Confidentiality of Ecclesiastical Records

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CONFIDENTIALITY OF ECCLESIASTICAL RECORDS†

REVEREND EDWARD DILLON, J.C.D.*

Two fundamental factors govern the confidentiality of ecclesiastical records. They are the nature of the information involved and the manner in which it is obtained. Thus, confessional matter, by its nature, is confidential. Further, since it involves information obtained under the seal of the Sacrament, it may never be divulged.¹

The cloak of confidentiality spread to other communications. Canon 1548, section 2 exempts from any obligation of testifying in an ecclesiastical trial the following persons: "clerics, in regard to whatever was made known to them in connection with their sacred ministry; civil officials, doctors, obstetricians, advocates, notaries and others who are bound to professional secrecy, even by reason of advice rendered, as regards matters subject to this secrecy." A party to a case could release such a person from the obligation of confidentiality, but there are exceptions, the most significant of which is the seal of confession.² This exemption is extended

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The Code of Canon Law was promulgated in 1983 in Latin. A translation of the Code was published by the Canon Law Society of America, with the permission of the National Conference of Catholic Bishops and the Holy See. The translation contains both the Latin text and an English translation. All quotations of canons in this presentation are given in English and are taken from that translation.

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¹ 1983 CODE c.983, § 1: "The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason." Id. Under the provision of 1983 Code c.1550, § 2, a confessor is incapable in law of being a witness regarding information obtained through the confessional.

² Id. at c.1550, § 2: The following are considered incapable [of testifying]: "2. priests as regards everything which has become known to them by reason of sacramental confession,
to "persons who fear that infamy, dangerous vexations or other serious evils will happen to themselves, or their spouse, or persons related to them by consanguinity or affinity, as a result of their testimony."\(^3\)

Some very specific regulations govern the confidentiality of information gathered in a Tribunal proceeding. The treatment of other records is, in general, less specific. Accordingly, for the purposes of this treatment, it seems appropriate to follow a similar distinction, that is, between Tribunal records and other types of records.

Each diocese is required to maintain an archive. This, by definition, is a "safe place" or depository for records and is under the care of a chancellor, whose principal task is to "see to it that the acts of the curia are gathered, arranged and safeguarded. . . ."\(^4\) This depository is to be locked\(^5\) and there are restrictions as to who may have access to these documents or remove them from the archive.\(^6\) However, that does not necessarily imply that all documents in the archive are completely confidential.

Information pertaining to administrative decisions in matters, for example, such as property, building and the like may not be divulged by members of the curia,\(^7\) but there is no inherent reason why the Bishop could not do so. The Bishop is the one who establishes the norm of secrecy to be observed in general matters by the diocesan staff.\(^8\) However, that norm (or norms) establishes only an obligation for the curial staff and does not necessarily affect the basic nature of the document(s) in question. Thus, if the basic document is accessible, it may be obtained by anyone to whom the law gives this right, or more accurately, by anyone whom the law does not deprive of this right, even though the curial staff

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\(^1\) Id. at c.1548, § 2(2): [T]he following are exempted from the obligation to answer: "2. persons who fear that infamy, dangerous vexations or other serious evils will happen to themselves, or their spouse, or persons related to them by consanguinity or affinity, as a result of their testimony."\(^3\)

\(^2\) Id. at c.1548, § 2(2): [T]he following are exempted from the obligation to answer: "2. persons who fear that infamy, dangerous vexations or other serious evils will happen to themselves, or their spouse, or persons related to them by consanguinity or affinity, as a result of their testimony."\(^3\)

\(^3\) Id. at c.482, § 1: "In every curia, a chancellor is to be appointed whose principal task is, unless particular law determines otherwise, to see to it that the acts of the curia are gathered, arranged and safeguarded in the archive of the curia."\(^4\)

\(^4\) Id. at c.482, § 1: "In every curia, a chancellor is to be appointed whose principal task is, unless particular law determines otherwise, to see to it that the acts of the curia are gathered, arranged and safeguarded in the archive of the curia."\(^4\)

\(^5\) Id. at c.487, § 1: "It is necessary that the archive be locked and that only the bishop and the chancellor have a key to it; . . . ." \(^5\)

\(^6\) Id. "[N]o one may [e]licitly enter it without the permission either of the bishop or of both the moderator of the curia and the chancellor." \(^6\) 1983 Code c.488 provides: "It is not permitted to remove documents from the archives, except for a brief time only and with the consent either of the bishop or of both the moderator of the curia and the chancellor." \(^6\)

\(^7\) Id. at c.471: All persons who are admitted to offices within the curia must: "2. observe secrecy within the limits and according to the manner determined by law or by the bishop." \(^8\)

\(^8\) Id.
could not ordinarily divulge the information it contains.

One of the bases of confidentiality is the right to privacy, now formally recognized in ecclesiastical statutory law for the first time. But even that right to privacy is not paramount. The so-called secret marriage is a good example. The obligation to maintain secrecy about such a marriage ceases by law if, in the judgment of the local Ordinary, serious scandal or serious harm to the sanctity of marriage would arise if secrecy is preserved. The right to privacy, therefore, must be balanced against any other rights which may come into play in the individual case; and 2) more importantly, against the greater good of the broader community; and 3) the promotion of the ultimate mission of the Church.

Canon 487, section 2 provides that an interested party, personally or through an agent, may obtain an authentic copy or photocopy of documents which are public by their nature and which pertain to the status of that person. The concept "public by nature" is not specifically defined in the Code. Since it is used in reference to documents, it could well be argued that it refers to public ecclesiastical documents. These are documents which "official persons have drawn up in the exercise of their function in the Church, after having observed the formalities prescribed by law."

The Code of 1917 listed some of the principal public ecclesiastical documents: acts of the Pope, of the Roman Curia and of Ordinaries, if the acts were issued in the exercise of their office and in authentic form; instruments made by ecclesiastical notaries; judicial ecclesiastical records; records of baptism, confirmation, ordination, religious profession, marriage and death which are preserved in the Curia or the parish or the religious organization; also written attestations, taken from the said

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* Id. at c.220: “No one is permitted to damage unlawfully the good reputation which another person enjoys nor to violate the right of another person to protect his or her own privacy.”

* Id. at c.1130: “For a serious and urgent reason the local ordinary can permit a marriage to be celebrated secretly.” Id. 1983 Codex c.1131 provides: “The permission to celebrate a marriage secretly also includes: 1. permission that the pre-matrimonial investigation be made secretly; 2. the obligation that secrecy concerning the marriage be observed by the local ordinary, the assisting minister, the witnesses and the spouses.”

* Id. at c.1132: “The obligation to observe secrecy ... ceases on the part of the local ordinary if serious scandal or serious harm to the sanctity of marriage is threatened by observing the secret and this is to be made known to the parties before the celebration of the marriage.”

* Id. at c.487, § 2: “It is a right of interested parties to obtain personally or through their proxy an authentic written copy or a photocopy of documents which are public by their nature and which pertain to the status of such persons.”

* Id. at c.1540, § 1: “Public ecclesiastical documents are those which official persons have drawn up in the exercise of their function in the Church, after having observed the formalities prescribed by law.”
records, made by pastors, or Ordinaries or ecclesiastical notaries, and authentic copies of them.\textsuperscript{14}

The revised Code parallels the comparable canons in the 1917 Code. Therefore, it is to be interpreted in accordance with the interpretations applied to the canons of the 1917 Code. The list is not exhaustive because it describes only the principal public ecclesiastical documents. However, it provides insight as to what is to be considered a public ecclesiastical document.

The document has to be based on some official action and be a recording of the information pertaining to that action, for example, baptism or ordination, or a decree establishing a parish. It always involves the action of some authority in the Church, whether that be the Pope, an Ordinary, an ecclesiastical notary, a judge, or a pastor. Furthermore, the term "public ecclesiastical document" pertains in concept more to the weight of authority the document carries as an instrument of proof than it does to general accessibility of the document. This is seen clearly in the case of records pertaining to judicial actions, for example, marriage cases. These are public ecclesiastical documents, but are not publicly accessible even though the information pertains to the status of a person, is provable in the external forum, and by law there is a defined element of publication required for such information. Consequently, the access provided in Canon 487, section 2, is not absolute.

In the first place, Canon 487, section 2 refers only to public ecclesiastical documents. In the second place, the right of access to the document is to be interpreted in light of two other factors: 1) whether there is a specific statutory obligation of secrecy; and 2) the relationship to the information of the person who seeks access. These considerations must be coupled with the more general considerations mentioned above regarding the right to privacy, the greater good of the broader community, and the welfare of the Church's mission as a whole. With these general principles in mind, a review of some specific situations mentioned in the Code can

\textsuperscript{14} 1917 Code c.1813, § 1:

The principal public ecclesiastical documents are:

1) acts of the Supreme Pontiff, of the Roman Curia and of Ordinaries, if the acts were issued in the exercise of their office and in authentic form; also authentic attestations concerning these acts made by the aforesaid persons or their notaries:

2) instruments made by ecclesiastical notaries;

3) judicial ecclesiastical records;

4) records of baptism, confirmation, ordination, religious profession, marriage, and death, which are preserved in the Curia, or the parish, or the religious organization; also written attestations taken from the said records made by pastors, or Ordinaries, or ecclesiastical notaries, and authentic copies of them.

\textit{Id.}
be undertaken.

Canon 221, section 1 recognizes the right of all the Christian faithful to vindicate and defend their rights in Church law before a competent ecclesiastical court.\(^\text{16}\) This implies a right to everything necessary to so vindicate and defend their rights and includes access to the information necessary to make their case. The right of access could not be proposed as an absolute one since, in light of the principles mentioned above, there could be restrictions applicable in a given case. Nonetheless, it establishes a general principle that the person has a right of access unless in a particular case some restriction must be placed for a specific purpose. Such a denial would be made either in a judicial or an administrative fashion, more commonly the latter. In either case, it must be made in writing,\(^\text{16}\) it must be interpreted strictly,\(^\text{17}\) and it must give the reasons on which it is based.\(^\text{16}\)

A cloak of secrecy is specifically established for information acquired in the process for the appointment of bishops. Canon 377, section 3 establishes, in broad outline, the inquiry that precedes the selection of individuals whose names are proposed to the Apostolic See for appointment to episcopal office. It decrees that the Apostolic legate may obtain opinions on the suitability of a candidate, and these are given and kept in secrecy.\(^\text{16}\)

In addition to the regular archive of the diocese, there is also a secret archive. This contains documents which are to be kept secret so that they

\[^{16}\text{Id. 1983 Code c.221, § 1: "The Christian faithful can legitimately vindicate and defend the rights which they enjoy in the Church before a competent ecclesiastical court in accord with the norm of law." Id.}\]

\[^{16}\text{Id. 1983 Code c.37: "An administrative act which deals with the external forum is to be set forth in writing. . . ." Id.}\]

\[^{17}\text{Id. at c.36, § 1: An administrative act is to be understood in accord with the proper meaning of the words and the common usage of speech. In a doubtful situation administrative acts are subject to a broad interpretation except for the following administrative acts which are subject to a strict interpretation: those dealing with lawsuits, those threatening or inflicting penalties, those which restrict the rights of a person, those which injure the acquired rights of others, or those which benefit private individuals and are contrary to the law. Id.}\]

\[^{18}\text{Id. at c.51: "A decree should be issued in writing, giving, in the case of a decision, the reasons which prompted it, at least in a summary fashion." Id.}\]

\[^{19}\text{Id. at c.377, § 3: [M]oreover, the pontifical legate is to hear some members of the college of consultors and of the cathedral chapter, and if he judges it expedient, he shall also obtain, individually and in secret, the opinion of other members of the secular and religious clergy as well as of the laity who are outstanding for their wisdom. Id.}\]
can be "protected most securely." It is accessible only to the Bishop. He alone may have the key. When the See is vacant, the secret archive may be opened by the diocesan administrator only in a case of true necessity. Further, a document may not be removed from the secret archive except as provided by law. In fact, the only time a document may be removed is so that it may be destroyed as provided by law.

Only the most exceptional type of documents are placed in the secret archive. Ordinarily, they would pertain to criminal trials. An individual bishop might choose in a given case to place other documents or information in the secret archive so as to lessen or prevent the possibility of scandal or the possibility of defamation of an individual's good name. However, that course could legitimately be taken only in unusual circumstances, and all the rules governing the secret archives would then apply.

Canon 645 governs admission to the novitiate of a religious institute. It stipulates the nature of the investigation which precedes admission. It goes on to provide that if, in the opinion of a superior, other information is needed, it can be obtained under an obligation of secrecy. That obligation is two-fold. It obliges the person who gives the information. More importantly, it obliges the superior who obtained it. Whether the information is used in the decision-making process is immaterial to its confidentiality. In a case, therefore, where an individual, whose request for admission to a novitiate was denied, petitions access to such a record, for example, for the purpose of reviewing the information on which the decision was made, the superior would have no choice in law but to deny the request.

A religious superior who wishes to dismiss a member of the Institute for whatever reason may do so only with the support of the Institute's
council. The vote is by secret ballot. Secrecy applies, though, only to the ballots themselves, that is, to the identity of the individual who cast the particular ballot. The process which precedes it clearly requires that the individual have access to all records pertaining to the case, whether that be information about the case or background information which might affect the individual’s defense.

This right of access is a fairly general one. Certainly it applies to all situations in which a person is obliged to mount a defense against accusations or administrative or judicial actions. Only in the rarest of cases could access to such information be denied without thereby jeopardizing the validity of the action itself. This issue will emerge in greater clarity when treating the confidentiality of Tribunal records.

There are two other areas in the Code which provide some guidance. Canon 1582 permits a judge access to any place or thing when he considers this necessary to settle a case.

The canon could be interpreted as applying to records in general since the words used are very broad. Further, there is built into the procedural law itself a safeguard of secrecy imposed on the judge and others who participate in a judicial proceeding, the purpose of which is to protect the parties and their good names, or to avoid discord, scandal or “some other similar disadvantage.”

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27 Id. at c.699, § 1: “With the council, which must have at least four members for validity, the supreme moderator is to proceed collegially to the careful weighing of the proofs, arguments and defenses; if it has been so decided by a secret ballot, the supreme moderator is to issue the decree of dismissal, . . . “ Id.

28 Id. at c.697:

[I]f the major superior, after having heard the council, believes the process of dismissal is to be begun:

1. . . .

2. the major superior is to warn the member in writing or before two witnesses with an explicit threat of subsequent dismissal unless the member reforms, the cause of the dismissal is to be clearly indicated and the member is to be given the full opportunity of self-defense; . . .

Id.

29 Id. at c.1582: “If in order to settle a case the judge considers it opportune to have access to a given place or to inspect something, this should be specified in a decree which describes in summary fashion those elements which must be exhibited at the access, after hearing the parties.” Id.

30 Id. at c.1455

1. Judges and tribunal personnel are always bound to secrecy of office in a penal case; they are also thus bound in a contentious case if the parties may be harmed by the revelation of some procedural act.

2. . . .

3. Moreover, as often as the nature of a case or the proofs is such that the reputation of others is endangered by divulging the acts or proofs, or an opportunity for discord is provided or scandal or some other similar disadvantage might arise, the judge can
But a party to a case also has a defense against such an action by a judge in regard to records. No one is obliged to exhibit documents (or records) which cannot be communicated without risk that infamy, dangerous vexations or other serious evils will happen to themselves, or their spouse, or persons related to them by consanguinity or affinity. The right of denial covers documents which are common to both parties, and even though other safeguards against possible evil consequences are built into the law, and despite what might seem to be a violation of the right of defense which the other party to the case should enjoy. It seems that the right to privacy is paramount in this situation and supersedes even the right of defense.

Such is the case when the document is common to both parties. A fortiori applies, and perhaps with even more vigor, when a document or record is not common to both parties, but rather pertains only to one of the parties, for example, a personnel record. In the absence of any authoritative jurisprudence, it seems that the one who makes the judgment on whether fear of such evil is present is the one whose record it is, rather than a judge or the one who might, in fact, have physical possession of the record.

The question of divulgence of information acquired by the Tribunal in investigating a marriage arises at a number of points in the formal process. The underlying concern is always the right of defense. As a concept, that applies not just to the respondent's right of defending against allegations made by the petitioner, but also to the petitioner's right of pursuing the claim made in the petition, to the respondent's right either to oppose or support the claim made in that petition, and to the Defender of the Bond's right to oppose the claim. Sequentially, the first point at which this issue arises is at the very beginning of the process.

The revised Code states that by the decree which admits the petition, the judge must call or cite the other party for the contestatio litis. That decree of citation must be communicated to the respondent as soon as

bind the witnesses, the experts, the parties and their advocates or proxies by oath to observe secrecy.

*Id.*

* Id. at c.1545: “The judge can order that a document which is common to both parties be exhibited in the process.” *Id.*

* Id. at c.1546, § 1: “Even if documents are common, no one is obliged to exhibit those which cannot be communicated without risk of harm in accordance with the norm of can. 1548, § 2, n.2, or without risk of violating the obligation to observe secrecy.” *Id.*

* Id. at c.1507, § 1: “In the decree which accepts the libellus of the petitioner the judge or president must either call into court or cite the other parties for the joinder of issues. . . .” *Id.* “Libellus” is a standard canonical term used for the petition which introduces the case. *Id.*
possible, and if it is not done, the process is null. Furthermore, the petition must be made available to the other party, either as an attachment to the citation or by communication after the other party's judicial deposition.

The general principle is that the respondent must have access to the information necessary to present an adequate defense. But, while this is a general principle, it is not an absolute one. Access to information is not so essential a right that any restriction would irreparably damage the right of defense. The judge has discretionary power to withhold the information contained in the petition until after judicial deposition by the respondent. Consequently, the specific allegations made by the petitioner are not necessarily known to the respondent at the time of the contestatio litis. The law demands that this be done only for grave cause. But the absence of this information does not essentially destroy the right of defense, at least at this stage of the process, so it can be omitted without the entire process being invalid. Thus, an exception to complete divulgence is already established at the beginning of the process.

The next procedural point at which a person other than an official of the court has access to the information gathered is treated in Canon 1678. Representatives of the parties have a right to be present at the examination of the parties, the witnesses and the experts. The parties do not have any rights both because the canon does not mention them and because it specifically exempts the situation mentioned in Canon 1559. This latter canon says the parties have no right to be present unless, in a case involving the private good, the judge admits them. A marriage case al-

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34 Id. at c.1508, § 1: "The decree of citation to the trial must be forwarded immediately to the respondent. . . ." Id.
35 Id. at c.1511: "If the citation has not been legitimately communicated, the acts of the process are null. . . ." Id.
36 Id. at c.1508, § 2: "The introductory libellus is to be joined to the citation unless for serious reasons the judge determines that the libellus is not to be made known to the respondent before the latter makes a deposition during the trial." Id.
37 The only restriction is that he exercise it for a grave cause, and he is the only one who determines whether such a case exists and in what it consists. See id.
38 The word used is "patronis," which implies a function broader than that of advocate or procurator considered singly.
39 1983 Code c.1678, § 1:

The defender of the bond, the advocates of the parties and the promoter of justice, if intervening in the suit, have the right:

1. to be present at the examination of the parties, the witnesses and the experts, with due regard for the prescription of can. 1559;
2. to inspect the judicial acts even though not published and to review the documents produced by the parties.

Id.
40 Id. at c.1559: "The parties may not assist at the examination of witnesses unless the judge believes that they must be admitted, especially when the matter concerns the private
ways involves the public good, and the parties are never to be admitted to the examination of the opponent, the witnesses, or the experts. In addition to this, the second part of Canon 1678 specifically excludes the parties from attending such sessions. Furthermore, the judge may also decide that, because of the nature of the matter or of the person involved, the deposition is to proceed in secret, excluding even the advocates and procurators.

Prior to examination of the witnesses, the judge is to communicate their names to the parties. If he prudently believes that this cannot be done without grave difficulty at this point, it may be done later, but before the publication of the testimony. This is another dimension of the right of defense. Its intent is that the parties will have an opportunity to object to a witness and to lodge a petition for exclusion of a particular witness, or witnesses.

Canon 1554 of the revised Code is almost identical in tone and wording to Canon 1763 of the 1917 Code. Article 123 of Provida Mater is even closer to the revised Code in wording. Following up on that was article 130, which provided that if necessity demanded it, the judge or auditor could bind the advocates and even the procurators under an oath of secrecy. Further, the judge could even go so far as to permit a
witness to testify on condition that his name not be revealed to either or both parties. Ordinarily, the actual testimony would later be divulged to the parties at the time of publication. However, the basic principle here established is that if essential testimony is obtained or induced under a condition or promise of confidentiality, this condition or promise must be honored assiduously from then on. So far, this addresses only the identity of the witnesses. But that is an important issue in and of itself, since in the revised Code the identity is ordinarily to be disclosed.

A further consideration worth noting is that if the judge had cause to doubt the sincerity of an oath of secrecy taken by an advocate or procurator, he would treat them in the same way as he would treat the party, namely, he would not reveal the identity of the witness. This principle was not articulated in the law itself, but was a sufficiently probable opinion and so it could be followed.

The services of experts, court appointed or nominated by the parties and approved by the court, may be used whenever the judge determines that their skill or knowledge is required to prove something or to determine the true nature of a thing. These experts are to have access to the acts of the case, to documents and whatever else is necessary to permit them to carry out their function correctly and faithfully. Their work may be viewed from two perspectives: 1) their evaluation is for the purpose of proving something; or 2) their evaluation is for the purpose of assisting the judge in arriving at a conclusion as to the true nature of the matter before the court. If the first view is taken, their report is no different from any other proof. On the other hand, the judge is not obliged to

Doheny, Canonical Procedure in Matrimonial Cases 244-246 (Milwaukee, 1938) (hereinafter Doheny).

61 Provida Mater, art. 130 at § 2:
If a witness testifies only on the condition that his name not be revealed to either one or both parties, and if the instructor thinks that this stipulation is well founded, he has the right to delegate two or three people to whom the name of the witness is to be given so that they may investigate the credibility and honesty of the witness, which people are not to be interested in the case and must be above all suspicion as regards the party or parties, insofar as this can be determined.

Id.

62 Actual violation of the oath would be sufficient cause to impose a fine or other penalty, even deprivation of office. See 1917 Code c.1625, § 3.

63 See Cappello, Quaestio Canonica, 19 Periodica 71-73 (1930) (hereinafter Quaestio).

64 1983 Code c.1574: "The services of experts must be used whenever their examination and opinion, based on the laws of art or science, are required in order to establish some fact or to clarify the true nature of something by reason of a prescription of the law or a judge." Id.

65 Id. at c.1577, § 2: "The acts of the case and other documents and aids which the expert may need in order to function properly and faithfully must be turned over to the expert." Id. 1983 Code c.1581 provides: "The parties may designate private experts who must be approved by the judge. . . . If the judge admits them, they may inspect the acts of the case if necessary and be present at the discharging of the court experts' function. . . ." Id.
use the services of an expert, but may do so where he finds it useful or necessary to assist him in sifting through the facts. In light of this, the report of the expert may be viewed in the same way as the report of an assessor, an assessor who is an expert in a particular field, and consequently available to no one but the judge.

The issue of confidentiality has arisen most urgently in connection with the requirement that the acts be published. After the promulgation of the American Procedural Norms (A.P.N.) and before the effective date of the revised Code, it seems to have been a general practice among American Tribunals to deny to both parties access to the acts of the case. The reasoning was that Tribunals which lack the power of subpoena would be unable, or at least find it very difficult, to obtain testimony unless witnesses could be assured that their responses would be held in confidence. Such a practice was justifiable both for practical considerations and as a matter of law. But it is important, as a setting for considering the revised Code, to understand that ecclesiastical law has always taken the position that the parties should have access to the acts unless, in a particular case, such access is to be restricted or denied. The principle is openness, the exception is secrecy.

This may be seen clearly in the A.P.N. Norm 18, which states: "when, after consultation with the Advocate and the Defender, the Judge has decided that all necessary and available evidence has been obtained, the principals will be permitted to read the Acts unless, in the opinion of the Judge, there is danger of violation of the rights of privacy. The Judge will consider the requests by the principals for further instruction before bringing the case to a conclusion." So the revised Code does not articulate a new concept in law, nor reestablish an old concept, long unused and only now being revived, even though the reality of practice might seem to be that secrecy is the norm and openness the exception. In short, in practice what had developed was that the current rule had become the exception, and the exception had become the rule.

Canon 1598 stipulates that once the proofs are gathered, the judge is to permit the parties and their advocates, under pain of nullity, to inspect the acts which have been kept secret from them up to that point. The advocate may even request a copy of the acts. This right of access, however, is not entirely unrestricted. In the first place, the inspection site is restricted to the office of the Tribunal. In the second place, in cases which pertain to the public good, the judge may decide that in order to avoid

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64 Id. at c.1680: "In cases of impotence or defect of consent due to mental illness, the judge is to use the services of one or more experts unless it is obvious from the circumstances that this would be useless. . . . " See supra note 48.
68 Marriage cases pertain to the public good as distinct from the purely private good of
the most grave danger, a particular part of the acts is to be shown to no one, insuring always that the integrity of the right of defense is maintained.99

This particular canon is very similar to two canons of the 1917 Code. According to Canon 1858 of that Code, before the pleading and sentence in a case, all proofs which still remained secret had to be published.90 Publication involved granting to the parties and their advocates, permission to inspect the acts of the process.91 These provisions were further clarified by article 175 of Provida Mater, which specified that the presiding judge, by decree, was to grant to the parties and their advocates the authority to examine the testimony and all the other proofs contained in the acts which had been kept secret up to that time, and also permission to request a copy of the acts.92 Out of this background came Canon 1598 of the revised Code. So a review of the commentators on those canons of the 1917 Code and the articles of Provida Mater is in order because it provides insight for understanding the concept of publication and its relationship to the right of defense as found in the revised Code.

Oddly enough, a number of authors did little more than simply state the canons of the 1917 Code or the provisions of Provida Mater, with little or no commentary.93 Those who comment on them in any way are agreed that the essential consideration is the right of defense. The infor-

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99 1983 CODE c.1598, § 1:
After the proofs have been collected the judge by a decree must, under pain of nullity, permit the parties and their advocates to inspect at the tribunal chancery the acts which are not yet known to them; a copy of the acts can also be given to the advocates upon request; however, in cases concerned with the public good, in order to avoid very serious dangers, the judge can decree that a given act is not to be shown to anyone, with due concern, however, that the right of defense always remains intact.

90 1917 CODE c.1858: “Before the pleading and the sentence in a case, all proofs which have been admitted into the acts of the case and which still remain secret must be published.” Id.

91 Id. at c.1859: “If permission was granted to the parties and their advocates to inspect the acts of the process and to obtain copies of the same, the publication of the process is thereby made.” Id.

92 Provida Mater, art. 175:
1. After the proofs thus far introduced by both sides have been duly considered by the Defender of the Bond, by the judge instructor and by the presiding judge, the communication of all the acts to both parties must take place.
2. This authorization is granted by a decree of the presiding judge in virtue of which he grants the parties and their advocates the authority to examine the testimony and all the other proofs that are in the acts and which have remained secret, as well as to request a copy of the acts.

Id.

93 See W. Doheny, supra note 50; Bottoms, The Discretionary Authority of the Ecclesiastical Judge in Matrimonial Trials of First Instance, Canon Law Studies § 349, at 145 (Catholic University of America 1955; D. Prummer, Manuale Iuris Canonici 605 (Friburgi 1933).
mation supporting or contradicting the petition must be available to the parties so that they may put forward in the pleading stage an adequate representation of their contentions. Wernz-Vidal explain, for example, that the proofs cannot be impugned unless they are known. Augustine sees it as giving the parties an opportunity to defend their positions. Others merely speak of it as being necessary for the right of defense. Most seem to be agreed that publication is necessary for validity, although the opinion is not unanimous. Augustine, on the other hand, states that publication is not required for the validity of the trial. In the legislation prior to the 1917 Code, it certainly was not a requirement for validity, and, no doubt, this influenced the post-Code writers. But the intent of the 1917 Code seemed to be that it be a requirement for validity.

Most authors take for granted that publication will be made. A number go so far as to state unequivocally that it is required for validity, and that its omission would cause nullity in the process, albeit remediable nullity. Wernz-Vidal even go so far as to say that, since it is of the substance of the process, the time period for submitting additional proofs or pleadings does not begin to run until after all proofs are divulged. The general view of authors, therefore, seems to have been that publication was an essential and substantial part of the process and was required so

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64 See Wernz-Vidal, De processibus n.476 (hereinafter Wernz-Vidal).
66 See Gaspari, Tractatus Canonici de Matrimonio II 304 (Rome 1932); Veermersch & Creusen, Epitome Iuris Canonici III 107 (Rome 1949) (hereinafter Veermersch); Della Rocca & Fitzgerald, Canonical Procedure 266 (Milwaukee 1961) (hereinafter Della Rocca); Coronata (Mateo Conte), De processibus 294.
67 Augustine, VIII, at 301.
68 See Rotal decision January 28, 1918, A.A.S. 11, 24; see also Wanenmacher, Canonical Evidence in Marriage Cases, Canon Law Studies § 9, at 386 (Catholic University of America 1920) (hereinafter Wanenmacher).
69 See Wanenmacher, supra note 68, at 386-87. He is hesitant to declare publication absolutely necessary for validity. However, he says:

The publication of the acts is in justice due to the parties, but it does not clearly appear whether its omission vitiates the proceedings and the sentence . . . The Code seems to indicate that making an adversary acquainted with the other's proofs is so necessary that its omission vitiates the proceedings.

Id.
70 See Della Rocca, supra note 66, at 266; Wernz-Vidal, supra note 64, at n.476.
71 See M. Cardinal Lega-Victorio Bartocetti, Commentarius in Judicia Ecclesiastica II, at tit. xii (Rome 1939).
72 See Wernz-Vidal, supra note 64, at n.477. This is similar to the position taken by Franciscus Roberti in De processibus, vol. ii (Rome 1941). He points out that publication is a necessary corollary to the fact that testimony is taken in secret. Id. at n.350. Without this publication the case may not be concluded and, if it is concluded, it is null. Id. at n.435.
Ecclesiastical Records

as to maintain the integrity of the right to defense. Substantial omission would, as a consequence, impair seriously a person's right of defense and would nullify the proceeding.

It is important to understand this issue as it emerged in the post-
Code commentaries because it is so similar to the legislation of the 1983 Code. The restrictions or limitations these commentators see in the 1917 Code must be considered in a review of the 1983 Code.

Despite its paramount importance, the right of the defense was always to be balanced against the welfare of the Church, the public good, and even against the welfare of the individual in situations where full publication might impair justice. The rule, therefore, was that publication be effected, but always with the possibility of an exception based upon the particular circumstances of the case.

Veermersch-Cruesen assert that publication could be omitted if it would be seriously detrimental. Cappello strongly espoused a similar position. In responding to a question on publication, he held that the parties not only may petition for a copy of the acts, but have a true right to this so that the Ordinary or the judge cannot per se deny the petition for a copy of the acts. To avoid difficulties with witnesses, the judge could bind all concerned under an oath of secrecy according to the provision of section 3, Canon 1623, Code of 1917. However, if the party threatened to make the acts known and the Ordinary or the judge prudently feared damage from their divulgence and also feared that the party would not be faithful to an oath of secrecy, the Ordinary or judge was not bound to grant the petition for a copy of the acts.

There is no question about whether or not publication is necessary for validity under the revised Code. Canon 1598 states that the proofs are to be made available for inspection under pain of nullity. The remainder of the canon is in line with the history and understanding of prior legislation, and must be understood in accordance with that legislation. Such an approach is entirely in accord with standard approaches to interpreting ecclesiastical law.

Accepting, then, the position that ecclesiastical law gives the parties and their advocates a right to inspect the proofs which have been gathered and even goes so far as to give the advocates a right to petition for a copy of the acts, the question must be asked: Are these absolute rights or are there circumstances in which either or both may be restricted or even denied completely without, thereby, invalidating the process?

73 Veermersch, supra note 66, at III, at 107. Della Rocca speaks of the exceptional cases where publication is not permitted. However, this has little bearing here since the reference is to non-consummation cases and the Code of 1917 did not permit publication in such cases. See 1917 Code c.1985.

74 Quaestio, supra note 53, at 72-73.
Considering first the right of the advocate to inspect or obtain a copy of the acts, the only conclusion available is that it is not an absolute right but one subject to restrictions. In accordance with previous legislation, the judge could bind the advocate under an oath of secrecy not to reveal to the party either the content of the testimony or even the name(s) of the witness(es). This would be justifiable only when the judge has already made a determination, in accordance with the remainder of Canon 1598, that the information is to be withheld from the party. As Doheny explains: "It is the natural tendency of an attorney or advocate to keep his client perfectly informed." Where such a transmission of information would effectively negate the value the judge is trying to preserve by means of withholding information from the party, he would be justified in binding the advocate under an oath of secrecy. Further action would be in accord with the principles enunciated above regarding divulgence of the identity of witnesses.

Regarding the right of the party to inspect the acts, Canon 1598 establishes a restriction as to place. The party has this right of inspection, but only in the chancery of the Tribunal. Not only is the judge under no obligation to permit the inspection elsewhere, but it seems he is not free to do so. The second restriction evident in the canon is that the party has no right even to petition for a copy of the acts, much less to obtain a copy of them. The first phrase of the canon speaks only of inspection when it includes both the party and the advocate. The second phrase speaks of a right to petition for a copy of the acts, but mentions only the advocate and is entirely silent about the party. It is reasonable to conclude that the legislator did not intend to give the party a right.

Marriage cases always involve the public good, so the latter portion of the canon is applicable to them. The judge can determine, therefore, that any particular act is not to be made available to anyone. This means that the judge may exclude any or all items in the acts by this decision. It also means a decision is to be made in regard to each individual item of proof. Further, it clearly is the intent of the law to give the judge this exclusionary power not only in regard to the parties, but also in regard to the advocates. It goes without saying that what he could exclude from the party he could also exclude from the procurator, since the latter, as a proxy, is canonically identical to the party.

Such an action may be taken only to avoid the gravest danger. It is the judge who makes the decision on whether this very grave danger is present and whether the only means of avoiding it is restriction of the right of access in whole or in part. In making his decision, he may be

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78 W. Doheny, supra note 50, at 254.
79 1983 Code c.1691.
guided by the provisions of *Provida Mater* and the commentaries thereon. Consequently, the judge can take into account such individual and particular considerations as that the witnesses might be subjected to harassment or lawsuits; or he may take into account more general considerations such as lessening the likelihood that testimony will be available in future cases if anything is done to erode the trust people in general have that information communicated to the Church, or to an official of the Church, will be held in confidence. Again, the rule is that the party and the advocate have the right of access to the proofs gathered, but not an unrestricted right. A decision must be made in each individual case — and within the individual case — about each individual item of proof. But, in fact, that is not significantly different from what the previous law required.

At the conclusion of the case in first instance, a sentence is drawn up articulating the decision of the judge. Most tribunals have modeled their sentences on those of the S.R. Rota so that the sentence contains a rather extensive review of the testimony introduced.

Canon 1614 of the revised Code says that the sentence has no force until it is published. Canon 1615 then stipulates that publication is effected either by giving a copy of the sentence to the parties or their procurators, or by transmitting a copy of it to them by the public postal service or in another safe way. Again, the right of defense is the main consideration. A party who feels aggrieved by the decision of a judge has the option of filing a complaint of nullity, if there is a ground of such nullity present, or of interposing an appeal against the decision to a

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77 *Provida Mater* is not abrogated in whole by the revised Code. Canon 20 of that Code states the principle that prior legislation is abrogated or derogated only if such is expressly established or if it is directly contrary to later legislation. Further, Canon 21 states that if there is any doubt, the revocation of the prior legislation is not to be presumed but, insofar as possible, the two are to be reconciled.

78 1983 CODE c.1614: "The sentence is to be published as soon as possible with an indication of the ways in which it can be challenged; it has no force before publication even if the dispositive section has been made known to the parties with the permission of the judge." *Id.*

79 *Id.* at c.1615: "The publication or announcement of the sentence can be made either by giving a copy of the sentence to the parties or their procurators or by sending a copy to them in accord with the norm of can. 1509." *Id.*

80 *Id.* at c.1621: "The complaint of nullity mentioned in can. 1620 can always be proposed by way of exception in perpetuity and by way of action before the judge who pronounced the sentence within ten years from the date of publication of the sentence." *Id.* "The complaint of nullity in the cases mentioned in can. 1622 can be proposed within three months from the notification of publication of the sentence." *Id.* at c.1623.

81 1983 CODE c.1620 lists the various grounds on which a sentence might be irremediably null. The most critical of these from the point of view of the subject here under consideration is § 7: "the right of defense was denied to one or other party. . . ." *Id.* Canon 1622 lists the grounds on which a sentence might be remediably null.
higher court.** Ordinarily, therefore, the entire sentence is to be communicated to the parties.

The Code makes provision for the situation where the sentence is not communicated. Obviously, the proceeding in the first instance is concluded so it cannot become invalid. However, the period within which appeal may be lodged does not begin to run until publication is effected.*** From the wording of Canon 1682, section 1, it seems the parties have the option, even though not the strict right, of presenting their observations on the sentence for consideration by the appellate court in its decision on whether to confirm the first-instance decision or to remand it for trial in the ordinary process at the second instance. That would presume an awareness of the reasons on which the first-instance decision was based. But the reasons do not necessarily have to include a detailed recounting of the various proofs. Also, this may not be a major concern in a marriage case since in such cases there is a mandatory review by a court of appeals of all affirmative decisions.** In fact, at the appellate level, the approach is the same whether the case comes to the court as a matter of procedural requirement, or whether there is also an appeal by one or other of the parties.** Action on an appeal would not be distinct or different from action taken on routine review.

There are two issues to be considered in arriving at a conclusion:

1. The information the sentence should contain. It would seem that the sentence might consist in the required recital of identifying facts and of the procedural acts which occurred, coupled with a very brief dispositive part.** The dispositive part of the sentence is the portion which rendered decision on the controversy. It is, therefore, a statement of the judge's conclusion. The revised Code requires that this be preceded by the reasons on which it is based.** That portion can be very brief and may

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** Id. at c.1628: "The party who feels aggrieved by a given sentence and likewise the promoter of justice and the defender of the bond in cases in which their presence is required, have the right to appeal from a sentence to a higher judge. . . ." Id.

*** Id. at c.1634, § 2: "Meanwhile the judge from whom the appeal is being made must transmit the acts to the appellate judge . . . ." Id.

** Id. at c.1682, § 1: "The sentence which first declared the nullity of the marriage together with the appeals if there are any and the other acts of the trial, are to be sent ex officio to the appellate tribunal within twenty days from the publication of the sentence." Id.

** Id. at § 2:

If the sentence rendered in favor of the nullity of marriage was in the first grade of trial, the appellate tribunal by its own decree is to confirm the decision without delay or admit the case to an ordinary examination of a new grade of trial, after considering the observations of the defender of the bond and those of the parties if there are any.

Id.

** 1983 CODE c.1612 lists the identifying facts which must be included and the other formalities to be observed.

* Id. at § 3: "Following these points is the dispositive section of the sentence preceded by
Ecclesiastical Records consist in nothing more than a statement of the various conclusions arrived at by the judge from the proofs offered, without giving any extensive detail as to what individual witnesses might have said.

2. How the sentence is to be communicated. It seems a matter for the discretion of the judge as to whether he orders publication by means of handing a copy of the sentence to the parties or by transmitting a copy to them. The 1917 Code offered three alternatives:

a. Summon the parties to the Tribunal to hear the sentence read by the judge;

b. Notify the parties that the sentence is at the Tribunal and that they have a right to read it and to petition for a copy of it; and

c. Send a copy of the sentence to the parties by the public mails.**

In fact, most tribunals seem to have opted for the second alternative. Since the judge has an alternative under Canon 1614 of the revised Code, he could determine that publication be by means of handing the parties a copy of the sentence. This would require that they be summoned to the Tribunal to receive the copy. It would seem advisable to indicate to them, in the same notice, the actual decision rendered.

Canon 1634, section 2, ordains that the time period within which appeal must be lodged does not begin to run until the party receives a copy of the sentence. It could be argued that failure of the party to obey the summons of the Tribunal to appear and receive a copy of the sentence is an equivalent to forfeiting of the right of appeal. Further, the case will receive the same kind of review at appellate level whether the party appeals or not. Consequently, a decision by the judge to hand the sentence to the party rather than mail it would not, no matter how the circumstances might transpire, be a violation of any strict right.

Canon 1481, section 1 of the revised Code gives the Judge power to appoint a Procurator, even for an unwilling party. If such an action is taken in a particular case, the sentence may be communicated to the Procurator, and this communication is sufficient to bring the sentence into force under Canon 1614.

There is, of course, always the possibility that the party or parties will appear at the Tribunal to receive a copy of the sentence. It is advisable, therefore, to insure the decision is written in such a way that it does not

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** 1917 Code c.1877:

The publication of a sentence can be done in three ways, either by summoning the parties to hear the sentence solemnly read by the judge sitting in court, or by notifying the parties that the sentence is at the chancery of the court and giving them permission to read it and to get copies of it, or, where such is the custom, by sending a copy of the sentence by registered mail, in which case care must be taken to have proof that the parties actually receive the sentence.

Id.
not violate any of the concerns of confidentiality which might previously have arisen in the particular case. If it is necessary to send further information to the appellate court, this may be done either by sending a photo-copy of the entire acts, or some kind of summary of the testimony, much like an assessor’s report, as an addendum to but not a part of the sentence.

Conclusions

The variety of records is extensive. The right of access to those records varies according to the nature of the record and the relationship to the record of the party who seeks or who is requested to exhibit it. It would be difficult to provide an exhaustive list of documents or records with an evaluation of the confidentiality of each. A partial such list, however, will demonstrate a method of approach to the question, taking into account the principles mentioned previously.

Baptismal, marriage and death records are public ecclesiastical documents. They pertain to the status of a person in the Church. They are generally accessible. However, they may also contain marginal notations which form part of the official record in the true sense; for example, a note that an individual is adopted, a note that a person was professed as a religious and is now dispensed, a note that a marriage was declared null. The provision of Canon 1548, section 2, number 2 would be applicable to such records.

Records of ecclesiastical proceedings have to be considered under two headings, depending on the type of proceeding. Records of criminal cases are placed in the secret archives of the curia. They are accessible to no one except the Ordinary. When the See is vacant, they are accessible to the Administrator, but only in a limited manner. Records of other contentious cases, for example, marriage cases, are governed by a rule of confidentiality. No obligation of secrecy governs because a case was processed and the final result reached. But the record of the case containing testimony and the like is accessible only to the parties, their advocates and procurators and Tribunal officials, and then only in the circumstances and in a manner defined in law and only for the purpose defined in law. Upon completion of a case, they become entirely confidential and fall under the rule of Canon 1548, section 2, number 2.

Personnel records on priests or religious could and probably would contain public ecclesiastical documents, for example, a record of ordination or religious profession, or letters of appointment to particular ministries. As such they are accessible, certainly, to the individual on whom the record exists. They could also contain other records or documents, for example, educational transcripts, records or reports of health care treatment or therapy, letters of praise or complaint, and the like. These are
not public ecclesiastical documents and do not become such merely by being placed in an official file of an ecclesiastical institution. As merely private documents, they are the sole property of the ecclesiastical authority in whose possession they are. The Code does not articulate a right of access to them, even on the part of the individual on whom the record exists. That individual, though, has a right to privacy in ecclesiastical law. This right imposes an obligation on the ecclesiastical authority to hold such a record under a seal of confidentiality. This obligation is akin to the obligation incumbent on those mentioned in Canon 1548, section 2, note 1, namely, civil officials, doctors, obstetricians, advocates, notaries, and those who are bound to professional secrecy. The individual on whom the record exists could release the ecclesiastical authority from the obligation of confidentiality in regard to all or part of the record, but, under the provision of Canon 1546, section 1, cannot be obliged to do so.