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Part V
Agencies and the Public

Secrecy and the Access to Administrative
Records

Albert G. Pickerell*

I
THE FEDERAL SCENE

Since 1948 newspaper editors have been expressing anxiety over a "growing tendency" of government officials to suppress public information. In 1950 the American Society of Newspaper Editors authorized its Freedom of Information Committee (which previously had been primarily concerned with reducing barriers to the international flow of information) to undertake a general attack on the "undemocratic practice" of news suppression. The chairman of the committee reported a short time later that a "nation-wide and incessant guerilla warfare was being waged against our right of access to public information." There is "arrogant suppression of news all over the place," he told the 1951 ASNE convention. As a result a concerted campaign has been carried on by several newspaper organizations, especially the ASNE. At least four national associations have set up standing "freedom of information" committees, and similar groups have been formed in many states to fight news suppression on state and local levels.

*Associate Professor of Journalism, University of California, Berkeley.


2 The problem of course is not a new one. "Every newspaperman is used to a nominal tussle over news that reflects some discredit on elected or employed public officials . . . ." This is a conflict as old as government and news of government." James S. Pope, in Cross, The People's Right to Know xv (1953).

3 Editor & Publisher, Jan. 27, 1951, p. 59.

4 ASNE, PROBLEMS OF JOURNALISM 1951, p. 171.

5 For reports of the ASNE see annual volumes of PROBLEMS OF JOURNALISM and the monthly Bulletin of the ASNE. Also taking part in the campaign have been the American Newspaper Publishers Association, the Associated Press Managing Editors Association (see annual volumes of The APME Red Book), Sigma Delta Chi, national journalistic fraternity (see its monthly publication, The Quill), and the National Editorial Association (see its monthly publication, The National Publisher).
Numerous protests of withholding information of legitimate interest to the public have been lodged by these Freedom of Information committees as they sought, by a combination of publicity and legal action, to win broader access to public information. During the first half of 1953, for example, one group processed forty "major" cases, the "majority of which concerned secret government of one kind or another, or outright censorship by autocratic officials."

In 1951 the ASNE commissioned Harold L. Cross, veteran New York newspaper attorney, to continue a preliminary study and to prepare a "comprehensive report on customs, laws and court decisions affecting our free access to information whether it is recorded on police blotters or in the fields of the national government." The result was his *The People's Right to Know*, published in 1953, and hailed as a "manual of arms" for newspaper editors.

The practice of news suppression has not been peculiar to any special type of information or limited to any particular branch of government. One California editor has commented: "... off-the-record statements by public officials are becoming a growing disease in this country. Because the President of the United States holds off-the-record conferences to supply background information, deputy sheriffs are doing likewise."

Two executive orders (one by President Truman and one by President Eisenhower) have been the cause of much criticism, as have the information policies of the Department of Defense and the tight rein on information imposed by Secretary Wilson's directive of March 29, 1955, which permitted release only of material that would "constitute a constructive contribution to the primary mission of the Department of Defense."

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7 Cross, *The People's Right to Know* xv (1953).

8 See also its 1953 CUM. SUPP. No. 1 (1954). For an illustration of the use of Cross' book to gain broader access to public information see Romm, *Opening Up the City Hall*, Nieman Reports, Jan. 1954, p. 8.


Numerous other governmental information policies have been strongly protested.\(^{13}\)

The "freedom of information" campaign reached something of a climax late in 1955 when a special House subcommittee under the chairmanship of Representative John E. Moss of California opened hearings on govern-

Truth Will Out?

\(^{13}\) These include activities of the Office of Strategic Information in the Commerce Department; the Commerce Department's control of the export of technical data; an "excessive" number of secret meetings by congressional committees; and information policies of the Atomic Energy Commission. See, e.g., reports of the ASNE subcommittee on Atomic Information in ASNE, Problems of Journalism 1952 and 1953 and an article by its chairman, Block, *The Fetish of Atomic Secrecy*, Harper's Magazine, Aug. 1953, p. 31. For general discussion by an editor of public information problems and restrictions see statement by Wiggins in *Hearings before the Subcommittee on Reorganization of the Senate Committee on Government Operations*, 84th Cong., 1st Sess., pp. 682–701 (1955). This statement also appears in ASNE, Problems of Journalism 1955, pp. 272–79. One of the most severely criticized administration policies has been the Eisenhower-to-Wilson letter of May 17, 1954, issued during the Army-McCarthy hearings, described by one newsman as "the greatest threat to freedom of the press in our time." Mollenhoff, *Is the Press Alert to a Dangerous Precedent on Executive Secrecy?*, The Quill, Dec. 1955, p. 9. See also Mollenhoff, *A Precedent the Press Should Examine*, Nieman Reports, Jan. 1956, p. 28. "Never has so broad a power of executive right to withhold been asserted." Cross, Editor & Publisher, No. 26, 1955, p. 72.
ment information practices. The subcommittee, said Representative Moss, "will not be conducting an investigation but, rather, will be studying a vital problem." As preparation for its task the group in August, 1955, sent a questionnaire to all federal executive and independent agencies. Among other things, the replies revealed some 30 new classifications that had been devised to keep information unrelated to security from being disclosed and apparently to circumvent the Presidential order which had limited classification of information to three defined categories, "top secret," "secret" and "confidential." Hearings were held November 7–10 and concentrated on the Executive branch. A second set of hearings was conducted in January, 1956, centered on the regulatory agencies. Witnesses for the Civil Service Commission particularly drew heavy fire. The commission had replied to the subcommittee questionnaire thusly: "The authority of the Commission to deny access to or to furnish information from its records and files is based on the inherent power of the executive branch of the Government derived from the Constitution..." Both Commissioner Young and the agency's acting general counsel defended commission rulings that had kept secret such information as the names of eligible candidates for postmaster appointments. They maintained such authority was "inherent" in the Civil Service Act of 1949.

Representative Moss expressed "amazement" that some agencies contended they had an "inherent power" to keep information from the public, describing it as a "fantastically new concept of law." Officials of the agency asserted that they answered all "reasonable" requests for information. They insisted, however, that they alone had the right to judge what was "reasonable." As a result of the hearings, there were indications

15 The four-page questionnaire and the "unevaluated" replies from the agencies, along with the bulk of exhibits, has been issued as a 552-page committee print, Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the House Committee on Government Operations, 84th Cong., 1st Sess. (1955).
16 For example, "for administrative use only," "for official distribution," "for staff use only," "administratively confidential," etc.
18 Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the House Committee on Government Operations, 84th Cong., 1st Sess. 83 (1955).
20 Editor & Publisher, Nov. 19, 1955, p. 13. "We are amazed to learn that Congressman John E. Moss is 'amazed' that some government agencies believe they have an 'inherent' power to control information. This perverted notion that elected or appointed officials can decide what items of non-security information should be released to the public has been the root cause of news suppression at all levels of government. It has provided the basic reason for the Moss Committee investigation." Editor & Publisher, Nov. 26, 1955, p. 6.
the committee would take action to recommend changes in federal statutes. The Civil Service Commission has revised its public information regulations.22

Cross found the right of inspection on the federal level to be a "rare exception," in contradistinction from the law at state and municipal levels, where the right of inspection is the "general rule." He found there was no enforceable legal right to general inspection of federal non-judicial records, the availability thereof being a matter of official grace, indulgence or dis-

Cross reported he had practiced newspaper law for 35 years without encountering a serious case of refusal of access to public records and proceedings. "Now," he commented in 1951, "scarcely a week goes by without a new refusal. The last five years brought more newspaper lawsuits to open records than in any previous twenty-five years."

It is difficult to conceive of any branch of the law that does not require frequent examination of such public documents as police records, vital statistics, tax assessments, motor vehicle records and various other materials to which newspaper organizations have been seeking the right of access. As Justice Botein has pointed out:

The information stored in public records which the news reporter wants to inspect for possible publication may be the same information which the lawyer desires to inspect for possible use in a trial, in the preparation of legal documents, or in the myriad of functions he performs for clients.

The complexities and bigness of government alone make it increasingly difficult for the newsman to dig out information, especially information the public official is reluctant to disclose. As an indication of the problem facing the editor in his quest for "all the news that's fit to print," in San Francisco alone there are some 200 federal agency offices.

The (London) *Economist* thus pictured a British senior civil servant if he had attended opening sessions of the Moss subcommittee hearings: "... he would have returned to Whitehall thankfully, like an explorer escaped from the Jibaro head-hunters." The observations of the *Economist* illustrate sharply basic differences in the United States and England as to the relationship between public officials and the press, as well as differences in status of the contemporary press. Commented the *Economist*:

Nobody ventured to suggest that these self-elected guardians of the public interest were already getting more information from government departments than were the newspapermen of any other country in the world. Nobody seriously challenged the proposition that it was undemocratic and shameful to deny them more information. As for the idea, widely if not universally entertained in Whitehall, that government officials should be

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22 See Cross, *People's Right to Know* 199-201 (1953) for listing of "several factors" (including five "legal doctrines") held responsible for the "state of the law." He deals in separate chapters with Rev. Stat. § 161 (1875), 5 U.S.C. § 22 (1952), and the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. §§ 1001-11 (1952). He describes the former as having been "tortured into a barrier against the public interest" and a situation that "cried aloud for change." *Id.* at 222. He considers the latter as "abject failure" as far as making records available is concerned. New York Times, Dec. 18, 1955, p. 69.


insulated from inquisitive newspapermen by press officers, who should dis-
pense whatever information the department chiefs think fit to give them
and no more— that idea was too arrogant and fantastic to be mentioned
at all.

Even within the United States there are many varying concepts of
"freedom of information." From a practical standpoint, they range from
the somewhat idealistic and sometimes over-zealous position of newsmen
to the "inherent" powers of suppression claimed by some government of-
fficials. According to the charges, the suppression of public information
takes many forms and stems from various motives. There is not room here
for discussion of all of these. One position is that the barriers are supported
principally by public officials who have a basic contempt for the judgment
and intellectual capacity of the American people. Another is that cen-
sorship is used to cover up administrative mistakes and to prevent embar-
rassment.

There is evidence that the complexities of governmental affairs and the
continuing crises of the cold war have reduced the public's interest in public
information and strengthened the idea that security is somehow served by
secrecy. The efforts in recent years of newspaper editors to reduce the area
of restricted information, says one observer, "may prove to be the neces-
sary pioneer work of men with real vision of a grave national problem.

The American Civil Liberties Union published a study on the subject and
expressed "rising concern" that government agencies were "narrowing 'the
market-place of opinion.'" But there has been little general concern, and

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For discussion of distinguishable theories of functions and purpose of mass media see,
e.g., contributions by Siebert and Peterson in MASS MEDIA AND EDUCATION 13-53 (Henry ed.
1954); see also SIEBERT, PETTERSON AND SCHRAMM, THE FOUR THEORIES OF THE PRESS (unpub-
lished manuscript in Stanford University library, Division of Communication and Journalism,
1955); and HOCKING, FREEDOM OF THE PRESS (1947).

E.g., "A free people cannot properly exercise their franchise unless they know the facts
about the public business. And there can be no withholding of the facts about the public busi-
wonder whether the initials ASNE do not really stand for 'American Society for No-restrictions
Everywhere.' So vast is the flood of rhetoric and report about Freedom of Information, so fre-
quent and so ferocious are the pronouncements of editors and publishers on the subject, that
one is sometimes impelled to seek out a Noah to show the way into an ark of dry silence away
from the deluge of declaration." Markel, Bulletin of the ASNE, March 1, 1956, p. 7. "Moderation,
in my opinion, will accomplish much more for freedom of information than an evangelical

See, e.g., The APME Red Book 1954, p. 190, and Wiggins, A Failing Faith in the People

"In sum, secrecy may be a device to conceal ignorance and error as well as knowledge
and success." GELLHORN, SECURITY, LOYALTY AND SCIENCE 50 (1950).

RAYMOND, THE PEOPLE'S RIGHT TO KNOW 45 (1955).

Id. at 3. This ACLU report concludes that the "abuses of power in Federal agencies to
suppress information of value and interest to the nation were never so rampant as now." Id. at
45. For another general report on the subject see Stone, SECRECY IN GOVERNMENT, 24 EDITORIAL
newspaper editors themselves, in the opinion of some of their spokesmen, have in some instances not taken sufficient interest in the problem. If the suppression of public information is as "arrogant" and "rampant" as some observers claim, the situation certainly presents a grave threat to the proper functioning of democratic processes.

II

THE CALIFORNIA PICTURE

In the winter of 1951 the Riverside Press-Enterprise learned that two drunk driving arrests had been made by the Riverside police department, the reports of which had been withheld from police records. Thus was the newly organized Freedom of Information committee of the California Newspaper Publishers Association (hereinafter referred to as the CNPA) provided with its first case of alleged news suppression. Since then the CNPA and its Freedom of Information committee have been active in this field, sponsoring legislation and lodging numerous complaints that information of a legitimate interest to the public was being concealed. At the 1953 legislative session two bills dealing with access to public information were passed, both actively supported by the CNPA and the League of California Cities. The first was Assembly Bill 339 which was signed into law as Government Code sections 54950-958 and makes "open public meeting" provisions for all local governmental agencies. The act does not apply to state agencies but, on the basis of a recent opinion of the Attorney General, now appears to apply to legislative bodies of chartered cities. City attorneys of charter cities had previously held both ways on the subject.

36 HAEZER, CALIFORNIA AND 'THE RIGHT TO KNOW' (unpublished master's thesis in University of California Library, Berkeley, 1955). See also Berkeley Gazette, Nov. 27, 1951, p.3.
37 For examples of these protests see files of The California Publisher, monthly publication of the California Newspaper Publishers Association.
39 27 Ops. CAI. ATT'Y GEN. 123 (No. 56/40, Mimeographed, March 2, 1956), holding invalid a San Diego city council resolution restricting attendance at "council conferences" by requiring citizens to register and further to agree to remain silent unless requested so to speak. "The right and ability of the people to have free and open access to all meetings of local legislative bodies is vital to the preservation of an informed electorate and constitutes an elemental safeguard to democratic government. The existence of devices, loopholes or subterfuges which tend to 'cabin, crib or confine' the public from free access to the meetings and deliberations of their local governmental agencies is contrary to the public policy of this State." Id. at 131.
40 See the correspondence in the office of League of California Cities, Berkeley.
Governor Warren objected to the bill’s failure to cover state agencies, commenting: 41

There isn’t any reason at all why we should have a law for local government and then refuse to have the same thing for State government. I personally believe it would be a good thing to have such a law for all branches of government, including the legislature. Some of the worst things that have happened in government stemmed from secrecy. It should be avoided.

The second proposal was Assembly Bill 1160, introduced by Frank Luckel of San Diego as a result of refusal by county health authorities to allow the San Diego Union and Evening Tribune access to their records. The bill proposed to add a section to the Government Code, reflecting the “intent” of the legislature, 42 and supporters of the bill urged passage because “appeal courts are known to pay close attention to ‘intent’ whenever a law is challenged.” 43 The bill received a pocket veto by Governor Warren, who referred to it as a “cutie” and as merely a statement of policy that did not change existing law. The governor said he vetoed the bill because it was a “pious evasion of responsibility on the part of the Legislature .... I believe there is a greater likelihood the Legislature will pass effective legislation if nothing is on the books than if there are a few pious phrases that are not implemented by positive law.” 44

On June 2, 1953, Senator George Miller introduced a resolution to create a special Senate investigating committee on Governmental Organizations. 45 He later announced the group would conduct a study of the availability to the public of official records. Newspaper reporters, editors, and publishers were asked to help the Senate committee by reporting specific instances of refusals or difficulties experienced in attempting to gain access to official records of state, county, or city governments. 46

41 San Francisco Chronicle, July 26, 1953, p. 14. A bill that would have applied similar “open meeting” requirements to all state agencies was introduced in the 1955 legislature by Sheridan N. Hegland. The bill, Assembly Bill 18, was never reported out of the Committee on Governmental Efficiency and Economy.

42 Assembly Bill 1160 would have added the following section to the Government Code: “Except as otherwise provided by law, all official records, reports, or other official documents, or any state agency, or of any county, city and county, city or of any district, or any public agency of any kind, or of any of the officers and employees thereof, shall be available to the public for inspection during business hours, and any persons shall be permitted to inspect such official records, reports, or other official documents.”

43 The California Publisher, Aug. 1953, p. 3.


45 Sen. Res. No. 157 in 3 Journal of the Senate 3484 (1953 reg. sess.), authorizing and directing the committee “to ascertain, study and analyze all facts relating to any department or agency of state or local government in California, including (but not limited to) its organization, functions and personnel and administration; the evaluation of all phases of its program and the relations of such agencies or departments to newspapers, radio and television in carrying out such program ...”

In January, 1954, the committee posed four questions to some 66 state agencies and boards:47

1. What records in the keeping of your office are by law confidential? Please furnish citations for such decisions.
2. What other records in your office do you consider as not being open to inspection? State reasons.
3. What records in your office are not now confidential which you believe should be made confidential? State reasons.
4. Are any records now confidential by law which you believe should be open to the public?

The responses, along with opinions of the attorney general and the legislative counsel on the subject, were published by the committee in May, 1955. The 148-page report contains the full replies received from each agency, together with such exhibits as were presented.48 The committee held hearings in November, 1955, and Senator Miller has said other hearings would be conducted during 1956, with the expectation that legislation would be recommended to the 1957 session.49

Several sections of the codes of California relate to public records and their inspection. Two sections define public writings.50 Others provide that citizens are entitled to inspection and, upon demand, to certified copies of public writings.51 These definitions of "public writings" extend well beyond the general common law definitions.52 The "stark brevity" of the California

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47 Calif. Senate Special Committee on Governmental Administration, Public Records Survey (Partial Report, May 1955). This report will hereinafter be cited as Public Records Survey.
48 Ibid.
49 Letter from Senator George Miller, to writer, September 30, 1955: "It is our hope . . . we will be able to develop some better law on the subject to remove the areas of doubt which now exist."
50 "Public writings" are defined in CAL. CODE CIV. PROC. § 1888 as follows: "Public writings are: 1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country; 2. Public records, kept in this State, of private writings."
51 CAL. CODE CIV. PROC. § 1894 provides: "Public writings are divided into four classes: 1. Laws; 2. Judicial records; 3. Other official documents; 4. Public records, kept in this State, of private writings."
52 The following is a frequently cited common law definition: "A public record is a written memorial made by a public officer . . . [It] is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done." Amos v. Gunn, 84 Fla. 285, 343, 94 So. 615, 634 (1922).
SECRECY AND ACCESS TO RECORDS

definitions has left wide scope for judicial interpretations, but actually there have been few cases bearing on these statutes. For the most part those that have been decided have ruled merely whether a particular record falls within the provisions of the statutes and do not lay down any broad general rules that can be followed. Generally there is no single test that may be applied to determine what constitutes a public record. The only language of general applicability in the various California cases is found in Coldwell v. Board of Public Works to the effect that "the only means of deciding whether or not a document is a public writing is by determining whether or not it falls within the statutory definition.

On the surface California's statutes defining public records and the right of inspection appear to be "liberal." The general statutory provisions seem clearly to indicate the legislature intended that only those matters specifically made confidential by law should be excepted from public view. In passing Assembly Bill 339 in 1953 the legislature declared the following as a matter of policy:

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in their delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

And in Assembly Bill 1160, the legislature declared as its "intent" that "all official records, reports, or other official documents" should be available to the public for inspection, "except as otherwise provided by law."

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53 Cross, in Bulletin of the ASNE, June 1, 1954, p. 7.
54 The mere fact that a writing is in the custody of a public agency does not make it a public record. Whelan v. Superior Court, 114 Cal. 548, 46 Pac. 468 (1896); Coldwell v. Board of Public Works, 187 Cal. 510, 202 Pac. 879 (1921). A test frequently used by the courts is that "in order that an entry or record of the official acts of a public officer shall be a public record it is not necessary that such record be expressly required by law to be kept, but it is sufficient if it be necessary or convenient to the discharge of his official duty." People v. Tomalty, 14 Cal. App. 224, 231, 111 Pac. 513, 515 (1910). See also People v. Pearson, 111 Cal. App.2d 9, 244 P.2d 35 (1952).
55 187 Cal. 510, 202 Pac. 879 (1921).
56 Id. at 518, 202 Pac. at 882.
57 Consider, e.g., instructions by the governor in a letter by his departmental secretary to all department heads: "[T]he Governor [has] instructed me to notify the Department of Public Health that any report it prepares should be made available to the press unless there is a specific prohibition in law against it. This may be taken as policy by all departments." Letter from M. F. Small, Departmental Secretary to All Department Heads, Jan. 7, 1952, in Public Records Survey, supra note 47 at 140. The Controller replied to the Miller committee inquiry: "Unless made confidential by law, we regard all records in the custody of this office as being open to public inspection." Id. at 77.
58 CAL. GOVT. CODE § 1227.
59 This was the bill which received a pocket veto by Governor Warren. See note 42 supra.
The phrase "and other matters" in Political Code section 1227 would seem to imply that the legislature intended to extend the right of inspection to more than just "public records." And the courts have been "liberal" in their interpretation of the phrase "other matters." In *Musket v. Department of Public Service*, it was held that the papers of a municipal utility were not "strictly speaking, public records," but access was granted on the ground they were "other matters" of a general public concern. In *Coldwell v. Board of Public Works* the court held that a private person had the right to inspect the preliminary estimates and plans prepared in the office of the city engineer of the City and County of San Francisco, in connection with the Hetch-Hetchy project, even though the documents were memoranda prepared for use in the office and had not been formally adopted as the official acts of the engineer. Inspection was granted on the basis they were "other matters" in which the "whole public" had an interest. In both cases the petitioner gained access to documents sought, and both reflect a liberal point of view in respect to the public's right of inspection.

In reaching its conclusion in *Musket v. Department of Public Service* that the documents "strictly speaking" were not public writings, the court adopted a policy of consolidating the statutes, resulting in a restrictive definition of "public writings." According to section 1888 of the Code of Civil Procedure public writings are the "written acts or records of the acts" of public bodies or officials. Section 1894 then divides public writings into four classes: "law, judicial records, other official documents, and public records, kept in this state, of private writings." Consolidating the language of the two statutes, the court held in the *Musket* case that papers in question must not only be "official documents" but must also be the "written acts or records of the acts" of public officials or bodies. In other words, it is not enough that they be written acts or records of acts or official documents—they must be both.

This "doctrine of exclusion" has been consistently applied by the attorney general in opinions rendered for various state agencies. And the

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59 Section 1227 provides: "The public records and other matters in the office of any officer, except as otherwise provided, are at all times during office hours open to inspection of any citizen of this state." (Emphasis added.)

60 35 Cal. App. 630, 170 Pac. 653 (1917).

61 187 Cal. 510, 202 Pac. 879 (1921).

62 A student writer hailed the *Coldwell* case thus: "This case establishes the sound rule that a citizen or organization of citizens may inspect all data concerning any activity of the state or municipality irrespective of their character as public records . . . . The section of the Code of Civil Procedure [section 1892] which opens all public writings to inspection has been made mere surplusage by this decision. Everything covered by it and much additional material is accessible under the Political Code . . . ." Note, 10 Calif. L. Rev. 346, 347–48 (1922).

63 35 Cal. App. 630, 170 Pac. 653 (1917).

Miller committee survey shows these opinions have been widely relied on by many agencies other than those for whom they were prepared. It is not difficult to see how this "doctrine" could have been conceived. Section 1894, certainly, has little meaning standing by itself. However, one could question whether the office of the attorney general was required to construe the public records statutes in the restricted manner in which it has. But conceding the attorney general felt constrained by the dicta of the *Mushet* and *Coldwell* cases to follow the *Mushet* "doctrine of exclusion" there appears to have been no requirement for the attorney general to have interpreted "records of the acts" so narrowly.

This is illustrated in an opinion prepared in response to an inquiry from the County Counsel of San Bernardino raising the question of whether lists of names and addresses of students attending a public high school were "public writings" within the meaning of the statutes. The question concerned lists of pupils maintained by school officials in preparation of reports required under the Education Code and also to serve as aids in school administration. The attorney general, applying the "doctrine of exclusion" of the *Mushet* case, concluded the "records in question are not public records . . ."\(^6^5\) It is significant to note that the attorney general refers to the lists as "records." The preparation of such lists—for whatever purpose—certainly is an act. The attorney general still could have applied the *Mushet* analysis and found such records to be "official documents" that were also "records of acts" and hence to be "public writings."

Also it is to be noted that subdivision 3 of section 1894 of the Code of Civil Procedure refers to "other official documents," which could be interpreted to imply that the legislature intended public writings to include more than "written acts or records of acts." Otherwise, why not "other official records," thus making it consistent with subdivision 2—"judicial records"?

The right of inspection is not an absolute or unqualified right, and even though a document is a public record it is not automatically open to inspection. Section 1892 of the Code of Civil Procedure provides every citizen has a right to inspect any public writing "except as otherwise expressly provided by statute," and section 1227 of the Government Code permits inspection of public records and other matters "except as otherwise provided." For reasons of public policy, the legislature in many instances has specifically declared certain records to be confidential or not open to inspection. Also there are particular relationships which the legislature has .

\(^6^5\) 16 Ops. Cal. Atty Gen. 163, 164 (1950). Cross has warned newspaper editors to avoid "routine, indiscriminate requests" for opinions of attorneys general. "These men by their official position are advocates of those very office holders whom you are seeking to force to permit that access," The Publishers' Auxiliary, Feb. 16, 1954, p. 1. See also Editor & Publisher, April 25, 1953, p. 106. "Opinions of the attorney general are not of controlling authority, but in the light of the relation of the office to the general government, they are regarded as having a quasi-judicial character and are accorded substantial weight by the courts." 6 Cal. Jur.2d 97 (1952).
declared should be protected and preserved inviolate. Section 1881(5) of
the Code of Civil Procedure provides: "A public officer cannot be examined
as to communications made to him in official confidence, when the public
interest would suffer by the disclosure."

On several occasions the courts have recognized section 1881(5) as an
exception to the public records statutes.66 Also it has been held that public
policy demands certain types of communications and documents be treated
as confidential even though they are in the custody of a public officer and
are of a public nature.67 In the exercise of their investigative powers, gov-
ernment agencies frequently find it necessary or convenient to solicit data
that would be available only with the understanding it will be kept con-
fidential and not indiscriminately disclosed. Undoubtedly there are situa-
tions in which it is in the public interest that a public official and the integ-
ritv of his information be protected. The statute would clearly seem to
place the burden on the custodian of the records to demonstrate that "the
public interest would suffer by the disclosure," to use the words of sec-
ction 1881(5).

It appears there should be some sort of control over the public official
in the exercise of this privilege, but this presents a difficult problem. As
Hocking has commented, "We say recklessly that [readers or listeners]
have a 'right to know'; yet it is a right which they are helpless to claim,
for they do not know that they have a right to know what as yet they do
not know."68

The Miller committee survey shows that public officials in many in-
stances have assumed a good deal of authority to withhold information and
that confusion and inconsistencies exist among the various agencies. Sev-
eral of them comment on the uncertainty of the law and declare that legis-
lation to clarify the situation would be helpful.69 Some agencies regard the
information submitted in application for a license and the grades made in
an examination to be confidential.70 Others do not.71 The Structural Pest
Control Board takes the interesting position that since sections of the
Structural Pest Control Act list certain documents as public records, "it
would, therefore, follow, that those not named would be confidential.72

The Miller committee survey further noted:73

66 San Francisco v. Superior Court, 38 Cal.2d 156, 238 P.2d 581 (1951); Coldwell v. Board
of Public Works, 187 Cal. 510, 202 Pac. 879 (1921).
68 Hocking, FREEDOM OF THE PRESS 170-71 (1947).
69 E.g., The Department of Public Works states: "Passage of legislation to remove this
uncertainty [as to the confidentiality of matters involved in prospective or pending litigation]
would be highly desirable." Public Record Survey, supra note 47 at 136.
70 E.g., Board of Optometry, id. at 127, and Board of Architectural Examiners, id. at 117.
71 E.g., Board of Medical Examiners, id. at 125.
72 Id. at 128. The Board of Chiropractic Examiners takes a similar view, id. at 118.
73 Public Records Survey, supra note 47 at 7. "Newspapers generally, though with numer-
ous exceptions, enjoy more and better access to these sources of news by means of the sugar
While the newspapermen, because they are expected by the public to report on public affairs, encounter many difficulties in carrying out this mission, theirs is not nearly so difficult as is the lot of the individual taxpayer.... For newspapermen, wise in the ways of obtaining facts, usually manage to ferret out the information they seek despite the obstacles encountered.

But the public's right to information about public affairs should not be based on such a haphazard, illogical process. It should not be left to official grace, indulgence or discretion. Public policy calls for some speedy objective process by which denials of access may be tested by legal standards clearer and more uniform than now exist. The right should be subject only to those limitations that are clearly and urgently in the public interest. The determination of just where this public interest lies is, in practice, a difficult problem. Newspaper editors themselves are not in agreement.

The argument is made that the public interest is best served "if ideas can be fully and freely exchanged." Obviously it is not in the public interest that every piece of correspondence of every public official be open to indiscriminate inspection. But in a democratic society the public should be entitled to know the considerations involved in public affairs decisions, as well as the results.

Naturally, no reasonable person wants access to information that legitimately should be concealed in the interest of national security and defense, and would not claim right of inspection of records pertaining to state secrets, diplomatic communications, confidential military matters, and the like. Also, it is recognized there are cases in which public policy demands that certain proceedings and papers be kept from public view—ranging, for example, from some personnel records to deliberations of the Supreme Court. Should the public be told all (the position of the overzealous "right to know" advocates), or what some person in authority

of voluntary processes than they could hope to get by the vinegar of compulsion under the present state of the law." Cross, The People's Right to Know 5 (1953).

"It is not enough merely to recognize the important political justification for freedom of information. Citizens of a self-governing society must possess the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity. This right must be elevated to a position of highest sanctity if it is to constitute an effective bulwark against unresponsive leadership." Notes, Access to Official Information: a Neglected Constitutional Right, 27 Ind. L.J. 209, 212 (1952).


Peterson, The Legislatures and the Press, 27 State Government 223 (Nov. 1954). "Too often the members of the press assume that public servants, as a group, are not entitled to confidence with respect to their conscientious endeavor to discharge their duties honorably." Id. at 224.

But cf., "Only documents which present ultimate actions should be accessible to the public. Those which are merely part of the preliminary steps by which the conclusion was reached should become public only in the discretion of the particular agency." Yankwich, Book Review, 48 Nw. U.L. Rev. 527, 530 (1953).
thinks is wise or sufficient for them to know (the position of officials who claim an *inherent* power to suppress)? The answer, of course, is some place in between. Such decisions should be by legislative determination and not left loosely to the custodian of the records.

Absolutes are neither desirable nor attainable, and, as Cross points out, no perfect law is to be expected. The situation in California is considerably better than that found on the federal level and in many states. But still, on the basis of existing cases and opinions of the attorney general, one is unable to determine with any degree of certainty what are public records and what are not. In any “tight” cases that might now arise, California statutes as presently interpreted do not appear to give adequate recognition to the importance of the market-place of public opinion in a free society. As Macaulay said, “...nothing could be more irrational than to give power and not give the knowledge without which there is the greatest risk that power will be abused.”

The degree of confusion and inconsistency evidenced by agency responses to the Miller committee alone indicates clearly the need for legislative action. There is obvious need for a new and more positive law. One approach might be to declare *everything*, in effect, to be a public writing and open to inspection, unless expressly excepted by statute. This would require a careful study to determine just what specific documents the legislature desired to declare by law to be confidential. In instances in which the legislature in the past has desired that government documents be withheld from public inspection because of the nature of the records, the legislature has known how to legislate to that end; in fact, it has done so on at least twenty-four occasions.

It is true such procedure may result in oversights and omissions, producing occasional “hard” cases for the courts. But that is the lesser evil than a continued tendency to narrow the information available to the citizen concerning the operation of his government.

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78 Cross, in Bulletin of the ASNE, March 1, 1955, pp. 9, 10.
79 4 MACAULAY, HISTORY OF ENGLAND 429 (Harper ed. 1879).
80 The present statutory definition of “public writings” could be interpreted to do this. Public writings are “written acts or records of the acts” of official bodies or public officers (CAL. CODE CIV. PROC. § 1888). Is not a letter a “written act or record of the act”—the *act of communicating*? See LA. REV. STAT. § 44:1 (1950) for a broad, general definition of public records.
81 See Opinion of Legislative Counsel No. 110, July 21, 1953, in Public Records Survey, supra note 47 at 17, for list of twenty-four statutes declaring documents confidential. “In general the statutes declaring certain documents confidential are indexed only by the subject matter. Consequently, a complete list of such statutes cannot be prepared without a careful examination of all the laws of the State.” Ibid. A survey of New Jersey statutes discloses sixty-seven known statutes that classify certain documents as “public records” and/or “records open to public inspection.” YOUNG, PUBLIC RECORDS IN NEW JERSEY (Rutgers University Press Research Survey Study No. 9, 1955).