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Houston Chronicle Publishing Co. v. City of Houston: Public Has Limited Access to Criminal Records

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Houston Chronicle Publishing Co. v. City of Houston: Public Has Limited Access to Criminal Records

After the city of Houston refused to release certain arrest records the Houston Chronicle Publishing Company sought a declaratory judgment in order to establish a statutory right of access to the documents under the Texas Open Records Act. The trial court denied the relief sought and the plaintiff appealed. *Held, reversed*: The media and the public have a limited right to review information maintained by state law enforcement agencies. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ filed).*

I. The Texas Open Records Act and Investigatory Files

Recognizing that the public should be entitled to full disclosure of the affairs of state government, the Sixty-third Texas Legislature adopted the Texas Open Records Act.[1] The Act provides a comprehensive scheme for public access to state documents. Fifteen classes of documents are termed "public"[2] while sixteen categories are exempt from disclosure.[3] Despite the exempt categories, the legislature clearly expressed an intention that the "Act shall be liberally construed in favor of the granting of any request for information."[4]

One exemption from public disclosure under the Texas Open Records Act provides that "records of law enforcement agencies that deal with the detection and investigation of crime" are not available for public review.[5] According to the author of the Act[6] this section was modeled after a provision of the Federal Freedom of Information Act.[7] The primary purpose of the federal

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* Editor's Note: After this Note was set in print the Texas Supreme Court, in a per curiam opinion, refused application for writ of error, n.r.e. 19 Tex. Sup. Ct. J. 300 (April 28, 1976).

1. Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Supp. 1975-76).

2. *Id.* § 6(a).

3. *Id.* § 3(a). The state judicial branch is not included within the purview of the Texas Open Records Act. *Id.* § 2(1)(G).

4. *Id.* § 14(d). Upon written application by any person the custodian of the requested document must promptly produce the record for inspection and duplication. *Id.* § 5(b). Governmental agencies are authorized to charge reasonable fees for access to such records. Hendricks v. Board of Trustees, 525 S.W.2d 930 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). If a governmental unit determines that the requested document is confidential, the agency may within 10 days request that the Texas Attorney General resolve the dispute. Tex. Rev. Civ. Stat. Ann. 6252-17a, § 7a (Supp. 1975-76). If no action is taken by the agency, the party desiring the record may seek a writ of mandamus for a judicial determination of the issue. *Id.* § 8. According to the court in Texas Indus. Accident Bd. v. Industrial Foundation of the South, 526 S.W.2d 211, 214 (Tex. Civ. App.—Beaumont, writ granted), the party seeking the mandamus must enter the controversy with "clean hands."

5. Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 3(a)(8) (Supp. 1975-76). *See generally* Comment, *Texas Open Records Act: Law Enforcement Agencies' Investigatory Records*, 29 Sw. L.J. 431 (1975).

6. Texas State Representative Lane Denton addressing the Texas House of Representatives on February 13, 1973. Transcripts on file with the Texas Legislative Counsel.

7. The federal act, as originally adopted, provided for the non-disclosure of investigatory files compiled for law enforcement purposes except to the extent the information is available by law to a party other than an agency. 5 U.S.C. §§ 552(b)(7)

law enforcement exception was to enhance the detection of federal statutory violations[8] and protect the privacy of citizens being investigated by[9] or providing information to[10] federal investigatory agencies. This exception, however, cannot completely abrogate the media's right under the first amendment to publish items of public interest[11] or the public's right to be informed of governmental activities.[12] Courts have a duty to strike a workable balance between these conflicting public policy precepts.[13]

II. BALANCING THE INTERESTS

In applying the law enforcement exemption of the Texas Open Records Act the courts are faced with three basic policy considerations which are firmly rooted in the traditions of our society: (1) the state's right to secrecy, (2) the freedom of the press, and (3) the individual's right to privacy. These policy considerations do not operate in a vacuum. Judicial decisions often demonstrate that the state's right to secrecy or the individual's right to privacy can conflict with the freedom of the press. For purposes of analysis each concept is examined separately.

State Secrecy. As a practical matter government must operate behind closed doors in certain limited circumstances. A common law privilege of governmental confidentiality, therefore, has been recognized by the courts.[14] In a

(1970). This section was recently amended by the 93d Congress, 2d Session. Act of Dec. 31, 1974, Pub. L. No. 93-579, § 3, 88 Stat. 1897 (codified at 5 U.S.C. § 552(b)(7) (Supp. IV, 1974)). *See also* Comment, *Amendment of the Seventh Exemption under the Freedom of Information Act*, 16 WM. & MARY L. REV. 697 (1975).

8. Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972); Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); Evans v. DOT, 446 F.2d 821 (5th Cir.), *cert. denied*, 405 U.S. 918 (1971).

9. Cowles Communications, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971). *See generally* Hulett, *Privacy and the Freedom of Information Act*, 27 ADM. L. REV. 275 (1975).

10. Clement Bros. v. NLRB, 282 F. Supp. 540 (N.D. Ga. 1968), *aff'd*, 407 F.2d 1027 (5th Cir. 1969).

11. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); M. SHAPIRO, FREEDOM OF SPEECH (1966); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

12. James Madison declared, "A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." S. PADOVER, THE COMPLETE MADISON 377 (1953).

13. *See generally* Comment, *National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act*, 123 U. PA. L. REV. 1438 (1975).

14. The cases have been limited to information concerning diplomatic or military secrets. *See, e.g.*, United States v. Reynolds, 345 U.S. 1 (1953) (investigatory report in the custody of the Secretary of the Air Force held not discoverable); Totten v. United States, 92 U.S. 105 (1875) (government contract executed during the Civil War classified as privileged); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 420 U.S. 992 (1975) (classified CIA documents presumptively privileged); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) (investigatory report of Department of Air Force held confidential); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912) (navy drawings classified as secret documents). In United States v. Nixon, 418 U.S. 683 (1974), the United States Supreme Court held that the President's generalized interest in confidentiality, unsupported by a need to protect military, diplomatic, or sensitive national security secrets, could not prevail over a specific judicial need for the documents. For a discussion of this case see Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RES. L. REV. 747 (1975); Van Alstyne, *A Political Constitutional Review of United States v. Nixon*, 22 U.C.L.A.L. REV. 116 (1974).

criminal law context, for example, public disclosure of governmental activities regarding the detection and prosecution of criminal misconduct can frustrate effective law enforcement in at least three ways. First, if individuals engaging in prohibited conduct are cognizant of the time, place, and method of future investigations, the criminal justice system would be undermined.[15] Second, criminal prosecutions are conducted in an adversary context. Accordingly, the legislative and judicial branches have established rules of confidentiality regarding records within the control of the state in order to promote effective prosecution.[16] For this reason the Texas Attorney General has ruled that the Texas Open Records Act should not serve as an additional means of discovery in a criminal case.[17] Finally, the courts have recognized that the state has an interest in preventing extensive press coverage when such conduct may prejudice the defendant's right to a fair trial.[18]

Freedom of the Press. Since the historic case of *New York Times Co. v. Sullivan*[19] the courts have afforded the press a special legal status which promotes the free flow of information to the public and enhances "uninhibited, robust and wide open" debate of national issues.[20] The Court has been less helpful with the specific right of "newsgathering." In *Branzburg*

15. The curtain of secrecy can be lifted after investigations are completed. At that point in time the legality of governmental intrusion would be governed by the fourth amendment's prohibition of unreasonable searches and seizures. In Katz v. United States, 389 U.S. 347 (1967), the Court ruled that the fourth amendment applied in all situations where the defendant had a reasonable expectation of privacy. *See generally* E. FISHER, SEARCH AND SEIZURE (1970); E. GRISWOLD, SEARCH AND SEIZURE (1975); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); Cleary, *Recent Developments in the Law of Search and Seizure*, 1 NAT'L J. CRIM. DEF. 21 (1975).

16. *See, e.g.*, FED. R. CRIM. P. 16; TEX. CODE CRIM. PROC. ANN. art. 39.14 (1968). As compared to the federal courts, a defendant in a Texas state court has a limited right of discovery. Upon a showing of good cause pre-trial discovery is extended to statements of the defendant and to all tangible items possessed by the state. *Id.* Depositions may be conducted by the defendant as a matter of right at the examining trial or any time upon good cause motion. *Id.* arts. 39.01-.02. The use of the depositions at the trial is limited to impeachment, unless the witness is unavailable. *Id.* arts. 39.12-.13. It is well established that the state's suppression of material evidence favorable to the defendant violates due process. Brady v. Maryland, 373 U.S. 83 (1963). Following direct examination of government witnesses the accused has a right of access to all prior statements made by that witness which are material to the trial. The defendant may also inspect any document used before the jury in such a manner that its contents are at issue. Gaskin v. State, 353 S.W.2d 467 (Tex. Crim. App. 1962).

17. OPEN RECORDS DECISION No. 108 (Aug. 5, 1975); *accord*, Kerr v. United States Dist. Ct., 511 F.2d 192 (9th Cir. 1975); Frankel v. SEC, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971); Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968); Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.P.R. 1967).

18. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963). In *Sheppard* the Court outlined the types of constitutionally permissible restraints on the press, which included controlling the number and the conduct of reporters in the courtroom and issuing protective orders to proscribe statements made to the press.

19. 376 U.S. 254 (1964).

20. For a treatment of the media's liability in defamation actions see Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199 (1976). *See also* Time, Inc. v. Firestone, 44 U.S.L.W. 4262 (U.S. March 2, 1976), where the Court held that a news story involving the divorce of a wealthy socialite involved neither a public figure nor a public event. Thus, liability did not need to be predicated on malice. For a discussion of the media's liability in privacy actions see Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453 (1975); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974).

v. Hayes[21] the Court recognized that "newsgathering" qualified for first amendment protection but held the privilege did not apply when newsmen were questioned before the grand jury concerning confidential sources.[22] A further blow to the press was struck in *Pell v. Procunier*[23] when the Court held that newsmen did not have a constitutional right of access to prisons or prisoners beyond that afforded the general public. Despite these cases one must not lose sight of the concept that a free press is an indispensable tool in assuring the essence of democracy: an informed electorate.[24] This concept applies with particular vigor within the framework of criminal investigations and prosecutions which have consistently been classified by the courts as events of public interest.[25] The media's reporting of such events, therefore, should fall within first amendment protection.[26]

Privacy. The common law tort of privacy was first introduced in a law review article by Warren and Brandeis.[27] This tort, as defined by Dean Prosser, involved four separate torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation of the plaintiff's name or likeness for the defendant's advantage.[28] The intrusion[29] and appropriation[30] branches of privacy have been expressly recognized in Texas.

21. 408 U.S. 665 (1972).

22. *Id.* In a concurring opinion Justice Powell stated that the case was limited to grand jury testimony and that societal interests must be balanced on a case-by-case basis. *Id.* at 710.

23. 417 U.S. 817 (1974). *Pell* involved a California Department of Corrections regulation which prohibited prison interviews by reporters. The companion case, Saxbe v. Washington Post Co., 417 U.S. 843 (1974), involved a similar rule of the Federal Bureau of Prisons.

24. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972); Associated Press v. United States, 326 U.S. 1 (1945). *See also* A. MEIKLEJOHN, POLITICAL FREEDOM 75 (1960); J. WIGGINS, FREEDOM OR SECRECY 66 (1974); Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. Washington Post Co.*, 2 HASTINGS CONST. L.Q. 829 (1975). The press has had some success in gaining access to governmental records on constitutional grounds. *See, e.g.*, Tennessean Newspaper, Inc. v. FHA, 464 F.2d 657 (6th Cir. 1972); Stern v. Richardson, 367 F. Supp. 1316 (D.D.C. 1973); Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176 (E.D. Pa. 1972); *cf.* Trimble v. Johnston, 173 F. Supp. 651 (D.D.C. 1959).

25. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (story of rape and killing of plaintiff's daughter); Williams v. KCMO Broadcasting Div.-Meredith Corp., 472 S.W.2d 1 (Mo. Ct. App. 1971) (broadcast of plaintiff's arrest).

26. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967). In *Hill* the Court ruled that the states could not redress false reports of matters of public interest absent a showing that the defendant published with knowledge of the report's falsity or in reckless disregard of the truth. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Court rested its opinion on a narrower ground. The Court ruled that since the defendant had obtained the identity of the rape victim from judicial records, which were public documents, the disclosure was constitutionally protected. *See generally* A. MILLER, ASSAULT ON PRIVACY (1971); A. WESTIN, PRIVACY AND FREEDOM (1967).

27. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This view is now accepted in the vast majority of states. *See, e.g.*, Daily Times Democrat v. Graham, 276 Ala. 380, 162 So. 2d 474 (1964); Carey v. Statewide Fin. Co., 3 Conn. Cir. 716, 223 A.2d 405 (1966); Carlson v. Dell Publishing Co., 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965).

28. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802-18 (4th ed. 1971).

29. Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973), *noted in* 27 SW. L.J. 865 (1973).

30. Kimbrough v. Coca-Cola/USA, 521 S.W.2d 719 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

The United States Supreme Court has held that privacy has federal constitutional dimensions.[31] In the criminal law arena a government's informant[32] as well as a party being investigated or accused of criminal activity must be accorded a right of privacy by the courts.

III. HOUSTON CHRONICLE PUBLISHING CO. V. CITY OF HOUSTON

The issue presented to the court of civil appeals was whether various investigatory records were public information under the Texas Open Records Act. The materials requested by the plaintiffs included offense reports,[33] personal history and arrest records,[34] police blotters,[35] show-up sheets,[36] and arrest sheets.[37] On the effective date of the Texas Open Records Act all of the documents sought were available to the media with the exception of the police blotters.[38] In January 1974, however, the city ceased to allow the press access to certain offense reports.[39] The Texas Attorney General ruled that the name, address, and offense of each arrestee and the disposi-

31. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortions); Katz v. United States, 389 U.S. 347 (1967) (eavesdropping); Griswold v. Connecticut, 381 U.S. 479 (1965) contraceptives). However, the Court has expressly stated that a person's *general* right to privacy is the subject of state law. Katz v. United States, 389 U.S. 347, 350-51 (1967).

32. The underlying rationale of this privilege is that if informers' names were readily available, such persons would be less likely to supply information to law enforcement agencies. In most circumstances anonymity is essential to the continued usefulness of an informant and to protect him from reprisals. *See generally* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 111 (2d ed. 1972); Comment, *An Informer's Tale: Its Use in Judicial and Administrative Proceedings*, 63 YALE L.J. 206 (1953). If the identity of the informer becomes essential to a fair determination of the guilt or innocence of the accused, the privilege ceases. In Roviaro v. United States, 353 U.S. 53 (1957), a narcotics conviction was reversed based on the Government's refusal to reveal the identity of an "informant." The "informant" had participated in the sale of the drugs and might have provided relevant information regarding the defense of entrapment or the Government's accusation that the defendant knowingly participated in the sale of illegal goods. Thus, the party who sought protection was more than a mere informant. Additionally, McCray v. Illinois, 386 U.S. 300 (1967), stands for the proposition that the state does not violate due process or the right of confrontation by failing to reveal the identity of an informant who merely provides facts to establish probable cause for search and seizure. If the Government uses the informer as a witness at trial, however, his true identity must be disclosed based on confrontation and cross-examination principles. Harris v. United States, 371 F.2d 365 (9th Cir. 1967).

33. This report usually includes the offense committed, the location, identification and description of the complainant, the time and place of the offense, any vehicles involved, the identification and description of any witnesses, the weather, and the names of investigating officers. Supplementary reports are often compiled which may include a synopsis of confessions, officers' opinions regarding the investigation, informant's statements, ballistics reports, fingerprint comparisons, and laboratory tests. 531 S.W.2d at 179.

34. These reports compile a chronological history of the arrests and criminal activities of an individual. The reports also include the individual's name, race, sex, alias, place and date of birth, physical description, marital status, occupation, relatives, handwriting exemplar, fingerprints, palm prints, and past arrests. *Id.* at 179-80.

35. These reports include the same information as the personal history and arrest record as well as details of the arrest. *Id.* at 180.

36. This document is maintained by the police during each twenty-four-hour period to document each arrest made. It contains the arrestee's name and age, the place of arrest, the arresting officer, and the modus operandi of the arrestee. *Id.*

37. This record is similar to the show-up sheet in that it reflects the arrests made each day and lists the name, race, and age of each suspect. Further, the place of the arrest, the offense committed, and the names of the arresting officers are compiled. *Id.*

38. *Id.*

39. *Id.* at 181.

tion of each case should be released to the media.[40] According to the opinion of the attorney general the city should cooperate with the press by providing additional information concerning police activities as long as the right of privacy of affected parties was preserved.[41] To comply with this decision the city allowed the media access to the data but vigorously asserted a right to withhold the information at any time.[42]

Justice Curtis Brown recognized that the resolution of the controversy involved a careful weighing of conflicting societal interests.[43] The court first held that the media and the public have a constitutionally protected right of access to information concerning the detection and prosecution of criminals.[44] This right of access, however, must be tempered by an equally compelling need for government secrecy[45] and individual privacy.[46] Justice Brown balanced these interests and expressed the view that the press should have access to all arrest records, police blotters, and show-up sheets.[47] Public access was limited, however, to only the front page of the offense reports which included data such as the offense committed, the time and location of the crime, and the identities of the complainant and investigating officers.[48] The court's conclusion was logical because a public event was involved and a revelation of such limited facts, therefore, constituted only a minimal invasion of privacy.[49] Further, public access to this information certainly would not significantly retard state prosecution.

Other information contained in offense reports, such as statements by informants, confessions, and officers' opinions regarding investigations, should not under the court's holding be made available to the public.[50] The dissemination of this type of data might severely hamper future criminal prosecutions.[51] Similarly, personal history and arrest records which generally consist of an individual's past experiences within the criminal justice system were also ruled confidential.[52] Justice Brown expressed the concern that a contrary holding might result in "massive and unjustified damage to the individual."[53] The court was undoubtedly correct in this judgment. Although law enforcement agencies have an affirmative duty to collect all information related to potential criminal activities, investigative reports can unfortunately consist of hearsay, rumors, and other unreliable facts. As only

40. OPEN RECORDS DECISION No. 18A (March 25, 1974). Actually, this opinion was issued to clarify OPEN RECORDS DECISION No. 18 (Jan. 15, 1974) which held that the information sought was protected from public disclosure under the Texas Open Records Act because it constituted arrest records dealing with the detection and investigation of crime.
41. OPEN RECORDS DECISION No. 18A (March 25, 1974).
42. 531 S.W.2d at 181.
43. *Id.*
44. *Id.* at 186.
45. *Id.*; *see* notes 14-19 *supra* and accompanying text.
46. *Id.* at 188; *see* notes 28-33 *supra* and accompanying text.
47. *Id.* at 185.
48. *Id.* at 186-87.
49. *See* note 26 *supra* and accompanying text.
50. 531 S.W.2d at 187.
51. *Id.*
52. *Id.* at 188.
53. *Id.*

limited efforts have been made to expunge or correct inaccurate data in investigatory files,[54] grave injury would be inflicted upon an individual's reputation by allowing public disclosure of this type of material. The public often places an unquestioned credence upon information contained in an official public document.

IV. CONCLUSION

Houston Chronical Publishing Co. v. City of Houston is an important case in Texas jurisprudence. Justice Curtis Brown of the court of civil appeals dealt with several complex and conflicting policy considerations. In an excellent example of judicial scholarship Justice Brown balanced these interests and ruled that the public had access to particular types of criminal investigatory records.

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54. *See, e.g.*, Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974); Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970). *See generally* Comment, *Expungment of Arrest Records of Exonerated Arrestees*, 16 S. TEX. L.J. 173 (1975).