**IN THE COURT OF APPEALS — DISTRICT IV**
**STATE OF WISCONSIN**

**WISCONSIN MANUFACTURERS AND COMMERCE, et al.**,

Plaintiffs-Respondents,

v.

**TONY EVERS, et al.**,

Defendants-Appellants,

&

**MILWAUKEE JOURNAL SENTINEL**,

Intervenor-Appellant.

Case Nos. 2020AP2081 & 2020AP2103

Appeal from the Circuit Court of Waukesha County
Honorable Lloyd V. Carter Presiding
Case No. 20-CV-1389

# BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 13 MEDIA ORGANIZATIONS IN SUPPORT OF INTERVENOR-APPELLANT

Natalie A. Harris
Baron Harris Healey
225 W. Washington St., Ste. 2200
Chicago, Illinois 60606
nharris@bhhlawfirm.com

## TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii
INTRODUCTION AND INTEREST OF AMICI CURIAE .....1
ARGUMENT .....3
I. The Associations' suit is impermissible under the Public Records Law. .....3
II. Timely access to information required to be disclosed under the Public Records Law serves the public interest, especially during a public health crisis. .....7
CONCLUSION .....11
FORM AND LENGTH COMPLIANCE CERTIFICATION.....13
APPENDIX A: DESCRIPTIONS OF AMICI .....14
APPENDIX B: NON-WISCONSIN AUTHORITIES.....18

## TABLE OF AUTHORITIES

### CASES

*Ballard v. Newberry Cty.*, No. 2017-002429, 2021 WL 116345 (S.C. Ct. App. Jan. 13, 2021).....6
*City of Burlington v. Boney Publishers, Inc.*, 166 N.C. App. 186 (2004).....5
*Filarsky v. Superior Court*, 28 Cal. 4th 419 (2002).....6
*Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).....8
*Hunter Health Clinic v. Wichita State Univ.*, 52 Kan. App. 2d 1 (2015).....4
*Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).....7
*Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976).....7
*Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86.....3
*Township of Hamilton v. Scheeler*, No. L-0833-15, 2015 WL 3915926 (N.J. Super. Ct. Law Div. June 24, 2015).....5

### STATUTES

Kan. Stat. Ann. § 45-215 *et seq*.....4
Kan. Stat. Ann. § 45-222.....4
N.J. Stat. Ann. 47:1A-6.....5
Wis. Stat. § 19.31 *et seq*.....1, 4, 7
Wis. Stat. § 19.356.....2, 3, 6, 7
Wis. Stat. § 806.04.....2

### OTHER AUTHORITIES

Adam A. Marshall & Gunita Singh, *Access to Public Records and the Role of the News Media in Providing Information About Covid-19*, 11 J. Nat'l Sec. L. & Pol'y 199 (2020).....7, 8
Allison Ross et al., *Florida releases data on number of COVID-19 cases in each nursing home, assisted living facility*, Tampa Bay Times (Apr. 27, 2020), https://perma.cc/GPG8-LYJU.....10
*COVID-19 Weekly Report*, Oregon Health Authority (Feb. 24, 2021), https://perma.cc/L9DR-CP38.....10
Daniel Chang, *Herald drafted a suit seeking ALF records. DeSantis aide pressured law firm not to file it*, Miami Herald (Apr. 11, 2020), https://perma.cc/Z3L9-Z2XG.....9
Iowa Dep't of Justice, Office of the Att'y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-19 Pandemic* (Apr. 20, 2020), https://perma.cc/X2MV-NQSE.....8, 9
KGW Staff, *Here are the 102 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Feb. 4, 2021), https://perma.cc/CQC6-9VDP.....11
KGW Staff, *Here are the 124 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Dec. 9, 2020), https://bit.ly/3sFel6P.....11

Mary Ellen Klas & Lawrence Mower, *Under pressure, DeSantis releases names of elder care homes with COVID-19 cases*, Miami Herald (Apr. 18, 2020), https://perma.cc/KYH5-9KPQ .....9
NC Watchdog Reporting Network, *How NC chose cooperation over transparency on meatpacking plants with virus outbreaks*, News & Observer (Aug. 11, 2020), https://bit.ly/2TqLLGz .....8
Rachel Polansky & Phil Trexler, *State of Ohio releases some details on COVID-19 cases in nursing homes after 3News investigation*, WKYC (Apr. 17, 2020), https://bit.ly/3kBPAFC.....10

## INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, The Associated Press, The E.W. Scripps Company, International Documentary Association, The Media Institute, National Association of Black Journalists, National Association of Hispanic Journalists, National Freedom of Information Coalition, National Press Club Journalism Institute, The National Press Club, The News Leaders Association, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech (collectively, "amici"). Amici are members of the news media and groups dedicated to defending the First Amendment and newsgathering rights of the press. Journalists and news organizations frequently rely on public records, including those obtained pursuant to Wisconsin's public records law, Wis. Stat. §§ 19.31–19.39 (the "Public Records Law" or the "Law"), to report on matters of public concern, and timely access to public records regarding crises like the COVID-19 pandemic is critical for journalists working to keep the public informed. As such, amici have a strong interest in this case.

After the Wisconsin Department of Health Services ("DHS") received public records requests seeking data about Wisconsin businesses whose employees had contracted COVID-19, DHS decided to release records containing the names of businesses employing at least twenty-five people where at least two employees had tested positive for COVID-19 or had close contacts that were investigated by contact tracers. *See* Br. & App. of Intervenor-Appellant, Milwaukee J. Sentinel

("Intervenor-Appellant's Br.") at 5. Plaintiffs-Respondents Wisconsin Manufacturers & Commerce, Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and Visitors Bureau (the "Associations") filed suit to bar the release of those records. *Id.* at 5–6. After briefing and a hearing held on November 30, 2020, the Waukesha County Circuit Court verbally denied the State of Wisconsin's and the Milwaukee Journal Sentinel's motions to dismiss and granted the Associations' motion for a preliminary injunction. *Id.* at 9.

Amici agree with Intervenor-Appellant Milwaukee Journal Sentinel that this matter should be dismissed because Wis. Stat. § 19.356(1) prohibits the underlying action and no other provision of law—including the Declaratory Judgments Act, Wis. Stat. § 806.04—affords the Associations a means to block disclosure. *See* Intervenor-Appellant's Br. at 12–33. Amici write to emphasize the legal and policy considerations that necessitate dismissal of this case. Members of the news media depend on timely access to records like those at issue here to report on the spread of COVID-19, which, in turn, enables Wisconsinites to make informed decisions during this public health crisis. Because a paramount goal of the Public Records Law is to ensure members of the public have access to information they need to understand issues affecting their communities and their lives, amici respectfully urge the Court to reverse the circuit court's denial of the State of Wisconsin's and the Milwaukee Journal Sentinel's motions to dismiss with instructions that this case be dismissed on remand.

## ARGUMENT

### I. The Associations' suit is impermissible under the Public Records Law.

Section 19.356 of the Public Records Law states in relevant part: "Except as authorized in this section or as otherwise provided by statute, . . . no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record," subject to enumerated exceptions not at issue in this case. Wis. Stat. § 19.356. As explained in the Milwaukee Journal Sentinel's brief, the Associations' suit is expressly barred by this statutory language, and no exception applies because the Associations are not "record subjects" within the meaning of Wis. Stat. § 19.356(2)(a), *see* Intervenor-Appellant's Br. at 13–18; indeed, Section 19.356 was *specifically* enacted to foreclose non-record subjects from seeking judicial review to enjoin the disclosure of public records, *see id.* at 1–3; 11–13. That the Associations' lawsuit is prohibited under the Public Records Law—a conclusion drawn inexorably from the text of Section 19.356 and its legislative history—should be the end of the matter. However, because this Court's interpretation of the Wisconsin Public Records Law may be informed by the interpretations of other states' open records laws, *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 49, 327 Wis. 2d 572, 600, as further support for that conclusion, amici note that courts in other jurisdictions have held that similarly unambiguous statutory language prohibits third parties from seeking to obstruct access to information under state public records laws.

For example, in *Hunter Health Clinic v. Wichita State University*, the Court of Appeals of Kansas considered whether a person or entity seeking to prevent a state agency from disclosing records had statutory standing to bring a cause of action under the Kansas Open Records Act (KORA), Kan. Stat. Ann. §§ 45-215–45-223. 52 Kan. App. 2d 1, 2 (2015). Hunter Health Clinic ("Hunter") objected to the university's prospective disclosure of records to the Wichita Eagle, a local newspaper. *Id*. The Kansas Court of Appeals held that Hunter did not have standing to pursue its cause of action under KORA. *Id*. It reasoned that KORA empowers Kansas courts to exercise "jurisdiction to *enforce the purposes of th[e] act* with respect to [public] records, by injunction, mandamus or other appropriate order, in an action brought by any person[.]" *Id*. at 8 (citing Kan. Stat. Ann. § 45-222(a)) (emphasis added). But "Hunter was not an entity or person whose request for records under the act . . . ha[d] been denied or impeded[.] On this basis, Hunter . . . lacked statutory standing to make a KORA claim." *Id*. at 9–10 (cleaned up). In so holding, the court noted that permitting Hunter to bring an action would be antithetical to the purposes of the public records statute: Such a "construction of KORA does not promote the public policy as determined by the legislature." *Id*. at 11. *Cf.* Wis. Stat. § 19.31 ("[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.").

Notably, when presented with declaratory judgment actions brought for the purpose of preventing disclosure of public records—as the Associations have attempted to do here—courts are careful to consider the plain text and legislative intent of the relevant open records law. For example, in *Township of Hamilton v. Scheeler*, a New Jersey township brought a declaratory judgment action against a records requester seeking relief from any obligation to respond to the requester's Open Public Records Act ("OPRA") request. No. L-0833-15, 2015 WL 3915926, at *1 (N.J. Super. Ct. Law Div. June 24, 2015). "Although the declaratory judgment action was not instituted under OPRA, [it] directly implicate[d] OPRA[,]" *id*. at *2; thus, the court turned "to the fundamental issue [of] whether the Township[] filing a declaratory judgment complaint against Scheeler . . . [was] contrary to the plain language of OPRA, and the policies that underlie" it. *Id*. Motivated by the goal of "maintain[ing] a sharp focus on the purpose of OPRA and resist[ing] attempts to limit its scope," *id.* at *3 (citation omitted), and looking at the "unequivocal" statutory text stating that "[t]he right to institute *any* proceeding under this section shall be solely that of the requestor," *id*. at *3–4 (citing N.J. Stat. Ann. 47:1A-6) (emphasis added), "[t]he court conclude[d] that the Township circumvented the substantive provisions of OPRA by filing a declaratory judgment action," *id*. at *6.

Other courts likewise have held that declaratory judgment actions may not be instituted to circumvent the plain text of a public records statute. *See, e.g.*, *City of Burlington v. Boney Publishers, Inc.*, 166 N.C. App. 186, 191–92 (2004)

(examining "whether the Public Records Act . . . [was] designed to allow a government entity to file for declaratory judgment" and concluding that the Act does not "allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request," based on the plain text of the statute (citation omitted)); *Ballard v. Newberry Cty.*, No. 2017-002429, 2021 WL 116345, at *3 (S.C. Ct. App. Jan. 13, 2021) ("If we were to recognize a general right to seek a declaratory judgment that the Public Records Act has been violated, we would be creating something the General Assembly did not create and might not create if it considered the issue. We are not at liberty to add to the statutory law or subtract from it."); *see also Filarsky v. Superior Court*, 28 Cal. 4th 419, 425–26 (2002) (explaining that the California Public Records Act ("CPRA") "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies," and that the CPRA authorizes "a declaratory relief proceeding commenced only by an individual or entity seeking disclosure of public records, and not by the public agency from which disclosure is sought").

Given the clear language of Wis. Stat. § 19.356 that "no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record"—subject to exceptions not triggered by the facts of this case, Intervenor-Appellant's Br. at 16–18—this Court should reverse and remand this matter with instructions to dismiss the Associations' suit. Dismissal is not only

required by law, *see* Wis. Stat. § 19.356; Intervenor-Appellant's Br. at 11–35, but comports with the public policy of Wisconsin, *see* Wis. Stat. § 19.31, and as explained below, is in the public interest.

## II. Timely access to information required to be disclosed under the Public Records Law serves the public interest, especially during a public health crisis.

Members of the news media require prompt access to public records in order to report on matters of public concern; timely access is especially important in the midst of an ongoing public health crisis. *See generally* Adam A. Marshall & Gunita Singh, *Access to Public Records and the Role of the News Media in Providing Information About Covid-19*, 11 J. Nat'l Sec. L. & Pol'y 199 (2020); *id.* at 212 ("Timely and dependable access to public records and meetings is always necessary for democratic governance, but it is especially critical in times of crisis and uncertainty."). Permitting the Associations' lawsuit to move forward is therefore not only inconsistent with Wisconsin law, as discussed *supra*, but also it deprives the public of timely, accurate information about the spread of COVID-19, just when communities need that information the most. "The peculiar value of news is in the spreading of it while it is fresh[.]" *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). And that is especially true during a global pandemic, when members of the news media are counted on to get urgent public health information to the public. *See Grosjean v.*

*Am. Press Co*., 297 U.S. 233, 250 (1936) ("[The press is] a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity[.]").

Here, the Associations' action, which seeks to prevent the release of records related to COVID-19 outbreaks around the state, has hindered timely access to information of pressing public concern. "These delays . . . are not only imprudent, they are harmful." Marshall & Singh, *supra*, at 207. As Derek Kravitz, a journalist and lecturer with Columbia University's Brown Institute for Media Innovation, has explained, "[p]ublic disclosure of outbreaks are a matter of public interest, and a public health concern. . . . Greater transparency leads to greater awareness and knowledge of what's happening in local communities, and better strategies for people in either avoiding or preventing further community spread." NC Watchdog Reporting Network, *How NC chose cooperation over transparency on meatpacking plants with virus outbreaks*, News & Observer (Aug. 11, 2020), https://bit.ly/2TqLLGz. The Iowa Attorney General's Office, for example, has recognized that the disclosure of information about positive cases of COVID-19 to the media can help reduce the spread of the virus. Iowa Dep't of Justice, Office of the Att'y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-19 Pandemic* (Apr. 20, 2020), https://perma.cc/X2MV-NQSE. That office specifically advised that names of businesses that have experienced outbreaks of COVID-19 can be released to the public, as the "state epidemiologist

has determined that it is necessary for protection of the health of the public to" identify such facilities. *Id.*

Access to government records concerning COVID-19 cases at businesses has made possible meaningful reporting about the pandemic. For example, in Florida, state health administrators initially refused to disclose the names of the assisted living facilities in which residents had tested positive for COVID-19, despite numerous requests from journalists for that information. Daniel Chang, *Herald drafted a suit seeking ALF records. DeSantis aide pressured law firm not to file it*, Miami Herald (Apr. 11, 2020), https://perma.cc/Z3L9-Z2XG. By mid-April 2020, a coalition of news media entities prepared to sue the governor for violating the state's public records law. Mary Ellen Klas & Lawrence Mower, *Under pressure, DeSantis releases names of elder care homes with COVID-19 cases*, Miami Herald (Apr. 18, 2020), https://perma.cc/KYH5-9KPQ. On the eve of the lawsuit, Governor DeSantis's administration released the information, after the governor ordered the state's surgeon general to "determine that it is necessary for public health to release the names of the facilities where a resident or staff member is tested positive for COVID-19[.]" *Id.* Release of the information helped Floridians make informed decisions about family members in assisted living facilities. As a spokesperson for AARP Florida explained, "[f]amilies now have at least some idea if the disease is in the facility where their loved one is and, even better, families know where it's not. They have a greater level of peace of mind if they know their facility isn't on the list." *Id*. The release also informed

the public about the overall spread of coronavirus in assisted living facilities in Florida. For example, *The Tampa Bay Times* used the data provided by the state to compile breakdowns of cases by geographical region. *See* Allison Ross et al., *Florida releases data on number of COVID-19 cases in each nursing home, assisted living facility*, Tampa Bay Times (Apr. 27, 2020), https://perma.cc/GPG8-LYJU. Such detailed information is "essential in helping the public know the scope of the problem." *Id*.

Similarly, in Ohio, the state's Department of Health had initially refused to disclose the names of assisted living facilities in which there had been outbreaks of COVID-19. Rachel Polansky & Phil Trexler, *State of Ohio releases some details on COVID-19 cases in nursing homes after 3News investigation*, WKYC (Apr. 17, 2020), https://bit.ly/3kBPAFC. After a local news outlet filed a public records request for that data, the department began to publish the number of cases at each nursing home, broken down by county, on its website. *See id.* One individual whose parent has been in an Ohio nursing home stated that having that information helped assuage his feeling of "helpless[ness]." *See id.* In Oregon, state health officials track outbreaks of five or more employees at workplaces where there are at least thirty workers, and such data is published weekly. *See, e.g.*, *COVID-19 Weekly Report*, Oregon Health Authority (Feb. 24, 2021), https://perma.cc/L9DR-CP38. Reporting based on these weekly updates has analyzed outbreaks at prisons, corporate distribution facilities, childcare centers, and other places, allowing Oregon communities to better understand the scope of

the pandemic's toll in their state. *See, e.g.*, KGW Staff, *Here are the 102 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Feb. 4, 2021), https://perma.cc/CQC6-9VDP (discussing how, as of February 4, 2021, seven of the eight largest active coronavirus outbreaks in Oregon were at state prisons); KGW Staff, *Here are the 124 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Dec. 9, 2020), https://bit.ly/3sFel6P (noting a record number of workplace outbreaks in the state, stemming in part from cases at Amazon and Walmart distribution centers); Jade McDowell, *Oregon Health Authority lists weekly workplace outbreaks*, East Oregonian (Dec. 17, 2020), https://perma.cc/7A9L-5293 (reporting outbreaks at childcare facilities). Wisconsin residents, too, are entitled to accurate information from government agencies about the spread of COVID-19 in their state.

## CONCLUSION

Wisconsin residents need timely, accurate, and comprehensive information to navigate this pandemic safely; prompt access to public records about the spread of COVID-19 is vital to ensuring that Wisconsinites have access to that information. Release of the names of businesses in Wisconsin employing at least twenty-five people where at least two employees have tested positive for COVID-19 or have had close contacts that were investigated by contact tracers is required by law, and the Associations have no valid legal basis to attempt to bar DHS from disclosing that information to members of the press and public. For the foregoing reasons, amici respectfully urge the Court to reverse the circuit court's denial of

the State of Wisconsin's and the Milwaukee Journal Sentinel's motions to dismiss and remand this case with instructions that it be dismissed.

Dated: March 12, 2021

Respectfully submitted,

By:___ _____

Natalie A. Harris (WBN 1036133)
BARON HARRIS HEALEY
225 W. Washington St.
Suite 2200
Chicago, Illinois 60606
Tel. (312) 741-1028
nharris@bhhlawfirm.com

*Attorney for Amici Curiae*

## FORM AND LENGTH COMPLIANCE CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages and 2,856 words excluding the cover page, tables of contents and authorities, and appendices.

By:_____

Natalie A. Harris (WBN 1036133)
BARON HARRIS HEALEY
225 W. Washington St.
Suite 2200
Chicago, Illinois 60606
Tel. (312) 741-1028
nharris@bhhlawfirm.com

## APPENDIX A: DESCRIPTIONS OF AMICI

**The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

**The Associated Press** ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 280 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

**The E.W. Scripps Company** serves audiences and businesses through local television, with 60 television stations in 42 markets. Scripps also owns Newsy, the next-generation national news network; national broadcast networks Bounce, Grit, Escape, Laff and Court TV; and Triton, the global leader in digital audio technology and measurement services. Scripps serves as the long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

**The International Documentary Association** (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

**The Media Institute** is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

**The National Association of Black Journalists** (NABJ) is an organization of journalists, students and media-related professionals that provides quality programs and services to and advocates on behalf of black journalists worldwide. Founded by 44 men and women on December 12, 1975 in Washington, D.C., NABJ is the largest organization of journalists of color in the nation.

**The National Association of Hispanic Journalists** (NAHJ) is dedicated to the recognition and professional advancement of Hispanics in the news industry. Established in April 1984, NAHJ created a national voice and unified vision for all Hispanic journalists.

**The National Freedom of Information Coalition** is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member

network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

**The National Press Club Journalism Institute** is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

**The National Press Club** is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

**The News Leaders Association** was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

**The Society of Environmental Journalists** is the only North American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

**Society of Professional Journalists** ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

**The Tully Center for Free Speech** began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

## APPENDIX B: NON-WISCONSIN AUTHORITIES

2021 WL 116345
Only the Westlaw citation is currently available.
Court of Appeals of South Carolina.

Desa BALLARD, Appellant/Respondent,

v.

NEWBERRY COUNTY, Respondent/Appellant.

Appellate Case No. 2017-002429
|
Opinion No. 5787
|
Heard September 9, 2020
|
Filed January 13, 2021

**Synopsis**

**Background:** Attorney, who represented former county magistrate, brought action as private citizen against county alleging violations of Public Records Act and state Freedom of Information Act (FOIA) for county's failure to retain some government emails and text messages. Following bench trial, the Circuit Court, Newberry County, Thomas A. Russo, J., 2017 WL 10186868, found that county violated FOIA, that attorney had no private right of action for alleged violation of Public Records Act, and awarded attorney's fees to attorney. Attorney appealed and county cross-appealed.

**Holdings:** The Court of Appeals, Hewitt, J., held that:

[1] attorney had no implied civil right to enforce provisions of Public Records Act;

[2] attorney could not use FOIA as means to enforce Public Records Act; and

[3] attorney did not have civil right to enforce Public Records Act under "public importance" exception to standing.

Affirmed in part and reversed in part.

West Headnotes (8)

[1] **Records**

Under the Public Records Act, it is a crime to unlawfully remove, deface, or destroy a public record. S.C. Code Ann. § 30-1-30.

[2] **Records**

Under the Public Records Act, it is a crime for a public official to refuse or willfully neglect to perform any of his or her statutory duties. S.C. Code Ann. § 30-1-140.

[3] **Records**

Attorney representing former county magistrate had no implied civil right to enforce provisions of Public Records Act, and thus had no private right of action to sue county for alleged violation of Act by failing to retain email and text messages, where Act was not enacted for anyone's particular benefit, and nothing indicated that right to seek declaratory judgment under Act should have been recognized over precedents refusing to recognize implied right of action in statutes that—like Act—describe the government's basic structure and operation. S.C. Code Ann. § 30-1-30.

[4] **Statutes**

A statute which does not purport to establish a civil liability, but merely makes a provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

[5] **Action**

A private right of action will be implied under a statute only if the legislation was enacted for the special benefit of a private party.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

[6] **Records**

Attorney representing former county magistrate could not use state Freedom of Information Act (FOIA) as means to bring declaratory judgment action and enforce Public Records Act for county's failure to maintain emails and texts message sought in attorney's FOIA request, where FOIA and Public Records Act ran on parallel tracks but were separate statutory regimes, Public Records Act was codified in different chapter of state code than FOIA, which granted citizens only right to enforce provisions of FOIA chapter, and it was Public Records Act—not FOIA—that required development of standard for managing public records, required legal custodian of public records to follow such standard, and any violation of such requirements was violation of Act, not FOIA. S.C. Code Ann. §§ 30-1-30, 30-1-140, 30-4-100(A).

[7] **Records**

The state Freedom of Information Act (FOIA) grants citizens the right to inspect public records, copy public records, or receive public records electronically. S.C. Code Ann. § 30-4-30(A)(1).

[8] **Records**

Attorney representing former county magistrate did not have civil right to enforce Public Records Act under "public importance" exception to standing, where there was no urgent need for future guidance in case as attorney's claim was indistinguishable from any other conceivable case that citizens could bring alleging Public Records Act violations, and Act delineated specific means for enforcement such that court would not find standing in scenario in which legislature declined to so. S.C. Code Ann. § 30-1-10 et seq.; S.C. Code Ann. Regs. 12-503.15.

Appeal From Newberry County, Thomas A. Russo, Circuit Court Judge

**Attorneys and Law Firms**

Desa Ballard, Appellant/Respondent, Pro Se.

Boyd B. Nicholson, Jr., and Sarah P. Spruill, of Haynsworth Sinkler Boyd, P.A., both of Greenville, for Respondent/Appellant.

**Opinion**

HEWITT, J.:

***1** This case is about whether there is a private right of action when public records have been inadvertently destroyed. It involves two chapters in Title 30 of the South Carolina Code: Chapter 1 (from here forward, the "Public Records Act") and Chapter 4 (the Freedom of Information Act, commonly called FOIA).

A FOIA request revealed that Newberry County failed to retain some government emails and text messages. The circuit court ruled that a private citizen could not bring a civil suit claiming the failure violated the Public Records Act, but the court also ruled that failing to retain the records violated FOIA. We agree there is no civil cause of action for violating the Public Records Act, but we find the circuit court erred when it held a public body violates FOIA if it fails to retain public records.

**FACTS**

This case arose out of attorney Desa Ballard's representation of a former part-time chief magistrate in Newberry County. After the County resolved a legal dispute with a different magistrate, the County eliminated a stipend for certain magistrates and began the process of doing away with part-time magistrate positions.

Ballard filed a FOIA request with the County in December 2014. Among other things, she sought communications to and from the county administrator pertaining to magistrate positions over a roughly five year period.

The County had problems collecting all of the potentially relevant documents. The administrator's computer crashed in March 2014, months before Ballard's FOIA request, and the County did not have a central email server, a system for "backing up" and archiving email messages, or a system for retaining text messages, which Ballard also requested.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

The parties were ultimately able to narrow the list of things the County would produce. Still, the County produced roughly 2,000 pages of documents. The County produced all of the administrator's post-crash emails and several pre-crash emails that the County recovered from other employees or through other means. Ballard nevertheless maintained that the County's production was insufficient and claimed the County violated FOIA in not retaining all emails and text messages that were "public records."

The circuit court split its findings into three sections. First, the circuit court found the County had "no archiving policy, no document retention policy, and no FOIA compliance policy in place" as it related to electronic data. The court further found the County "had no system in place for backing up or archiving county emails, no connected email servers, no cloud storage, [ ] no end user back-ups," and that this violated FOIA. The court believed a declaratory judgment to this effect was all the relief it could grant because any information beyond what the County already produced appeared to have been inadvertently and irretrievably destroyed.

Second, the circuit court ruled Ballard did not have a private right of action to sue for the County's alleged violations of the Public Records Act. The court based its decision on the absence of a statute creating such a right and the fact that the Public Records Act explicitly references criminal liability, not civil liability.

***2** Third and finally, the circuit court found the County violated FOIA in failing to disclose the "specific purpose" of several executive sessions held during prior county council meetings. The court awarded Ballard roughly half of her attorney's fees based on its view that the case produced a "split" result.

## ISSUES

The County did not appeal the FOIA violation related to executive sessions and the award of attorney's fees. Thus, all parties agree these portions of the circuit court's judgment will stand.

Ballard argues the circuit court erred in holding there is not a private right of action to sue under the Public Records Act. She also argues the circuit court erred in failing to award all of her attorney's fees rather than roughly half of those fees.

The County cross-appeals and argues its failure to retain emails and text messages does not violate FOIA.

## STANDARD OF REVIEW

This case requires us to construe the Public Records Act and FOIA. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Lambries v. Saluda Cty. Council*, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

## PUBLIC RECORDS ACT

The Public Records Act consists of sections 30-1-10 through -180 of the South Carolina Code. Among other things, it defines a "public body," identifies the legal custodian of public records, and explains that the Department of Archives and History is responsible for establishing efficient and economical "standards, procedures, techniques, and schedules" for public bodies to manage the ocean of information they produce. S.C. Code Ann. §§ 30-1-10(B), -20, & -80 (2007).

**[1]** **[2]** The Public Records Act also contains enforcement mechanisms. It is a crime to unlawfully remove, deface, or destroy a public record. *See* S.C. Code Ann § 30-1-30 (2007). It is also a crime for a public official to refuse or willfully neglect to perform any of his or her statutory duties. *See* S.C. Code Ann. § 30-1-140 (2007). If someone refuses to surrender a public record to the record's legal custodian or to the Department of Archives, that is a separate crime, and the act empowers certain individuals to bring a civil action for the record's surrender. *See* S.C. Code Ann. § 30-1-50 (2007). Critically, nothing in the Public Records Act grants any interested party, however well-intentioned, the right to enforce the act by bringing a civil action.

**[3]** **[4]** **[5]** We agree with the circuit court that there is also no implied civil right to enforce these statutes. A bellwether case on implied causes of action is *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, which explains "the general rule [ ] that a statute which does not purport to establish a civil liability, but merely makes [a] provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) (quoting 73 Am. Jur. 2d, *Statutes* § 432 (1974)). A private right of action will "be implied only if the legislation was enacted for the special benefit of a private party." *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007).

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

No one appears to dispute that the Public Records Act was not enacted for anyone's particular benefit. There is also a virtually unbroken string of precedents refusing to recognize implied rights of action in statutes that—like the Public Records Act—describe the government's basic structure and operation.[1]

***3** If we were to recognize a general right to seek a declaratory judgment that the Public Records Act has been violated, we would be creating something the General Assembly did not create and might not create if it considered the issue. We are not at liberty to add to the statutory law or subtract from it.

**FOIA VIOLATION**

**[6]** FOIA is the nub of this appeal. As Ballard sees it, FOIA allows her to bring a declaratory judgment and enforce the Public Records Act. Building on that premise, she argues there was no "split" result in this case. She says her singular claim that the County was not properly preserving public records fully succeeded and she should consequently be awarded all of her attorney's fees rather than half.

From the County's perspective, the inadvertent destruction of public records is a violation of the Public Records Act, not of FOIA. The County does not object to the amount of fees the circuit court awarded, but argues no additional fees are appropriate.

**[7]** There is no denying these statutory regimes are related to each other. The Public Records Act imports from FOIA the definition of "public record." § 30-1-10(A). Public records are a large part of how FOIA furthers its announced purpose: to ensure "that public business be performed in an open and public manner[.]" S.C. Code. Ann. § 30-4-15 (2007). To that end, FOIA grants citizens the right to inspect public records, copy public records, or receive public records electronically. S.C. Code Ann. § 30-4-30(A)(1) (Supp. 2019). Certain records are exempt from disclosure, but that does not diminish the point. There is little value in the right to inspect public records if there are no public records for citizens to inspect.

This issue presents a difficult question. It is possible to frame Ballard's contention in a way that makes an answer in her favor seem instinctive. It would be natural for a citizen denied the right to inspect a document that was not retained by a public body to say the public body has violated FOIA. That person might make the argument by pointing out that FOIA's definition of a public record is breathtakingly broad—it includes "all" documentary materials, regardless of form, that are prepared *or* retained by a public body, and that FOIA itself grants citizens the right to inspect and copy public records. S.C. Code Ann. §§ 30-4-20(c), -30(A)(1) (2007 & Supp. 2019).

Even so, we find the County's argument is more faithful to the statutory text. FOIA and the Public Records Act run on parallel tracks, but they differ from each other in a key respect. When read literally, FOIA treats everything a public body produces as a public record. Perhaps because keeping everything would be overwhelming, if not impossible, the Public Records Act acknowledges up front that public bodies are not expected to retain everything they produce. FOIA grants citizens the right "to enforce the provisions of *this chapter*[.]" S.C. Code Ann. § 30-4-100(A) (Supp. 2019) (emphasis added). There is no disputing the Public Records Act is codified in a different chapter.

It is the Public Records Act—not FOIA—that requires the Department of Archives to develop a program and standards for public bodies in managing their public records. *See* § 30-1-80. It is the Public Records Act—not FOIA—that requires the legal custodian of public records to follow that program. *See id.* If a public body violates the requirement to implement a program for archiving and maintaining public records, it violates the Public Records Act—not FOIA. These are separate statutory regimes, and the plain text of FOIA's civil remedy instructs that it is not a tool for enforcing statutes that are not a part of FOIA.

***4** Ballard points us to *Brock v. Town of Mount Pleasant* because in that case, the circuit court declined to find a violation of the Public Records Act but also enjoined a public body from deleting and eliminating records in the future. 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014). This court said the trial court in *Brock* did not err in refusing to address past email deletions because "the law in this area is ever developing." *Id.* at 122, 767 S.E.2d at 211. The circuit court's injunction was not appealed, and nothing in this court's opinion remotely approaches a holding that the Public Records Act contains a private right of action or that a past violation of that act is also a violation of FOIA.

We do not overlook Ballard's argument that reversing the FOIA violation could be viewed as frustrating FOIA's purpose and government accountability. With utmost respect,

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

we disagree. We highly doubt our holding will in any way encourage public bodies to violate the Public Records Act. For one, doing so would expose the participating individuals to criminal liability. *See* §§ 30-1-20, -50. Concerns about increased sunlight in government, while undeniably legitimate, cannot overcome the statutory limitation that a private right of action under FOIA must be tied to enforcing FOIA.

We emphasize that the only evidence with support in the record is that by the time Ballard submitted her FOIA request, the documents in question did not exist and were not in the County's possession. Destruction of pertinent documents covered by a then-pending FOIA request could very well present a different question.

**PUBLIC IMPORTANCE STANDING**

**[8]** Ballard asks to enforce the Public Records Act under the "public importance" exception to standing if she may not enforce those statutes through FOIA. Our supreme court has explained that "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

We do not see an urgent need for future guidance here. Nothing distinguishes this case from any other conceivable case a citizen could bring challenging whether a public body is following the Public Records Act and its accompanying regulations. *See, e.g.*, S.C. Code Ann. Regs. 12-503.15 (2011) (specifying a county council's obligations for general correspondence and "subject files"). Finding standing here could well invite countless copycat suits filed against public bodies both large and small. That many of these suits might be well-intentioned is beside the point. The Public Records Act delineates specific means of enforcement. We believe it is best to exercise restraint and refuse to do indirectly what the General Assembly could have done directly. We will not recognize a civil right to enforce the act when the General Assembly did not include such a right in the Code.

**CONCLUSION**

We affirm the circuit court's finding that there is no private right of action for a citizen to bring a civil suit against a public body under the Public Records Act, affirm its award of attorney's fees, and reverse its judgment that the County violated FOIA in failing to retain certain emails and text messages.

**AFFIRMED IN PART, REVERSED IN PART.**

THOMAS and HILL, JJ., concur.

**All Citations**

--- S.E.2d ----, 2021 WL 116345

Footnotes

1 *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 785 S.E.2d 595 (2016); *Marion*, 373 S.C. 390, 645 S.E.2d 245; *Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 602 S.E.2d 51 (2004); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993); *Citizens for Lee Cty., Inc. v. Lee Cty.*, 308 S.C. 23, 416 S.E.2d 641 (1992); *Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 398 S.E.2d 687 (1990); *Whitworth*, 289 S.C. 418, 338 S.E.2d 155; *Patterson v. I.H. Servs., Inc.*, 295 S.C. 300, 368 S.E.2d 215 (Ct. App. 1988); *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 351 S.E.2d 878 (Ct. App. 1986).

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Review Allowed by City of Burlington v. Boney Publishers, Inc., N.C., December 2, 2004

166 N.C.App. 186
Court of Appeals of North Carolina.

CITY OF BURLINGTON, a Municipal Corporation, Plaintiff,
v.
BONEY PUBLISHERS, INC., d/b/a The Alamance News, Defendant.

No. COA03–904.
|
Sept. 7, 2004.

**Synopsis**

**Background:** City brought declaratory judgment action against newspaper publisher, seeking a declaration that it properly held closed meeting of city council and withheld the minutes of the meeting from publisher. The Superior Court entered order approving city's actions, which was not appealed. Subsequently, the Superior Court, Alamance County, James C. Spencer, Jr., J., denied publisher's motion for partial summary judgment, which challenged city's ability to bring declaratory judgment action, and certified its order for immediate appeal. Publisher also filed petition for writ of certiorari, which the Court of Appeals granted.

**Holdings:** The Court of Appeals, Bryant, J., held that:

[1] Public Records Act did not authorize city to file declaratory judgment action, and

[2] Open Meetings Act did not authorize city to file declaratory judgment action.

Reversed.

West Headnotes (5)

**[1] Motions** Form and Requisites of Orders

An order is "interlocutory" if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. Rules Civ.Proc., Rule 54(a), West's N.C.G.S.A. § 1A–1.

**[2] Appeal and Error** Certificate as to Grounds

A trial court's certification of an order as immediately appealable under rule governing appeals from partial judgments is not dispositive when the order appealed from is interlocutory. Rules Civ.Proc., Rule 54(b), West's N.C.G.S.A. § 1A–1.

**[3] Declaratory Judgment** Appeal and Error

Trial court could not certify, as immediately appealable under rule governing appeals from partial judgments, its order declaring that city was not constitutionally or statutorily barred from bringing a declaratory judgment action against newspaper publisher to resolve dispute as to city's compliance with Open Meetings Act and Public Records Act; order did not resolve any of the claims or counterclaims presented by the parties in the declaratory judgment action. West's N.C.G.S.A. § 132–1 et seq., West's N.C.G.S.A. § 143–318.9 et seq.; Rules Civ.Proc., Rule 54(b), West's N.C.G.S.A. § 1A–1(a).

**[4] Declaratory Judgment** Government or Officers as Parties

Public Records Act did not authorize city to file declaratory judgment action against newspaper publisher to resolve dispute as to city's compliance with Act; only the person seeking public records could initiate judicial action to enforce the request. West's N.C.G.S.A. § 132–9(a).

2 Cases that cite this headnote

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

[5] **Declaratory Judgment** Government or Officers as Parties

**Municipal Corporations** Rules of Procedure and Conduct of Business

Open Meetings Act did not authorize city to file declaratory judgment action against newspaper publisher to resolve dispute as to city's compliance with Act at closed meeting of city council; only the person seeking a declaration that action of a public body was in violation of Act was entitled to initiate judicial action to enforce the request, and permitting city to bring declaratory judgment action would have chilling effect on public, thereby eliminating the protection Act was intended to provide. West's N.C.G.S.A. §§ 143–318.16, 143–318.16A(a).

1 Cases that cite this headnote

****873** On writ of certiorari to review order filed 20 November 2002 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 31 March 2004.

**Attorneys and Law Firms**

City Attorney Robert M. Ward; and Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for plaintiff-appellee.

Everett, Gaskins, Hancock & Stevens, L.L.P., by C. Amanda Martin, for defendant-appellant.

**Opinion**

BRYANT, Judge.

***187** Boney Publishers, Inc. d/b/a *The Alamance News* (defendant) appeals an order filed 20 November 2002 denying defendant's motion for partial summary judgment and declaring that the City of Burlington (plaintiff) was not constitutionally or statutorily barred from bringing a declaratory judgment action to determine whether the City was in compliance with North Carolina's open meetings and public records laws.

On 15 July 2002, the Burlington City Council (Council) met for a work session. A motion was made pursuant to N.C. Gen.Stat. § 143–318.11(a) and approved to hold a closed session allowing the Council to discuss potential and pending litigation. Jay Ashley, reporter for *The Alamance News,* and another reporter from a different organization left the meeting. Those remaining in the meeting included Council members, the city clerk, city attorney Robert Ward, private attorney Reginald Gillespie (who had been retained to represent the City in five pending lawsuits discussed during the closed session), and Alamance County Area Chamber of Commerce president Sonny Wilburn. Wilburn was present for part of the closed session in order to advise the Council and the attorneys on issues of land valuation and marketability, as these issues related to possible settlement of the pending lawsuits. The Council met for approximately 90 minutes with Wilburn present and approximately 15 minutes outside of Wilburn's presence. Wilburn left the meeting during a break. During the break, Ashley asked Ward to explain why Wilburn had been allowed to be present in a meeting called pursuant to attorney-client privilege. In his response, Ward explained that outside parties are permitted to participate in closed sessions when there is a logical reason to ****874** include them in the meeting. Ward said he relied on a guidebook published by the Institute of Government for his position on the issue.

On 30 July 2002, Tom Boney, publisher of *The Alamance News,* attended an open meeting of the Council, where he voiced his objection to Wilburn's presence in the 15 July 2002 closed session, arguing Wilburn's presence destroyed the attorney-client privilege and rendered ***188** the purpose of the meeting void. Boney contended that the closed session was illegal and requested access to the closed session minutes. Ward responded that the closed session was held in accordance with state law. Boney was not given a copy of the minutes of the closed session.

On 14 August 2002, Boney delivered a letter to Ward, the city manager, the city clerk, and to each Council member. In his letter, Boney again stated he believed the attorney-client privilege had been destroyed by Wilburn's presence and the meeting had been improperly convened pursuant to N.C. Gen.Stat. § 143–318.11(a)(3). Boney demanded the closed session minutes and stated his willingness to pursue legal action to compel the City's compliance. Responding to Boney's letter, Ward repeated his position that outside individuals may be included in a closed session if there is a logical reason for them to be present. Ward did not articulate what logical reason justified Wilburn's presence, but provided Boney with citations to two cases: one from South Carolina and one from Texas in support of his position.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

On 19 August 2002, Boney sent a second letter again requesting the minutes of the closed session. The following day (20 August 2002), Boney appeared at another Council meeting to request access to the closed session minutes. On 21 August 2002, via a letter signed by Ward, the city manager, and the city clerk, Ward responded that certain individuals had been requested to attend the closed session, and the presence of those individuals was essential in order to accomplish the purposes of the closed session. The letter also stated that the minutes would be withheld pursuant to N.C. Gen.Stat. § 143–318.10(e), until such time as public inspection would not frustrate the purpose of the closed session.

On 22 August 2002, the City initiated a declaratory judgment action against defendant in order to resolve the conflict between the City and defendant. Defendant counterclaimed. This matter came for hearing at the 16 September 2002 civil session of Alamance County Superior Court with the Honorable James C. Spencer, Jr. presiding. The superior court framed the issue as follows:

> Did the presence of a third party at the July 15, 2002 closed meeting of the Burlington City Council vitiate the asserted attorney-client privilege § N.C.G.S. 143–318.11(a)(3)} and thereby result in a violation of the North Carolina Open Meetings Law?

***189** By order filed 25 September 2002, the superior court found that Wilburn was an agent of the City; Wilburn was present at the meeting for the purpose of facilitating the rendition of legal services; and everyone present understood the confidential nature of the closed meeting. The court concluded that the City acted properly in holding the closed session and in withholding the minutes. Defendant did not appeal from this ruling nor assign error to any portion of this order.

Defendant thereafter filed a motion for partial summary judgment "with respect to the declaratory judgment claim instituted by the plaintiff." This matter came for hearing at the 4 November 2002 civil session of Alamance County Superior Court before Judge Spencer. The court framed the issue as follows:

> Was it constitutionally and statutorily permissible for the plaintiff, City of Burlington, to initiate a declaratory judgment action against the defendant, *The Alamance News,* seeking a determination of the [C]ity's rights and obligations with respect to a dispute which had arisen between the plaintiff and the defendant as to whether the City was in or out of compliance with the North Carolina Open Meetings Law and Public Records Law?

By order filed 20 November 2002, the court concluded there was no constitutional ****875** or statutory bar to plaintiff's initiation of a declaratory judgment action seeking a determination of the City's rights and obligations with respect to whether the City was in compliance with the North Carolina Open Meetings Law and Public Records Law, and concluded defendant's motion should be denied. Defendant filed notice of appeal on 20 December 2002 from the 20 November 2002 order. The superior court granted Rule 54 certification on 21 January 2003. On 16 May 2003, this Court granted defendant's petition for writ of certiorari to review the 20 November 2002 order.

*Interlocutory appeal*

**[1]** A judgment is either interlocutory or a final determination of the rights of parties. N.C.G.S. § 1A–1, Rule 54(a) (2003); *see Veazey v. Durham,* 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950). An order is interlocutory if it is entered during the pendency of an action and does not dispose of the case, but requires further action by the trial court to finally determine the rights of all the parties involved in the controversy. *Veazey,* 231 N.C. at 362, 57 S.E.2d at 381. Generally, there ***190** is no right to appeal from an interlocutory order. *See* N.C.G.S. § 1A–1, Rule 54(b) (2003). Our courts, however, have recognized two avenues for appealing interlocutory orders.

**[2]** Under Rule 54(b), when multiple claims are involved in an action and the court enters a final judgment that adjudicates one or more of the claims, such judgment, although interlocutory in nature, may be appealed if the trial judge certifies that there is no just reason for delay. N.C.G.S. § 1A–1, Rule 54(b); *see Hoots v. Pryor,* 106 N.C.App. 397, 401, 417 S.E.2d 269, 272 (1992). In this case, the trial court certified the denial of partial summary judgment as immediately appealable pursuant to Rule 54(b); however, such certification is not dispositive when the order appealed from is interlocutory. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.,* 131 N.C.App. 242, 247, 507 S.E.2d 56, 60 (1998).

In the instant case, the trial court entered two separate orders. The first order, filed 25 September 2002, decreed:

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

1. The oral motion of the defendant, made at the September 16, 2002 hearing, for defendant's attorneys to be granted access to the minutes of the July 15, 2002 closed meeting of the Burlington City Council is DENIED;

2. The July 15, 2002 closed meeting of the Burlington City Council was, and is declared to have been, held in compliance with the requirements of the North Carolina Open Meetings Law;

3. The actions of the City of Burlington in denying, at the present time, access to the minutes of the July 15, 2002 closed meeting of the Burlington City Council are, and are declared to be, in compliance with the requirements of the North Carolina Public Records Law and Open Meetings Law;

4. The prayer of defendant for injunctive relief arising out of the conduct of the City of Burlington surrounding the July 15, 2002 closed meeting of the Burlington City Council is DENIED;

5. **Inasmuch as there are claims in defendant's Counterclaim not addressed at the September 16, 2002 hearing, the matter is retained for further proceedings, *191 including any determination respecting costs and attorney fees.**

(emphasis added). Defendant *did not* appeal from this order.

Concerning the 20 November 2002 order from which defendant *did* appeal, the only issue before the superior court was whether:

> it [was] constitutionally and statutorily permissible for the plaintiff, City of Burlington, to initiate a declaratory judgment action against the defendant, *The Alamance News,* seeking a determination of the [C]ity's rights and obligations with respect to a dispute which had arisen between the plaintiff and the defendant as to whether the City was in or out of compliance with the North Carolina Open Meetings Law and Public Records Law?

**[3]** Our review of the complaint and counterclaims reveal that the 20 November 2002 order was not a final judgment as to any of the claims or counterclaims presented ****876** by the parties. Therefore, Rule 54 certification was not properly granted as to the 20 November 2002 order. However, on 16 May 2003, this Court granted defendant's subsequent petition for writ of certiorari to review the 20 November 2002 order.

---

The issue on appeal is whether the Public Records Act and Open Meetings Act were designed to allow a government entity to file for declaratory judgment.

*Public Records Act*

**[4]** In *McCormick v. Hanson Aggregates Southeast, Inc.,* 164N.C.App. 459, 596 S.E.2d 431 (2004),[1] this Court addressed the issue of whether a governmental entity could file a declaratory action. *McCormick,* 164N.C.App. at ——, 596 S.E.2d at 434 (quoting N.C.G.S. § 132–9(a) (2003)) (" '[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying' "). The *McCormick* Court concluded:

> The North Carolina Public Records Act clearly gives the public a right to access records compiled by government agencies. *See News and Observer Publ'g Co. v. Poole,* 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (" 'the legislature intended to provide that, as ***192** a general rule, the public would have liberal access to public records' ") (quoting *News and Observer v. State,* 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984)); N.C.G.S. § 132–1(b) (2003) (the public records compiled by the agencies of North Carolina government "are the property of the people"). "The Public Records Act permits public access to all public records in an agency's possession 'unless either the agency or the record is specifically exempted from the statute's mandate.' " *Gannett Pacific Corp. v. N.C. State Bureau of Investigation,* 164N.C.App. 154, ——, 595 S.E.2d 162, 164, 2004 N.C.App. LEXIS 693, at *3–4 (2004) (citing *Times–News Publishing Co. v. State,* 124 N.C.App. 175, 177, 476 S.E.2d 450, 452 (1996)). Further, the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request. *McCormick,* 164 N.C.App. at ——, 596 S.E.2d at 434. The *McCormick* Court held, "based on the Public Records Act and the policy consideration for disclosure under the act ... the use of a declaratory judgment action in the instant case was improper." *McCormick,* 164 N.C.App.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

at ——, 596 S.E.2d at 434. Likewise, we hold use of a declaratory judgment action under the Public Records Act was improper in the instant case.

*Open Meetings Act*

Generally, "[i]t is the policy of this State, as announced by the General Assembly, to conduct the public's business in public." *Boney v. Burlington City Council,* 151 N.C.App. 651, 657–58, 566 S.E.2d 701, 705–06 (2002) ("The purpose of the Open Meetings Law is 'to promote openness in the daily workings of public bodies.' " (citation omitted)); N.C.G.S. § 143–318.9 (2003) ( "Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly.").

Under certain circumstances, a public body may hold a closed meeting, N.C.G.S. § 143–318.11 (2003); however, the body is required to "keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired," N.C.G.S. § 143–318.10(e) (2003). "Such minutes and ***193** accounts shall be public records within the meaning of the Public Records Law, G.S. 132–1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143–318.11 may be withheld from public ****877** inspection so long as public inspection would frustrate the purpose of a closed session." N.C.G.S. § 143–318.10(e) (2003).

**[5]** Uniform with the Public Records Act, the Open Meetings Act does not appear to allow a government entity to bring a declaratory judgment action; only a person seeking a declaration that an action of a public body was in violation of the Open Meetings Act is entitled to initiate judicial action to seek enforcement of its request. *See* N.C.G.S. § 143–318.16 (2003) ("Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special damage different from that suffered by the public at large."); N.C.G.S. § 143–318.16A(a) (2003) ("Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article.... Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large."); *Eggimann v. Wake County Bd. of Educ.,* 22 N.C.App. 459, 463, 206 S.E.2d 754, 757 (1974) (stating that the "provisions of former G.S. 143–318.6 [now G.S. § 143–318.16] were intended to apply only to a situation where a citizen has been refused access to a meeting required to be open").

Likewise, the same consideration we noted in our opinion in *McCormick* as to the propriety of a government agency bringing a declaratory judgment action as to public records, applies in the instant case to a government agency bringing a declaratory judgment action as to open meetings. Allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation will have a chilling effect on the public, in essence eliminating the protection offered them under the statute by requiring them " 'to defend civil actions they otherwise might not have commenced, ... thus frustrating the Legislature's purpose of furthering the fundamental right of every person ... to have prompt access to information in the possession of public agencies.' " *McCormick,* 164 N.C.App. at ——, 596 S.E.2d at 434 (2004) (quoting *Filarsky v. Superior Court,* 28 Cal.4th 419, 423, 121 Cal.Rptr.2d 844, 845, 49 P.3d 194, 195 (2002)).

***194** Based on the purpose of promoting " 'openness in the daily workings of public bodies,' " *Boney,* 151 N.C.App. at 658, 566 S.E.2d at 706 (citation omitted), and the policy consideration for disclosure under the act, it was error for the trial court to allow a public body to file a declaratory judgment action in the instant case.

Reversed.

Judges McCULLOUGH and ELMORE concur.

**All Citations**

166 N.C.App. 186, 600 S.E.2d 872, 33 Media L. Rep. 1370

Footnotes

1 Plaintiff's motion for a temporary stay was allowed by our Supreme Court on 21 June 2004.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Marken v. Santa Monica-Malibu Unified School Dist., Cal.App. 2 Dist., January 24, 2012

28 Cal.4th 419, 49 P.3d 194, 121 Cal.Rptr.2d 844, 30 Media L. Rep. 2089, 02 Cal. Daily Op. Serv. 6270, 2002 Daily Journal D.A.R. 7823
Supreme Court of California

STEVE A. FILARSKY, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CITY OF MANHATTAN BEACH, Real Party in Interest.

No. S091308.
July 15, 2002.

## SUMMARY

An individual requested that a city disclose certain documents pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.). The city refused to disclose the requested documents, and the individual stated his intent to file a judicial proceeding under the act to compel disclosure. Before he initiated such a proceeding, however, the city filed its own declaratory relief action pursuant to Code Civ. Proc., § 1060, seeking a declaration that the city was not required to disclose the records sought. The trial court entered a minute order concluding that the documents requested were not subject to disclosure as a matter of law. (Superior Court of Los Angeles County, No. YC034873, Jean E. Matusinka, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B139018, denied the individual's petition for a writ of mandate.

The Supreme Court reversed with directions to vacate the Court of Appeal's decision denying the petition and to issue a writ of mandate compelling the trial court to vacate its order granting declaratory relief and to enter an order sustaining the individual's demurrer to the complaint. The court held that the trial court abused its discretion by granting declaratory relief in the action filed by the city pursuant to Code Civ. Proc., § 1060, solely for the purpose of ascertaining the city's obligation to disclose the records to the individual. The trial court should have sustained the individual's demurrer to the complaint on the grounds that (1) Gov. Code, §§ 6258 and 6259, set forth the exclusive means under these circumstances for litigating the question whether the requested records must be disclosed, (2) litigation of the matter pursuant to those provisions was the more appropriate procedure for granting effective relief, and (3) those provisions did not authorize the city to initiate a judicial proceeding to determine its obligation to disclose public records that had been requested pursuant to the act. (Opinion by George, C. J., expressing the unanimous view of the court.) ***420**

## HEADNOTES

### Classified to California Digest of Official Reports

(1)
Records and Recording Laws § 12.5--Inspection of Public Records-- California Public Records Act--Purpose.
The California Public Records Act (Gov. Code, § 6250 et seq.) was modeled on the federal Freedom of Information Act and was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies.

(2)
Records and Recording Laws § 16--Inspection of Public Records-- Procedure--Actions; Review--California Public Records Act.
The purpose of the provision in the California Public Records Act (Gov. Code, § 6250 et seq.) limiting appellate review of the trial court's order to a petition for an extraordinary writ (Gov. Code, § 6259, subd. (c)) is to prohibit public agencies from delaying the disclosure of public records by appealing a trial court's decision and using continuances in order to frustrate the intent of the act. The legislative objective was to expedite the process and make the appellate remedy more effective.

(3)
Records and Recording Laws § 16--Inspection of Public Records-- Procedure--Actions--Attorney Fees.
An award of costs and attorney fees pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.) is mandatory if the plaintiff prevails. On the other hand, if the defendant public agency prevails, the court lacks legal authority to award costs to the agency-even though the agency would be entitled to costs in an ordinary action-unless the action is frivolous.

(4)

Records and Recording Laws § 16--Inspection of Public Records-- Procedure--Actions--Under California Public Records Act--Ordinary Declaratory Relief Action--Distinctions.

There are at least four important distinctions between proceedings arising under the California Public Records Act (Gov. Code, § 6250 et seq.) and ordinary declaratory relief actions. First, under the act, only a person seeking disclosure-not the public agency in possession of the records-may seek a judicial declaration regarding the agency's obligation to disclose a document. In an ordinary declaratory relief action, however, either party to a controversy may initiate the action. Second, in a proceeding under the act, the court must schedule the filing of responsive pleadings and hearings in order to reach a decision as soon as possible. Such a requirement is not imposed upon courts in an ordinary declaratory relief action. Third, if a person initiates a proceeding under the act, he or she must be awarded attorney fees and costs if he or she prevails, ***421** and the defendant public agency cannot recover fees or costs unless the proceeding is frivolous. In contrast, in a declaratory relief action, a member of the public seeking disclosure cannot recover attorney fees if he or she prevails, and a prevailing public agency may recover costs even if the individual's request for disclosure is not frivolous. Fourth, appellate review of the superior court's ruling in a proceeding under the act must be by a petition for a writ of mandate filed no more than 40 days after notice of the ruling. A public agency, however, may appeal from a declaratory judgment requiring disclosure of the records, thus delaying disclosure for a significant period of time.

(5)

Records and Recording Laws § 16--Inspection of Public Records-- Procedure--Actions--Under California Public Records Act--By Public Agency.

Gov. Code, §§ 6258 and 6259, of the California Public Records Act (Gov. Code, § 6250 et seq.)), do not authorize a public agency to initiate a proceeding under the act to determine that agency's obligation to disclose documents to a member of the public. If the person requesting the records does not deem it worthwhile to bring a judicial proceeding to compel disclosure after a public agency has denied a request for disclosure, no litigation will occur and the records will not be disclosed. Even if the request implicates important, unresolved legal questions, such questions are not ripe for adjudication unless and until a person files a judicial proceeding pursuant to Gov. Code, § 6258, that would require the resolution of these questions. In enacting Gov. Code, §§ 6258 and 6259, the Legislature specified the exclusive procedure in these circumstances for litigating disputes regarding a person's right to obtain disclosure of public records under the act, and a superior court abuses its discretion in bypassing this statutory procedure and granting declaratory relief in an action initiated by a public agency pursuant to Code Civ. Proc., § 1060.

(6)

Declaratory Relief § 8--Jurisdiction and Discretion of Trial Courts.

The trial court may refuse to grant declaratory relief in any case where its declaration or determination is not necessary or proper at the time under all the circumstances (Code Civ. Proc., § 1061). The trial court's decision to entertain an action for declaratory relief is reviewable for abuse of discretion. The mere circumstance that another remedy is available is an insufficient ground for refusing declaratory relief, and doubts regarding the propriety of an action for declaratory relief pursuant to Code Civ. Proc., § 1060, generally are resolved in favor of granting relief. Even if the trial court possesses subject matter jurisdiction in a declaratory relief action, however, the court properly may refuse to grant relief where an appropriate procedure has been ***422** provided by special statute and the court believes that more effective relief can and should be obtained through that procedure.

[See 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 822, 824.]

(7)

Records and Recording Laws § 16--Inspection of Public Records-- Procedure--Actions--Under California Public Records Act--By Public Agency.

The trial court abused its discretion by granting declaratory relief in an action filed by the city pursuant to Code Civ. Proc., § 1060, solely for the purpose of ascertaining the city's obligation to disclose records to an individual, after the city denied his request under the California Public Records Act (Gov. Code, § 6250 et seq.). The court should have sustained the individual's demurrer to the complaint on the grounds that (1) Gov. Code, §§ 6258 and 6259, set forth the exclusive means under these circumstances for litigating the question whether the requested records must be disclosed, (2) litigation of the matter pursuant to those provisions was the more appropriate procedure for granting effective relief, and (3) those provisions did not authorize the city to initiate

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

a judicial proceeding to determine its obligation to disclose public records that had been requested pursuant to the act.

[See 2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, §§ 286, 287; West's Key Number Digest, Records 63.]

COUNSEL

Steve A. Filarsky, in pro. per., for Petitioner.

Davis Wright Tremaine and Kelli L. Sager for California First Amendment Coalition as Amicus Curiae on behalf of Petitioner.

No appearance for Respondent.

Robert V. Wadden, Jr., City Attorney, for Real Party in Interest.

Littler Mendelsohn, Arnold P. Peter, Bruce J. Sarchet, Janel R. Ablon and Laura S. Shipley for California State Association of Counties and League of California Cities as Amici Curiae on behalf of Real Party in Interest. ***423**

**GEORGE, C. J.**

Petitioner Steve A. Filarsky requested that real party in interest City of Manhattan Beach (the city) disclose certain documents pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.) (hereafter referred to as the CPRA or the Act).[1] The city refused to disclose the requested documents, and petitioner stated his intent to file a judicial proceeding under section 6258 of the Act to compel disclosure. Before petitioner initiated such a proceeding, however, the city filed its own declaratory relief action pursuant to Code of Civil Procedure section 1060, seeking a declaration that the city was not required to disclose the records sought by petitioner. The city prevailed in that action, and the Court of Appeal denied petitioner's request for a writ of mandate to overturn the trial court's order declaring that the city was not required to disclose the documents. The Court of Appeal also held that the city properly could initiate a declaratory relief action pursuant to Code of Civil Procedure section 1060 to ascertain its obligation to disclose documents requested pursuant to the Act, even though petitioner had not commenced any litigation regarding his request for disclosure.

We granted review to decide whether a superior court properly may grant declaratory relief in an action initiated by a public agency solely to determine the agency's obligation to disclose documents to a member of the public after the agency has denied the person's request under the Act. As we shall explain, we conclude that the Legislature set forth in Government Code sections 6258 and 6259 the exclusive procedure for litigating the issue of a public agency's obligation to disclose records to a member of the public in these circumstances, and these provisions do not authorize a public agency in possession of the records to seek a judicial determination regarding its duty of disclosure.

Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation would eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act, thus frustrating the Legislature's purpose of furthering the fundamental right of every person in this state to have prompt access to information in the possession of public agencies. Therefore, we also conclude that the superior court abused its discretion in granting declaratory relief in the action initiated by the city pursuant to Code of Civil Procedure section 1060, and that ***424** the court instead should have sustained petitioner's demurrer to the city's complaint. Accordingly, the judgment of the Court of Appeal is reversed.

**I**

In several letters sent to the city, petitioner, an attorney, sought disclosure of records related to the city's hiring of a police captain. After the city attorney denied his request for disclosure, petitioner wrote to the city: "I find your response most perplexing and am offering the City one more opportunity to provide the information requested before I seek court intervention." Petitioner's letter concluded: "Government Code section 6258 provides that any person may institute proceedings for injunctive or declaratory relief to enforce the right to inspect or receive a copy of any public record. A prevailing plaintiff in litigation filed pursuant to the Public Records Act is entitled to recover costs and reasonable attorneys fees [.] Government Code section 6259(d)."

In response, the city agreed to disclose only a small portion of the records requested by petitioner. The city also stated in a letter dated April 26, 1999: "You have indicated your intent to pursue this matter in court. We would certainly welcome the guidance of the court and may initiate that process ourselves." Indeed, that same day, the city filed its complaint for declaratory relief pursuant to Code of Civil Procedure section 1060. The complaint alleged that petitioner "has clearly indicated ... his intent to file a legal

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

action against the [c]ity if all the documents requested are not delivered to him." It further alleged that an actual controversy had arisen, because petitioner contended that he was entitled to disclosure of the records under the Act and the city disputed that contention. The complaint stated that the "[c]ity desires a judicial determination of its rights and duties under Government Code section 6250 et seq.... and a declaration as to whether or not [the city] has an obligation to provide [petitioner] with the records he has requested .... [¶] A judicial declaration is necessary and appropriate in that declaratory relief is the designated form of action *under the Public Records Act as set forth in Government Code section 6258*, [petitioner] claims an immediate right to the records demanded, important privacy and confidentiality rights of the affected employee are involved and the respective rights and duties of [petitioner] and [the city] *cannot otherwise be determined*." (Italics added.) The complaint requested a declaration that the city had no legal duty to provide the documents to petitioner, and also sought costs and attorney fees.

In response to a letter from petitioner requesting that the city dismiss its action, the city wrote that the declaratory relief action was "an accommodation" of petitioner's desire to litigate the matter. The city's letter stated: "If ***425** we are incorrect and you do not wish the matter to be litigated please so state in writing and we will promptly dismiss the case. However, if it is your desire to have this action dismissed so you can simply file a new action to litigate the same issues we will not do so."

Petitioner demurred to the city's complaint. He contended that the complaint failed to state a cause of action and that the trial court lacked jurisdiction, because a declaratory relief action pursuant to Code of Civil Procedure section 1060 could not be utilized to determine the validity of a request for public records. Petitioner's demurrer to the complaint was overruled, and the matter was submitted on the trial briefs of the parties. The court entered a minute order concluding that the documents requested by petitioner were not subject to disclosure as a matter of law. The notice of the order, prepared by the city, stated: "[A] final order granting declaratory relief in favor of [the city] in the above-captioned action was entered on January 25, 2000." As far as the record and the briefing indicate, the trial court did not award costs or attorney fees, and no judgment has been entered.

Petitioner filed a petition for writ of mandate pursuant to a provision in the Act stating that any order of the court supporting the decision of a public official refusing disclosure is not a final judgment or order within the meaning of Code of Civil Procedure section 904.1, from which an appeal may be taken, but that such an order immediately is reviewable by a petition for the issuance of an extraordinary writ. (Gov. Code, § 6259, subd. (c).) After issuing an order to show cause, the Court of Appeal determined that the city properly had brought its declaratory relief action pursuant to Code of Civil Procedure section 1060, and that the records were not subject to disclosure. Petitioner sought review of both conclusions.

We granted review but limited the issues to be briefed and argued in this court to the question whether a public agency is authorized to commence a declaratory relief action pursuant to Code of Civil Procedure section 1060 to determine its obligation to comply with a request by a member of the public that the agency disclose documents alleged to be public records, and whether the superior court properly may grant declaratory relief to a public agency in such an action.

## II

(1) The CPRA was modeled on the federal Freedom of Information Act (FOIA) ( 5 U.S.C. § 552 et seq.) and was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. ( ***426** *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [230 Cal.Rptr. 362, 725 P.2d 470].) The Legislature has declared that such "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Gov. Code, § 6250.)

A state or local agency, upon receiving a request by any person for a copy of public records, generally must determine within 10 days whether the request seeks public records in the possession of the agency that are subject to disclosure. (§ 6253, subd. (c).) If the agency determines that the requested records are not subject to disclosure, for example because the records fall within a statutory exemption (see § 6254), the agency promptly must notify the person making the request and provide the reasons for its determination. (§ 6253, subd. (c).)

The Act sets forth specific procedures for seeking a judicial determination of a public agency's obligation to disclose records in the event the agency denies a request by a member of the public. "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

or to receive a copy of any public record or class of public records under [the Act].” (§ 6258.) The plain language of this provision contemplates a declaratory relief proceeding commenced only by an individual or entity seeking disclosure of public records, and not by the public agency from which disclosure is sought.

After a person commences such a proceeding, the court must set the times for responsive pleadings and for hearings “with the object of securing a decision ... at the earliest possible time.” (§ 6258.) If it appears from the plaintiff's verified petition that “certain public records are being improperly withheld from a member of the public,” the court must order the individual withholding the records to disclose them or to show cause why he or she should not do so. (§ 6259, subd. (a).)

The court's order either directing disclosure by a public official or supporting the decision to refuse disclosure “is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ” filed within 20 days after service of the notice of entry of the order, or within an additional 20 days as the trial court may allow for good cause. (§ 6259, subd. (c).) (2) The purpose of the provision limiting appellate review of the trial court's order to a petition for extraordinary writ is to prohibit public agencies from delaying the disclosure of public records by appealing a trial ***427** court decision and using continuances in order to frustrate the intent of the Act. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334-1336 [283 Cal.Rptr. 893, 813 P.2d 240].) The legislative objective was to expedite the process and make the appellate remedy more effective. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 112 [40 Cal.Rptr.2d 839, 893 P.2d 1160] (plur. opn. of Kennard, J.), 117-118 (conc. opn. of George, J.).) Indeed, the Act's provision regarding a public agency's obligation to act promptly upon receiving a request for disclosure (§ 6253, subd. (c)), the provision directing the trial court in a proceeding under the Act to reach a decision as soon as possible (§ 6258), and the provision for expedited appellate review (§ 6259, subd. (c)) all reflect a clear legislative intent that the determination of the obligation to disclose records requested from a public agency be made expeditiously.

The Act includes protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure. “The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. If the court finds that the plaintiff's case is *clearly frivolous*, it shall award court costs and reasonable attorney fees to the public agency.” (§ 6259, subd. (d), italics added.) (3) An award of costs and attorney fees pursuant to this provision is mandatory if the plaintiff prevails. (*Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 899-900 [283 Cal.Rptr. 829].) On the other hand, if the defendant public agency prevails, the court lacks legal authority to award costs to the agency-even though the agency would be entitled to costs in an ordinary action-unless the action is frivolous. “Although the City might ordinarily be entitled to its costs as the party prevailing in the lawsuit under Code of Civil Procedure section 1032, the Legislature has provided otherwise in cases brought pursuant to the Act. In cases brought pursuant to the Act, the Legislature has expressly limited an award of costs to the public agency to those actions in which the plaintiff's case is clearly frivolous. As such, the specific provisions of the Act must prevail over the more general provision of the Code of Civil Procedure. [Citations.]” (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 484 [23 Cal.Rptr.2d 412].)

We subsequently agreed with the Court of Appeal's interpretation of the statute in *Rogers*: “This statutory provision quite clearly addresses the circumstances under which both a plaintiff and a defendant can obtain an award of costs (and attorney fees) following a Public Records Act lawsuit. For the plaintiff, he or she must 'prevail in litigation filed pursuant to this ***428** section.' (Gov. Code, § 6259, subd. (d).) For a defendant public agency, it must both prevail and have the trial court conclude the plaintiff's case was 'clearly frivolous.' (*Ibid.*)” (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 997 [73 Cal.Rptr.2d 682, 953 P.2d 858], italics omitted.) Thus, unless the plaintiff initiates litigation pursuant to section 6258 that is clearly frivolous, the plaintiff is insulated from liability for the public agency's costs incurred in defending the action.

The foregoing special statutory procedures governing a judicial proceeding arising under the Act are significantly different from the procedures applicable in an ordinary action for declaratory relief pursuant to Code of Civil Procedure section 1060. Unlike Government Code section 6258, which limits declaratory relief proceedings to those initiated by individuals or entities seeking disclosure of public records,

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Code of Civil Procedure section 1060 generally authorizes governmental agencies to commence any type of declaratory relief action.[2] (*Hoyt v. Board of Civil Service Commrs.* (1942) 21 Cal.2d 399, 401-404 [132 P.2d 804].) In addition, although ordinary actions for declaratory relief generally must be set for *trial* at the earliest possible date (Code Civ. Proc., § 1062.3), the court is not expressly obligated to schedule responsive pleadings and hearings in order to facilitate a prompt decision. Furthermore, in an ordinary declaratory relief action, the prevailing party *is* entitled to court costs (*id.*, § 1032; see *Spiva v. Phoenix Indemnity Co.* (1959) 167 Cal.App.2d 496, 498 [334 P.2d 614]), but the prevailing party is *not* entitled to attorney fees in the absence of a contractual provision so providing (*Spiva v. Phoenix Indemnity Co.*, *supra*, 167 Cal.App.2d at pp. 498-499). Moreover, a judgment ordinarily constitutes the final resolution of an action for declaratory relief pursuant to Code of Civil Procedure section 1060 (see *Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 729-731 [146 P.2d 673, 151 A.L.R. 1062]), and such a judgment is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1).

(4) In sum, there are at least four important distinctions between proceedings arising under the Act and ordinary declaratory relief actions. First, under the Act, only a person seeking disclosure-not the public agency in possession of the records-may seek a judicial declaration regarding the ***429** agency's obligation to disclose a document. In an ordinary declaratory relief action, however, either party to a controversy may initiate the action. Second, in a proceeding under the Act, the court must schedule the filing of responsive pleadings and hearings in order to reach a decision as soon as possible. Such a requirement is not imposed upon courts in an ordinary declaratory relief action. Third, if a person initiates a proceeding under the Act, he or she must be awarded attorney fees and costs if he or she prevails, and the defendant public agency cannot recover fees or costs unless the proceeding is frivolous. In contrast, in a declaratory relief action, a member of the public seeking disclosure cannot recover attorney fees if he or she prevails, and a prevailing public agency may recover costs even if the individual's request for disclosure is not frivolous. Fourth, appellate review of the superior court's ruling in a proceeding under the Act must be by a petition for writ of mandate filed no more than 40 days after notice of the ruling. On the other hand, a public agency may appeal from a declaratory judgment requiring disclosure of the records, thus delaying disclosure for a significant period of time.

These distinctions establish that permitting a public agency to file a preemptive declaratory relief action to determine its obligation to disclose records to a member of the public would eliminate important incentives and protections for individuals requesting public records. Members of the public could be discouraged from requesting records, because a simple request for disclosure and a denial by the public agency could require the individual to defend a civil action in which he or she would be liable for costs if the agency prevailed, and in which the individual would not recoup attorney fees if he or she succeeded. The initiation of an ordinary declaratory relief action also could delay disclosure of the documents for a lengthy period, because the court would be under no statutory obligation to schedule briefing and hearings to expedite a decision, as would a court in a proceeding pursuant to the Act. Moreover, in a declaratory relief action pursuant to Code of Civil Procedure section 1060, a public agency could appeal from a judgment in favor of the individual or entity seeking disclosure, thus further delaying a determination whether the records must be disclosed and thwarting the clear intent of the Legislature that the matter be resolved expeditiously.

In the present case, the trial court apparently determined that it was possible to apply provisions of the Act to an ordinary declaratory relief proceeding. For example, the action for declaratory relief filed by the city, although denominated an action pursuant to Code of Civil Procedure section 1060, has been litigated in a manner suggesting that the parties and the trial court considered the action to be the practical equivalent of a proceeding under the Act. Thus, the city's complaint alleged that "declaratory relief is ***430** the designated form of action" under the Act as set forth in Government Code section 6258, and the complaint sought attorney fees, which are unavailable in an ordinary declaratory relief action. In addition, rather than entering a *judgment* declaring that disclosure is not required, the court entered an *order* granting declaratory relief in favor of the city. Although Code of Civil Procedure section 1060 specifies that the court's declaration "shall have the force of a final judgment," which may be appealed pursuant to Code of Civil Procedure section 904.1, petitioner sought a writ of mandate to review the trial court's "final order" pursuant to Government Code section 6259, subdivision (c), which governs appellate review of proceedings brought under the Act.

Indeed, in this court the city contends that in a declaratory relief action initiated by a public agency pursuant to Code of Civil Procedure section 1060, a defendant who obtains a ruling compelling the agency to produce documents pursuant

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

to the Act is entitled to recover attorney fees and costs pursuant to Government Code section 6259, subdivision (d). In addition, according to the city, the defendant in such an action possesses a right to expedited writ review, as authorized by section 6259, subdivision (c).

The city's position in this regard is consistent with the Court of Appeal's decision in *Fontana Police Dept. v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249 [88 Cal.Rptr.2d 641] (*Fontana Police Dept.*), which considered an action filed by a public agency seeking a protective order to preclude the production of public records requested by the defendant. The appellate court determined that the action was the "functional equivalent" of a proceeding under the Act, and that therefore the prevailing defendant who succeeded in obtaining production of the records was entitled to attorney fees and costs pursuant to section 6259, subdivision (d). (*Fontana Police Dept.*, *supra*, 74 Cal.App.4th at p. 1253.) The only issue on appeal in that matter, however, was the defendant's entitlement to attorney fees and costs, and the decision did not consider the propriety of the public agency's initiation of an action for a protective order to preclude disclosure of the public records pursuant to the defendant's request under the Act.

Neither the decision in *Fontana Police Dept.*, *supra*, 74 Cal.App.4th 1249, nor the arguments of the city in the present case, provide any reasoned basis for selecting which of the special statutory provisions governing judicial proceedings conducted pursuant to the Act should apply to declaratory relief actions filed by public entities pursuant to Code of Civil Procedure section 1060 in the circumstances now before us, and which should not apply. For example, the city does not explain why the foregoing isolated provisions in the Act-regarding attorney fees and appellate review-should be deemed ***431** applicable in an ordinary declaratory relief action initiated by a public agency, but other provisions of the Act-including the statute specifying that judicial proceedings conducted pursuant to the Act may be commenced only by a person seeking disclosure of documents (§ 6258)-should not apply. The provision authorizing an award of attorney fees to a prevailing plaintiff is limited expressly to litigation *filed pursuant to section 6259*. (§ 6259, subd. (d).) This provision also reflects a legislative intent that the plaintiff in a proceeding pursuant to sections 6258 and 6259 cannot be the public agency from which disclosure is sought, because the provision contemplates that the public agency always will pay any costs and attorney fees "should the plaintiff prevail." (§ 6259, subd. (d).) The provision authorizing expedited writ review authorizes a party to file a petition for extraordinary writ *upon entry of an order pursuant to section 6259*. (§ 6259, subd. (c).) If these special statutory procedures nevertheless govern an ordinary declaratory relief action filed by a public agency pursuant to Code of Civil Procedure section 1060, as the city contends, the procedures and limitations of section 6258 also should apply. As we have seen, section 6258 limits the declaratory relief proceedings it authorizes to those initiated by persons seeking to enforce their right to inspect or to obtain disclosure of public records.

The city maintains that public agencies must be permitted to initiate declaratory relief actions to determine their rights and obligations under the Act, because a public agency might deny the request of another public agency for inspection of public records, necessitating litigation to determine whether such records must be disclosed. The present case does not involve such a dispute, however, and we have no occasion to decide whether a public agency is authorized to initiate a judicial proceeding to enforce a right to inspect or to seek disclosure of public records in the possession of another public agency.

We also have no occasion in the present case to determine whether a third party possesses the right to seek a judicial ruling precluding a public agency from disclosing documents pursuant to the CPRA. (See, e.g., Civ. Code, § 1798.45.) Such an action, known as a "reverse FOIA" case pursuant to the federal counterpart of the CPRA, has been held to be authorized by a specific federal statute authorizing judicial review of agency actions that adversely affect another person. (5 U.S.C. § 702; *Campaign for Family Farms v. Glickman* (8th Cir. 2000) 200 F.3d 1180, 1184.) The United States Supreme Court has recognized, however, that the FOIA itself provides only a cause of action to compel disclosure-not an action to prohibit disclosure. (*Chrysler Corp. v. Brown* (1979) 441 U.S. 281, 290-294 [99 S.Ct. 1705, 1711-1714, 60 L.Ed.2d 208].)

Amici curiae California State Association of Counties and League of California Cities contend that a federal district court's power to grant ***432** equitable relief in an FOIA case is not limited to granting only the remedies set forth in the FOIA, and that the CPRA should be construed in a similar manner to authorize the type of declaratory relief sought by the city in the present case. Amici curiae rely upon the high court's decision in *Renegotiation Board v. Bannercraft Co.* (1974) 415 U.S. 1, 18-25 [94 S.Ct. 1028, 1037-1041, 39 L.Ed.2d 123], which suggested that in a proceeding initiated

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

by government contractors pursuant to the FOIA, the district court's equity powers were not limited to those specified in the FOIA and could extend to enjoining action by a public agency. The high court considered it unnecessary to decide that issue, however, because it determined that the district court had erred in enjoining the defendant agency from engaging in contract negotiations pending the determination of the contractors' FOIA claim. Such a result, the court reasoned, would permit the contractors to use the FOIA to achieve a particular result in administrative proceedings through judicial interference. Contrary to the contention of amici curiae, the cited decision does not provide any guidance in resolving the only issue presented here-whether a California superior court should grant declaratory relief in an action initiated by a public agency solely to determine the agency's obligation to disclose documents to a member of the public after the agency has denied the person's request under the CPRA.

(5) As established above, Government Code sections 6258 and 6259 do not authorize a public agency to initiate a proceeding under the Act to determine that agency's obligation to disclose documents to a member of the public. This limitation is logical and consistent with the policies underlying the Act. If the person requesting the records does not deem it worthwhile to bring a judicial proceeding to compel disclosure after a public agency has denied a request for disclosure, no litigation will occur and the records will not be disclosed. Even if the request implicates important unresolved legal questions, such questions are not ripe for adjudication unless and until a person files a judicial proceeding pursuant to section 6258 that would require the resolution of these questions. A public agency's initiation of an action regarding disclosure *before* a person commences litigation to require disclosure frustrates the purpose of the Act by discouraging requests for public records and requiring persons who make such requests to defend lawsuits they otherwise might not initiate. It also results in a waste of judicial resources. A person might threaten to commence a lawsuit, but such a threat often results in no actual litigation.

Having determined that the Act does not authorize a public agency to initiate an action to determine the agency's obligation to disclose public records after the agency denies a request for disclosure, and that permitting a public agency to maintain such an action would thwart the intent and ***433** purpose of the Act, we next consider whether Code of Civil Procedure section 1060 nevertheless authorizes a public agency to bring a declaratory relief action to determine whether it must disclose public records. We conclude that in enacting sections 6258 and 6259, the Legislature specified the exclusive procedure in these circumstances for litigating disputes regarding a person's right to obtain disclosure of public records under the Act, and that a superior court abuses its discretion in bypassing this statutory procedure and granting declaratory relief in an action initiated by a public agency pursuant to Code of Civil Procedure section 1060.

(6) "The court may refuse to [grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.) The trial court's decision to entertain an action for declaratory relief is reviewable for abuse of discretion. (*Cutting v. Bryan* (1929) 206 Cal. 254, 257 [274 P. 326].) The mere circumstance that another remedy is available is an insufficient ground for refusing declaratory relief, and doubts regarding the propriety of an action for declaratory relief pursuant to Code of Civil Procedure section 1060 generally are resolved in favor of granting relief. (Code Civ. Proc., § 1062 [declaratory relief is cumulative to other remedies]; 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 822, p. 278.)

Even if the trial court possesses subject matter jurisdiction in a declaratory relief action filed pursuant to Code of Civil Procedure section 1060, however, the court properly may refuse to grant relief where an appropriate procedure has been provided by special statute and the court believes that more effective relief can and should be obtained through that procedure. (*Holden v. Arnebergh* (1968) 265 Cal.App.2d 87, 91-92 [71 Cal.Rptr. 401]; see 5 Witkin, Cal. Procedure, *supra*, Pleading, §§ 822, 824, pp. 278, 280.) Although some decisions state that in order to deny declaratory relief on this ground, the alternative remedy must be available to the plaintiff (e.g., *Maguire v. Hibernia S. & L. Soc.*, *supra*, 23 Cal.2d 719, 732), these decisions have not considered a situation where, as here, a special statutory scheme reflects an intention to *deny* the plaintiff the opportunity to seek declaratory relief, and where authorizing such relief pursuant to Code of Civil Procedure section 1060 would violate the policies underlying the statutory scheme. (Cf. *West Coast Poultry Co. v. Glasner* (1965) 231 Cal.App.2d 747, 751-752 [42 Cal.Rptr. 297] [trial court properly dismissed private litigant's action for declaratory relief where determination of the controversy more properly was within the power of the state civil service and personnel boards].) In such a situation, the superior court would abuse its discretion if it permitted the plaintiff, by initiating an ordinary declaratory relief action,

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

to circumvent the particular procedures and other provisions specified by the Legislature in the statutory scheme that was intended to govern such disputes. ***434**

A public agency might possess legitimate reasons for seeking a judicial declaration, before litigation is filed pursuant to the Act, regarding the agency's obligation to disclose public records. (*City of Santa Rosa v. Press Democrat* (1986) 187 Cal.App.3d 1315, 1322 [232 Cal.Rptr. 445].) For example, as the city contends, where an agency has been accused publicly of violating the Act, the agency might wish to obtain a judicial determination that its denial of a request for records was justified. The record in the present case, including the exchange of letters between the parties and the circumstance that the city's complaint sought attorney fees (which are available only to a prevailing *plaintiff* in a proceeding under the Act), also suggests the possibility that the city filed its declaratory relief action in order to gain a tactical advantage, however. The city does not contend that it or any third person would have suffered any prejudice had it not initiated the underlying declaratory relief action to ascertain its obligation to disclose the documents to petitioner. If petitioner chose not to file an action pursuant to section 6258, the city would not have been required to disclose the requested records. If petitioner had filed an action seeking to compel disclosure pursuant to the Act, the city could have raised all the contentions it successfully raised in its own declaratory relief action. The city contends that if such an action had been filed by petitioner instead of by the city, the only difference would have been in the caption of the case.

Whatever a public agency's motivation for initiating a declaratory relief action in these circumstances, authorizing the agency to commence such an action would chill the rights of individuals to obtain disclosure of public records, require such individuals to incur fees and costs in defending civil actions they otherwise might not have initiated, and clearly thwart the Act's purpose of ensuring speedy public access to vital information regarding the government's conduct of its business. (See *CBS, Inc. v. Block*, *supra*, 42 Cal.3d 646, 656.) "In light of the clear legislative objective to promote disclosure which underlies the CPRA, we find no reason to imply a countervailing intention to subject a requester of information to a potential civil action instituted by the government agency for the purpose of testing the legitimacy of the request. Rather than promoting the goals of open government and full disclosure, such a result would be at war with the very purpose of the CPRA and would effectively discourage requests for disclosure by a member of the public or representative surrogate." (*City of Santa Rosa v. Press Democrat*, *supra*, 187 Cal.App.3d 1315, 1323.)

(7) We determine that the superior court abused its discretion by granting declaratory relief in the action filed by the city pursuant to Code of Civil Procedure section 1060 solely for the purpose of ascertaining the city's obligation to disclose records to petitioner, after the city denied his request ***435** under the CPRA. The superior court should have sustained petitioner's demurrer to the complaint on the grounds that (1) Government Code sections 6258 and 6259 set forth the exclusive means under these circumstances for litigating the question whether the requested records must be disclosed, (2) litigation of the matter pursuant to those provisions is the more appropriate procedure for granting effective relief, and (3) those provisions do not authorize the city to initiate a judicial proceeding to determine its obligation to disclose public records that have been requested pursuant to the Act.

**III**

The judgment of the Court of Appeal is reversed with directions to vacate that court's decision denying the petition and to issue a writ of mandate compelling the superior court to vacate its order granting declaratory relief and to enter an order sustaining petitioner's demurrer to the complaint.

Kennard, J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred. ***436**

Footnotes

1 Further undesignated statutory references are to the Government Code.

2 Code of Civil Procedure section 1060 states in relevant part: "Any person ... who desires a declaration of his or her rights or duties with respect to another ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... in the superior court ... for a declaration of his or her rights and duties in the premises .... He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

> The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment....”

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Raef v. Appellate Division of Superior Court, Cal.App. 2 Dist., September 30, 2015

56 S.Ct. 444
Supreme Court of the United States.

GROSJEAN, Sup'r of Public Accounts of Louisiana
v.
AMERICAN PRESS CO., Inc., et al.

No. 303.
|
Argued Jan. 13, 14, 1936.
|
Decided Feb. 10, 1936.

**Synopsis**

Suit by American Press Company, Incorporated, and others against Alice Lee Grosjean, Supervisor of Public Accounts for the State of Louisiana. From a decree for plaintiffs (10 F.Supp. 161), the defendant appeals.

Affirmed.

West Headnotes (15)

[1] **Federal Courts** Requisite amount or value

Where bill by nine newspaper publishers sought to restrain collection of state license tax on ground that statute authorizing it violated Fourteenth Amendment, and record supported allegation that in respect of each of six of plaintiffs, jurisdictional amount was involved, District Court had jurisdiction (Acts La. No. 23 of 1934, s 1; Jud.Code, s 24(1), 28 U.S.C.A. s 41(1); Const. Amend. 14, s 1).

8 Cases that cite this headnote

[2] **Federal Courts** Particular Cases, Claim or Value

Where bill, supported by record, showed that as to each of six of the nine plaintiffs, jurisdictional amount was involved, motion to dismiss bill in its entirety held property denied. Jud.Code, § 24(1), 28 U.S.C.A. § 1331 et seq.

11 Cases that cite this headnote

[3] **Appeal and Error** Dismissal and Nonsuit in General

Where motion to dismiss, for insufficiency of amount involved, was directed to bill, filed by nine plaintiffs, in its entirety, whether bill should have been dismissed as to three of plaintiffs held not presented for review. Jud.Code, § 24(1), 28 U.S.C.A. §§ 1331, 1332, 1341, 1342, 1345, 1354, 1359.

7 Cases that cite this headnote

[4] **Federal Courts** Equity jurisdiction in general

Where general laws of state afforded no remedy for recovery of taxes paid under protest, and it was speculative whether aggrieved taxpayer could obtain relief under statute imposing license tax on newspaper publishers and providing for $500 find or imprisonment, or both, for violation thereof, newspaper publishers attacking statute as violation of Fourteenth Amendment held without plain, adequate, and complete remedy at law and entitled to apply for equitable relief (Acts La. No. 23 of 1934, ss 1, 5; Const. Amend. 14, s 1).

14 Cases that cite this headnote

[5] **Constitutional Law** First Amendment

States are precluded from abridging freedom of speech or of the press, not by the First Amendment, but by the due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14, § 1.

33 Cases that cite this headnote

[6] **Constitutional Law** Personal and bodily rights in general

"Liberty," as used in Fourteenth Amendment, embraces not only the right of a person to be

 © 2020 Thomson Reuters. No claim to original U.S. Government Works. 

free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. U.S.C.A.Const. Amend. 14, § 1.

19 Cases that cite this headnote

[7] **Constitutional Law** Corporations or other business entities

**Constitutional Law** Corporations and other business entities

Corporation is not a "citizen" within privileges and immunities clause of the Fourteenth Amendment (Const. Amend. 14).

71 Cases that cite this headnote

[8] **Constitutional Law** Freedom of Religion and Conscience

**Constitutional Law** First Amendment

Abridgement clause of the First Amendment expresses one of those fundamental principles of liberty and justice, and, as such, is embodied in the concept "due process of law," and is, therefore, protected against hostile state invasion by due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 1, 14, § 1.

43 Cases that cite this headnote

[9] **Constitutional Law** Relation to common law

Range of a constitutional provision phrased in terms of the common law may sometimes be fixed by recourse to the common law, but the doctrine justifying such recourse must yield to more compelling reasons and is subject to the qualification that the common-law rule invoked shall not have been rejected by our ancestors as unsuited to their civil or political conditions.

3 Cases that cite this headnote

[10] **Common Law** Adoption and Repeal

Restricted rules of the English law in respect of the freedom of the press, in force when the Constitution was adopted, were never accepted by the American colonists.

1 Cases that cite this headnote

[11] **Constitutional Law** Books

**Constitutional Law** Speech, press, assembly, and petition

First and Fourteenth Amendments were intended to preclude Congress and the states from adopting any form of restraint upon printed publications, or their circulation, including those restraints which had theretofore been effected by means of censorship, license, and taxation, and from taking any government action which might prevent such free and general discussion of public matters as seems essential to prepare the people for an intelligent exercise of their rights as citizens. U.S.C.A.Const. Amends. 1, 14, § 1.

198 Cases that cite this headnote

[12] **Constitutional Law** News gathering and dissemination; newspapers

**Licenses** Constitutionality and Validity of Acts and Ordinances

State statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly circulation of more than 20,000 copies held unconstitutional under due process of law clause of Fourteenth Amendment because it abridges the freedom of the press. Acts La. No. 23 of 1934, § 1; U.S.C.A.Const. Amend. 14, § 1.

126 Cases that cite this headnote

[13] **Constitutional Law** Applicability to governmental or private action; state action

Freedom of speech and of the press, which are protected from congressional infringement by First Amendment, are among fundamental personal rights and liberties protected by Fourteenth Amendment from invasion by state action. U.S.C.A.Const. Amends. 1, 14.

48 Cases that cite this headnote

 © 2020 Thomson Reuters. No claim to original U.S. Government Works. 

**[14]** **Constitutional Law** Business organizations; corporations

Corporation is a "person" within due process clause of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

70 Cases that cite this headnote

**[15]** **Licenses** Constitutionality and Validity of Acts and Ordinances

State statute imposing license tax for privilege of engaging in business of selling advertising upon all publishers of newspapers or magazines having weekly circulation of more than 20,000 copies held unconstitutional. Acts La. No. 23 of 1934, § 1.

65 Cases that cite this headnote

****445** ***233** Appeal from the District Court of the United States for the Eastern District of Louisiana.

**Attorneys and Law Firms**

***234** Messrs. Charles J. Rivet, of New Orleans, La., and Gaston L. Porterie, Atty. Gen., for appellant.

***237** Messrs. Esmond Phelps, of New Orleans, La., and Elisha Hanson, of Washington, D.C., for appellees.

**Opinion**

***240** Mr. Justice SUTHERLAND delivered the opinion of the Court.

This suit was brought by appellees, nine publishers of newspapers in the state of Louisiana, to enjoin the enforcement against them of the provisions of section 1 of the act of the Legislature of Louisiana known as Act No. 23, passed and approved July 12, 1934, as follows: 'That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.'

The nine publishers who brought the suit publish thirteen newspapers; and these thirteen publications are the ***241** only ones within the state of Louisiana having each a circulation of more than 20,000 copies per week, although the lower court finds there are four other daily newspapers each having a circulation of 'slightly less than 20,000 copies pert week' which are in competition with those published by appellees both as to circulation and as to advertising. In addition, there are 120 weekly newspapers published in the state, also in competition, to a greater or less degree, with the newspapers of appellees. The revenue derived from appellees' newspapers comes almost entirely from regular subscribers or purchasers thereof and from payments received for the insertion of advertisements therein.

The act requires every one subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business described in section 1. The resulting tax must be paid when the report is filed. Failure to file the report or pay the tax as thus provided constitutes a misdemeanor and subjects the offender to a fine not exceeding $500, or imprisonment not exceeding six months, or both, for each violation. Any corporation violating the acts subjects itself to the payment of $500 to be recovered by suit. All of the appellees are corporations. The lower court entered a decree for appellees and granted a permanent injunction. (D.C.) 10 F.Supp. 161.

**[1]** **[2]** **[3]** First. Appellant assails the federal jurisdiction of the court below on the ground that the matter in controversy does not exceed the sum or value of $3,000, as required by paragraph 1 of section 24 of the Judicial Code (28 U.S.C.A. s 41(1). The case arises under the Federal Constitution; and the bill alleges, and the record shows, that the requisite amount is involved in respect of each of six of the nine appellees. This is enough to sustain the jurisdiction of the District Court. The motion was to dismiss the bill—that is to say, the bill in its entirety—and in that form it was properly denied. No motion to dismiss was made or considered ***242** by the lower court as to the three appellees in respect of whom the jurisdictional amount was insufficient, and that question, therefore, is not before us. The Rio Grande, 19 Wall. 178, 189, 22 L.Ed. 60; Gibson v. Shufeldt, 122 U.S. 27, 32, 7 S.Ct. 1066, 30 L.Ed. 1083.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works. 

**[4]** Second. The objection also is made that the bill does not make a case for equitable relief. But the objection is clearly ****446** without merit. As pointed out in Ohio Oil Co. v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 73 L.Ed. 972, the laws of Louisiana afford no remedy whereby restitution of taxes and property exacted may be enforced, even where payment has been made under both protest and compulsion. It is true that the present act contains a provision (section 5) to the effect that where it is established to the satisfaction of the Supervisor of Public Accounts of the state that any payment has been made under the act which was 'not due and collectible,' the supervisor is authorized to refund the amount out of any funds on hand collected by virtue of the act and not remitted to the state treasurer according to law. It seems clear that this refers only to a payment not due and collectible within the terms of the act, and does not authorize a refund on the ground that the act is invalid. Moreover, the act allows the supervisor to make remittances immediately to the state treasurer of taxes paid under the act, and requires him to do so not later than the 30th day after the last day of the preceding quarter; in which even the right to a refund, if not sooner exercised, would be lost. Whether an aggrieved taxpayer may obtain relief under section 5 is, at best, a matter of speculation. In no view can it properly be said that there exists a plain, adequate, and complete remedy at law. Davis v. Wakelee, 156 U.S. 680, 688, 15 S.Ct. 555, 39 L.Ed. 578; Union Pac. R. Co. v. Board of Com'rs of Weld County, 247 U.S. 282, 285, 38 S.Ct. 510, 62 L.Ed. 1110.

Third. The validity of the act is assailed as violating the Federal Constitution in two particulars: (1) That it abridges the freedom of the press in contravention of the due process clause contained in section 1 of the Fourteenth ***243** Amendment; (2) that it denies appellees the equal protection of the laws in contravention of the same amendment.

**[5]** 1. The first point presents a question of the utmost gravity and importance; for, if well made, it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process clause of the Fourteenth Amendment.

In the case of Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232, this court held that the term 'due process of law' does not require presentment or indictment by a grand jury as a prerequisite to prosecution by a state for a criminal offense. And the important point of that conclusion here is that it was deduced from the fact that the Fifth Amendment, which contains the due process of law clause in its national aspect, also required an indictment as a prerequisite to a prosecution for crime under federal law; and it was thought that since no part of the amendment could be regarded as superfluous, the term 'due process of law' did not, ex vi termini, include presentment or indictment by a grand jury in any case; and that the due process of law clause of the Fourteenth Amendment should be interpreted as having been used in the same sense, and as having no greater extent. But in Powell v. State of Alabama, 287 U.S. 45, 65, 68, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, we held that in the light of subsequent decisions the sweeping language of the Hurtado Case could not be accepted without qualification. We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded ***244** against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.

**[6]** That freedom of speech and of the press are rights of the same fundamental character, safeguarded by the due process of law clause of the Fourteenth Amendment against abridgement by state legislation, has likewise been settled by a series of decisions of this court beginning with Gitlow v. People of State of New York, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138, and ending with Near v. State of Minnesota, 283 U.S. 697, 707, 51 S.Ct. 625, 75 L.Ed. 1357. The word 'liberty' contained in that amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well. ****447** Allgeyer v. State of Louisiana, 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832.

**[7]** Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall, 168, 19 L.Ed. 357. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & L. Turnpike Road Co. v. Sandford, 164 U.S. 578, 592, 17 S.Ct. 198, 41 L.Ed. 560; Smyth v. Ames, 169 U.S. 466, 522, 18 S.Ct. 418, 42 L.Ed. 819.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works. 

The tax imposed is designated a 'license tax for the privilege of engaging in such business,' that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of 2 per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising; and, second, its direct ***245** tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (Magnano Co. v. Hamilton, 292 U.S. 40, 45, 54 S.Ct. 599, 78 L.Ed. 1109, and cases cited), it well might result in destroying both advertising and circulation.

**[8]** A determination of the question whether the tax is valid in respect of the point now under review requires an examination of the history and circumstances which antedated and attended the adoption of the abridgement clause of the First Amendment, since that clause expresses one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270, 48 A.L.R. 1102), and, as such, is embodied in the concept 'due process of law' (Twining v. State of New Jersey, 211 U.S. 78, 99, 29 S.Ct. 14, 53 L.Ed. 97), and, therefore, protected against hostile state invasion by the due process clause of the Fourteenth Amendment. Cf. Powell v. State of Alabama, supra, 287 U.S. 45, at pages 67, 68, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. The history is a long one; but for present purposes it may be greatly abbreviated.

For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the gaencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing. As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept ***246** the office of censor and at the same time good enough to be allowed to perform its duties. Collett, History of the Taxes on Knowledge, vol. I, pp. 4—6. The act expired by its own terms in 1695. It was never renewed; and the liberty of the press thus became, as pointed out by Wickwar (The Struggle for the Freedom of the Press, p. 15), merely 'a right or liberty to publish without a license what formerly could be published only with one.' But mere exemption from previous censorship was soon recognized as too narrow a view of the liberty of the press.

In 1712, in response to a message from Queen Anne (Hansard's Parliamentary History of England, vol. 6, p. 1063), Parliament imposed a tax upon all newspapers and upon advertisements. Collett, vol. I, pp. 8—10. That the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown does not admit of doubt. Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Historical Review, 322—327. There followed more than a century of resistance to, and evasion of, the taxes, and of agitation for their repeal. In the article last referred to (p. 326), which was written in 1918, it was pointed out that these taxes constituted one of the factors that aroused the American colonists to protest against ****448** taxation for the purposes of the home government; and that the revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.

These duties were quite commonly characterized as 'taxes on knowledge,' a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people, went almost without question, even on the part of ***247** those who defended the act. May (Constitutional History of England, 7th Ed., vol. 2, p. 245), after discussing the control by 'previous censure,' says: '* * * a new restraint was devised in the form of a stamp duty on newspapers and advertisements,—avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns, and continued in high esteem until our own time.' Collett (vol. I, p. 14), says: 'Any man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers.'

Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper

 © 2020 Thomson Reuters. No claim to original U.S. Government Works. 

stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government. Upon the correctness of this conclusion the very characterization of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake; for, as Erskine, in his great speech in defense of Paine, has said, 'The liberty of opinion keeps governments themselves in due subjection to their ***248** duties.' Erskine's Speeches, High's Ed., vol. I, p. 525. See May's Constitutional History of England (7th Ed.) vol. 2, pp. 238—245.

In 1785, only four years before Congress had proposed the First Amendment, the Massachusetts Legislature, following the English example, imposed a stamp tax on all newspapers and magazines. The following year an advertisement tax was imposed. Both taxes met with such violent opposition that the former was repealed in 1786, and the latter in 1788. Duniway, Freedom of the Press in Massachusetts, pp. 136, 137.

**[9]** The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see Pennsylvania and the Federal Constitution, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the two forms of taxation already described. Such belief must be rejected in the face of the then well-known purpose of the exactions and the general adverse sentiment of the colonies in respect of them. Undoubtedly, the range of a constitutional provision phrased in terms of the common law sometimes may be fixed by recourse to the applicable rules of that ***249** law. But the doctrine which justifies such recourse, like other canons of construction, must yield to more compelling reasons whenever they exist. Cf. ****449** Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., 294 U.S. 648, 668, 669, 55 S.Ct. 595, 79 L.Ed. 1110. And, obviously, it is subject to the qualification that the commonlaw rule invoked shall be one not rejected by our ancestors as unsuited to their civil or political conditions. Den ex dem. Murray v. Hoboken Land & Improvement Co., 18 How. 272, 276, 277, 15 L.Ed. 372; Waring et al. v. Clarke, 5 How. 441, 454—457, 12 L.Ed. 226; Powell v. State of Alabama, supra, 287 U.S. 45, at pages 60—65, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

**[10]** **[11]** In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two wellknown and odious methods.

This court had occasion in Near v. State of Minnesota, supra, 283 U.S. 697, at pages 713 et seq., 51 S.Ct. 625, 75 L.Ed. 1357, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the constitutional provision, it was broadly said (283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357), meant 'principally although not exclusively, immunity from previous restraints or (from) censorship.'

Judge Cooley has laid down the test to be applied: 'The evils to be prevented were not the censorship of the press merely, but any action of the government by ***250** means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' 2 Cooley's Constitutional Limitations (8th Ed.) p. 886.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works. 

It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

**[12]** The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

In view of the persistent search for new subjects of taxation, it is not without significance that, with the single exception of the Louisiana statute, so far as we can discover, no state during the one hundred fifty years of our ***251** national existence has undertaken to impose a tax like that now in question.

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

2. Having reached the conclusion that the act imposing the tax in question is unconstitutional under the due process of law clause because it abridges the freedom of the press, we deem it unnecessary to consider the further ground assigned, that it also constitutes a denial of the equal protection of the laws.

Decree affirmed.

**All Citations**

297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660, 1 Media L. Rep. 2685

**End of Document**

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

52 Kan.App.2d 1
Court of Appeals of Kansas.

HUNTER HEALTH CLINIC, Appellee,
v.
WICHITA STATE UNIVERSITY, Appellee,
and
Wichita Eagle and Beacon Publishing Company, Inc., Appellant.

No. 111,586.
|
Nov. 6, 2015.

**Synopsis**
**Background:** After newspaper presented a request for records to state university under Kansas Open Records Act (KORA), seeking e-mails from e-mail accounts of university employees, who were former and current chairs of health clinic's board of directors, mentioning clinic, clinic brought a putative KORA cause of action to prevent university from releasing what it asserted were private clinic records. The Sedgwick District Court, Faith Maughan, J., granted clinic injunctive relief, preventing university from disclosing what the court determined were private records relating to clinic, and newspaper appealed.

**Holdings:** The Court of Appeals, Buser, J., held that:

[1] clinic lacked statutory standing to bring KORA claim against newspaper;

[2] any person whose request for public records has been denied or impeded has statutory standing to enforce the purposes of KORA by filing a cause of action in the district court of any county in which the records are located; and

[3] since health clinic did not have a cause of action under KORA to prevent state university from disclosing claimed private records, it lacked standing to obtain an injunction enforcing KORA.

Reversed and remanded with direction.

West Headnotes (15)

[1] **Action** Persons entitled to sue
**Appeal and Error** Standing
Issue of whether a party has standing in a judicial action presents a question of law subject to unlimited review.

[2] **Action** Persons entitled to sue
"Standing" is a party's right to make a legal claim or seek judicial enforcement of a duty or right.

[3] **Declaratory Judgment** Appeal and Error
**Declaratory Judgment** Scope and extent of review in general
Health clinic abandoned, for purposes of appeal, any reliance on the declaratory judgment statute as basis for injunctive relief against newspaper, which sought e-mails from e-mail accounts of state university employees, who were former and current chairs of health clinic's board of directors, mentioning clinic; although health clinic petitioned the district court in part for a declaratory judgment, clinic identified Kansas Open Records Act (KORA) as the basis for the district court's jurisdiction, clinic argued the matter as a KORA action, district court granted clinic's motion for injunctive relief, which did not mention declaratory judgment, and clinic did not reference declaratory judgment in its appellate brief, and it did not urge that remedy at oral arguments. West's K.S.A. 45–215 et seq., 60–1701.

[4] **Records** Persons entitled to pursue proceedings; standing
To establish standing under the Kansas Open Records Act (KORA), a party must meet the traditional tests for standing and satisfy the statutory standing requirement. West's K.S.A. 45–215 et seq.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

[5] **Action** Persons entitled to sue

Generally, to demonstrate common-law or traditional standing, a person suing individually must show a cognizable injury and establish a causal connection between the injury and the challenged conduct.

[6] **Action** Persons entitled to sue

Common-law standing is constitutionally required. West's K.S.A. Const. Art. 3, § 1.

[7] **Records** In general; necessity

**Records** Administrative construction of statutes and regulations; judicial deference

Kansas Open Records Act (KORA) provides that, when a public agency receives a request for records, it must decide whether the request is for access to the public record and, if so, whether an exception applies, and the public agency is bound by KORA when making its decisions. West's K.S.A. 45–218(d).

[8] **Action** Statutory rights of action

**Mandamus** Persons Entitled to Relief

**Records** Nature, Form, Right, and Elements of Action or Other Proceeding

Provision of the Kansas Open Records Act (KORA), stating that district court of any county in which public records are located shall have jurisdiction to enforce the purposes of this Act with respect to such records, by injunction, mandamus or other appropriate order, in an action brought by any person, does not create a cause of action to enforce the purposes of KORA with respect to private records. West's K.S.A. 45–222(a).

[9] **Records** Sufficiency and Specificity of Response

Violation under Kansas Open Records Act (KORA) may occur when a public agency denies access to the public record. West's K.S.A. 45–215 et seq.

[10] **Records** Media

Health clinic lacked statutory standing to bring Kansas Open Records Act (KORA) claim against newspaper, which sought e-mails from e-mail accounts of state university employees, who were former and current chairs of health clinic's board of directors, mentioning clinic; clinic's request to the district court was to prevent university from disclosing purportedly private records, and clinic was not an entity or person whose request for records under the Act, i.e., the public record, had been denied or impeded. West's K.S.A. 45–222(a).

[11] **Mandamus** Persons Entitled to Relief

**Records** Persons Entitled to Disclosure; Interest or Purpose

Phrase "any person" refers to persons seeking access to the public record, not to persons who would have the public agency deny access to claimed private records, as that phrase is used in provision of Kansas Open Records Act (KORA), stating that district court of any county in which public records are located shall have jurisdiction to enforce the purposes of this Act with respect to such records, by injunction, mandamus or other appropriate order, in an action brought by any person. West's K.S.A. 45–222(a).

[12] **Records** Persons entitled to pursue proceedings; standing

Any person whose request for public records has been denied or impeded has statutory standing to enforce the purposes of Kansas Open Records Act (KORA) by filing a cause of action in the district court of any county in which the records are located. West's K.S.A. 45–222(a).

[13] **Records** General disclosure requirements; freedom of information

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Under Kansas Open Records Act (KORA), it is the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by the Act, and KORA shall be liberally construed and applied to promote this public policy. West's K.S.A. 45–215 et seq.

**[14] Injunction** Equitable nature of remedy

Injunction provides an equitable remedy to a party for a legal wrong that gives rise to a cause of action.

**[15] Records** Persons entitled to pursue proceedings; standing

Since health clinic did not have a cause of action under Kansas Open Records Act (KORA) to prevent state university from disclosing claimed private records, it lacked standing to obtain an injunction enforcing KORA against newspaper, which sought e-mails from e-mail accounts of state university employees, who were former and current chairs of health clinic's board of directors, mentioning clinic. West's K.S.A. 45–215 et seq.

****11** *Syllabus by the Court*

1. The issue of whether a party has standing to pursue a cause of action presents a question of law subject to unlimited review.

2. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right.

****12** 3. To establish standing under the Kansas Open Records Act (KORA), K.S.A. 45–215 *et seq.*, a party must meet the traditional tests for standing and satisfy the statutory standing requirement.

4. Any person whose request for public records has been denied or impeded has statutory standing to enforce the purposes of KORA by filing a cause of action in the district court of any county in which the records are located.

5. Under KORA, it is the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by the act. KORA shall be liberally construed and applied to promote this public policy.

6. An injunction provides an equitable remedy to a party for a legal wrong that gives rise to a cause of action.

7. Under the facts of this case, the plaintiff did not have statutory standing to bring a cause of action under KORA seeking to enjoin the public agency from disclosing purportedly private records.

**Attorneys and Law Firms**

Lyndon W. Vix, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, for appellant Wichita Eagle and Beacon Publishing Company, Inc.

Alan L. Rupe, Jessica Skladzien, and Jeremy K. Schrag, of Lewis, Brisbois, Bisgaard & Smith, LLP, of Wichita, for appellee Hunter Health Clinic, Inc.

Christopher M. Grunewald, assistant attorney general, and Derek Schmidt, attorney general, for appellee Wichita State University.

Maxwell E. Kautsch, Kautsch Law, L.L.C. of Lawrence, for amici curiae Kansas Press Association, Inc.

Before PIERRON, P.J., BUSER and POWELL, JJ.

**Opinion**

BUSER, J.

***2** This appeal addresses the following question: Does a person who seeks to prevent a public agency from disclosing claimed private records have statutory standing to bring a cause of action under the Kansas Open Records Act (KORA), K.S.A. 45–215 *et seq.*? The Wichita Eagle and Beacon Publishing Company, Inc., (Eagle) presented a request for records to Wichita State University (WSU) under KORA. Upon learning of the request, Hunter Health Clinic (Hunter) brought a putative KORA cause of action to prevent WSU from releasing what it asserted were private Hunter records. After considering Hunter's standing under KORA to bring the lawsuit and the merits of Hunter's claims, the district court granted Hunter injunctive relief preventing WSU from disclosing what the court determined were private records relating to Hunter.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

We conclude that Hunter did not have statutory standing to pursue its cause of action under KORA. Accordingly, we reverse the district court's judgment and orders and remand the case to the district court with directions to dismiss the petition.

Factual and Procedural Background

At the outset, the parties submitted this case to the district court based on stipulated facts. The stipulated facts relevant to our holding are summarized below.

The parties agreed that the plaintiff, Hunter, a not-for-profit corporation with a principal place of business in Sedgwick County, Kansas, is not a public agency under KORA. The defendant, WSU, is a Kansas state educational institution and a public agency under KORA. The defendant, Eagle, is a Kansas for-profit corporation that ***3** publishes a general-circulation newspaper distributed throughout the state of Kansas.

Richard Muma is a former member and chair of Hunter's Board of Directors, and Jaya Escobar is a successor chair of Hunter's Board. Both individuals are also employees of WSU. Muma and Escobar used their WSU e-mail accounts to conduct correspondence regarding Hunter. Use of WSU e-mail accounts is governed by technology policies and procedures published by WSU.

On May 20, 2013, Kelsey Ryan, a reporter for the Eagle, sent a KORA request to WSU which stated in pertinent part:

> ****13** "Pursuant to the state open records law, Kan. Stat. Ann. Secs. 45–215 to 45–250, I write to request access to and a copy of emails to or from the account of Jaya Escobar ... and Richard Muma ... from August 31, 2012, to today that mention 'Hunter,' 'Hunter Health Clinic,' or 'the clinic.' "

According to a news article published in the Eagle, the newspaper is " 'seeking the e-mails in connection with its reporting on financial troubles' " at Hunter.

In response to the Eagle's request, WSU collected the e-mails, 420 in total with 219 attachments, and provided them to Hunter. The parties stipulated that the collected e-mails did not relate to the function, activities, programs, operations, or administration of WSU.

On May 22, 2013, Hunter filed a lawsuit against WSU and the Eagle (petition). Hunter pled that the district court had "jurisdiction to enforce [KORA] ... pursuant to K.S.A. 45–222." Hunter also asked the district court to issue "[a] declaratory judgment that (1) the records sought ... are not public records within the meaning of [KORA] and (2) the records sought ... are excepted from disclosure pursuant to [KORA]." Hunter further asked the district court to permanently enjoin "WSU from providing access to and copies of ... any and all" of the e-mails. Finally, Hunter asked the district court to issue a temporary restraining order, which the district court issued the same day.

WSU answered the petition by denying Hunter's claims for lack of knowledge. Nevertheless, WSU said it stood "ready to comply with [the] Order and determination of the [district court] relative ***4** to the [e]-mail records under consideration." WSU raised no affirmative defenses.

The Eagle answered Hunter's petition by admitting the district court "has subject matter jurisdiction over certain actions brought pursuant to [KORA]." The Eagle denied, however, that "this is such an action." In particular, the Eagle raised as a defense Hunter's lack of "standing to bring this action," specifically asserting the district court was "without subject matter jurisdiction."

The parties did not submit pretrial questionnaires, and the district court did not file a pretrial order. Instead, the parties arranged for submission of the case on stipulated facts via an e-mail exchange with the district court. The parties then submitted their legal arguments in written form.

Hunter presented its arguments in a " 'Motion for Permanent Relief Pursuant to the Kansas Open Records Act' " (motion) and supporting memorandum of law. Hunter did not mention declaratory judgment in either the motion or the memorandum. Instead, Hunter requested "an order pursuant to K.S.A. 45–222(a)," the same section of KORA it had cited in its petition to establish the district court's jurisdiction. Hunter asserted it was proceeding "under [KORA], asking this Court to issue an order under K.S.A. 45–222 preventing [WSU] from disclosing to the ... Eagle certain e-mails." Hunter also contended that "[t]he plain language of the KORA authorizes this action." Hunter renewed its request for a permanent injunction, arguing it would succeed on the merits under KORA.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

The Eagle responded by objecting to the form of Hunter's motion, alleging the filing was "somewhat at variance" with the e-mail agreement between the parties and the district court. In particular, the Eagle expressed concern that a ruling on a motion for injunction, as opposed to "a trial on stipulated facts" as the parties had supposedly agreed, would be an interlocutory order. The Eagle stated its "desire ... that whatever order the Court enters ... be a final judgment."

The Eagle then argued that Hunter did not have standing as a KORA plaintiff: "Hunter's action is not designed to promote the policy of open records; it is designed to do exactly the opposite—to ***5** *prevent* disclosure. It is therefore not an action that is authorized by K.S.A. 45–222(a)." In support, the Eagle noted: "Hunter cites no cases in which an action under KORA has been commenced by anyone other than the requester of records whose request has been denied."

In reply, Hunter stated it was "surprised that the Eagle would object to the form of the opening motion." Hunter asserted, without ****14** citation to its motion, that it had requested a declaratory judgment. But Hunter failed to argue declaratory judgment in its reply or even mention the remedy after this initial assertion.

For its part, WSU stated in its written submission that it "looks forward to guidance and instruction from the Court relative to its obligations in addressing this unique situation." WSU said it was "not in a position to object to the KORA request at issue here because the emails in question are not directly related to the 'function, activities, programs, operations, and/or administration of WSU.' " WSU assured the district court it would "follow the order of this Court or, if a negotiated resolution between [Hunter] and [the Eagle] is reached, will cooperate to accommodate an appropriate and lawful construction of [KORA]."

On February 13, 2014, the district court issued its ruling from the bench. The district court ruled that Hunter had standing to pursue its petition because it had shown "a significant personal stake in the release of the requested e-mails." The district court, however, did not specifically address Hunter's statutory standing under KORA. After concluding that the e-mails were not part of the public record under KORA, the district court granted Hunter's motion and permanently enjoined WSU from disclosing them. The district court specified that its ruling was a final judgment. The Eagle filed a timely appeal.

Standing

The central issue presented by this appeal is whether Hunter has standing to pursue its cause of action under KORA to prevent WSU from disclosing to the Eagle what Hunter claims are private records. Hunter relies on its common-law standing. On the contrary, the Eagle contends Hunter lacks the requisite statutory ***6** standing under KORA. WSU, now represented by the Attorney General in place of its own general counsel, has changed its position which it took before the district court and, for the first time on appeal, supports Hunter's legal contentions.

**[1]** Our long-standing standard of review provides: "The issue of whether a party has standing in a judicial action ... presents a question of law" subject to unlimited review. *Sierra Club v. Moser,* 298 Kan. 22, 29, 310 P.3d 360 (2013).

**[2]** "Standing is 'a party's right to make a legal claim or seek judicial enforcement of a duty or right.' [Citation omitted.]" *Board of Miami County Comm'rs v. Kanza Rail–Trails Conservancy, Inc.,* 292 Kan. 285, 324, 255 P.3d 1186 (2011). To determine whether Hunter had such a right, we must first identify the legal claim, duty, or right at issue.

**[3]** Hunter petitioned the district court in part for a declaratory judgment, but it identified KORA as the basis for the district court's jurisdiction. Hunter then argued the matter as a KORA action, and the district court granted Hunter's motion, which did not mention declaratory judgment. Similarly, Hunter does not reference declaratory judgment in its appellate brief, and it did not urge that remedy at oral arguments. As a result, Hunter has abandoned any reliance on the declaratory judgment statute, K.S.A. 60–1701, in the present litigation. See *Superior Boiler Works, Inc. v. Kimball,* 292 Kan. 885, 889, 259 P.3d 676 (2011) (issues not briefed are deemed waived or abandoned on appeal).

Instead, as Hunter readily acknowledges on appeal, it "sued the Eagle and WSU under the KORA," repeating that it "brought this lawsuit under the KORA." Hunter also disputes the Eagle's position that "only the person who issues the KORA request can pursue legal action to enforce the KORA." Consequently, Hunter is clearly pursuing a putative KORA claim in this litigation.

**[4]** Having identified the basis of Hunter's claim, we must consider both common-law standing and, if any, statutory

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

standing under KORA. Hunter contends that common-law standing alone suffices in KORA actions. On the contrary, the Eagle claims that standing is "purely statutory" in a KORA action. We disagree with both parties. Kansas law provides that "[t]o have standing, a party must satisfy ***7** any statutory standing requirements *and* meet the traditional ****15** tests for standing." (Emphasis added.) *Friends of Bethany Place v. City of Topeka,* 297 Kan. 1112, Syl. ¶ 2, 307 P.3d 1255 (2013).

**[5]** **[6]** With regard to common-law standing: "Generally, to demonstrate common-law or traditional standing, a person suing individually must show a cognizable injury and establish a causal connection between the injury and the challenged conduct." *Sierra Club,* 298 Kan. at 33, 310 P.3d 360. Common-law standing is constitutionally required. See *Sierra Club,* 298 Kan. at 29, 310 P.3d 360 (common-law standing satisfies "the Kansas case-or-controversy requirement imposed by the judicial power clause of Article 3, § 1 of the Kansas Constitution"). Even if a party "meets the statutory requirements, it must also meet the second prong, satisfying the requirements under the common-law standard that is often referred to in our caselaw as the traditional standing test." 298 Kan. at 30, 310 P.3d 360.

The parties agree the district court ruled that Hunter established common-law standing. The parties also do not challenge this holding on appeal. For our purposes, then, we presume that Hunter has common-law standing to pursue a KORA claim.

The question then becomes: What, if any, statutory standing requirements are necessary to pursue a KORA claim?

We begin by stating the KORA procedure that should be followed when a public agency receives a request for access to the public record:

> "Each request for access to a public record shall be acted upon as soon as possible, but not later than the end of the third business day following the date that the request is received. If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection. If the request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester not later than the end of the third business day following the date that the request for the statement is received." K.S.A. 45–218(d).

**[7]** Thus, KORA provides that when a public agency receives a request for records, it must decide whether the request is for access to the public record and, if so, whether an exception applies. The public agency is bound by KORA when making its decisions. See ***8** *State Dept. of SRS v. Public Employee Relations Board,* 249 Kan. 163, 170, 815 P.2d 66 (1991). Given this statutory framework, it is not surprising that plaintiffs in prior KORA cases have claimed a public agency should release purportedly public records. See, *e.g., Wichita Eagle & Beacon Publishing Co. v. Simmons,* 274 Kan. 194, 50 P.3d 66 (2002).

Hunter, however, claims that under KORA a public agency *should not* release records that are claimed to be *private.* Because Hunter seeks to prevent WSU from disclosing to the Eagle what it claims are private e-mails, Hunter maintains it is a KORA plaintiff based on K.S.A.2014 Supp. 45–222, the statute which creates the KORA cause of action.

We will consider this statute next, and to the degree it is ambiguous, we will then consider it in the context of KORA as a whole. See *Cady v. Schroll,* 298 Kan. 731, 739, 317 P.3d 90 (2014) (only if a statute is ambiguous does a court resort to the canons of construction); *City of Topeka,* 297 Kan. at 1123, 307 P.3d 1255 (the provisions of an act are considered in pari materia).

K.S.A.2014 Supp. 45–222 provides:

> "(a) The district court of any county in which *public records* are located shall have jurisdiction *to enforce the purposes of this act with respect to such records,* by injunction, mandamus or other appropriate order, *in an action brought by any person,* the attorney general or a county or district attorney.
>
> "(b) In any action hereunder, the court shall determine the matter de novo. The court on its own motion, or on motion of either party, may view the records in controversy ****16** in camera before reaching a decision.
>
> "(c) In any action hereunder, the court shall award costs and a reasonable sum as an attorney's fee for services rendered in such action, including proceedings on appeal, to be recovered and collected as part of the costs to the plaintiff if the court finds that the agency's denial of access to the public record was not in good faith and without a

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

reasonable basis in fact or law. The award shall be assessed against the public agency that the court determines to be responsible for the violation.

"(d) In any action hereunder in which the defendant is the prevailing party, the court shall award to the defendant costs and a reasonable sum as an attorney's fee for services rendered in such action, including proceedings on appeal, to be recovered and collected as part of the costs if the court finds that the plaintiff maintained the action not in good faith and without a reasonable basis in fact or law.

"(e) Except as otherwise provided by law, proceedings arising under this section shall be assigned for hearing and trial at the earliest practicable date.

***9** "(f) The provisions of subsections (c) and (d) concerning the awarding of costs and attorney fees for services rendered during an appeal shall apply only to actions which are based on causes of action accruing on or after July 1, 2004." (Emphasis added.)

Hunter bases its statutory standing argument on the phrase, "any person," in K.S.A.2014 Supp. 45–222(a). "At most," Hunter argues, "KORA imposes a statutory standing requirement that requires the plaintiff to be a 'person.' " Hunter concludes that because it is a legal person, it is a KORA plaintiff.

The phrase "any person" is undoubtedly broad, but KORA places it in a specific context: "The district court of any county in which *public records* are located shall have jurisdiction to enforce *the purposes of this act with respect to such records* ... in an action brought by *any person,* the attorney general or a county or district attorney." (Emphasis added.) K.S.A.2014 Supp. 45–222(a).

**[8]** KORA defines "public records" at K.S.A.2014 Supp. 45–217(g)(1)–(3). We will not parse that language because Hunter did not ask the district court to exercise jurisdiction over ostensibly public records. Instead, Hunter asked the district court to exercise jurisdiction over what it said were private records. But K.S.A.2014 Supp. 45–222(a) does not create a cause of action to enforce the purposes of KORA with respect to private records. As a result, given this statutory language focusing on "public records," Hunter's claim of statutory standing to make a KORA claim to prevent disclosure of private records is not persuasive.

**[9]** **[10]** We read "the purposes of this act" in the same manner. K.S.A.2014 Supp. 45–222(a). The purposes of KORA are shown by subsection (c), which awards costs to the "plaintiff if the court finds that the agency's *denial* of access to the *public record* was not in good faith and without a reasonable basis in fact or law. The award shall be assessed against the public agency that the court determines to be responsible for *the violation.*" (Emphasis added.) K.S.A.2014 Supp. 45–222(c). Thus, a violation under KORA may occur when a public agency denies access to the public record. As one commentator has observed: "Any person whose request for records *under the act* has been *denied or impeded* may bring an action in the district court of the county where the records are located." (Emphasis ***10** added.) Fredrickson, *Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act,* 33 Kan. L. Rev. 205, 261 (1985). Hunter was not an entity or person whose request for records under the act, *i.e.,* the public record, has been denied or impeded. Hunter's request to the district court was to prevent WSU from disclosing purportedly private records. On this basis, Hunter again lacked statutory standing to make a KORA claim.

Moreover, assuming K.S.A.2014 Supp. 45–222(a) is ambiguous, our reading of "any person" is consistent with the meaning of "any person" referenced throughout KORA. For example, "[*a*]*ll public records shall be open for inspection* by *any person,* except as otherwise provided by this act, and suitable ****17** facilities shall be made available by each public agency for this purpose." (Emphasis added.) K.S.A. 45–218(a). Likewise, "[u]pon request in accordance with procedures adopted under K.S.A. 45–220, *any person may inspect public records* during the regular office hours of the public agency." (Emphasis added.) K.S.A. 45–218(b). And, "[*a*]*ny person may make abstracts or obtain copies of any public records* to which *such person has access* under this act." (Emphasis added.) K.S.A.2014 Supp. 45–219(a).

**[11]** As these statutory provisions show, "any person" must be read in context. See *Nationwide Mutual Ins. Co. v. Briggs,* 298 Kan. 873, 875, 317 P.3d 770 (2014) (legislative intent is expressed in the language used). In both K.S.A.2014 Supp. 45–222(a) and the KORA provisions just quoted, "any person" refers to persons seeking access to the public record, not to persons who would have the public agency deny access to claimed private records.

This understanding is confirmed by the civil penalty provision, K.S.A. 45–223(a):

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

> "Any public agency subject to this act that knowingly violates any of the provisions of this act or that *intentionally fails to furnish information* as required by this act shall be liable for the payment of a civil penalty in an action brought by the attorney general or county or district attorney, in a sum set by the court of not to exceed $500 for each violation." (Emphasis added.)

If Hunter is correct, the attorney general or county or district attorney could similarly sue to prevent a public agency from furnishing information. But if that were so, the legislature would not have ***11** limited the penalty to cases where the agency "intentionally fails to furnish" information. K.S.A. 45–223(a). The legislature would also have included a penalty for furnishing information contrary to KORA. The fact that the legislature penalized only failing to furnish information strongly indicates furnishing information is the only remedy available under KORA. If furnishing information is the only remedy available, then a person who does not want a public agency to furnish information is not a KORA plaintiff.

**[12]** We hold that any person whose request for public records has been denied or impeded has statutory standing to enforce the purposes of KORA by filing a cause of action in the district court of any county in which the records are located. Under the facts of this case, however, Hunter did not have statutory standing to bring a cause of action under KORA seeking to enjoin WSU from disclosing ostensibly private records to the Eagle.

**[13]** Hunter briefs the public policy implications of our ruling. But the legislature has declared it to be "the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act." K.S.A. 45–216(a). The legislature also directed that KORA "shall be liberally construed and applied to promote such policy." K.S.A. 45–216(a). This legislatively determined public policy is a "significant departure from the previous law, the Kansas Public Records Inspection Act," which provided that only a "small number" of records were "open to public scrutiny." *Harris Enterprises, Inc. v. Moore,* 241 Kan. 59, 63, 734 P.2d 1083 (1987). "KORA, on the other hand, declares it to be the public policy of this state that public records shall be open for inspection by any person." 241 Kan. at 63, 734 P.2d 1083. The legislature's intent was "to ensure public confidence in government by increasing the access of the public to government and its decision-making processes." *Data Tree v. Meek,* 279 Kan. 445, 454, 109 P.3d 1226 (2005). Hunter's construction of KORA does not promote the public policy as determined by the legislature.

We note there is a dearth of Kansas caselaw addressing this specific issue. The Eagle, however, cites an unpublished Kansas federal case which is supportive of our reading of KORA. In *Reliastar Life Ins. Co. v. Warrior,* 2007 WL 2669558 (D.Kan.2007), a party ***12** in a dispute with an insurance company sought criminal investigative records held by the Wyandotte County District Attorney's office. The District Attorney's office was willing to release the records under a protective order, but the insurance company argued ****18** the records were not subject to release under KORA. United States District Magistrate Judge David J. Waxse held the insurance company could not rely on KORA:

> "In this case, it is the records custodian of the Wyandotte County District Attorney's office who has the discretion, under K.S.A. 45–221(a)(10), to determine whether to disclose the criminal investigation records at issue. If the Wyandotte County District Attorney's office makes the decision not to disclose such records, then the party requesting to inspect the records may bring an action under [KORA] to seek disclosure of such records. If a court were to find that the enumerated conditions of subsection (a)(10) warranted disclosure, the court would then have the power to require the District Attorney's office to make the records available. On the other hand, if the District Attorney's office makes a decision to produce or make the records available for inspection, it may do so, and nothing in K.S.A. 45–221(a)(10) *prohibits* the District Attorney's office from doing so.
>
> "Here, the Wyandotte County District Attorney's office has apparently agreed to disclose the investigative file in response to [the party's] subpoena, subject to an appropriate protective order. As the agency has made that decision, [KORA] cannot be used by [the insurance company] to prevent that disclosure." 2007 WL 2669558, *5–6.

We agree with this reading of KORA. To use a clichéd formulation, KORA is a sword to obtain access to the public record, not a shield to prohibit access to private records. Hunter asked the district court to do the latter. Since Hunter did not have the right under KORA to make such a legal claim or to seek judicial enforcement of such a duty or right, it lacked the requisite statutory standing.

Hunter presents an alternative argument: "Even if the Eagle could somehow establish that Hunter has no statutory

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

standing to bring its claims under KORA ... the district court's injunction would still be proper pursuant to K.S.A. 60–901 *et seq.,*" the statutes governing injunctive relief. The Eagle replies: "An injunction is a *remedy,* not a cause of action. It cannot exist in a vacuum but must be tied to a valid cause of action, and the plaintiff must have standing to assert that cause of action."

Our research located cases holding an injunction does not stand ***13** alone but is a remedy available upon a successful cause of action. See *Moore v. Walter Coke, Inc.,* 294 F.R.D. 620, 632 (N.D.Ala.2013); *Pinnacle Min. Co., LLC v. Bluestone Coal Corp.,* 624 F.Supp.2d 530, 539 (S.D.W.Va.2009); *Goerlitz v. City of Maryville,* 333 S.W.3d 450, 455 (Mo.2011). As one authority on federal procedure states: "[P]ermanent injunctions ordinarily may be rendered only after a valid adjudication of the merits of the action." 13 Moore's Federal Practice § 65.05[3] (3d ed., 2015).

Turning to Kansas law, an injunction is merely "an order to do or refrain from doing a particular act." K.S.A. 60–901. Thus it is "an equitable remedy designed to prevent irreparable injury by prohibiting or commanding certain acts." *Nat'l Compressed Steel Corp. v. Unified Gov't of Wyandotte County/Kansas City,* 272 Kan. 1239, Syl. ¶ 2, 38 P.3d 723 (2002). A remedy is, of course, available only to a party who can show a wrong. See *Brown v. ConocoPhillips Pipeline Co.,* 47 Kan.App.2d 26, 37, 271 P.3d 1269 (2012) ("A party cannot obtain an equitable remedy unless there is a wrong for which a remedy is necessary."). And a wrong, here, means a legal wrong, *i.e.,* one giving rise to a cause of action. See *Greenlee v. Board of Clay County Comm'rs,* 241 Kan. 802, 805, 740 P.2d 606 (1987) ("official misconduct can constitute an individual wrong only if the duty is owed to the party seeking redress"); *Thompson–Hayward Chem. Co. v. Cyprus Mines Corp.,* 8 Kan.App.2d 487, 492, 660 P.2d 973 (1983) ("A cause of action arises from the wrong done and not from the character of relief sought or from the measure of compensation.").

**[14]** We conclude that in Kansas an injunction provides an equitable remedy to a party for a legal wrong that gives rise to a cause of action. An injunction, therefore, must be supported by a cause of action. We find an example in *Cole v. Mayans,* 276 Kan. 866, 869, 80 P.3d 384 (2003), where a candidate for mayor of Wichita "filed a petition ****19** ... seeking a temporary and permanent injunction" on the basis that another candidate's "contribution from his legislative campaign account violated Wichita campaign finance ordinances." Contrary to Hunter's argument, the candidate brought her "cause of action *under the Wichita ordinances,*" not under the injunctive relief statutes. (Emphasis added.) 276 Kan. at 871, 80 P.3d 384.

**[15]** ***14** Since Hunter did not have a cause of action under KORA, it lacked standing to obtain an injunction enforcing KORA. For the same reason, Hunter lacked standing to obtain a decision on the predicate question of whether the e-mails were part of the public record. Given this lack of standing, we will not review the district court's decision that the e-mails were not part of the public record because the matter is moot. See *Smith v. Martens,* 279 Kan. 242, 244–45, 106 P.3d 28 (2005).

We also decline to consider the Eagle's requests to strike WSU's appellate brief and disregard it as a party based on the Attorney General's entry of appearance and WSU's subsequent change in legal position in this lawsuit. Although WSU and the Attorney General are subject to KORA, we have concluded this is not a KORA action.

The judgment and orders of the district court are reversed, and the case is remanded with directions to dismiss the petition.

**All Citations**

52 Kan.App.2d 1, 362 P.3d 10, 324 Ed. Law Rep. 1096


© 2021 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Overruling Recognized by Barclays Capital Inc. v. Theflyonthewall.com, Inc., 2nd Cir.(N.Y.), June 20, 2011

39 S.Ct. 68
Supreme Court of the United States

INTERNATIONAL NEWS SERVICE
v.
ASSOCIATED PRESS.

No. 221.
|
Argued May 2 and 3, 1918.
|
Decided Dec. 23, 1918.

**Synopsis**
On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit in equity by the Associated Press against the International News Service. An order of the District Court, granting a preliminary injunction (240 Fed. 983), was modified by the Circuit Court of Appeals (245 Fed. 244, 157 C. C. A. 436), and defendant brings certiorari. Affirmed.

West Headnotes (15)

[1] **Copyrights and Intellectual Property** Nature of property; common law copyright in general

In considering the general question of property in news matter, its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it, must be recognized.

13 Cases that cite this headnote

[2] **Copyrights and Intellectual Property** Nature of property; common law copyright in general

News, regarded as the material out of which rival news-gathering agencies are seeking to make profits at the same time and in the same field, when gathered by one, is "quasi property," though posted on bulletins or published in papers of some of its members.

10 Cases that cite this headnote

[3] **Copyrights and Intellectual Property** Dedication to public
**Newspapers** News associations and agencies

News furnished by complainant news gathering agency is not abandoned to the public for all purposes, including its use by a rival, on publication in the paper of a single member of complainant; abandonment being a question of intent, and the entire organization of complainant negativing such a purpose.

12 Cases that cite this headnote

[4] **Abandoned and Lost Property** Intent to abandon

Abandonment is a question of intent.

4 Cases that cite this headnote

[5] **Appeal and Error** Necessity of Specific Objection

Under equity rules 43, 44, 28 U.S.C.A. foll. § 723, as to objection by defendant, before or at the hearing, that suit is defective for want of parties, no specific objection of want of parties having been made below, objection because of suit for benefit of members of incorporated co-operative organization being brought by it, instead of them, will be treated as waived.

1 Cases that cite this headnote

[6] **Federal Civil Procedure** Particular Classes Represented

Under equity rule 38, 28 U.S.C.A. foll. § 723, authorizing one or more to sue for all, where the question is one of common or general interest to a numerous class, an incorporated co-operative organization is a proper party, as representing

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

the interest of its members, to conduct a suit in substance brought for their benefit.

5 Cases that cite this headnote

[7] **Newspapers** News associations and agencies

News furnished by complainant news-gathering agency does not, on publication thereof in newspapers of a portion of its members, become the common possession of all, to the extent that defendant, rival in news-gathering, may take it therefrom and transmit it to papers published in competition with those of other members of complainant, allowing simultaneous publication.

3 Cases that cite this headnote

[8] **Antitrust and Trade Regulation** In general; what is unfair competition

What is unfair competition in business must be determined with particular reference to the character and circumstances of the business.

19 Cases that cite this headnote

[9] **Antitrust and Trade Regulation** Misappropriation

To sustain jurisdiction of equity over the controversy of appropriation by one news-gathering agency of news gathered by another such agency, as unfair competition, no general and absolute property in the news as such need be affirmed; the right to acquire property by honest labor or the conduct of a lawful business being as much entitled to protection as the right to guard property already acquired, and furnishing the basis of jurisdiction in the ordinary case of unfair competition.

113 Cases that cite this headnote

[10] **Antitrust and Trade Regulation** Misappropriation

Whether defendant news-gathering agency may be restrained from appropriating, for sale, news taken from bulletins issued by complainant agency, or any of its members, or from newspapers published by any of them, turns on the question of unfair competition in business, which is not dependent on any general right of property analogous to the common-law right of the proprietor of an unpublished work, nor foreclosed by failure to copyright.

141 Cases that cite this headnote

[11] **Antitrust and Trade Regulation** Misappropriation

It is unfair competition in business for defendant news-gathering agency to take from newspapers, published by members of complainant news-gathering agency, news furnished by complainant, and transmit it to clients of defendant, enabling them to publish in competition with, and as soon as papers of, other members of complainant.

26 Cases that cite this headnote

[12] **Antitrust and Trade Regulation** Passing Off or Palming Off

**Antitrust and Trade Regulation** Misappropriation

Attempt by defendant to palm off his goods as those of complainant is not essential to unfair competition, for which equity will grant relief, but it is enough for defendant to appropriate and sell as his own news gathered by complainant for sale.

124 Cases that cite this headnote

[13] **Equity** Conduct with respect to different transactions

Under present state of pleadings and proof, the practice of complainant news-gathering agency, seeking to enjoin defendant rival from appropriating outright news gathered by it, of taking news items published by defendant's subscribers as tips to be investigated, and using the news, if verified by investigation, a practice followed by defendant and by news agencies generally, *held* not shown to fix on complainant the taint of unclean hands.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

13 Cases that cite this headnote

**[14]** **Copyrights and Intellectual Property** Literary or artistic qualities of work

A contribution to a newspaper as a literary product, though it may also convey news, is the subject of copyright, under Act March 4, 1909, c. 320, §§ 4, 5, 17 U.S.C.A. §§ 4, 5, authorizing copyright as to all writings of an author, and specifically mentioning periodicals, including newspapers.

12 Cases that cite this headnote

**[15]** **Copyrights and Intellectual Property** Literary or artistic qualities of work

The "news" element, the information concerning current events contained in a literary production, is not subject for copyright under U.S.C.A. Const. art. 1, § 8, par. 8, not being the creation of the writer.

45 Cases that cite this headnote

**Attorneys and Law Firms**

****69** ***217** Messrs. Samuel Untermyer, of New York City, Hiram W. Johnson, of San Francisco, Cal., and Henry A. Wise and William A De Ford, both of New York City, for petitioner.

***221** Mr. Frederic W. Lehmann, of St. Louis, Mo., for respondent.

**Opinion**

Mr. Justice PITNEY delivered the opinion of the Court.

The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. That a corporation may be organized under that act for the purpose of gathering news for the use and benefit of its members and for publication in newspapers owned or represented by them, is recognized by an amendment enacted in 1901 (Laws N. Y. 1901, c. 436). Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to $3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through ***230** the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other use of it shall be permitted, and that no member shall furnish or permit any one in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the state of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than $2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts.

Complainant in its bill, defendant in its answer, have set forth in almost identical terms the rather obvious circumstances and conditions under which their business is conducted. The value of the service, and of the news furnished, depends upon the promptness of transmission, as well as upon the accuracy and impartiality of the news; it being essential that the news be transmitted to members or subscribers as early or

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

earlier than similar information can be furnished to competing newspapers ***231** by other news services, and that the news furnished by each agency shall not be furnished to newspapers which do not contribute to the expense of gathering it. And further, to quote from the answer:

'Prompt knowledge and publication of worldwide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business.'

The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employees of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by ****70** inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and, third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

The District Court, upon consideration of the bill and answer, with voluminous affidavits on both sides, granted a preliminary injunction under the first and second heads, but refused at that stage to restrain the systematic practice admittedly pursued by defendant, of taking news bodily from the bulletin boards and early editions of complainant's newspapers and selling it as its own. The court expressed itself as satisfied that this practice amounted to unfair trade, but as the legal question was ***232** one of first impression it considered that the allowance of an injunction should await the outcome of an appeal. 240 Fed. 983, 996. Both parties having appealed, the Circuit Court of Appeals sustained the injunction order so far as it went, and upon complainant's appeal modified it and remanded the cause, with directions to issue an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. 245 Fed. 244, 253, 157 C. C. A. 436. The present writ of certiorari was then allowed. 245 U. S. 644, 38 Sup. Ct. 10, 62 L. Ed. 528.

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) Whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade.

The federal jurisdiction was invoked because of diversity of citizenship, not upon the ground that the suit arose under the copyright or other laws of the United ***233** States. Complainant's news matter is not copyrighted. It is said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily; and, according to complainant's contention, news is not within the operation of the copyright act. Defendant, while apparently conceding this, nevertheless invokes the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the copyright act by complied with) only by being kept secret and confidential, and that upon the publication with complainant's consent of uncopyrighted news of any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful.

[1] [2] A preliminary objection to the form in which the suit is brought may be disposed of at the outset. It is said that the Circuit Court of Appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have been made below, we will treat the objection as waived. See Equity Rules 38, 43, 44 (33 Sup. Ct. xxix, xxx).

***234** [3] In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

[4] No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171). Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872. But the present act is broader; it provides that the works for which copyright may be secured shall include 'all the writings of an author,' and specifically mentions ****71** 'periodicals, including newspapers.' Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076 (Comp. St. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917) pp. 7, 14, 16, 17.

[5] But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Const. art. 1, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

[6] We need spend no time, however, upon the general ***235** question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this brance of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent but extremely useful in itself, and indubitably constitutes a legitimate business. The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure ***236** that of the other. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

[7] [8] Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. See Morison v. Moat, 9 Hare, 241, 258. And, although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

[9] In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402; In re Debs, 158 U. S. 564, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (Truax v. Raich, 239 U. S. 33, 37–38, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Brennan v. United Hatters, 73 N. J. Law, 729, 742, 65 Atl. 165, 9 L. R. A. [N. S.] 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; ***237** Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.

The question, whether one who has gathered general information or news at pains and expense for the purpose of subsequent publication through the press has such an interest ****72** in its publication as may be protected from interference, has been raised many times, although never, perhaps, in the precise form in which it is now presented.

Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust.

In National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, the Circuit Court of Appeals for the Seventh Circuit dealt with news matter gathered and transmitted by a telegraph company, and consisting merely of a notation of current events having but a transient value due to quick transmission and distribution; and, while declaring that this was not copyrightable although printed on a tape by tickers in the offices of the recipients, and that it was a commercial not a literary product, nevertheless held that the business of gathering and communicating the news—the service of purveying it—was a legitimate business, meeting a distinctive commercial want and adding to the facilities of the business ***238** world, and partaking of the nature of property in a sense that entitled it to the protection of a court of equity against piracy.

Other cases are cited, but none that we deem it necessary to mention.

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it.

[10] [11] The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the city of New York, and because of this, and of time differentials due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant. Besides this, and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service ***239** of competing Associated Press papers, occasionally even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant —which is what defendant has done and seeks to justify —is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest ***240** of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference ****73** with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur. § 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

[12] The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibited if the reward were to be so limited. No single ***241** newspaper, no small group of newspapers, could sustain the expenditure. Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return. The practical needs and requirements of the business are reflected in complainant's by-laws which have been referred to. Their effect is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures.

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles, but only postpones participation by complainant's competitor in the processes of distribution and

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant. and in violation of the principle that underlies the maxim 'sic utere tuo,' etc.

[13] It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. Howe Scale Co. v. Wyckoff, Seamans, etc., 198 U. S. 118, 140, 25 Sup. Ct. 609, 49 L. Ed. 972. But we cannot concede that ***242** the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices. The device of rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived.

[14] The doctrine of unclean hands is invoked as a bar to relief; it being insisted that defendant's practices against which complainant seeks an injunction are not different from the practice attributed to complainant, of utilizing defendant's news published by its subscribers. At this point it becomes ****74** necessary to consider a distinction that is drawn by complainant, and, as we understand it, was recognized by defendant also in the submission of proofs in the District Court, between two kinds of use that may be made by one news agency of news taken from the ***243** bulletins and newspapers of the other. The first is the bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or other expense. This form of pirating was found by both courts to have been pursued by defendant systematically with respect to complainant's news, and against it the Circuit Court of Appeals granted an injunction. This practice complainant denies having pursued and the denial was sustained by the finding of the District Court. It is not contended by defendant that the finding can be set aside, upon the proofs as they now stand. The other use is to take the news of a rival agency as a 'tip' to be investigated, and if verified by independent investigation the news thus gathered is sold. This practice complainant admits that it has pursued and still is willing that defendant shall employ.

Both courts held that complainant could not be debarred on the ground of unclean hands upon the score of pirating defendant's news, because not shown to be guilty of sanctioning this practice.

As to securing 'tips' from a competing news agency the District Court (240 Fed. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The Circuit Court of Appeals (245 Fed. 247, 157 C. C. A. 436) found that the tip habit, though discouraged by complainant, was 'incurably journalistic,' and that there was 'no difficulty in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information.'

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after ***244** rewriting and without independent investigation and verification; whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. In a line of English cases a somewhat analogous practice has been held not to amount to an infringement of the copyright of a directory or other book containing compiled information. In Kelly v. Morris, L. R. 1 Eq. 697, 701, 702, Vice Chancellor Sir William Page Wood (afterwards Lord Hatherly), dealing with such a case, said that defendant was

'not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained.'

This was followed by Vice Chancellor Giffard in Morris v. Ashbee, L. R. 7 Eq. 34, where he said:
'In a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road.'

A similar view was adopted by Lord Chancellor Hatherly and the former Vice Chancellor, then Giffard, L. J., in Pike v. Nicholas, L. R. 5 Ch. App. Cas. 251, and shortly afterwards by the latter judge in Morris v. Wright, L. R. 5 Ch. App. Cas. 279, 287, where he said, commenting upon Pike v. Nicholas: 'It was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the plaintiff's book; and so here, if the fact be that Mr. Wright used the plaintiff's ***245** book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book.'

A like distinction was recognized by the Circuit Court of Appeals for the Second Circuit in Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607 and in West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 838, 100 C. C. A. 303.

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of taking news items published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold—the practice having been followed by defendant also, and by news agencies generally—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled.

There is some criticism of the injunction that was directed by the District Court upon the going down of the mandate from the Circuit Court of Appeals. In brief, it restrains any taking or gainfully using of the complainant's ****75** news, either bodily or in substance from bulletins issued by the complainant or any of its members, or from editions of their newspapers, '*until its commercial value as news to the complainant and all of its members has passed away*.' The part complained of is the clause we have italicized; but if this be indefinite, it is no more so than the criticism. Perhaps it would be better that the terms of the injunction be made specific, and so framed as to confine the restraint to an extent consistent with the reasonable protection of complainant's newspapers, each in its own area and for a specified time after its ***246** publication, against the competitive use of pirated news by defendant's customers. But the case presents practical difficulities; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction; hence, while not expressing approval of the form adopted by the District Court, we decline to modify it at this preliminary stage of the case, and will leave that court to deal with the matter upon appropriate application made to it for the purpose.

The decree of the Circuit court of Appeals will be

Affirmed.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

Mr. Justice HOLMES, dissenting.

When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them —in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because some one has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind ***247** which the first user has earned. The

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff and that it is thought undesirable that an advantage should be gained in that way. Apart from that the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes. The ordinary case, I say, is palming off the defendant's product as the plaintiff's but the same evil may follow from the opposite falsehood—from saying whether in words or by implication that the plaintiff's product is the defendant's, and that, it seems to me, is what has happened here.

Fresh news is got only by enterprise and expense. To produce such news as it is produced by the defendant represents by implication that it has been acquired by the defendant's enterprise and at its expense. When it comes from one of the great news collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in Western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury, a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to me strong ***248** enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for _____ hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

Mr. Justice McKENNA concurs in this opinion.

Mr. Justice BRANDEIS, dissenting.

There are published in the United States about 2,500 daily papers.[1] More than 800 of them are supplied with domestic and foreign news of general interest by the Associated Press —a corporation without capital stock ****76** which does not sell news or earn or seek to earn profits, but serves merely as an instrumentality by means of which these papers supply themselves at joint expense with such news. Papers not members of the Associated Press depend for their news of general interest largely upon agencies organized for profit.[2] Among these agen ***249** cies is the International News Service which supplies news to about 400 subscribing papers. It has, like the Associated Press, bureaus and correspondents in this and foreign countries; and its annual expenditures in gathering and distributing news is about $2,000,000. Ever since its organization in 1909, it has included among the sources from which it gathers news, copies (purchased in the open market of early editions of some papers published by members of the Associated Press and the bulletins publicly posted by them. These items, which constitute but a small part of the news transmitted to its subscribers, are generally verified by the International News Service before transmission; but frequently items are transmitted without verification; and occasionally even without being re-written. In no case is the fact disclosed that such item was suggested by or taken from a paper or bulletin published by an Associated Press member.

No question of statutory copyright is involved. The sole question for our consideration is this: Was the International News Service properly enjoined from using, or causing to be used gainfully, news of which it acquired knowledge by lawful means (namely, by reading publicly posted bulletins or papers purchased by it in the open market) merely because the news had been originally gathered by the Associated Press and continued to be of value to some of its members, or because it did not reveal the source from which it was acquired?

The ‘ticker’ cases, the cases concerning literary and artistic compositions, and cases of unfair competition were relied upon in support of the injunction. But it is admitted that none of those cases affords a complete analogy with that before us. The question presented for decision is new, and it is important.

News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge ***250** of such occurrences of interest and to distribute reports thereof. The Associated Press contended that knowledge so acquired is property, because it costs money and labor to produce

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news; and that to protect it effectively, the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under the copyright statutes. The inventions and discoveries upon which this attribute of property is conferred only by statute, are the few comprised within the patent law. There are also many other cases in which courts interfere to prevent curtailment of plaintiff's enjoyment of incorporal productions; and in which the ***251** right to relief is often called a property right, but is such only in a special sense. In those cases, the plaintiff has no absolute right to the protection of his production; he has merely the qualified right to be protected as against the defendant's acts, because of the special relation in which the latter stands or the wrongful method or means employed in acquiring the knowledge or the manner in which it is used. Protection of this character is afforded where the suit is based upon breach of contract or of trust or upon unfair competition.

The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property; nor is the manner of its acquisition or use nor the purpose to which it is applied, such as has heretofore been recognized as entitling a plaintiff to relief.

First. Plaintiff's principal reliance was upon the 'ticker' cases; but they do not support ****77** its contention. The leading cases on this subject rest the grant of relief, not upon the existence of a general property right in news, but upon the breach of a contract or trust concerning the use of news communicated; and that element is lacking here. In Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 25 Sup. Ct. 637, 639 (49 L. Ed. 1031) the court said the Board ——

'does not lose its rights by communicating the result [the quotations] to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach.'

And it is also stated there (198 U. S. 251, 25 Sup. Ct. 640, 49 L. Ed. 1031):
'Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward.'

The only other case in this court which relates to this subject is ***252** Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821. While the opinion there refers the protection to a general property right in the quotations, the facts are substantially the same as those in the Christie Case, which is the chief authority on which the decision is based. Of the cases in the lower Federal courts and in the state courts it may be said, that most of them too can, on their facts, be reconciled with this principle, though much of the language of the courts cannot be.[3] In spite of anything that may appear in these cases to the contrary it seems that the true principle is stated in the Christie Case, that the collection of quotations 'stands like a trade secret.' And in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 402, 31 Sup. Ct. 376, 382 (55 L. Ed. 502), this court says of trade secret:
' any one may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract.'

See John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 29, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135.

The leading English case, Exchange Telegraph Co. v. Gregory & Co., [1896] 1 Q. B 147, is also rested clearly upon a breach of contract or trust, although there is some ***253** reference to a general property right. The later English cases seem to have

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

rightly understood the basis of the decision, and they have not sought to extend it further than was intended. Indeed, we find the positive suggestion in some cases that the only ground for relief is the manner in which knowledge of the report of the news was acquired.[4]

If the news involved in the case at bar had been posted in violation of any agreement between the Associated Press and its members, questions similar to those in the 'ticker' cases might have arisen. But the plaintiff does not contend that the posting was wrongful or that any papers were wrongfully issued by its subscribers. On the contrary it is conceded that both the bulletins and the papers were issued in accordance with the regulations of the plaintiff. Under such circumstances, for a reader of the papers purchased in the open market, or a reader of the bulletins publicly posted, to procure and use gainfully, information therein contained, does not involve inducing any one to commit a breach either of contract or of trust, or committing or in any way abetting a breach of confidence.

Second. Plaintiff also relied upon the cases which hold that the common law right of the producer to prohibit copying is not lost by the private circulation of a literary composition, the delivery of a lecture, the exhi ***254** bition of a painting, or the performance of a dramatic or musical composition.[5] These ****78** cases rest upon the ground that the common law recognizes such productions as property which, despite restricted communication, continues until there is a dedication to the public under the copyright statutes or otherwise. But they are inapplicable for two reasons: (1) At common law, as under the copyright acts, intellectual productions are entitled to such protection only if there is underneath something evincing the mind of a creator or originator, however modest the requirement. The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection.[6] (2) At common law, as under the copyright acts, the element in intellectual productions which secures such protection, is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed; that is, 'some new collocation of visible or audible points—of lines, colors, sounds, or ***255** words.' See White-Smith Music Co. v. Apollo Co., 209 U. S. 1, 19, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628; Kalem Co. v. Harper Bros., 222 U. S. 55, 63, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285. An author's theories, suggestions, and speculations, or the systems, plans, methods, and arrangements of an originator, derive no such protection from the statutory copyright of the book in which they are set forth;[7] and they are likewise denied such protection at common law.[8]

That news is not property in the strict sense is illustrated by the case of Sports and General Press Agency, Ltd., v. 'Our Dogs' Publishing Co., Ltd., [1916] 2 K. B. 880, where the plaintiff, the assignee of the right to photograph the exhibits at a dog show, was refused an injunction against defendant who had also taken pictures of the show and was publishing them. The court said that, except in so far as the possession of the land occupied by the show enabled the proprietors to exclude people or permit them on condition that they agree not to take photographs (which condition was not imposed in that case), the proprietors had no exclusive right to photograph the show and could therefore grant no such right. And it was further stated that, at any rate, no matter what conditions might be imposed upon those entering the grounds, if the defendant had been on top of a house or in some position where he could photograph the show without interfering with the physical property of the plaintiff, the plaintiff would have no right to stop him. If, when the plaintiff creates the event recorded, he is not entitled to the exclusive first publication of the ***256** news (in that case a photograph) of the event, no reason can be shown why he should be accorded such protection as to events which he simply records and transmits to other parts of the world, though with great expenditure of time and money.

Third. If news be treated as possessing the characteristics not of a trade secret, but of literary property, then the earliest issue of a paper of general circulation or the earliest public posting of a bulletin which embodies such news would, under the established rules governing literary property, operate as a publication, and all property in the news would then cease. Resisting this conclusion, plaintiff relied upon the cases which hold that uncopyrighted intellectual and artistic property survives private circulation or a restricted publication; and it contended that in each issue of each paper, a restriction is to be implied, that the news shall not be used gainfully in competition with the Associated Press or any of its members. There is no basis for such an implication. But it is, also, well settled that where the publication is in fact a general one—even express words of restriction upon use are inoperative. In other words, a general publication is effective to dedicate literary property to the public, regardless of the actual intent of its owner.[9] In the cases dealing with lectures, dramatic and musical performances, and art exhibitions,[10] upon which plaintiff relied, there was no general publication in print comparable to the issue of daily newspapers or

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

the unrestricted public posting of bulletins. The principles governing those cases differ more or less in application, if not in theory, from the principles governing the issue of printed copies; ***257** and in so far as they ****79** do differ, they have no application to the case at bar.

Fourth. Plaintiff further contended that defendant's practice constitutes unfair competition, because there is 'appropriation without cost to itself of values created by' the plaintiff; and it is upon this ground that the decision of this court appears to be based. To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but, with the exceptions indicated above, the law has heretofore sanctioned the practice. Thus it was held that one may ordinarily make and sell anything in any form, may copy with exactness that which another has produced, or may otherwise use his ideas without his consent and without the payment of compensation, and yet not inflict a legal injury;[11] and that ordinarily one is at perfect liberty to find out, if he can by lawful means, trade secrets of another, however valuable, and then use the knowledge so acquired gainfully, although it cost the original owner much in effort and in money to collect or produce.[12]

***258** Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him. The unfairness in competition which hitherto has been recognized by the law as a basis for relief, lay in the manner or means of conducting the business; and the manner or means held legally unfair, involves either fraud or force or the doing of acts otherwise prohibited by law. In the 'passing off' cases (the typical and most common case of unfair competition), the wrong consists in fraudulently representing by word or act that defendant's goods are those of plaintiff. See Hanover Milling Co. v. Metcalf, 240 U. S. 403, 412, 413, 36 Sup. Ct. 357, 60 L. Ed. 713. In the other cases, the diversion of trade was effected through physical or moral coercion, or by inducing breaches of contract or of trust or by enticing away employees. In some others, called cases of simulated competition, relief was granted because defendant's purpose was unlawful; namely, not competition but deliberate and wanton destruction of plaintiff's business.[13]

***259** That competition is not unfair in a legal sence, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit.[14] He who makes a city known through his product, must submit to sharing the resultant trade with others who, perhaps for that reason, locate there later. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 673, 21 Sup. Ct. 270, 45 L. Ed. 365. He who has made his name a guaranty of quality, protests in vain when another with the same name engages, perhaps for that reason, in the same lines of business; provided, precaution is taken to prevent the public from being deceived into the belief that what he is selling, was made by his competitor. One bearing a name made famous by another is permitted to enjoy the unearned benefit which necessarily flows from such use, even though the use proves harmful to him who gave the name value. Brown Chemical Co. v. Meyer, 139 U. S. 540, 544, 11 Sup. Ct. 625, 35 L. Ed. 247; ****80** Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481; Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142. See Saxlehner v. Wagner, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525.

The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted. ***260** No breach of contract such as the court considered to exist in Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497 Ann. Cas. 1918B, 461; or of trust such as was present in Morison v. Moat, 9 Hare, 241; and neither fraud nor force is involved. The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. See Bamforth v. Douglass Post Card & Machine Co. (C. C.) 158 Fed. 355; Tribune Co. of Chicago v. Associated Press (C. C.) 116 Fed. 126. That they have a legal right to do, because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.

It is also suggested that the fact that defendant does not refer to the Associated Press as the source of the news may furnish a basis for the relief. But the defendant and its subscribers, unlike members of the Associated Press, were under no contractual obligation to disclose the source of the news; and there is no rule of law requiring acknowledgment to be made where uncopyrighted matter is reproduced. The International News Service is said to mislead its subscribers into believing that the news transmitted was originally gathered by it and that they in turn mislead their readers. There is, in fact, no representation by either of any kind. Sources of information are sometimes given because required by contract; sometimes because naming the source gives authority to an otherwise incredible statement; and sometimes the source is named because the agency does not wish to take the ***261** responsibility itself of giving currency to the news. But no representation can properly be implied from omission to mention the source of information except that the International News Service is transmitting news which it believes to be credible.

Nor is the use made by the International News Service of the information taken from papers or bulletins of Associated Press members legally objectionable by reason of the purpose for which it was employed. The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all available news. The suit is, as this court declares, in substance one brought for the benefit of the members of the Associated Press, who would be proper, and except for their number perhaps necessary, parties; and the plaintiff conducts the suit as representing their interests. It thus appears that the protection given by the injunction is not actually to the business of the complainant news agency; for this agency does not sell news nor seek to earn profits, but is a mere instrumentality by which 800 or more newspapers collect and distribute news. It is these papers severally which are protected; and the protection afforded is not from competition of the defendant, but from possible competition of one or more of the 400 other papers which receive the defendant's service. Furthermore, the protection to these Associated Press members consists merely in denying to other papers the right to use as news, information which by authority of all concerned, had theretofore been given to the public by some of those who joined in gathering it; and to which the law denies the attributes of property. There is in defendant's purpose nothing on which to base a claim for relief.

***262** It is further said that, while that for which the Associated Press spends its money is too fugitive to be recognized as property in the common-law courts, the defendant cannot be heard to say so in a court of equity, where the question is one of unfair competition. The case presents no elements of equitable title or of breach of trust. The only possible reason for resort to a court of equity in a case like this is that the remedy which the law gives is inadequate. If the plaintiff has no legal cause of action, the suit necessarily fails. Levy v. Walker, L. R. 10 Ch. D. 436, 449. There is nothing in the situation of the parties which can estop the defendant from saying so.

Fifth. The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts and to use news so obtained ****81** gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the ***263** boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, 'a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public' was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure temporarily by arrangement with the Associated Press the latter's foreign news service. For aught that ***264** appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto.[15] It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the United States not served by the Associated Press; and a large part of their readers may also be so located that they cannot procure prompt access to papers served by the Associated Press.

A Legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate inquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news, without opening the door to other evils, greater than that sought to be remedied. Such appears to have been the opinion of our Senate which reported unfavorably a bill to give news a few ***265** hours' protection;[16] and which ratified, on February ****82** 15, 1911, the convention adopted at the Fourth International American Conference;[17] and such was evidently the view also of the signatories to the International Copyright Union of November 13, 1908,[18] as both these conventions expressly exclude news from copyright protection.

***266** Or legislators dealing with the subject might conclude, that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in the interest of free speech) to restrain actionable libels,[19] and for other reasons decline to protect by injunction mere political rights;[20] and as Congress has prohibited courts from enjoining the illegal assessment or collection of federal taxes.[21] If a Legislature concluded to recognize property in published news to the extent of permitting recovery at law, it might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.[22]

Or again, a Legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protection ***267** of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a Legislature concluded (as at least one court has held, New York and Chicago Grain and Stock Exchange v. Board of Trade, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107) that under certain circumstances news-gathering is a business affected with a public interest; it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for insuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

**All Citations**

248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293

Footnotes

1 See American Newspaper Annual and Directory (1918) pp. 4, 10, 1193–1212.

2 The Associated Press, by Frank B. Noyes, Sen. Doc. No. 27, 63d Congress, First Session. In a brief filed in this court by counsel for the Associated Press the number of its members is stated to be 1030. Some members of the Associated Press are also subscribers to the International News Service.
Strictly the member is not the publishing concern, but an individual who is the sole or part owner of a newspaper, or an executive officer of a company which owns one. By-laws, article II, section 1.

3 Board of Trade of City of Chicago v. Tucker, 221 Fed. 305, 137 C. C. A. 255; Board of Trade of City of Chicago v. Price, 213 Fed. 336, 130 C. C. A. 302; McDearmott Commission Co. v. Board of Trade of City of Chicago, 146 Fed. 961, 77 C. C. A. 479, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759; Board of Trade v. Cella Commission Co., 145 Fed. 28, 76 C. C. A. 28; National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Illinois Commission Co. v. Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; Board of Trade v. Hadden-Krull Co. (C. C.) 109 Fed. 705; Cleveland Tel. Co. v. Stone (C. C.) 105 Fed. 794; Board of Trade v. C. B. Thomson Commission Co. (C. C.) 103 Fed. 902; Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Prac. (N. Y.) 194. The bill in F. W. Dodge Co. v. Construction Information Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412, was expressly based on breach of contract or of trust. It has been suggested that a Board of Trade has a right of property in its quotations because the facts reported orignated in its exchange. The point has been mentioned several times in the cases, but no great importance seems to have been attached to it.

4 In Exchange Telegraph Co., Ltd., v. Howard, 22 Times Law Rep. 375, 377, it is intimated that it would be perfectly permissible for the defendant to take the score from a newspaper supplied by the plaintiff and publish it. And it is suggested in Exchange Telegraph Co., Ltd., v. Central News, Ltd., [1897] 2 Ch. 48, 54, that there are sources from which the defendant might be able to get the information collected by the plaintiff and publish it without committing any wrong. Copinger, Law of Copyright (5th Ed.) p. 35, explains the Gregory Case on the basis of the breach of confidence involved. Richardson, Law of Copyright, p. 39, also inclines to put the case ‘on the footing of implied confidence.’

5 Ferris v. Frohman, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 299, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595; Universal Film Mfg. Co. v. Copperman, 218 Fed. 577, 134 C. C. A. 305; Werck-meister v. American Lithographic Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591; Drummond v. Altemus (C. C.) 60 Fed. 338; Boucicault v. Hart, 13 Blatchf. 47, Fed. Cas. No. 1692; Crowe v. Aiken, 2 Biss. 208, Fed. Cas. No. 3441; Boucicault v. Fox, 5 Blatchf. 87, Fed. Cas. No. 1691; Bartlett v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1,076; Bartlett v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1082; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; Aronson v. Baker, 43 N. J. Eq. 365, 12 Atl. 177; Caird v. Sime, L. R. 12 App. Cas. 326; Nicols v. Pitman, L. R. 26 Ch. D. 374; Abernethy v. Hutchinson, 3 L. J. (O. S.) Ch. 209; Turner v. Robinson, 10 Ir. Eq. Rep. 121.

6 Compare Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 250, 23 Sup. Ct. 298, 47 L. Ed. 460; Higgins v. Keuffel, 140 U. S. 428, 432, 11 Sup. Ct. 731, 35 L. Ed. 470; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 58–60, 4 Sup. Ct. 279, 28 L. Ed. 349; Baker v. Selden, 101 U. S. 99, 105, 106, 25 L. Ed. 841; Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872; National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 296–298, 56 C. C. A. 198, 60 L. R. A. 805; Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co., 169 Fed. 386, 391, 94 C. C. A. 642, 17 Ann. Cas. 957.

7 Baker v. Selden, 101 U. S. 99, 25 L. Ed. 841; Perris v. Hexamer, 99 U. S. 674, 25 L. Ed. 308; Barnes v. Miner (C. C.) 122 Fed. 480, 491; Burnell v. Chown (C. C.) 69 Fed. 993; Tate v. Fullbrook, [1908] 1 K. B. 821; Chilton v. Progress Printing & Publishing Co., [1895] 2 Ch. 29, 34; Kenrick & Co. v. Lawrence & Co., L. R. 25 Q. B. D. 99; Pike v. Nicholas, L. R. 5 Ch. App. 251.

8 Bristol v. Equitable Life Assurance Society, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568; Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436.

9 Jewelers' mercantile Agency v. Jewelers' Publishing Co., 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; Wagner v. Conried (C. C.) 125 Fed. 798, 801; Larrowe-Loisette v. O'Loughlin (C. C.) 88 Fed. 896.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

10 See cases in note 5, supra; Richardson, Law of Copyright, p. 128.

11 Flagg Manufacturing Co. v. Holway, 178 Mass. 83, 59 N. E. 667; Bristol v. Equitable Life Assurance Society, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568; Keystone Type Foundry v. Portland Publishing Co., 186 Fed. 690, 108 C. C. A. 508.

12 Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Tabor v. Hoffman, 118 N. Y. 30, 36, 23 N. E. 12, 16 Am. St. Rep. 740; James v. James, L. R. 13 Eq. 421. Even when knowledge is compiled, as in a dictionary, and copyrighted, the suggestions and sources therein may be freely used by a later compiler. The copyright protection merely prevents his taking the ultimate data while avoiding the labor and expense involved in compiling them. Pike v. Nicholas, L. R. 5 Ch. App. 251; Morris v. Wright, L. R. 5 Ch. App. 279; Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607; West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 100 C. C. A. 303. It is assumed that in the absence of copyright, the data compiled could be freely used. See Morris v. Ashbee, L. R. 7 Eq. 34, 40. Compare also Chilton v. Progress Printing & Publishing Co., [1895] 2 Ch. 29.

13 'Trust Laws & Unfair Competition' (U. S. Bureau of Corporations, March 15, 1915) pp. 301–331, 332–461; Nims, Unfair Competition and Trademarks, c. XIX; Sperry & Hutchinson Co. v. Pommer (D. C.) 199 Fed. 309, 314; Racine Paper Goods Co. v. Dittgen, 171 Fed. 631, 96 C. C. A. 433; Schonwald v. Ragains, 32 Okl. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854; Attorney General v. National Cash Register Co., 182 Mich. 99, 148 N. W. 420, Ann. Cas. 1916D, 638; Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co., 69 Misc. Rep. 90, 124 N. Y. Supp. 956, 958; Dunshee v. Standard Oil Co., 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263; Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807.

The cases of Fonotipia Limited v. Bradley (C. C.) 171 Fed. 951, and Prest-O-Lite Co. v. Davis (D. C.) 209 Fed. 917, which were strongly relied upon by the plaintiff, contain expressions indicating rights possibly broad enough to sustain the injunction in the case at bar; but both cases involve elements of 'passing off.' See also Prest-O-Lite Co. v. Davis, 215 Fed. 349, 131 C. C. A. 491; Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 131 C. C. A. 626; Prest-O-Lite Co. v. H. W. Bogen (C. C.) 209 Fed. 915; Prest-O-Lite Co. v. Avery Lighting Co. (C. C.) 161 Fed. 648. In Prest-O-Lite Co. v. Auto Acetylene Light Co. (C. C.) 191 Fed. 90, the bill was dismissed on the ground that no deception was shown.

14 Magee Furnace Co. v. Le Barron, 127 Mass. 115; Ricker v. Railway, 90 Me. 395, 403, 38 Atl. 338.

15 According to the by-laws of the Associated Press no one can be elected a member without the affirmative vote of at least four-fifths of all the members of the corporation or the vote of the directors. Furthermore, the power of the directors to admit anyone to membership may be limited by a right of protest to be conferred upon individual members. See By-Laws, article III, section 6. 'The members of this corporation may, by an affirmative vote of seven-eighths of all the members, confer upon a member (with such limitations as may be at the time prescribed) a right of protest against the admission of new members by the board of directors. The right of protest, within the limits specified at the time it is conferred, shall empower the member holding it to demand a vote of the members of the corporation on all applications for the admission of new members within the district for which it is conferred except as provided in section 2 of this article.'

16 Senate Bill No. 1728, 48th Congress, First Session. The bill provides:

'That any daily or weekly newspaper, or any association of daily or weekly newspapers, published in the United States or any of the territories thereof, shall have the sole right to print, issue, and sell, for the term of eight hours, dating from the hour of going to press, the contents of said daily or weekly newspaper, or the collected news of said newspaper association, exceeding one hundred words.

'Sec. 2. That for any infringement of the copyright granted by the first section of this act the party injured may sue in any court of competent jurisdiction and recover in any proper action the damages sustained by him from the person making such infringement, together with the costs of suit.'

It was reported on April 18, 1884, by the Committee on the Library without amendment, and that it ought not to pass, Journal of the Senate. 48th Congress, First Session, p. 548. No further action was apparently taken on the bill.

When the copyright legislation of 1909, finally enacted as Act of March 4, 1909, c. 320 (35 Stat. 1075), was under consideration, there was apparently no attempt to include news among the subjects of copyright. Arguments before the Committees on Patents of the Senate and House of Representatives on Senate Bill No. 6330 and H. R. Bill No. 19853, 59th Congress, First Session, June 6, 7, 8, and 9, and December 7, 8, 10, and 11, 1906; Hearings on Pending Bills to Amend and Consolidate Acts Respecting Copyright, March 26, 27 and 28, 1908.

17 38 Stat. 1785, 1789, Article 11.

18 Bowker, Copyright: Its History and Its Law, pp. 330, 612, 613. See the similar provisions in the Berne Convention (1886) and the Paris Convention (1896). Id. pp. 612, 613.

In 1898 Lord Herschell introduced in Parliament a bill, section 11 of which provides: 'Copyright in respect of a newspaper shall apply only to such parts of the newspaper as are compositions of an original literary character, to original illustrations

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

therein, *and to such news and information as have been specially and independently obtained*.' (Italics ours.) House of Lords, Sessional Papers, 1898, Vol. 3, Bill No. 21. Birrell, Copyright in Books, p. 210. But the bill was not enacted, and in the English law as it now stands there is no provision giving even a limited copyright in news as such. Act of December 16, 1911, 1 and 2 Geo. 5, c. 46.

19 Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310; Prudential Assurance Co. v. Knott, L. R. 10 Ch. App. 142.

20 Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909. Compare Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; Green v. Mills, 69 Fed. 852, 859, 16 C. C. A. 516, 30 L. R. A. 90.

21 Revised Statutes, § 3224 (Comp. St. 1916, § 5947); Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901; Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557.

22 Act of March 4, 1909, § 25, c. 320 (35 Stat. 1075, 1081) provides, as to the liability for the infringement of a copyright, that 'in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars,' and that in the case of infringement of a copyrighted newspaper the damages recoverable shall be one dollar for every infringing copy, but shall not be less than $250 nor more than $5,000.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-215

# 45-215. Title of act

Currentness

K.S.A. 45-215 through 45-223 shall be known and may be cited as the open records act.

**Credits**
Laws 1984, ch. 187, § 1.

Notes of Decisions (63)

K. S. A. 45-215, KS ST 45-215
Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-216

# 45-216. Public policy that records be open

Currentness

(a) It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.

(b) Nothing in this act shall be construed to require the retention of a public record nor to authorize the discard of a public record.

**Credits**
Laws 1984, ch. 187, § 2.

Notes of Decisions (10)

K. S. A. 45-216, KS ST 45-216
Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-217

# 45-217. Definitions

Currentness

As used in the open records act, unless the context otherwise requires:

(a) "Business day" means any day other than a Saturday, Sunday or day designated as a holiday by the congress of the United States, by the legislature or governor of this state or by the respective political subdivision of this state.

(b) "Clearly unwarranted invasion of personal privacy" means revealing information that would be highly offensive to a reasonable person, including information that may pose a risk to a person or property and is not of legitimate concern to the public.

(c) "Criminal investigation records" means: (1) Every audio or video recording made and retained by law enforcement using a body camera or vehicle camera as defined by K.S.A. 45-254, and amendments thereto; and (2) records of an investigatory agency or criminal justice agency as defined by K.S.A. 22-4701, and amendments thereto, compiled in the process of preventing, detecting or investigating violations of criminal law, but does not include police blotter entries, court records, rosters of inmates of jails or other correctional or detention facilities or records pertaining to violations of any traffic law other than vehicular homicide as defined by K.S.A. 21-3405, prior to its repeal, or K.S.A. 21-5406, and amendments thereto.

(d) "Custodian" means the official custodian or any person designated by the official custodian to carry out the duties of custodian of this act.

(e) "Official custodian" means any officer or employee of a public agency who is responsible for the maintenance of public records, regardless of whether such records are in the officer's or employee's actual personal custody and control.

(f)(1) "Public agency" means the state or any political or taxing subdivision of the state or any office, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.

(2) "Public agency" shall not include:

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(A) Any entity solely by reason of payment from public funds for property, goods or services of such entity; or (B) any municipal judge, judge of the district court, judge of the court of appeals or justice of the supreme court.

(g)(1) "Public record" means any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of:

(A) Any public agency; or

(B) any officer or employee of a public agency pursuant to the officer's or employee's official duties and which is related to the functions, activities, programs or operations of any public agency.

(2) "Public record" shall include, but not be limited to, an agreement in settlement of litigation involving the Kansas public employees retirement system and the investment of moneys of the fund.

(3) Notwithstanding the provisions of subsection (g)(1), "public record" shall not include:

(A) Records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds. As used in this subparagraph, "private person" shall not include an officer or employee of a public agency who is acting pursuant to the officer's or employee's official duties;

(B) records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state; or

(C) records of employers related to the employer's individually identifiable contributions made on behalf of employees for workers compensation, social security, unemployment insurance or retirement. The provisions of this subparagraph shall not apply to records of employers of lump-sum payments for contributions as described in this subparagraph paid for any group, division or section of an agency.

(h) "Undercover agent" means an employee of a public agency responsible for criminal law enforcement who is engaged in the detection or investigation of violations of criminal law in a capacity where such employee's identity or employment by the public agency is secret.

**Credits**

Laws 1984, ch. 187, § 3; Laws 1992, ch. 321, § 22; Laws 1994, ch. 293, § 4; Laws 2005, ch. 126, § 7; Laws 2011, ch. 30, § 191, eff. July 1, 2011; Laws 2016, ch. 82, § 10, eff. July 1, 2016.

Notes of Decisions (24)

K. S. A. 45-217, KS ST 45-217

Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-218

# 45-218. Inspection of records; request; response; refusal, when; fees

Currentness

(a) All public records shall be open for inspection by any person, except as otherwise provided by this act, and suitable facilities shall be made available by each public agency for this purpose. No person shall removal [remove] original copies of public records from the office of any public agency without the written permission of the custodian of the record.

(b) Upon request in accordance with procedures adopted under K.S.A. 45-220, any person may inspect public records during the regular office hours of the public agency and during any additional hours established by the public agency pursuant to K.S.A. 45-220.

(c) If the person to whom the request is directed is not the custodian of the public record requested, such person shall so notify the requester and shall furnish the name and location of the custodian of the public record, if known to or readily ascertainable by such person.

(d) Each request for access to a public record shall be acted upon as soon as possible, but not later than the end of the third business day following the date that the request is received. If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection. If the request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester not later than the end of the third business day following the date that the request for the statement is received.

(e) The custodian may refuse to provide access to a public record, or to permit inspection, if a request places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency. However, refusal under this subsection must be sustained by preponderance of the evidence.

(f) A public agency may charge and require advance payment of a fee for providing access to or furnishing copies of public records, subject to K.S.A. 45-219.

**Credits**
Laws 1984, ch. 187, § 4.

WESTLAW © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Notes of Decisions (13)

K. S. A. 45-218, KS ST 45-218
Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-219

# 45-219. Abstracts or copies of records; fees

Currentness

(a) Any person may make abstracts or obtain copies of any public record to which such person has access under this act. If copies are requested, the public agency may require a written request and advance payment of the prescribed fee. A public agency shall not be required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations or similar audio or visual items or devices, unless such items or devices were shown or played to a public meeting of the governing body thereof, but the public agency shall not be required to provide such items or devices which are copyrighted by a person other than the public agency.

(b) Copies of public records shall be made while the records are in the possession, custody and control of the custodian or a person designated by the custodian and shall be made under the supervision of such custodian or person. When practical, copies shall be made in the place where the records are kept. If it is impractical to do so, the custodian shall allow arrangements to be made for use of other facilities. If it is necessary to use other facilities for copying, the cost thereof shall be paid by the person desiring a copy of the records. In addition, the public agency may charge the same fee for the services rendered in supervising the copying as for furnishing copies under subsection (c) and may establish a reasonable schedule of times for making copies at other facilities.

(c) Except as provided by subsection (f) or where fees for inspection or for copies of a public record are prescribed by statute, each public agency may prescribe reasonable fees for providing access to or furnishing copies of public records, subject to the following:

(1) In the case of fees for copies of records, the fees shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available.

(2) In the case of fees for providing access to records maintained on computer facilities, the fees shall include only the cost of any computer services, including staff time required.

(3) Fees for access to or copies of public records of public agencies within the legislative branch of the state government shall be established in accordance with K.S.A. 46-1207a, and amendments thereto.

(4) Fees for access to or copies of public records of public agencies within the judicial branch of the state government shall be established in accordance with rules of the supreme court.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(5) Fees for access to or copies of public records of a public agency within the executive branch of the state government shall be established by the agency head. Any person requesting records may appeal the reasonableness of the fees charged for providing access to or furnishing copies of such records to the secretary of administration whose decision shall be final. A fee for copies of public records which is equal to or less than $.25 per page shall be deemed a reasonable fee.

(d) Except as otherwise authorized pursuant to K.S.A. 75-4215, and amendments thereto, each public agency within the executive branch of the state government shall remit all moneys received by or for it from fees charged pursuant to this section to the state treasurer in accordance with K.S.A. 75-4215, and amendments thereto. Unless otherwise specifically provided by law, the state treasurer shall deposit the entire amount thereof in the state treasury and credit the same to the state general fund or an appropriate fee fund as determined by the agency head.

(e) Each public agency of a political or taxing subdivision shall remit all moneys received by or for it from fees charged pursuant to this act to the treasurer of such political or taxing subdivision at least monthly. Upon receipt of any such moneys, such treasurer shall deposit the entire amount thereof in the treasury of the political or taxing subdivision and credit the same to the general fund thereof, unless otherwise specifically provided by law.

(f) Any person who is a certified shorthand reporter may charge fees for transcripts of such person's notes of judicial or administrative proceedings in accordance with rates established pursuant to rules of the Kansas supreme court.

(g) Nothing in the open records act shall require a public agency to electronically make copies of public records by allowing a person to obtain copies of a public record by inserting, connecting or otherwise attaching an electronic device provided by such person to the computer or other electronic device of the public agency.

**Credits**

Laws 1984, ch. 187, § 5; Laws 1984, ch. 282; § 2; Laws 1994, ch. 100, § 1; Laws 1995, ch. 135, § 1; Laws 2010, ch. 112, § 1, eff. July 1, 2010.

Notes of Decisions (3)

K. S. A. 45-219, KS ST 45-219

Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-220

# 45-220. Procedures for obtaining access to or copies of records; request; office hours; provision of information on procedures

Effective: July 1, 2018
Currentness

(a) Each public agency shall adopt procedures to be followed in requesting access to and obtaining copies of public records, which procedures shall provide full access to public records, protect public records from damage and disorganization, prevent excessive disruption of the agency's essential functions, provide assistance and information upon request and insure [ensure][1] efficient and timely action in response to applications for inspection of public records.

(b) A public agency may require a written request for inspection of public records but shall not otherwise require a request to be made in any particular form. Except as otherwise provided by subsection (c), a public agency shall not require that a request contain more information than the requester's name and address and the information necessary to ascertain the records to which the requester desires access and the requester's right of access to the records. A public agency may require proof of identity of any person requesting access to a public record. No request shall be returned, delayed or denied because of any technicality unless it is impossible to determine the records to which the requester desires access.

(c) If access to public records of an agency or the purpose for which the records may be used is limited pursuant to K.S.A. 45-221 or K.S.A. 45-230, and amendments thereto, the agency may require a person requesting the records or information therein to provide written certification that:

(1) The requester has a right of access to the records and the basis of that right; or

(2) the requester does not intend to, and will not: (A) Use any list of names or addresses contained in or derived from the records or information for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed; or (B) sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records or information for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed.

(d) A public agency shall establish, for business days when it does not maintain regular office hours, reasonable hours when persons may inspect and obtain copies of the agency's records. The public agency may require that any person desiring to inspect or obtain copies of the agency's records during such hours so notify the agency, but such notice shall not be required to be in writing and shall not be required to be given more than 24 hours prior to the hours established for inspection and obtaining copies.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(e) Each official custodian of public records shall designate such persons as necessary to carry out the duties of custodian under this act and shall ensure that a custodian is available during regular business hours of the public agency to carry out such duties.

(f) Each public agency shall provide, upon request of any person, the following information:

(1) The principal office of the agency, its regular office hours and any additional hours established by the agency pursuant to subsection (c).

(2) The title and address of the official custodian of the agency's records and of any other custodian who is ordinarily available to act on requests made at the location where the information is displayed.

(3) The fees, if any, charged for access to or copies of the agency's records.

(4) The procedures to be followed in requesting access to and obtaining copies of the agency's records, including procedures for giving notice of a desire to inspect or obtain copies of records during hours established by the agency pursuant to subsection (c).

(g)(1) Except for requests of summary data compiled from information submitted by multiple criminal justice agencies or as otherwise provided by law, requests for records submitted to the central repository or any other repositories supporting the criminal justice information system that are maintained by the Kansas bureau of investigation pursuant to K.S.A. 22-4704 and 22-4705, and amendments thereto, shall be directed to the criminal justice agency from which the records originated.

(2) As used in this subsection, the terms “central repository,” “criminal justice agency” and “criminal justice information system” have the same meanings as defined in K.S.A. 22-4701, and amendments thereto.

(h) Except for requests of summary data compiled from information submitted by multiple law enforcement agencies or as otherwise provided by law, requests for records submitted to the Kansas asset seizure and forfeiture repository that are maintained by the Kansas bureau of investigation pursuant to K.S.A. 60-4127, and amendments thereto, shall be directed to the law enforcement agency from which the records originated.

(i) Requests for records defined as “files” pursuant to K.S.A. 75-4379, and amendments thereto, submitted to a state or local law enforcement agency or governmental agency shall be directed to the state or local law enforcement agency or governmental agency that made, maintained or kept such files, as required by K.S.A. 75-4379, and amendments thereto.

**Credits**

Laws 1984, ch. 187, § 6; Laws 1984, ch. 282, § 3; Laws 2003, ch. 126, § 2; Laws 2013, ch. 72, § 1, eff. July 1, 2013; Laws 2018, ch. 26, § 2, eff. July 1, 2018; Laws 2018, ch. 93, § 2, eff. July 1, 2018.

Notes of Decisions (11)

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Footnotes

1 Bracketed text inserted on revision.

K. S. A. 45-220, KS ST 45-220

Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-221

# 45-221. Certain records not required to be open; separation of open and closed information required; statistics and records over 70 years old open

Currentness

(a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 75-4315d, and amendments thereto, or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court or rule of the senate committee on confirmation oversight relating to information submitted to the committee pursuant to K.S.A. 75-4315d, and amendments thereto, to restrict or prohibit disclosure.

(2) Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.

(3) Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.

(4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service of officers and employees of public agencies once they are employed as such.

(5) Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law.

(6) Letters of reference or recommendation pertaining to the character or qualifications of an identifiable individual, except documents relating to the appointment of persons to fill a vacancy in an elected office.

(7) Library, archive and museum materials contributed by private persons, to the extent of any limitations imposed as conditions of the contribution.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(8) Information which would reveal the identity of an individual who lawfully makes a donation to a public agency, if anonymity of the donor is a condition of the donation, except if the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public officer or employee.

(9) Testing and examination materials, before the test or examination is given or if it is to be given again, or records of individual test or examination scores, other than records which show only passage or failure and not specific scores.

(10) Criminal investigation records, except as provided herein. The district court, in an action brought pursuant to K.S.A. 45-222, and amendments thereto, may order disclosure of such records, subject to such conditions as the court may impose, if the court finds that disclosure:

(A) Is in the public interest;

(B) would not interfere with any prospective law enforcement action, criminal investigation or prosecution;

(C) would not reveal the identity of any confidential source or undercover agent;

(D) would not reveal confidential investigative techniques or procedures not known to the general public;

(E) would not endanger the life or physical safety of any person; and

(F) would not reveal the name, address, phone number or any other information which specifically and individually identifies the victim of any sexual offense in article 35 of chapter 21 of the Kansas Statutes Annotated, prior to their repeal, or article 55 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.

If a public record is discretionarily closed by a public agency pursuant to this subsection, the record custodian, upon request, shall provide a written citation to the specific provisions of paragraphs (A) through (F) that necessitate closure of that public record.

(11) Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent.

(12) Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility.

(13) The contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition of property, prior to the award of formal contracts therefor.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(14) Correspondence between a public agency and a private individual, other than correspondence which is intended to give notice of an action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public by a public agency and is not specifically in response to communications from such a private individual.

(15) Records pertaining to employer-employee negotiations, if disclosure would reveal information discussed in a lawful executive session under K.S.A. 75-4319, and amendments thereto.

(16) Software programs for electronic data processing and documentation thereof, but each public agency shall maintain a register, open to the public, that describes:

(A) The information which the agency maintains on computer facilities; and

(B) the form in which the information can be made available using existing computer programs.

(17) Applications, financial statements and other information submitted in connection with applications for student financial assistance where financial need is a consideration for the award.

(18) Plans, designs, drawings or specifications which are prepared by a person other than an employee of a public agency or records which are the property of a private person.

(19) Well samples, logs or surveys which the state corporation commission requires to be filed by persons who have drilled or caused to be drilled, or are drilling or causing to be drilled, holes for the purpose of discovery or production of oil or gas, to the extent that disclosure is limited by rules and regulations of the state corporation commission.

(20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

(21) Records of a public agency having legislative powers, which records pertain to proposed legislation or amendments to proposed legislation, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(22) Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(23) Library patron and circulation records which pertain to identifiable individuals.

(24) Records which are compiled for census or research purposes and which pertain to identifiable individuals.

(25) Records which represent and constitute the work product of an attorney.

(26) Records of a utility or other public service pertaining to individually identifiable residential customers of the utility or service.

(27) Specifications for competitive bidding, until the specifications are officially approved by the public agency.

(28) Sealed bids and related documents, until a bid is accepted or all bids rejected.

(29) Correctional records pertaining to an identifiable inmate or release, except that:

(A) The name; photograph and other identifying information; sentence data; parole eligibility date; custody or supervision level; disciplinary record; supervision violations; conditions of supervision, excluding requirements pertaining to mental health or substance abuse counseling; location of facility where incarcerated or location of parole office maintaining supervision and address of a releasee whose crime was committed after the effective date of this act shall be subject to disclosure to any person other than another inmate or releasee, except that the disclosure of the location of an inmate transferred to another state pursuant to the interstate corrections compact shall be at the discretion of the secretary of corrections;

(B) the attorney general, law enforcement agencies, counsel for the inmate to whom the record pertains and any county or district attorney shall have access to correctional records to the extent otherwise permitted by law;

(C) the information provided to the law enforcement agency pursuant to the sex offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, shall be subject to disclosure to any person, except that the name, address, telephone number or any other information which specifically and individually identifies the victim of any offender required to register as provided by the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, shall not be disclosed; and

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(D) records of the department of corrections regarding the financial assets of an offender in the custody of the secretary of corrections shall be subject to disclosure to the victim, or such victim's family, of the crime for which the inmate is in custody as set forth in an order of restitution by the sentencing court.

(30) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.

(31) Public records pertaining to prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the state. This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state, except as otherwise provided by law.

(32) Engineering and architectural estimates made by or for any public agency relative to public improvements.

(33) Financial information submitted by contractors in qualification statements to any public agency.

(34) Records involved in the obtaining and processing of intellectual property rights that are expected to be, wholly or partially vested in or owned by a state educational institution, as defined in K.S.A. 76-711, and amendments thereto, or an assignee of the institution organized and existing for the benefit of the institution.

(35) Any report or record which is made pursuant to K.S.A. 65-4922, 65-4923 or 65-4924, and amendments thereto, and which is privileged pursuant to K.S.A. 65-4915 or 65-4925, and amendments thereto.

(36) Information which would reveal the precise location of an archeological site.

(37) Any financial data or traffic information from a railroad company, to a public agency, concerning the sale, lease or rehabilitation of the railroad's property in Kansas.

(38) Risk-based capital reports, risk-based capital plans and corrective orders including the working papers and the results of any analysis filed with the commissioner of insurance in accordance with K.S.A. 40-2c20 and 40-2d20, and amendments thereto.

(39) Memoranda and related materials required to be used to support the annual actuarial opinions submitted pursuant to K.S.A. 40-409(b), and amendments thereto.

(40) Disclosure reports filed with the commissioner of insurance under K.S.A. 40-2,156(a), and amendments thereto.

(41) All financial analysis ratios and examination synopses concerning insurance companies that are submitted to the commissioner by the national association of insurance commissioners' insurance regulatory information system.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(42) Any records the disclosure of which is restricted or prohibited by a tribal-state gaming compact.

(43) Market research, market plans, business plans and the terms and conditions of managed care or other third-party contracts, developed or entered into by the university of Kansas medical center in the operation and management of the university hospital which the chancellor of the university of Kansas or the chancellor's designee determines would give an unfair advantage to competitors of the university of Kansas medical center.

(44) The amount of franchise tax paid to the secretary of revenue or the secretary of state by domestic corporations, foreign corporations, domestic limited liability companies, foreign limited liability companies, domestic limited partnership, foreign limited partnership, domestic limited liability partnerships and foreign limited liability partnerships.

(45) Records, other than criminal investigation records, the disclosure of which would pose a substantial likelihood of revealing security measures that protect: (A) Systems, facilities or equipment used in the production, transmission or distribution of energy, water or communications services; (B) transportation and sewer or wastewater treatment systems, facilities or equipment; or (C) private property or persons, if the records are submitted to the agency. For purposes of this paragraph, security means measures that protect against criminal acts intended to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of government by disruption of public services, mass destruction, assassination or kidnapping. Security measures include, but are not limited to, intelligence information, tactical plans, resource deployment and vulnerability assessments.

(46) Any information or material received by the register of deeds of a county from military discharge papers, DD Form 214. Such papers shall be disclosed: To the military dischargee; to such dischargee's immediate family members and lineal descendants; to such dischargee's heirs, agents or assigns; to the licensed funeral director who has custody of the body of the deceased dischargee; when required by a department or agency of the federal or state government or a political subdivision thereof; when the form is required to perfect the claim of military service or honorable discharge or a claim of a dependent of the dischargee; and upon the written approval of the commissioner of veterans affairs, to a person conducting research.

(47) Information that would reveal the location of a shelter or a safehouse or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault.

(48) Policy information provided by an insurance carrier in accordance with K.S.A. 44-532(h)(1), and amendments thereto. This exemption shall not be construed to preclude access to an individual employer's record for the purpose of verification of insurance coverage or to the department of labor for their business purposes.

(49) An individual's e-mail address, cell phone number and other contact information which has been given to the public agency for the purpose of public agency notifications or communications which are widely distributed to the public.

(50) Information provided by providers to the local collection point administrator or to the 911 coordinating council pursuant to the Kansas 911 act, and amendments thereto, upon request of the party submitting such records.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(51) Records of a public agency on a public website which are searchable by a keyword search and identify the home address or home ownership of a law enforcement officer as defined in K.S.A. 21-5111, and amendments thereto, parole officer, probation officer, court services officer or community correctional services officer. Such individual officer shall file with the custodian of such record a request to have such officer's identifying information restricted from public access on such public website. Within 10 business days of receipt of such requests, the public agency shall restrict such officer's identifying information from such public access. Such restriction shall expire after five years and such officer may file with the custodian of such record a new request for restriction at any time.

(52) Records of a public agency on a public website which are searchable by a keyword search and identify the home address or home ownership of a federal judge, a justice of the supreme court, a judge of the court of appeals, a district judge, a district magistrate judge, a municipal judge, the United States attorney for the district of Kansas, an assistant United States attorney, a special assistant United States attorney, the attorney general, an assistant attorney general, a special assistant attorney general, a county attorney, an assistant county attorney, a special assistant county attorney, a district attorney, an assistant district attorney, a special assistant district attorney, a city attorney, an assistant city attorney or a special assistant city attorney. Such person shall file with the custodian of such record a request to have such person's identifying information restricted from public access on such public website. Within 10 business days of receipt of such requests, the public agency shall restrict such person's identifying information from such public access. Such restriction shall expire after five years and such person may file with the custodian of such record a new request for restriction at any time.

(53) Records of a public agency that would disclose the name, home address, zip code, e-mail address, phone number or cell phone number or other contact information for any person licensed to carry concealed handguns or of any person who enrolled in or completed any weapons training in order to be licensed or has made application for such license under the personal and family protection act, K.S.A. 75-7c01 et seq., and amendments thereto, shall not be disclosed unless otherwise required by law.

(54) Records of a utility concerning information about cyber security threats, attacks or general attempts to attack utility operations provided to law enforcement agencies, the state corporation commission, the federal energy regulatory commission, the department of energy, the southwest power pool, the North American electric reliability corporation, the federal communications commission or any other federal, state or regional organization that has a responsibility for the safeguarding of telecommunications, electric, potable water, waste water disposal or treatment, motor fuel or natural gas energy supply systems.

(55) Records of a public agency containing information or reports obtained and prepared by the office of the state bank commissioner in the course of licensing or examining a person engaged in money transmission business pursuant to K.S.A. 9-508 et seq., and amendments thereto, shall not be disclosed except pursuant to K.S.A. 9-513c, and amendments thereto, or unless otherwise required by law.

(b) Except to the extent disclosure is otherwise required by law or as appropriate during the course of an administrative proceeding or on appeal from agency action, a public agency or officer shall not disclose financial information of a taxpayer which may be required or requested by a county appraiser or the director of property valuation to assist in the determination of the value of the taxpayer's property for ad valorem taxation purposes; or any financial information of a personal nature required or requested by a public agency or officer, including a name, job description or title revealing the salary or other compensation of officers, employees or applicants for employment with a firm, corporation or agency, except a public agency. Nothing contained herein shall be construed to prohibit the publication of statistics, so classified as to prevent identification of particular reports or returns and the items thereof.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(c) As used in this section, the term “cited or identified” shall not include a request to an employee of a public agency that a document be prepared.

(d) If a public record contains material which is not subject to disclosure pursuant to this act, the public agency shall separate or delete such material and make available to the requester that material in the public record which is subject to disclosure pursuant to this act. If a public record is not subject to disclosure because it pertains to an identifiable individual, the public agency shall delete the identifying portions of the record and make available to the requester any remaining portions which are subject to disclosure pursuant to this act, unless the request is for a record pertaining to a specific individual or to such a limited group of individuals that the individuals' identities are reasonably ascertainable, the public agency shall not be required to disclose those portions of the record which pertain to such individual or individuals.

(e) The provisions of this section shall not be construed to exempt from public disclosure statistical information not descriptive of any identifiable person.

(f) Notwithstanding the provisions of subsection (a), any public record which has been in existence more than 70 years shall be open for inspection by any person unless disclosure of the record is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or by a policy adopted pursuant to K.S.A. 72-6214, and amendments thereto.

(g) Any confidential records or information relating to security measures provided or received under the provisions of subsection (a)(45) shall not be subject to subpoena, discovery or other demand in any administrative, criminal or civil action.

**Credits**

Laws 1984, ch. 187, § 7; Laws 1984, ch. 282, § 4; Laws 1986, ch. 193, § 1; Laws 1987, ch. 176, § 4; Laws 1989, ch. 154, § 1; Laws 1991, ch. 149, § 12; Laws 1994, ch. 107, § 8; Laws 1995, ch. 44, § 1; Laws 1995, ch. 257, § 6; Laws 1996, ch. 256, § 15; Laws 1997, ch. 126, § 44; Laws 1997, ch. 181, § 15; Laws 2000, ch. 156, § 3; Laws 2001, ch. 211, § 13; Laws 2002, ch. 178, § 1; Laws 2003, ch. 109, § 22; Laws 2004, ch. 171, § 30; Laws 2005, ch. 126, § 1; Laws 2008, ch. 121, § 4, eff. July 1, 2008; Laws 2009, ch. 83, § 27, eff. April 23, 2009; Laws 2009, ch. 125, § 1, eff. July 1, 2009; Laws 2010, ch. 112, § 2, eff. July 1, 2010; Laws 2011, ch. 30 §192, eff. July 1, 2011; Laws 2011, ch. 84 §23, eff. July 1, 2011; Laws 2012, ch. 147, § 1, eff. July 1, 2012; Laws 2013, ch. 72, § 2, eff. July 1, 2013; Laws 2013, ch. 133, § 18, eff. July 1, 2013; Laws 2014, ch. 120, § 6, eff. July 1, 2014; Laws 2015, ch. 68, § 10, eff. July 1, 2015.

Notes of Decisions (113)

K. S. A. 45-221, KS ST 45-221

Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-222

# 45-222. Civil remedies to enforce act; attorney fees

Currentness

(a) The district court of any county in which public records are located shall have jurisdiction to enforce the purposes of this act with respect to such records, by injunction, mandamus, declaratory judgment or other appropriate order, in an action brought by any person, the attorney general or a county or district attorney. The district court may require a defendant to complete training approved by the attorney general concerning the requirements of the open records act.

(b) In any action hereunder, the court shall determine the matter de novo. The court on its own motion, or on motion of either party, may view the records in controversy in camera before reaching a decision.

(c) In any action hereunder, or under K.S.A. 45-251, and amendments thereto, the burden of proof shall be on the public agency to sustain its action.

(d) In any action hereunder, the court shall award costs and a reasonable sum as an attorney's fee for services rendered in such action, including proceedings on appeal, to be recovered and collected as part of the costs to the plaintiff if the court finds that the agency's denial of access to the public record was not in good faith and without a reasonable basis in fact or law. The award shall be assessed against the public agency that the court determines to be responsible for the violation.

(e) In any action hereunder in which the defendant is the prevailing party, the court shall award to the defendant costs and a reasonable sum as an attorney's fee for services rendered in such action, including proceedings on appeal, to be recovered and collected as part of the costs if the court finds that the plaintiff maintained the action not in good faith and without a reasonable basis in fact or law.

(f) In any action hereunder brought by the attorney general or a county or district attorney, if the court finds that any provisions were violated, such court:

(1) Except as provided in subsection (f)(2), may award the attorney general's or the county or district attorney's reasonable expenses, investigation costs and attorney fees; and

(2) shall award the same if the court determines that the violation was not made in good faith and without a reasonable basis in fact or law.

WESTLAW © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

(g) Except as otherwise provided by law, proceedings arising under this section shall be assigned for hearing and trial at the earliest practicable date.

(h) The provisions of subsections (d) and (e) concerning the awarding of costs and attorney fees for services rendered during an appeal shall apply only to actions which are based on causes of action accruing on or after July 1, 2004.

**Credits**

Laws 1984, ch. 187, § 8; Laws 1984, ch. 282, § 6; Laws 1990, ch. 190, § 1; Laws 2000, ch. 156, § 4; Laws 2004, ch. 151, § 2; Laws 2015, ch. 68, § 11, eff. July 1, 2015.

Notes of Decisions (52)

K. S. A. 45-222, KS ST 45-222

Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

West's Kansas Statutes Annotated
Chapter 45. Public Records, Documents and Information
Article 2. Records Open to Public

K.S.A. 45-223

# 45-223. Civil penalties for violations

Currentness

(a) Any public agency subject to this act that knowingly violates any of the provisions of this act or that intentionally fails to furnish information as required by this act shall be liable for the payment of a civil penalty in an action brought by the attorney general or a county or district attorney, in a sum set by the court of not to exceed $500 for each violation.

(b) Any civil penalty sued for and recovered hereunder by the attorney general shall be paid into the attorney general's open government fund. Any civil penalty sued for and recovered hereunder by a county or district attorney shall be paid into the general fund of the county in which the proceedings were instigated.

**Credits**
Laws 1984, ch. 187, § 9; Laws 2000, ch. 156, § 5; Laws 2015, ch. 68, § 12, eff. July 1, 2015.

Notes of Decisions (1)

K. S. A. 45-223, KS ST 45-223
Statutes are current through laws enacted during the 2021 Regular Session of the Kansas Legislature effective on March 4, 2021.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

New Jersey Statutes Annotated
Title 47. Public Records (Refs & Annos)
Chapter 1A. Examination and Copies of Public Records (Refs & Annos)

N.J.S.A. 47:1A-6

# 47:1A-6. Proceeding to challenge access denial; hearing

Effective: July 7, 2002
Currentness

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may:

institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L.2001, c. 404 (C.47:1A-7).

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

**Credits**
L.2001, c. 404, § 7.

Notes of Decisions (101)

N. J. S. A. 47:1A-6, NJ ST 47:1A-6
Current with laws through L.2021, c. 15.

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Gentile v. State Bar of Nevada, U.S.Nev., June 27, 1991

96 S.Ct. 2791
Supreme Court of the United States

NEBRASKA PRESS ASSOCIATION et al., Petitioners,
v.
Hugh STUART, Judge, District Court of Lincoln County, Nebraska, et al.

No. 75-817.
|
Argued April 19, 1976.
|
Decided June 30, 1976.

**Synopsis**

Nebraska state trial judge, in anticipation of a trial for a multiple murder which had attracted widespread news coverage, entered an order which, as modified by the Nebraska Supreme Court, restrained the news media from publishing or broadcasting accounts of confessions or admissions made by defendant to law enforcement officers or third parties, except members of the press, and other facts "strongly implicative" of the defendant. On appeal, the Nebraska Supreme Court, 194 Neb. 783, 236 N.W.2d 794, affirmed the order as modified. Upon certiorari, the Supreme Court, Mr. Chief Justice Burger, held, inter alia, that the case was not moot simply because the order had expired; that while the guarantees of freedom of expression are not an absolute prohibition under all circumstances, the barriers to prior restraint remain high and the presumption against its use continues intact; and that the heavy burden imposed as a condition to securing a prior restraint was not met in the present case.

Reversed.

Mr. Justice White and Mr. Justice Powell filed concurring opinions.

Mr. Justice Brennan filed an opinion concurring in the judgment, in which Mr. Justice Stewart and Mr. Justice Marshall joined.

Mr. Justice Stevens filed an opinion concurring in the judgment.

West Headnotes (16)

[1] **Federal Courts** Case or controversy requirement; justiciability; mootness and ripeness

Although the jurisdiction of the Supreme Court under Article III of the Constitution extends only to actual cases and controversies, jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review." U.S.C.A.Const. art. 3, § 2.

153 Cases that cite this headnote

[2] **Constitutional Law** Mootness

Case involving a prior restraint on pretrial publicity was not moot simply because the restrictive order had expired, since the controversy between the parties was "capable of repetition, yet evading review."

190 Cases that cite this headnote

[3] **Constitutional Law** Sixth Amendment
**Jury** Competence for Trial of Cause

The Sixth Amendment in terms guarantees "trial by an impartial jury" in federal criminal prosecutions, and because trial by jury in criminal cases is fundamental to the American scheme of justice, the due process clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. U.S.C.A.Const. Amends. 6, 14.

79 Cases that cite this headnote

[4] **Criminal Law** Publicity, media coverage, and occurrences extraneous to trial

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Pretrial publicity, even pervasive, adverse publicity, does not inevitably lead to an unfair trial.

195 Cases that cite this headnote

**[5]** **Constitutional Law** Prior Restraints

Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. U.S.C.A.Const. Amend. 1.

256 Cases that cite this headnote

**[6]** **Constitutional Law** Prior Restraints

If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. U.S.C.A.Const. Amend. 1.

139 Cases that cite this headnote

**[7]** **Constitutional Law** Publicity Regarding Proceedings

Although it is unnecessary to establish a priority between First Amendment rights and the Sixth Amendment right to a fair trial under all circumstances, as the authors of the Bill of Rights themselves declined to do, the protection against prior restraints should have particular force as applied to reporting of criminal proceedings. U.S.C.A.Const. Amends. 1, 6.

52 Cases that cite this headnote

**[8]** **Constitutional Law** First Amendment in General

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly. U.S.C.A.Const. Amend. 1.

5 Cases that cite this headnote

**[9]** **Constitutional Law** Publicity Regarding Proceedings

Those who exercise First Amendment rights in newspapers or broadcasting enterprises should direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. U.S.C.A.Const. Amend. 1.

22 Cases that cite this headnote

**[10]** **Constitutional Law** Presumption of invalidity

While the guarantees of freedom of expression are not an absolute prohibition under all circumstances, the barriers to prior restraint remain high and the presumption against its use continues intact. U.S.C.A.Const. Amend. 1.

82 Cases that cite this headnote

**[11]** **Criminal Law** Publicity, media coverage, and occurrences extraneous to trial

Although, on the pretrial record, the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning the murder case, and although he could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial, his conclusion as to the impact of such publicity on prospective jurors was, of necessity, speculative, dealing as he was with factors unknown and unknowable. U.S.C.A.Const. Amend. 1.

186 Cases that cite this headnote

**[12]** **Criminal Law** Gag orders and similar restraints

Record was lacking in evidence to support a finding that measures short of prior restraint on the press and speech would not have protected the rights of defendant in murder prosecution.

57 Cases that cite this headnote

**[13]** **Injunction** Publishing, journalism, and bookselling

In respect to prior restraints on pretrial publicity, the need for in personam jurisdiction presents an obstacle to a restraining order that

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

applies to publication at large, as distinguished from restraining publication within a given jurisdiction. U.S.C.A.Const. Amend. 1.

24 Cases that cite this headnote

**[14]** **Criminal Law** Gag orders and similar restraints

Record left it far from clear that prior restraint on publication would have protected the rights of defendant in murder trial, considering such practical problems as the limited territorial jurisdiction of the court issuing the restraining order, the difficulties inherent in predicting what information will in fact undermine jurors' impartiality, the problem of drafting an order that will effectively keep prejudicial information from prospective jurors, and the fact that the events in the instant case occurred in a small community where rumors travel swiftly by word of mouth.

150 Cases that cite this headnote

**[15]** **Constitutional Law** Publicity Regarding Proceedings

**Criminal Law** Gag orders and similar restraints

To the extent "gag" order prohibited the reporting of evidence adduced at open preliminary hearing held to determine whether the defendant should be bound over for trial, it violated the settled principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom," and the portion of the order restraining publication of other facts "strongly implicative" of the defendant was too vague and too broad to survive the scrutiny given to restraints on First Amendment rights. U.S.C.A.Const. Amend. 1.

134 Cases that cite this headnote

**[16]** **Criminal Law** Gag orders and similar restraints

With respect to murder case "gag" order prohibiting reporting or commentary on judicial proceedings held in public, the barriers to prior restraint were not overcome, and to the extent the order restrained publication of such material, it was clearly invalid. U.S.C.A.Const. Amend. 1.

145 Cases that cite this headnote

****2793** Syllabus[*]

***539** Respondent Nebraska state trial judge, in anticipation of a trial for a multiple murder which had attracted widespread news coverage, entered an order which, as modified by the Nebraska Supreme Court, restrained petitioner newspapers, broadcasters, journalists, news media associations, and national newswire services from publishing or broadcasting accounts of confessions or admissions made by the accused to law enforcement officers or third parties, except members of the press, and other facts "strongly implicative" of the accused. The modification of the order had occurred in the course of an action by petitioners, which had sought a stay of the trial court's original order and in which the accused and the State of Nebraska intervened. This Court granted certiorari to determine whether the order violated the constitutional guarantee of freedom of the press. The order expired by its own terms when the jury was impaneled. Respondent was convicted; his appeal is pending in the Nebraska Supreme Court. Held:

****2794** 1. The case is not moot simply because the order has expired, since the controversy between the parties is "capable of repetition, yet evading review." Pp. 2796-2797.

2. While the guarantees of freedom of expression are not an absolute prohibition under all circumstances, the barriers to prior restraint remain high and the presumption against its use continues intact. Although it is unnecessary to establish a priority between First Amendment rights and the Sixth Amendment right to a fair trial under all circumstances, as the authors of the Bill of Rights themselves declined to do, the protection against prior restraint should have particular force as applied to reporting of criminal proceedings. Pp. 2801-2804.

3. The heavy burden imposed as a condition to securing a prior restraint was not met in this case. Pp. 2804-2808.

(a) On the pretrial record the trial judge was justified in concluding that there would be intense and pervasive pretrial

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

publicity concerning the case, and he could also reasonably ***540** conclude, based on common human experience, that publicity might impair the accused's right to a fair trial. His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, however, dealing as he was with factors unknown and unknowable. P. 2804.

(b) There is no finding that measures short of prior restraint on the press and speech would not have protected the accused's rights; the Nebraska Supreme Court no more than implied that alternative measures might not suffice, and the record lacks evidence that would support such a finding. Pp. 2804-2805.

(c) It is not clear that prior restraint on publication would have effectively protected the accused's rights, in view of such practical problems as the limited territorial jurisdiction of the trial court issuing the restraining order, the difficulties inherent in predicting what information will in fact undermine the jurors' impartiality, the problem of drafting an order that will effectively keep prejudicial information from prospective jurors, and the fact that in this case the events occurred in a small community where rumors would travel swiftly by word of mouth. P. 2806.

(d) To the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing held to determine whether the accused should be bound over for trial, it violated the settled principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom," Sheppard v. Maxwell, 384 U.S. 333, 362-363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600, and the portion of the order restraining publication of other facts "strongly implicative" of the accused is too vague and too broad to survive the scrutiny given to restraints on First Amendment rights. Pp. 2806-2807.

Reversed.

**Attorneys and Law Firms**

E. Barrett Prettyman, Jr., Washington, D. C., for petitioners.

Floyd Abrams, New York City, for National Broadcasting Co., Inc., and others as amici curiae, by special leave of Court.

***541** Harold Mosher, Lincoln, Neb., for respondent Hugh Stuart, Judge.

Milton L. Larson, North Platte, Neb., for respondent State of Nebraska.

**Opinion**

Mr. Chief Justice BURGER delivered the opinion of the Court.

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admission made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

***542** I

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in ****2795** Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. Three days after the crime, the County Attorney and Simants' attorney joined in asking the County Court to enter a restrictive order relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial." The County Court heard oral argument but took no evidence; no attorney for members of the press appeared at this stage. The County Court granted the prosecutor's motion for a restrictive order and entered it the next day, October 22. The order prohibited everyone in attendance from "releas(ing) or authoriz(ing) the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced"; the order also required members of the press to observe the Nebraska Bar-Press Guidelines.[1]

***543** Simants' preliminary hearing was held the same day, open to the public but subject to the order. The County Court bound over the defendant for trial to the State District Court. The charges, as amended to reflect the autopsy findings, were

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

that Simants had committed the murders in the course of a sexual assault.

Petitioners several press and broadcast associations, publishers, and individual reporters moved on October 23 for leave to intervene in the District Court, asking that the restrictive order imposed by the County Court be vacated. The District Court conducted a hearing, at which the County Judge testified and newspaper articles about the Simants case were admitted in evidence. The District Judge granted petitioners' motion to intervene and, on October 27, entered his own restrictive order. The judge found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The order applied only until the jury was impaneled, and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the ***544** victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court's order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating, and courthouse traffic control during the trial.

Four days later, on October 31, petitioners asked the District Court to stay its order. At the same time, they applied to ****2796** the Nebraska Supreme Court for a writ of mandamus, a stay, and an expedited appeal from the order. The State of Nebraska and the defendant Simants intervened in these actions. The Nebraska Supreme Court heard oral argument on November 25, and issued its Per curiam opinion December 1. State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975).[2]

***545** The Nebraska Supreme Court balanced the "heavy presumption against . . . constitutional validity" that an order restraining publication bears, New York Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1971), against the importance of the defendant's right to trial by an impartial jury. Both society and the individual defendant, the court held, had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined that this right was in jeopardy. The court noted that Nebraska statutes required the District Court to try Simants within six months of his arrest, and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as Lincoln County. The Nebraska Supreme Court held that "(u)nless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly." 194 Neb., at 797, 236 N.W.2d, at 803.

The Nebraska Supreme Court rejected that "absolutist position," but modified the District Court's order to accommodate the defendant's right to a fair trial and the petitioners' interest in reporting pretrial events. The order as modified prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The Nebraska Supreme Court did not rely on the Nebraska Bar-Press Guidelines. See n. 1, Supra. After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public.

***546** We granted certiorari to address the important issues raised by the District Court order as modified by the Nebraska Supreme Court, but we denied the motion to expedite review or to stay entirely the order of the State District Court pending Simants' trial. 423 U.S. 1027, 96 S.Ct. 557, 46 L.Ed.2d 401 (1975). We are informed by the parties that since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court.

II

The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints ****2797** on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the Simants case. Intervenor Simants argues that for this reason the case is moot.

**[1]** Our jurisdiction under Art. III, s 2, of the Constitution extends only to actual cases and controversies. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 96 S.Ct. 848, 43 L.Ed.2d 74 (1975); Sosna v. Iowa, 419 U.S. 393, 397-403, 95 S.Ct. 553, 556-559, 42 L.Ed.2d 532 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911).

**[2]** The controversy between the parties to this case is "capable of repetition" in two senses. First, if Simants' conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to ***547** seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, *e. g., Weinstein v. Bradford,* 423 U.S. 147, 96 S.Ct. 347, 46 L..2d 350 (1975); Sosna v. Iowa, supra; Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 (1973); Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-179, 89 S.Ct. 347, 350, 21 L.Ed.2d 325 (1968). We therefore conclude that this case is not moot, and proceed to the merits.

III

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors. They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press. Jefferson, for example, ***548** writing from Paris in 1786 concerning press attacks on John Jay, stated:

"In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . ." 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954).

See also F. Mott, Jefferson and the Press 21, 38-46 (1943).

The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning ****2798** Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching Voir dire of the two panels eventually called, and rendered a substantial opinion on the purposes of Voir dire and the standards to be applied. See 1 Causes Celebres, Trial of Aaron Burr for Treason 404-427, 473-481 (1879); United States v. Burr, 25 Fed.Cas.No. 14,692g, p. 49 (CC Va.1807). Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Mr. Chief Justice Marshall's careful voir dire inquiry into the matter of possible bias makes clear that the problem is not a new one.

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate. The trial of Bruno Hauptmann in a small New Jersey community for ***549** the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession including other judges pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court. See generally Hudon, Freedom of the Press Versus Fair Trial: The Remedy Lies With the Courts, 1 Val.U.L.Rev. 8, 12-14 (1966); Hallam, Some Object Lessons on Publicity in Criminal Trials, 24 Minn.L.Rev. 453 (1940); Lippmann, The Lindbergh Case in Its Relation to American Newspapers, in Problems of Journalism 154-156 (1936).

The excesses of press and radio and lack of responsibility of those in authority in the Hauptmann case and others of

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

that era led to efforts to develop voluntary guidelines for courts, lawyers, press, and broadcasters. See generally J. Lofton, Justice and the Press 117-130 (1966).[3] The effort was renewed in 1965 when the American Bar Association embarked on a project to develop standards for all aspects of criminal justice, including guidelines to accommodate the right to a fair trial and the rights of a free press. See ***550** Powell, The Right to a Fair Trial, 51 A.B.A.J. 534 (1965). The resulting standards, approved by the Association in 1968, received support from most of the legal profession. American Bar Association, Project on Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft 1968) Other groups have undertaken similar studies. See Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial (1967). In the wake of these efforts, the cooperation between bar associations and members of the press led to the adoption of voluntary guidelines like Nebraska's. See n. 1, Supra ; American Bar Association Legal Advisory Committee on Fair Trial and Free Press, The Rights of Fair Trial and Free Press 1-6 (1969).

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, ****2799** and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.

The problems presented in this case have a substantial history outside the reported decisions of the courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for ***551** it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises.

IV

**[3]** The Sixth Amendment in terms guarantees "trial, by an impartial jury . . ." in federal criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968).
"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'A fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right. But when the case is a "sensational" one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment. The relevant decisions of this Court, even if not dispositive, are instructive by way of background.

In Irvin v. Dowd, supra, for example, the defendant was convicted of murder following intensive and hostile news coverage. The trial judge had granted a defense motion for a change of venue, but only to an ***552** adjacent county, which had been exposed to essentially the same news coverage. At trial, 430 persons were called for jury service; 268 were excused because they had fixed opinions as to guilt. Eight of the 12 who served as jurors thought the defendant guilty, but said they could nevertheless render an impartial verdict. On review the Court vacated the conviction and death sentence and remanded to allow a new trial for, "(w)ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." 366 U.S., at 728, 81 S.Ct., at 1645.

Similarly, in Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), the Court reversed the conviction of a defendant whose staged, highly emotional confession had been filmed with the cooperation of local police and later broadcast on television for three days while he was awaiting trial, saying "(a)ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Id., at 726, 83 S.Ct., at 1419. And in Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), the Court held that

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself "inherently prevented a sober search for the truth." Id., at 551, 85 S.Ct., at 1637. See also Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959).

In Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the Court focused sharply on the impact of pretrial **2800 publicity and a trial court's duty to protect the defendant's constitutional right to a fair trial. With only Mr. Justice Black dissenting, and he without opinion, the Court ordered a new trial for the petitioner, even though the first trial had occurred 12 years before. Beyond doubt the press had shown no responsible concern for the constitutional guarantee of a fair trial; the communityfrom *553 which the jury was drawn had been inundated by publicity hostile to the defendant. But the trial judge "did not fulfill his duty to protect (the defendant) from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom." *Id.*, at 363, 86 S.Ct., at 1522. The Court noted that "unfair and prejudicial news comment on pending trials has become increasingly prevalent," *id.*, at 362, 86 S.Ct., at 1522, and issued a strong warning:

"Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, The trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should Continue the case until the threat abates, Or transfer it to another county not so permeated with publicity. In addition, Sequestration of the jury was something the judge should have raised Sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the *554 court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Id., at 362-363, 86 S.Ct., at 1522 (emphasis added).

Because the trial court had failed to use even minimal efforts to insulate the trial and the jurors from the "deluge of publicity," Id., at 357, 86 S.Ct., at 1519, the Court vacated the judgment of conviction and a new trial followed, in which the accused was acquitted.

Cases such as these are relatively rare, and we have held in other cases that trials have been fair in spite of widespread publicity. In Stroble v. California, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 (1952), for example, the Court affirmed a conviction and death sentence challenged on the ground that pretrial news accounts, including the prosecutor's release of the defendant's recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor's conduct, but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at trial. The Court also noted the thorough examination of jurors on Voir dire and the careful review of the facts by the state courts, and held that petitioner had failed to demonstrate a denial of due process. See also Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962).

**[4]** Taken together, these cases demonstrate that pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and **2801 extent of the publicity, which *555 is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity the measures described in Sheppard may well determine whether the defendant receives a trial consistent with the requirements of due process. That this responsibility has not always been properly discharged is apparent from the decisions just reviewed.

The costs of failure to afford a fair trial are high. In the most extreme cases, like Sheppard and Estes, the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed. The "strong measures" outlined in Sheppard v. Maxwell are means by which a trial judge can try to avoid exacting these costs from society or from the accused.

The state trial judge in the case before us acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial.[4] What we must decide is not simply whether the Nebraska courts erred ***556** in seeing the possibility of real danger to the defendant's rights, b whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution.

V

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," and it is "no longer open to doubt that the liberty of the press and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707, 51 S.Ct. 625, 628, 75 L.Ed. 1357 (1931). See also Grosjean v. American Press Co., 297 U.S. 233, 244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936). The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a "previous" or "prior" restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case.

In Near v. Minnesota ex rel. Olson, supra, the Court held invalid a Minnesota statute providing for the abatement as a public nuisance of any "malicious, scandalous and defamatory newspaper, magazine or other periodical." Near had published an occasional weekly newspaper described by the County Attorney's complaint as "largely devoted to malicious, scandalous and defamatory articles" concerning political and other public figures. 283 U.S., at 703, 51 S.Ct., at 626. Publication was enjoined pursuant to the statute. Excerpts from Near's paper, set out in the dissenting opinion of Mr. Justice Butler, show beyond question that one of its principal characteristics was blatant anti-Semitism. See Id., at 723, 724-727, n. 1, 51 S.Ct., at 634-635.

***557** Mr. Chief Justice Hughes, writing for the Court, noted that freedom of the press is not an absolute right, and the State may punish its abuses. He observed that the statute was "not aimed at the redress of individual or private wrongs." ****2802** Id., at 708, 709, 51 S.Ct., at 628. He then focused on the statute:

"(T)he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and unless the owner or publisher is able . . . to satisfy the judge that the (matter is) true and . . . published with good motives . . . his newspaper or periodical is suppressed . . . . This is of the essence of censorship." Id., at 713, 51 S.Ct., at 630.

The Court relied on Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907): "(T)he main purpose of (the First Amendment) is 'to prevent all such Previous restraints upon publications as had been practiced by other governments.' "[5]

The principles enunciated in Near were so universally accepted that the precise issue did not come before us again until ***558** Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). There the state courts had enjoined the petitioners from picketing or passing out literature of any kind in a specified area. Noting the similarity to Near v. Minnesota, a unanimous Court held: "Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000.

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. Carroll v. Princess Anne, 393 U.S. 175, 181, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. . . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." 402 U.S., at 418-420, 91 S.Ct., at 1577-1578.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

More recently in New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), the Government sought to enjoin the publication of excerpts from a massive, classified study of this Nation's involvement in the Vietnam conflict, going back to the end of the Second World War. The dispositive opinion of the Court simply concluded that the Government had not met its heavy burden of showing justification for the prior restraint. Each of the six concurring Justices and the three dissenting Justices expressed his views separately, but "every member of the Court, tacitly or explicitly, accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional." ***559** Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376, 396, 93 S.Ct. 2553, 2564, 37 L.Ed.2d 669 (1973) (Burger, C. J., dissenting). The Court's conclusion in New York Times suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and ****2803** assess the impact on national security of the lengthy documents at issue.

**[5]** The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

**[6]** A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.[6]

**[7]** **[8]** **[9]** The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492-493, 95 S.Ct. 1029, 1044-1045, 43 L.Ed.2d 328 (1975); see also, Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.

"A responsible press has always been regarded as ***560** the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Sheppard v. Maxwell, 384 U.S., at 350, 86 S.Ct., at 1515.

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue like the order requested in New York Times does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.

"We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial ***561** rooms of this Nation's press." *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 259, 94 S.Ct. 2831, 284041 L.Ed.2d 730 (1974) (White, J., concurring).

See also Columbia Broadcasting v. Democratic Comm., 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973). As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

**[10]** The authors of the Bill of Rights did not undertake to assign priorities as ****2804** between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, see Ex parte Milligan, 4 Wall. 2, 18 L.Ed. 281 (1867), cautions against suspending explicit guarantees.

The Nebraska courts in this case enjoined the publication of certain kinds of information about the Simants case. There are, as we suggested earlier, marked differences in setting and purpose between the order entered here and the orders in Near, Keefe, And New York Times, But as to the underlying issue the right of the press to be free from Prior Restraints on publication those ***562** cases form the backdrop against which we must decide this case.

VI

We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 (CA2 1950), aff'd, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951); see also L. Hand, The Bill of Rights 58-61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

A

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

**[11]** Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would ***563** be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common man experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pre-trial publicity Could Impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

B

We find little in the record that goes to another aspect of our task, determining whether measures short of an order retraining ****2805** all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect; the Nebraska Supreme Court referred to the issue only by implication. See 194 Neb., at 797-798, 236 N.W.2d, at 803.

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in Sheppard v. Maxwell, 384 U.S., at 357-362, 86 S.Ct., at 1519-1522: (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County;[7] (b) postponement of the trial to allow ***564** public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the Burr Case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

publicity. See Sheppard v. Maxwell, supra, at 361-362, 86 S.Ct., at 1521-1522. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. See American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 2-15 (App. Draft 1968).[8]

***565** We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." Murphy v. Florida, 421 U.S., at 799, 95 S.Ct., at 2036. Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

****2806** **[12]** We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

C

**[13]** We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty, see, E. g., Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1878). The need for In ***566** personam Jurisdiction also presents an obstacle to a restraining order that applies to publication at large as distinguished from restraining publication within a given jurisdiction.[9] See generally American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Rev. Draft, Nov. 1975); Rendleman, Free Press-Fair Trial: Review of Silence Orders, 52 N.C.L.Rev. 127, 149-155 (1973).[10]

The Nebraska Supreme Court narrowed the scope of the restrictive order, and its opinion reflects awareness of the tensions between the need to protect the accused as fully as possible and the need to restrict publication as little as possible. The dilemma posed underscores how ***567** difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors. When a restrictive order is sought, a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge, and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

****2807** **[14]** Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

D

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press. There was testimony concerning at least two incriminating statements made by Simants to private persons; the statement evidently a confession that he gave to law enforcement officials was also introduced. The State District Court's later order was entered after this public hearing and, as modified by the ***568** Nebraska Supreme Court, enjoined reporting of (1) "(c)onfessions or admissions against interests made by the accused to law enforcement officials"; (2) "(c) onfessions or admissions against interest, oral or written, if any, made by

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media"; and (3) all "(o)ther information strongly implicative of the accused as the perpetrator of the slayings." 194 Neb., at 801, 236 N.W.2d, at 805.

**[15]** To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "(T)here is nothing that proscribes the press from reporting events that transpire in the courtroom." Sheppard v. Maxwell, 384 U.S., at 362-363, 86 S.Ct., at 1522. See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947). The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. As part of a final order, entered after plenary review, this prohibition regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. See, E. g., Hynes v. Mayor of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); Buckley v. Valeo, 424 U.S. 1, 76-82, 96 S.Ct. 612, 662-665, 46 L.Ed.2d 659 (1976); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). The third phase of the order entered falls outside permissible limits.

E

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, ***569** true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, ****2808** in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction, because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. See Sheppard v. Maxwell, supra, 384 U.S., at 363, 86 S.Ct., at 1522; Estes v. Texas, 381 U.S., at 550-551, 85 S.Ct., at 1636-1637; Rideau v. Louisiana, 373 U.S., at 726, 83 S.Ct., at 1419; Irvin v. Dowd, 366 U.S., at 728, 81 S.Ct., at 1645. However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess ***570** the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

**[16]** Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Reversed.

Mr. Justice WHITE, concurring.

Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. ***571** It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no further than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues.If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

Mr. Justice POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case I write to emphasize the unique burden that rests upon the party, whether it be the State or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity.*

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting ****2809** the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness ***572** of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.

I believe these factors are sufficiently addressed in the Court's opinion to demonstrate beyond question that the prior restraint here was impermissible.

Mr. Justice BRENNAN, with whom Mr. Justice STEWART and Mr. Justice MARSHALL join, concurring in the judgment.

The question presented in this case is whether, consistently with the First Amendment, a court may enjoin the press, in advance of publication,[1] from reporting or commenting on information acquired from public court proceedings, public court records, or other sources pending judicial proceedings. The Nebraska Supreme Court upheld such a direct prior restraint on the press, issued by the judge presiding over a sensational state murder trial, on the ground that there existed, a "clear and present danger that pretrial publicity could substantially impair the right of the defendant (in the murder trial) to a trial by an impartial jury unless restraints were imposed." State v. Simants, 194 Neb. 783, 794, 236 N.W.2d 794, 802 (1975). The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the ***573** accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

I

The history of the current litigation highlights many of the dangers inherent in allowing any prior restraint on press reporting and commentary concerning the operations of the criminal justice system.

This action arose out of events surrounding the prosecution of respondent-intervenor Simants for the premeditated mass murder of the six members of the Kellie family in Sutherland, Neb., on October 18, 1975. Shortly after the crimes occurred, the community of 850 was alerted by a special announcement over the local television station. Residents were requested by the police to stay off the streets and exercise caution as to whom they admitted into their houses, and rumors quickly spread that a sniper was loose in Sutherland. When an investigation implicated Simants as a suspect, his name and description were provided to the press and then disseminated to the public.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Simants was apprehended on the morning of October 19, charged with six counts of premeditated murder, and arraigned before the County Court of Lincoln County, Neb. Because several journalists were in attendance and "proof concerning bail . . . would be prejudicial to the rights of the defendant to later obtain a fair trial," App. 7, a portion of the bail hearing was closed, over Simants' objection, pursuant to the request of the Lincoln County Attorney. At the hearing, counsel was appointed for Simants, bail was denied, and October 22 was set as the date for a preliminary hearing **2810 to determine whether Simants should be bound over for trial in *574 the District Court of Lincoln County, Neb. News of Simants' apprehension, which was broadcast over radio and television and reported in the press, relieved much of the tension that had built up during the night. During the period from October 19 until the first restrictive order was entered three days later, representatives of the press made accurate factual reports of the events that transpired, including reports of incriminating statements made by Simants to various relatives.

On the evening of October 21, the prosecution filed a motion that the County Court issue a restrictive order enjoining the press from reporting significant aspects of the case. The motion, filed without further evidentiary support, stated:
"The State of Nebraska hereby represents unto the Court that By reason of the nature of the above-captioned case, there has been, and no doubt there will continue to be, mass coverage by news media not only locally but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a. m. on October 22, 1975; and there is A reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trail in the District Court if testimony of witnesses at the preliminary hearing is reported to the public.

"Wherefore the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply." App. 8. (Emphasis supplied.)

Half an hour later, the County Court Judge heard *575 argument on the prosecution motion. Defense counsel joined in urging imposition of a restrictive order, and further moved that the preliminary hearing be closed to both the press and the public. No representatives of the media were notified of or called to testify at the hearing, and no evidence of any kind was introduced.

On October 22, when the autopsy results were completed, the County Attorney filed an amended complaint charging that the six premeditated murders had been committed by Simants in conjunction with the perpetration of or attempt to perpetrate a sexual assault. About the same time, at the commencement of the preliminary hearing, the County Court entered a restrictive order premised on its finding that there was "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial . . . ." Amended Pet. for Cert. 1a. Accordingly, the County Court ordered that all parties to the case, attorneys, court personnel, public officials, law enforcement officials, witnesses, and "any other person present in Court" during the preliminary hearing, were not to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." Id., at 2a. The court further ordered that no law enforcement official, public officer, attorney, witness or "news media" "disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." Ibid.[2] The **2811 order was to *576 remain in effect 'until modified or rescinded by a higher court or until the defendant is ordered released from these charges.' Id., at 3a. The court also denied the defense request to close the preliminary hearing,[3] and an open hearing was then held, at which time various witnesses testified, disclosing significant factual information concerning the events surrounding the alleged crimes. Upon completion of the hearing, the County Court bound the defendant over for trial in the District Court, since it found that the offenses charged in the indictment had been committed, and that there was probable cause to believe that Simants had committed them.

The next day, petitioners Nebraska newspaper publishers, broadcasters, journalists, and media associations, *577 and national newswire services that report from and to Nebraska sought leave from the District Court to intervene in the criminal case and vacation of the County Court's restrictive order as repugnant to the First and Sixth Amendments to the United States Constitution as well as relevant provisions of the Nebraska Constitution. Simants' attorney moved that the

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

order be continued and that future pretrial hearings in the case be closed. The District Court then held an evidentiary hearing, after which it denied the motion to close any hearings, granted petitioners' motion to intervene, and adopted on an interim basis the County Court's restrictive order. The only testimony adduced at the hearing with respect to the need for the restrictive order was that of the County Court Judge, who stated that he had premised his order on his awareness of media publicity, "(c)onversation around the courthouse," and "statements of counsel." App. 64, 65. In addition, several newspaper clippings pertaining to the case were introduced as exhibits before the District Court.

Without any further hearings, the District Court on October 27 terminated the County Court's order and substituted its own. The court found that "Because of the nature of the crimes charged in the complaint . . . there is a Clear and present danger that pre-trial publicity Could impinge upon the defendant's right to a fair trial and that an order setting forth the limitations of pre-trial publicity is appropriate . . . ." Amended Pet. for Cert. 9a. (emphasis supplied). Respondent Stuart, the District Court Judge, then "adopted" as his order the Nebraska Bar-Press Guidelines as "clarified" by him in certain respects.[4]

***578** ****2812** On October 31, petitioners sought a stay of the order from the District Court and immediate relief from the Nebraska Supreme Court by way of mandamus, stay, or expedited appeal. When neither the District Court nor the Nebraska Supreme Court acted on these motions, ***579** petitioners on November 5 applied to Mr. Justice Blackmun, as Circuit Justice, for a stay of the District Court's order. Five days later, the Nebraska Supreme Court issued a *per curiam* statement that to avoid being put in the position of "exercising parallel jurisdiction with the Supreme Court of the United States," it would continue the matter until this Court "made known whether or not it will accept jurisdiction in the matter." Id., at 19a-20a.

On November 13, Mr. Justice Blackmun filed an in-chambers opinion in which he declined to act on the stay "at least for the immediate present." 423 U.S. 1319, 1326, 96 S.Ct. 237, 240, 46 L.Ed.2d 199. He observed: "(I)f no action on the (petitioners') application to the Supreme Court of Nebraska could be anticipated before December 1, (as was indicated by a communication from that court's clerk before the court issued the Per curiam statement,) . . . a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-to-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the (petitioners) possess and may properly assert. Under those circumstances, I would not hesitate promptly to act." Id., at 1324-1325, 96 S.Ct., at 240. However, since the Nebraska Supreme Court had indicated in its Per curiam statement that it was only declining to act because of uncertainty as to what this Court would do, and since it was deemed appropriate for the state court to pass initially on the validity of the restrictive order, Mr. Justice Blackmun, "without prejudice to the (petitioners) to reapply to me should prompt action not be forthcoming," Id., at 1326, 96 S.Ct., at 240, denied the stay "(o)n the expectation . . . that the Supreme Court of Nebraska, forthwith and without delay will entertain the ***580** petitioners') application made to it, and will promptly decide it in the full consciousness that 'time is of the essence.' " Id., at 1325, 96 S.Ct., at 240.

When, on November 18, the Supreme Court of Nebraska set November 25 as the date to hear arguments on petitioners' motions, petitioners reapplied to Mr. Justice Blackmun for relief. On November 20, Mr. Justice Blackmun, concluding that each passing day constituted an irreparable infringement on First Amendment values and that the state courts had delayed adjudication of petitioners' claims beyond "tolerable limits," 423 U.S. 1327, 1329, 96 S.Ct. 251, 253, 46 L.Ed.2d 237 granted a partial stay of the District Court's order. First, the "wholesale incorporation" of the Nebraska Bar-Press Guidelines was stayed on the ground that they "constitute a 'voluntary code' which was not intended to be mandatory" ****2813** and which was "sufficiently riddled with vague and indefinite admonitions understandably so in view of the basic nature of 'guidelines,' " that they did "not provide the substance of a permissible court order in the First Amendment area." Id., at 1330, 1331, 96 S.Ct., at 254. However, the state courts could "reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order." Id., at 1331, 96 S.Ct., at 255. Second, the portion of the District Court order prohibiting reporting of the details of the crimes, the identities of the victims, and the pathologist's testimony at the preliminary hearing was stayed because there was "(n)o persuasive justification" for the restraint; such "facts in themselves do not implicate a particular putative defendant," Ibid, and "until the bare facts concerning the crimes are related to a particular accused, . . . their being reported in the media (does not appear to) irreparably infringe the accused's right ***581** to a fair trial of the issue as to whether he was the one who committed the crimes." *Id.*, a1332, 96 S.Ct., at 255. Third, believing that prior restraints

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

of this kind "are not necessarily and in all cases invalid," Mr. Justice Blackmun concluded that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm," Id., at 1332-1333, 96 S.Ct., at 255, and other such facts would include "those associated with the circumstances of his arrest," those "that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one," and "statements as to the accused's guilt by those associated with the prosecution." Id., at 1333, 96 S.Ct., at 255.[5] Finally, the restrictive order's limitation on disclosure of the nature of the limitations themselves was stayed "to the same extent" as the limitations. Ibid.[6]

The following day petitioners filed a motion that the Court vacate Mr. Justice Blackmun's order to the extent it permitted the imposition of any prior restraint on publication. Meanwhile, on November 25, the Supreme Court of Nebraska heard oral argument as scheduled, ***582** and on December 1 filed a *per curiam* opinion.[7] Initially, the court held that it was improper for petitioners or any other third party to intervene in a criminal case, and that the appeal from that case must therefore be denied. However, the court concluded that it had jurisdiction over petitioners' mandamus action against respondent Stuart, and that respondents Simants and State of Nebraska had properly intervened in that action.[8] Addressing ****2814** the merits of the prior restraint issued by the District Court, the Nebraska Supreme Court acknowledged that this Court "has not yet had occasion to speak definitively where a clash between these two preferred rights (the First Amendment freedom of speech and of the press and the Sixth Amendment right to trial by an impartial jury) was sought to be accommodated by a prior restraint on freedom of the press." 194 Neb., at 791, 236 N.W.2d, at 800. However, relying on dictum in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972),[9] and our statementin New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971), that a prior restraint on the ***583** media bears " 'a heavy presumption against its constitutional validity,' " *id.*, at 714, 91 S.Ct., at 2141, the court discerned an "implication" "that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints may be constitutional for otherwise there is no need for a mere presumption." 194 Neb., at 793, 236 N.W.2d, at 801. The court then concluded that there was evidence "to overcome the heavy presumption" in that the State's obligation to accord Simants an impartial jury trial "may be impaired" by pretrial publicity and that pretrial publicity "might make it difficult or impossible" to accord Simants a fair trial. Id., at 794, 797, 236 N.W.2d, at 802, 803.[10] Accordingly, the court held, Id., at 801, 236 N.W.2d, at 805:

"(T)he order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

"The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the ***584** following respects: It shall be effective only as to events which have occurred prior to the filing of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2)Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings."[11]

On December 4 petitioners applied to this Court for a stay of that order and moved that their previously filed papers be treated as a petition for a writ of certiorari. On ****2815** December 8, we granted the latter motion and deferred consideration of the petition for a writ and application for a stay pending responses from respondents on the close of business the following day. 423 U.S. 1011, 96 S.Ct. 442, 46 L.Ed.2d 382.[12] On December 12, we granted the petition for a writ of certiorari, denied the motion to expedite, and denied the application for a stay. 423 U.S. 1027, 96 S.Ct. 557, 46 L.Ed.2d 401.[13]

***585** II

A

The Sixth Amendment to the United States Constitution guarantees that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The right to a jury trial, applicable to the States through the Due Process Clause of the Fourteenth

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Amendment, see, E. g., Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), is essentially ***586** the right to a "fair trial by a panel of impartial, 'indifferent' jurors," Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), jurors who are " 'indifferent as (they) stand unsworn.' " Reynolds v. United States, 98 U.S. 145, 154, 25 L.Ed. 244 (1879), quoting E. Coke, A Commentary upon Littleton 155B (19th ed. 1832). See also, E. g., Ristaino v. Ross, 424 U.S. 589, 597 n. 9, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Irvin v. Dowd, supra, 366 U.S., at 722, 81 S.Ct., at 1642; In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). So basic to our jurisprudence is the right to a fair trial that it has been called "the most fundamental of all freedoms." Estes v. Texas, 381 U.S. 532, 540, 85 S.Ct. 1628, 1631, 1632, 14 L.Ed.2d 543 (1965). It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. See, E. g., Rideau v. Louisiana, supra, 373 U.S. at 726-727, 83 S.Ct., at 1419. See generally Duncan v. Louisiana, supra, 391 U.S. at 149-158, 88 S.Ct., at 1448-1452.

The First Amendment to the United States Constitution, however, secures rights equally fundamental in our jurisprudence, and its ringing proclamation that "Congress ****2816** shall make no law . . . abridging the freedom of speech, or of the press . . ." has been both applied through the Fourteenth Amendment to invalidate restraints on freedom of the press imposed by the States, see, E. g., Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Near v. Minnesota ex rel Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), and interpreted to interdict such restraints imposed by the courts, see, E. g., New York Times Co. v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Indeed, it has been correctly perceived that a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The ***587** press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. Sheppard v. Maxwell, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600 (1966). See also, E. g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-496, 95 S.Ct. 1029, 1044-1046, 43 L.Ed.2d 328 (1975). Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. See, E. g., In re Oliver, supra, 333 U.S., at 270-271, 68 S.Ct., at 506; L. Brandeis, Other People's Money 62 (1933) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman").

No one can seriously doubt, however, that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial, see, E. g., Sheppard v. Maxwell, supra, and the past decade has witnessed substantial debate, colloquially known as the Free Press/Fair Trial controversy, concerning this interface of First and Sixth Amendment rights. In effect, we are now told by respondents that the two rights can no longer coexist when the press possesses and seeks to publish "confessions or admissions against interest" and other information "strongly implicative"[14] of a criminal defendant as the ***588** perpetrator of a crime, and that one or the other right must therefore be subordinated. I disagree. Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the ****2817** information is obtained.[15] This does not imply, however, any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.

B

"(I)t has been generally, if not universally, considered that it is the chief purpose of the (First Amendment's) guaranty to prevent previous restraints upon publication." ***589** *Near v. Minnesota ex rel. Olson*, 283 U.S., at 713, 51 S.Ct., at 630. See also, *e. g., id.*, at 716-717, 51 S.Ct., at 631; *Patterson v. Colorado ex rel.ttorney General,* 205 U.S. 454, 462, 27

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

S.Ct. 556, 558, 51 L.Ed. 879 (1907); *Grosjean v. American Press Co.,* 297 U.S. 233, 249, 56 S.Ct. 444, 448, 80 L.Ed. 660 (1936).[16] Prior restraints are "the essence of censorship," *Near v. Minnesota ex rel. Olson, supra,* 283 U.S., at 713, 51 S.Ct., at 630, and "(o)ur distaste for censorship reflecting the natural distaste of a free people is deep-written in our law." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975). The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech, see, E. g., *Carroll v. Princess Anne,* 393 U.S. 175, 180-181, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968); *Near v. Minnesota ex rel. Olson, supra*; "a free society prefers to punish the few who abuse rights of speech After they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S., at 559, 95 S.Ct., at 1246. A commentator has cogently summarized many of the reasons for this deep-seated American hostility to prior restraints:

"A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures ***590** do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows." T. Emerson, The System of Freedom of Expression 506 (1970).[17]

Respondents correctly contend that "the (First Amendment) protection even as to prior restraint is not absolutely unlimited." Near v. Minnesota, supra, 283 U.S., at 716, 51 S.Ct., at 631. However, the exceptions to the rule have been confined to "exceptional cases." Ibid. The Court in Near, the first case in which we were faced with a prior restraint against the press, delimited three such possible exceptional circumstances. The first two exceptions were that "the primary requirements of decency may be ****2818** enforced against obscene publications," and that "(t)he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government (for) (t)he constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that have all the effect of force. . . .' " Ibid. These exceptions have since come to be interpreted as situations in which the "speech" involved is not encompassed within the meaning of the First Amendment. See, E. g., Roth v. United States, 354 U.S. 476, 481, 77 S.Ct. 1304, 1306, 1 L.Ed.2d 1498 (1957); Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). See also New York Times Co. v. United States, 403 U.S. 713, 726 n. *, 91 S.Ct. 2140, 2147, 29 L.Ed.2d 822 (1971) (Brennan, J., concurring); Id., at 731 n. 1, 91 S.Ct., at 2153 (White, J., concurring). ***591** And even in these situations, adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment. See, E. g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); United States v. Thirty-seven Photographs, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). Thus, only the third category in Near contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest:

" 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." 283 U.S., at 716, 51 S.Ct., at 631.

Even this third category, however, has only been adverted to in dictum and has never served as the basis for actually upholding a prior restraint against the publication of constitutionally protected materials. In New York Times Co. v. United States, supra, we specifically addressed the scope of the "military security" exception alluded to in Near and held that there could be no prior restraint on publication of the "Pentagon Papers" despite the fact that a majority of the Court believed that release of the documents, which were ***592** classified "Top Secret-Sensitive" and which were

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

obtained surreptitiously, would be harmful to the Nation and might even be prosecuted after publication as a violation of various espionage statutes. To be sure, our brief *per curiam* declared that " '(a)ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,' " Id., at 714, 91 S.Ct., at 2141, quoting Bantam Books, Inc. v. Sullivan, supra, 372 U.S., at 70, 83 S.Ct., at 639, and that the "Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' " 403 U.S., at 714, 91 S.Ct., at 2141, quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971). This does not mean, as the Nebraska Supreme Court assumed,[18] that prior restraints can be justified on an Ad hoc balancing approach that concludes that the "presumption" must be overcome in light of some perceived "justification." Rather, this language refers to the fact that, as a matter of procedural safeguards and burden of proof, prior restraints even **2819 within a recognized exception to the rule against prior restraints will be extremely difficult to justify; but as an initial matter, the purpose for which a prior restraint is sought to be imposed "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints." Southeastern Promotions, Ltd. v. Conrad, 420 U.S., at 559, 95 S.Ct., at 1247; see also, E. g., id., at 555, 95 S.Ct., at 1243; Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376, 382, 93 S.Ct. 2553, 2557, 37 L.Ed.2d 669 (1973); Organization for a Better Austin v. Keefe, supra, 402 U.S., at 419-420, 91 S.Ct., at 1577-1578; cf. E. g., Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); Freedman v. Maryland, 380 U.S., at 58-59, 85 S.Ct., at 738-739. Indeed, two Justices in New York Times apparently controverted the existence of even a limited "military security" exception to the rule against prior restraints on the publication of otherwise protected material, see 403 *593 U.S., at 714, 91 S.Ct., at 2141 (Black, J., concurring); *id.*, at 720, 91 S.Ct., at 2144 (Douglas, J., concurring). And a majority of the other Justices who expressed their views on the merits made it clear that they would take cognizance only of a "single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." Id., at 726, 91 S.Ct., at 2147 (Brennan, J., concurring). Although variously expressed, it was evident that even the exception was to be construed very, very narrowly: when disclosure "will Surely result in direct, immediate, and irreparable damage to our Nation or its people," Id., at 730, 91 S.Ct., at 2149 (Stewart, J., joined by White, J., concurring) (emphasis supplied) or when there is "governmental allegation and proof that publication must Inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . . (But) (i)n no event may mere conclusions be sufficient." Id., at 726-727, 91 S.Ct., at 2148 (Brennan, J., concurring) (emphasis supplied). See also Id., at 730-731, 91 S.Ct., at 2149-2150 (White, J., joined by Stewart, J., concurring) ("concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system" is not overcome even by a showing that "revelation of these documents will do substantial damage to public interests").[19] It is thus clear that even within the sole possible exception to the prohibition against prior restraints on publication of constitutionally protected materials, *594 the obstacles to issuance of such an injunction are formidable. What respondents urge upon us, however, is the creation of a new, potentially pervasive exception this settled rule of virtually blanket prohibition of prior restraints.[20]

**2820 I would decline this invitation. In addition to the almost insuperable presumption against the constitutionality of prior restraints even under a recognized exception, and however laudable the State's motivation for imposing restraints in this case,[21] there are compelling *595 reasons for not carving out a new exception to the rule against prior censorship of publication.

1

Much of the information that the Nebraska courts *596 enjoined petitioners from publishing was already in t public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication. "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S., at 374, 67 S.Ct., at 1254. Similarly, Estes v. Texas, 381 U.S., at 541-542, 85 S.Ct., at 1632, a case involving the Sixth Amendment right to a fair trial, observed: "(R)eporters of all media . . . are plainly free to report whatever occurs in open court through their respective media. This was settled in **2821 Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946), which we reaffirm." See also Id., at 583-585, 85 S.Ct., at 1653-1654 (Warren, C. J.,

concurring). And Sheppard v. Maxwell, 384 U.S., at 362-363, 86 S.Ct., at 1582, a case that detailed numerous devices that could be employed for ensuring fair trials, explicitly reiterated that "(o)f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." See also Id., at 350, 86 S.Ct., at 1515; Stroble v. California, 343 U.S. 181, 193, 72 S.Ct. 599, 605, 96 L.Ed. 872 (1952). The continuing vitality of these statements was reaffirmed only last Term in Cox Broadcasting Corp. v. Cohn, a case involving a suit for damages brought after publication under state law recognizing the privacy interest of its citizens. In holding that ***597** a "State may (not) impose sanctions on the accurate publication of the name of a rape victim obtained from public records," 420 U.S., at 491, 95 S.Ct., at 1044, we observed:
"(I)n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard v. Maxwell, 384 U.S. 333, 350, 86 S.Ct. 1507, 1515, 16 L.Ed.2d 600 (1966).

"Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.

"The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized." Id., at 491-492, 95 S.Ct., at 1044-1045 (emphasis supplied).

***598** "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection. " Id., at 495, 95 S.Ct., at 1046 (emphasis supplied).

See also Id., at 496, 95 S.Ct., at 1046. Prior restraints are particularly anathematic to the First Amendment, and any immunity from punishment subsequent to publication of given material applies A fortiori to immunity from suppression of that material before publication. Thus, in light of Craig, which involved a contempt citation for a threat to the administration of justice, and Cox Broadcasting, which similarly involved an attempt to establish civil liability after ****2822** publication, it should be clear that no injunction against the reporting of such information can be permissible.

2

The order of the Nebraska Supreme Court also applied, of course, to "confessions" and other information "strongly implicative" of the accused which were obtained from sources other than official records or open ***599** court proceedings. But for the reasons that follow reasons equally applicable to information obtained by the press from official records or public court proceedings I believe that the same rule against prior restraints governs *any* information pertaining to the criminal justice system, even if derived from nonpublic sources and regardless of the means employed by the press in its acquisition.

The only exception that has thus far been recognized even in dictum to the blanket prohibition against prior restraints against publication of material which would otherwise be constitutionally shielded was the "military security" situation addressed in New York Times Co. v. United States. But unlike the virtually certain, direct, and immediate harm required for such a restraint under Near and New York Times, the harm to a fair trial that might otherwise eventuate from publications which are suppressed pursuant to orders such as that under review must inherently remain speculative.

A judge importuned to issue a prior restraint in the pretrial context will be unable to predict the manner in which the

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information,[22] ***600** or the impact, evaluated in terms of current standards for assessing juror impartiality,[23] the information would have on that audience. These considerations would render speculative the prospective impact on a fair trial of reporting even an alleged confession or other information "strongly implicative" of the accused. Moreover, we can take judicial notice of the fact that given the prevalence of plea bargaining, few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled.[24] Indeed, even in cases that do proceed to trial, the material sought to be suppressed before trial will often be admissible and may be admitted in ****2823** any event.[25] ***601** And, more basically, there are adequate devices for screening from jury duty those individuals who have in fact been exposed to prejudicial pretrial publicity.

Initially, it is important to note that once the jury is impaneled, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings.[26] Similarly, judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press.[27] But even if the press nevertheless obtains potentially prejudicial information and decides to publish that information, ***602** the Sixth Amendment rights of the accused may still be adequately protected. In particular, the trial judge should employ the Voir dire to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. See, E. g., Ham v. South Carolina, 409 U.S. 524, 531-534, 93 S.Ct. 848, 852-854, 35 L.Ed.2d 46 (1973) (opinion of Marshall, J.); Swain v. Alabama, 380 U.S. 202, 209-222, 85 S.Ct. 824, 829-836, 13 L.Ed.2d 759 (1965). Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on Voir dire prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information. Moreover, Voir dire(may indicate the need to grant a brief continuance[28] ****2824** or to grant a change of venue,[29] techniques that can effectively ***603** mitigate any publicity at a particular time or in a particular locale. Finally, if the trial court fails or refuses to utilize these devices effectively, there are the "palliatives" of reversals on appeal and directions for a new trial. Sheppard v. Maxwell, 384 U.S., at 363, 86 S.Ct., at 1522.[30] We have indicated that even in a case involving outrageous publicity and a "carnival atmosphere" in the courtroom, "these procedures would have been sufficient to guarantee (the defendant) a fair trial . . . ." Id., at 358, 86 S.Ct., at 1520. See generally Id., at 358-363, 86 S.Ct., at 1519-1522; cf. Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1308, 95 S.Ct. 1, 5, 42 L.Ed.2d 17, and n. 3 (1974) (Powell, J., in chambers). For this reason, the one thing Sheppard did not approve was "any direct limitations on the freedom traditionally exercised by the news media." 384 U.S., at 350, 86 S.Ct., at 1515.[31] Indeed, the ***604** traditional techniques approved in Sheppard for ensuring fair trials would have been adequate in every case in which we have found that a new trial was required due to lack of fundamental fairness to the accused.

For these reasons alone I would reject the contention that speculative deprivation of an accused's Sixth Amendment right to an impartial jury is comparable to the damage to the Nation or its people that Near and New York Times would have found sufficient to justify a prior restraint on reporting. Damage to that Sixth Amendment right could never be considered so direct, immediate and irreparable, and based on such proof rather than speculation, that prior restraints on the press could be justified on this basis.

C

There are additional, practical reasons for not starting down the path urged by respondents.[32] The exception ***605** to the prohibition ****2825** of prior restraints adumbrated in Near and New York Times involves no judicial weighing of the countervailing public interest in receiving the suppressed information; the direct, immediate, and irreparable harm that would result from disclosure is simply deemed to outweigh the public's interest in knowing, for example, the specific

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

details of troop movements during wartime. As the Supreme Court of Nebraska itself admitted,[33] however, any attempt to impose a prior restraint on the reporting of information concerning the operation of the criminal justice system will inevitably involve the courts in an Ad hoc evaluation of the need for the public to receive particular information that might nevertheless implicate the accused as the perpetrator of a crime. For example, disclosure of the ***606** circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice; commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern, and even a brief delay in reporting that information shortly before an election may have a decisive impact on the outcome of the democratic process, see Carroll v. Princess Anne, 393 U.S., at 182, 89 S.Ct., at 352; dissemination of the fact that indicted individuals who had been accused of similar misdeeds in the past had not been prosecuted or had received only mild sentences may generate crucial debate on the functioning of the criminal justice system; revelation of the fact that despite apparently overwhelming evidence of guilt, prosecutions were dropped or never commenced against large campaign contributors or members of special interest groups may indicate possible corruption among government officials; and disclosure of the fact that a suspect has been apprehended as the perpetrator of a heinous crime may be necessary to calm community fears that the actual perpetrator is still at large. Cf. ***607** Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S., at 1302, 95 S.Ct., at 2 (Powell, J., in chambers).[34] all of these ****2826** situations, judges would be forced to evaluate whether the public interest in receiving the information outweighed the speculative impact on Sixth Amendment rights.

These are obviously only some examples of the problems that plainly would recur, not in the almost theoretical situation of suppressing disclosure of the location of troops during wartime, but on a regular basis throughout the courts of the land. Recognition of any judicial authority to impose prior restraints on the basis of harm to the Sixth Amendment rights of particular defendants, especially since that harm must remain speculative, will thus inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment. Indeed, the potential for arbitrary and excessive judicial utilization of any such power would be exacerbated by the fact that judges and committing magistrates might in some cases be determining the propriety of publishing information that reflects on their competence, integrity, or general performance on the bench.

There would be, in addition, almost intractable procedural difficulties associated with any attempt to impose prior restraints on publication of information relating to pending criminal proceedings, and the ramifications of these procedural difficulties would accentuate the burden on First Amendment rights. The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pretrial publicity against ***608** his clients and pre-empt ineffective-assistance-of-counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal. We need not raise any specter of floodgates of litigation or drain on judicial resources to note that the litigation with respect to these motions will substantially burden the media. For to bind the media, they would have to be notified and accorded an opportunity to be heard. See, E. g., Carroll v. Princess Anne, supra; McKinney v. Alabama, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976). This would at least entail the possibility of restraint proceedings collateral to every criminal case before the courts, and there would be a significant financial drain on the media involuntarily made parties to these proceedings. Indeed, small news organs on the margin of economic viability might choose not to contest even blatantly unconstitutional restraints or to avoid all crime coverage, with concomitant harm to the public's right to be informed of such proceedings.[35] Such acquiescence might also mean that significant erroneous precedents will remain unchallenged to be relied on for even broader restraints in the future. Moreover, these collateral restraint proceedings would

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

be unlikely to result in equal treatment of all ***609** organs of the media[36] and, even if all the press could be brought into the proceeding, would often be ineffective, since disclosure ****2827** of incriminating material may transpire before an effective restraint could be imposed.[37]

To be sure, because the decision to impose such restraints even on the disclosure of supposedly narrow categories of information would depend on the facts of each case, and because precious First Amendment rights are at stake, those who could afford the substantial costs would seek appellate review. But that review is often inadequate, since delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the press seeks to disseminate.[38] As one commentator has observed:
"Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss a loss in the immediacy, the impact, of speech. . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." A. Bickel, The Morality of Consent 61 (1975).[39]

***610** And, as noted, given the significant financial disincentives, particularly on the smaller organs of the media,[40] to challenge any ****2828** restrictive orders once they are imposed ***611** by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected.[41]

III

I unreservedly agree with Mr. Justice Black that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Bridges v. California, 314 U.S., at 260, 62 S.Ct., at 192. But I would reject the notion that a ***612** choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. To hold that courts cannot impose any prior restraints on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system is not, I must emphasize, to countenance the sacrifice of precious Sixth Amendment rights on the altar of the First Amendment. For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension. To be sure, these alternatives may require greater sensitivity and effort on the part of judges conducting criminal trials than would the stifling of publicity through the simple expedient of issuing a restrictive order on the press; but that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights.

There is, beyond peradventure, a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system, an institution of such pervasive influence in our constitutional scheme. And the necessary impact of reporting even confessions can never be so direct, immediate, and irreparable that I would give credence to any notion that prior restraints may be imposed on that rationale. It may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the judicial task of safeguarding ***613** precious rights of criminal defendants more difficult. Voluntary codes such as the Nebraska Bar-Press Guidelines are a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities, and I would encourage continuation of such voluntary cooperative efforts between the bar and the media. However, the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges. See, *e. g., Near v. Minnesota ex rel. Olson,* 283 U.S., at 720, 51 S.Ct., at 632; *Cox Broadcasting Corp. v. Cohn,* 420 U.S., at 496, 95 S.Ct., at 1047; *Miami Herald Plishing Co. v. Tornillo,* 418 U.S., at 258, 94 S.Ct., at 2839; Id., at 259, 94 S.Ct., at 2840 (White, J., concurring); Cf. *New York Times Co. v. Sullivan,* 376 U.S., at 269-283, 84 S.Ct., at 720-727. Every restrictive order imposed on the ****2829** press in this case was accordingly an unconstitutional prior restraint on the freedom of the press, and I would therefore reverse the judgment of the Nebraska Supreme Court and remand for further proceedings not inconsistent with this opinion.

APPENDIX TO OPINION OF BRENNAN, J., CONCURRING IN JUDGMENT

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They ***614** are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

Information Generally Appropriate for Disclosure, Reporting

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.

2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.

3. The amount or conditions of bail.

4. The identity of and biographical information concerning the complaining party and victim, and, if a death is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.

5. The identity of the investigating and arresting agencies and the length of the investigation.

6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view ***615** of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.

****2830** 6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

Prior Criminal Records

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, ***616** police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particular after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

are potential jurors and an accused is presumed innocent until proven guilty.

Photographs

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.

2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

Continuing Committee for Cooperation

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom ***617** of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with respect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970

Mr. Justice STEVENS, concurring in the judgment.

For the reasons eloquently stated by Mr. Justice BRENNAN, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. See Ashwander v. TVA, 297 U.S. 288, 346-347, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (Brandeis, J., concurring). I do, however, subscribe to most of what Mr. Justice BRENNAN says and, if ever required to face the issues squarely, may well accept his ultimate conclusion.

**All Citations**

427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, 1 Media L. Rep. 1064

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499, 505.

1 These Guidelines are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. They outline the matters of fact that may appropriately be reported, and also list what items are not generally appropriate for reporting, including confessions, opinions on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and evidence presented in the jury's absence. The publication of an accused's criminal record should, under the Guidelines, be “considered very carefully.” The Guidelines also set out standards for taking and publishing photographs, and set up a joint bar-press committee to foster cooperation in resolving particular problems that emerge.

2 In the interim, petitioners applied to Mr. Justice Blackmun as Circuit Justice for a stay of the State District Court's order. He postponed ruling on the application out of deference to the Nebraska Supreme Court, 423 U.S. 1319, 96 S.Ct. 237, 46 L.Ed.2d 199 (1975) (in chambers); when he concluded that the delay before that court had “exceed(ed) tolerable limits,” he entered an order. 423 U.S. 1327, 1329, 96 S.Ct. 251, 253, 46 L.Ed.2d 237 (1975) (in chambers). We need not set out in detail Mr. Justice Blackmun's careful decision on this difficult issue. In essence he stayed the order insofar as it incorporated the admonitory Bar-Press Guidelines and prohibited reporting of some other matters. But he declined “at

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

least on an application for a stay and at this distance, (to) impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial." Id., at 1332, 96 S.Ct., at 255. He therefore let stand that portion of the District Court's order that prohibited reporting the existence or nature of a confession, and declined to prohibit that court from restraining publication of facts that were so "highly prejudicial" to the accused or "strongly implicative" of him that they would "irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." Id., at 1333, 96 S.Ct., at 256. Subsequently, petitioners applied for a more extensive stay; this was denied by the full Court. 423 U.S. 1027, 96 S.Ct. 557, 46 L.Ed.2d 401 (1975).

3 The Warren Commission conducting an inquiry into the murder of President Kennedy implied grave doubts whether, after the dissemination of "a great deal of misinformation" prejudicial to Oswald, a fair trial could be had. Report of the President's Commission on the Assassination of President John F. Kennedy 231 (1964). Probably the same could be said in turn with respect to a trial of Oswald's murderer even though a multitude were eyewitnesses to the guilty act. See generally Id., at 231-242; Jaffe, Trial by Newspaper, 40 N.Y.U.L.Rev. 504 (1965); Powell, The Right to a Fair Trial, 51 A.B.A.J. 534 (1965).

4 The record also reveals that counsel for both sides acted responsibly in this case, and there is no suggestion that either sought to use pretrial news coverage for partisan advantage. A few days after the crime, newspaper accounts indicated that the prosecutor had announced the existence of a confession; we learned at oral argument that these accounts were false, although in fact a confession had been made. Tr. of Oral Arg. 36-37, 59.

5 In Near v. Minnesota, Chief Justice Hughes was also able to say: "There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." 283 U.S., at 715, 51 S.Ct., at 631. A subsequent line of cases limited sharply the circumstances under which courts may exact such punishment. See Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Because these cases deal with punishment based on contempt, however, they deal with problems substantially different from those raised by prior restraint. See also Barist, The First Amendment and Regulation of Prejudicial Publicity An Analysis, 36 Ford.L.Rev. 425, 433-442 (1968).

6 See A. Bickel, The Morality of Consent 61 (1975).

7 The respondent and intervenors argue here that a change of venue would not have helped, since Nebraska law permits a change only to adjacent counties, which had been as exposed to pretrial publicity in this case as Lincoln County. We have held that state laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial. Groppi v. Wisconsin, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971). We note also that the combined population of Lincoln County and the adjacent counties is over 80,000 providing a substantial pool of prospective jurors.

8 Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. Tr. of Oral Arg. 7-8. See E. g., Chicago Council of Lawyers v. Bauer, 7 Cir., 522 F.2d 242 (CA7 1975), cert. denied, Sub nom. Cunningham v. Chicago Council of Lawyers, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204. We are not now confronted with such issues. We note that in making its proposals, the American Bar Association recommended strongly against resort to direct restraints on the press to prohibit publication. American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 68-73 (App. Draft 1968). Other groups have reached similar conclusions. See Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 401-403 (1968); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial 10-11 (1967).

9 Here, for example, the Nebraska Supreme Court decided that the District Court had no jurisdiction of the petitioners except by virtue of their voluntary submission to the jurisdiction of that court when they moved to intervene. Except for the intervention which placed them within reach of the court, the Nebraska Supreme Court conceded, the petitioners "could have ignored the (restraining) order . . . ." State v. Simants, 194 Neb. 783, 795, 236 N.W.2d 794, 802 (1975).

10 Assuming, Arguendo, That these problems are within reach of legislative enactment, or that some application of evolving concepts of long-arm jurisdiction would solve the problems of personal jurisdiction, even a cursory examination suggests how awkwardly broad prior restraints on publication, directed not at named parties but at large, would fit into our jurisprudence. The British experience is in sharp contrast for a variety of reasons; Great Britain has a smaller and unitary court system permitting the development of a manageable system of prior restraints by the application of the constructive contempt doctrine. Cf. n. 5, Supra, At 17; see generally Maryland v. Baltimore Radio Show, 338 U.S. 912, 921-936, 70 S.Ct. 252, 256-265, 94 L.Ed. 562 (1950) (App. to opinion of Frankfurter, J., respecting denial of certiorari); Gillmor, Free

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Press and Fair Trial in English Law, 22 Wash. & Lee L.Rev. 17 (1965). Moreover, any comparison between the two systems must take into account that although England gives a very high place to freedom of the press and speech, its courts are not subject to the explicit strictures of a written constitution.

* In Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1307, 95 S.Ct. 1, 4, 42 L.Ed.2d 17 (1974), an in-chambers opinion, I noted that there is a heavy presumption against the constitutional validity of a court order restraining pretrial publicity.

1 In referring to the "press" and to "publication" in this opinion, I of course use those words as terms of art that encompass broadcasting by the electronic media as well.

2 A copy of the "Nebraska Bar-Press Guidelines," ostensibly a voluntary code formulated by representatives of the media and the bar, was attached to the order. The Guidelines, which are similar to voluntary codes adhered to by the press in several States, are attached as an appendix to this opinion.

Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance, and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

3 The court apparently believed that a public preliminary hearing was required by state law. The Nebraska Supreme Court subsequently held that the pertinent state statute did not require that pretrial hearings be open to the public. Both petitioners and the State of Nebraska agree that the question whether preliminary hearings may be closed to the public consistently with the "Public Trial" Clause of the Sixth Amendment is not before us, and it is therefore one on which I would express no views.

4 The Nebraska Bar-Press Guidelines, see appendix to this opinion, were "clarified" as follows, Amended Pet. for Cert. 10a-11a:

"1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is 'pre-trial' publicity.

"2. It would appear that defendant has made a statement or confession to law enforcement officials that it is inappropriate to report the existence of such statement or the contents of it.

"3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

"4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

"5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

"6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

An additional portion of the order relating to the press' accommodations in the courtroom and the taking of photographs in the courthouse was not contested below and is not before this Court. The full order, including its references to confessions, was read in open court.

5 Mr. Justice Blackmun's view of the burden of proof for imposing such restraints was as follows: "The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." 423 U.S., at 1333, 96 S.Ct., at 256.

6 The in-chambers opinion also stayed any prohibition concerning reporting of the pending application for relief in the Supreme Court of Nebraska, but permitted a prohibition of reporting of the two in-chambers opinions to the extent they contained "facts properly suppressed." Id., at 1334, 96 S.Ct., at 256. Nothing in the opinion was to be "deemed as barring

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

what the District Judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media." Ibid.

7 Two justices of the Supreme Court of Nebraska dissented on jurisdictional grounds similar to those that formed the predicate for that court's earlier Per curiam statement, and two other justices who agreed with those jurisdictional claims nevertheless joined the Per curiam to avoid a procedural deadlock.

8 These rulings resulted in the paradoxical situation that "(petitioners) could have ignored the (County Court's) order" because that court had not obtained personal jurisdiction over them and because "courts have no general power in any kind of case to enjoin or restrain 'everybody,' " State v. Simants, 194 Neb. 783, 795, 236 N.W.2d 794, 802 (1975). However, because they had improperly intervened in the criminal case (from which they could not appeal), a prior restraint could issue against them. Indeed, the court noted that the prior restraint "applies only to (petitioners)" and not to any other organs of the media. Id., at 788, 236 N.W.2d, at 798.

9 See n. 21, Infra.

10 The evidence relied on by the Nebraska Supreme Court included the following: The fact that before entry of the restrictive order, certain newspapers had reported information "which, if true, tended clearly to connect the accused with the slayings," 194 Neb., at 796, 236 N.W.2d, at 802; the fact that "counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County," Id., at 797, 236 N.W.2d, at 803; the fact that Nebraska law required the trial to transpire within six months of the date the information was filed, Ibid.; the relatively small population of the counties to which Nebraska law would permit a change of venue, Id., at 797-798, 236 N.W.2d, at 803; the "mere heinousness or enormity of a crime"; and "the trial court's own knowledge of the surrounding circumstances," Id., at 798, 236 N.W.2d, at 803.

11 The Nebraska Supreme Court also "adopted" American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press s 3.1, Pretrial Hearings (App. Draft 1968), which provides for exclusion of the press and public from pretrial hearings under certain circumstances, and remanded the case to the District Court to consider any applications to close future pretrial proceedings under that standard. The constitutionality of closing pretrial proceedings under specific conditions is not before us, and is a question on which I would intimate no views.

12 Justices Stewart and Marshall and I noted that we would have granted the application for a stay.

13 Justices Stewart and Marshall and I dissented from denial of the motions to expedite and to grant a stay; Mr. Justice White dissented from the latter motion to the extent the state courts had prohibited the reporting of information publicly disclosed during the preliminary hearing in the underlying criminal proceeding.

Although the order of the Nebraska Supreme Court expired when the jury in State v. Simants was impaneled and sequestered on January 7, 1976, this case is not moot. This is a paradigmatic situation of "short term orders, capable of repetition, yet evading review." E. g., Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). It is evident that the decision of the Nebraska Supreme Court will subject petitioners to future restrictive orders with respect to pretrial publicity, and that the validity of these orders, which typically expire when the jury is sequestered, generally cannot be fully litigated within that period of time. See, E. g., Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975). See also Carroll v. Princess Anne, 393 U.S. 175, 178-179, 89 S.Ct. 347, 350, 21 L.Ed.2d 325 (1968).

Counsel informs us that Simants had subsequently been tried, convicted, and sentenced to death, and that his appeal is currently pending in the Nebraska Supreme Court. Simants' defense rested on a plea of not guilty by reason of insanity, and all of the information which remained unreported during the pretrial period was ultimately received in evidence. The trial judge also declined to close further pretrial hearings, granted Simants' requests to sequester the jury and conduct Voir dire with no more than four prospective jurors present at one time, and denied Simants' request for a change of venue. A Jackson v. Denno (378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)) hearing and the first day of Voir dire were also closed to the public. Petitioners have challenged the latter rulings, and that litigation is still pending in the state courts.

14 The precise scope of these terms is not, of course, self-evident. Almost any statement may be an "admission against interest" if, for example, it can be shown to be false and thus destructive of the accused's credibility. This would even be true with respect to exculpatory statements made by an accused, such as those relating to alleged alibi defenses. Similarly, there is considerable vagueness in the phrase "strongly implicative" of the accused's guilt. The Nebraska Supreme Court did not elaborate on its meaning, and counsel for the State suggests it only covers the existence of the accused's prior criminal record, if any. Tr. of Oral Arg. 54. Others might view the phrase considerably more expansively. See Supra, at 2813; cf. 194 Neb., at 789-790, 236 N.W.2d, at 799. Indeed, even the fact the accused was indicted might be viewed as "strongly implicative" of his guilt by reporters not schooled in the law, and the threat of contempt

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

for transgression of such directives would thus tend to self-censorship even as to materials not intended to be covered by the restrictive order.

15 Of course, even if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.

16 The only criticism of this statement is that it does not embrace all of the protection accorded freedom of speech and of the press by the First Amendment. See, E. g., Near v. Minnesota ex rel. Olson, 283 U.S., at 714-715, 51 S.Ct., at 630.

17 Thus the First Amendment constitutes a direct repudiation of the British system of licensing. See, E. g., Near v. Minnesota ex rel. Olson, supra, at 713-714, 51 S.Ct., at 630; Grosjean v. American Press Co., 297 U.S. 233, 245-250, 56 S.Ct. 444, 447-449, 80 L.Ed. 660 (1936); Bridges v. California, 314 U.S. 252, 263-264, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941); Wood v. Georgia, 370 U.S. 375, 384, and n. 5, 82 S.Ct. 1364, 1369, 8 L.Ed.2d 569 (1962).

18 See n. 33, Infra ; Supra, at 2813-2814.

19 The rarity of prior restraint cases of any type in this Court's jurisprudence has also been noted. See, E. g., New York Times Co. v. United States, 403 U.S., at 733, 91 S.Ct., at 2151; Near v. Minnesota ex rel. Olson, 283 U.S., at 718, 51 S.Ct., at 632 (“The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right”).

20 The Nebraska Supreme Court denigrated what it termed the “extremist and absolutist” position of petitioners for assuming that “each and every exercise of freedom of the press is equally important” and that “there can be no degree of values for the particular right in which the absolutist has a special interest.” 194 Neb., at 799, 800, 236 N.W.2d, at 804. This seriously mischaracterizes petitioners' contentions, for petitioners do not assert that First Amendment freedoms are paramount in all circumstances. For example, this case does not involve the question of when, if ever, the press may be held in contempt subsequent to publication of certain material, see Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); Craig v. Harney, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546 (1947); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Nor does it involve the question of damages actions for malicious publication of erroneous material concerning those involved in the criminal justice system, see New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). And no contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication. However, to the extent petitioners take a forceful stand against the imposition of any prior restraints on publication, their position is anything but “extremist,” for the history of the press under our Constitution has been one in which freedom from prior restraint Is all but absolute.

21 One can understand the reasons why the four prior restraint orders issued in this case. The crucial importance of preserving Sixth Amendment rights was obviously of uppermost concern, and the question had not been definitively resolved in this Court. Our language concerning the “presumption” against prior restraints could have been misinterpreted to condone an Ad hoc balancing approach rather than merely to state the test for assessing the adequacy of procedural safeguards and for determining whether the high burden of proof had been met in a case falling within one of the categories that constitute the exceptions to the rule against prior restraints. Indeed, in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), there was even an intimation that such restraints might be permissible, since the Court stated that “(n)ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and They may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.” Id., at 684-685, 92 S.Ct., at 2658 (emphasis supplied). However, the Court in Branzburg had taken pains to emphasize that the case, which presented the question whether the First Amendment accorded a reporter a testimonial privilege for an agreement not to reveal facts relevant to a grand jury's investigation of a crime or the criminal conduct of his source, did not involve any “prior restraint or restriction on what the press may publish.” Id., at 681, 92 S.Ct., at 2657. It was evident from the full passage in which the sentence appeared, which focused on the fact that there is no “constitutional right of special access (by the press) to information not available to the public generally,” Id., at 684, 92 S.Ct., at 2658, that the passage is best regarded as indicating that to the extent newsmen are properly excluded from judicial proceedings, they would probably be unable to report about those proceedings. See generally Id., at 683-685, 92 S.Ct., at 2657-2658. See also Id., at 691, 92 S.Ct., at 2661 (decision “involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire”); Pell v. Procunier, 417 U.S. 817, 833-834, 94 S.Ct. 2800, 2809-2810, 41 L.Ed.2d 495 (1974). It is clear that the passage was not intended to decide the important question presented by this case. In any event, in light of my views

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

respecting prior restraints, it should be unmistakable that the First Amendment stands as an absolute bar even to the imposition of interim restraints on reports or commentary relating to the criminal justice system, and that to the extent anything in Branzburg could be read as implying a different result, I think that it should be disapproved. Cf. New York Times Co. v. United States, supra, 403 U.S., at 724-725, 91 S.Ct., at 2146-2147 (Brennan, J., concurring).

22 It is suggested that prior restraints are really only necessary in "small towns," since media saturation would be more likely and incriminating materials that are published would therefore probably come to the attention of all inhabitants. Of course, the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication. For example, even with the restrictive order in the Simants case, all residents of Sutherland had to be excluded from the jury. Indeed, the media in such situations could help dispel erroneous conceptions circulating among the populace. And the smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed. There is, in short, no justification for conditioning the scope of First Amendment protection the media will receive on the size of the community they serve.

23 Some exposure to the facts of a case need not, under prevailing law concerning the contours of the Six Amendment right to an impartial jury, disqualify a prospective juror or render him incapable of according the accused a fair hearing based solely on the competent evidence adduced in open court. "(E)xposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged (does not) alone presumptively deprive the defendant of due process." Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). See also, E. g., id., at 800, 95 S.Ct., at 2036, and n. 4; Beck v. Washington, 369 U.S. 541, 555-558, 82 S.Ct. 955, 963-964, 8 L.Ed.2d 98 (1962); Irvin v. Dowd, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); Reynolds v. United States, 98 U.S. 145, 155-156, 25 L.Ed. 244 (1879).

24 Of course, judges accepting guilty pleas must guard against the danger that pretrial publicity has effectively coerced the defendant into pleading guilty.

25 Cf. Stroble v. California, 343 U.S. 181, 195, 72 S.Ct. 599, 606, 96 L.Ed. 872 (1952). For example, all of the material that was suppressed in this case was eventually admitted at Simants' trial. Indeed, even if Simants' statements to police officials had been deemed involuntary and thus suppressed, no one has suggested that confessions or statements against interest made by an accused to private individuals, for example, would be inadmissible.

26 Failure of the trial judge to take such measures was a significant factor in our reversals of the convictions in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

27 A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel, law enforcement officials, and the attorneys involved in the case. In Sheppard v. Maxwell, supra, we observed that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters." 384 U.S., at 361, 86 S.Ct., at 1521. See also Id., at 360, 86 S.Ct., at 1521 ("(T)he judge should have further sought to alleviate this problem (of publicity that misrepresented the trial testimony) by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers"); Id., at 359, 363, 86 S.Ct., at 1521, 1522. As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. Cf. New York Times Co. v. United States, 403 U.S., at 728-730, 91 S.Ct., at 2148-2149 (Stewart, J., joined by White J., concurring). Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel.

28 Excessive delay, of course, would be impermissible in light of the Sixth Amendment right to a speedy trial. See, E. g., Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. See Groppi v. Wisconsin, 400 U.S. 505, 510, 91 S.Ct. 490, 493, 27 L.Ed.2d 571 (1971); cf. 18 U.S.C. s 3161(h)(8) (1970 ed., Supp. IV).

29 In Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), we held that it was a denial of due process to deny a request for a change of venue that was necessary to preserve the accused's Sixth Amendment rights. And state statutes may not restrict changes of venue if to do so would deny an accused a fair trial. Groppi v. Wisconsin, supra.

30 To be sure, as the Supreme Court of Nebraska contended, society would be paying a heavy price if an individual who is in fact guilty must be released. But in no decision of this Court has it been necessary to release an accused on the

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

ground that an impartial jury could not be assembled; we remanded for further proceedings, assuming that a retrial before an impartial forum was still possible.

As to the contention that pretrial publicity may result in conviction of an innocent person, surely the trial judge has adequate means to control the Voir dire, the conduct of trial, and the actions of the jury, so as to preclude that untoward possibility. Indeed, where the evidence presented at trial is insufficient, the trial judge has the responsibility not even to submit the case to the jury.

31 Although various committees that have recently analyzed the "Free Press/Fair Trial" issue have differed over the devices that they believed could properly be employed to ensure fair trials, they have unanimously failed to embrace prior restraints on publication as within the acceptable methods. See, E. g., Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 401-402 (1968) (Judicial Conference Committee headed by Judge Kaufman); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations 10-11 (1967); American Bar Association, Project on Standards for Criminal Justice, Fair Trial and Free Press 68-73 (App. Draft 1968); see also American Bar Association Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press 7 (Rev. Draft, Nov. 1975).

32 I include these additional considerations, many of which apply generally to any system of prior restraints, only because of the fundamentality of the Sixth Amendment right invoked as the justification for imposition of the restraints in this case; the fact that there are such overwhelming reasons for precluding Any prior restraints even to facilitate preservation of such a fundamental right reinforces the longstanding constitutional doctrine that there is effectively an absolute prohibition of prior restraints of publication of Any material otherwise covered within the meaning of the free press guarantee of the First Amendment. See Supra, at 2816-2819.

33 For example, in addition to numerous comments about accommodating First and Sixth Amendment rights in each case, the court observed:

"That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. Near v. Minnesota ex rel. Olson, supra. In these instances and many others no preferred constitutional rights collide.

"In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, that an accommodation of some sort must be reached." 194 Neb., at 798-799, 236 N.W.2d, at 803-804.

Thus, at least when reporting of information "strongly implicative" of the accused also reflects on officials actions, a particularized analysis of the need to disseminate the information is contemplated even by those who believe prior restraints might sometimes be justifiable with respect to commentary on the criminal justice system.

34 Prior restraints may also effectively curtail the incentives for independent investigative work by the media which could otherwise uncover evidence of guilt or exonerating evidence that nevertheless threatens the Sixth Amendment rights of others by strongly implicating them in illegal activity.

35 Indeed, to the extend media notified of the restraint proceedings choose not to appear in light of the cost and time potentially involved in overturning any restraint ultimately imposed, there will be no presentation of the countervailing public interest in maintaining a free flow of information, as opposed to the interests of prosecution, defense, and judges in maintaining fair proceedings.

36 For example, in this case the restraints only applied to petitioners, who improperly intervened in the criminal case and thus subjected themselves to the court's jurisdiction. The numerous Amici, however, were not subject to the restraining orders and were free to disseminate prejudicial information in the same areas in which petitioners were precluded from doing so.

37 Cf. New York Times Co. v. United States, 403 U.S., at 733, 91 S.Ct., at 2151 (White, J., joined by Stewart, J., concurring).

38 In this case, prior restraints were in effect for over 11 weeks, and yet by the time those restraints expired, appellate review had not yet been exhausted. Moreover, appellate courts might not accord these cases the expedited hearings they so clearly would merit. See Tr. of Oral Arg. 43-48.

39 As we observed in Bridges v. California, 314 U.S., at 268, 62 S.Ct., 196, which held that the convictions of a newspaper publisher and editor for contempt, based on editorial comment concerning pending cases, were violative of the First Amendment:

"It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion."

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. . . .

"This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression. And to assume that each would be short is to overlook the fact that the 'pendency' of a case is frequently a matter of months or even years rather than days or weeks." Id., at 269, 62 S.Ct., at 196.

See also Id., at 277-278, 62 S.Ct., at 201; Carroll v. Princess Anne, 393 U.S., at 182, 89 S.Ct., at 352; Wood v. Georgia, 370 U.S., at 392, 82 S.Ct., at 1374; Pennekamp v. Florida, 328 U.S., at 346-347, 66 S.Ct., at 1037.

40 The editor and publisher of Amicus Anniston (Ala.) Star poignantly depicted in a letter to counsel the likely plight of such small, independent newspapers if the power to impose prior restraints against pretrial publicity were recognized:

"Small town dailies would be the unknown, unseen and friendless victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published.

"Our papers are not read in the White House, the Congress, the Supreme Court or by networks news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided.

"Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners." Brief for Washington Post Co. et al. as Amici Curiae 31-32.

41 There is also the danger that creation of a second "narrow" category of exceptions to the rule against prior restraints would be interpreted as a license to create further "narrow" exceptions when some "justification" for overcoming a mere "presumption" of unconstitutionality is presented. Such was the reasoning which eventuated in this litigation in the first place. See Supra, at 2813-2814.


© 2021 Thomson Reuters. No claim to original U.S. Government Works.

2015 WL 3915926 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Atlantic County

TOWNSHIP OF HAMILTON, County of Atlantic, Plaintiffs,

v.

Harry B. SCHEELER, Jr., Amy Von Bosse, John Does 1-10, Mary Does 1-10 and ABC Business Entitites 1010 (being fictitious names), jointly, severally and/or in the alternative, Defendants.

No. L-0833-15.
June 24, 2015.

**Opinion**

Robert Sandman, Esquire, and Evan M. Labov, Esquire (Hankin, Sandman, Palladino and Weintrob, P.C.) for plaintiff, Township of Hamilton.

C.J. Griffin, Esquire (Pashman Stein) for defendant, Harry B. Scheeler. Jr.

James P. McClain, Atlantic County Prosecutor and John J. Santoliquido, Assistant Prosecutor (Atlantic County Prosecutor's Office) Amicus Curiae.

Michael Winkelstein, Judge.

***1** This action arises out of defendant Harry B. Scheeler Jr.'s request for video surveillance footage from plaintiff Hamilton Township pursuant to the New Jersey Open Public Records Act (OPRA), *N.J.S.A.* 47:1A-1 to -13, and the common law right of access to public records. Instead of granting or denying the request, the Township filed a lawsuit against Scheeler, asking the court to relieve the Township of any obligation to respond to the request and to enjoin Scheeler from making similar requests in the future.

Scheeler asserts that the Township has no authority to seek relief from the records request in court; that only the requestor has such a right. Consequently, before reaching the merits of the request, the threshold issue that the court addresses in this opinion is whether a government agency, such as plaintiff, may file a lawsuit against a person requesting public records, or whether the right to institute a lawsuit determining the validity of the request belongs solely to the requestor. The court concludes that the right to bring the issue to court belongs exclusively to the requestor, not the government agency.

To properly address this issue a review of the procedural history of the case is helpful. On March 26, 2015, Scheeler, a resident of North Carolina at the time, submitted a request to the Township for public records pursuant to OPRA and the common law. In part, the request stated: “Please provide video footage for all building CCTV cameras both [for the] town hall and [the] police department for the past 30 days. Once these records are turned over they will be publicly archived on YouTube. I will repeat this request every thirty days.”

In response to Scheeler's request, on April 8, 2015, the Township filed an order to show cause and verified complaint. The complaint was characterized as a declaratory judgement action. In sum, the complaint seeks to relieve the Township of any obligation to respond to Scheeler's request and seeks to enjoin him from making future requests for CCTV video recordings.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Scheeler subsequently narrowed his request: "I seek, pursuant to OPRA and the common law all video footage from March 25, 2015 from 12pm until 5pm from the police department's sally port camera."

The Township amended its complaint. In the first count, the complaint seeks judgment (1) relieving the Township of any obligation to respond to Scheeler's March 26, 2015 OPRA request; (2) enjoining him from filing any future OPRA or common law requests for CCTV video recordings; (3) enjoining him from filing any action, either in Superior Court or with the Government Records Council (GRC), relating to the March 26, 2015 OPRA request; and (4) requesting counsel fees and costs of suit.

In the second count of the amended complaint, the Township asks for similar relief with regard to requests for the video recordings from "Amy Von Bosse." Amy Von Bosse is a fictitious name used by Scheeler in filing additional requests for the video recordings. He used the fictitious name pursuant to *N.J.S.A.* 47:1A-5i, the OPRA provision that allows a requestor for government records to make a request anonymously. The second count of the amended complaint seeks judgment against Amy Von Bosse for substantially the same relief the Township sought against Scheeler in the first count.

***2** The amended complaint contained a third count, in which the Township sought (1) relief from any obligation to respond to Scheeler's OPRA and common law requests; (2) relief from an obligation to respond to OPRA and common law requests in the future for surveillance footage; and (3) counsel fees. On April 16, 2015, another judge of this court signed an ex parte order temporarily relieving the Township from responding to Scheeler's request for documents.

Scheeler objects to the Township filing the declaratory judgment action. He asserts that filing the action deprived him of statutory rights under OPRA: the right to obtain a written response to an OPRA request within seven business days from the government agency, *N.J.S.A.* 47:lA-5i; the ability to select the appropriate forum to have the denial of the document request reviewed, i.e., either appeal to the GRC or to the Superior Court, *N.J.S.A.* 47:lA-6; and the right to counsel fees if he is the prevailing party, *N.J.S.A.* 47:1A-6; *N.J.A.C.* 5:105-2.13. Scheeler answered the amended complaint and filed a counterclaim asserting that by filing the declaratory judgment action, the Township denied him those rights, which violates the New Jersey Civil Rights Act, *N.J.S.A.* 10:6-1 to -2. He also sought counsel fees.

Prior to the return date of the order to show cause, the parties briefed both the procedural and substantive aspects of this case. Three primary issues have come to light. The first, as noted, is whether the procedure followed by the Township filing a declaratory judgment action in response to Scheeler's record requests warrants dismissal of the complaint. The second issue is whether Scheeler, as a resident of North Carolina at the time he submitted the OPRA request, had standing to file such a request given the provision of OPRA that "government records shall be readily accessible for inspection, copying or examination by the citizens of this State." *N.J.S.A.* 47:1A-1.

The final issue goes to the substance of the request. That is, whether the requested video footage, which both parties acknowledge qualifies as a public record under OPRA and the common law, need not be provided by the Township because the video contains "security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of building or facility or persons therein"; or "security measures and surveillance techniques which, if disclosed, would create a risk of the safety to persons, property, electronic data or software." *N.J.S.A.* 47:1A-1.1.

Procedurally, the court is addressing the Township's application in a summary manner under *Rule* 4:67-1. Although the declaratory judgment action was not instituted under OPRA, both the complaint and the answer directly implicate OPRA as well as the common law claim for access to public records. As such, because OPRA directs that the "right to institute any proceeding under [OPRA] … shall proceed in a summary or expedited manner," *N.J.S.A.* 47:lA-6, the court is treating this application accordingly. Neither party has objected to the court resolving these issues without the need to create a factual record.

The court now turns to the fundamental issue addressed in this opinion: whether the Township's filing a declaratory judgment complaint against Scheeler, in lieu of simply sending him a letter denying his request for inspection of the requested government

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

records, is contrary to the plain language of OPRA, and the policies that underlie both OPRA and the common law right to access public records. The court will first address the statutory scheme embedded in OPRA.

***3** The Legislature included within OPRA a procedure to be followed by both the requestor, in submitting a request for government records, and by the government agency, in responding to that request. *N.J.S.A.* 47:1A-5, -6. Requests for access to government records are to be in writing and hand delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate records custodian. *N.J.S.A.* 47:1A-5g. The custodian is to "promptly comply" with the request, and if unable to do so, "the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor." *Ibid*. If a portion of the document being requested needs to be deleted, the custodian may do so, but must then "promptly permit access to the remainder of the record." *Ibid*.

Subject to certain exceptions, the request for access to a government record must be denied or granted by the government agency "as soon as possible, but not later than seven business days after receiving the request." *N.J.S.A.* 47:lA-5i. A failure to respond within seven business days after receiving the request shall be considered a denial of the request. *Ibid*.

In response to a request denial, the requestor, "at the option of the requestor," may:
Institute a proceeding to challenge the custodian's decision by filing an action in Superior Court which shall be heard … by a Superior Court Judge who has been designated to hear such cases … ; or

In lieu of filing an action in Superior Court, file a complaint with the Government Records Council [GRC].

The right to institute any proceeding under this section shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

[*N.J.S.A.* 47:1A-6.]

This language unequivocally gives the requestor, not the government agency, the right to go to court or take other action if the records request is not granted. The public policy of this state, included in the first section of OPRA, provides the rationale for the statutory procedure. It reads:
government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by what was previously known as the Right to Know Law, *N.J.S.A.* 47:1A-1 to -13 as amended and supplemented, shall be construed in favor of the public's right of access.

[*N.J.S.A.* 47:1A-1.]

These legislative findings are more than just a preamble to the OPRA statute; they are substantive law. *Burnette v. Cnty of Bergen*, 198 *N.J.* 408, 422-23 (2009).

The purposes and goals of OPRA are well settled. In *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 *N.J. Super.* 312, 329 (Law Div. 2004), the Law Division judge observed the following:
Clearly, the court must always maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope .... The salutary goal, simply put, is to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process… OPRA is founded on the premise that society as a whole suffers … if governmental bodies are permitted to operate in secrecy.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

Our Supreme Court agreed. "The [OPRA] statute is designed both to promote prompt access to government records and to encourage requestors and agencies to work together toward that end by accommodating one another." *Mason v. City of Hoboken*, 196 *N.J.* 51, 78 (2008). In 2011, the Court observed:

***4** The purpose of OPRA is to maximize public knowledge about public affairs … and to minimize the evils inherent in a secluded process.... Those who enacted OPRA understood that knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions. An underlying premise of OPRA is that society as a whole suffers when governmental bodies are permitted to operate in secrecy.

[*Fair Share Housing Ctr. Inc. v. N.J. State League of Municipalities*, 207 *N.J.* 489, 501 (2011) [internal quotation marks and citations omitted.]

Consistent with these policies, OPRA's procedural requirements impose obligations on both the requestor and the public agency for the submission and processing of requests for public records. In doing so, "OPRA shifts the traditional burden of proof to the responding agency." *Mason*, *supra*, 196 *N.J.* at 76.

In this case, no dispute exists that the government agency did not timely deny the March 26, 2015 OPRA request. Indeed, it has never denied the request. Instead, the Township filed suit against the requestor. The Township asked for restraints against the requestor; and for an order relieving the Township from any obligation to respond to the current and future requests for surveillance videos. These actions did not comply with the plain language of OPRA.

The procedure set forth in *N.J.S.A.* 47:1A-6 establishing the requestor's rights upon denial of its records request is not a legislative suggestion. It is substantive law. The law does not authorize the government agency to choose the forum in which to have the request for documents adjudicated; that choice lies with the requestor. The law is unambiguous. "The right to institute *any proceeding* under this section shall be solely that of the requestor." *N.J.S.A.* 47:1A-6 [emphasis added]. By filing a lawsuit against Scheeler, the Township deprived him of his right to choose the forum in which to have a denial of his request adjudicated, or, indeed, to simply walk away if the request was denied. *N.J.S.A.* 47:1A-6.

One of the goals of OPRA is to foster cooperation between requestors and agencies to reasonably accommodate both of their interests. *Mason*, *supra*, 196 *N.J.* at 66. The Township's action does not foster that purpose.

The Township has argued that pursuant to the declaratory-judgment statute it is entitled, without exception, to file suit to adjudicate its rights vis-a-vis another party. The court disagrees.

The Declaratory Judgments Act (the Act) states, in part:

The enumeration of other sections of this article of the questions determinable and rights declarable in a proceeding brought under the provisions of this article does not limit or restrict the exercise of the general powers conferred by this section in a proceeding for declaratory relief, in which a judgment will terminate the controversy or remove an uncertainty.

[*N.J.S.A.* 2A:16-52]

In *Rego Industries, Inc. v. American Modern Metals Corp.*, 91 *N.J. Super.* 447, 453 (App. Div. 1966), the court spoke to the purpose of a declaratory judgment proceeding:

Such proceeding is intended to serve as an instrument of preventative justice, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

status without the necessity of a prior breach. Stated in another way, there is ordinarily no reason to invoke the provisions of the Declaratory Judgments Act where another adequate remedy is available.

***5** "Stated somewhat differently, declaratory judgment is not an appropriate way to discern the rights or status of parties upon a state of facts that are future, contingent, and uncertain." *Independent Realty Co. v. Twp. of N. Bergen*, 376 *N.J. Super*. 295, 302 (App. Div. 2005) (quoting *N.J.S.A.* 2A:16- 51). The Act is not available when the request "is in effect an attempt to have the court adjudicate in advance the validity of a possible [claim or] defense in some expected future lawsuit. *Ibid*. "'The declaratory judgment procedure may not be used to pre-judge issues that are committed for initial resolution to an administrative forum, any more than it may be used as a substitute to establish, in advance, the merits of an appeal from the forum.'" *Ibid*. (quoting *Pennsylvania Dep't of Gen. Serv. v. Frank Briscoe Co.*, 502 Pa. 449, 459 (1983)).

In *Rego Industries*, *supra*, the Appellate Division, in affirming the trial court, agreed that the Act could not be used as an attempt to have the court adjudicate in advance the validity of a possible defense to a defendant's imminent lawsuit. 91 *N.J. Super* at 453. The court agreed with Vice Chancellor Jayne in *Ewing Twp. V. Trenton*, 137 *N.J. Eq*. 109, 110 (Ch. 1945), who, in commenting upon the use of the Act, observed that it was not "'intended to be utilized defensively to bag in advance an imminent and impending law suit.'" *Ibid*.

This is substantially what the Township has done here. It has attempted to use a declaratory judgment proceeding to head off a lawsuit by Scheeler under OPRA, in which he would be entitled to counsel fees if successful; and to prevent him from taking his claim to the GRC, which also allows for counsel fees to the prevailing party. *N.J.A.C.* 5:105-2.13(2008). And, not insignificantly, the Township's lawsuit has prevented Scheeler from simply walking away if the Township denied his request.

In support its decision to file a declaratory judgment lawsuit against Scheeler, the Township has offered a number of citations; to a published New Jersey opinion, to multiple unpublished opinions, and to opinions from other jurisdictions. The published opinion is *Bergen County Improvement Authority v. North Jersey Media Group, Inc., d/b/a The Record*, 370 *N.J. Super.* 504 (App. Div. 2004), a consolidated action involving three lawsuits. There, the public agency asked the court to determine whether certain documents requested of the Improvement Authority should be deemed public documents under the common law. *Id*. at 508. The complaint also included a claim for a judicial declaration as to whether the release of the documents was required under OPRA. *Id*. at 509.

The trial court determined that the requested documents were exempt from disclosure under OPRA. That ruling was not appealed. *Ibid.* The Law Division further found, however, that the release of documents was required under the common law. *Ibid*. On appeal, it was the latter ruling of the trial court that was placed before the Appellate Division. *Ibid*. The issue here, whether it is proper for a government agency to file suit against the document requestor, was not addressed by the Appellate Division. And no record of the trial court proceeding has been provided; this court simply does not know if the subject issue was ever addressed in that proceeding. Thus, *Bergen* is neither dispositive nor informative.

This court has also reviewed the unpublished decisions brought to its attention and the decisions from other jurisdictions. Initially, the court observes that unpublished opinions are not to be cited by any court. *R.* 1:36-3. And further, the unpublished opinions and those from other jurisdictions offered by the Township here either addressed issues that are not before this court, or the underlying legislation upon which the decisions are based differs from the OPRA statute. Accordingly, the court does not find any of those decisions precedential, informative, or useful in arriving at a decision.

***6** The court concludes that the Township circumvented the substantive provisions of OPRA by filing a declaratory judgment action to ask the court to relieve it of its obligation to respond to Scheeler's request. The government agency may not, in the guise of a declaratory judgment action, file suit against a requestor solely for the purpose of having a court determine whether the request is appropriate. The choice of whether to file suit, seek relief from the GRC, or take no action belongs to the requestor.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

The failure by the Township to comply with the procedures set forth in OPRA warrants, by itself, dismissal of the declaratory judgment action. But there is more.

Even without the violations of the substantive procedural process set forth in OPRA, filing a declaratory judgment action against a document requestor is contrary to the public policies that serve as the as foundation for OPRA and the common law right to access government records. As with OPRA, common law standards are based upon "traditions of openness and hostility to secrecy in government." *North Jersey Newspapers Co., v. Passaic Cnty Bd. of Chosen Freeholders*, 127 *N.J.* 9, 16 (1992). To allow a government agency to file a lawsuit against someone who has submitted a request for government records would undoubtedly have a chilling effect on those who desire to submit such a request, undercutting the public policy previously described.

A government agency's lawsuit against document requestors subjects them to involuntary litigation with all of its concomitant financial, temporal, and emotional trimmings. A public policy that gives a government agency the right to sue a person who asks for a government document is the antithesis of the policy underlying both OPRA and the common law - to provide citizens with a means of access to public information to keep government activities open and hold the government accountable.

For all of these reasons, the court dismisses the complaint and dissolves the temporary restraints.

The court does not reach the issue of whether one has to be a citizen of the state of New Jersey to file an OPRA request; nor does it reach the substantive issue of whether the Township is entitled to deny the request for the specific surveillance video Scheeler sought. These issues must abide a decision in the proper forum.

That leaves defendant's counterclaim, in which he has asserted a violation of New Jersey Civil Rights Act, and a claim for counsel fees. The court cannot address the claim for Civil Rights Act violations as that claim is not subject to summary disposition and may, in fact, require discovery. Moreover, in the answer to the amended complaint, the Township has demanded a jury trial on that claim.

Nevertheless, the counsel fee claim is ripe for adjudication. Scheeler is the prevailing party. *N.J.S.A.* 47:1A-6 specifically states that "a requestor who prevails in any proceeding shall be entitled to a reasonable attorney fee." While this proceeding was not brought under OPRA, it involved a request for documents under OPRA and caused Scheeler to answer the complaint. Though this is not a typical OPRA action warranting counsel fees, as the court has not decided the substantive issue of whether the requested video footage should be provided to Scheeler, it is the Township that imposed an unwanted lawsuit upon him by not following the OPRA procedure.

OPRA's fee-shifting provisions "are a vital means" of providing citizens with the right to access government records. *Courier News v. Hunterdon Cnty Prosecutor's Office*, 378 *N.J. Super* 539, 546 (App. Div. 2005). "Without these provisions, the ordinary citizen would be waging a quixotic battle against a public entity with almost inexhaustible resources." *Ibid.* To deny a counsel fee application in a case such as here would essentially reward the Township for violating OPRA. Consequently, defendant's counsel shall submit a counsel fee application pursuant to the five-day rule.

***7** The court has attached an order memorializing its decision.

***COURT INITIATED*:**

TOWNSHIP OF HAMILTON, COUNTY OF ATLANTIC, Plaintiff,

vs.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works. 

HARRY B. SCHEELER, JR., AMY VON BOSSE, JOHN DOES 1-10, MAY DOES 1-10 AND ABC BUSINESS ENTITITES 1010 (being fictitious names), jointly, severally and/or in the alternative, Defendants.

***ORDER***

THIS MATTER having been brought before the court on the return date on an Order to Show Cause on June 12, 2015; and the court having heard oral argument on that date, and for the reasons expressed in the court's written opinion of June 24, 2015,

IT IS ORDERED, this 24th day of June, 2015, that plaintiff's complaint is dismissed;

IT IS FURTHER ORDERED that counsel for the defendant, Harry B. Scheeler, Jr., shall submit, within ten days of the date of this order, its application for counsel fees;

IT IS FURTHER ORDERED that the counterclaim of defendant for alleged violation of the New Jersey Civil Rights Act remains extant; and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within seven (7) days of its receipt.

<<signature>>

MICHAEL WINKELSTEIN, J.A.D.

(retired and temporarily assigned on recall)

**End of Document**

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused to be served an Amicus Brief and Motion For Leave To File An Amicus Curiae Brief filed via the Wisconsin appellate court eFiling Electronic Filing System for *Wisconsin Manufacturers and Commerce, et al. v. Tony Evers, et al.* (Case Numbers 2020AP2081 & 2020AP2103) and via electronic mail on March 12, 2021, to counsel of record as follows:

Ryan J. Walsh
Amy C Miller
EimerStahl LLP
10 East Doty Street
Suite 800
Madison, Wisconsin 53703
Tel. 608-441-5798
rwalsh@eimerstahl.com
amiller@eimerstahl.com
*Counsel for Plaintiffs-Respondents*

Sarah Huck
Anne M. Bensky
Wisconsin Department of Justice
17 W. Main St.
Madison, Wisconsin 53707
Tel. 608-266-7971
hucksa@doj.state.wi.us
benskyam@doj.state.wi.us
*Counsel for Defendants-Appellants*

Thomas C. Kamenick
Wisconsin Transparency Project
Kamenick Law Office, LLC
1144 Noridge Trl.
Port Washington, Wisconsin 53074
Tel. 262-365-7424
tom@wiopenrecords.com
*Counsel for Intervenor-Appellant*

Respectfully submitted,

Natalie A. Harris (WBN 1036133)
BARON HARRIS HEALEY
225 W. Washington St.
Suite 2200
Chicago, Illinois 60606
Tel. (312) 741-1028
nharris@bhhlawfirm.com
*Counsel for Amici Curiae*