7627 Old Receiver Road
Frederick MD 21701

April 30, 1989

Bill Monroe, Editor
Washington Journalism Review
2233 Wisconsin Ave., NW
Washington, DC 20007

Dear Mr. Monroe:

For reporters and WJR to lament the state of the Freedom of Information Act and court decisions limiting it is for them not to recognise their own chickens come home to roost.

Lyle Denniston's opinion that the recent decision confirming the withholding of rap sheets is the Supreme Court's most important yet reflects a narrow, selfish interest and is otherwise at the least questionable.

Almost all reporters enjoying regular salaries and their employers ignored FOIA when it was enacted, leaving it to those of us who, without resources or support, wanted to make that magnificent legislative enactment of that most basic American right, that of the people to know what their government does. We fought alone, ignored by reporters, editors and publishers.

This created a situation in which errant government, longing to suppress what is embarrassing to it, could and did rewrite the law by shopping for judges of predisposed friendliness. Government lawyers selected cases in which they could treat the pplaintiffs and the information sought as unpopular and somehow unworthy. By these means they did rewrite the law and among the issues on whch they succeeded almost two decades ago was this very one of rap sheets about which you now complain. And "national security" and many others.

In accomplishing this, fraud and perjury were commonplace and immune. Again, this was possible only because reporters and their employers refused to publish even the court records. Once when perjury and fraud were proven in court and undenied - I made myself subject to the penalties of perjury in alleging them - Mr. Denniston is among the three dozen who found this not newsworthy, the actual words of the New York Times reporter when he discussed it with me. Federal agents commit serious felonies in the federal courts and that is not newsworthy! (It also was the first effort to force unsuesessful FOIA litigants to pay court costs, also not newsowrthy.)

So the Reporters Committee is unhappy about that rap-sheet decision? Well, the chickens are its own! And this gets to an earlier - and unreported - Supreme Court decision that rewrote a major part of FOIA, the investigative files exemption. Under that decision <u>all</u> FBI, CIA and similar records were immunized. Not just rap sheets.

Trying to be Andy Jackson's "one determined man," which would have been impossible without my lawyer, Jim Lesar, I went to the committee, to the ACLU and to the Nader people, asking them to file amicus briefs. Some indicated they would. None did. And the court refused to grant cert.

But then the Congress, citing this case, reinstalled and strengthened the disclosure language of that exemption. One man made the system work, against such enormous odds, and not a paper in the country reported it.

Which case was more important, the one in which rap sheets are denied or the one in which these rap sheets were a minuscule fraction of the important records in their entirety - the case that opened all those files and records?

You FOIA Johnnies-come-lately, so long on the backs of so many of us unknowns who you so long ignored, ought learn a lesson from the FOIA history and get yourselves and your interests in perspective and start reporting why by traditional American standards is real and legitimate news instead of wailing like crybabies while others did your fighting for you. And got bashed - for you and by you.

Harold Weisberg

P.S. All your chickens haven't roosted yet.

CC: Lyle Denniston

Court Bans FOIA Probe Of Central Files

By Lyle Denniston

Lyle Denniston covers the Supreme Court for the Baltimore *Sun*.

The first sources of information that the ruling shields are rap sheets.

Cynics in the press, not very happy with a variety of Supreme Court rulings on press rights, have been complaining for years that the justices simply have no idea how the news business actually works. The cynics may find their best evidence yet in a ruling that could shut off press access to a vast amount of newsworthy information held in federal government files.

The Supreme Court's decision in *Justice Department v. Reporters Committee for Freedom of the Press* yielded its latest—and most important ever—interpretation of the Freedom of Information Act. The FOIA is a 23-year-old law that the press has used countless times to force federal agencies to release information from their files. The press frequently employs the FOIA to find out what the government's immense files contain about specific individuals who have had dealings with government agencies.

But, according to the new ruling, the press's desire to use such information in a news story "is not the kind of public interest for which Congress enacted the FOIA." That is a rather astonishing proposition all by itself. But there is more.

Information about an individual who has done business with a government agency, the Court said, reveals nothing directly about the performance of that agency, and it is exclusively the performance of government agencies that the FOIA aims to force into the open.

A couple of examples from the Supreme Court's opinion show the Court's thinking. Take an individual with a criminal record who has dealings with a corrupt member of Congress. The existence of the criminal record, the Court suggests, "would tell us nothing about the congressman's behavior." Or take an individual with a criminal record who is an executive of a corporation that has defense contracts. According to the Court, the criminal record says nothing about the Pentagon's performance in awarding contracts to that company.

In the eyes of virtually any editor or reporter, the fact that a member of Congress has ties to or does favors for someone who has been in trouble with the police, or the fact that the Pentagon buys goods or services from such a person, says a great deal indeed about the member of Congress or about the Pentagon. At the very least, those facts suggest a need to ask some rather searching follow-up questions to the congressman or the Pentagon.

But there is additional evidence of the Court's curious perspective on the assumptions with which newspeople work. The kind of information that the decision puts out of the press's reach (and, indeed, removes from the public in general) is data that in many cases has existed in public records, open to the press in, say, courthouse files or police station blotters. But, said the Court, once a federal agency assembles that fragmented information into a comprehensive databank, it is transformed into private information.

To the press, once information has been out in the open, it is folly to think it can become private simply because someone put it on a computer disk and stored it with other once public data. The Court views it differently, however.

"Plainly," it said, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." Compilations of data, the Court added, have greater power to "affect personal privacy" than do the individual pieces of information.

It is at least debatable whether either of those propositions is "plainly" true or, in fact, is true at all. But as they now represent the law of the land, they will certainly govern the press's future use of the FOIA to seek personal data stored in federal databanks.

Perhaps even more important is that the Court's opinion actually amounts to an essay—going well beyond the confines of the FOIA—on the scope of personal privacy regarding combined (as opposed to fragmented) information. It may take years before this essay's implications for privacy law in general become clear.

The first sources of information that the ruling shields are rap sheets, criminal history records, which the FBI has compiled on more than 24 million individuals. (Although no justice dissented in the ruling, two thought it went too far in barring press access to rap sheets.) The ruling grew out of CBS reporter Robert Schakne's attempt to get the FBI's rap sheets on members of the Medico family, which had ties to organized crime and allegedly had secured defense contracts with the help of a former Pennsylvania congressman, Daniel Flood. Now some 24 million files of obvious news value are insulated from the press's scrutiny—no matter what they contain. And that is just the beginning.

Last month, this column was too optimistic in expecting the Supreme Court to show sympathy for news photographers accused of interfering with police by taking pictures at a crime scene. Mark Robert Hoffman, convicted of "obstructing" police when he photographed an arrest on a highway near Detroit in 1986, had challenged the conviction in an appeal to the Court. But, on March 20, the Court turned Hoffman's appeal aside without a word of explanation and without one justice voting his way. As a result, Hoffman served a weekend in jail to satisfy his sentence. He is now working at the *Bridgeport* (Connecticut) *Post* and *Telegram*.●