

Voice from the Vault

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Insuring Title, Assuring Access: How Commercial Interests Shape Our Right to Know.

We celebrate the public's right to know about government as a cornerstone of our democracy. Our current concepts of the right to know, however, are significantly different than what earlier generations understood and practiced.

18th Century American governments borrowed the idea of "parliamentary privacy" from Great Britain. The idea evolved from concerns that public access to parliamentary deliberations restricted the free exchange of ideas among members. In particular, as Parliament sought to wrest powers from the monarchy, the members feared that the king could charge them with treason for speaking out against the Crown.

The American revolutionaries applied this concept to their own legislative bodies. This explains, in part, why no minutes were kept of the constitutional convention of 1777 that created Vermont. Later the U.S. constitutional convention also prohibited the keeping of minutes, a prohibition that James Madison thankfully ignored. Madison's personal notes are the primary source for knowing what went on at the convention. Even the deliberations of the U.S. Senate, when it was first created, were viewed as outside a public right to know. By the early 1800s, however, parliamentary privacy lost ground and legislative deliberations became open, usually in concert with the ratification of constitutional amendments protecting legislative speech.

A second concept limiting the right to know persisted until the late 19th and early 20th centuries. This was the common-law tradition restricting access to public records to those with a direct and tangible interest in the records. Vermont took a leading role in moving away from this tradition. In 1906, in *Clement v. Graham*, the Vermont Supreme Court ruled that a private citizen, Percival Clement of Rutland, had the right to inspect the records of the state auditor's office, though he had no direct and tangible interest in any of the records. The court held there was a broader interest; that of a citizen's right to review the transactions of government. Clement's hostility to the elected state officials (he had run for governor in 1902 as a renegade Republican) was not a barrier to his right of access.

The main assault on the common-law tradition, however, took place in the courts of other states and centered on an issue that is familiar to us today. Did commercial interests have a right of access to land records, even if they did not have a direct and tangible interest in the property? Challenged by title insurance companies, the old common law tradition

requiring a direct interest gave way. Beneath the litigation were economic changes that transformed the view of land as a patrimony to one that viewed land as a commodity. This, in turn was linked to the declining number of farms, changing urban/rural demographics, and an increase in the buying and selling of land. The increase in land transactions overwhelmed custodians of deeds, who could not keep pace with the change.

In a recent article in *The American Archivist*, Dwayne Cox examined state case law from 1874 to 1918 involving the title companies' struggle to gain access to the records of registrars of deed.¹ The case law covered a variety of issues as title companies sought to have hired staff working in the registrar's office, tried to create complete abstracts to all title records, and even sought rent-free space for doing the work. Registrars responded not only by pointing to the common-law tradition of direct interest, but also by noting the potential harm to the documents, the disruption of business, and the loss of fees if a parallel set of records was created by commercial interests. As Cox notes, "Many of the open records issues faced by late nineteenth- and early twentieth-century custodians of public records sound familiar...How can custodians of public records balance the demands of access and the need for security? When should they establish fee-for-service operations? To what extent can researchers legitimately circumvent these fees? When does an individual's right to privacy supercede the public's right to know?"²

In many of the states a similar pattern emerged. A title company would bring suit after being denied access; the state supreme court would uphold the direct interest doctrine; the legislature would be lobbied to amend the access statutes; and the courts would subsequently uphold those new laws. By the end of the period studied by Cox the requirement for a direct interest was dead.

Today we see many of the same conditions leading to similar challenges and questions. The number of Vermont farms continues to decline, land is becoming even more of a commodity as demographics, sprawl and recreation change use patterns, and municipal offices are inundated with proliferating land records. Added to the mix are new technologies that raise basic questions about how public, public records should be as well as about the costs of providing copies. This recent legislative session saw a variety of bills introduced addressing these issues, while Vermont courts have recently ruled on a number of issues relating to access to electronic versions of the grand list.

The right to know is constantly evolving. What needs further study is how commercial interests have helped shape Vermont's changing view of access to public records.

Footnotes:

¹ Dwayne Cox, "*Title Company v. County Recorder: A Case Study in*

Open Records Litigation, 1874-1918," *The American Archivist*,
Spring/Summer 2004, Vol. 67, No. 1.
2 Ibid., page 56.