

Response to OLR report on the First Amendment and FOI

I have practiced the First Amendment everyday for more than four decades and learned of the link between it and FOI. If your job is to keep government honest, to speak and write about government, then it is simple logic you should know what the government is, or is not, doing. I see similarities between the right to “petition the government for redress of grievances,” the fifth prong of the First Amendment, and “the people have a right to be fully informed of the action taken by public agencies in order that they may retain control over the instruments they have created; that the people do not yield their sovereignty to the agencies which serve them;” the “preamble” to Connecticut’s FOI laws.

It is good to see the nonpartisan OLR pointed to the Richmond Newspapers Supreme Court case showing a direct link between FOI and the First Amendment.

The OLR report cites the Supreme Court plurality ruling in *HOUCHINS v. KQED, INC.*, 438 U.S. 1 (1978) that the First Amendment does not mandate a right of access to government information. It dealt with access to prisoners and a prison in California.

But the OLR report ignores the dissenting opinion filed by Justice Stevens and joined by justices Brennan and Powell:

“The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution. [18](#) It is for this reason that the First Amendment protects not only the dissemination but also the receipt of information and ideas. See, e. g., *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, [425 U.S. 748, 756](#); *Procunier v. Martinez*, [416 U.S. 396, 408](#) -409; *Kleindienst v. Mandel*, [408 U.S. 753, 762](#) -763. [19](#) [[438 U.S. 1, 31](#)] Thus, in *Procunier v. Martinez*, supra, the Court invalidated prison regulations authorizing excessive censorship of outgoing inmate correspondence because such censorship abridged the rights of the intended recipients. See also *Morales v. Schmidt*, 489 F.2d 1335, 1346 n. 8 (CA7 1973

“In addition to safeguarding the right of one individual to receive what another elects to communicate, the First Amendment serves an essential societal function. [20](#) Our system of self-government assumes the existence of an informed citizenry. [21](#) As Madison wrote:

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce [[438 U.S. 1, 32](#)] or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

“It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about

the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance. [22](#)

“For that reason information gathering is entitled to some measure of constitutional protection. See, e.g., *Branzburg v. Hayes*, [408 U.S. 665, 681](#); *Pell v. Procunier*, [417 U.S., at 833](#). [23](#) As this Court's decisions clearly indicate, however, this protection is not for the private benefit of those who might qualify as representatives of the "press" but to insure that the citizens are fully informed regarding matters of public interest and importance.

“The public and the press had consistently been denied any access to those portions of the Santa Rita facility where inmates were confined and there had been excessive censorship of inmate correspondence. Petitioner's no-access policy, modified only in the wake of respondents' resort to the courts, could survive constitutional scrutiny only if the Constitution affords no protection to the public's right to be informed about conditions within those public institutions where some of its members are confined because they have been charged with or found guilty of criminal offenses.”

Please have this response to the OLR report put on the task force Web site and become a permanent part of the task force's file.

James H. Smith
Newspaper editor (ret.)
CCFOI, president
Task Force member