. The researchers also kept track of what questions they were asked. The law provides access to public documents without the necessity of providing identification and without having to provide a reason for wanting the documents. The researchers kept track of how often they were asked for identification and how often they were asked why they wanted the documents requested. The open meetings aspect of the study involved a detailed analysis of minutes collected from school committees and city and town councils across the state.

The results, published in April 1997, were quite mixed. The best results were from city and town clerks. They did an excellent job of complying with requests for basic information (minutes and agendas of city and town councils, for example). Almost

all cities and towns complied with the statutory limit on photocopying charges, but four jurisdictions did not. There was even a police department with a posted sign in violation of the state statute. The school departments also performed extremely well in terms of responding to requests for information. Many of them provided documents free of charge. The minutes that were analyzed for compliance with the requirements of the Open Meetings Law were less heartening. Most failed to live up to at least one statutory requirement. Votes and attendance were not always recorded in detail; a few errors were more significant, particularly with regard to executive sessions. Executive sessions are closed to the public subject to provisions that were not always honored, including specifying one of the statutory reasons for going into closed session.

The worst results were from the police. The study involved three separate requests for police documents, all clearly covered by the Open Records Law: police logs, recent initial arrest reports, and any police brutality complaints (with names redacted, as provided by law). Not a single one of Rhode Island's police departments provided information on police brutality complaints even though there is a Rhode Island Supreme Court case directly on this point, upholding the citizen's right to access to this information. The overall statewide compliance rate for the other requests for police records was a miserable 35 percent. While the police were unlikely to provide access to the documents requested, they were twice as likely as city clerks or school department clerks to ask for identification or for a reason for the request. Most police departments did both.

A follow-up study, *Open or Shut?*, was conducted in 1997-98 by undergraduates at the Taubman Center at Brown University with the assistance of volunteers from Common Cause of Rhode Island. A primary component of the study involved access to police records since that was the area identified as most problematic in the first study. The 1998 results were only marginally better than the 1997 findings. If compliance is measured by whether the requests resulted in any kind of positive response, then there was significant improvement over the previous year. The researchers received some kind of positive response to almost two-thirds of requests, although many of those responses were not fully compliant with the law. Of course, a two-thirds compliance rate is still miserable, but it was better than the year before. A common problem was not releasing the narrative portion of the initial arrest report. The police departments in only eight of Rhode Island's 39 cities and towns were fully compliant. But those departments demonstrated that compliance is easily attainable.

This study also tested accessibility of the terms of lawsuits settled against municipalities. A Rhode Island statute, enacted in 1991, provides that such

settlements are public records. Through a painstaking process involving the civil court database, multiple lawsuits were identified in each city and town. Written requests were sent to the city or town solicitor and, for the delinquent tax cases, to the tax assessor. These local officials were remarkably non-responsive. Overall, the terms of requested settlements were obtained in only 32% of the cases. There were very few outright denials, but many failures to respond (to repeated requests) and some very weak excuses.

A third study in this series, conducted exclusively by Brown undergraduate students, was published by the Taubman Center in October 2000. The study, *Public Courts, Private Records*, included a major section about the expungement of criminal records — an issue of taking public information out of the public domain. The results concerning expungement demonstrated that a significant number of expungements were not authorized by statute. This study also sought to examine the trends in the sealing of civil court records. The results suggested that sealing is not a widespread phenomenon, but some of the examples of sealed records contained limited explanations of even the basic reason for sealing the record. Finally, this study included a follow-up concerning access to settlements of municipal legal claims. Requesting settlements from school departments and from city and town solicitors resulted in an overall compliance rate of 71 percent. School departments were somewhat more responsive than city and town solicitors were. The results were much better than the year before, but several jurisdictions earned the dubious distinction of not responding to legitimate requests for such information two years in a row.

There are two obvious implications to these studies. First, freedom of information laws are not self-implementing. Just because the law provides for access to various aspects of government does not mean that citizens will experience that kind of openness. Moreover, relying exclusively on citizen complaints is a sure way to continue this under-enforcement of the law. People who are denied information by public officials do not necessarily know that their rights have been abridged, let alone know how to complain. And who has the determination to follow through with a formal complaint? Whatever the answer, the number of complaints filed in a given year reveals very little about how well the law is actually being applied. The only way to know how well a law operates in the world is to test performance in a systematic way.

The studies in Rhode Island all indicate that there are serious implementation problems with freedom of information policies. While there was some improvement since 1997, the overall performance of police in the second study was still far from satisfactory. City and town solicitors, apparently more



attuned to professional norms of secrecy than to the requirements attendant to the job of solicitor, were also unsatisfactory in their overall levels of compliance. In light of this systematic aggregate evidence, it is discouraging that Attorney General Sheldon Whitehouse does not appear to recognize that this is a problem. Whitehouse told the ACCESS/Rhode Island board of directors that survey results demonstrated nothing more than “he said, she said.” One possible reason for indulging the position of many police chiefs that public access is “not a problem” is the built-in conflict of interest that the Office of Attorney General has trying to enforce open government requirements on the very police departments that it relies on for criminal prosecutions.

State press associations and academic groups have conducted freedom of information audits in twenty-two states at most recent count. All of these studies demonstrate the kinds of problems that public officials in Rhode Island have yet to acknowledge. The Attorney General could, of course, send inspectors out into the field to measure compliance for himself, much like the Department of Labor does in enforcing minimum age laws. Or the Secretary of State could take the kind of leadership position that James Langevin did when he held that office. There is a clear need for stronger leadership and enforcement of laws assuring Rhode Islanders of an open and accessible government. Until enormous gains are made in this area, however, the importance of being audited for compliance with open government requirements is that it highlights the critical gap between statutory rights and real world outcomes.

#### References and further readings:

- The Rake v. Gorodetsky, 425 A. 2d 1144 (RI 1982) This is the leading Rhode Island case on public access to police brutality reports. The Rake was a student newspaper at Brown University. See also, Direct Action for Rights and Equality v. Gannon, 713 A.2d 218, 225 (RI 1998).
- Electronic versions of the three audits described in this article can be accessed through the home page of the Taubman Center at Brown University: [http://www.brown.edu/Departments/Taubman\\_Center/](http://www.brown.edu/Departments/Taubman_Center/)
- The Freedom of Information Center at the University of Missouri-Columbia maintains an excellent online summary of FOI audits carried out across the country: <http://web.missouri.edu/~foiwww/openrecseries.html>

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## Gaining access to an arrest report in Barrington

by Kathleen Odean

Just for a few minutes during the month of April, 2001, Barrington reminded me of those countries where police make arrests and citizens aren't supposed to ask for the details. I had read a brief description in the Barrington Times about an arrest near my house and I wanted to know more, so I stopped by the police station and asked for the initial arrest report. The woman in uniform, who I later learned was a dispatcher, asked if I was one of the parties involved. When I said no, she said I couldn't get it and that they don't give out arrest reports “to just anyone.”

In fact, under Rhode Island law, an initial arrest report is a public record, which means that “just anyone” — which is a good description of who we mean by “the public” — can have it. More than that, you don't have to say who you are or why you want it. It's not up to the police to decide if you have a good enough reason.

I told the uniformed woman that I understood it was a public record. Visibly annoyed, she told me she needed my name. When I replied that, actually, names aren't required to get public records, she brusquely referred me to the records window. After a wait, a uniformed man appeared and told me to fill out a records request form, pointing to a pile of papers on the counter. He explained that if I were an involved party, I could get the record now, but since I wasn't, the request had to go to the public records officer, who wasn't there.

The papers on the counter included request forms and, under them, a handout about public records. According the Attorney General's Web site, which I looked at later, police chiefs in Rhode Island have agreed to post the information in this handout as a placard at police stations, but in Barrington it was

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**“If the police make the arrests and then decide who can and can't learn details about them, how can citizens judge if the police are doing their jobs well?”**

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buried under a pile of papers.

I filled out the required information on the request form and gave it to him. “You have to put your name on this,” he said. I showed him that the request form and the handout state that names are optional. “It will take longer to get the record if we don’t have your name,” he told me, but couldn’t explain why.

After more waiting, he told me it would take up to ten business days, if the records officer approved my request. When I asked why it would take ten days for me to get a record that he would give right now to an involved party, he only said, “That’s the law.”

I then thought to ask to see the police log, as I’d heard that’s where newspapers get information. “Oh, no,” said the dispatcher, “That’s part of the record.” I said I thought it too was public (or how could journalists see it?). In a few more minutes, a door opened and another officer told me, with no explanation, to step inside and sit in a small room. I wasn’t sure what was going on — Would they fingerprint me? Take a mug shot? — until I was seated and he handed me a sheet from the computerized police log.

As I looked at the page, the officer said that it wasn’t up to him but if it were, he wouldn’t show me anything without knowing who I was. I considered bringing up police accountability. If the police make the arrests and then decide who can and can’t learn details about them, how can citizens judge if the police are doing their jobs well? How would we know if they respond differently to calls from poor neighborhoods than from wealthy ones? Or if police are following procedures about mandatory arrest for domestic abuse? Citizen access to arrest reports lets us know what’s going on in our community. The legislature considers this so important that there are fines for willful violation of the law.

I asked for a photocopy of the log sheet: Request denied. I returned to the question of getting the arrest report, and he said that no one in the building even had access to it, a contradiction of what the other officer told me.

Finally, I asked for a photocopy of the request form. The form includes a receipt to be filled out by the police and given to the citizen, but perhaps they didn’t know that. The dispatcher reluctantly photocopied the form. As she did, I asked if she’d had any training in public records. “I’m only the dispatcher,” she said, “I don’t know anything about records.” When I observed that she had given me wrong information about getting records, she denied it and said she had only told me to fill out a request form.

“I guess you’re just a confrontational kind of person,” she added before I left. The experience was unpleasant, true, starting from when I said that arrest reports were public, which she didn’t want to

hear. Both times that I said my name wasn’t required, the hostility was palpable.

I chose not to give my name even though I have nothing to hide. Lots of people in Barrington know me. But officials should give out public records because that’s the law, not because they approve of who is asking. Why should it matter if I’m local or from out of town? Or if they don’t like the way I look or the ethnic origin of my last name?

Big Brother, though, is hard at work in Barrington. When I finally went to pick up the record, the police had my name in their files and printed it out on my receipt for photocopy costs. I hadn’t given my name, address, or phone number, or called the station. Maybe they ran a check on my license plate.

You might conclude from our Attorney General’s Web site that access to public police records in Rhode Island is no longer a problem. The Web site highlights a June 1999 press release about Rhode Island police chiefs agreeing to standard procedures for public records, some of which Barrington is following. The Attorney General has also distributed hundreds of copies of little booklets about public records laws.

But until the police department staff members who deal with the public stop giving out inaccurate information and wrongly denying requests, we continue to have a problem in this state. Most citizens would probably have taken the

dispatcher’s word as true and left without pursuing their request. Press releases and booklets aren’t enough to solve the problem. They were a start, but more needs to be done to ensure that citizens actually — not just theoretically — have unencumbered access to public records in Rhode Island.

*Kathleen Odean, a writer and librarian, lives in Barrington, R.I.*

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**“Officials should give out public records because that’s the law, not because they approve of who is asking.”**

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# Complaints and compliance in Rhode Island

by Linda Lotridge Levin

**E**ach year the attorney general of Rhode Island receives dozens of letters from citizens and public officials complaining about possible violations of the state's Access to Public Records Law (R.I. Gen. Laws 38-2-1 et seq.) and the Open Meetings Law (R.I. Gen. Laws 42-46-1 et seq.). The attorney general assigns one of his or her assistants to research the complaint to determine its merit and then hands down an opinion, based on interpretation of the state statutes.

For instance, in 2000, the attorney general handed down six official rulings and 29 unofficial rulings relating to open meetings, and eight official rulings and 28 unofficial rulings relating to public records. The previous year, he rendered four official and 21 unofficial opinions relating to the public records law and 15 official and 39 unofficial opinions on possible violations of the open meetings law. Under the current attorney general (2002), official opinions are given only to city and town solicitors who request a ruling on an action of a local elected or appointed body. Unofficial opinions are those given to individual citizens, journalists and non-governmental organizations. (See attorney general's Web site at [www.riag.state.ri.us](http://www.riag.state.ri.us))

According to the Access to Public Records Law, anyone can ask to look at or copy a public record. The public official who has custody or control of the records must comply with the request within 10 days or, if he or she denies the request, must indicate in writing the specific reasons for denial. The limit may be extended for a period not to exceed 30 days. The person seeking the record may then file a complaint with the attorney general, who, by law, must investigate and determine whether the complaint has merit. Usually a warning to the governmental body is sufficient, but the attorney general can ask the Superior Court for an injunction on behalf of the citizen who sought the record. The burden of proof is on the public body to prove that the records can be properly withheld from public inspection. The court can impose a fine not to exceed \$1,000 on the offending public body or official and can order the public body to provide the records at no cost to the defendant. If the citizen's case lacks legal merit, the court can award attorney's fees and costs to the government body.

If an individual believes that a meeting of a public body has violated any portion of the Open Meetings

Law, the person can file a complaint with the attorney general's office. Such a complaint must be filed within 90 days from the date of public approval of the minutes of the meeting at which the alleged violation occurred or, in the case of an unannounced or improperly closed meeting, within 90 days of the public action of the public body revealing the alleged violation. If the attorney general refuses to take action, the citizen can file suit in Superior Court and if the public body is found in violation of the law the court may impose up to a \$5,000 fine.

Sometimes the explanation for the violation is simple but nonetheless inexcusable: The official or officials failed to read the laws and were unaware that what they were doing could be illegal. Such was the case of the well-meaning retired businessman who volunteered to be chairman of a local government committee. When asked if he had read either of the laws, he admitted he had not, but he said he would before he unwittingly violated one of them.

In many other instances, it is obvious from reading the resulting opinion that the violation was a blatant disregard

for the law. It is sometimes easier, officials will argue, to conduct business out of the public eye. It is faster and there are no interruptions from citizens who may want to question some of the public body's decisions.

Why should a citizen who has tried to obtain

records considered public under the law, or who has attended a meeting that is closed for no legal reason care enough to complain? Because, as many citizens and journalists believe, the right of access to government information is as important as the right to vote. Consider this: The government does not own the public records, and it has no right to keep you from public meetings. You own the records. You are the government.

What kinds of public records complaints did the attorney general's office receive in 1999 and 2000? In 2000 the most common complaint — nine — that resulted in an unofficial opinion was that the government body failed to respond to a public records request within the 10-day period, and the town of North Smithfield and the Coventry Fire District violated the law by overcharging for requested documents. Other complaints focused on records that the attorney general, on investigation,

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**“In 2000, there were 29 complaints relating to the Open Meetings Law filed with the attorney general...”**

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found under law not to be public, such as autopsy photos.

Official opinions were rendered on questions about the public record status of the membership list of the Greenville Library (it is a public record so long as it does not include the materials requested by the library patron), and whether third party names in a police record are public (the opinion suggested a balancing test on the third party's right to privacy versus the public's interest in the information).

In 1999, unofficial opinions on access to public records resulted in six violations, including one after a request from the Newport Daily News for the number of teachers in town who had been granted provisional certificates. The request was refused. The attorney general ruled the information public since it was not identifiable to an individual.

The official opinion on public records that garnered the most controversy in 1999 gave approval to Narragansett police to redact names of victims on a case-by-case basis. Again the attorney general suggested a balancing test, weighing the victim's right to privacy versus the public's right to know.

In 2000, there were 29 complaints relating to the Open Meetings Law filed with the attorney general, and 13 of those unofficial rulings showed violations of the law. Several local government bodies failed to post notice of their meetings. The attorney general ordered them to reconsider matters from those meetings at a future, properly scheduled meeting. Other violations included failure of a school committee to post a public notice in a local newspaper at least 48 hours before the day of the meeting, and failure of a public body to maintain minutes of its meetings and to make them available to the public.

The six official rulings on matters relating to open meetings that year included one that said the Democratic City Committee in Cranston could convene a meeting of all nine of its members but only to discuss political strategy and not any city council business.

Of the 39 complaints filed relating to open meetings in 1999, eight cited failure of a public body to specify the nature of the business to be discussed in an executive or closed session, and eight complaints were against public bodies that failed to post a notice of a meeting in a timely manner. Two complaints said insufficient information in a posted meeting notice was provided on a topic to be discussed at the meeting; two cited failure of a public body to maintain proper minutes, and two called the public body to task for illegally voting in an executive or closed session.

Fifteen official opinions were handed down in 1999 relating to open meetings. The attorney general said it was legal for public bodies to hold "informational

sessions" where a guest speaker answered questions, assuming that the members of the board do not "engage in collective discussion" about issues. In another opinion, he said that voting by secret ballot in an open session is "inconsistent with the intent and spirit of the law."

Are these opinions of the attorney general binding? Is it imperative that the public officials adhere to them? They are only opinions, but conscientious officials and public bodies usually do pay attention to them, using the opinions as guideposts as they conduct the public's business.

However, the laws will continue to be violated, either willfully or through simple negligence or even ignorance. It is then up to the media and members of the public to remain vigilant, to monitor the activities of the government, and, when needed, to file complaints about possible violations with the attorney general. The media's special responsibility should be to make every effort to cover meetings of public bodies in their communities and report on their activities and their violations of the Open Meetings Law.

Citizens, too, have a special responsibility. They should familiarize themselves with the meetings and public records laws. They should attend meetings of the school committee and the town or city council. Later they can request copies of the minutes to monitor their accuracy. If they are denied a public record, they have an obligation to complain. It's a citizen's right. It's a citizen's responsibility to ensure that the activities of the government remain accessible to the public.

Perhaps Paul McMasters, First Amendment ombudsman for the Freedom Forum, gives the most succinct reason why the readers and the viewers should be concerned when an attempt is made, no matter how minor, to shut down the flow of public information. "For almost two centuries, the First Amendment has represented a promise Americans made to themselves, resolving to endure the most noxious speech in order to preserve that compact," he says.

As important as public vigilance is, it is critical that public officials be familiar with the laws, that they understand the purpose of the laws and the various exemptions, such as when meetings legally may be closed and when they may not be, and which records are public under the law and which are not. Ignorance is no excuse for violating the laws.

*Linda Lotridge Levin is a professor of journalism and chair of the Department of Journalism at the University of Rhode Island. She is the author of Mass Communication Law in Rhode Island.*

# Balancing the rights of public access and privacy in the courts

Frank J. Williams

**O**f all government entities, the judiciary is perhaps the most accessible institution. We welcome and encourage the public to observe proceedings in our courthouses and the vast majority of court records are available for public inspection. Additionally, decisions in our Supreme and Superior Courts are most often conveyed in written opinions that detail the court's rationale for issuing a decision, complete with supporting legal precedents and citations.

Yet even given this degree of openness, the judiciary remains poorly understood. While we are taking steps to educate and inform the citizenry of important issues related to court processes and important concepts such as judicial independence, I have long felt that access and openness go hand in hand with the public's trust and confidence in their third branch of government.

**12** The Rhode Island Judiciary has gone to great lengths to make public records more accessible to the citizens of Rhode Island. In every courthouse public terminals are available to allow access to information designated as "open" under rule and law. Court clerks also make themselves available to help the public access the information for which they search. The Judicial Records Center is also an important resource for those in search of archived records and has recently unveiled a new Web site with helpful information for the public. Additionally, the Rhode Island Judicial Technology Center is often able to respond to requests for statistics and information relevant to important judicial issues and trends.

Recently the judiciary has taken the additional step of providing Internet access to certain public records. Previously, individuals seeking access to criminal court records were required to physically visit courthouses, battling parking and waiting in line for service. CourtConnect provides online access to public information contained in the Rhode Island Adult Criminal Database and made its debut on the court Web site in the summer of 2001. CourtConnect has dramatically enhanced access to this information of interest especially to attorneys, employers, law enforcement, media, and others in our state.

Yet to the extent that the judiciary seeks to make our courts more open and accessible, we must also

be sensitive to an individual's right to privacy. In many cases, these concerns are well-understood and accepted by nearly all. Court matters involving juveniles, for example, are not subject to the same laws affording public access to information. Although court matters of public record can include personal information, other records such as an individual's health or substance abuse problems, for example, are not accessible to the public. The protection afforded to the foregoing areas is based upon the sensitive nature of the circumstances whereby the privacy of the individual outweighs the right to access and knowledge by the public.

The constant balance between privacy and the public right to access is often dictated by law. Other circumstances require that a judge exercise his or her discretion in a particular case. During the recent process to implement CourtConnect it was noted that the criminal database can contain personal or sensitive information. In some cases, critical personal information such as Social Security numbers and information relating to the victim of a crime could be found within individual files at the courthouses and Judicial Records Center. Although historically, access to such information has been limited by requiring an individual to physically visit a courthouse, given the wide availability of public information via the Internet it was decided that such information would be withheld from the online database.

In addition to concerns over privacy, judges must also weigh the right to public access with an individual's right to a fair trial. Many believe that the wording of the First and the Sixth Amendments sometimes creates a conflict between free press and a fair trial. Journalists, in particular, defend the public's right to know, arguing that detailed and accessible information results in a populace that better understands the legal process. Those on the other hand of the issue claim a fair trial cannot be guaranteed if too much information about a case and the parties involved — particularly inadmissible evidence or prior convictions — is accessible to the public, especially the jury.

The right to public access and an individual's right to a fair trial have also been raised in circumstances where a judge may decide that televised coverage of proceedings might have an adverse impact on a defendant's right to a fair trial. Unlike the federal courts, the Rhode Island Judiciary often allows television and still cameras to record proceedings in high profile cases, recognizing that such access serves to reassure and illustrate to the public that such proceedings are fairly conducted.

I believe that balance can exist among what may sometimes appear to be conflicting rights and competing interests. The media does have an important role to play in educating the public about the workings of our courts and we in the judiciary

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need to respect the vital role of the media. In contrast, the media should also recognize that the same vigilance the courts apply to protecting the right to a fair trial has been applied to protecting the right to free speech.

Generally, circumstances where there exists a potential conflict between First Amendment rights and an individual's Sixth Amendment rights are few and far between. In the vast majority of cases, our courts continue to recognize that criminal proceedings involving adults should be open. As Chief Justice Warren Burger noted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 5455, 571-73 (1980):

“(W)hen a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion ... . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner (or) in any covert manner.’ Where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ (which) can best be provided by allowing people to observe it.”

- 14 I share Chief Justice Burger’s predilection to maintain a level of public scrutiny of our court proceedings. But above all else, it is important to stress again that balance is the key ingredient in a recipe that recognizes the importance of both the public right to know and the individual right to privacy and a fair trial.

I have often said that the judiciary is the “last refuge” of hope for our democracy, providing a vital outlet for groups and individuals to address their numerous conflicts under the rule of law. If we are unable to stem the tide of lost confidence in our system of justice, I fear that we will find the very foundations of our democracy to be on unstable ground. As Rhode Island’s Chief Justice, I believe that maintaining an open, accessible, and user-friendly judiciary is one of the best ways to restore the public’s confidence in the court system. To achieve this end, I have committed myself to foster a healthy balance between public access and personal privacy while maintaining the integrity of the judicial process.

*Frank J. Williams is the Chief Justice of the Rhode Island Supreme Court*

## Television cameras in the courts

by Barbara Meagher

My experience with cameras in Rhode Island courts dates back to May 1983. It was the first week of my new reporting job at WLNE-TV, Channel 6, in Providence, Rhode Island. I remember it was a trying day.

I was assigned to cover a pre-trial hearing in an underworld murder conspiracy case and I had to get up to speed fast. I was new to the state, and no one, of course, had time to provide me with a quick history of the local mob. The prosecutor chewed me out because I didn’t already know the answer to the question I asked him.

As I look back 18 years later, I can quickly recall the day’s traumas. But what I can’t remember is any trouble getting the camera into Superior Court. It was easy. Just to be sure, I recently checked the file tape and, yes, there they are — the judge, the defendant, the lawyers. And when a television reporter has pictures to tell the story, it’s not such a bad day after all.

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**“Court rules stipulate that only one (TV) camera goes into court at a time, so each station takes turns providing this ‘pool’ coverage.”**

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That’s generally been the case all these years. A television station makes a phone call, the judge grants permission, a reporter and photographer show up and set up the camera in the courtroom, somewhere out of the way. In Rhode Island, cameras have been allowed inside courtrooms since 1981. All you need is the permission of the judge hearing the case. Until recently, Rhode Island judges regularly said “yes.” The benefit to television stations is clear: When human drama plays out in court, we get to show and tell those stories to our viewers. There’s also been a payoff for the public.

In 1998 former Governor Edward DiPrete surprised everyone when he pleaded guilty to corruption charges and ended the state’s four-year case against him. That morning, it threw us into a frenzy. Once the judge gave permission, my station set up a live feed within an hour, which provided the pictures and sound to all three stations. (Court rules



stipulate that only one camera goes into court at a time, so each station takes turns providing this “pool” coverage.) Because that one judge said “Yes,” citizens across Rhode Island could see — as it happened — the spectacle of DiPrete admitting his crimes for the first time.

And there were other examples. According to records kept at Superior Court, the biggest year for television coverage was 1986, when crews signed in 191 times. (The numbers do not include District Courts, which do not keep records.) Two major events piqued the public’s interest that year: the trial of Ralph Richard of Pawtucket, who was accused of murdering his infant daughter; and the many legal proceedings relating to corruption at RIHMFC, the state’s housing agency.

1993 was a big year, too. TV news crews signed into Superior Court 170 times, according to court records. Once again, compelling trials drew us. Banking crisis villain Joe Mollicone and Brendel family killer Christopher Hightower were both on trial that year. In fact, there were so many media outlets interested in the two cases, stations rented a construction trailer and parked it outside the courthouse to house equipment and people. And viewers got play-by-play coverage of each trial every day.

But since then, the numbers have declined. In 2000, television stations visited Superior Court only 63 times — a huge drop from the 191 sign-ins during the biggest year, 1986. What’s the reason for the decline? Are we less interested, are there fewer high-profile trials, or are judges turning us away more often? It seems it’s all of the above.

The truth is, television news is looking for “action.” At least that’s the phase it’s been in for the past several years. For an event to make the 6 o’clock news, it generally has to have some “entertainment” value. News executives typically deny this, because “entertainment” is supposed to be a dirty word in journalistic circles. In any case, because of competition from the entertainment programs now available on cable, news professionals want stories that are visually compelling, that “grab the viewer.” You don’t find that in just any trial. Plus, most courtrooms in Rhode Island don’t have much light, and since we can’t add professional lighting, the pictures can look dismal. That’s why television news people are more likely to show up only for the more compelling moments: arraignments, opening arguments, the defendant taking the stand, the verdict.

TV stations don’t ask to cover court as often as they did, but judges are indeed saying “no” more often when they do ask. Superior Court Judge Stephen Fortunato is one who will deny access upon occasion, and has no qualms about saying why: He’s often disappointed in the coverage.

“I’m not enamored of the idea of cameras, especially when some of the reporters don’t have an idea of what is transpiring,” he said in an interview. He’s still angry about one local television reporter’s account of a labor dispute just before the opening of the Providence Place mall in 1999. Fortunato recalls being careful to say in court that his decision would not affect the planned opening date of the mall — he knew a lot was riding on getting the place open on time and didn’t want any confusion about his role. Still, he remembers what he saw on the 6 o’clock news that night: “A reporter stood in front of this building and said, ‘As I speak right now, a judge is pondering whether or not the mall will open.’ To me it was the shoddiest piece of reporting I’d ever seen...”

Because of cases like that one, Fortunato doesn’t trust television journalists to get the story right, and he says that’s why he’s likely to forbid television coverage during criminal trials. “The stakes are so high for the individuals involved,” he says.

Fortunato’s attitude isn’t unique. Other judges voiced similar attitudes at a recent conference. The message is this: Do a better job of reporting what happens in the courts, or we may not let you in.

This is the kind of talk that makes journalists cringe. After all, we argue, judges shouldn’t have anything to say about the content and quality of our work.

(Unless, of course, we’re sued for libel and are standing before them as defendants.)

Like it or not, the Rhode Island Supreme Court does, in effect, give judges that right. Judges cannot bar reporters from sitting in most court proceedings, but reporters have no right to bring their TV cameras with them. Judges can say “no” for any reason, and never have to explain themselves. So more and more judges seem to be deciding not to bother with cameras.

The stakes are high for reporters. We need pictures or we don’t have much of a story. Courtroom sketches are okay, but they’re visually dull. And there’s no sound! Nothing beats hearing the voices of the people involved.

It’s important to note that overall, the electronic media still has a pretty good deal here in Rhode Island. Most judges still make it easy for us to get

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**“Judges cannot bar reporters from sitting in most court proceedings, but reporters have no right to bring their TV cameras with them.”**

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our jobs done. Nobody can remember a District Court judge saying “no.” Judge Robert Pirraglia is one who is a big proponent.

“Every camera person who comes here, in 18 years, no one has ever crossed the line. All I say to them is: Set up before we begin, do not disrupt court proceedings when you break down, and otherwise, do your job. And they always have.”

In fact, most judges still say “yes” to television coverage. Even Judge Fortunato opens his doors during civil cases.

But the fact that the doors are closing at all is something worth thinking about. It could get worse. Until the United States Supreme Court takes the unlikely step of mandating free access for cameras nationwide, we in Rhode Island have to bow to the wishes of state judges.

I submit there are some very simple things television stations can do to improve their status with the courts:

- Sit reporters down for a basic tutorial on court procedure. The Bar Association gladly supplies lawyers to do this pro bono. It’s amazing how much this can help — once someone translates legal jargon, court isn’t such a foreign place. And the quality of news reporting should improve.
- Make sure photographers show a measure of respect by dressing properly. My station recently reminded photographers to carry a pair of long pants with them at all times. In my early days here, photographers just wouldn’t go into court wearing shorts, but things became a bit too casual over the years. Judges appreciate the gesture.
- Finally, television reporters can certainly benefit by making personal connections with judges. Traditionally, judges stay silent during trials but are often open to talking, either on or off the record, once the trial is over. The new Supreme Court chief justice, Frank Williams, has done this himself and is encouraging his colleagues to do the same. Not only will reporters get some insight, but judges will see that these reporters do indeed care about getting the facts.

All this takes time, planning and preparation — scarce commodities in today’s television newsrooms. But at the very least, these gestures are an investment in keeping the courts truly open to the public in the future.

*Barbara Meagher, a former ABC6 television news reporter, teaches broadcast journalism at the University of Connecticut.*

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## Opening the doors: General Assembly audits and the open meetings law

by Seth Andrew

*“The people of the state of Rhode Island believe that public officials and employees must adhere to the highest standards of ethical conduct, respect the public trust and the rights of all persons, be open, accountable and responsive, avoid the appearance of impropriety and not use their position for private gain...” (RI Constitution, Article III)*

In 1997, RI Secretary of State James Langevin and a team from Brown University issued a report titled “Access Denied: Chaos, Confusion, and Closed Doors,” that revealed the Rhode Island General Assembly’s low compliance with the Open Meetings Law (§ 42-46) that they themselves had passed.

Despite its position of leadership, the General Assembly was notorious for violations of both the spirit and the letter of the Open Meetings Law. Groups and individuals reported a range of violations of the law, but little had been done to improve the culture of non-compliance at the State House. There had not been an independent, quantified evaluation of compliance with the Open Meetings Law until 1997.

When State Representative James Langevin was elected to the office of Secretary of State in 1994, he vowed to increase access to the legislative process, rebuild trust in state government, and provide unprecedented access to legislative information. Improvements were made in the form of an independent database of legislative activities, enhanced bill-tracking through online access to legislative information, time-stamping of meeting notices, and the creation of the Office of Public Information. In early 1995 letters were sent to the Speaker of the House and the Senate Majority Leader requesting compliance with the Open Meetings Law.

As Secretary of State Langevin was making these changes, Superior Court Justice Patricia A. Hurst decided a landmark case in April of 1997, ruling that three members of a Barrington School Committee advisory group had willfully violated the state’s Open Meetings Law. The members had failed to post their meetings or keep minutes and were ordered to pay “minimum” fines for demonstrating “a reckless disregard for compliance with the law.” The case was the first to impose fines for violations of this law and raised the question of whether

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members of a local school committee were being held to a higher standard than those who created the law — the General Assembly.

By mid-1997 reports of Open Meetings Law violations persisted. Secretary of State Langevin met with members of Brown University's Taubman Center for Public Policy where they discussed conducting a comprehensive study to determine the exact scope of the legislature's failure to comply with the Open Meetings Law. Professor Ross Cheit and three undergraduates, Seth Andrew, Kathleen Campbell, and Robert Taylor, joined the project.

## The Study

Rhode Island has a long history of maintaining a citizen legislature open to public input on a scale found in few states. Citizens are welcome to come to the State House, witness legislative proceedings, and even testify on legislation before Assembly committees without prior notice. Lobbyists and average Rhode Islanders are equally welcome at legislative hearings under the law, but significant barriers to participation exist.

State House regulars may know how the system works or have "inside information" as to which specific bills will be heard in which committees at what time. However, the public was often given little, if any, notice about the agendas of these meetings and the information that was provided was often long, complex, and/or inaccurate.

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In the summer of 1997, the Brown University team began the study, whose purpose was three-fold. First, to catalogue the scope of the legal violations of the law in a format that was reliable and valid. Second, to promote citizen involvement in the legislative process by building a greater understanding of citizen's legal access rights. Third, to prompt improvements in the General Assembly's compliance with the law.

The Brown University team began a review of legislative materials to look at each standing committee's compliance with the Open Meetings Law for every meeting held during the 1997 legislative session. They used computerized legislative tracking database records and cross-checked them with time-stamped meeting notices, minutes of committee meetings, and the various stamps affixed to legislation as it passed through the system, to compile a robust record of legislative activity.

In sum, 388 meetings, 3,226 pieces of legislation, and 9,383 instances of legislation posted on agendas were reviewed and double-checked by both the Brown team and staff in the Office of the Secretary of State. Upon the final review, each committee was "graded" based on the percentage of total committee meetings in compliance with both the letter and the spirit of the law.

Letter of the law violations were broken into three categories: Meetings with no public notice, meetings without adequate public notice, and additions or revisions made to the meeting agenda without adequate public notice. Each of these categories was determined by comparing recorded committee actions with public notices for those meetings or the lack thereof.

Spirit of the law violations were also broken into three categories: Meetings with "continuous calendars," meetings posted as part of a "multi-day" calendar, and meetings with "unreasonable" agendas. Continuous calendars are those stating that "any bills not previously heard and/or considered by the committee" may be taken up at a given meeting, without specific reference to the bills on the agenda. Multi-day calendars were those that listed dozens of bills over a two, three, or four-day period with no indication of which bills would be heard when. Meetings with unreasonable agendas were those that posted more bills than the committee had ever been able to hear at any single meeting.

Hypothetical fines, based on the 1997 Barrington School Board precedent, were also reported for each committee to indicate the severity of the violations and the implications for individual members as well as the leadership of the committee and the General Assembly. Fines were only reported for letter of the law violations, an indication of the conservative standard used by the authors in making most methodological decisions.

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The report, published as "Access Denied: Chaos, Confusion, and Closed Doors," revealed that violations of the Open Meetings Law were routine and widespread. A total of 52% of the meetings held in the 1997 session were shown to have had some type of violation of the letter or spirit of the Open Meetings Law. Substantive action was taken on 236 bills with no notice to the public whatsoever, including items as important as the state budget and the sale of major non-profit hospitals to for-profit companies. There were a total of 166 violations of the letter of the law and 176 violations of the spirit of the law in the 1997 session alone.

Egregious examples included 41 meetings that were posted on the same day the meeting was to take place, and even some that were posted after the meeting had been scheduled to begin. One committee posted a meeting agenda containing 254 bills to be heard, even though the most bills that they had ever acted on in one meeting was 55. Another committee was found to have had some type of violation of the letter or spirit of the Open Meetings Law 86.7% of the time. Half of all the standing committees received failing grades, indicating less than 60% overall compliance with the letter or spirit of the law. Not a single committee had 100% compliance with the letter of the law. If

one was to apply the Barrington case minimum standard of \$75.00 per member per violation, the members of the General Assembly would have owed a total of \$126,425.00 as a result of 1997 Open Meetings Law violations.

Fortunately, a few bright spots appeared in the findings. Four Senate committees complied with the spirit of the law 100% of the time and the Senate Health, Education, and Welfare Committee also complied with the letter of the law 80% of the time, indicating that passing grades could be achieved if the effort was made to adhere to the Open Meetings Law.

## Aftermath and improvements

The report came under immediate attack, especially by the leadership of the General Assembly who claimed it was inflammatory and unfair. Legislators denounced it as “outrageous slander,” “disinformation,” and “blatantly untrue.” They said it contained mistakes and promised to prove the document flawed. Langevin and the Brown team released more than 1,000 pages of supporting documents showing proof of the violations and offered to evaluate any criticisms and correct any errors.

None of the initial critics could prove that there was even one error in the study and eventually the furor gave way to an understanding of the problem. In short order, the House and the Senate made strides to improve access to the legislative process. The 1998 session saw dramatic improvements in compliance with the spirit and letter of the Open Meetings Law. A special committee of the Senate was formed to address proposals to enhance public access. Subsequently, the use of “continuous” calendars and “multi-day” calendars was completely abolished, leading to 100% compliance for the entire General Assembly in those two categories.

A March 1999 report, “Access 1998: Opening the Door,” issued by Secretary of State Langevin, detailed the General Assembly’s compliance during the 1998 legislative session. It showed improvement in compliance, but left room for further gains. It showed that 10% of legislative hearings had some degree of violation of the Open Meetings Law, down from 52% the year before. Four committees had 100% compliance with both the spirit and letter of the law, up from zero. Every committee had a passing grade, and most received “A” grades while only half of the committees had received passing grades the year before. Continuous calendars and multi-day calendars were completely eliminated and the number of unreasonable agenda violations declined from 47 to 7. The total number of violations of the letter of the law declined from 166 in 1997 to 44 in 1998, and spirit of the law violations declined from 176 to just 7.

Clearly, violating the law 10% of the time is not

cause for complacency, as 100% compliance is both expected and required for all public bodies. But the speed with which the changes were made gave great hope that perfect compliance could be achieved in relatively short order. Unfortunately, there have not been any further studies of the General Assembly’s compliance since 1999, so the question remains as to whether further improvements were made, or there was a relapse to old practices.

## Recommendations

“Access Denied: Chaos, Confusion, and Closed Doors” and “Access 1998: Opening the Door” pointed towards three recommendations. First, the need for effective third party monitoring of the state’s Open Meetings Law. Second, the need for an electronic system that tracks and records all of the notices, agendas, and additions to the agendas as well as the corresponding votes and actions taken by the General Assembly committee on each bill. Ideally, compliance with the system would be made mandatory through an amendment to the Open Meetings Law. Such a system could automatically report violations of the open meetings statute to the Attorney General. It would also have the benefit of centralizing and organizing data on members’ votes in committee.

Third, the General Assembly should make every effort to establish a regular meeting schedule for the legislative season that is announced at the start of the session and strictly adhered to throughout. This can be accomplished by scheduling committee meetings and floor action on separate days, restricting the time of committee meetings, or holding floor sessions after scheduled committee meetings instead of before.

With enough focus and determination, Rhode Island can become a national model for Open Meetings Law compliance. Most of all, it can help to open the doors and encourage all citizens to become engaged in the civic life of Rhode Island.

*Seth Andrew was one of the Brown student researchers and co-author of ACCESS DENIED. He is currently the director of the Providence-based Democracy Schools Coalition and CEO of SAGA Non-Profit Consulting. He can be reached at Seth@alumni.brown.edu.*

## References and further readings:

- An electronic version of “Access Denied” can be accessed through the home page of the Taubman Center at Brown University:  
[http://www.brown.edu/Departments/Taubman\\_Center/](http://www.brown.edu/Departments/Taubman_Center/)
- An electronic version of “Access 1998: Opening the Door” can be accessed through the home page of the Rhode Island Secretary of State:  
<http://www.sec.state.ri.us/accessrpt/execsum.htm>

# Does the law apply to the General Assembly?

by Katherine Gregg

**L**egislators make Rhode Island laws. But they have not always felt obliged to follow them. Meetings notices posted at the last minute. Descriptions of what might come up at a legislative committee meeting that are so vague — or voluminous — as to be worthless to the average Rhode Islander trying to keep up with or have an influence on what happens at the General Assembly. The question has come up many times over the years: Does the Open Meetings Law apply to the General Assembly? One attorney general after another has produced an opinion. But, they don't all agree.

In May 1983, the Providence Journal asked then Atty. Gen. Dennis J. Roberts II to investigate a vote taken by members of the Senate Labor Committee on an unemployment insurance bill. The vote didn't even take place at a meeting; the committee clerk polled each member individually and by telephone.

"If your investigation discloses a violation of the Open Meetings Law and the Superior Court upholds your position, the court may in its discretion declare the action of the Senate Labor Committee null and void," the newspaper wrote Roberts.

In his May 11, 1983, opinion letter, Roberts gave two seemingly contradictory responses: On the one hand, he said: "Legislative Committees are subject to the Open Meetings Law. Discussion and action upon a bill which the committee has advisory power to recommend to the full legislative branch must take place at a duly convened meeting. Polling of members of the committee at their desks or by telephone is not within the letter or spirit of the law."

But Roberts decided that no punishment was warranted in this case because, in his view, no harm was done. He based this on the fact that the bill was pulled off the Senate calendar and sent back to the Labor Committee for another vote after the newspaper drew attention to the committee's earlier shenanigans. He then raised the issue that has muddied every discussion since about legislators' obligations under the Open Meetings Law: the rights the state Constitution grants the legislature to make its own rules of conduct. Article IV, Section 7 says, in part: "Each House may determine its rules of proceeding, punish contempts, punish its members for disorderly behavior and, with the concurrence of two-thirds, expel a member."

With this provision in mind, Roberts wrote: "To the

objection that the meeting was not properly noticed... It should be noted that Senate rules allow a committee to meet after a certain juncture of the session without prior notice or the posting of an agenda. The authority for the Senate to adopt its own rules of proceeding is found in the State Constitution... and the notice requirements in the rules thus supersede the notice required by" the Open Meetings Law. 42-46-6.

In May 1985, the Rhode Island affiliates of three citizen activist groups — the League of Women Voters, the American Civil Liberties Union and Common Cause — filed a formal complaint with the attorney general about the "routine" violation of the public notice requirements by six legislative committees. Among their issues: that meeting notices, if they were posted at all, contained such vague descriptions of what might be considered — "all bills previously heard in committee and all other matters still pending in committee" — that they were useless.

The House parliamentarian at the time, Elmer Cornwell, a political science professor at Brown University, offered this

explanation: "As the session deadline approaches, and the pace of work accelerates, advance posting must often be waived." But the citizen groups were unappeased by Cornwell's apologia for the lawmakers or then House Speaker Matthew J. Smith's promise to "rectify any quasi-problem."

"We've documented more than 30 violations of the law's requirement that meetings be posted at least 48 hours in advance," said ACLU executive director Steven Brown at the same press conference where Marilyn Hines, then of Common Cause, accused the lawmakers of "subverting the Open Meetings Law at every turn. It seems to be accepted practice there."

In July 1987, Common Cause and the League of Women Voters filed another complaint about the slipshod public-notice practices of legislative committees. Edward Oliver, then president of Common Cause, gave the reason for his group's persistence at a July 28, 1987, press conference: "Certainly, a cornerstone of ethical processes in state government requires that our legislature be continually open to public participation. These violations are a disservice to our citizens who are effectively shut out of the process if there are no advance postings of meetings."

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**"Rhode Island has a long history of maintaining a citizen legislature open to public input..."**

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In her comments, Carolyn Goldman, then president of the League of Women Voters, said the concern was more than academic to unpaid, volunteer groups such as hers. “These laws are essential to citizen participation in the political process of the state legislature. This time requirement is short as it is, and to further shorten it by non-compliance severely limits or excludes our lobbyists’ efforts to present League positions on issues before the Assembly.”

Then in February, 1988 came another report in which the ACLU harshly criticized public officials at all levels of government across the state, including lawmakers, for brazenly flouting the Open Meetings Law over a six-year period. The report — entitled “Behind Closed Doors: The Lack of Compliance” — also expressed concern about the “serious lack of enforcement of this law, over the years, by the Attorney General’s office.”

“The attorney general’s office has been extremely inattentive to its responsibility to enforce the (law). Violation after violation goes unpunished and for too long, the attorney general has accepted flimsy assurances of ‘good faith’ and ‘future compliance’ on even the most blatant violations.”

Over the years, three attorneys general were asked to take the lawmakers to task. All three — Roberts, Arlene Violet and James O’Neil — rejected to one extent or another lawmakers’ arguments that they are exempt from the Open Meetings Law. But none saw fit to punish the lawmakers for violations.

Roberts took the position: no harm done. Violet called the transgressions “inadvertent.” And O’Neil mediated what he touted as “a compromise” in which House and Senate leaders promised to provide “as much advance notice as possible” of legislative meetings. Violet explained her reasoning at some length in an October 15, 1985, letter to legislative leaders in which she wrote: “This office recognizes the importance of maintaining the Constitutional prerogative of the Legislature.”

In passing the Open Meetings law, however, the legislature itself declared an “intent to make public business known to the public,” and it did not exempt itself as it did for some other distinct groups. “Having not specifically exempted legislative committees from the definition of ‘public body,’ it is clear Rhode Island has a long history of maintaining a citizen legislature open to public input that the enacting legislature intended that legislative committees be subject to the Open Meetings Law,” she wrote. Even if one did not buy that argument, she noted: each legislature had the power to “modify the applicability of the Open Meetings Laws to its sitting committees. Such has not been done by any Rhode Island legislature since 1976. In fact, the presently sitting legislature has specifically alluded to compliance with the Rhode

Island Open Meetings Law in its rules of the House and rules of the Senate.”

But all that said, Violet chose not to punish the Assembly or criticize it too harshly: “Although I find that legislative committees of the General Assembly are covered by and must comply with the Rhode Island Open Meetings Law... I also find that there is no evidence to contradict a further finding that any non-compliance with same was inadvertent and dictated by the exigencies of time rather than through any motive to escape public review of legislative actions.” O’Neil also opted to empathize and strike a compromise with the errant lawmakers, rather than go to court and seek sanctions against them.

Confronted by the Providence Journal-Bulletin with a hearing notice that listed 300 bills for possible consideration on a single night by the now defunct Joint Committee on Retirement, his deputy attorney general, Walter Gorman, responded this way on July 1, 1987: “It appears that the General Assembly took a cautious approach to the Act’s notice requirement, and thereby informed the public of every bill which might be considered at what was expected to be the final committee meeting of the 1987 session.”

In January 1998 — a full decade later — the General Assembly was castigated again for repeated violations of the Open Meetings Law that made it impenetrable to anyone but professional lobbyists and insiders. The violations were documented in a report entitled “Access Denied” that was jointly issued by Brown University faculty and students and Secretary of State James Langevin. The subtitle: “Chaos, Confusion and Closed Doors.”

In a follow-up report a year later, Langevin gave the lawmakers credit for “tremendous strides”: many fewer violations and the “complete elimination” of some practices such as the posting, day after day, of super-long agendas that make it impossible for the average citizen to know when a bill might really gets its hearing.

In 1998, then General Treasurer Nancy Mayer sought to close the “loophole in state law” that spares legislative committees from filing minutes with the secretary of state within 35 days, a requirement that that applies to other public bodies. Republican Mayer also sought to hold the Democrat-controlled legislature to the state’s equal

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**“The report ... revealed that violations of the Open Meetings Law were routine and widespread.”**

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employment and affirmative action laws, the Administrative Procedures Act and state purchasing law. But her bill went nowhere.

On February 3, 1999, newly elected Atty. Gen. Sheldon Whitehouse, a staunch believer in “separation of powers,” weighed in with his own opinion on the Open Meetings Law. In a letter to House Speaker John Harwood and Senate Majority Leader Paul Kelly, he wrote: “I feel obliged to inform you that this administration believes that the Open Meetings Law is not enforceable by this department against either House of the General Assembly, or any legislative committee thereof.”

While courts outside Rhode Island have “gone different ways to reach the conclusion that statutory Open Meetings Laws may not be enforced against legislative committees... the result has almost always been to keep the executive branch from intruding into internal legislative functions,” Whitehouse wrote. Though he was pummeled by critics, including Secretary of State Langevin, Whitehouse said he was only recognizing what his predecessors had tacitly acknowledged: that any attempt to enforce the law against the legislature was likely to fail in the courts.

Legislative leaders promised to abide by the law, regardless. Said House Majority Leader Gerard M. Martineau at the time: “We still think it is the right way to conduct business.”

28 With no fear now of any legal repercussions, some legislative committees have backslid. The House Judiciary Committee posted the same 13-page agenda for both March 28 and March 29, 2000, that guaranteed that no one outside the legislature’s inner circle would have any idea when and if the committee would take up any one of 87 posted bills, including guns, voter initiative, drunk driving penalties, a heavily criticized rewrite of the state’s public records law, affirmative action, and a new judgeship. In this kind of atmosphere, said H. Philip West, executive director of Common Cause, “there is both the danger that good legislation will die and that bad legislation will slip through.”

*Katherine Gregg is a Providence Journal reporter who covers the State House.*

# Why public records are important to the public

by Ira Chinoy

W hen used well, public records are among the most important tools available to American journalists. Beat reporters may check them to see whether officials they cover are twisting the truth. Small-town newspapers gather them into lists documenting the details of daily life — home sales, new incorporations, and street-by-street crime reports. Investigative reporters scour them to uncover startling facts that affect people in the most profound ways.

When Washington Post reporter Joby Warrick was tipped off by workers at a government-owned uranium processing plant that it had been contaminated by radioactivity, he knew there would be no story without evidence. He found much of it by poring through documents the plant was required to keep on file in a public reading room. “Data hidden in obscure studies, footnotes and charts confirmed everything workers had told us,” said Warrick. He reported that the contamination had turned up in the Kentucky plant’s work areas, locker rooms and cafeterias, and even in neighboring creeks and private wells. Reviewing other public records, including death certificates, the newspaper found evidence suggesting elevated rates of leukemia among plant employees, whose cancer deaths had been privately tracked by plant operators but never studied in a scientific way by impartial investigators with access to medical and work records. The federal government, which earlier downplayed the risks to workers, was prompted to apologize and agreed to compensate current and former workers for what was done to them.

Just what constitutes a public record varies from place to place. The concept, at its heart, is that records maintained by government agencies about their operations and the activities they regulate should be open to the public. There are exceptions, of course. Federal records affecting national security or pending criminal investigations are exempt, as are trade secrets and certain personal records that would constitute an invasion of privacy if released. But if a federal agency withholds records, it bears the burden of explaining why. States have enacted similar laws spelling out what can and cannot be disclosed.

Municipal budgets, payrolls, tax assessments, road construction bids, snow removal contracts, housing permits and school fire safety reports are typical public records. So are business licenses, real estate deeds and the forms filled out during government inspections of restaurants, nursing homes and food processing plants. Most documents filed in civil and criminal

courts are public. Some government offices are in the business of auditing other government offices, and those reports are generally public, too.

With these and other records reporters can begin to answer questions about what government does, whether it is doing what it should, and whether officials are abusing the public trust for themselves or their friends. Access to government records is part of what allows the news media and others to answer these questions independently of the way the officials themselves would respond.

Those who aspire to elected office and their supporters also leave a trail of records. Voter registration lists are public. So are reports of campaign contributions. While examining such records for the *Kansas City Star*, reporter Joe Stephens spotted a cluster of workers from a Massachusetts pool toy manufacturer — including secretaries and others of modest means — who were writing \$1,000 checks to Kansas Republican Bob Dole's presidential primary campaign in 1995. Some were registered Democrats and at least one was not registered to vote at all. Following those leads, Stephens was able to report that the source of some contributions was not the donors' own money, as required by law, but piles of cash supplied by an aide to the company's founder, a Dole fund-raiser who was said to have an interest in becoming an ambassador. The story led to a felony conviction, home confinement and record fines for the wealthy businessman, whom the judge accused of using "tainted money to pollute the political system."

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Public records are not confined to paper. Court rulings and new laws have permitted greater access to government records stored in electronic form. A Rhode Island judge ruled in the 1985 that the *Providence Journal* was entitled to certain computerized records of the Rhode Island Housing and Mortgage Finance Corporation, a state agency that financed low-rate mortgages for first-time home buyers. As a result, reporters could detect significant patterns among thousands of transactions. They discovered that sons and daughters of powerful state officials were getting loans at rates below those being offered to the general public.

Some people might shudder to think that their driving records are public, but computerized traffic court records have been used to report on troubling patterns in the traffic history of school bus drivers and leniency in the treatment of drunk drivers.

Federal law provides much less access to records detailing the inner workings of Congress than it does for other agencies. The Tax Reform Act of 1986 contained mysterious wording that appeared to provide hundreds of loopholes tailor-made for specific companies and individuals, but Congress provided little public information linking each tax break to its intended recipient. Working from available clues, however, veteran investigative reporters Donald

Barlett and James Steele, then with the *Philadelphia Inquirer*, spent 15 months examining all sorts of other public records trying to "crack the code," as Steele later put it. Their disclosures that the act's beneficiaries included the lawmakers' friends, big campaign contributors, and some of the wealthiest Americans infuriated ordinary taxpayers and earned the pair their second Pulitzer Prize.

Even when access to records is guaranteed by law, other barriers exist. Legitimate requests are routinely denied, and the appeal process can be time consuming and costly. Some agencies are notorious for delays — lasting months and even years — in providing documents. Though fees may be waived, some departments have done the opposite, requiring payments for paper or electronic copies far beyond what it would cost to produce them. And some records, even when released, are of dubious quality. There have been controversies, for example, over the accuracy of crime statistics collected by the Federal Bureau of Investigation from police agencies across the country. In several cities journalists and other investigators found that police displayed a pattern of underreporting violent crime.

One other barrier to the effective use of public records is not in government offices but in newsrooms. Reporters may not turn to documents and databases nearly as often as the law entitles them to, either because they lack the time, the initiative or the awareness. Organizations such as Investigative Reporters and Editors provide training, conferences and publications through which journalists adept at using public records can share what they have learned about the process.

At one of those conferences, Barlett and Steele, now with *Time* magazine, talked about their decades of experience using records. "Reading a document the third or fourth time," said Steele, "you will see things that were not there the first time." While young reporters may have grand visions of finding that one "blockbuster document," he said, the reality is that "documents are like a jigsaw puzzle. You find one piece here, one piece there, another over there. Every one of those pieces is so important to that end picture."

In the end, public records and what they may reveal are important to journalists because they are important to everyone. Though the rights and means of access have changed over time, the underlying concept is not new. America's founders believed that public knowledge about the affairs of government was vital. Journalist Walter Lippmann, an evangelist for accurate reporting, voiced a similar sentiment in 1919. "There can be no liberty," he wrote, "for a community which lacks the information with which to detect lies."

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# Privacy and the public

by Bob Zelnick

**O**n April 19, 1989, during firing exercises some 260 miles northeast of Puerto Rico, the middle gun in Turret Two aboard the battleship USS Iowa exploded, killing 47 sailors and hastening the day these dinosaurs of the sea were returned to mothballs.

The Navy immediately launched an investigation of the disaster. Within weeks, leaks from the Naval Investigative Service (NIS) suggested that the investigation had begun to focus on a seaman named Clayton Hartwig, one of those who had lost his life in the explosion. The word was that Hartwig had been despondent over the break-up of a homosexual relationship with another sailor aboard the ship and over his failure to obtain a coveted assignment to the security team at the U.S. Embassy in London. According to leaks, while serving as gun captain of the Turret Two middle gun Hartwig had managed to place an incendiary device between two of the powder bags. During the ramming procedure used to prepare the powder for ignition, the incendiary device was detonated, causing the powder to explode prematurely.

**32** During the entire period of the investigation, I was the Pentagon correspondent for ABC News. As I began my own inquiry into the case, I found several reasons to treat the Navy's leaks with skepticism. We learned that the ship's command had been careless in its handling of the gunpowder — storing it at temperatures considered too high to be safe — and had been conducting unauthorized and unsafe weapons tests. Close friends of Hartwig of both genders denied he had been homosexual. Letters from Hartwig shared with us by family and friends in his hometown of Cleveland were forward-looking and optimistic, according to several independent psychiatrists I consulted. One sailor from the Iowa, himself a former security guard at the London embassy, told us Hartwig had spent his last night on earth seeking advice on how to handle what he thought would be his new responsibilities. Another sailor told us that Hartwig had not even been scheduled to work in Turret Two until the morning of the disaster, something which would completely undermine the notion of premeditation.

My assistant, Mark Brender, and I followed our own leads on a number of fronts. These included at least three written inquiries made pursuant to the Freedom of Information Act. First, we requested complete records of the storage of gunpowder aboard the ship as well as the documents related to recent firing tests. Second, we requested a status report as of the date of Hartwig's death on his

requested assignment to the U.S. Embassy in London. And finally, we requested a copy of the duty roster for the final voyage of the Iowa. We emphasized that the request was time-urgent and we also told the Navy we were prepared to appeal any denial of our request.

To its credit, the Navy made all this material available. And their information reinforced my conclusion that the NIS investigation was hopelessly off-course. The Navy's careless storage of the gunpowder and unauthorized gun exercises were confirmed. Hartwig's assignment to London was so close that he was not even on the duty roster for that final voyage because both he and the Navy assumed he would be separated from the ship and sent to London before the training exercise was completed.

To close the chapter on this account, the Navy released its scurrilous report on the incident, which I challenged, both on ABC and in an op-ed page piece in the New York Times. Both Houses of Congress held hearings on the affair. Sen. Sam Nunn, chairman of the Senate Armed Services Committee, "requested"

— in reality, ordered — the Navy to submit its physical evidence for review by the Sandia National Weapons Laboratory in Los Alamos. Sandia concluded that there was no physical evidence to support the incendiary device theory. And it found that it could replicate the explosion by subjecting the powder to greater than normal pressure, thus strongly suggesting an over-ramming accident. Eventually, the Navy withdrew its first report and issued a second, saying it could not determine the cause of the explosion aboard the USS Iowa. It expressed regrets to the Hartwig family.

I think about the USS Iowa and the Navy's irresponsible first investigation and the agony it caused the Hartwig family — already grieving the loss of their son — every time I hear of efforts to restrict public access to government records and documents in the name of privacy. I would hate to think that anything we sought back in 1989 as part of our legitimate effort to investigate both the standard of care practiced aboard the Iowa and the Navy's investigation of the explosion, could be held beyond our lawful reach under today's federal or state standards or those that are under consideration.

Efforts to restrict access to government controlled

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**“Efforts to restrict access to government controlled information are today widespread.”**

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information are today widespread. They involve all three branches of government — the executive, legislative and judicial — and, with respect to the judiciary, include both decisions and the administration of the court system. This process of retrenchment began nearly two decades ago with the 1982 Supreme Court decision in *United States Department of State v. Washington Post Co.* There the court read broadly the language of an exemption to the Freedom of Information Act that dealt with “personnel and medical files and similar files.” The term “similar files” was read by the justices to include any file that “applies to a particular individual.” That language was held broad enough to prevent release of the final words of the crew of the Challenger recorded by mission control, in effect extending the right of privacy beyond the grave. That is interesting because, as you know, a deceased’s estate has no claim for damages even against one who has disseminated false, malicious, and defamatory statements, the theory being that a dead person can suffer no damage from such insults. Apparently the dead are more sensitive about invasions of privacy than malicious insults.

In a second case, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, which involved FBI “rap sheets” on organized crime and corrupt politicians, decided in 1989, the Supreme Court established the so-called “practical obscurity” standard, meaning that even information once in the public realm could be withheld by the government if the interests of confidentiality outweighed the public value of the information. The case also narrowed the scope of the public interest to be weighed to the “core purpose” of FOIA: to shed light on an agency’s performance of its statutory purpose.

More recently, in the 1998 case of *Kallstrom v. City of Columbus*, the Sixth Circuit ruled that Ohio’s “right of access” law, which made available the personnel records of state employees, including undercover police officers, constituted an unconstitutional breach of privacy — the first time ever that a federal court invalidated a state open government law on constitutional privacy grounds.

Both the federal and state governments have also made significant moves in the direction of privacy versus access. Just last month the Bush Administration introduced a sweeping set of guidelines under the Health Insurance Portability and Accountability Act of 1996 giving patients greater control over their medical records, restricting those who can view such records, and requiring documentation each time the records are reviewed.

And last year, in the case of *Reno v. Condon*, the U.S. Supreme Court upheld sections of the Driver Privacy Protection Act of 1994, which bans states from disseminating information contained on

driver’s licenses. Many states were making millions a year selling this information to commercial customers.

The states too have been active in extending so-called privacy rights. Three years ago, Mississippi became among the first states to close 911 calls to the public and last year its state House overwhelmingly rejected a proposal that would allow some records of 911 calls to be released.

A second example involved the February death of NASCAR superstar Dale Earnhardt at the Daytona 500 race. The Orlando Sentinel requested the autopsy photos of Earnhardt, not for publication, but as part of an investigation into NASCAR safety. Earnhardt’s widow, Teresa, fought the move, saying she feared the pictures would wind up on the Internet, and NASCAR fans besieged the legislature and governor’s office with demands not to let this happen. In just three weeks, the legislature passed and Governor Jeb Bush signed a law restricting the release of autopsy photos unless done pursuant to a court order. After signing the bill into law, Gov. Bush posed with the Earnhardt widow on the steps of the Capitol.

Rhode Island, too, appears to be moving to make confidential a vast array of individual information, including medical and psychiatric records, child custody and adoption records and information about grades on employment exams, and academic performance generally. Alleged victims of sexual abuse would also have most records shielded.

Many of these laws and proposals — in Rhode Island and elsewhere — reflect legitimate concerns about individual privacy. Many are targeted at forms of dissemination or publication — particularly for commercial purposes — which may only incidentally include the media. Yet many deprive the media of vital tools of their trade, and the public of some potentially critical information.

Take the *Kallstrom* decision, for example. At first blush, many might applaud the protection of personnel records on constitutional privacy grounds. But think back just a few weeks to the killing of a fleeing black youth in Cincinnati by a white officer seeking to arrest him on more than a dozen misdemeanor charges — and the subsequent riots and allegations of racism. Would knowledge of that officer’s personnel record be in the public interest? Many would say, yes. I certainly would. After all, who’s employing him in the first place?

The other cases are also more complex than one might at first suspect. Investigative reporters sometimes use the information from drivers’ licenses to find sources or bring troublesome material to light. For example, as noted in a research paper by one of my Boston University journalism students, the Atlanta Journal-Constitution searched through 5.4 million computer

files to identify 43 drivers who had at least 15 drunken-driving convictions, many of whom had successfully and repeatedly renewed their licenses. And the St. Petersburg Times used the computer to identify substitute teachers who had criminal records, some for sex offenses.

As for 911 calls, what better way to check on the quality of police response to emergencies than to employ the taped calls as a point of reference.

With respect to the Earnhardt autopsy photos, I understand they have already appeared on the Internet. More to the point, might they have contributed to better auto safety for the men who drive the racecars? Balanced against the privacy interests of a decedent, I would be surprised if the law passed in only three weeks survives future constitutional and political scrutiny.

Rather than a comprehensive review of the Rhode Island bills, a few cursory observations are in order. First, with regard to victims of domestic assault, there may be circumstances where the victim or her children are placed at greater risk when their location is made public. Where no such special danger is present, however, I think the more sexual abuse and assault crimes are treated like all others, the more we will do to remove the self-described shame or stigma of some of the victims. And the more we will do to erase what Professor Alan Dershowitz of Harvard Law School claims is an inequality in the law: the name of the alleged perpetrator is made public — to his infinite shame and humiliation — but the alleged victim is protected from disclosure.

Another observation about Rhode Island. It would be most unfortunate if privacy laws became a shield against criticisms for policies a majority of Rhode Islanders may oppose. For example, if the state university system maintains a program of racial preferences whereby minorities with lower objective credentials are admitted, it would be highly relevant to see how they perform vis a vis their class at large. The same would hold true for, let us say, a promotion exam for firemen. Are we following test score results, or notions of social justice? The public has the right to know.

Again, let us not ignore the public benefits of access and plunge blindly into the forest of confidentiality. The Reporters Committee for Freedom of the Press offers the following limited sample of important stories broken because of access by journalists to public records:

- The Syracuse Post-Standard discovered that thousands of bridges in New York had not been inspected on schedule and that when they were, many were found to be in dangerous condition.
- The Atlanta Journal and Constitution analyzed hospital bills in Georgia and found major

discrepancies at what patients were charged for identical services at different facilities.

- The News Tribune of Tacoma, Washington, found hundreds of pounds of military explosives are stolen each year, much of it winding up in the hands of criminals or white supremacist paramilitary organizations.
- In 1988-90, despite soaring homicide rates in the District of Columbia, the Washington Post found that 75 percent of the city's murders were not even prosecuted.
- US News and World Report disclosed that many patients were still receiving transfusions of HIV or hepatitis-infected blood as well as mislabeled, contaminated or mistested blood despite health officials' assurances to the contrary.
- I can add one or two further examples of my own. After the Associated Press received a Pulitzer Prize for its account of an alleged U.S. troop massacre of South Korean civilians at No Gun Ri in 1951, US News and other papers used FOIA to document the fact that as many as three of the AP's key sources were not even at the scene of the alleged massacre.
- And in my research for a book I am writing on the Florida Bush-Gore contest, I came across a Miami Herald piece which reported that on the basis of analysis of 500,000 ballots cast in 12 counties, it was clear that at least 445 convicted felons voted illegally and as many as 5,000 may have done so statewide. Incidentally, 75 percent of them were registered Democrats.

Despite these public benefits of access, one must ask why is there so much activity running in the opposite direction now? I think there are two reasons. The first, of course, is the coming of the computer era, the wired society with all the attendant loss of privacy risks. Americans are only now beginning to realize how much about themselves they disclose when they apply for a driver's license, or even check out at a supermarket counter, let alone file for bankruptcy, purchase a home, engage in a custody battle, register to vote, check into a hospital for surgery, shop by catalogue, subscribe to a magazine or join a club. In the hands of an adept computer operator, this information will be as widely shared as his list of clients. As one executive commented, "You have no privacy. Get over it." (Of course, my own personal fantasy has been to obtain the subscription list to *Cosmopolitan Magazine*. All my life I have wanted to meet the woman who knows 125 ways to give him a turn-on he'll never forget.)

The second factor is widespread distrust of the press. The press, in the view of many, is no longer the New York Times of the Scotty Reston era and the CBS News of the avuncular Walter Cronkite.



Instead it is the pestilential horde of Drudge Reports, screaming talk radio, rumor-mongering Web sites and slashing ideologies.

As a result, when the debate over privacy and media rights enters the public domain, most people focus not on rigorous investigative work but instead on the publication of the Starr report on the Clinton-Lewinsky relationship, or Princess Diana's car hurtling through a Paris tunnel, paparazzi in hot pursuit. The general view appears to be that greater media access to information means an inevitable increase in seamy or prurient details in which most people profess to have little interest. In his insightful book, "The Unwanted Gaze," distinguished legal scholar Jeffrey Rosen complains that the media's ability to cast light on the tawdry details of a person's private life makes it impossible for the public to judge the complexities of his or her entire personality. He writes: "Knowing everything about someone's private life inevitably distracts us from making reliable judgments about his or her character and public achievements."

If Rosen's complaint sounds hauntingly familiar, consider this indictment of the press: "The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."

The author's recommended solution: creation of a right of privacy to arm the victims of this intrusive press. The author: Louis Brandeis writing with Samuel Warren in 4 Harvard Law Review 193 (1890). Those Brandeis remarks are much quoted today. Mentioned much less often is the crisp Brandeis observation — spoken much later in life — that "sunlight is the best disinfectant."

Today the courts themselves are wrestling with the problem of privacy in the administration of their own system. Until recently the records of court cases both civil and criminal were kept in paper files open to those members of the public interested enough to come to the courthouse and search for them. But with the rapid computerization of such files, members of the media, employment agencies, credit bureaus, insurance companies and other interested parties can access this information within minutes. Applying the theory of "practical obscurity" first articulated by the Supreme Court in the DOJ v. Reporters Committee case of 1989, many court administrators have expressed concern that the wholesale access made possible by computer technology will play havoc with the right to privacy.

The Administrative Office of the Federal Court System has been seeking comments on how to accommodate the competing public interests of reasonable privacy and the right to know. The options include continuing to assume the records are public, reclassifying them to make some available and some not, providing different "levels of access," with the parties, their lawyers and court staff entitled to everything promptly and the media and others entitled to some lesser degree of access. Under most proposals, the most restricted material would involve criminal cases where "Access to documents such as plea agreements, unexecuted warrants, certain pre-indictment information and pre-sentence reports would be restricted to parties, counsel, essential court employees, and the judge."

The Maryland state judiciary went through a similar exercise last year. Its proposal would have restricted computer access, now subscribed to by some 3,000 firms, and allowed administrators to turn aside file requests that are "unduly burdensome." The proposal drew fire from many fronts. A private detective wondered whether without speedy access to court records she would have been able to identify the convicted child molester who had applied for work as a baby-sitter. And the manager of a nearby nuclear plant felt his access to court documents had helped him identify a potential saboteur applying for work at the facility. The Washington Post worried that "reporters and representatives of citizen groups critical of judges or court procedures (might) find themselves inexplicably denied information they need." Moreover, as the Post editorialized, "Banks use the system to make background checks on tellers, day care centers, to check for criminal records of potential employees. Parents seek information about day care centers and schools." In the end, the Maryland courts abandoned their effort to revise the rules and decided instead that the difference between paper and computer files is one of degree rather than kind.

I confess that I place a rather high premium on the right to privacy. Though not of a conspiratorial bent, I personally would prefer my grocery purchases remain a matter known only to myself, the lady behind me who complains I have too many items for the line I'm in, and the valedictorian at the counter who can't tell the difference between plastic and paper. I have always viewed my financial

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**"The manager of a nearby nuclear plant felt his access to court documents had helped him identify a potential saboteur."**

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condition as privileged material, certainly to go no further than my accommodating local bookie, though concededly it's tough to keep that information from one's banker, the beady-eyed huckster who sold you your used car and the financing to get it off the lot, your mortgage holder, your credit card company, the financial aid office at your daughter's law school, your accountant, your brokerage company, and the friendly IRS agent who is just an eyelash short of being able to indict you. As to my medical records, I blush when I have to buy a bottle of aspirin, let alone Viagra.

Yet despite this love of privacy, I am concerned about restrictions that protect no vital interest, that are not narrowly tailored, and that potentially cause many problems for the work of a free press. Today, as a student of mine observed, the mouse and the spreadsheet are, to many reporters, as important as shoe-leather and the notepad. Computer-assisted reporting is now studied in the journalism schools, and practiced in the field. The Seattle Times won one Pulitzer Prize for a computer-assisted report documenting that the Boeing 737 had potentially fatal flaws, and a second for a report documenting how Indian tribal leaders were buying expensive homes while 100,000 Native Americans remained in need of basic shelter.

I would suggest that some of the restrictions now being proposed are unconstitutional on their face, while others seem to be grounded in theoretical rather than documented need. In the first category are those seeking to prevent the publication of information on the public record or otherwise lawfully obtained by the press regarding the victims of crime, or witnesses, or other matters to come before the court. In a long line of cases beginning with the 1979 Supreme Court decision in *Smith v. Daily Mail*, the court has held the press immune from prior restraint, criminal punishment, or civil damages for printing the information. The three reasons are: First, that the legitimate privacy interests do not suffer since the protection extends only to lawfully obtained information. Information obtained, for example, by wiretap, bugging or computer hacking would fall outside the zone of protection.

Second, as Justice Thurgood Marshall wrote in *The Florida Star v. B.J.F.*, where a law banning publication of the names of rape victims was thrown out, "Punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." In other words, if it's obtainable through public channels, it is going to come out one way or the other.

And third is the issue of timidity and self-censorship. The courts simply do not want the press fearing its own shadow. It knows democracy works best with a robust, confident press, whatever the

occasional excesses and irresponsibility. Again quoting Justice Marshall, "We continue to believe that the sensitivity and significance of the interests presented in the clashes between the First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." And quoting the *Daily Mail* decision: "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."

As I mentioned, we are also witnessing mighty responses to magnificent non-threats. Just last year, Congress passed and President Clinton vetoed what would have been America's version of Britain's Official Secrets Act, banning publication of classified information likely to compromise national security or harm U.S. soldiers.

Well frankly, I would be more open to the remedy if someone would inform me what the problem is. Which reports from what reporter during war or peace have proven damaging to U.S. national security interests, dangerous to the lives of American troops, or of benefit to any enemy, past or present? I can't think of any, and I covered Vietnam as a freelance reporter and the Pentagon during eight years in the '80s and '90s, a period that included the end of the Cold War, the invasion of Panama, and the conduct of the Persian Gulf War. During that time I and my colleagues at NBC and CBS broke many stories involving classified information. Did we ever jeopardize U.S. national security interests, or put the lives of American soldiers at risk, or benefit an enemy of this country in any way? I think not.

So again I ask: Is there a valid concern about privacy in the computer age? Yes. Are there some legislative steps that might offer a plausible response to at least part of the problem of involuntary disclosure of private information? Probably. But let us act with a healthy regard for Constitutional principle and precedent. And let us not target the press, which claims a special and constitutionally protected place in the working of a free society.

To date, the abuses, while potentially troublesome, do not strike me as overly threatening, and, to the extent they may be, they should be approached with a scalpel and not a butcher knife. There is never a good time to roll back First Amendment principles. Doing so at the dawn of the computer age seems particularly misguided.

*The preceding was a lecture delivered at Brown University on May 2, 2001. Robert Zelnick spent twenty-one years with ABC News covering political and congressional affairs. He now teaches in the Department of Journalism at Boston University.*

# Censorship at the source: the worst kind

By Paul McMasters

**M**aximum access to government information is a fundamental right and a shared responsibility of both the press and the public. Despite that, freedom of information is in deep trouble today. And because it is in deep trouble, democracy is in deep trouble. The public and the press alike must recognize that delay and denial of access to government information is in fact censorship. It is censorship of the most insidious sort because it is censorship at the source.

This form of censorship starts at the very top. Washington, D.C., the capital of the open society, is awash in secrecy and efforts to keep information from the American people. Just a few examples:

Reps. Tom Davis and Jim Moran of Virginia introduced legislation that would exempt exchanges of information between the federal government and private businesses from the federal Freedom of Information Act. Supposedly, the bill would prevent cyber attacks against critical infrastructure. So they propose to blow a real hole in the FOIA rather than patch a possible hole in our cyber security,

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This same sort of cyber-panic resulted in a massive compromise of the people's right to know last summer when a bill was rushed into law to prevent the EPA from making information available to millions of citizens living in the shadow of 30,000 chemical facilities — information crucial to their own health and safety.

Also last year, Congress slashed funds to put a halt to the declassification of massive stores of secrets no longer considered injurious to national security but of great importance to historians, researchers and ordinary citizens.

The story is just as sad at the state level. In the past three years, journalists and concerned citizens in a dozen states have conducted FOI audits of government agencies, with alarming findings. Routinely and regularly, government officials are violating the states' sunshine laws by refusing to turn over records requested by citizens.

These audits have demonstrated three things: Ignorance of the people about their rights, ignorance of public officials about their responsibilities under the law, and unwillingness by attorneys general to punish the offenders. But it is at the local level, where the actions of government are most likely to intersect with the day-to-day lives of Americans, that we find the most depressing

attitudes toward access.

If there is any doubt just how closed a society we have become, here are some things officials on city and county councils, commissions and boards do to shut out the people:

- They go into secret sessions.
- They conduct “virtual” meetings by telephone, fax or e-mail.
- They meet in small, less-than-quorum groups.
- They won't accept agenda suggestions from the public.
- They impose onerous requirements for a citizen to get an issue on the agenda.
- They won't allow negative comments about public officials or employees by name.
- They won't allow citizens to speak about certain topics or more than one topic.
- They strictly limit the amount of time a citizen can speak.
- They remove citizens from the room or make them sit down if they are not deemed to be speaking in a respectful or deferential manner.
- They conduct the people's business during “retreats,” professional gatherings or other meetings remote from the community.
- They require the city or county attorneys to look after their interests rather than the interests of the taxpayers.
- To add insult to injury, they justify these actions as being for the people, rather than their own convenience and comfort. Thus:
- They exploit the panic over personal privacy to put even more information out of reach.
- They describe government information as a revenue source and turn it over to private vendors, explaining that they are making money when in fact they are compelling the taxpayers to pay for the same information twice.
- They refuse to disseminate information unless forced to, and do not fully or effectively utilize new technologies to make more information available more quickly.

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**“The primary culprits, of course, are government officials who develop a proprietary attitude toward information.”**

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It all adds up to the shutting of the public out of the political and governmental process on a massive scale and gives the lie to the whole idea of an open society.

How did we get to this?

The primary culprits, of course, are government officials who develop a proprietary attitude toward information. Information truly is power. It's also a nuisance to spend time and resources on sharing it with the taxpayers who footed the bill for its collection in the first place. But the American press also bears some blame for this sorry lack of access to information. Government officials always have tried to control the journalists — for reasons good and bad.

From the beginnings of this nation, the method of control was primarily censorship. Early on, the fledgling nation's security was the rationale of choice for punishing the press and shutting it down for the dissemination of inconvenient information. From the time of John Peter Zenger on, journalists were routinely jailed and censored.

While censorship could be justified more easily during wartime, however, it gradually became a tougher proposition during peacetime. Although there were no significant pro-First Amendment decisions by the Supreme Court until after World War I the idea of a free and independent press in fact, as well as on paper, gradually began to take hold.

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So as overt censorship of the press by the government became more difficult, other methods of keeping the press in line had to be perfected. Thus, withholding of government information and secrecy became a high art, including propaganda, disinformation, and news management — all the tools that one normally associates with a dictatorship.

What government could not accomplish by punishing the press it learned to accomplish by starving the press. This was a different brand of censorship — at the source — but censorship nonetheless. And it was a frontal attack on the Jeffersonian principle of an informed citizenry. Of course, it wasn't about the press at all. But the press fell into the trap of taking it personally and forever damaged the cause of access by acting as if this was about the press and not about the people and basic democratic principles.

At a time when many Americans think of the press as part of the problem rather than part of the solution, delay and denial of access offers an opportunity for the press to change that perception. The press must do a better job of holding government officials to account on excessive secrecy. The press can start by recognizing that freedom of information is not "inside baseball" but a right of the

people. Then it can make the case that denial and delay of access are forms of censorship as pernicious and anti-democratic as burning books and jailing journalists.

Indeed, there is no justification for censorship in a democratic society. All censorship is bad, but censorship of the press is particularly threatening. Censorship of books and other media generally has to do with sex and other naughtiness. Censorship of the press, on the other hand, almost always has to do with suppression of the truth about our governance and the things that affect our daily lives and livelihoods in profound ways.

So what do we do? I don't pretend to have all the answers but I do have some proposals. Here are just a few things the press can do:

- Muster as much outrage on behalf of the public as it does for itself.
- Cover FOI issues much better and more regularly than it does now.
- Make sure articles made possible by FOI laws make that clear to readers and listeners.
- Editorialize on freedom of information issues.
- Watch lawmakers and lawmaking concerning access more closely.
- Conduct an audit of public officials' compliance with sunshine laws.
- Recognize good work by citizens and political leaders in opening up government meetings and records.
- Go to court to assert the public's access rights more often.

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**“Censorship of the press has to do with suppression of the truth about our governance and the things that affect our daily lives and livelihoods.”**

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Here are some things that the public can do:

- Demand to know the positions on access of candidates for office.
- Attend public meetings and speak up.
- Request public records regularly.
- Hold elected officials at all levels accountable on their access policies.
- Support laws that open up government meetings and records.
- Be persistent and insist on being heard.

And while we're handing out assignments, here are some for public officials, too:

- They need to begin with a presumption that records and meetings are open.
- They need to resist a proprietary attitude toward public records and a dismissive attitude toward citizens' right of access.
- They need to view citizen requests for information as an opportunity to involve more people in the political process and their own governance.
- They need to find ways to make more information available to more people — without their having to ask for it.
- They need to recognize that an informed citizen is a more trusting citizen. A more trusting citizen is a more involved citizen. And a more involved citizen is the foundation of good government.

Why does it matter? It matters because in an environment of secrecy and information suppression, citizens grow increasingly distrustful of their leaders, increasingly unsupportive of decisions made behind closed doors, increasingly suspicious of secrets locked away in files, and increasingly angry at bureaucratic resistance to granting access to even the most routine records.

**46** In such an environment, paranoia and conspiracy theories thrive, and opportunities for improving government policies and practices go begging. In such an environment, it is not just the dream of democracy but the reality of democracy that begins to shrivel and confront the idea of a slow death.

*This is an edited version of a speech Paul McMasters gave in receiving the John Peter and Anna Catherine Zenger Award from the University of Arizona. McMasters is the First Amendment Ombudsman at the First Amendment Center. He may be contacted at [pmcmasters@freedomforum.org](mailto:pmcmasters@freedomforum.org).*

## Your right to federal records

by Lucy Dalglish

**E**very significant aspect of life in the United States is affected by the federal government. But it wasn't until 1966 with the passage of the federal Freedom of Information Act that the public was able to receive information about the government's activities. By making all records of federal government agencies presumptively available to you upon request, this Act guarantees your right to inspect a storehouse of government documents.

Journalists and scholars, in particular, have used the FOI Act to investigate a variety of news stories and historical events. Their revelations, based on documents they received, have often led to change where change was needed. In 1996, for example, when a ValuJet crash in the Everglades killed 110 persons, the Cleveland Plain Dealer had documents in hand showing what the government knew about safety problems at the airline. It had just completed a series of articles on safety problems at small airlines, a series which relied significantly upon records received through FOI requests to the Federal Aviation Administration.

In 1995, the Dayton (Ohio) Daily News used the Act to learn that women in the military endured cavalier responses to charges of rape brought against enlisted men and officers, many of whom had faced multiple charges. In 1993, that newspaper perused Occupational Safety and Health Administration databases obtained through the Act to identify the most dangerous work places in the country.

Other reporters have used the Act to identify wasteful government spending. In the early 1990s a request by an Associated Press reporter led to a story about a little known \$200 million federal program to advertise U.S. food and drink overseas. Monies were going to companies such as McDonald's, Burger King, Pillsbury, Dole, M&M-Mars and Jim Beam, all of whom had substantial advertising budgets of their own to draw on.

The Act has been used for myriad other purposes such as to uncover important information about the Rosenberg spy trials, FBI harassment of civil rights leaders, surveillance of authors, international smuggling operations, environmental impact studies, the salaries of public employees, school district compliance with anti-discrimination laws, and sanitary conditions in food processing plants. Reporters have successfully used the FOI Act to learn about crimes committed in the United States by those with diplomatic immunity, cost overruns of

defense contractors, and terrorist activities, including a plan to assassinate Menachem Begin during a trip to this country.

### How It Works

The federal FOI Act, 5 U.S.C. § 552, gives you access to all records of all federal agencies in the executive branch, unless those records fall within one of nine categories of exempt information that agencies are permitted (but generally not required) to withhold. Even if requested information arguably or technically falls within an exemption, the U.S. Attorney General has ordered that agencies should not invoke that exemption unless they can point to a “foreseeable harm” that will occur as a result of the disclosure.

You may try to make an informal telephone request to an agency to obtain documents. However, agencies frequently require that requests be made in writing. In fact, you establish your legal rights under the FOI Act only by filing a written request. Once you have filed an FOI Act request, the burden is on the government to release the documents promptly or to show that they are covered by one of the Act’s exemptions. At all agencies, a designated FOI officer is responsible for responding to FOI Act requests.

According to the statute, the agency must respond to your written FOI Act request within 20 working days; however, as a practical matter, agencies frequently extend the time for response. A “response” to a request is a grant or denial of the records sought. A simple acknowledgment by an agency that it has received your request does not count as the response to which you are entitled under the FOI Act.

If you have an urgent need for the information, you should ask for “expedited review.” You are entitled to expedited review if health and safety are at issue or if you are a person primarily engaged in disseminating information and there is an urgency to inform the public about an actual or alleged governmental activity. Agencies may also decide that they will grant expedited review for additional categories of records. For instance, the Justice Department grants expedited review for requests concerning issues of government integrity that have already become the object of widespread national media interest.

An agency may charge you the reasonable costs of providing the documents; however, you may be entitled to reduced fees or fee waivers. For instance, agencies cannot charge representatives of the news media for costs of searching for records.

If an agency refuses to disclose all or part of the information, or does not respond within 20 working days to a written FOI Act request, you may appeal to the agency’s FOI Appeals Officer. You may avoid the agency appeal and go directly to court only if the agency does not respond within the required time

period. An appropriate agency response is a grant or denial of the requested information. The agency may also appropriately respond that it is extending its time limit for granting or denying the information by up to 10 additional working days if voluminous records must be searched, records must be retrieved from various offices or several agencies must be consulted.

If you file an administrative appeal that is denied or not responded to within 20 working days, you can then file a lawsuit in a federal court convenient to you. If you can demonstrate the need for prompt consideration, you may ask that the court give expeditious consideration to your case. If you win in court, a judge will order the agency to release the records and may award you attorney’s fees and court costs.

The FOI Act applies to every “agency,” “department,” “regulatory commission,” “government controlled corporation,” and “other establishment” in the executive branch of the federal government. This includes Cabinet offices, such as the Departments of Defense, State, Treasury, Interior, Justice (including the Federal Bureau of Investigation, the Immigration and Naturalization Service and the Bureau of Prisons); independent regulatory agencies and commissions, such as the Federal Trade Commission, Federal Communications Commission and the Consumer Product Safety Commission; “government controlled” corporations, such as the Postal Service and Amtrak; and presidential commissions. The FOI Act also applies to the Executive Office of the President and the Office of Management and Budget, but not to the President or his immediate staff.

The Act does not apply to Congress, the federal courts, private corporations or federally funded state agencies. However, documents generated by these groups and filed with executive branch agencies of the federal government become subject to disclosure under the Act, just as if they were documents created by the agencies. Congressional agencies such as the Library of Congress and the General Accounting Office follow their own records disclosure rules and procedures patterned after the FOI Act.

The FOI Act also does not apply to state or local governments. All states have their own “open records” laws which permit access to state and local records. (Information on how to use these state laws is available from The FOI Service Center of the Reporters Committee for Freedom of the Press. The

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Reporters Committee publishes “Tapping Officials Secrets,” a compendium of open government laws for each state and the District of Columbia.) If documents of a state or local government are submitted to a federal agency, they become subject to the federal FOI Act. This would occur, for example, when a state or local agency that receives federal funds through the Office of Justice Programs submits reports to the agency accounting for how the funds were spent.

The FOI Act is very broad. It covers all “records” in the possession or control of a federal agency. The term “records” is defined expansively to include all types of documentary information, such as papers, reports, letters, films, computer tapes, photographs and sound recordings. But physical objects which cannot be reproduced, such as the rifle used to assassinate John F. Kennedy, are generally not considered “records” under the Act. If in doubt as to whether the material you want is a “record,” assume it is and request it.

When requesting records, you must “reasonably describe” the material you want. This does not mean you need to know an exact document or docket number, but your request should be specific enough so that a government employee familiar with the subject area can locate the records with a reasonable amount of effort. Your request should be made for existing records only. The FOI Act cannot be used as a way to compel an agency to answer specific questions you might have, and agencies will be very quick to tell you that they do not have to “create” records under the FOI Act.

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However, if it seems more practical for both you and the agency, you may offer to accept the information you seek in a list or other abbreviated response rather than in copies of source documents.

Most people think of the FOI Act in terms of requesters, people who write to agencies seeking information. But the Act goes further to make information public. It mandates publication requirements and reading room requirements. Newer legislation requires that those materials be available electronically and that the government take other steps to make information easily available to you.

An FOI Act request may be made by “any person.” This means that all U.S. citizens, as well as foreign nationals, can use the Act. A request can also be made in the name of a corporation, partnership, or other entity, such as a public interest group or news organization. Members of the news media have no more and no fewer rights to information under the Act than other requesters. To obtain information, you do not need to tell the agency why you are making a request. However, advising the FOI officer that you are a journalist, author or researcher and intend to publish some or all of the requested

information may encourage prompt consideration of your request and entitle you to fee benefits. If the informal approach does not succeed, exercise your rights under the FOI Act to make a formal request. To preserve all your rights under the Act, your formal request must be made in writing. Any reporter, author, or researcher should be able to write his or her own request letter.

Each federal agency subject to the FOI Act has a designated FOI Act officer responsible for handling information requests. Large cabinet agencies, such as Defense and Agriculture, have separate FOI officers for their various subdivisions and regional offices. If you are sure which subdivision of an agency has the records you want, send your request letter directly to that FOI officer. If you are uncertain, send your request to the agency or departmental FOI officer, who will then forward it to the appropriate division. You will save time by calling the agency first to determine where the records you seek are located and where you should direct your request.

Sometimes it is advisable to send separate requests to agency headquarters and to field offices that may have records you want. The FBI, for example, searches its field offices for records only when requests are made directly to those offices; a request to the Bureau in Washington will lead only to a search of its central files. If you are unsure which federal agency or office has the records you want, send the same request to several agencies or offices.

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Address your request letter to the FOI officer at the appropriate agency or subdivision. Most agencies will accept a request by hand delivery, mail or fax. If you mail your request, mark the outside of the envelope “FOI Act Request.” If you send the request by registered mail with return receipt requested, you may be able to track the request if you should later need to do so. Keeping a photocopy of your letter and your receipt will help you later if you need to make an appeal.

Generally a request letter should contain the elements included in the Sample FOI Act Request Letter, which can be found at the Reporters Committee Web site ([www.rcfp.org](http://www.rcfp.org)). However, any written request is covered by the FOI Act. The Reporters Committee publication, “How to Use the Federal FOI Act,” is on the Web site and includes an automatic request letter generator, a sample appeal letter and addresses of federal agencies. In most cases, you should be able to prepare a simple request letter by yourself, but if you need assistance, you may call The FOI Service Center at 1-800-336-4243.

*Lucy Dalglish is the Executive Director of the Reporters Committee for Freedom of the Press.*

# September 11th: your rights and the nation's security

By Jane E. Kirtley

**D**epending on whom you talk to, either everything changed on September 11, 2001, or nothing changed.

Most Americans would like to think that the core values that are central to our society — the vision, the concepts, the ideals that make us what we are — emerged stronger than ever out of the rubble of the World Trade Center towers. Some of the most important of those, at least to me, would include the right to find out what our government is up to and to express ourselves freely.

But the reality is that, as has so often been the case in times of crisis, the initial, knee-jerk reaction of many of those in government has been to jettison those fundamental rights in the name of achieving greater security. And for the most part, the public has been indifferent, or even complicit.

The reason for this attitude can probably be attributed to the fact that most Americans had little or no prior personal experience with terrorist attacks before September 11. They bought the argument that it was the openness of our society that made us vulnerable. And in panic and desperation, they instinctively demanded that the government take steps to make sure nothing like that ever happened again, no matter what the cost.

And so, with little discussion and less dissension, Congress passed the USA PATRIOT Act just a few weeks after the attacks. The law is the embodiment of the FBI's ultimate wish list, granting sweeping new authority to the law enforcement community to monitor our telephone conversations and intercept our e-mail communications.

People who should know better have said that this kind of surveillance is unqualifiedly a good thing. It will protect us from the "bad guys." And, besides, if you aren't doing anything illegal, why should it bother you if the government is keeping tabs on what you say and what Web sites you visit?

There are many flaws in that reasoning, but let's mention just two. First of all, law enforcement officials themselves would admit that electronic surveillance is only one imperfect method of trying to track down terrorists, and that, inevitably, innocent people who have nothing to do with illegal activities will also be caught up in this type of electronic sweep. And second, only those who have

never experienced life in a totalitarian state — or have never bothered to read the history of the FBI during the J. Edgar Hoover years — would be confident that their "innocent" activities could never be misconstrued as suspicious, or worse. If you know you are subject to government surveillance, it will change the way you act, speak and think. I, for one, am not prepared to abandon the Bill of Rights in return for vague promises that doing so will keep me safe.

Even if you are fortunate enough not to be the target of an investigation yourself, spare a thought for those who are. Perhaps they are people who don't look much like you. Perhaps they speak a different language. Perhaps they aren't even American citizens. Who cares if a few hundred of them are kept in secret custody by the government?

Fortunately, some federal judges do. In early August, Gladys Kessler, a federal district judge in Washington, D.C., ordered the Justice Department to disclose the names of individuals detained since September 11, despite the government's insistence that doing so might compromise national security. And a few weeks later, a U.S. Court of Appeals panel ruled that deportation hearings for aliens, even the so-called "special interest" cases involving individuals suspected of having some kind of terrorist ties, must be open to the press and the public.

"Democracies die behind closed doors,"

Circuit Judge Damon J. Keith reminded us.

But secret justice is only one aspect of the new, post-9/11, regime. The executive branch has seized on national security concerns as a pretext to revamp the Justice Department's policy governing responses to requests under the Freedom of Information Act. A memorandum issued by Attorney General John Ashcroft in October advised government bureaucrats that the Justice Department would defend their decisions to withhold records from disclosure as long as there was some "sound legal basis" for doing so. This is a major shift from the articulated policy of the previous administration. At least on paper, the Clinton Justice Department recognized the presumption that government

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**"Democracy doesn't exist in a vacuum, and the Constitution isn't a self-executing document. Even the best government can become lazy or corrupt if it isn't held accountable."**

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records should be open to public scrutiny, and directed agencies to disclose material, even if it could legally be withheld under an exemption to the FOIA, unless some harm would result.

Sadly, in the wake of September 11, it seems that just about any kind of information could be used by someone for evil purposes: the location of water reservoirs, gas pipelines, chemical plants. As a result, many federal agencies quietly removed this kind of data from their Web sites, even though the same material might be readily obtainable from other sources. And most Americans, if they paid any attention at all, cheered them on. After all, why make it easier for a terrorist to attack us? Who needs all that information, anyway?

The short answer is: we do. Democracy doesn't exist in a vacuum, and the Constitution isn't a self-executing document. Even the best government can become lazy or corrupt if it isn't held accountable. The confidence that so many citizens claim to have in their elected officials is predicated on openness. The public has the responsibility to monitor the government. We abandon that responsibility at our peril. A time of national crisis is certainly not the occasion to do so.

What kind of horrific new disaster will it take, I wonder, to make the public realize that secrecy does not equal security? Or that rights, once given up, are very hard to win back again?

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