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The Lost Stories



How a steady stream of laws, regulations and judicial decisions have eroded reporting on important issues

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THE
REPORTERS
COMMITTEE
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PRESS

Are we losing our best stories?

Two years before Sept. 11, 2001, then-*Cleveland Plain Dealer* reporter Beth Marchak revealed serious problems with how airlines handled hazardous materials. Many airlines, she wrote, continued to commit violations and simply paid the fines rather than fix the problems.

“The FAA is ignoring years of enforcement records that already identify repeat violators, can’t tell if hazardous materials-related problems are solved, is reluctant to pursue criminal cases, and has trouble tracking fines, officials at the agency say,” Marchak wrote.

But shortly after Sept. 11, when reporters became more interested in analyzing the data from airports in their coverage areas, the FAA closed the information from public release, citing security reasons. The agency now releases some of the information, but withholds any records relating to hazardous materials or security breaches.

While many journalists were aware of the damage Sept. 11 did to the availability of open records in the United States, openness was already being hit from another angle. Privacy considerations began making it more difficult for reporters and the public to get records relating to individuals.

The past two decades of journalism in the United States generated a collection of important stories that made significant changes to benefit the public interest. But reporting many of those stories would be difficult or impossible today because of greater restrictions on access to institutions, events and information. Whether by acts of Congress, new rules by federal agencies, decisions by courts, or even overreactions by administrators and bureaucrats, restrictions on access have led to a host of “lost stories” that are no longer informing the public about how its government works.

This guide reviews some of those lost stories, discusses future risks that journalists should watch for, and advises journalists how to compensate for the shortfalls in access.

Driver records

Congress passed the Driver’s Privacy Protection Act in 1994 to protect personal information in driver records. The DPPA requires states releasing driver information to ensure that the release is authorized by the driver and that the information will be used only for specifically authorized purposes, such as law enforcement and insurance coverage. Rep. Barbara Boxer (D-Calif.) hoped to prevent stalking when she introduced the measure, but it has stopped reporting in many states that relied on driver records.

“There was stupendous public good in that reporting,” said Charles Davis, director of the Freedom of Information Center at the University of Missouri.

In 1986 and 1987, for example, Elliot Jaspin, then a reporter for the *Providence (R.I.) Journal-Bulletin*, looked into the records of school bus drivers. The story, one of the pioneering uses of databases for investigative reporting, relied on an analysis of

computer records to show the high rate of motor vehicle violations and the high rate of felony convictions among the drivers. The stories reported on the state’s haphazard system for certifying drivers.

The story inspired more reporters around the country to use databases to investigate government institutions and processes. Such stories led to changes in law and public awareness of serious problems and corruption.

In November 1996, then-*Columbus Dispatch* reporter Michael Berens analyzed Ohio drivers license data to show that under Ohio’s system of traffic enforcement, there was a record number of drivers whose licenses were suspended for not filing a report with the Bureau of Motor Vehicles. The DPPA provisions had not taken affect in Ohio by that time.

The series detailed how an obscure traffic accident reporting law resulted in the suspensions of 110,000 drivers licenses in just a five-year period; many were the hospitalized accident victims. The law required motorists to file a one-page report with the state — an extra report beyond the traffic accident report commonly filled out by police at the scene. Failure to file this

obscure report resulted in automatic license suspension. The requirement, a 1955 law that was enforced beginning in 1992, was abolished in March 1997 (H.B. 210) as a direct result of the series, according to Berens.

The computerized findings of Ohio driver records also showed uneven enforcement of a law that stripped high school dropouts of their licenses based on attendance). Rich school districts seldom, if ever, applied the law. Poorer districts commonly did, using the law to strip licenses from young mothers who left school to give birth.

As a result of Berens’ series, the Ohio Department of Education initiated a review of the process, recommended that pregnant students not be penalized for school absences, and strengthened policies to provide a fair and equitable enforcement of the law.

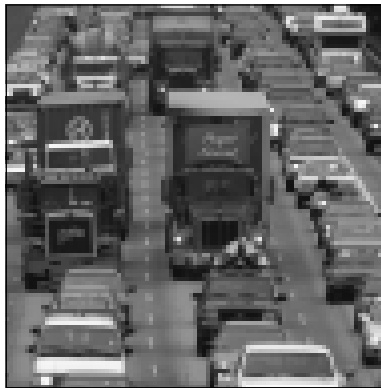
The series also sparked review by Franklin County judges on a controversial formula that awarded defendants \$30 for every day in jail to be paid against their fines. Failure to pay a \$90 fine was three days in jail, for instance. Many judges did not ask if defendants could afford to pay the fine and simply sent them to jail for failure to pay.

The practice was abolished, and all defendants were asked about their financial status at the time of their sentencing. Destitute defendants were not jailed strictly for failure to pay.

Medical privacy

More than nine years after the Driver’s Privacy Protection Act was passed, privacy worries continue to close off information to the public and the press.

The Health Insurance Portability and Accountability Act, a privacy measure, recently delivered a blow to reporters who



routinely contacted hospitals to get information about the status of patients. The act ultimately required the Department of Health and Human Services to write privacy rules.

The HIPAA rules were developed during the Clinton administration and went into effect in April 2001. The law gave providers until April 14, 2003, to fully comply with the regulations, so journalists are just now starting to see the impact of the law.

The rules were designed to protect the medical privacy of patients and to give them more control over their health information and how it is used. All health care providers and entities that work with patient billing records must comply with the law or face severe civil or even criminal penalties.

Journalists who routinely called hospitals to get the status of a patient may be unable to get such information in the future. Under HIPAA, hospitals may release only the name and a one-word status of the patient — but only if the patient has agreed to have his or her name released and then only if the reporter has the individual's full name.

“A troubled community is made more so when it cannot find or identify its victims or activate the support systems that neighbors, clergy and others might provide both the victims and their families,” The Reporters Committee for Freedom of the Press wrote in comments to the U.S. Department of Health and Human Services before the final regulation was passed. “It is unthinkable that in such a situation, a hospital communicator would be subject to a \$25,000 fine for providing general information about a victim.”



Local agencies such as county health departments, coroners offices and emergency response agencies are not covered by HIPAA, yet many of those agencies are using it as a reason to deny journalists information.

When a reporter from *The Roanoke (Va.) Times* went to cover a house fire that injured two people in Spring 2003, the fire and emergency response department refused to give him the names of the victims or any basic descriptive information, such as age and gender. Dwayne Yancey, assistant managing editor at the *Times*, said the department claimed it must abide by HIPAA because it provided a medical service that is billed for electronically.

Other local agencies seem to be applying HIPAA beyond its original intent. Journalists around the country report that police and fire departments have cited HIPAA for not disclosing accident information.

When Erik Brooks of the *Kenosha (Wis.) News* asked a county health department if there were any local cases of monkeypox, a disease that was reported to have been found in humans in Wisconsin, the agency claimed — due to confidentiality reasons — it could neither confirm nor deny that any cases existed.

Before HIPAA took effect, reporters were able to find important stories that involved health records.

In 1996, Keith Epstein reported for *The (Cleveland) Plain Dealer* that researchers were performing pharmaceutical research on people who were uninformed about the full nature of the work.

In June 2000, “Dateline NBC” aired an investigation showing how State Farm Insurance used unqualified individuals to review medical claims, and supported lower recommended payments. Operations inside “the paper review” process were consistently slanted toward denying claims. The story gained attention from both the U.S. House of Representatives and the Senate, and prompted an investigation by the National Association of Insurance Commissioners.

Homeland security and the critical infrastructure

In the creation of the Department of Homeland Security, a new statute was developed that would allow the department to withhold “critical infrastructure information.” The Homeland Security Act criminalizes leaks of unclassified critical infrastructure information provided to the government by businesses who, in turn, are promised secrecy and immunity from prosecution for sharing the information.

Sen. Patrick Leahy (D-Vt.) called the move “the most severe weakening of the Freedom of Information act in its 36-year history.”

The actual impact of the act has yet to be seen, but if current trends hold true, it could mean that important stories won’t get done. Information about security vulnerabilities journalists obtained through FOI requests has led to significant stories that have informed the public about their communities. Journalists regularly report about problems in industry that pose threats to local communities and the safety of infrastructure.

But access to information about industrial vulnerabilities and preparedness was not the only area where security butted heads with the public’s right to know what’s going on in their communities.

Access to information about dams, nuclear power plants, pipelines and chemical plants has become much more guarded under new restrictions designed to keep our “homeland” safe.

Shortly after Sept. 11, data about dam safety was temporarily unavailable from the Army Corps of Engineers. The data has since been made available, but could be at risk under the Homeland Security Act.

In June 1995, Dateline NBC analyzed national data on dams, showing that thousands of dams were precariously close to collapse.

In November 1997, a group of University of Missouri students reported for KOMU-TV in Columbia, Mo., that, although more than 1,200 dams in Missouri should have had Emergency Action Plans in case of a break, only 33 did.

New Federal Energy Regulatory Commission guidelines protect “critical energy infrastructure information” from disclosure. FERC regulates the interstate transmission of oil, natural gas and electricity, as well as the construction of natural gas pipeline facilities. Under the changes, FERC can now limit access to information that “could be useful to persons in planning an attack on critical infrastructure” and are “exempt from mandatory disclosure under the FOI Act.”

The agency’s distribution system creates a parallel information distribution system based on its own determinations of “need-to-know.” Requesters who the agency decides need to know information would be required to sign nondisclosure agreements limiting their ability to share the information.

Such regulations would have prevented, for example, a 1996

Time magazine story about the Nuclear Regulatory Commission's failure to enforce its own safety regulations — and the dangerous consequences that failure had caused at least one power plant.

In addition to regulations, other new laws have been passed. In June 2002, for example, Sen. Christopher “Kit” Bond (R-Mo.) introduced the “Community Protection from Chemical Terrorism Act,” legislation that was designed to restrict access to chemical plant’s risk management plans. Environmental reporters and citizen groups have used that information to assess the risk of chemical plants in their areas. Although the information is no longer online, it remains available in EPA reading rooms around the country.

However, when a chlorine gas cloud spewed from a railcar near Festus, Mo. — Bond’s home state — reporters did not have at hand the risk management plan for the company where the spill occurred.

Sean Moulton, senior information policy analyst with OM-BWatch, a federal watchdog organization, says withholding the information makes little sense, as risk management plans do not provide overly detailed information about a plant.

“It doesn’t say where [the chemical supply] is stored, nor indicate what it is stored in,” Moulton said.

“There is a risk when industry is not under the watchful eye of the public,” he added. “When you get information, you can create pressure to get something fixed or changed.”

Overzealous administrators and bureaucrats

Other stories are lost due neither to new laws nor to court actions, but federal administrators who take it upon themselves to restrict information, particularly that which they think could in any way be useful to someone with a malicious motive.

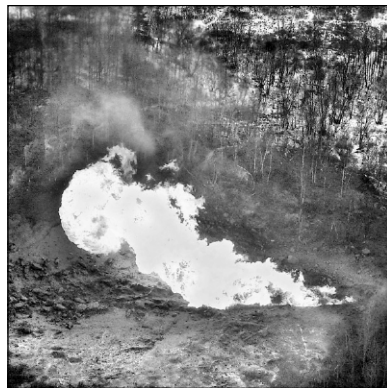
In July 2001, Ralph Haurwitz and Jeff Nesmith did a series of stories in the *Austin American-Statesman* looking at pipeline safety around the country. As a result of the series, federal agencies with pipeline oversight have increased efforts to update regulatory activities and rulemaking, Haurwitz said. In addition, the Texas Railroad Commission levied its largest fine ever against a company responsible for an accident in Abilene, Texas.

Some of the data they used, including pipeline incidents and company financial information, is still available today. But other information concerning pipelines in environmentally sensitive areas can no longer be obtained.

“Today, if a reporter wanted to do a particular analysis dealing with these areas, it would be difficult to do it because the information is no longer public,” Haurwitz said.

The potential for closure of these and other types of “critical infrastructure information” worries journalism organizations.

“I think if the government gets its way it’s going to be an awful lot harder to do what we’ve been doing,” said James Bruggers, president of the Society of Environmental Journalists and an environmental reporter for *The (Louisville) Courier-Journal*. “I’m not sure what the overall benefit is. The fact that a lot of this information has been made public has made communities safer.”



On Oct. 12, 2001, the Federal Depository Libraries received a request, on behalf of the U.S. Geological Survey’s associate director for water, to destroy all copies of a CD-ROM publication: *Source area characteristics of large public surface water supplies I 19.76:99-248 USGS Open-File Report no. 99-248*. The CD-ROM contained databases and electronic maps of surface water intake locations, streamflow and other characteristics of surface water. The government said releasing the information would put America’s water supplies at risk, as terrorists could use it to find vulnerabilities.

Although that specific CD-ROM has not been used widely by news organizations, data about ground water has been a resource for many news stories. In 1990, *The (Huntington) Herald-Dispatch* uncovered more than 100,000 potential contamination sources for West Virginia ground water. In 2000, the *Los Angeles Times* used city records to trace the origins of high levels of chromium 6 found in ground water.

Looking to the courts for relief

The judicial branch is responsible for its share of “lost stories,” as courts have found many ways to limit media access to important information. Most notably, access to immigration hearings has been virtually eliminated since Sept. 11.

From hearings for the alleged Washington, D.C.-area snipers to immigration hearings for foreign nationals the government has detained since Sept. 11, reporters trying to inform the public about the justice system are increasingly running into closed doors.

Although subsequent hearings have been open to the public and press, the original pretrial hearings for accused sniper Lee Boyd Malvo, 17 at the time of his arrest in 2002, were closed. Malvo, along with John Allen Muhammad, is accused of shooting 19 people — killing 13 and wounding six — in Alabama, Georgia, Louisiana, Maryland, Virginia and Washington, D.C.

A judge denied media requests for access to Malvo’s November 2002 hearing, which resulted in his detainment. But another judge refused to close Malvo’s preliminary hearing in January. Most recently, a judge banned camera access to the hearing to determine Malvo’s court date.

As of late October, Muhammad was on trial in Prince William County, Va. The judge there ruled against allowing TV cameras, but has allowed still camera access.

While the media tries to cover the war on terrorism, the doors have been shut to immigration hearings for those detained since Sept. 11.

In September 2001, Chief Immigration Judge Michael Creppy issued a memorandum closing access to all “special interest” immigration cases.

Two federal appeals circuits are in conflict whether or not such hearings should be open. A federal appeals court panel in Cincinnati (6th Cir.) ruled in August 2002 that proceedings for Rabih Haddad, the Lebanese co-founder of an Islamic charity, should be open to the press and public. In late January, the government’s request for a rehearing by the full court was denied.

But another federal appeals court, in Philadelphia (3rd Cir.), said in October 2002 that deportation proceedings should not be public.

The U.S. Supreme Court, which often takes cases where there is a split in the circuits, declined review of the Third

Circuit's decision.

It is not only high-profile cases being closed, though. Courts regularly close proceedings, making it more difficult for the media to report on cases that give the public insight into the judicial system.

In December 2002, a federal appeals court in New York (2nd Cir.) upheld a lower court's decision to ban the public — including the defendant's wife — from parts of the trial of a man convicted of weapons possession and conspiracy to commit murder stemming from his participation in a scheme to import heroin from Turkey.

Media organizations and openness advocates have heralded a statement made by Judge Damon Keith in the Sixth Circuit's decision, that across-the-board closure of immigration hearings is unconstitutional.

"Democracies die behind closed doors," he wrote.

But finding out what was going on behind those closed doors is what allowed *Los Angeles Times* reporter Lisa Getter in 2001 to report about problems in the immigration system that prevented many people from being granted asylum.

"In 9 out of 10 cases," Getter wrote, "the judges order the immigrants deported. A *Los Angeles Times* examination of the nation's immigration courts reveals a system in which judges are overburdened, immigrants are intimidated and justice often seems arbitrary."

In April 2001, *The Dallas Morning News* reported that "hundreds of foreigners, including asylum seekers and others convicted of no crime, are trapped indefinitely in U.S. jails."

To do the story, the newspaper pushed for access to names of individuals being detained by the government, something that has become virtually impossible since Sept. 11.

As journalists reported on the arrests and detention of hundreds of people around the country in the United States' war on terrorism, they ran up against government efforts to keep hearings and even the whereabouts of detainees secret.

One particularly sensitive and confusing area of terrorism-related detentions deals with people held as "material witnesses." Under the material witness statute, any person may be detained indefinitely if their testimony is "material in a criminal proceeding" and it would be "impracticable" to expect them to respond to a subpoena.

One such detainee, James Ujaama, a U.S. citizen, originally was held as a material witness to terrorist activities. Ujaama, 36, was later charged with conspiring to provide material support to terrorists and with possessing and discharging a firearm in furtherance of a crime. He has since accepted a plea bargain and is serving two years in federal prison.

While Ujaama was held as a material witness, news media around the country wanted to tell the public why he was being held. Particularly interested were media outlets in Denver, where he was arrested in July 2002, and in Seattle, where he was a Muslim activist. But the courts thwarted media efforts to gain access to Ujaama's hearings and proceedings.

"The story here was whether detention including American citizens as material witnesses — in some cases for long periods of time — is legal, constitutional or is a good policy," said Seth Berlin, an attorney for *The Denver Post*. "It's very difficult to tell that story if you can't have access to the proceedings."

Charlie Brennan, a *Rocky Mountain (Denver) News* reporter who covered the Ujaama case, called the process "a nightmare."

"It just made it extremely frustrating, really impossible to write anything intelligent about what was happening to this person and why," Brennan said. "To be in a situation where people who are holding a citizen in custody cannot even acknowledge that they are holding that person is frankly scary. I've been a reporter for 22 years and I've never seen anything like that."

Reporters were denied access to an initial hearing that was held in Denver on July 26, 2002, to determine the legality of detaining Ujaama as a material witness, not as a criminal. Later, when Ujaama was moved by federal authorities to Virginia, Brennan was told conflicting stories as to whether he was there at all.

Courts and the privacy debate

Government agencies often choose on their own to raise the privacy argument when they don't want to release information. The dispute over openness must be resolved in the courts.

After two lower court rulings favoring the city of Chicago, the Supreme Court agreed in November 2002 to decide whether the federal Bureau of Alcohol, Tobacco and Firearms can withhold federal gun-tracking data from the city. At issue in the case was access to information on approximately 200,000 firearm traces made by police every year. When police officers confiscate a weapon in a crime, they track down who made it, sold it and bought it.



The ATF claimed that releasing gun-tracing information would "significantly intrude upon the privacy of hundreds of thousands of individuals — including firearms purchasers, potential witnesses to crime and others — without meaningfully assisting the public to evaluate the conduct of the federal government."

It also argued release of the records would hinder ongoing law enforcement investigations.

The dispute started when the City of Chicago sued the ATF in 1999 after the agency refused to

release gun-tracing data that the city requested under the federal Freedom of Information Act. Chicago claimed it needed the information to help prove its case in a \$433 million lawsuit against gun manufacturers the city believed illegally marketed guns to the inner city. Chicago wanted to use the information to locate gun sources and analyze trafficking patterns.

Chicago won at both the federal district and appellate levels. The U.S. Court of Appeals in Chicago (7th Cir.) found that releasing the information raised neither privacy nor law-enforcement concerns. Rather, the court found that the public interest would be served by the disclosures.

"Disclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny," the appeals court held in its March 2002 decision.

The U.S. Supreme Court was scheduled to hear arguments

March 4, 2003, but a provision inserted into this year's spending package as it worked its way through Congress precludes the ATF from spending any money to release the gun-tracing information. Rep. George Nethercutt (R-Wash.) introduced the provision as an amendment to the 2003 Consolidated Appropriations Resolution, which was signed by the President on Feb. 20. The House report on the bill said releasing the data "would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens."

The Supreme Court cancelled the hearing and said the Seventh Circuit must reconsider the case in light of the change.

News organizations are watching this case closely because gun-tracing data is an important reporting tool; journalists rely on the data to report on the illegal flow of guns. News stories have shown how police guns ended up in the hands of criminals, often through illegal interstate trafficking.

Using database information that the ATF is now withholding, *The Denver Post* identified guns traced from crime scenes that had been sold by law enforcement agencies. According to the *Post's* Jeff Roberts, who analyzed the data, the newspaper found more than 2,800 examples of such guns from 1994 to 1998.

According to Roberts, after the series ran in September 1999 some Denver-area police departments announced they would stop selling used police guns. Denver Mayor Wellington Webb, who was president of the U.S. Conference of Mayors at the time, called on other departments nationwide to do the same thing.

In December 2000, the *Dayton Daily News* used gun-tracing data for its story, "Ohio: The Gunrunner's Paradise." The story showed "more than 1,000 guns used in crimes nationwide came from Ohio" in 1997 and 1998. But despite the "state's well-known role in supplying guns, ATF agents in Ohio rank among or near the bottom third of all federal districts for generating criminal cases," the report showed.

In November 1999, *The Washington Post* used ATF gun-tracing data to report that Washington, D.C.'s Metropolitan Police Department "has traded in nearly 9,000 used guns in exchange for a lower price on new firearms. Across the Washington area, police have recycled more than 20,000" guns in the past decade.

Privacy and private property

Privacy considerations go beyond public records. The U.S. Supreme Court and multiple federal appeals courts have found that reporters who accompany officials onto private property can be liable for invasion of privacy. The courts have also found that police officers can violate search and seizure laws by bringing a third party with them.

What that means for journalists is that, rather than independently witnessing an event, they must rely only the word of officials after an event takes place. It is akin to the difference between being an embedded reporter with a military unit in wartime, and hearing from Central Command what the unit did. It is not the same.

In 1999, the U.S. Supreme Court held that police officers can violate the Fourth Amendment when executing an arrest or search warrant by bringing members of the media into a private residence. However, in 2001 CNN and the federal government settled an invasion of privacy lawsuit brought by Montana

ranchers. The decision affected the media's ability to accompany officials to certain places, such as police ride-alongs.

CNN was reporting on the alleged poisoning of eagles and other birds by ranchers. The case presented the legal question of whether the media could be liable for accompanying law enforcement officials on otherwise lawful searches of private persons.

The suit was filed by Paul and Erma Berger after Fish and Wildlife Service agents raided the Bergers' Montana ranch in March 1993 in search of evidence that they illegally poisoned the birds. Prior to the raid, the FWS granted a CNN camera crew permission to accompany the agents onto the property.



During the search, the camera crew filmed the agents as they searched the Bergers' ranch, and recorded a conversation between Paul Berger and an FWS agent who wore a hidden microphone.

The Bergers sued the FWS and CNN in separate actions, asserting civil rights violations in both lawsuits and several wiretap and other state claims against the network. A U.S. district court judge in Billings dismissed the civil rights suit against the network in February 1996, holding

in part that the reporters could not be "state actors" and thus cannot be sued for civil right violations. The district court also dismissed the other claims against CNN and its employees.

In November 1997, a panel of the U.S. Court of Appeals in San Francisco (9th Cir.) reversed the dismissal of the civil rights claim and the Bergers' claims of trespass and intentional infliction of emotional distress. The panel held that the news reporters had cooperated so closely with the FWS during the search that they became joint actors. That decision made CNN susceptible to a lawsuit for violating the Bergers' civil rights. (*See NM&L, Winter 1998*)

In May 1999, the U.S. Supreme Court sent the case back to the Ninth Circuit to reconsider its ruling in light of the high court's finding that the law was unclear at the time of the raid. At the same time, the Supreme Court ruled in a similar case that law enforcement officials were entitled to qualified immunity for their actions because the state of the law was uncertain at the time of the search. (*Cable News Network, Inc. v. Berger; Wilson v. Layne*)

In November 1999, the Ninth Circuit ruled the federal officials were immune to suit, but media participants were not. (*Cable News Network, Inc. v. Berger*)

The "lost stories" here are those where the media serves an important role as an independent observer of state power. Many searches and arrests lead to allegations of racial motives, police brutality or other improper behavior. Allowing news media to observe such scenes would typically infringe very little on a true "privacy" interest, and would serve a valuable role in helping a community understand how its police officers enforce the law.

Court cases under seal

Important information hidden under seal by courts has prevented many important stories from coming to the forefront.

Settlements between the Catholic Church and victims of sexual abuse by priests were tucked away under seal until only recently. Settlements between manufacturers and consumers have kept safety problems under wraps and out of news reports.

In some cases, after great efforts by news organizations, those documents have been opened. Federal judges in South Carolina even adopted a new rule, effective Nov. 1, 2002, that bans secret settlements. The rule applies to all federal district courts in South Carolina.

But in other cases, important information remains hidden in court files.

Court records will remain sealed in the high-profile case of Stephen Roach, a former Cincinnati police officer acquitted of criminal charges in the shooting death of Timothy Thomas, a 19-year-old, unarmed African American male, that led to city riots in April 2001. The Dec. 31, 2002, decision by the Ohio Court of Appeals ended *The Cincinnati Enquirer's* yearlong battle to obtain access to the court records.

In January 2003, a U.S. district court judge in Boston denied media requests for letters written by confessed “shoebomber” Richard Reid, claiming the letters could contain coded messages to other terrorists and put national security at risk.

Access to jurors

Reporters routinely interview jurors following trials to help explain the deliberation process to readers. But journalists do not always have access to jurors.

After the trial of Andrea Yates, a Texas nurse who, in 2002, was convicted of killing her five children, jurors told *Dallas Morning News* reporter Terri Langford how they came to their decision in the controversial case. Jurors also discussed what it was like to be sequestered for four weeks.

“It is crucial to know how jurors come to their conclusions,” Langford said. “Interviewing them after any trial allows the public to gain critical insight as to how jurors decide the fate of one of their own.”

In the case of Yates, Langford said, it was important to talk to the jurors to determine exactly what evidence convinced them that Yates was guilty of murder and not clinically insane at the time.

When the initial trial for Fred Neulander, a rabbi and former community leader accused of murdering his wife in Camden County, N.J., ended in a hung jury in November 2001, the judge ordered that journalists could not contact or interview discharged jurors. *The Philadelphia Inquirer* challenged the court’s order and lost at the trial court level. On appeal, the New Jersey Supreme Court affirmed the lower court’s decision and expanded the order to prohibit communications with the press, initiated by the discharged jurors. It reasoned that it was necessary to ban juror interviews to prevent the prosecution from obtaining an unfair advantage in the retrial of the defendant by the disclosure of information regarding the jury’s deliberations.

In a friend-of-the-court brief filed by The Reporters Committee for Freedom of the Press, several media groups urged the U.S. Supreme Court to accept the *Inquirer's* petition for review of the case. The brief contends that the New Jersey Supreme

Court’s order prohibiting juror interviews was an unconstitutional prior restraint that “severely restricts the First Amendment rights of the press and limits the exchange of information about the administration of justice in our society.”

Electronic access to courts

Access to electronic court records is at a pivotal point, as courts decide what they will and will not make available.

In 2001, the Justice Management Institute and the National Center for State Courts began work on developing a model policy on electronic access to court records. The groups listened to testimony from those advocating for open access to online court records and those who claimed that stalkers could use court information to invade individuals’ privacy.

According to an analysis by the Reporters Committee, the guidelines the organizations produced do not encourage sufficient public access. The guidelines actually have the potential to discourage states from making court records fully available electronically.

Journalists should pay attention to developments in their own states, while they still have the opportunity for input. Otherwise, they will wake up one day and wonder what happened to their access.

And unfortunately, too many of the stories being reported are those warning readers to be leery of Internet scams and stalkers — and too few explain why access to this information is important.

Reporters who have used electronic court records know what important stories can be done.

In October 2002, reporters for WOAI-TV in San Antonio used electronic court records to show that thousands of accused criminals in Bexar County, Texas, were getting off the hook because the justice system there couldn’t process their cases fast enough.

WSMV-TV in Nashville analyzed electronic court records in September 2002 and found that a former patrol officer on disability had been working to defend the same kind of criminals he used to arrest, and was getting paid by taxpayers to do both.

When the *Tulsa (Okla.) World* wanted to look at the outcomes of juvenile court cases, reporters had to build their own database using paper records. Reporters requested a redacted version of the court’s database, but an exemption in the state’s open records law allowed the courts to withhold the data.

The *World* later asked a federal judge to make public a database of police data that included the names of officers, complaints, pedestrian stops and other information created as part of a settlement in a police discrimination lawsuit. The newspaper won access to the information in a settlement.

In addition, under the terms of the settlement, the department has to create a database of all of its contacts with the public and internal affairs investigations. The judge ordered the department to design the database to easily provide public information.

What to do when you still need to do the story?

Journalists may need to be more creative in their newsgathering. When reporters in Roanoke, Va., were unable to get



information about fire victims from emergency response personnel, they didn't give up on the story. Reporters were able to get information from neighbors.

Similarly, a Wisconsin reporter trying to get information about monkeypox did the research by contacting local veterinarians.

The best thing journalists can do is educate themselves about privacy and access laws so they know when something truly may be withheld under the law. Some records *must* be redacted, while others may be released if the agency deems it in the public interest.

The following are some tips for accessing information:

Do enough reporting to discover the real reason officials are reluctant.

Follow the food chain. Records get reported to many agencies at different levels. Try a different source if one is being particularly reluctant.

Appeal to the public good. Identify important stories that have been done using the records, showing why aggregated statistics or anonymous records won't do.

Appeal to accountability. Many politicians run on "cleaning up the government." Offer to check their performance.

Find out whether any researchers got the data, and how they used it.

Avoid promising to use the records for only specific stories. Try to be general when you talk about how you might use the information.

Avoid promising that you'll never try to track down individuals in a database. You don't want to be in a position of having to prove how you found people in your story.

Finally, if closures to places, records or institutions ultimately could hurt the public interest, report on those potential closures. ♦

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HIPAA: The Department of Health and Human Services Office of Civil Rights has an online guide to HIPAA at www.hhs.gov/ocr/hipaa.

The Reporters Committee for Freedom of the Press has a guide to help journalists understand the new medical privacy regulation. The guide is online at: www.rcfp.org/pullouts/medicalprivacy/

The Reporters Committee also follows developments in state policies on electronic access to court records at: www.rcfp.org/courtaccess/

Investigative Reporters and Editors Resource Center database of investigative stories is online at www.ire.org/resourcecenter/.

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