

LOCAL COMMENT: Why the press must keep fighting for public's right to know

BY HERSCHEL P. FINK

March 18, 2005

I sometimes think that, for an institution devoted to communication, the press does a remarkably poor job of communicating the importance of its constitutional mission: informing people about the operations of government and the officials who serve them.

How else to account for periodic opinion polls reflecting low public understanding of, and support for, what the press does and its importance?

Indeed, it is the free and independent press, acting as investigator, watchdog and whistle-blower, that sets America apart from other nations of the world.

The Free Press, for the more than two decades I've represented it, has been one of the most vigorous and aggressive news organizations in the fight to inform its readers of the workings of government. It is a constant battle against secrecy and closed doors.

Ironically, it is often left to the judiciary -- another institution essential to protecting our freedoms, but one that is also subject to press scrutiny -- to tell the public how much freedom, self-governance and the American way of life depend on a free flow of information through the press.

U.S. Court of Appeals Judge Damon Keith said it better than anyone in an opinion three years ago, when the Free Press sued to overturn the federal government's post-9/11 policy of secret deportations behind closed doors.

He wrote: "The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty.

"Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully and accurately. . . . When government begins closing doors, it selectively controls information rightfully belonging to the people."

Another great defender of public access, Chief Michigan Appeals Judge William Whitbeck, wrote a stinging dissent last month from a majority opinion that cloaked in secrecy an internal Eastern Michigan University report about "arguably extravagant and inappropriate expenditures" by the school's former president. The information had been sought by the Ann Arbor News under the Michigan Freedom of Information Act.

Judge Whitbeck wrote that "the concept of accountability . . . is so essential to the process of governing." And accountability, he said, "depends on information; we cannot make an informed judgment about whether a decision of a government official was the correct one without having at least

some information about the decision.

"In 1976, the Michigan Legislature took a decisive step toward regularizing the access that citizens have to information about governmental decision-making and, thereby, toward ensuring accountability by elected and appointed governmental officials. That step was the passage of the FOIA."

Yet, despite the law, there remain constant challenges and new efforts to erode access. The Free Press, as its front-page motto proclaims, must remain "On Guard."

Increasingly, the roadblock du jour consists of attempts by officials to impose unreasonable and illegal "search," "labor" and duplication fees for all FOIA requests -- a tactic that obviously discourages access. The Free Press is now challenging such illegal fees in court actions.

One pending Oakland County Circuit Court case pits the Free Press against Michigan Attorney General Mike Cox, Michigan's highest law enforcement official.

Despite the Legislature's explicit dictate in FOIA that search and labor charges may be imposed only when "failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particular instance, and the public body specifically identifies the nature of these unreasonably high costs," public bodies continue to demand labor fees routinely for virtually every request, something the Legislature never intended.

The Free Press sued Cox when the newspaper discovered a written attorney general's policy to routinely charge an FOIA requester a labor fee every time a request involved one single hour -- a clear violation of FOIA. As Chief Appeals Judge Whitbeck wrote in another recent case, FOIA fees were intended only to be "nominal."

Yet in recent weeks, the City of Detroit attempted improperly to charge the Free Press \$37,732.08 for several requests related to an investigation of city waste. Wayne State University attempted to charge the Free Press \$748.73 for records relating to another investigation into university expenditures. The Free Press is considering lawsuits in both cases, contending that excessive charges are a constructive denial under FOIA.

These are but a few of numerous examples. The Free Press has the resources to challenge and litigate against such improper charges. But individual citizens, for whom FOIA is also supposed to work, often do not.

Local and state governments are not alone in trying to inhibit access to public information by imposing excessive and improper fees. The courts -- an institution not subject to FOIA -- are equally guilty.

Recently, the Free Press challenged costs in two counties where judges have set fees for copying court documents at \$1 to as much as \$2.50 per page.

The Michigan Supreme Court has often declared that access to court records is a fundamental public right.

As early as 1889, the Supreme Court declared that "citizens have the general right of free access to and public inspection of public records," including court records.

Moreover, current Supreme Court rules governing all Michigan courts mandate that courts not charge

more than "the reasonable cost of reproduction." In most cases that is less than a nickel a page, not a dollar and more.

While taking on the courts in the courts may be risky business, it is something the Free Press won't avoid. The reason is that openness -- including access to court records -- is essential to maintaining confidence in the integrity of the justice system. Hopefully, through efforts such as Sunshine Week, the public will better understand why it is we fight for access.

It is so that you, the reader, can be better informed and better understand. It is so that our leaders will better govern, being held accountable, when or if they fail.

***HERSCHEL P. FINK**, a partner in the Detroit law firm Honigman Miller Schwartz and Cohn, has represented the Free Press as its legal counsel for more than 20 years. He previously worked 10 years as a daily newspaper reporter and editor. Write to him in care of the Free Press Editorial Page, 600 W. Fort St., Detroit, MI 48226.*

Copyright © 2005 Detroit Free Press Inc.