

## Opinion No. 73-10

January 30, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Senator Thomas Rutherford 729 Lomas Vista, N.E. Albuquerque, New Mexico

### QUESTIONS

QUESTIONS

May news media record public meetings and later broadcast such recordings?

CONCLUSION

See analysis.

### OPINION

#### {\*17} ANALYSIS

Although the "right of the public to know" has not been construed as a common law right of reporters or individual citizens to attend meetings of public bodies, we note that in New Mexico, certain governmental functions have been made open to the general public by legislative and constitutional enactment.

In the belief that an informed constituency will yield responsive government, Section 5-6-17, N.M.S.A., 1953 Comp., was enacted. Such statute states in part:

"The governing bodies of all municipalities, boards, county commissioners, boards of public instruction and all other governmental boards and commissions of the state or its subdivisions, supported by public funds, shall make all final decisions at meetings open to the public . . . ."

Attorney General Opinion No. 59-105, pointed out that this section requires something more than a simple announcement of the final decision in an open meeting. In Attorney General Opinion No. 63-55 it was noted that a "meeting open to the public" presupposes the right of the public freely to attend such meetings with the concurrent right to {\*18} freely express their views on the matter being considered. It was also pointed out that the legislative intent of Section 5-6-17, *supra*, was not only to insure the fullest participation in the decisionmaking process to the public, but was also to fulfill the public need to be fully apprised as to the "whys and wherefores" of the final decision.

Also, it is noted that Section 12 of Article IV of the Constitution of New Mexico provides for all **sessions** of the state legislature to be open to the public.

With this, an examination of Section 17, Article II of the New Mexico Constitution is warranted:

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press . . ."

From this it can be seen that every person is guaranteed the right to freely speak, write and publish his sentiments on all subjects. Also, no law can be passed to restrain or abridge the liberty of the press.

Amendment I of the Constitution of the United States provides much the same guarantee. There, it is provided that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." The First Amendment, as applied to the states through the Fourteenth Amendment, also guarantees such freedoms against actions of the states and their subdivisions.

This brings us to the crux of the problem at hand: Do statutory and constitutional proscriptions on restricting the "freedom of the press," guarantee news reporters the right to use recording devices in those governmental meetings designated by law as "public"?

Courts have been ever alert to strike down any infringement or limitation upon the fundamental right of the press freely to publish and distribute news and comments. **Near v. State of Minnesota**, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; **Lovell v. City of Griffin**, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949. That right has, however, never been held to confer upon the press a constitutionally protected right of access to sources of information not available to the general public. **United Press Associations v. Valente**, 308 N.Y. 71, 123 N.E.2d 777 (1954).

It thus appears that freedom of the press to obtain information is not absolute, but where the general public is allowed by law to solicit information, such right cannot rationally be denied to a newsman, for as a practical matter, the freedom to gather news is inseparable from the freedom to publish news.

It is plain that one cannot truly have a free press unless the right to gather news is protected in conjunction with the right to impart the same news. As dissenting Justice Musmanno stated in **In re Mack**, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956):

Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water. Gathering of news embraces photographing of the news, printing of the photographs, and reproduction of the photographs in the finished newspaper. To

prohibit the taking of photographs is no less an infringement of freedom of the press than to prohibit the presence of a news reporter."

Freedom of speech and of the press are protected by the constitution not only against heavy handed frontal attack, but also from more subtle governmental interference. **Kingsly International Pictures Corporation v. Regents of University of State of New York**, 79 S. Ct. 1362, 360 U.S. 684, 3 L.Ed2d 1512 (1959). Indeed, the only conclusion supported by history is that unqualified prohibitions laid down by the framers of the Bill of Rights were intended to grant the fullest liberty to the press, in the broadest scope possible that can be countenanced in an orderly society. **Bridges v. State of California**, 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941).

However, despite the broad scope of the protective status of the First Amendment freedoms and privilege, it is <sup>{\*19}</sup> clear that none of them is absolute, and that whether, in a given case, an asserted right under the guarantee of freedom of press will prevail or not depends on the particular circumstance involved and the weighing and balancing of the protection afforded by the right asserted against the purposes that would be defeated or denied to an opposing interest. For example, the right of an individual to a fair trial overrides the interest of the press to photograph, televise or record such proceedings. **Estes v. Texas**, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). The right of a citizen to travel and report in unfriendly countries is outweighed by the federal government's interest in protecting that citizen from danger. **Zemel v. Rusk**, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 1791 (1965). the right of a newsman to gather and keep secret information regarding criminal activities has been held to outweigh a grand jury's investigative needs. **Caldwell v. United States**, 434 F.2d 1081 (9th Cir. 1971).

As stated in **Konigsberg v. State Bar of California**, 366 U.S. 36, 49-51, 81 S. Ct. 997, 1006, 6 L. Ed. 2d 105, 116-17 (1960):

"At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments are 'absolutes'

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Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be affected, and that performance requires an appropriate weighing of the respective interests involved."

With this in mind, we feel that in certain instances, the government's need to provide for order, dignity, decorum, etc., might outweigh a newsman's right to use certain recording equipment if such equipment would detract seriously from certain legitimate governmental interests. On the other hand, we can see no rationale in prohibiting unobtrusive recording devices which do not effectively detract from a governmental meeting.

Certainly, since the legislative intent of Section 5-6-17, **supra**, was partly to provide for an informed constituency and a responsive government, no effective argument can be put forth that the public officials' need for privacy outweighs the right of the public to hear or view recordings of such meetings.

Also, the argument is specious that public broadcast of such meetings would inhibit free discussion therein. This contention is dispelled by the fact that the general public has the right of access to such meetings, and verbatim reports of such meetings could be published by anyone who so attends.

We feel, however, that in certain instances, an unregulated and irresponsible press might so detract from a public meeting as to cause disarray and chaos. The thought of popping flashbulbs, noisy or cumbersome equipment, reporters scurrying about and around the participants, and the general distraction thereof makes us wince at what might be thought by some to be "freedom of the press." However, we can see no reason why a responsible press, armed with certain unobtrusive recording devices, should be denied access to public meetings.

With this, our answer to you is a restricted yes, news reporters may record public meetings and may later broadcast those recordings, if the recording process does not effectively interfere with certain legitimate governmental interests such as the need to provide for order, decorum, etc. We make no distinction as to the type of recording devices which may be allowed, be they video tapes, sound tapes, etc., so long as the use of such devices is unobtrusive and does not effectively interfere with the processes so recorded.

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