

GUARANTEED RIGHT OF PUBLIC ACCESS TO  
AGENCY DOCUMENTS:  
*CAPITAL CITIES MEDIA, INC.*  
*v. CHESTER,*  
797 F.2d 1164 (3d Cir. 1986)

Public access to information concerning the functioning of government promotes the American ideal of self-government.<sup>1</sup> The framers of the Constitution designed the first amendment<sup>2</sup> to facilitate the free flow of information upon which individuals may make reasoned judgments.<sup>3</sup> While the Supreme Court recognizes a right to receive,<sup>4</sup> dis-

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1. The Supreme Court on several occasions recognized the role of an informed public in the democratic system of government. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (public scrutiny of criminal trials permits the public to participate in and serve as a check on the judicial process); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1979) (Brennan, J., concurring) (free communication has a structural role to play in securing and fostering self-government); *Houchins v. KQED*, 438 U.S. 1, 31-32 (1977) (Stevens, J., dissenting) (the United States' system of self-government assumes the existence of an informed electorate, thus courts must protect access to information).

*See* H. CROSS, *THE PEOPLE'S RIGHT TO KNOW*, 128-32 (1953); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 14; Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 115 (1977).

2. U.S. CONST. amend. I states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

3. *See* Ivester, *supra* note 1 at 122-23, n.65, citing *The Complete Madison* 337 (S. Padover ed. 1953); 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910) (letter from James Madison to W.T. Barry (Aug. 4, 1822). James Madison, author of the first amendment, believed that: "a popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power which knowledge gives."). *See also* A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 26-27 (1948) ("The principle of the freedom of speech arises from the necessities of the program of self government. . . . It is a deduction from the basic American agreement that basic issues shall be decided by universal suffrage.").

4. *See, e.g.,* *Procunier v. Martinez*, 416 U.S. 396 (1974) (personal correspondence); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to possess obscene materials in one's home); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (political material); *Gris-*

seminate,<sup>5</sup> and gather information,<sup>6</sup> the Court permits access to government-held information only in the context of judicial proceedings.<sup>7</sup> In *Capital Cities Media, Inc. v. Chester*<sup>8</sup> the Court of Appeals for the Third Circuit determined that the first amendment guarantees access to a public agency's documents.<sup>9</sup> The party seeking the documents must prove that the agency traditionally allowed public access, and that one of the agency's positive functions is providing access.<sup>10</sup>

In *Capital Cities* Pennsylvania's Department of Environmental Resources (DER) denied the Wilkes-Barre *Times Leader*<sup>11</sup> access to certain documents under DER control.<sup>12</sup> While investigating the causes of contamination of northeast Pennsylvania's public drinking water supply,<sup>13</sup> the *Times Leader* sought information about the DER's possible culpability and enforcement strategy.<sup>14</sup> The *Times Leader* charged

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wold v. Connecticut, 381 U.S. 479 (1965) (right to receive information about birth control); Marsh v. Alabama, 326 U.S. 501 (1946) (religious material).

5. See, e.g., Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (commercial advertisements); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (newspapers); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (radio); Time, Inc. v. Hill, 385 U.S. 374 (1967) (magazines).

6. See *Bransburg v. Hayes*, 408 U.S. 665, 707 (1972) (acknowledging that the first amendment protects news gathering).

7. See *infra* notes 32-55 and accompanying text.

8. 797 F.2d 1164 (3d Cir. 1986).

9. *Id.* at 1166-67.

10. *Id.* at 1175-76.

11. Capital Cities Media owns the Wilkes-Barre *Times Leader*.

12. 797 F.2d at 1166. In response to the *Times Leader's* written request for access to certain documents, DER supplied a substantial amount of material. *Id.* The DER, however, informed the *Times Leader* that in accordance with DER policy it withheld certain interoffice memoranda, documents relating to attorney/client communications, and citizen complaints. *Id.* DER policy provided that all citizens shall be provided access to departmental records and documents. Exceptions to this policy are: 1) reports or communications, the publication of which would disclose the progress or result of an investigation undertaken by the agency; 2) any item restricted or prohibited by statute, or which would impair a person's reputation; 3) any item which would result in the loss by the state of federal funds. *Id.*

13. *Id.* at 1165. In December, 1983, Pennsylvania Gas and Water Co., a major supplier of drinking water, placed 250,000 customers on water use restrictions. Giardia cysts contaminated the water, causing an outbreak of an internal illness known as giardiasis. *Id.*

14. *Id.* The *Times Leader* published approximately four hundred articles dealing with this incident. Approximately eighty articles focused on DER and raised questions as to whether DER selectively enforced its mandate to protect the environment. *Id.* Other articles examined DER's enforcement strategy with regard to sewage discharge

that the DER's denial of access violated the first amendment and the state law "right to know."<sup>15</sup> A federal district court in Pennsylvania dismissed the complaint for failure to state a claim under the first amendment.<sup>16</sup> The *Times Leader* appealed to the Third Circuit, contending that the denial of access to a public agency's official records abridged the public's historic first amendment right to information to evaluate the government's effectiveness.<sup>17</sup>

The public's right of access to information regarding the functioning of government emerged as an important issue at the Constitutional Convention.<sup>18</sup> The delegates recognized, however, that courts and legislatures must balance the public's right to know against the need for informed, efficient decisionmaking.<sup>19</sup> Similarly, the first amendment's historical background reveals a fundamental purpose to promote the

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problems in two townships identified as the probable sources of the giardia cyst contamination. *Id.* at 1165-66.

15. *Capital Cities Media, Inc. v. Chester*, 609 F. Supp. 494 (D. Pa. 1985). *Capital Cities* invoked pendent jurisdiction to allege state causes of action arising under PA. STAT. ANN. tit. 65, § 66.1 (Purdon 1959). *Id.* at 495. *Capital Cities* also asserted a fourteenth amendment challenge, claiming that the department's practices with respect to the production and withholding of its records deprived the *Times Leader* of equal protection of the law. *Id.*

16. *Id.* at 497. *Capital Cities* alleged that the documents sought were official DER records subject to public inspection and that DER's denial of access to these records violated the first amendment. The district court held that *Capital Cities'* conclusory allegations failed to state a first amendment violation. *Id.* The court further held that under *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the eleventh amendment barred the court from considering the state law basis for *Times Leader's* claim of access. *Id.* at 498.

17. *Capital Cities Media v. Chester*, 797 F.2d 1164, 1165 (3d Cir. 1986).

18. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 170 (Elliot ed. 1974) (the debates addressed public's right to know regarding the publication of congressional proceedings, focusing on the proposed provision "[t]hat each house shall keep a journal . . . and shall publish the same from time to time; except such part . . . as may be judged by that house to require secrecy."). See also O'BRIEN, THE PUBLIC'S RIGHT TO KNOW 38 (1981) (a majority of the delegates agreed that the public's right to know the legislature's actions requires constitutional protection because the delegates adopted art. I, § 5, cl. 3, which provides: "each house shall keep a journal of its proceedings, and from time to time publish same, excepting such parts as may in their judgment require secrecy. . .").

19. See O'Brien, *The First Amendment and the Public's Right to Know*, 7 HASTINGS CONST. L.Q. 579, 595 (1980). The delegates agreed that withholding information concerning foreign negotiations, treaties and military operations, and occasionally information relating to domestic governance from the public was both necessary and legitimate. *Id.*

exchange of ideas and free flow of information<sup>20</sup> to the public without prior restraint.<sup>21</sup>

Courts failed to recognize a constitutional right of access to government-held information until the 1970's.<sup>22</sup> Early common law denied citizens a right to inspect public records and documents.<sup>23</sup> Eventually, a rule evolved in England allowing individuals to inspect public documents that furnished evidence or information necessary to maintain or defend litigation.<sup>24</sup> After this rule's application in the United States,<sup>25</sup> state courts<sup>26</sup> and legislatures<sup>27</sup> expanded the rule.

Through the Freedom of Information Act of 1966 (FOIA),<sup>28</sup> Congress took a major step to effectuate the public's right to know.<sup>29</sup> FOIA's legislative history indicates Congress' concern that restricting the flow of information endangered the democratic system of govern-

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20. See *supra* notes 3-6 and accompanying text.

21. See *New York Times Co. v. Sullivan*, 403 U.S. 713, 714 (1971). See also *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931); *Pell v. Procunier*, 417 U.S. 817 (1974). The constitutional guarantee of a free press assures the maintenance of our political system and open society . . . and secures the paramount public interest in a free flow of information to the public. . . . [A]ny system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity. 417 U.S. at 832.

22. See *Gannet v. DePasquale*, 443 U.S. 368 (1978) (no sixth amendment right for press or public to attend criminal trials); *Houchins v. KQED*, 438 U.S. 1 (1977) (no constitutionally mandated right of access to any government-held information); *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post*, 417 U.S. 843 (1974) (no constitutional right of access to prisons or their inmates).

23. See H. CROSS, *supra* note 1, at 25.

24. *Id.* The English courts began to recognize the right of inspection for use in providing for prospective litigation and enforced it either by a simple order or by writ of mandamus. *Id.*

25. *Id.* at 26.

26. *Id.* at 27. Courts began to depart from the rule allowing for access only with respect to litigation. A New Jersey court issued mandamus to compel access to letters of recommendation of applicants for municipal licenses for the sale of ale, basing issuance on the citizen's common interest in the enforcement of laws and ordinances of his or her community. *State ex rel. Ferry v. Williams*, 41 N.J.L. 332 (1879). A Vermont court allowed access by a citizen seeking inspection of bills on file with the state auditor's office, stating that permitting access may result in reforms. Access was thus a matter of right. *Clement v. Graham*, 78 Vt. 290 (1906).

27. *Capital Cities Media*, 797 F.2d at 1170. More than half of the states enacted right to know laws. *Id.* at 1171. See PA. STAT. ANN. tit. 65, §§ 66.1, 66.2 (Purdon 1959).

28. 5 U.S.C. § 552 (1982).

29. *Ivester*, *supra* note 1, at 143.

ment.<sup>30</sup> Through the FOIA, Congress intended to insure maximum public disclosure of information held by various government agencies.<sup>31</sup>

The Supreme Court only recently recognized a constitutional right of access to government-held information.<sup>32</sup> In *Richmond Newspapers, Inc. v. Virginia*,<sup>33</sup> the Court held that the right to attend criminal trials is implicit in the first amendment.<sup>34</sup> The newspaper appealed from the trial judge's closure order, granted in response to the defendant's concern that press and public attendance would prejudice jurors.<sup>35</sup> Although it granted the newspaper the right of access under the first amendment,<sup>36</sup> the Court noted that the right is not absolute.<sup>37</sup>

In *Globe Newspapers v. Superior Court*<sup>38</sup> the Supreme Court reaffirmed the public's right of access.<sup>39</sup> Holding that a state statute man-

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30. See H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418, 2429.

A democratic society requires an informed intelligent electorate, and the intelligence of the electorate varies as the quality and quantity of its information varies. A danger signal to our democratic society in the U.S. is the fact that such a political truism needs repeating. . . . [T]he ideals of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in Government.

*Id.*

31. 5 U.S.C. § 552(b) (1982) provides, however, for nine exemptions encompassing (1) national security matters, (2) internal personnel rules and practices, (3) statutory exemptions, (4) trade secrets, (5) inter-agency and intra-agency memoranda, (6) matters of personal privacy, (7) investigatory files, (8) financial institution records, and (9) geological information concerning wells. Section 552(b) does not mandate withholding information. Rather, government, in exercise of its discretion, may release documents falling within one of the categorical exemptions. See *Associated Dry Goods Corp. v. Equal Employment Opportunity Comm'n*, 419 F. Supp. 814, 821 (E.D. Va. 1976).

32. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1979). But see *Gannet v. DePasquale*, 443 U.S. 368 (1978), where the Court considered the right of public and press access to criminal proceedings. *Id.* at 391-92.

33. 448 U.S. 555 (1980).

34. *Id.* at 580.

35. *Id.* at 560. At the time the trial judge granted closure, no other party set forth any objections. *Id.* at 560.

36. *Id.* at 575. "[I]n the context of trials, the [f]irst [a]mendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that [a]mendment was adopted." *Id.* at 576.

37. *Id.* at 581. The Court suggests that situations exist in which denial of access may be justified. *Id.* at 581-82, n.18.

38. 457 U.S. 596 (1982).

39. *Id.* at 610-11.

dating closure of trials imposed an excessive restriction,<sup>40</sup> the Court offered two reasons for first amendment protection of public right of access to criminal trials.<sup>41</sup> First, criminal trials historically have been open to the general public.<sup>42</sup> Second, the right of access to criminal trials plays a significant role in the functioning of the judicial process and the government as a whole.<sup>43</sup> The Court stated that to deny access, the state must have a compelling interest and the denial must be narrowly tailored to serve that interest.<sup>44</sup>

The Court expanded the public's right of access to voir dire in criminal trials in *Press-Enterprise v. Superior Court (Press-Enterprise I)*.<sup>45</sup> The Court applied the *Globe*<sup>46</sup> reasoning, holding that juror selection historically was open to the public, and that openness is a valuable part of jury selection.<sup>47</sup> Thus, courts can deny access to voir dire only when a party proves an overriding interest and that the denial of judicial access is narrowly tailored to serve the significant interest.<sup>48</sup> The Court, however, recognized some limits on the right of access.<sup>49</sup>

In *Press-Enterprise v. Superior Court (Press-Enterprise II)*<sup>50</sup> the

40. *Id.* at 610.

41. *Id.* at 605. The opinions in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), emphasize these considerations.

42. *Id.* at 605. The Court viewed a tradition of openness as significant in constitutional terms because the Constitution carries the gloss of history and because "a tradition of accessibility implies the favorable judgment of experience." *Id.* (quoting Justice Brennan's concurrence in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980)).

43. *Id.* at 606. The Court viewed public access to criminal trials as providing a check on the judicial process and fostering an appearance of fairness. *Id.*

44. *Id.* at 607. Courts limit the circumstances under which access to criminal trials can be denied, and courts strictly scrutinize whether denial of access is justified. *Id.* at 606.

45. 464 U.S. 501 (1984).

46. *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982).

47. *Press-Enterprise v. Superior Court*, 464 U.S. 501, 505-10 (1984). In surveying the history of jury selection, the Court found that public juror selection was the common practice in the United States at the time of the Constitution's adoption. *Id.* at 508. Openness enhances the basic fairness of the trial as well as public confidence in the judicial system. *Id.*

48. *Id.* The Court emphasizes that a party must articulate the interests protected by denial of access along with findings so specific that a reviewing court can determine whether access was properly denied.

49. *Id.* at 510. The right of access is rebuttable. *Id.*

50. 106 S. Ct. 2735 (1986).

Court extended the right of access to preliminary criminal hearings.<sup>51</sup> Employing the *Globe*<sup>52</sup> and *Press-Enterprise I*<sup>53</sup> tests, the Court emphasized that if a criminal hearing has historically been public and allowing access logically and significantly assists in the proper judicial function of the hearing, a qualified first amendment right of access attaches.<sup>54</sup> Courts may deny access only if specific recorded findings exist demonstrating that denial of access is essential to preserve higher values.<sup>55</sup>

*Capital Cities Media, Inc. v. Chester*<sup>56</sup> is a federal appellate court's first attempt to determine whether the first amendment guarantees a right of access to agency documents.<sup>57</sup> Judge Stapleton, writing for a divided court,<sup>58</sup> applied the Supreme Court's test, most recently articulated in *Press-Enterprise II*, for determining the right of access to judicial proceedings.<sup>59</sup> The court decided that Capital Cities successfully proved that access to DER documentation was necessary to assess the department's performance, thus satisfying the requirement that access be valuable to administrative procedure.<sup>60</sup> Nevertheless, the court sustained the lower court's dismissal of the claim because Capital Cities

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51. *Id.* at 2744.

52. *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982).

53. *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984).

54. *Press-Enterprise II*, 106 S. Ct. at 2741.

55. *Id.* at 2743. Where the interest, as here, was the right of the accused to a fair trial, the Court applies a substantial probability test. *Id.* The Court would deny access if specific findings demonstrated a substantial probability of prejudice to the defendant's right to a fair trial, and if reasonable alternatives to closure would inadequately protect the right to fair trial. *Id.*

*See also* *Society of Professional Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985). Here, the court applied the analysis developed in this line of cases, holding that a public right of access exists with respect to formal administrative fact finding hearings. *Id.* at 573. Noting little historical tradition as to the particular agency, the court nevertheless held that such a tradition existed based on analogy to the openness of civil trials. *Id.* at 575.

56. 797 F.2d 1164 (3d Cir. 1986).

57. *See supra* notes 32-55 and accompanying text.

58. The court divided 7-5. Circuit Judge Adams concurred, writing a separate opinion. Circuit Judge Higginbotham, joined by Circuit Judges Sloviter and Mansmann, dissented. Circuit Judge Garth also dissented.

59. *Capital Cities Media, Inc. v. Chester*, 797 F.2d at 1175. The court interpreted the test to require a party arguing a first amendment right of access to government information must allege and prove a tradition of public access and that the value of access is significant to the proceeding to which access is sought. *Id.*

60. *Id.*

failed to allege the existence of an historical tradition of access to agency-held documents.<sup>61</sup>

In attempting to find a right of access to agency-held documents,<sup>62</sup> the court concluded that the founding fathers intended affirmative rights of access not explicitly conferred by the Constitution to depend on political processes for protection.<sup>63</sup> The court emphasized that the Supreme Court never recognized an absolute first amendment right of public access.<sup>64</sup> The court reasoned that a right of access guaranteed by the first amendment would require courts to balance the competing interests, thus effectively legislating categories of exclusions.<sup>65</sup>

The dissent attacked the majority's holding as creating an unprecedented pleading barrier for parties seeking access to agency-held documents.<sup>66</sup> The dissent viewed the first amendment as restricting governmental abuse of power, creating individual rights, and imposing governmental duties.<sup>67</sup> Arguing that the majority misinterpreted the Supreme Court's holdings from *Richmond* through *Press-Enterprise II*,<sup>68</sup> the dissent asserted that none of those decisions imposed a plead-

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61. *Id.* at 1176. The court interpreted "tradition of access" to apply to agencies generally. *Id.* at 1175. Under this pleading requirement, Capital Cities' claim that the DER denied the *Times Leader* access to official documents of the public agency could not stand.

62. *Id.* at 1167-74. The court surveyed the history of the right of public access, maintaining that "it requires some straining of the text [of the first amendment] to construe the amendment . . . [as] conferring upon each citizen a presumptive right of access to any government-held information." *Id.* at 1168.

63. *Id.* at 1167.

64. *Id.* at 1171. The court primarily bases its conclusion on *Houchins v. KQED*, 438 U.S. 1 (1979). See *supra* note 18. Although *Houchins* has not been overruled, the Supreme Court recently demonstrated a willingness to search for a presumption in favor of access. See *supra* notes 28-51 and accompanying text.

65. 797 F.2d at 1172. The court essentially stated that a balancing test would be too cumbersome, because the court must consider the value of each document against the asserted governmental interest. *Id.*

66. *Id.* at 1190 (Gibbons, J., dissenting). In effect, the dissent accused the majority of being uncomfortable with the first amendment purpose of informing the electorate, thereby evading its duty to examine the restraint and determine whether it is narrowly tailored to the identified government interest.

67. *Id.* at 1184-85. The dissent appears to adopt Emerson's position that the right to know focuses on the affirmative aspects of the first amendment. See Emerson, *supra* note 1. Emerson maintains that the most significant and beneficial aspect of the right to know lies in its potential role in increasing the amount of information available to the public from the government. *Id.* at 2.

68. *Capital Cities Media, Inc. v. Chester*, 797 F.2d at 1190. The dissent disagrees with the majority regarding the significance of a tradition of openness. *Id.* The lan-



ing requirement.<sup>69</sup> Rather, the dissent viewed these cases as holding only that courts may sustain a denial of access if the denial demonstrably advances significant governmental interests and is narrowly tailored to serve those interests.<sup>70</sup> Finally, the dissent argued that if the court requires the claimant to demonstrate a tradition of access, the Pennsylvania right to know statute<sup>71</sup> is sufficient evidence of this tradition.<sup>72</sup>

The Third Circuit's reasoning in *Capital Cities*<sup>73</sup> is inconsistent with the Supreme Court's approach in *Richmond through Press-Enterprise II*.<sup>74</sup> In applying the test articulated in the *Richmond* line of cases, the Supreme Court demonstrated a willingness to find a tradition of openness.<sup>75</sup> The *Capital Cities* court, however, struck a middle ground and neither recognized nor denied the existence of a tradition of access.<sup>76</sup> The Third Circuit refused to read the Supreme Court's decisions as mandating an expansion of first amendment protection.<sup>77</sup> Rather, in relying on an earlier assertion by the Court that no general right of access to government-held information exists,<sup>78</sup> the Third Circuit denigrated the Supreme Court's recognition of a right of access.<sup>79</sup> The

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guage relied on by the majority "applies only to access to various stages of the judicial process rather than to records of the executive or legislative branches." *Id.*

69. *Id.*

70. *Id.*

71. PA. STAT. ANN. tit. 65, § 66.1 (Purdon 1959). The Pennsylvania right to know statute is consistent with the federal Freedom of Information Act, 5 U.S.C. § 552 (1982). See *supra* notes 27-31 and accompanying text. While both statutes exempt certain categories of documents, neither mandate that such documents must always be withheld. Rather, the administrator is granted discretion to withhold documents.

72. 797 F.2d at 1191. The dissent argued that legislative promulgation of "right to know" acts does not minimize a first amendment protection of that right. *Id.*

73. 797 F.2d 1164 (3d Cir. 1986).

74. See *supra* notes 32-55 and accompanying text.

75. See *supra* note 64.

76. 797 F.2d at 1175. The court implied, however, that such a tradition could not be found. *Id.* Nevertheless, the court's holding only extended to the pleading standard. *Id.* at 1176.

77. *Id.* at 1189. The court characterized these decisions as holding no more than that the government may not close government proceedings which historically have been open. *Id.* at 1173.

78. *Id.* at 1173. The court ruled on the *Houchins* case. See *supra* notes 22, 64 and accompanying text. The Third Circuit emphasized that the *Richmond* line of decisions did not overrule *Houchins*. *Id.*

79. See *supra* note 77. This author agrees with the dissent that a better interpretation of the decisions would be that they hold that arbitrary restraints on access to infor-

*Capital Cities* court, heavily emphasizing the test's tradition of access component, misread the Supreme Court's decisions as placing the burden of proving a tradition of access on the party seeking access.<sup>80</sup>

The Third Circuit further implied that there must be a tradition of access traceable to colonial times.<sup>81</sup> Because courts apply the Supreme Court's test to the particular type of government proceeding, the Third Circuit's reasoning requires parties in *Capital Cities*' position to prove that agency documents were generally available during the colonial period.<sup>82</sup> Proving a tradition of access is virtually impossible because few governmental agencies existed at that time.<sup>83</sup>

By construing the Supreme Court's decisions as establishing a pleading requirement, the Third Circuit avoided recognizing a constitutional right of access to agency-held documents. The court's *Capital Cities* approach indicates that parties desiring access to agency-held documents must seek legislative assistance to further enlarge the scope of that access.<sup>84</sup>

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mation abridge the freedoms protected by the first amendment. 797 F.2d at 1188. Courts should treat barriers to access as prior restraints. *Id.* at 1190.

80. *See supra* note 66. The dissent argued that the majority contravened traditional first amendment analysis by placing the pleading burden on the *Times Leader*.

81. 797 F.2d at 1173. The court emphasized that the Supreme Court traced the history of judicial proceedings to colonial times to determine whether a tradition of openness existed.

82. *Id.* at 1175.

83. *Id.* at 1190. The dissent correctly noted that strictly holding to the requirement that access existed in colonial times would ignore the enormous growth in governmental activity in the past two hundred years, and would contradict the idea that the framers designed the Constitution to accommodate an expanding government. *Id.* at 1190, n.12.

84. *Id.* at 1170-71. The court endorsed the view that decisions as to the type and amount of information disclosed are political. *Id.* at 1171.