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FREEDOM OF INFORMATION LAWS AND THE FIRST AMENDMENT

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You asked for a summary of case law concerning the relationship between the First Amendment of the U.S. Constitution and freedom of information (FOI) laws.

SUMMARY

Under U.S. Supreme Court precedent, access to government records is a policy question to be decided by legislative bodies; it is not a constitutional question. As the Court wrote in a recent opinion, it “has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOI[Act] laws” (*McBurney v. Young*, 133 S.Ct.1709, 1718 (2013)).

The primary Supreme Court case concerning a constitutional right of access to government records is *Houchins v. KQED*, 438 U.S. 1 (1978). In *Houchins*, the plurality opinion and concurrence both held that neither the First nor the Fourteenth amendments “mandates a right of access to government information or sources of information within the government’s control” (*id.*, at 15), nor do they grant the media a right of access that is greater than the public’s right of access. The plurality opinion noted that, while previous Supreme Court cases upheld First Amendment rights to communicate information, those cases did not construe the First Amendment as providing a right to obtain information from the government.

Since *Houchins*, other Supreme Court cases have discussed the lack of a First Amendment right to government records. In one case, the Court upheld a California law that limited the purposes for which public records could be sought, noting that "California could decide not to give out arrestee information at all without violating the First Amendment" (*Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 40 (1999)). Similarly, in the *McBurney* opinion cited above, the Court noted that there is no constitutional right to obtain records under FOI laws.

In an appellate court case, the U.S. Court of Appeals, District of Columbia Circuit, citing *Houchins*, held that the First Amendment did not compel the government to release information about individuals detained after the September 11 attacks (i.e., arrestee names, names of their attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention).

This report addresses access to government records only. In a separate line of cases, beginning with a Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), courts have held that the First Amendment guarantees the public and media access to criminal trials. As Chief Justice Burger wrote in the *Richmond Newspapers* plurality opinion:

What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted...we hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment (*id.*, at 576, 580).

HOUCHINS V KQED

Facts and Procedural History

KQED, a broadcasting company, sought to inspect and photograph the part of the Alameda County (CA) Jail at Santa Rita where a prisoner reportedly committed suicide. After *Houchins* (the county sheriff) denied the request, KQED filed a lawsuit (1) alleging a deprivation of its First Amendment rights and (2) seeking preliminary and permanent injunctions to prevent the jail from excluding KQED personnel and equipment from jail facilities.

The jail subsequently implemented a program of six monthly public tours, which media members were welcome to attend. However, the tours covered only certain parts of the jail and prohibited (1) photography and tape recordings and (2) interviews with inmates.

A federal district court granted KQED's request for a preliminary injunction, prohibiting Houchins from denying KQED personnel and other media members from (1) access to all parts of the jail at reasonable times, (2) using photographic or sound equipment, or (3) interviewing inmates. The Ninth Circuit Court of Appeals sustained this order, concluding that the public and media had First and Fourteenth Amendment rights of access to prisons and jails.

Holding and Analysis

The Supreme Court reversed the appellate court's decision. Chief Justice Burger wrote a plurality opinion, joined by Justice White and Justice Rehnquist; Justice Stewart filed an opinion concurring in the judgment. Both the plurality and concurrence held that neither the First nor the Fourteenth amendments "mandates a right of access to government information or sources of information within the government's control" (*Houchins*, supra at 15). The opinions rejected (1) the Ninth Circuit's conclusion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and (2) KQED's argument that media organizations have an implied special right of access to government-controlled sources of information.

Plurality Opinion. In the plurality opinion, Chief Justice Burger wrote that, "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act" (*id.*, at 14, quoting Potter Stewart, *Or of the Press*, 26 *Hastings L.J.* 631, 636 (1975)). In rejecting KQED's First Amendment arguments, he wrote that:

The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control (*id.*, at 9).

The chief justice analyzed several cases cited by KQED and concluded that they focused on the media's right to communicate information, rather than a right of access to the information. For example, he found that, in two of the cases (*Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Mills v. Alabama*, 84 U.S. 214 (1966)), "the Court was concerned with the freedom of the media to *communicate* information once it is obtained; neither case intimated that the Constitution *compels* the government to provide the media with information or access to it on demand" (*id.*, at 9, emphasis in original).

Concerning a special right of access for the media, Chief Justice Burger reviewed another case cited by KQED, *Branzburg v. Hayes*, 408 U.S. 665 (1972). He noted that, in *Branzburg*, the Court stated that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally," and that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded" (*Houchins*, *supra* at 11, quoting *Branzburg*).

The chief justice also quoted from another case, *Zemel v. Rusk*, 381 U.S. 1 (1965), to emphasize the distinction between the right to speak and publish and the right to have access:

There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. *The right to speak and publish does not carry with it the unrestrained right to gather information* (*Houchins*, *supra* at 12, quoting *Zemel*, emphasis in original).

Chief Justice Burger concluded that access to penal institutions is a policy question to be resolved by a legislative body, describing it as "clearly a legislative task which the Constitution has left to the political processes" (*Houchins*, *supra* at 12). He noted that, with no basis for a constitutional duty to disclose information, or standards for disclosing or providing access, judges would "be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient'" (*id.*, at 14).

Concurring Opinion. Justice Stewart filed a concurring opinion in which he agreed with the plurality that there is no First or Fourteenth Amendment right of access to government-generated or -controlled information. He also agreed that the media does not have a basic right of access superior to that of the general public, writing that, "The Constitution does no more than assure the public and the press equal access once government has opened its doors" (*id.*, at 16).

However, Justice Stewart wrote that equal access for the public and media did not necessarily mean identical access:

[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see (*id.*, at 17).

According to Justice Stewart, KQED was entitled to some form of preliminary injunctive relief. He agreed with the District Court that, to keep the public informed, the media needed access that was more frequent and flexible than the regularly scheduled tours. He also agreed that the media needed cameras and sound equipment to properly do its job.

However, Justice Stewart found the District Court's order overly broad as it allowed the media to (1) access all areas of the jail and (2) interview inmates. These provisions, he wrote, are not compelled by the Constitution. Rather, any injunctive relief must "accommodate equitably the constitutional role of the press and the institutional requirements of the jail" (*id.*, at 18-19).

OTHER CASES

U.S. Supreme Court

Los Angeles Police Dept. v. United Reporting Publishing Corp. This 1999 case involved a California law that limited the purposes for which public records could be sought. Specifically, it prohibited requesters from accessing arrestees' addresses for the purpose of directly or indirectly selling a product or service. A federal district court permanently enjoined enforcement of the statute, and the Ninth Circuit Court of Appeals affirmed, holding that it was facially invalid because it unduly burdened commercial speech.

The Supreme Court reversed the decision, holding that the statute was not subject to a facial challenge. (A “facial challenge” requires the Court to look at the law and determine if it is unconstitutional as written.) In doing so, it accepted the police department’s argument that the statute does not abridge anyone’s right to speak, but rather regulates access to information possessed by the police:

This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses...The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. *California could decide not to give out arrestee information at all without violating the First Amendment (Los Angeles Police Dept., supra at 40, emphasis added).*

McBurney v. Young. In 2013, the Court ruled unanimously in *McBurney v. Young* that states may exclude out-of-state residents from the access to public records provided by their FOI laws. The case involved Virginia’s FOI law, which grants access to public records to state residents only. The Court rejected the plaintiffs’ arguments that the denials violated the U.S. Constitution’s Privileges and Immunities and dormant Commerce clauses, holding that (1) the state did not abridge any constitutionally protected privilege or immunity and (2) Virginia’s FOI law does not regulate commerce in any meaningful way.

Although *McBurney* did not raise any First Amendment claims, the Court’s opinion also discussed more generally the relationship between public access and the Constitution. The opinion stated that the Court “has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws” (*McBurney*, supra at 1718). It also noted that “no such right was recognized at common law,” and that, “Nineteenth century American cases... do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic” (*id.*).

Appellate Court

In *Center for National Security Studies v. U.S. Dept. of Justice*, 331 F.3d 918 (2003), the U.S. Court of Appeals, District of Columbia Circuit, held that the government did not have to release information about individuals detained after the September 11 attacks (i.e., arrestee names, names of their attorneys, dates of arrest and release, locations of arrest and detention, and reasons for detention).

The petitioners made several arguments for releasing the information, including a claim that it was required by the First Amendment. In rejecting this argument, the court, citing *Houchins*, stated that “the First Amendment is not implicated by the executive’s refusal to disclose the identities of the detainees and information concerning their detention” (*id.*, at 935). It also noted that *Houchins*, not *Richmond Newspapers*, is the applicable Supreme Court case concerning the constitutional right of access to government information outside the criminal trial context:

neither this Court nor the Supreme Court has ever *indicated* that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings. Indeed, there are no federal court precedents requiring, under the First Amendment, disclosure of information compiled during an Executive Branch investigation, such as the information sought in this case (*id.*, emphasis in original).

TA:ts