

# Judiciary Exclusion: The Public's Right to Know

## INTRODUCTION

Government scandals and furious voters often have forced the hands of legislatures to enact or revise laws. Historically, laws providing public access to government records were enacted in response to evidence of secrecy and censorship. In 1954 the American Civil Liberties Union reported that the government had refused to provide information to the media on the lethal radiation of a South Pacific nuclear bomb test site. The ensuing debate culminated in the 1967 passage of the United States Freedom of Information Act, providing access to records held by the executive branch of government. Seven years later, the Watergate investigations prompted the first amendment to the Act.<sup>1</sup> State governments, in the wake of political scandal, simultaneously followed suit and enacted open records laws.

The Texas legislature enacted the Open Records Act in response to the 1971 Sharpstown scandal in which legislators were found guilty of conspiring to accept bribes in exchange for the passage of certain banking laws. Voters subsequently forced the hands of the Texas legislature and demanded government accountability. Not only did the state of Texas meet the federal act by requiring access to executive records, it surpassed the act by requiring access to legislative and judicial records as well. Twenty years later, the political climate of public access had shifted considerably.

The most significant legislative change to the Texas Public Information Act, formerly known as the Open Records Act, was not based on a government scandal nor was it a reform forced by angry voters.<sup>2</sup> It was based upon the Texas Supreme Court's telephone records. The change was forced by a political interest group trying to gain access to those records. The result was a Texas Supreme Court ruling that the judiciary was outside the scope of the Public Information Act.

This report is a review of the 1999 judiciary exclusion of the Texas Public Information Act within its historical and political contexts. The arguments from proponents of judicial inclusion and exclusion are outlined and based upon telephone interviews, a Consumers Union report, the 2000 Public Information Handbook, Open Records Decisions of Attorneys General, a report of the American Bar Association, the Annals of the American Academy of Political and Social Science: Ethics in American Public Service, and electronic documents.

## OPEN INFORMATION LEGISLATION IN TEXAS

Open records legislation in the state of Texas arose from the United States Securities and Exchange Commission's investigation of the Speaker of the state House of Representative, Gus Mutscher, and other Texas officials. Mutscher and colleagues made a deal with Frank Sharp, a Houston developer and bank owner, to pass legislation that would allow Sharp to evade Federal Deposit Insurance Corporation regulations in exchange for unsecured loans.<sup>3</sup> The name "Dirty Thirty" was given to the thirty democrats and republicans who assembled against Mutscher. While the SEC investigation ensued, the Dirty Thirty convinced Mutscher to cooperate with a concurrent House investigation. Mutscher agreed and appointed five of his closest friends to lead the investigation. Mutscher then accused the thirty of partisan politics, and the thirty returned in-kind, accusing him of being "a dictator of state politics, more concerned with private than public interests."<sup>4</sup>

Mutscher, his aide, and another member were indicted by a Travis County grand jury in 1971 for "conspiring to accept bribes in the form of loans from Sharpstown Bank in exchange for passing the [banking] bills Sharp wanted."<sup>5</sup> As a result, nearly half of the state's senators and house members lost their seats in the next



election and the political careers of Governor Preston Smith and Lieutenant Governor Ben Barnes ended. Texans directed their anger toward state politicians and demanded reform.

Thus, in an effort to appease furious voters, the 63<sup>rd</sup> Texas Legislature convening in 1973 under “an unusually heavy cloud of public distrust and skepticism about the veracity of elected officials,” passed a nine-point reform package containing open information provisions to “restore public confidence in Texas government.”<sup>6</sup> The Texas Open Records Act was a part of that reform. The act deviated from the federal Freedom of Information Act, which only provided access to records of the executive branch, and included records from *all three* branches of government. The spirit of the 1973 Texan reform is commemorated in the Government Code: “The people, in delegating their 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.”<sup>7</sup>

Despite the clear legislative framework providing liberal access to governmental records, the act underwent a significant change during the 1999 legislative session. The events which prompted this change were: (1) a request by a political interest group for the telephone records of the Texas Supreme Court, (2) an Attorney General’s Opinion providing access to the records, (3) the Supreme Court’s ruling that the act did not apply to the records, and (4) the subsequent use of the court’s ruling to retrieve judicial records that had already been released under the Public Information Act.

## LEGAL OPINIONS AND RELATED ACTIONS

The Office of the Texas Attorney General is the leading authority providing access to governmental records and opining which bodies of government are subject to the Public Information Act. Before the 1999 legislative changes, the legal test used for each decision concerning the judiciary was: (1) whether or not the bodies concerned were part of the judiciary and, (2) whether the records related to the exercise of judicial powers or a judicial body’s administrative duties. Attorneys General have held consistently that “administrative records” are subject to disclosure while “adjudicative records” are not.

### Attorney General Opinions

The Attorney General’s Office has addressed public accessibility to judicial records in several Open Records Decisions over the past twenty-five years. A 1974 decision ruled that records held by a justice of the peace were not subject to the Public Information Act but could be disclosed under other law.<sup>8</sup> However, a 1978 decision held that information in the possession of a county judge was subject to the Act.<sup>9</sup> A 1988 decision exempted a district attorney’s records held on behalf of a grand jury and a 1989 decision permitted disclosure of court reporters’ records.<sup>10</sup> Decisions in 1990 and 1992 held that records of a personal bond program and books and records of an insurance company were within the judiciary exclusion.<sup>11</sup> A 1996 decision held that the corrections department is not a part of the judiciary and that “administrative records such as personnel files and other records reflecting day-to-day management are subject to the Public Information Act.”<sup>12</sup>

### Texans for Public Justice Opinion

In 1997, the Texans for Public Justice requested telephone billing information from the Texas Supreme Court. The court refused to release the records and the Texans for Public Justice requested an opinion from the Office of the Texas Attorney General. Attorney General Dan Morales ruled that the telephone records related to the expenditure of public funds and routine administration of the court. Morales found that “the telephone records are purely administrative in nature and do not relate to the exercise of judicial power.”<sup>13</sup> Thus, the records were “administrative” records and subject to disclosure.<sup>14</sup>



In response to the 1997 Opinion, the Texas Supreme Court ruled that judicial records *are not exempt* from the Public Information Act, but rather, that the act *does not apply* to judicial records. Further, the Texas Supreme Court interpreted the Public Information Act exemption of the judiciary as a governmental body to mean that the act simply does not apply to the judiciary. Therefore, the judiciary and its records were ruled by the Texas Supreme Court to be outside the scope of the Public Information Act.<sup>15</sup>

The Texas Supreme Court ruling was subsequently used by Dallas County judges in 1997 to retrieve records that already had been released. Based on the right-to-access provided by the Public Information Act, County Commissioner Jim Jackson requested and received access to the judges' parking garage records. Jackson wanted "to determine whether the judges were working full days."<sup>16</sup> Before he could release his final report, however, the judges, citing the Texas Supreme Court ruling, demanded return of the records and placed a gag order on him which prevented him from disclosing the contents of his report. The controversy which ensued caught the eye of Senator Jeff Wentworth.

## The Texas Legislature

There is no legislative history that discusses the precise scope of the term "judiciary" and why the legislature chose to exclude an entity entirely supported by public funds from the Open Records Act's provisions.<sup>17</sup> Previous legislatures have never contested Attorney General Opinions exempting the judiciary as a governmental body.<sup>18</sup> Since Congress is given the constitutional authority to overturn interpretations of those exemptions which it believes to be contrary to its original intent, then it follows that the legislature must be in agreement with previous interpretations of the act.<sup>19</sup> The Texas Supreme Court, in part, supported its argument for judicial exclusion on the legislatures' history of silence.<sup>20</sup>

After the court's ruling and the controversy ensuing from the Dallas County judges' gag order on Commissioner Jim Jackson, Senator Jeff Wentworth of the Senate Interim Committee on Public Information invited Chief Justice Phillips and Attorney General Dan Morales to present their views on the accessibility of judicial records.<sup>21</sup> "At that October 1997 meeting, members of the committee scolded Phillips for the Court's resistance to the notion that judges should be subject to the same open records policy as other state and local politicians."<sup>22</sup> The committee's final report in 1998, however, recommended that the court simply provide access to records through its own rules of administration.<sup>23</sup>

Senator Wentworth subsequently sponsored Senate Bill 1851 supporting the recommendation to exclude the judiciary from the Public Information Act. The bill resulted in the revision to the Public Information Act that: "access to information collected, assembled, or maintained by or for the judiciary is governed by the rules adopted by the Supreme Court of Texas or by other applicable laws and rules" and "[this section] does not address whether information is considered to be information collected, assembled, or maintained by or for the judiciary."<sup>24</sup> Thus, the Texas Supreme Court was not only given complete authority over the access to judicial records, but was also given the authority to opine whether records were, in fact, records of the judiciary.

## Judicial Interpretation

The 76<sup>th</sup> legislature assigned to the judiciary the authority to govern public access to judicial records and to interpret which records are "judicial" records. Subsequently, Rule 12 was written and incorporated into the Rules of Judicial Administration.<sup>25</sup> The purpose of the rule is "to provide public access to information in the judiciary consistent with the mandates of the Texas Constitution that the public interest is best served by open courts and by an independent judiciary. The rule should be liberally construed to achieve its purpose."<sup>26</sup>

The rule provides definitions for *judge*, *judicial agency*, *judicial officer*, and *judicial record*. Rather than defining "administrative" and "adjudicatory" records separately, the judiciary defined a "judicial record" as:



“a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before the court is not a judicial record.”<sup>27</sup>

## Public Access to Judicial Records

Generally, judicial records, with the exception of those covered by Rules 12.3 and 12.5, “are open to the general public for inspection and copying during regular business hours,” but does not require the court or judicial agency to create a record, retain a record, allow the inspection of records commercially available elsewhere, or comply with a request from or on behalf of a prisoner.<sup>28</sup> Access to judicial records may be denied if the record request “would substantially and unreasonably impede the routine operation of the court or judicial agency.”<sup>29</sup> Rule 12.3 states that the access rule *does not apply* to records or information controlled by various state or federal court rules and orders, the Code of Judicial Conduct, and the Public Information Act, among others. “Thus, no judicial agency must comply with both the [Public Information] Act and this rule; at most one can apply.”<sup>30</sup> Other records withheld from the public are listed among the twelve exemptions under Rule 12.5 which include judicial calendar information, investigations of character or conduct, and information confidential under other law.<sup>31</sup> Since the enactment of Rule 12, five petitions for appellate review have been filed.

## Per Curiam Rulings

Denials by lower court judges to provide access to judicial records resulted in five *per curiam* rulings by the Presiding Judges of the Administrative Judicial Regions.<sup>32</sup> In two of the five Per Curiam Rule 12 Decisions, it was determined that the “review committee can neither grant the petition in whole or in part nor sustain the denial of access to the requested information.”<sup>33</sup> Two decisions denied access to the requested information<sup>34</sup> and one decision determined that Rules 12.4 and 12.9 provided that Rule 12 does not require compliance with the request.<sup>35</sup> None of the five decisions granted citizens access to requested records.

The first decision filed on August 31, 1999 was brought by J.W. Payne, an attorney representing two attorneys who were being investigated by the Unauthorized Practice of Law Committee. Payne requested that the law committee provide him with a copy of the committee’s investigation. The committee sent him copies of the committee rules and a form letter which Payne had already received. After another request, he was sent copies of correspondence with potential investigators for the committee. The presiding judges ruled that the records were judicial records but not subject to disclosure because Rule 12.5(k) exempts records relating to an investigation of any person’s character or conduct unless the release of the record is requested by the person being investigated. Though the attorneys requested the release, the investigation included persons other than the two attorneys. The judges also ruled that personal notes of the investigator were exempt from disclosure as privileged work product. Payne also requested that all documents in the appeal be kept confidential, including the identity of the parties being investigated, “to prevent harm to the reputation of these active members of the bar.”<sup>36</sup> The panel of judges found that Rule 12 provides for the publication of the committee’s decisions, but does not provide that the documents are open to the public. The panel ultimately held that the applicant had been provided all of the documents to which he was entitled and denied access to the requested documents.

The second appeal was filed by an insurance company and its staff attorneys who were the subject of an Unauthorized Practice of Law Committee investigation. The final ruling on January 14, 2000 denied access to “inspect or copy the judicial records of the UPLC that relate to [its] allegations against [the insurance company].”<sup>37</sup> The appellants and respondent in this appeal were also party to a lawsuit pending in a Dallas County district court in a matter involving another insurance company. Based on the pending litigation, the records were ruled exempt from disclosure under Rule 12.5(j) because the records related to civil litigation in which a judicial agency (the committee) is a party.



The applicant of appeal number 00-001, decided on February 4, 2000, was an individual requesting that the Pflugerville Municipal Court allow him to view traffic citations for research he was conducting regarding “how the city of Pflugerville does business regarding traffic citations.”<sup>38</sup> The judges considered whether traffic citations were judicial records. The panel found that “traffic citation records pertain to the municipal court’s adjudicative function and are created, produced, and filed in connection with matters that are or have been before the municipal court. Thus, they are not judicial records within the meaning of Rule 12.” Because the records are not judicial records under 12.2(d), the committee could not decide whether or not they are exempt from disclosure under 12.5 (if it does not pass 12.2, it cannot then be considered under 12.5.)<sup>39</sup> The committee noted that various case law, common law, Constitutional law, and the Public Information Act provided that traffic citations should be made public. However, the committee could not sustain or deny the request for the *judicial records* because the records before the committee were *not judicial records*.

The applicant of the fourth appeal was a prisoner who had requested copies of the pre-sentence investigation report and the pre-trial bond file in the possession of his probation officer. The panel of nine judges ruled that: “Rule 12.4 provides that Rule 12 does not require a court, judicial agency, or records custodian to respond to or comply with a request for a judicial record from or on behalf of an individual who is imprisoned or confined in a correctional facility.”<sup>40</sup> Access to the records was denied because the respondent was not required to comply with the request.

In the fifth appeal, an attorney seeking to give legal assistance to individuals on probation had been denied access to the names of individuals on community supervision and probation in eight counties. Among the reasons for denying the request were: “(1) the records were exempt from the Public Information Act as records of the judiciary; (2) the records were created, produced, or filed in connection with a matter that has been before the court; (3) the records did not exist in the form requested and respondent was not required to create a record; (4) the records reflected the home addresses of the probationers and were exempt from disclosure; and (5) compliance with the request would substantially and unreasonably impede the routine operation of the department(s).”<sup>41</sup> The panel held that the records had been filed in connection with matters that had been before a court, and therefore, were not judicial records. The panel noted, however, that the records may be open pursuant to other law and other process such as mandamus. Thus, the committee ultimately ruled that it “can neither grant the petition in whole or in part nor sustain the denial of access to the requested records.”

## ARGUMENTS

The arguments arising from the 1999 exclusion of the judiciary from the Public Information Act are approached from two distinct interpretations of legal intent. Proponents for judicial inclusion under the Public Information Act insist that the intent of the law is to promote the public interest by establishing a system of checks and balances over the governing instruments created by the public. Advocates for judicial exclusion from the Public Information Act, on the other hand, contend the intent of the law is to promote the public interest by establishing an independent judiciary. The separation of powers doctrine, intrinsic to the Constitution of the United States, appears to be the central issue underlying each group’s interpretations.

### Argument for Judicial Inclusion

The conflicting interpretations of the Public Information Act may be examined against the 1997 Texas Supreme Court determination that the judiciary is not a governmental body. It is common knowledge that the judiciary is a governmental body. Nonetheless, one need look no further than the Black’s Law Dictionary to define the judiciary as “*that branch of government* invested with the judicial power” and “*that branch of government* which is intended to interpret, construe and apply the law.”<sup>42</sup> A spokesperson for the Freedom of Information Foundation states: “if it is a governmental body, then it is accountable to the public.”<sup>43</sup> Proponents for inclusion believe that judicial accountability and judicial accessibility are, if not interchangeable, at least interdependent.



The Freedom of Information Foundation spokesperson contends: “the public information issue is somewhat akin to the women’s right to vote issue in that the right was provided to women by the U.S. Constitution, it simply wasn’t enforced. Nonetheless, advocates felt as though they needed an amendment that specifically set forth that right. The same is true of this issue. The right of the people to oversee government is the foundation of our democracy. Yet, we keep writing rules and laws on who has to provide access to what. We are still trying to figure out how the [Texas] judiciary got out from underneath this system of checks and balances.”<sup>44</sup> A former spokesperson for Court Watch, a nonprofit court watchdog group, says: “only the Supreme Court could write itself right out of law.” The spokesperson refers to the general attitude of the Texas Supreme Court as that of “a priesthood.”<sup>45</sup> A spokesperson for the Office of the Attorney General, says: “it was never the intent of the Attorney General’s Office that the judiciary would be excluded from the Act.”<sup>46</sup>

Which records are administrative and which are adjudicative is a long-standing argument. Proponents of inclusion believe that adjudicative records, though exempt, should continue to be covered under the umbrella of the Public Information Act. They contend that the intent of the law is to provide this system of checks and balances, and that, under the current system, the courts are allowed to rule upon themselves. Rule 12, contend inclusionists, is merely “judicial stonewalling for the intent of protecting their own” and is “a sophisticated system of covering asses.”<sup>47</sup>

### **Argument Against Judicial Inclusion**

The position of proponents for exclusion arising from the 1997 Texas Supreme Court decision argue the semantics of “governmental body.” They assert that while the judiciary may very well be a governmental body, it is not a governmental body *in that context* and, therefore, is exempt from the Public Information Act. Proponents contend, moreover, that the judiciary is a separate and different body by virtue of its duties to interpret and enforce the law.<sup>48</sup> The Texas Supreme Court finding that the judiciary is wholly outside the scope of the Public Information Act is a demonstration of this judicial muscle.<sup>49</sup> Proponents for exclusion believe that judicial autonomy and judicial accountability are, if not interchangeable, at least interdependent.

A spokesperson for the Texas Supreme Court believes that the separate and different definition captures the necessary and traditional autonomy of the courts. He states that autonomy is necessary to “insulate [judges] from political pressure. . .it is a long, long standing policy. . .and the courts are different because they are deciding things.”<sup>50</sup> The court’s spokesperson suggests that the Texas Supreme Court’s system of checks and balances rests on its opinions and “the opinions form a body of material that allows one to assess where the judge is.” A system of checks and balances is in place, but the main intent of the law is to keep the court separate. The Public Information Act provides that separation by exempting the judiciary as a governmental body. However, “nobody was quite sure what that exclusion meant and it was gradually defined as an adjudicatory process solely so administrative functions have been thought not to fall within that.”<sup>51</sup> Rule 12 supporters believe that “there are only two groups of people who want these records - the news media, who wrap themselves in the flag and insist it has nothing to do with circulating papers - and those with a political ax to grind who are trying to get dirt on a judge.”<sup>52</sup> While exclusionists may concede that “dirty judges happen,” they “can’t be dirty without leaving a paper trail. . .somebody gets themselves into a corner and talks or someone drinks too much and the judge is found out.”<sup>53</sup>

## **CONCLUSION**

Open information laws are predominantly remedial, appeasing public demand for access to governmental records upon its discovery of scandal and secrecy. The United States Freedom of Information Act was prompted by the public’s discovery that a nuclear test site was emitting deadly radiation and was amended after the Watergate fiasco. State governments simultaneously enacted open records laws in response to public demand.



The Texas Open Records Act was legislated in 1971 in response to heated outcries for legislative reform. In the wake of the Sharpstown stock fraud scandal, the Texas legislature surpassed the requirements of the federal law by providing public access to the records held by all three branches of government. However, twenty years later, the political climate had changed and protests by the judiciary for legislative reform were heard more loudly by the Texas legislature than protests by the public for the status quo. Revisions by the 76<sup>th</sup> Texas legislature to open information law conformed to the wishes of the judiciary, excluding it wholly from the Public Information Act, and providing it with the authority to write its own rules for public access to its records. As such, Rule 12 of the Rules of Judicial Administration was written into law in 1999.

Arguments ensuing from the separation of the judiciary from the Public Information Act are approached from two distinct interpretations of legal intent. The purpose of the Public Information Act is to “maintain the people’s control ‘over the instruments they have created.’”<sup>54</sup> The purpose of Rule 12 is to serve the people’s interests “by an independent judiciary.”<sup>55</sup> Both intend to serve the public interest and ensure democratic values. While the aims are theoretically compatible, the tension between them creates a paradox. The paradox is the notion that excluding part of the government from access by those whose interests are represented by government somehow protects the public interest. However, independence and accountability should not be confused with independence and accessibility. Historian Gordon Wood observes that “most of the early constitution makers had little sense that judicial independence meant independence from the people.”<sup>56</sup> Aside from this seeming contradiction, the focus shifts to whether the separation of the judiciary from the Public Information Act encourages or hinders public access to judicial records.



Though none of the Per Curiam Rule 12 Decisions ultimately granted citizens access to requested records, the Rule itself is brow-raising. The definition that a record of *any nature* created, produced, or filed *in connection with any matter* that is or has been before the court is not a judicial record, is so broad and ambiguous that, without a spirit of restraint, records determined to be public under other law are no longer public under Rule 12. This is evident in the *per curiam* decision by the special committee that traffic citation records are not judicial records. The committee noted that Rule 76a of the Texas Rules of Civil Procedure provides access to civil court records. The panel noted that both common law and constitutional law also provide public access to these records. The panel even noted that traffic citations are subject to disclosure under the Public Information Act. But not under Rule 12. Under Rule 12, traffic citations are records of a nature created, produced, or filed *in connection with a matter* that is or has been before the court, and therefore, *not* judicial records. A record that is *not* a judicial record is a record that is *not* accessible to the public. On this front, then, it is apparent that the judiciary has pressed its powers to the utmost.

Other concerns arising from Rule 12 are the failure to require judicial agencies to create or retain records or comply with requests that would impede routine operations. Information that is clearly public will not be accessible if the judiciary must create a record to provide that information. This excuse was used by judicial agencies to deny access to information in one of the *per curiam* decisions. Moreover, under the new rule, the judiciary cannot destroy a record but it is not required to retain it. The legal abyss between “retention” and “destruction” is enormous. Whether judicial bodies will exploit this significant loophole is yet to be seen.

Furthermore, Rule 12 provides that records requests which would “substantially and unreasonably impede the routine operation of the court or judicial agency” will not be disclosed, regardless of whether the public has the right-to-access. Denying a records request on a legal ground of inconvenience is wholly unacceptable and contradictory to the spirit of “open government” asserted by the judiciary. Thus, on this front, it is apparent that, without a spirit of restraint, Rule 12 provisions will significantly hinder access to public records.

Perhaps the most disconcerting issue arising from the separation of the judiciary from the Public Information Act is the judiciary’s legal reign to rule upon itself. This flies in the face of our forefathers’ intentions to provide a system of separation of powers *and* checks and balances. The Constitution, on the premise that power monopolized is power abused, provides this system of checks and balances.<sup>57</sup> The assumption that judges ruling upon judges is a sufficient “check-and-balance” leaves a sour taste in the mouths of public interest groups. The former spokesperson for Court Watch states that “the [judiciary’s] own dedication to open government is suspect. In fact, only 17 percent of 100 sanctions [against judges] were publicly reported in FY 1996-1997.”<sup>58</sup> Public interest groups are concerned that even if a judge is reprimanded for knowingly or repeatedly withholding public information, “the judge will be protected by this wall of secrecy – a protection unavailable to any other public official who violates public information law.”<sup>59</sup> Rule 12 ensures that investigations of character or conduct will not be disclosed to the public. The contention of the judiciary’s spokesperson that a dirty judge can be “found out” when somebody gets drunk - or somebody paints themselves into a corner and talks - or somebody writes their misconduct in a legal opinion is a ludicrous remedy to Rule 12’s reticence.<sup>60</sup>

“The ultimate truth of the separation of powers is that its implementation requires statecraft, a spirit of restraint, and common purpose.”<sup>61</sup> Hence, “the success of any government under a separation of powers system depends upon each branch refraining from pressing its powers to the utmost.”<sup>62</sup> The judiciary’s self-removal from the public information law which governs the legislative and executive branches demonstrates its failure to adhere to a spirit of restraint and its failure to refrain from pressing its powers to the utmost. If power monopolized is, indeed, power abused, then the new Rule 12 may very well be the seedbed for corruption and scandal.



Restoring public confidence in Texas government was a significant aim of the original open records legislation. The arguments to include or exclude the judiciary from the Public Information Act illuminate the issue of public trust. Spokespersons for political interest groups and the Texas Supreme Court describe a government system embedded in motives of “ass covering, flag wrapping, and political ax grinding.”<sup>63</sup> The diatribe is not only distasteful, it exacerbates public distrust in political interest groups and the judicial system. “Generally, Americans believe that watchdogs bark too loud and too long about petty wrongdoing by public officials, namely, private misbehavior.”<sup>64</sup> When political interest groups “insist on purity of motives—serving only the people’s right to know the truth—the people reserve the right to be skeptical.”<sup>65</sup> When the public loses trust in its watchdogs, serious misconduct is trivialized and the people fail to act. Additionally, public skepticism of the judicial system is evident in a 1995 survey sponsored by the U.S. News and World Report. The survey found that only eight percent of respondents had a “great deal of confidence in the judicial system.”<sup>66</sup> “When the public loses faith in its judges, threats to judicial independence in the form of amendments to Article III of the Constitution, are the next logical step.”<sup>67</sup> Whether fertile or barren, the ground is public trust.

If trust confers legitimacy, then a cynical body politic compels “a spirit of restraint and common purpose” among servants of the public interest.<sup>68</sup> Political interest groups operating as a *de facto* quasi-official fourth branch of government must refrain from pressing its powers to the utmost.<sup>69</sup> Looking for dirt on a judge through telephone and parking garage records serves only savvy sensationalism when driven by insatiable appetites for Emmys and absolution. The constitutional cost of such a feast is instructive here: a binge on yellow journalism purged the judiciary from the Public Information Act. Rule 12 was the judges’ feast. The people’s push-to-check and-pull-to-balance was hardly enough for the judiciary’s ravenous appetite for evermore privacy. The imbalance of the mighty fourth branch’s push for power and the might third branch’s pull for privacy gives way to a sclerotic public interest: an act **of** a public body, prohibiting access **by** a public body, **for** the records of a public body. Absent a clear system of checks and balances, the judiciary’s authority to rule upon itself and the monopolized power inherent in Rule 12, the result of the separation of the judiciary from the Public Information Act is certain under Lord Acton’s dictum:

“I cannot accept your canon that we are to judge Pope and King unlike other men with a favourable presumption that they did no wrong. If there is any presumption, it is the other way, against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it.”<sup>70</sup>

## ENDNOTES

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1. Nadine Strossen, Ira Glasser, Kenneth B. Clark, “Using the Freedom of Information Act, A Step-by-Step Guide: An American Civil Liberties Union Publication,” in [aclu.org/library/foia.html](http://aclu.org/library/foia.html) [HYPERTEXT TRANSFER], 1998\_[cited 7 July 2000]; available from access network America Online [www.aol.com](http://www.aol.com); INTERNET, print version: Item#4002, ACLU Publications, 1-800-775-ACLU, P.O. Box 186, Wye Mills, Maryland, 21679.

2. Leatherbury, Thomas S., “The Texas Open Records Act,” unpublished paper prepared for the Advanced Administrative Law Conference, State Bar of Texas, Sept. 24-26, 1997. P. M-1. In 1995, the 74<sup>th</sup> Texas legislature changed the heading of Chapter 552 from “Open Records” to “Public Information.” The original legislation did not include an official name or title for the act, but the provisions came to be known as the “Open Records Act,” in “Break the Dam: Access to Public Information in Texas,” *Consumers Union Report*, November 1998, p. 26, endnote 3.



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3. Keever, Jack, "Past Scandal Echoes as Texas Begins a Cleanup," *Associated Press*, 24 February 1991, in *Consumers Union Report*, pp. 4-5, 26, endnote 12.
  4. John G. Johnson, "Dirty Thirty." *The Handbook of Texas Online*, a publication of The Texas State Historical Association, in <http://www.tsha.utexas.edu/handbook/online/> [HYPERTEXT TRANSFER], 1999\_[cited 21 July 2000] available from access network America Online www.aol.com; INTERNET, and see Kinch, S. and Procter, B., *Texas Under a Cloud* (Austin: Jenkins, 1972) and see Tracy D. Wooten, "The Sharpstown Incident and Its Impact on the Political Careers of Preston Smith, Gus Mutscher and Ben Barnes," *Touchstone* 5 (1986).
  5. Consumers Union, 4.
  6. Nowlin, James R., "Legislative Ethics: 1973," 5 *St. Mary's L.Jour.* 456 (1973), in "Break the Dam: Access to Public Information in Texas," in *Consumers Union Report*, November 1998, pp. 5, 26, endnotes 9, 14.
  7. Texas Government Code, § 552.001(a). Until 1993, the act was codified at Texas Revised Civil Statutes, Article 6252-17(a). See Sturgin II, John H., "The Texas Open Records Act," *Texas Bar Journal*, June 1997, pp. 596-600, and see "Break the Dam: Access to Public Information in Texas," *Consumers Union Report*, November 1998, pp. 4, 26, endnote 2.
  8. Office of the Texas Attorney General, Open Records Decision No. 25, in *2000 Texas Public Information Handbook*, (Austin, Texas: Office of the Texas Attorney General), 1974, p. 13.
  9. Office of the Texas Attorney General, Open Records Decision No. 25, in *2000 Texas Public Information Handbook*, (Austin, Texas: Office of the Texas Attorney General), 1978, p. 13.
  10. Office of the Texas Attorney General, Open Records Decision No. 513 and Open Records Decision No. 527, in *2000 Texas Public Information Handbook*, (Austin, Texas: Office of the Texas Attorney General), 1988, 1989, p. 13.
  11. Office of the Texas Attorney General, Open Records Decision No. 572 and Open Records Decision No. 619, in *2000 Texas Public Information Handbook*, (Austin, Texas: Office of the Texas Attorney General), 1990, 1992, p. 13.
  12. Office of the Texas Attorney General, Open Records Decision No. 646, in *2000 Texas Public Information Handbook*, (Austin, Texas: Office of the Texas Attorney General), 1996, p. 12.
  13. Office of the Texas Attorney General, Open Records Decision No. 657, (Austin, Texas: Office of the Texas Attorney General), 1997, p. 4.
  14. Open Records Decision No. 657 (1997).
  15. *Order and Opinion Denying Request Under Open Records Act*, No. 97-9141, 1997 WL 583726 (Tex. August 21, 1997) (not reported in S.W.2d). See Office of the Texas Attorney General, *2000 Texas Public Information Handbook*, (Austin, Texas: Office of the Texas Attorney General).
  16. Consumers Union, 14.
  17. Open Records Decision No. 657 (1997).



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18. Office of the Texas Attorney General, Open Records Decision No. 646 (1996); Open Records Decision No. 610 (1992); Open Records Decision No. 572 (1990); Open Records Decision No. 527 (1989); Open Records Decision No. 513 (1988); Open Records Decision No. 204 (1978); Open Records Decision No. 25 (1974), (Austin, Texas: Office of the Texas Attorney General).
  19. TEX. CONST., Art. 5, Sec. 1(a), "Retirement, Censure, Removal, and Compensation of Justices and Judges; State Commission on Judicial Conduct; Procedure" and TEX. CONST. Art. 5, Sec. 31(c) "the legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law." and the U.S. CONST., Art. I, Sec. 8, cl. 18, authorizing Congress to "make all Laws which shall be necessary and proper for carrying into execution . . . all . . . Powers vested by this Constitution in the Government of the United States." in *Texas Legislature Online*, in <http://www.capitol.state.tx.us/> [HYPERTEXT TRANSFER], 2000\_[cited 7 July 2000]; available from access network America Online [www.aol.com](http://www.aol.com); INTERNET
  20. *Order and Opinion Denying Request Under Open Records Act*, No. 97-9141.
  21. Consumers Union, 14.
  22. Consumers Union, 14.
  23. Consumers Union, 14. Copies of the report may be obtained through written request to the Senate Journal Clerk, P.O. Box 12068, Capitol Extension Room E1.812, Austin, TX 78711, Phone: 512-463-0050.
  24. *Texas Legislature Online*, in <http://www.capitol.state.tx.us/> [HYPERTEXT TRANSFER], 2000\_[cited 7 July 2000]; available from access network America Online [www.aol.com](http://www.aol.com); INTERNET, and cited in the *2000 Texas Public Information Handbook* as "an Act of May 25, 1999, 76<sup>th</sup> Leg., R.S., S.B. 1851, § 1 (codified at Gov't Code § 552.003)", p. 10, fn. 48.
  25. "Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration," R. Jud.Admin. 12 in <http://www.supreme.courts.state.tx.us/rules/index.htm> [HYPERTEXT TRANSFER], 2000\_[cited 5 July 2000]; available from mail-server @ [courts.state.tx.us](mailto:courts.state.tx.us); INTERNET, and in *Texas Public Information Handbook*, Appendix A, pp. 227-237.
  26. Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration, R. Jud.Admin. 12, and in *2000 Texas Public Information Handbook*, p. 227.
  27. Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration, R. Jud.Admin. 12 and in *2000 Texas Public Information Handbook*, p. 228, emphasis added.
  28. Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration, R. Jud.Admin. 12, and in *2000 Texas Public Information Handbook*, p. 228
  29. Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration, R. Jud.Admin. 12.8.
  30. Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration, R. Jud.Admin. 12 - 12.10.



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31. Supreme Court of Texas: Texas Judicial System Procedures, Rules and Revisions, Texas Rules of Judicial Administration, R. Jud.Admin. 12.5
  32. *Per curiam* translates to “by the court.” *Per curiam* decisions distinguish an opinion of the whole court from an opinion written by any one judge. *Black’s Law Dictionary*, 6<sup>th</sup> ed. (St. Paul: West Publishing, 1991), p. 786.
  33. “Supreme Court of Texas: Public Access to Judicial Records,” in <http://www.supreme.courts.state.tx.us/rules/index.htm> [HYPERTEXT TRANSFER], 2000\_[cited 5 July 2000]; available from mail-server @ courts.state.tx.us; INTERNET, Per Curiam Rule 12 Decision, Appeal No. 00-001, decided February 4, 2000 and Per Curiam Rule 12 Decision, Appeal No. 00-003, decided April 26, 2000.
  34. “Supreme Court of Texas: Public Access to Judicial Records,” in <http://www.supreme.courts.state.tx.us/rules/index.htm> [HYPERTEXT TRANSFER], 2000\_[cited 5 July 2000]; available from mail-server @ courts.state.tx.us; INTERNET, Per Curiam Rule 12 Decision, Appeal No. 99-001, decided August 31, 1999 and Per Curiam Rule 12 Decision, Appeal No. 99-002, decided January 14, 2000.
  35. “Supreme Court of Texas: Public Access to Judicial Records,” in <http://www.supreme.courts.state.tx.us/rules/index.htm> [HYPERTEXT TRANSFER], 2000\_[cited 5 July 2000]; available from mail-server @ courts.state.tx.us; INTERNET, Per Curiam Rule 12 Decision, Appeal No. 00-002, decided April 10, 2000.
  36. “Supreme Court of Texas: Public Access to Judicial Records,” in <http://www.supreme.courts.state.tx.us/rules/index.htm> [HYPERTEXT TRANSFER], 2000\_[cited 5 July 2000]; available from mail-server @ courts.state.tx.us; INTERNET, Per Curiam Rule 12 Decision, 99-001.
  37. Supreme Court of Texas: Public Access to Judicial Records, Per Curiam Rule 12 Decision, Appeal No. 99-002, decided January 14, 2000.
  38. Supreme Court of Texas: Public Access to Judicial Records, Per Curiam Rule 12 Decision, Appeal No. 00-001, decided February 4, 2000.
  39. Rule 12.5 outlines the exemptions from disclosure as it pertains to judicial records.
  40. Supreme Court of Texas: Public Access to Judicial Records, Per Curiam Rule 12 Decision, Appeal No. 00-002, decided April 10, 2000.
  41. Supreme Court of Texas: Public Access to Judicial Records, Per Curiam Rule 12 Decision, Appeal No. 00-003, decided April 26, 2000.
  42. *Black’s Law Dictionary*, 6<sup>th</sup> ed. (St. Paul: West Publishing, 1991), p. 593.
  43. Spokesperson for Freedom of Information Foundation, interview by author, Dallas, Texas, 6 July 2000.
  44. Spokesperson for Freedom of Information Foundation, interview by author.
  45. Former spokesperson for Court Watch, interview by author, Dallas, Texas, 5 July 2000.
  46. Spokesperson for the Office of the Texas Attorney General, interview by author, Dallas, Texas, 5 July 2000.



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47. Spokesperson for Freedom of Information Foundation and former spokesperson for Court Watch, interviews by author.
  48. Spokesperson for the Supreme Court of Texas, interview by author, Dallas, Texas, 6 July 2000.
  49. *Order and Opinion Denying Request Under Records Act*, No. 97-9141, 1997.
  50. Spokesperson for the Supreme Court of Texas, interview by author.
  51. Spokesperson for the Supreme Court of Texas, interview by author.
  52. Spokesperson for the Supreme Court of Texas, interview by author.
  53. Spokesperson for the Supreme Court of Texas, interview by author.
  54. 2000 Texas Public Information Handbook, 2.
  55. 2000 Texas Public Information Handbook, 227.
  56. Wood, Gordon. The Creation of the American Republic, 1776-1787 161 (1969) in "An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence," a publication of the American Bar Association, in <http://www.abanet.org/govaffairs/judiciary/report.html> [HYPERTEXT TRANSFER], 1997\_[cited 7 July 2000]; INTERNET, print version: American Bar Association, 740 Fifteenth Street, NW, Washington, DC 20005-1022.
  57. Kent A. Kirwan, "The Use and Abuse of Power: The Supreme Court and Separation of Powers," The Annals of the American Academy of Political and Social Science: Ethics in American Public Service 537 (1995): 76-84.
  58. Consumers Union, 14.
  59. Consumers Union, 14.
  60. Spokesperson for the Supreme Court of Texas, interview by author.
  61. Dean Peter Shane in "An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence", unpaginated.
  62. Dean Peter Shane in "An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence", unpaginated.
  63. Spokespersons for the Freedom of Information Foundation and the Supreme Court of Texas, and the former spokesperson for Court Watch, interviews by author.
  64. Warren Francke, "The Evolving Watchdog: The Media's Role in Government Ethics," The Annals of the American Academy of Political and Social Science: Ethics in American Public Service 537 (1995): 109-121.
  65. Francke, 111.



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66. Poll data was obtained from the Roper Center for Public Opinion Research and is available on the Westlaw poll database, in “An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence”, unpaginated, fn. 199.

67. An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence, unpaginated.

68. An Independent Judiciary Report of the ABA Commission on Separation of Powers and Judicial Independence, unpaginated.

69. Reference to Douglas Cater’s designation of the media as the fourth branch of government, Douglas Cater, *The Fourth Branch of Government* (Boston: Houghton Mifflin, 1959), p. 13 in Warren Francke, “The Evolving Watchdog: The Media’s Role in Government Ethics,” p. 110.

70. Dalberg-Acton, John Emerich Edward, *Essays on Freedom and Power* (Boston: The Beacon Press, 1949), p. 364.

