The Rise of Confidentiality: State Courts on Access to Public Records During the Mid-twentieth Century

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Abstract

Under the common law tradition, access to public records was restricted to those with a "direct and tangible" interest in the information. Challenges to this tradition, however, came from those who considered access to public records a right of citizenship. In the twentieth century, state courts across the country increasingly accepted the right of access to public records, but recognized that this right raised a new set of issues requiring identification of categories of information that could be restricted.

American courts inherited the English common law tradition regarding inspection of public records: access depended upon whether a citizen could demonstrate a "direct and tangible" interest in the information. During the late nineteenth century, the common law tradition came under attack from those who considered access to public records a right of citizenship unrelated to motive. By the early twentieth century, many states had articulated this new notion, although the restrictive common law standard had not disappeared. Ironically, as jurists increasingly accepted access to public records as a right of citizenship, they also called for new limitations upon unfettered inspection, giving rise to various categories of confidential information. By the early 1960s, the mantra now familiar to all American archivists, balancing the right to know with the demands of confidentiality, had come into sharper focus.[1]

In 1928, the Michigan Supreme Court issued its opinion in a landmark decision against the restrictive common law standard of access. The facts were that Edward A. Nowack, manager and editor of the *Michigan Digest*, sought access to records in the custody of Oramel B. Fuller, the state's auditor-general. Specifically, Nowack wanted to examine records documenting the use of

[1] Dwayne Cox, "*Title Abstract Company v. County Recorder of Deeds*: A Case Study in Open Records Litigation, 1874–1918," *American Archivist* 67 (Spring/Summer 2004): 46–57.

$25,000 in state funds to defray the cost of the 1927 governors' conference held on Mackinac Island. The editor lacked a statutory right to inspect the records, but the court ruled that recent case law turned the decision in his favor. The Michigan Supreme Court labeled the English common law tradition "repugnant to the spirit of. . .democratic institutions," a sentiment shared by those who considered access to public records a right of citizenship.[2]

During the following years, a number of state courts reached similar conclusions. In 1933, the Albany County, New York, Supreme Court found that municipal officials could not deny a taxpayer's right to inspect information regarding the expenditure of public funds, for in this case the citizen acted "as a trustee for all." Four years later, the Montana Supreme Court ruled that a citizen could inspect the voter registration books of Silver Bow County, even though motivated by political partisanship. In 1938, New York County Supreme Court overturned a decision by the administrators of Bellevue Hospital, who had denied Rose Mojica access to her patient records because she did not pay real estate taxes. The judge found it inconceivable "that the framers of the law intended to discriminate as between taxpayers." To deny the poor the rights granted to the more fortunate was not "in consonance with justice or democracy."[3]

Two New York cases initiated in 1955 and 1960 illustrate the continuing battle for broader access to public records. The first involved the trial of a New York City police officer indicted for manslaughter in the death of a fifteen-year-old boy. The public and the press had been admitted to the trial, which received considerable publicity. The jury absolved the defendant, the *New York Post* asked for a copy of the charge to the jury, the trial judge denied the request, and the King's County Superior Court ruled against the newspaper. Eventually, the New York Court of Appeals reversed the ruling. Public policy demanded open court proceedings, "one of the fundamental safeguards of a free society."[4]

The second case also involved a suit initiated by the *New York Post*. In this instance, the newspaper sought access to records of the Triborough Bridge and Tunnel Authority, which operated under an independent board. The New York County Supreme Court concluded that not all records kept by public officials were subject to disclosure; access to particular records depended upon the relevant statutes; the Tunnel Authority possessed a legal identity separate from the city and the state; statutes regarding access to public records did not apply to the Tunnel Authority; and the statute that created the Tunnel Authority did

[2] *Nowack v. Fuller*, 219 N.W. 749 (1928).

[3] *North v. Foley*, 265 N.Y.S. 780 (1933); *State v. McGrath*, 67 P.2d 838 (1937); *In Re Mojica*, 8 N.Y.S.2d 468 (1938).

[4] *New York Post v. Leibowitz*, 143 N.Y.S.2d 897 (1955); 147 N.Y.S.2d 782 (1955); 151 N.Y.S.2d 619 (1956); 163 N.Y.S.2d 409 (1957).

not address inspection of its records. Subsequently, the New York County Supreme Court, Appellate Division, overturned the decision: records of the Tunnel Authority were public records; public policy required access to public records in the absence of statutes to the contrary; and citizens enjoyed the right to inspect public records.[5]

Finally, in 1961, the Oregon Supreme Court issued its opinion in another case that illustrated the growing acceptance of broader access to public records. The facts were that the state's board of health had a statutory duty to conduct a two-year study of radiation sources and to formulate policies for the safe use, handling, and disposal of this material. Prior to completion of the study, Alan M. MacEwan requested access to the data gathered. The Multnomah County Circuit Court denied his petition and MacEwan appealed to the Oregon Supreme Court, which reversed the previous decision. The right of inspection included preliminary material; the right to inspect public records could be qualified to prevent unreasonable interference with the business of government; and in making such determinations, the courts should balance the interests of individual citizens with the larger public interest in efficient government. A dissenting opinion insisted that preliminary documents could be withheld at an agency's discretion and that only those representing "ultimate actions" should be open to the public.[6]

As in the past, those with commercial motives continued to push the limits of access. Some of the cases involved abstractors and insurers of real estate titles, as they had in the late nineteenth and early twentieth centuries. In 1931, the Georgia Supreme Court ruled in the case of George B. Tidwell, who accused J. W. Simmons, clerk of the Fulton County Superior Court, of having an illegal and unethical relationship with the Atlanta Title and Trust Company. Tidwell charged that the company had long occupied space in the courthouse at no cost and that the clerk allowed the company to remove deeds and other documents affecting titles to real estate from public custody in order to create abstracts and sell the information. Furthermore, he argued that the clerk failed to charge Atlanta Title the statutory fee for searching the records. In response, Simmons and Atlanta Title claimed that the records were open for inspection, that the company required no aid in searching them, and that free occupation of courthouse space fell within the clerk's discretion. The Georgia Supreme Court agreed with Simmons.[7]

In 1937, the Texas Court of Civil Appeals ruled in another title company case, involving Edgar Tobin, who wanted to photograph deeds and other records in the custody of A. U. Knaggs, the LaSalle County clerk. But Knaggs

[5] *New York Post v. Moses*, 204 N.Y.S.2d 44 (1960); 210 N.Y.S.2d 88 (1961).

[6] *MacEwan v. Holm*, 359 P.2d 413 (1961).

[7] *Atlanta Title & Trust Company v. Tidwell*, 160 S.E. 620 (1931).

denied his request. Tobin argued that the necessary equipment occupied little space, that he could duplicate the records without damaging them, that the process would require only a few weeks, that he would offset any expenses incurred by the clerk as a result of the work, and that duplicate copies provided back-up if fire, water, or some other hazard damaged the originals. Knaggs responded that Tobin's request constituted a nuisance, that duplication could damage the originals, and that the process would reduce the fee income of his office. The LaSalle County District Court considered Tobin's plan tantamount to lifting the clerk's office "out of its sockets over night," but the Texas Court of Civil Appeals disagreed. Tobin's commercial interests and his use of technology exercised no bearing upon the case, for the county clerk's office did not exist to raise revenue or for the private gain of the occupant.[8]

With the coming of the automobile age, businesses also sought access to motor vehicle registration records for commercial purposes. From 1926 to 1935, for example, Direct Mail Service paid approximately $2,500 per year for lists of motor vehicles registered in Massachusetts. In 1936, Direct Mail sought to purchase the same information, but the commissioner of public works had accepted the bid of another company and promised not to sell the same information to a competitor. Direct Mail then sent a team of typists to duplicate all the records, but the commissioner evicted them. Eventually, the case reached the Massachusetts Supreme Court, which concluded that the relevant statute called for open inspection of the records. The court also noted that recent cases, many of which dealt with title abstract companies, indicated erosion of the restrictive common law standard.[9]

Title abstractors and direct mail companies were not the only businesses that sought access to public records for commercial purposes. In 1943, the Missouri Supreme Court heard the case of Elinor Kavanaugh, who requested access to records in the custody of Wayne G. Henderson, supervisor of liquor control. Specifically, Kavanaugh wanted the volume of liquor sold broken down by brand name and container size. She then peddled this information to wholesale and retail merchants, who used it in planning their inventories. The previous supervisor of liquor control had kept such records, although he had no statutory responsibility to do so. The new supervisor had discontinued this practice. The Cole County Circuit Court ruled in Kavanaugh's favor, but the Missouri Supreme Court qualified the decision. The records Henderson kept were open to the public, but he had no obligation to create and maintain them in the absence of a statutory requirement.[10]

[8] *Tobin v. Knaggs*, 107 S.W.2d 677 (1937).

[9] *Direct Mail Service v. Commissioner of Public Works*, 3 N.E.2d 8 (1936); *Direct Mail Service v. Register of Motor Vehicles*, 5 N.E.2d 545 (1937).

[10] *State v. Henderson*, 169 S.W.2d 389 (1943).

Even courts that fell short of accepting access as a right of citizenship sometimes favored disclosure of records under the common law standard. In 1945, the New Hampshire Supreme Court ruled in the case of Aldea LeFebvre, whose deceased husband had worked for the Somersworth Shoe Company. The widow believed that the company had furnished her husband with a poisonous fluid for use in his work and that this compound caused his death. LeFebvre claimed that following her husband's demise, Somersworth sent samples of the fluid to the state's Division of Industrial Hygiene for analysis. She sought access to these records and the division denied her request, but the court ruled in her favor. The records were not open to the general public, but the court held that LeFebvre had a legitimate interest in access to them. Two years later, the New York County Supreme Court reached the same conclusion in a similar case involving a woman who believed that officials at a hospital operated by New York City had switched her baby at birth. She sought access to the relevant records, the hospital denied the request, and the court ruled in her favor. Curiosity, meddling, and a desire to "harass city officials" fell short of the standard for access. On the other hand, the distraught mother had demonstrated "a legitimate and reasonable purpose."[11]

Other courts still employed the common law standard to deny access to those who lacked the proper motive. In 1928, a Pennsylvania court ruled against John Tobin, who had been elected to the school board in Blythe Township. Tobin requested disclosure of past school board records to gather background information for his new duties, but the court ruled that he had demonstrated "no interest in a specific controversy" that would "enable him to maintain or defend an action." Hence he lacked a necessary interest in the material. Three years later, the Wyoming Supreme Court ruled in the case of G. H. Romsa, who had lost the election for sheriff of Laramie County. The unsuccessful candidate filed suit contesting the outcome and sought access to various documents in the custody of the county clerk for use as evidence. The court ruled that Romsa had no common law right to inspect the records in the absence of a demonstrated interest. Unfortunately, he had not alleged electoral irregularities, so the court decided that he had failed that test.[12]

No state clung to the common law standard more tenaciously than Kentucky. In 1939, the Kentucky Court of Appeals ruled in the case of Fayette County and the city of Lexington, where local government officials sought access to tax reports made to the state commissioner of revenue by the Kentucky Utilities Company, which operated within their boundaries. The court ruled that no person had a common law right to inspect public records unless he or she needed the information to maintain or defend against legal action, that no

[11] *Lefebvre v. Somersworth Shoe Company*, 41 A.2d 924 (1945); *Sosa v. Lincoln Hospital*, 74 N.Y.S.2d 184 (1947).

[12] *Tobin v. Blythe Township School Directors*, 11 D.&C. 696 (1928); *State v. Grace*, 5 P.2d 301 (1931).

common law right existed for all persons to inspect public records, that the wording of the relevant Kentucky statute provided access to the city of Lexington on a confidential basis, and that the wording of the relevant Kentucky statute prevented access by Fayette County.[13]

The same court upheld this decision twenty years later. The facts were that the state convicted William Floyd Owen of murder in Jefferson County Circuit Court. During the trial, Owen asked to make a statement to the presiding judge in chambers. The court reporter made shorthand notes on the statement and the *Courier-Journal* and *Louisville Times* Company requested a transcribed copy. The presiding judge denied the request and the Kentucky Court of Appeals affirmed the decision. Kentucky had neither constitutional nor statutory requirements for the inspection of public records, and the newspapers had not met the common law standard for access. A dissenting opinion questioned the majority's use of this restrictive test.[14]

Since at least the late nineteenth century, state courts had recognized that certain categories of public records merited confidential treatment for specific reasons that went beyond the general principles provided by the common law standard. In 1893, Rhode Island ruled that a newspaper reporter could not examine the records of a divorce case merely to publish the "sometimes disgusting details" that catered to the public's "morbid craving" for the "sensational and impure." Ten years later, the Michigan Supreme Court cited the physician-patient privilege in denying an insurance company's request to inspect records held by the state insane asylum at Kalamazoo. In 1917, Wyoming refused access to evidence requested by the plaintiff in a divorce case who planned to use the documents in proceedings that would dismiss her husband's lover from the Eastern Star Lodge.[15]

As the century progressed and the role of government became more complex, new categories of confidential records appeared. In 1948, for example, a Pennsylvania court ruled in the case of Harry K. Butcher, who planned to take the 1946 civil service examination for a position with the Philadelphia Bureau of Fire. The aspiring firefighter requested access to the questions that had been used on the 1944 test, the Civil Service Commission denied the request, and Butcher took his case to court. There he argued that the city charter opened all "examination papers" to public inspection, subject to "reasonable regulations." He also contended that many of the 1946 questions would resemble the ones used in 1944, giving an unfair advantage to those who had taken the test two years earlier. The court conceded that public records

[13] *Fayette County v. Martin*, 130 S.W.2d 838 (1939).

[14] *Courier-Journal and Louisville Times Company v. Curtis*, 335 S.W.2d 934 (1959).

[15] *In Re Caswell*, 29 A. 259 (1893); *Massachusetts Mutual Life Insurance Company v. Board of Trustees of Michigan Asylum for the Insane*, 144 N.W. 538 (1913); *King v. King*, 168 P. 730 (1917).

were open to inspection regardless of motive, but in this case concluded that the commission's decision to withhold access constituted a reasonable regulation. The court argued that no applicant could reasonably expect the commission to disclose examination questions "on the eve" of the test.[16]

During this period, state appellate courts also deemed adoption records confidential, for the government required thorough background investigations of prospective parents, sometimes uncovering sensitive information. The most sensational case involved the estate of John D. Rockefeller, Sr., who in 1917 created a trust that provided lifetime payments to his daughter, Edith Rockefeller McCormick. McCormick died in 1932, at which time her trust went to three daughters, including Muriel McCormick Hubbard. When Hubbard died in 1959, her trust amounted to $10 million. If she left no children to inherit the money, the funds went to several charities. Lincoln Center for the Performing Arts would receive the lion's share—$9.7 million. Hubbard had adopted several children, two in Yuba County, California. The children's interest in the estate totaled approximately $6 million. Lincoln Center challenged the legality of the Yuba County adoptions. Among other things, the center claimed that McCormick had adopted the children merely to thwart its own interest in the bequest. In search of information to demonstrate this claim, Lincoln Center asked the Yuba County Superior Court to disclose the adoption records. The Superior Court complied, but the California District Court of Appeal reversed that decision. Adoption records had been closed by statute in the absence of a good cause for disclosing them. Lincoln Center had not met that test.[17]

Juvenile delinquency and public welfare case files also were protected by confidentiality. In 1933, Irving Coopersburg sought access to records in the custody of the New York City commissioner of public welfare, but the court declared these documents confidential "lest worthy recipients be discouraged from applying for relief." Eight years later, the Supreme Judicial Court of Massachusetts closed access to records of old-age assistance, aid to dependent children, and relief for the blind. In 1954, the Pennsylvania Superior Court ruled in the case of Joseph Holmes, who had been committed to the state industrial school at White Hill as a delinquent child. Holmes's attorney asked to inspect all reports and recommendations made to the court. He was allowed to review statements made to the court by his client, but denied access to the reports of probation officers, which were regarded as confidential.[18]

Numerous jurisdictions specifically excluded records of law enforcement investigations from public inspection. In 1938, California held that public

[16] *Butcher v. Civil Service Commission*, 61 A.2d 367 (1948).

[17] *Hubbard v. Superior Court*, 11 Cal.Rptr. 700 (1961).

[18] *Coopersberg v. Taylor*, 266 N.Y.S. 359 (1933); *Hurley v. Board of Public Welfare*, 37 N.E.2d 993 (1941); *In Re Holmes*, 103 A.2d 454 (1954).

policy demanded confidentiality in records related to the apprehension, prosecution, and punishment of criminals. In 1947, the Louisiana Supreme Court denied an attorney's request to inspect the police report indicating that his client had stabbed a man to death outside the Dixie Theater in New Orleans. Six years later, New York ruled that the need to gather thorough information related to parole decisions necessitated confidentiality, for the public interest in a sound penal system outweighed the same interest in access to the information.[19]

Other types of investigations also fell under the cloak of confidentiality. In 1957, for example, the New York County Supreme Court ruled in a case that grew out of the state legislature's decision to establish local community health boards under the direction of psychiatrists. Armed with this authority, Dr. Maurice H. Greenhill sent four field investigators into Washington Heights "to study the emotional impact of recent juvenile crimes upon the population of the area." On 15 August 1957, Greenhill issued a press release describing these investigators as a "mental health disaster team" that would assist the New York City Community Mental Health Board in devising "measures of preventing mental sickness in the Washington Heights area." According to the press release, this "mental sickness" resulted from "the present social disturbance." A New York City taxpayer requested access to the Mental Health Board minutes and the field investigation reports submitted to Greenhill. The court allowed access to the minutes, but not the investigative reports.[20]

Sometimes courts denied access to information that had been provided to the government with an expectation of confidentiality. In 1951, the California Supreme Court heard arguments in a case involving the San Francisco Civil Service Commission, which had conducted a study comparing wage rates for their local government employees with those of similar positions in the private sector. The city and county employees complained that they were grossly underpaid compared to their private sector counterparts and asked the San Francisco Superior Court for access to the data compiled by the commission. The Superior Court agreed, but before the California Supreme Court the city and county successfully argued that representatives of the private sector had supplied the information with the expectation of confidentiality. In this instance, public policy demanded secrecy.[21]

Other jurisdictions denied access to protect state and local governments against litigation. In 1954, the New York Court of Appeals issued its decision in a case that originated three years earlier when Alfred E. Santegelo wrote to the mayor of New York City with several complaints regarding the commissioner of

[19] *Runyon v. Board of Prison Terms and Paroles,* 79 P.2d 101 (1938); *State v. Mattio,* 31 S.2d 801 (1947); *Jordan v. Loos,* 125 N.Y.S.2d 447 (1953).

[20] *McGahan v. Wagner,* 170 N.Y.S.2d 251 (1957).

[21] *City and County of San Francisco v. Superior Court,* 238 P.2d 581 (1951).

corrections. Santegelo alleged that the commissioner showed favoritism to a gambler imprisoned on Riker's Island, discriminated against Jewish employees, and wasted municipal funds. The mayor asked the city's commissioner of investigations for a report, the American Jewish Congress sought to inspect the document, and the city denied the request. The New York County Supreme Court ruled in favor of disclosure and the same court's Appellate Division upheld the decision, but the New York Court of Appeals disagreed. The municipal law that closed access to records used in adjusting claims against the city superseded the sections that opened public records to inspection.[22]

Three years later, California reached the same decision in the similar case of Ernest Sanders, whose eight-year-old son had drowned in a swimming pool operated by the city of Sunnyvale. Sanders asked the Santa Clara County Superior Court to compel Jacob A. Jessup, chief of public safety, to provide access to the drowning investigation report. The court issued a writ in support of the father, but Jessup declined to honor it and his position was upheld on appeal. The primary reason for the investigation had been to assist the city attorney in preparing a defense against possible litigation, therefore the dead boy's father could not inspect the report.[23]

State and local officials argued that all such restrictions fell under the general umbrella of protecting the larger public interest, as did the Nassau County, New York, Supreme Court when a Rockville Centre citizen's group asked to inspect records related to urban renewal in that community: minutes, contracts, notices of public hearings, maps, appraisals, correspondence, and financial documents. The court ruled that the group could inspect the records, except those regarding appraisals and prices paid for each home. In the court's opinion, urban renewal was "undoubtedly the most enlightened program of blight removal. . .yet. . .devised." Compelling disclosure of appraisals and prices paid would "hinder rather than promote" its success, thereby undermining the public interest. The court noted that property owners had the option of obtaining their own appraisals and rejecting purchase offers made by public officials. In the event of unresolved differences, condemnation proceedings would fix prices. The court concluded that the public's interest in urban renewal outweighed the homeowners' interest in inspecting appraisals of their own properties.[24]

American archivists incorporated concepts regarding access to public records into their professional vocabularies during this period. In 1945, Margaret Cross Norton, Illinois state archivist, identified access as one of several legal issues faced by archivists who had custody of public records. She called for

[22] *Cherkis v. Impellitteri*, 124 N.Y.S.2d 805 (1953); 124 N.Y.S.2d 816 (1953); 120 N.E.2d 530 (1954).

[23] *Jessup v. Superior Court*, 311 P.2d 177 (1957).

[24] *Sorley v. Lister*, 218 N.Y.S.2d 215 (1961).

open access to such materials, subject to "reasonable restrictions," and noted that various laws exempted specific records from inspection on grounds of confidentiality. Such exemptions included material the release of which would be "prejudicial to public or to private good." Norton observed that agencies transferring records to government archives often did so with the stipulation that disclosure required permission from the originating office. She concluded that such requirements saved archivists "many headaches in borderline cases" where the home department could better judge the situation.[25]

Others found the trend toward confidentiality more alarming than did Norton. In 1953, Harold L. Cross, writing on behalf of the American Society of Newspaper Editors, complained that public records were becoming increasingly confidential as a matter of policy. In support of this contention, he cited the growing secrecy regarding records related to the apprehension and prosecution of criminals, fire prevention, public health, taxation, and other material allegedly withheld in the public interest. Nevertheless, Cross found state and local governments more open than officials at the federal level, where agency heads enjoyed wide latitude to deny access to public records. In fact, the federal government lagged far behind many states in this area until 1966, when Congress passed the Freedom of Information Act.[26]

State courts first assaulted the restrictive common law standard and then led in the application of restrictions to specific categories of information, but archivists have devoted considerably more attention to issues surrounding access to federal records. Frank B. Evans's 1975 bibliography of archival literature contains approximately two column inches regarding access and confidentiality for state and local records and approximately twenty for material under the purview of the federal government. Whatever the reasons for this striking contrast, it is nevertheless noteworthy in light of the judicial history of access to public records in the United States. Not surprisingly, Margaret Cross Norton, a state archivist, was among the first to bring the question of access to public records to the attention of American archivists.[27]

The common law standard that limited access to those with a "direct and tangible" interest minimized litigation regarding the confidentiality of public records. As access became a right of citizenship, however, legislators and jurists recognized that unfettered inspection created a new set of issues. Increasingly, they identified categories of restricted information. Unfortunately, the statutes governing access to public records generally appear under such popular titles

[25] Margaret Cross Norton, "Some Legal Aspects of Archives," *American Archivist* 8 (January 1945): 1–11.

[26] Harold L. Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (New York: Columbia University Press, 1953), 75–93, 198–225.

[27] Frank B. Evans, *Modern Archives and Manuscripts: A Select Bibliography* (Washington, D.C.: Society of American Archivists, 1975), 59–60.

as the "open records law" or some other name that stresses the right to know. In truth, these statutes and the judicial decisions that interpret them often impose restrictions on access to specified material. In some ways, they are "closed records laws." At worst, the language is Orwellian. At best, it creates a gap between rhetoric and reality that confuses the issue of access to public records.