

1953

# Margaret Conover and Lorraine Beach v. Board of Education, Nebo School District, et al : Brief of Amici Curiae

Utah Supreme Court

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John D. Rice; Attorney for Amici Curiae;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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MARGARET CONOVER and LORAINÉ  
BEACH,

*Plaintiffs and Appellants,*

— vs. —

BOARD OF EDUCATION, NEBO SCHOOL  
DISTRICT, HAROLD CHRISTENSEN,  
LAVON PAYNE, L. J. CRABB, WIL-  
LIAM F. BROADBENT, DR. JESSE  
ELLSWORTH, Board Members and B. L.  
ISAACS, Clerk of said Board,

*Defendants and Respondents.*

---

JOHN F. FITZPATRICK, Publisher of the  
Salt Lake Tribune, a daily newspaper  
published in Salt Lake City, Utah,  
CHARLES W. CLAYBAUGH, Publisher  
of Box Elder Journal, a weekly news-  
paper published in Brigham City, Utah,  
HARRISON CONOVER, Publisher of  
the Springville Herald, a weekly news-  
paper published in Springville, Utah and  
NORMAN J. FULLENBACH, Publisher  
of the Richfield Reaper, a weekly news-  
paper published in Richfield, Utah.

*Amici Curiae.*

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**BRIEF OF AMICI CURIAE**

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JOHN D. RICE,  
*Attorney for Amici Curiae.*

**FILED**  
NOV 21 1953  
Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT of the STATE OF UTAH

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MARGARET CONOVER and LORAIN BEACH,

*Plaintiffs and Appellants,*

— vs. —

BOARD OF EDUCATION, NEBO SCHOOL DISTRICT, HAROLD CHRISTENSEN, LAVON PAYNE, L. J. CRABB, WILLIAM F. BROADBENT, DR. JESSE ELLSWORTH, Board Members and B. L. ISAACS, Clerk of said Board,

*Defendants and Respondents.*

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Case No. 8048

JOHN F. FITZPATRICK, Publisher of the Salt Lake Tribune, a daily newspaper published in Salt Lake City, Utah, CHARLES W. CLAYBAUGH, Publisher of Box Elder Journal, a weekly newspaper published in Brigham City, Utah, HARRISON CONOVER, Publisher of the Springville Herald, a weekly newspaper published in Springville, Utah and NORMAN J. FULLENBACH, Publisher of the Richfield Reaper, a weekly newspaper published in Richfield, Utah.

*Amici Curiae.*

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## BRIEF OF AMICI CURIAE

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John F. Fitzpatrick, Publisher of the Salt Lake Tribune, a daily newspaper published in Salt Lake City, Utah, Charles W. Claybaugh, Publisher of Box Elder



Journal, a weekly newspaper published in Brigham City, Utah, Harrison Conover, Publisher of the Springville Herald, a weekly newspaper published in Springville, Utah and Norman J. Fullenbach, Publisher of the Richfield Reaper, a weekly newspaper published in Richfield, Utah, having received leave to be heard herein as Amici Curiae, submit this Brief to present constitutional questions with relation to the question of access to the records of the Clerk of the Board of Education, Nebo School District, Spanish Fork, Utah.

Amici Curiae assert that the opinion from the office of the Department of Public Instruction of the State of Utah, E. Allen Bateman, Superintendent, to the Clerk of the Board of Education, Nebo School District, Spanish Fork, Utah, advising the Clerk that the Board of Education should determine whether or not tentative minutes should be released to other than the members of the Board, and that the Board could withhold tentative copies of minutes until their next meeting, results in a violation of the Constitution of the United States of America and of the State of Utah, by restraining and abridging the freedom of the press. The later action of the Clerk, following the receipt of this opinion, results in a previous censorship and a stifling of the printing of news of public interest.

The Findings and Judgment of the District Court justifies the withholding by the Clerk of the record of the meeting, because such record is called a tentative record and because it is held that the record kept by the



Clerk does not become the official record until placed in a journal. The Court, in its Findings and Judgment, allows the Clerk to withhold entering the record in the journal as official minutes of the meeting until approved by the Board at a following meeting. (Findings of Fact 4, 6, 7, and 8, R. 28-30, incl.).

Against these Findings and Conclusions of Law and Judgment of the Court, based on such Findings and Conclusions, Amici Curiae present the Constitution of the United States of America and the Constitution of the State of Utah and the Statutes of the State of Utah.

### THE ISSUES

1. This Brief is written on the constitutional right of the Press to publish the official records of the Board currently, and not at some future date to be determined by some Department of the Executive or an Administrative officer.

2. That the action of the Clerk, in withholding the record of the meeting until the records were approved by the Board, is based, in part at least, upon the advice given by the State Superintendent of Public Instruction in the letter to the Clerk of the Board, which is dated February 16, 1953 and is found at pages 3 and 4 of Appellants' Brief.

3. That the Findings of the District Court to the effect that the notes of the proceedings are not public records until entered in the journal, is contrary to law.

4. That the advice of the Superintendent of Public Instruction is contrary to law, in that said letter advises that the minutes of a Board of Education do not become official until they have been approved by the Board.

5. That the Findings, and especially Finding No. 8 and the Judgment based thereon, is contrary to law.

6. That the Finding and Decree of the Court, based upon the premise that the Clerk's notes need not be entered in the journal until approved by the Board at the following meeting of the Board is a reasonable exercise of discretion on the part of the Clerk, is erroneous and contrary to law.

7. That the Findings and Conclusions and decisions of the Court, based upon the premise that it is unreasonable to demand the minutes the day following the meeting is erroneous and contrary to law.

## ARGUMENT

Argument on the foregoing issues will be made collectively, since they are all interrelated with the position which the Amici Curiae wish to present to this Court.

It is well known that in most communities, the actions of a School Board are of great interest to the citizens in the community. This is accentuated where the population is small and where the building of schools or improvements, or letting of contracts and employment of teachers is of great concern to the local citizenry.

Most newspapers do not have sufficient staff to send reporters to all of the meetings which occur in the district served by the newspaper.

The basis of the argument of *Amici Curiae* can best be illustrated by the following quotation from Cooley's *Constitutional Limitations*, Vol. II, Chapter XII, page 937:

“As it (the newspaper) has gradually increased in value, and in the extent and variety of its contents, so the exactions of the community upon its conductors have also increased, until it is demanded of the newspaper publisher that he shall daily spread before his readers a complete summary of the events transpiring in the world public or private; so far as those readers can reasonably be supposed to take an interest in them, and he who does not comply with the demand must give way to him who will.”

To prevent access to the record of a meeting of the Board of Education, either on the premise of the paragraph 1 of the letter of the Superintendent of Public Instruction referred to before, or upon the ground that the record of the meeting is not a public record until placed in the journal, after having been approved by a Board at a subsequent meeting, defeats the purpose of a newspaper in serving the public.

## I.

TO HOLD THAT THE RECORD SHALL NOT BE MADE AVAILABLE TO THE PUBLIC UNTIL THE NEXT MEETING OF THE BOARD, VIOLATES THE CONSTITUTIONAL PROVISIONS OF THE UNITED STATES OF AMERICA, AMENDMENT NO. 1, AND AMENDMENT NO. 14, SECTION 1 AND THE PROVISIONS OF THE CONSTITUTION OF THE STATE OF UTAH, SECTION 15 OF ARTICLE 1.

The following excerpts are from Cooley's Constitutional Limitations, 8th Ed., Vol. 2, page 884 at 886:

“\* \* \* Their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and measures \* \* \*.”

“To guard against repressive measures of which persons in power might secure themselves and their favorites from just scrutiny and condemnation was the general purpose; and there was no design or desire to modify the rules of the common law which protected private character from detraction and abuse, except so far as deemed necessary to secure to accused parties a fair trial.”

See also page 936, et seq. of the same work.

See Selected Essays on Constitutional Law Under Auspices of Association of American Law Schools, Vol. 2, under the heading, “Limitations on Government Power,” pages 1060 to 1080.

The word "news" means no more than apparently authentic reports of current events of interest.

Associated Press vs. International News Service,  
245 Fed. 244, 2 ALR 317, affirmed at 248 U.S.  
215, 63 Law Ed. 211, 39 Supreme Court 68, 2  
ALR 293.

It will be seen that the very definition of newspaper suggests that it is a publication which gives the general current news of the day.

See *Lee vs. Beach Publishing Co.*, 173 S. 440.

And, as said in the case of *Coleman vs. MacLennan* (Kansas), 98 P. 281, at 284, where the Court quoted from Judge Cooley's work in part as follows:

"\* \* \*The evils to be prevented were not the censorship of the press merely, but any action of the government by 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."

And the Court, in the *Coleman vs. MacLennan* case said:

"This doctrine was recently authoritatively stated by the Supreme Court of North Carolina as follows: 'In its broadest sense, freedom of the press includes, not only exemption from censorship, but security against laws enacted by the

legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion.' ”

And see *Cowan vs. Fairbrother*, 118 N. C. 406, 24 SE 212, 32 LRA 829, 54 Am. State Reports, 733 at 740.

Amendment No. 1 to the Constitution of the United States of America provides that Congress shall make no law abridging the freedom of speech or of the Press.

Amendment No. 14, Section 1, to the Constitution of the United States of America provides that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States.

Section 15 of Article 1 of the Constitution of the State of Utah, provides that no law shall be passed to abridge or restrain the freedom of speech or the Press.

In the case of *Near vs. Minnesota*, 283 U. S. 697, 75 Law Ed. 1357, the question arose as to the right to enjoin the publication of a newspaper. The Court, speaking through Mr. Justice Hughes said:

“The question is whether a statute authorizing such proceedings in restraint of the publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the Constitutional protection, it has been generally, if not universally considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”

The Court further said:

“It is no longer open to doubt that the liberty of the press and of speech is within the liberties safeguarded by the two purpose clause of the Fourteenth Amendment from invasion by state action.”

At page 1366 of the Law Edition citation, the Court quoted:

“The liberty deemed to be established was thus described by Blackstone: ‘The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.’ ”

On that same page, there is a statement, which says:

“The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, ‘The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by the constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also.’ ”



Justice Hughes further said on page 1369 of the Law Edition:

“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. Public officers whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provision of state constitutions.”

In the case of *Bridges vs. California*, 314 U. S. 252, 86 Law Edition, 192, the Supreme Court, speaking through Mr. Justice Black, at page 206 of the Law Edition, said:

“We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. 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 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. Here, for example, labor controversies were the topics of some of the publications. Experience shows that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public 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. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a ‘reasonable tendency’ to obstruct justice in a pending case.

“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 abridgment 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.

"For these reasons we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert."

11 Am. Jur., Section 323, page 1118, stated:

"Although there is a dearth of authority on the question, it seems that executive restraints on the constitutional right of freedom of speech and of the press are forbidden on the theory that since one is rendered liable for the abuse of the right, no one may suppress in advance the publication of the printed sentiments of another citizen by then assuming to determine the propriety thereof."

And in Section 320 of the same work, at page 1112, it is said:

"Under the right of the freedom of speech and of the press, it is generally recognized that the public have a right to know and discuss all judicial proceedings, unless such right is expressly interdicted by constitutional provisions or unless the publication is of such nature as to obstruct or embarrass the court in its administration of the law."

And in the same Section, at page 1111, it is stated:

“In its broadest sense, the phrase ‘freedom of the press’ includes not only exemption from censorship, but security against laws enacted by the legislative department of the government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion.”

The journal kept by the Clerk is a public record and this is so whether or not the record is called tentative notes or is placed in an official book.

Section 53-6-15, Utah Code Annotated, 1953, provides that the Clerk shall keep an accurate journal of the proceedings of the Board.

Section 78-26-1, Utah Code Annotated, 1953, defines Public Writings.

Section 78-26-2, Utah Code Annotated, 1953, gives the right of inspection of public writings.

The provisions of Sections 53-6-15, 78-26-1 and 78-26-2, *supra*, must be read together, in order to arrive at the intent of the Legislature and to ascertain the meaning of the provision requiring the keeping of a journal by the Clerk.

*Accord vs. Booth*, 33 U. 279, 93 P. 734;

*Storen vs. Sexton*, 209 Ind. 589, 200 NE 251, 104 ALR 1359;

*Price vs. Tuttle*, 70 U. 156, 258 P. 1016;

*Dunn vs. Bryan*, 77 U. 604, 299 P. 253;

*Norville vs. State Tax Commission*, 98 U. 170, 97 P. 2d 937, 126 ALR 1318;

*General Petroleum vs. Smith*, 157 P. 2d 356, 158 ALR 364;

*Nebraska District vs. McKelvie*, 104 Neb. 93, 175 NW 531, 7 ALR 1688;

*Thornton vs. Anderson*, 64 SE 2nd 186, 24 ALR 2d 1079;

*Haggett vs. Harley*, 40 A. 561, 41 LRA 362.

It is the contention of Amici Curiae that the record kept by the Clerk is a public record and must be immediately available.

In the case of *Amos vs. Gunn*, 84 Fla. 285, 94 S. 615, on the second rehearing of a matter relating to the validity of an Act of the Legislature, the Court, at page 634 stated:

“But what is a public record is a question of law. A public record is a written memorial, made by a public officer and that officer must be authorized by law to make it. See *Colman vs. Commonwealth*, 25 Grat. (Va.) 865, 2 Bouvier’s Law Dictionary 429; *State vs. Anderson*, 30 La. Ann. 557, Black’s Law Dictionary.”

“A public record 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. 23 R.C.L. 155; Robison vs. Fishback 175 Ind. 132, 93 NE 666, LRA 1917B, 1179, Ann. Cas. 1913B, 1271; Bell vs. Kendrick, 25 Fla. 778, 6 S. 868.”

*State ex rel Noe vs. Knob*, 194 La. 834, 190 S. 135; *Holcomb Sheriff vs. State ex rel Chandler*, 200 S. 739.

It is the contention of Amici Curiae that the record made by the Clerk is the journal, whether called tentative notes or minutes and therefore, finding No. 6 (R. 28) is not supported by the law.

## II.

### THE CLERK’S RECORD OF THE MEETING OF THE BOARD IS A PUBLIC RECORD.

In *Burton vs. Tuite, City Treasurer*, 78 Mich. 363, 44 NW. 282, 7 LRA 73, at page 76, the Court held that a Title Abstracter must have access to City Tax File Books though no statute required them to be kept, and the Court said:

“This right of relator, claimed under the Statute, is denied, first, on the ground that these books are not public records, because there is no express statutory provision anywhere that such books shall be kept. These books are made up in the first place by the receiver of taxes, and by him handed over to the City Treasurer. They are therefore books used and kept in two of the public offices in the City of Detroit, and they must be considered public records. The claim that they

are private books of account is absurd. They are neither the private books of the receiver of taxes nor of the City Treasurer, and the City of Detroit, a public municipal corporation, can have no private books, not even of accounts, not open to inspection of its citizens. Its doings, and the doings of its officers, and the records and files in their offices, must be open to the public; nor can fees be charged for such inspection to those having the right to examine and inspect such files and records. \* \* \*

“I do not think that any common law, if it ever obtained in this free government, would deny to the people thereof the right of free access to the public inspection of public records. They have an interest always in such records, and I know of no law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record.

In the case of *Robison vs. Fishback*, 175 Ind. 132, 93 NE 666, LRA 1917B 1179, Ann. Cas. 1913B 1271, involving ownership of a card index system of assessments for improvements of property, the Supreme Court said at 93 NE Page 669:

“It is said that a public record 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; (cases cited). The evidence in this case is all to the point that the indexes are indispensable to the discharge of the duties of the office.”



The Court also said, quoting from *Coleman vs. Comm.*, 25 Gratt (Va.) 865, at Page 881:

“Whenever a written record of the transaction of a public officer in his office is a convenient and an appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required to do so or not; and when kept it becomes a public document — a public record belonging to the office and not to the officer; it is the property of the state and not of the citizen, and is in no sense a private memorandum.”

A New York Court stated in *People ex rel. Stenstrom vs. Harnett*, 131 Misc. 76, 226 N.Y.S. 338, at pages 341 and 345; affirmed June 22, 1928, 230 N.Y.S. 28; Memorandum where order is approved, 249 N.Y. 606 (mem.):

“The commissioner of the Bureau of Motor Vehicles claims that accident reports are not public records, but are of a confidential nature, not subject to inspection by the public generally or by persons who have a substantial interest in their contents. A public record, strictly speaking, is one made by a public officer in pursuance of his duty. The immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference. *Evanston vs. Gunn*, 99 U.S. 660, 25 L. Ed. 306; *Sturla vs. Freccia*, LR 5 App. Cas. (House of Lords) 623.”

“A person has an interest in a record or document filed pursuant to statute, although not strictly public, sufficient to entitle him to an

inspection, if it may be the basis of some official action or proceeding directly affecting him, or having direct bearing upon his substantial rights.”

In the case of *Village of Evanston vs. Jessie Gunn*, 99 U.S. 660, 25 L. Ed. 306, at page 307, the Court said:

“The Secretary of War is also required to provide, in the system of observations and reports in charge of the Chief Signal Officer of the Army, for such stations, reports and signals as may be found necessary for the benefit of agriculture and commercial interests. Under these Acts, a system has been established and records are kept at the stations designated, of which Chicago is one. Extreme accuracy in all such observations and in recording them is demanded by the rule of the Signal Service and it is indispensable, in order that they may answer the purposes for which they are required. They are, as we have seen, of a public character, kept for the public purposes, and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure. They come, therefore, within the rule which admits evidence ‘official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties or under their personal observations’.”

In the case of *International Union etc. vs. Gooding*, 251 Wis. 362, 29 NW 2d. 730, at page 735, the Court said:

“It is the rule independently of statute that public records include not only papers specifically

required to be kept by a public officer, but all written memorials made by a public officer within his authority where such writings constitute a convenient, appropriate or customary method of discharging the duties of the office. This was recognized in *State ex rel Dinneen vs. Larson*, 231 Wis. 207, 284 NW. 21, 25, 286 NW. 41. \* \* \*"  
See 45 Am. Jur., Records and Recording Laws, Sec. 2, page 420;

53 C. J., Records, Sec. 1, page 604;

~~*Lincoln County vs. Twin Falls etc. Co.*, 23 Id.~~  
*Lincoln County vs. Twin Falls etc. Co.*, 23 Idaho 433, 130 P. 7  
*People vs. Shaw*, 112 P. 2d 241 at Page 258.

### III.

A NEWSPAPER HAS THE RIGHT OF IMMEDIATE ACCESS TO SUCH RECORD SO AS TO ACQUAINT THE PUBLIC WITH THE ACTION OF THE BOARD.

See 33 Corpus Juris, Section 28, page 916, where the word "journal" is defined as follows:

"A word derived from the French word 'jour' and defined as a diary or daily record; a doublet of 'durinal'; an account of daily transactions or events; the official record of what is done and passed at a legislative assembly."

It is clear that the nature and purpose of the record kept, and the custom and usage involved in the making of the record indicate a purpose of recording the decisions and business of the Board. Since the Clerk is to keep the record, he alone is charged with its accuracy and record. The record kept by the Clerk does not

acquire any significance, by reason of its being placed in a book called "journal".

To make a distinction, as the District Court did, between the journal and the so-called tentative notes kept by the Clerk, is not justified by the Statute. And the further finding, that the Clerk is justified in not allowing access to the record of the meeting until at a future time, the Board approves the record, is not justified by the law, since the statute provides that the *Clerk* shall keep an accurate record.

Such a finding allows the executive or administrative department of the State to postpone access to the action of the Board, and the record of that action kept by the Clerk until some future, indefinite time: Thus resulting in a restraint upon freedom of the Press and an actual censorship of the news, which the Press has historically been allowed to publish.

See 53 <sup>1</sup>Corpus Juris, Section 48, page 631, where it is said:

"It has been held that in the absence of a statute, the publisher or editor of a newspaper has the right to inspect public records to acquire material for the purposes of his business of selling news, but this right does not extend to the records of a divorce case."

See *Holcomb Sheriff vs. State, ex rel Chandler*,  
200 S. 739;

45 Am. Jur., Sections 14 and 20, pages 426 and 429;

76 Corpus Juris Secundum, Section 37, page 145.

At 76 Corpus Juris Secundum, Section 36, page 137, it has been said:

“Generally speaking, any document which may properly be considered a public record is subject to inspection, and, where inspection is sought under a statute, the terms of the statute as reasonably construed determine the records subject to inspection.

“Generally speaking, any document which may properly be considered a public record is subject to inspection. It has been stated that, with respect to the need for inspection, records may be divided into four or more classes, including statutes, decisions, records relating to official acts, and records of titles to property. Whether or not a record is strictly public to which all persons have access regardless of motive depends, in the absence of statute, on the nature and purpose of the record, and possibly on custom and usage.

“Where inspection is sought under a statute, the terms of the statute as reasonably construed determine the records subject to inspection. A statute providing for inspection of public records by all persons is intended to include only those records intended for the use of particular public officers. Under a statute providing for inspection of the records and papers of particular city officers, the right of inspection includes all papers required by law to be kept by such officers but not papers and memoranda not required by law to be kept by them. \* \* \*”.

See *Wellford vs. Williams*, 64 LRA 418;

*In re Caswell*, 29 A. 259, 27 LRA 82, 18 R. I. 835,  
49 Am. State Reports 814;

*Levent vs. Daily News*, 49 S. 206;

*In re Hayes*, 73 S. 362;

*In re Ihrig*, 169 N. Y. Supp. 273;

*Sears Roebuck Co. vs. Hoyt*, 107 N. Y. Supp. 2d  
756;

*Tate vs. School District*, 324 Mo. 477, 23 SW 2d  
1013, 70 ALR 771;

*In re Becker*, 192 N. Y. Supp. 754;

*In re Egan*, 98 NE 467, 41 LRA (N.S.) 280;

42 Am. Jur., Sec. 75, at page 390.

#### IV.

THAT FINDING NO. 8 (R. 28-30, incl.), THAT THE ACTION OF THE CLERK IN WITHHOLDING ACCESS TO THE RECORD HE HAS KEPT UNTIL IT IS APPROVED BY THE BOARD AT A FOLLOWING MEETING, IS REASONABLE, AND THAT THE DEMAND THAT THE RECORD BE RELEASED THE FOLLOWING DAY IS UNREASONABLE IS DIRECTLY IN CONTRAVENTION TO THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF UTAH RELATING TO THE FREEDOM OF THE PRESS.

If neither the Congress nor the Legislature can abridge or restrain the freedom of the Press, then the

executive can not do so by its actions. To allow this would be to negative the Constitutional provisions, and result in as complete and effective a censorship or restraint as could be accomplished by law. In fact, to allow such an action by the executive would fly in the face of the statement of Madison, quoted in the case of *Near vs. Minn.*, supra.

See *Cowan vs. Fairbrother*, 118 N.C. 406, 24 SE 212, 32 LRA 829, 54 Am. State Reports, 733, at page 740.

For if the Clerk can delay access to his record by a claim that it has not been approved by the Board, he may delay this access for such a considerable time that the question would cease to be timely and the newspaper would be unable to publish the news when it was timely and to inform the public of the action of the Board while there was time for the public to act. For, as said in the case of *Bridges vs. California*, supra:

“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.”



The case of *Providence Journal et al, vs. McCoy et al*, 94 Fed. Sup. 186 (DCRI 1950), Affirmed 190 Fed. 2d 760 (1st Cir. 1951) Cert. Den. 342 U.S. 894, 72 S. Ct. 200, 96 L. Ed. 669 (1951) involved an action by a newspaper under the constitution and laws of the United States to enforce the right to inspect and make use of certain public records of the City of Pawtucket, having to do with tax cancellations or abatements. The Plaintiffs allege that the action, together with a right of the Plaintiffs to bring and maintain the same, arises under Article XIV of the Amendments to the Constitution of the United States (as embracing and making effective Article 1 of the Amendments) under the provisions of R. S. Section 1979, Title 8 U.S.C.A., Sec. 43, R. S., Section 1980 (3), Title 8 U.S.C.A., Sec. 47 (3) and R. S., Sec. 1981, Title 8 U.S.C.A., Sec. 48. That the Defendants, it was alleged in substance by their course of conduct, refused to make available to the Plaintiffs, tax cancellation resolutions and lists. It will be noted in that case that there is a similarity to the action of the Board of Education and the Clerk, with relation to the withholding of the record of the Clerk until approved by the Board, under an interpretation based upon the opinion of the State Superintendant of Schools, and the action of the City by resolution. The Ordinance of the City of Pawtucket reads in part as follows :

Sec. 1: "No city officer, official, agent or employee shall permit any person to examine any tax abatement record or any copy thereof, nor shall any such officer, official, agent or employee

disclose the contents of any such record to any person, unless such person has permission of the city council to examine such record.”

There was also a resolution stating that no person could examine the records for publication without the express permission of the city council. The Court, in deciding that the records in question were “public records,” quoted from 45 Am. Jur., page 420, and *In re Caswell*, 29 A. 259, 27 LRA 82. But the Court went further and decided that the action merited decision under the Fourteenth Amendment, Section 1 of the Constitution and the Civil Rights Act. And further, the Court decided that to restrict the examination and publication of the records is an abridgement of the freedom of speech and of the press.

A good discussion of the freedom of the press is had at page 196 of said opinion, where numerous cases are cited.

It was decided in *McCoy vs. Providence Journal*, which is an affirmation of the case found at 94 Fed. Sup., that the newspaper corporation was a person within the purview of the Fourteenth Amendment, and that the Acts under Municipal Ordinances by officers are within the prohibition of the Fourteenth Amendment.

An interesting comment is made in the last cited case to the effect that the access to the records was not denied nor directed by catagorical action but it was none

the less effective because postponement, evasion, and rebuff by the city officials was the same as outright refusal.

See *Bend Publishing Co. vs. Haner County Clerk*,  
244 P. 868;

*Nowack vs. Fuller*, 219 NW 749, 60 ALR 1351,  
Note 1356.

## CONCLUSION

It is respectfully submitted that the Findings of Fact of the District Court are not supported by the pleadings or evidence. That the Conclusions of Law are contrary to law and to the Constitution of the United States of America and of the State of Utah, and that the Judgement of the lower Court allows the Clerk and the Board to prevent a free publication of current news to which the people are entitled and results in executive censorship of the news, contrary to the freedom of the press clause of the Federal and State Constitutions.

Amici Curiae earnestly plead that the Judgment of the District Court should be reversed.

Respectfully submitted,

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