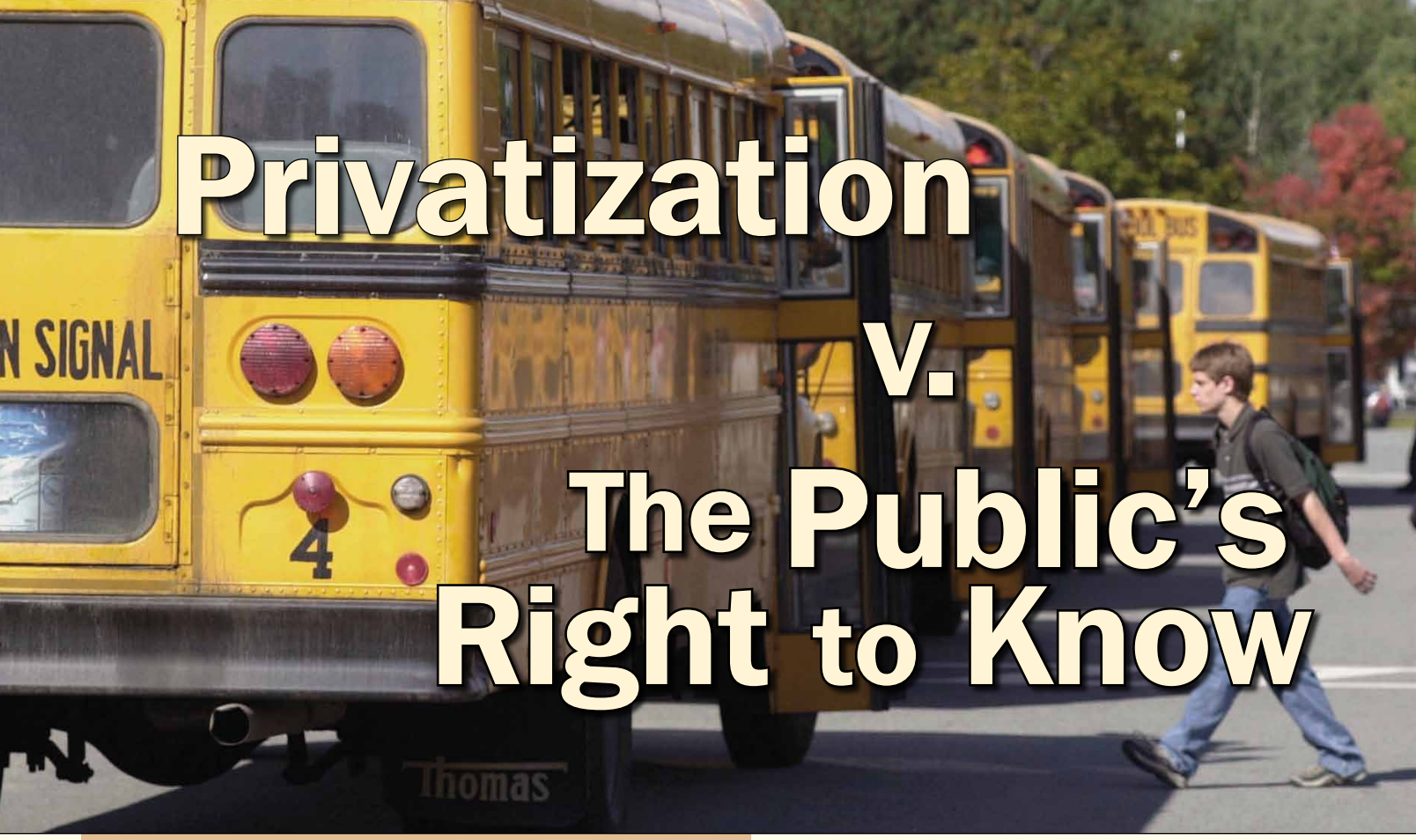


Privatization v. The Public's Right to Know

AP PHOTO BY TOBY TALBOT

From driving school buses to training Iraqi police, the private sector is increasingly responsible for the duties once held by the government.

But as those responsibilities leave the government's hands, is the public's right of access going along with them?

BY RANI GUPTA

Bob Segall was suspicious.

Years ago, Segall, then a reporter for WITI-TV in Milwaukee, Wis., got a tip that a local school bus driver had been convicted of sex crime. The tip checked out and Segall wondered: How many drivers like this are out there?

The station decided to request the records of all the local drivers. The school district had contracted out its bus services to about a dozen private companies, so Segall sent out public records requests to the companies, seeking the drivers' names and birth dates.

The response: a flat denial from an attorney representing all the bus companies.

Segall switched tactics. The Milwaukee school district had a provision in its contracts requiring all the bus companies to hand over a list of their drivers by September of each year. So he filed a records request with the school district for the lists.

Little did he know he was in for a major court battle.

continued inside

The Wisconsin Supreme Court had set the stage for this fight four years earlier, when it said in the 1996 case *Woznicki v. Erickson* that before an agency released records, it had to notify anyone whose "privacy or reputational interests" were implicated and give them a chance to challenge the release in court.

The Milwaukee schools' attorney told Segall that all 1,400 drivers were entitled to a notice. Eight hundred of them objected.

A handful raised legitimate concerns that they had restraining orders out against people who might find them, said Segall, now an investigative reporter for WTHR-TV in Indianapolis. But he said, "The vast majority of the hundreds and hundreds of bus drivers who filed *Woznicki* objections, all they put down was invasion of privacy."

Still, the judge appointed a referee to review all 801 objections. Six were found to have valid objections, and the judge ordered the release of the names and driver's license numbers of the rest. But the judge agreed to halt the order while the bus companies appealed.

More than a year after the companies first sued the school district seeking to prevent the release of the names, the state appeals court agreed that the names should be public.

When the station got the names, Segall said it turned up hundreds of drivers with "significant" backgrounds, including poor driving records or serious felony convictions. One driver who was alone with special-education children had been convicted of sex crimes, Segall said.

Bob Segall

After the story ran, the district didn't stop contracting out its bus services. Instead, it took advantage of the fact that under the public records law, a government agency is not required to turn over records it does not possess.

The district stopped requiring the contractors to turn over rosters of drivers. Its new agreement let school officials inspect the drivers' names at any time, but the district no longer had a list that could lead to an expensive public records battle — and no way for the press or public to find out who was driving thousands of local children.

"They decided it was easier for them not to have the information, which for me was a very troubling development," Segall said.

The station's fight shows how easy it is for a public agency to skirt accountability by taking advantage of weak public records laws that provide little access to contractors responsible for government work.

AP PHOTO BY JOHN MOORE

A private contractor involved in prisoner interrogation enters an interrogation room at Abu Ghraib prison in Iraq in 2004. Though contractors are responsible for many duties of public interest, it can be difficult to obtain information about them.

But the legacy of that case was not all negative. It was a prime example of the ways the *Woznicki* decision could be used to frustrate records requests and the public interest. The state Legislature curbed the reach of the court's ruling in 2003. The next year, legislators passed a law that allowed parents to see the names of their children's bus drivers.

Rare is the reporter who has not dealt with some privatization, whether that is with a contractor paid for some traditionally governmental service — such as running prisons in Texas or performing military duties in Iraq — or with an entity that has some public and private characteristics, such as an economic development corporation.

But the public records and open meetings laws that the press relies on provide much less access to the private contractors than if those responsibilities are still in government hands. That can make it nearly impossible for the media to provide oversight of important public services and report on how taxpayer money is being spent.

'Savvy' contractors

The contracting relationship used by the Milwaukee school district is fairly common. The private school bus industry has become big business, as shown by an annual survey by the trade magazine *School Bus Fleet*. In 2003, the top five contractors alone reported busing almost 4 million students. Federal statistics show 25 million students were transported at federal expense in the 2002-03 school year, the last year for which data is available.

All around the country, companies are running schools, hospitals and prisons – duties that were once the exclusive responsibility of government.

But public records laws and open meetings laws in most places have yet to catch up with this trend of contracting out. Many, including the federal Freedom of Information Act, say that only an entity that qualifies as an "agency" under the law is subject to the public records law. That may include all kinds of quasi-governmental entities (more on that later) but excludes many government contractors, even those that have significant responsibilities or receive large amounts of public money.

Local governments also frequently hire outside consultants for smaller jobs of public importance, such as investigating wrongdoing within an agency or searching for high-profile positions, such as university presidents or city managers.

Peter Fox, executive director of the Wisconsin Newspaper Association, says that while most government contractors are ethical, others use their private status and their knowledge of state laws to thwart openness.

"There are consultants who seek government work who are very savvy about the public records and open meetings laws,"

This report was made possible by a grant from the Robert R. McCormick Tribune Foundation.

AP PHOTO BY ERIC GAY

Flora Patino holds a photo of her son, Hector, one of hundreds of civilian contractors who have died in Iraq doing jobs typically handled by the military.

he said.

In September, the city of Peoria, Ariz., hired a consulting firm to assess its local police department. The consultant surveyed 44 staffers about the management of the department and the chief's performance. The chief announced his retirement soon after, prompting *The Arizona Republic* to seek the consultant's report.

The newspaper found out that the city did not have a copy of the report, said David Bodney, a Phoenix media attorney who represented the newspaper. The consultant had shared the report with the deputy city manager, who had then given it back. The consultant had also retained and destroyed the surveys because she had promised confidentiality, even though Bodney said she had no right to guarantee that.

Ultimately, the city handed over the deputy city manager's notes from her meeting with the consultant and 20 surveys that were stored or e-mailed from city computers.

But the consultant "never produced a thing," Bodney said, and the city insisted the consultant's documents were not public records.

Bodney thinks the newspaper had a "very strong argument" under the public records law, but that there was "a certain pointlessness" in going after destroyed documents.

"These are not isolated incidents," Bodney said. "More and more, public bodies are outsourcing basic government services to third-party contractors and whether legislatively or by court action if necessary, these efforts to frustrate access to public records must be resisted."

'Open buying power'

On the federal level, government spending on contracts has grown 89 percent since 2000, totaling more than $415 billion in the 2006 budget year. These companies are responsible for duties of obvious public interest, such as training Iraqi police, interrogating prisoners at Abu Ghraib and providing ambulance service to victims of Hurricane Katrina.

The information about contractors available without using the federal FOIA is limited, said Scott Amey, general counsel of the Project on Government Oversight, which has done extensive reporting on government contracting. In certain instances, Amey said, you can see the government's solicitations or requests for proposals, and a summary of the contract is sometimes available.

That may sound like a lot, Amey said, but he noted many of the contracts are awarded without solicitations. Many of the summaries are "very bare bones." And the public price tag usually does not include the individual pricing information or orders needed to accurately judge whether taxpayers are getting their money's worth.

Take so-called indefinite delivery-indefinite quantity contracts. These contracts are set up so the government can retain a certain amount of flexibility. For instance, an agency that knows it will need to lease cars but not knowing how many might sign a contract for up to $1 million with a company to provide cars for the government to lease. But the specific orders and prices are often kept secret — making it impossible to judge the contract without

The prevalence of privatization

News articles and official reports have revealed the surprising scope of contracting out:

Disciplining other contractors. The General Services Administration hired CACI Inc. to assist the government in suspending and disbarring contractors, the Project on Government Oversight revealed. CACI itself was nearly banned from government contracting in 2004 for problems with its contract for interrogators in Iraq.

Performing spy work in key areas. Contractors have outnumbered CIA staffers in agency stations in Islamabad, Pakistan, and Baghdad, the *Los Angeles Times* reported.

Screening smut for prosecutors. The Justice Department's official Web site directs citizens who want to report an obscene Web site to a private site run by Morality in Media, an "interfaith organization" that seeks to "rid the world of pornography." The group reviews the allegations and sends a report to federal prosecutors, *The Washington Post* reported in July.

Storing millions of pounds of unused ice. The Federal Emergency Management Agency only used about half of the more than 200 million pounds of ice bought after Hurricane Katrina, FEMA officials told *The Boston Globe*. FEMA then hired a contractor for $12.5 million to store the ice. When it went unused, FEMA finally decided to melt it down this year.

AP/THE FREMONT TRIBUNE PHOTO BY DEAN JACOBS

A trucker waits to unload ice at a privately run storage facility following Hurricane Katrina.

Courtroom success stories

The news for the media and others fighting to access records and meetings for contractors and public-private entities is not all dire. Here are some of the types of organizations that have been on the losing end of lawsuits:

Economic development corporations

These nonprofit organizations created to oversee redevelopment efforts are a frequent source of court battles. In Trenton, N.J., *The (Trenton) Times* sued after a nonprofit development corporation kicked a reporter out of its meetings. The state Supreme Court ruled in 2005 that the Lafayette Yard Development Corp., created by city leaders to draw a hotel to the city's downtown, was a public entity because it issued city-backed bonds and most of its board was appointed by the city.

University fundraising bodies

Requesters have had mixed results getting access to nonprofit organizations that raise money for public universities. In 2002, two Iowa residents sued to gain access to financial documents, meeting minutes and other records of the Iowa State University Foundation, the college's fundraising arm. The state Supreme Court found in 2005 that the foundation was performing a public function by virtue of its contract with the university.

AP/AMES TRIBUNE PHOTO BY NIRMALENDU MAJUMDAR

The Iowa State University Foundation

Umbrella organizations

In Kansas, 19 small school districts that felt they received an unfairly small chunk of change from the state formed a organization, Schools for Fair Funding, that successfully sued the Legislature to receive more money. But despite the fact that it was funded entirely with public money, the organization insisted it was not subject to the public records law, prompting *The Topeka Capital-Journal* to file suit.

The group argued that the superintendents who created the group were acting in their personal, not official, capacities. But a trial judge refused to throw out the lawsuit in December, finding in a summary judgment ruling that the organization "appeared" to meet the definition of a public agency.

Soon after, the organization agreed it was a public agency and contributed $12,500 to the Kansas Sunshine Coalition for Open Government.

Operators of public facilities

In 2004, a private company, Powers Management Inc., that ran a public stadium in Nashville, Tenn., settled a lawsuit with 14 former cheerleaders for the Nashville Kats arena football team who sued two employees they claimed had secretly videotaped them in their dressing room. The company refused to disclose the confidential settlement to *The Tennessean*, which sued.

Last year, a state appeals court said the company must release the agreement, saying the company was acting as the "functional equivalent" of government by running the stadium under contract with the local sports authority.

knowing if the hypothetical $1 million paid for 100 cars or 100,000.

"It just gives the government open buying power, but what we haven't seen is a lot of transparency on individual orders," Amey said.

FOIA requests can be filed for that information, which Amey said is "now starting to trickle in."

"But for the most part, it is very difficult to find out information about the individual task or delivery orders," he said.

In the courts, contractors have also had success keeping much of the most basic record of a privatized relationship — the contract itself — largely off-limits to the public through the trade secrets exemption of FOIA.

Defense contractors have successfully sued under the exemption to prevent the release of pricing information.

For instance, McDonnell Douglas signed a contract with the Air Force in 1998 to maintain and repair aircraft. When the Air Force told the company it was going to release some of the pricing information in response to a competitor's FOIA request, McDonnell Douglas sued.

The contract included a base year and eight option years. McDonnell Douglas protested that releasing the pricing information in its option-year contracts could hurt it if the contract was rebid because competitors could use the information to offer the Air Force a lower price. Though the Air Force maintained that it was unlikely the contracts would be rebid, in 2004, the majority of a three-judge panel from the federal appeals court in Washington, D.C., agreed with the company that the pricing information was a trade secret.

McDonnell Douglas also successfully petitioned to prohibit the release of prices for certain line items composed mostly of the materials and services of outside vendors. The court agreed with the company that releasing the information "would enable its competitors to derive the percentage . . . by which McDonnell Douglas marks up the bids it receives from subcontractors."

The idea that a markup charged to the government — an overcharge paid in public funds — would be protected drew a skeptical response from the dissenting judge, U.S. Circuit Judge Merrick Garland.

"This counter-intuitive result should cause us to think hard about whether it makes sense to regard prices actually paid *by the government* as trade secrets," Garland wrote.

However, Garland noted that since the government had not challenged whether prices charged to the government could be secret under FOIA's trade secrets exemption and the Trade Secrets Act, the court did not decide that issue.

The argument that pricing that is actually in the contract can be considered a trade secret seems like "kind of a stretch" to Harry Hammitt, publisher of the freedom of information newsletter *Access Reports*.

"The question still really exists: If you have a contract that is public, is information within a contract proprietary?" Hammitt said. "That doesn't really make a whole hell of a lot of sense to me, but the business community has done fairly well on this point."

Hammitt said the Washington court's rulings in this regard are particularly significant because much of the FOIA litigation takes place in the nation's capital. Indeed, last year a federal trial judge in Washington, D.C., relied on the 2004 decision in saying the Air Force could not release pricing in-

PALM BEACH POST PHOTO BY BILL INGRAM

Using public records, *The Palm Beach (Fla.) Post* revealed that many employees who were fired from privately run juvenile justice facilities were rehired at other centers, including a worker who was fired for punching Manuel Marrero (above) in the face while he was in a crime and drug treatment program.

formation for another contractor.

Discovering a revolving door

The federal FOIA, and many state laws patterned after it, can provide little access to a contractor's records. But there are states where legislatures and the courts have established a broad right to see those records. That can help expose problems, lead to change, and benefit government, the public and even the contractors.

Take Florida, where, as in many places, juvenile justice is a booming industry. Most of the residential facilities for juvenile offenders are run by contractors, which range from nonprofits that manage one facility to large, publicly traded corporations.

In 2003, problems started surfacing at a privately run, maximum-security girls prison near West Palm Beach, Fla., where guards were charged with having sex with teenage inmates and several girls' arms were broken while being restrained.

Kathleen Chapman, who covers social services for *The Palm Beach (Fla.) Post*, reported that a guard who was arrested for fondling a 15-year-old inmate had been fired from a previous job for using excessive force with an inmate at a boys prison. Another guard, who broke a girl's arm, was fired from the same boys prison for slamming a male inmate to the floor.

"I started to wonder if the problem was more prevalent than just these two centers, and if people were moving between them without people knowing their history," Chapman said.

Some officials at the juvenile centers were candid with her: Afraid of getting sued, the companies would give out neutral references for their past workers. Their past misdeeds would never come to light, and they would be hired again to work with troubled youths.

Most of the privately run centers did not know that Florida's strong public records law applied to them. Chapman did. So late that year, Chapman began sending out public records requests to all the contractors, asking for the names of everyone who had worked at the prisons, their job titles, dates of birth, the dates they were hired and (if applicable) fired, and the reason for the termination.

> "I don't know how we would have been able to do this in another state where the laws were less good."
>
> KATHLEEN CHAPMAN

Some of the private companies balked at the requests, feeling that they were intrusive.

The most common reaction, Chapman said, was surprise. Many had no idea that they were subject to the public records law. Once the state confirmed they should turn over the records, all but one eventually complied.

That company refused to disclose the information, even after the juvenile justice agency told it that doing so could be grounds for terminating the contract. Eventually the *Post* sued, and the documents were released.

Getting information about the state-run facilities was easier, largely because the information was centralized in one place and not spread out among several companies.

Post reporter William M. Hartnett created a database that was used to identify workers who held jobs at more than one juvenile center, and the reporters sent new requests seeking personnel records for those employees. Chapman and Hartnett's story, which ran in December 2004, revealed how the system had created a "revolving door" for fired juvenile justice workers.

The story never would have been possible, Chapman said, had Florida courts not established that "a private contractor standing in the shoes of government and doing the same job as government, their records are as open as the government's."

Without that precedent, the reporters would have had to rely on the contractors to voluntarily hand over the personnel information. That would have never happened, Chapman said, because their biggest fear was a lawsuit for disclosing that information — whether it was to a reporter or to a potential employer.

"They were really concerned about employees suing them, and I think that was a valid concern," Chapman said, "and I don't know how we would have been able to do this in another state where the laws were less good."

The juvenile centers were pleased when they learned through the *Post*'s reporting that the public records law would both protect them from liability for releasing a worker's information and give them a way to check out potential hires — by using the same strategies the reporters had. Shortly after the story ran, the state put in place a database similar to the newspaper's to screen possible workers for past misconduct.

The private centers knew there was a problem. But ignorant of the public records law, they knew of no way to get around it.

Paying only about $8 or $9 an hour for the demanding job of working with violent juvenile offenders, these companies were often faced with the choice of hiring someone with no experience or hiring someone who had worked at a juvenile detention center but left after a short period of time. They knew that hiring the more experienced person ran the risk of hiring someone with a history of abusing inmates, "and they didn't want to hire people with that kind of history," Chapman said.

The law's openness that helped the press, the contractors and the public. With a weaker law, that might never have happened.

Delay tactics

On the issue of privatization, Georgia's open records law seems clear.

Any private firm, person or entity performing a "service or function on behalf of an agency" is subject to disclosure "to the same extent that such records would be subject to disclosure if received or maintained by such agency."

Sounds pretty straightforward, right? Well, don't count on getting any records.

Even in states where the law and the courts' interpretation have made clear that contractors must turn over their records, actual compliance is low, as a recent public records audit by The Reporters Committee for Freedom of the Press found out.

In early March, the Reporters Committee sent 120 public records requests to private contractors and quasi-public organizations, as well as their public counterparts, in six states where the public records statutes and the case law appear to provide access.

The request was simple: the name and salary of the highest-paid employee.

The results — for both the public and private entities — was dismal. After more than four months, four in five had not responded. Some complied quickly. Others were openly hostile.

The requests were aimed at two common types of privatized entities: privately run prisons, jails or juvenile correctional facilities, and charter schools.

Most prisons or juvenile centers are run under typical contracting relationships. Charter schools, on the other hand, are usually created by statute and have characteristics of both public and private schools. For instance, in many states, they are run by nonprofit boards but receive public funding.

Requests were also sent to public schools and publicly run correctional facilities in the same states. Letters were sent directly to the schools and detention centers and addressed to the principal, warden or whoever else was in charge of the facility.

The public prisons were three times more like to reply than the private prisons, which responded only 11 percent of the time.

In the end, the charter and public schools had the same response rate: one in five complied.

Of the schools that replied, some sent their responses within days and none took more than a month. They responded by e-mail, fax and mail, taking advantage of the fact that the requests, sent on Reporters Committee letterhead, contained multiple forms of contact information.

Some used that information more to harangue requesters than to facilitate a fast reply.

Five days after a request was mailed to Roland Park Elementary/Middle School in Baltimore, Md., a woman who identified herself as a secretary called, saying they had "never received a request before" and saying that if compliance was "something that the law required," the letter should have gone to human resources.

When asked if she could forward the request to human resources, she replied, "I don't think they're going to take the time to find out the highest-paid employee." When asked her name, she said, "Thank you," and hung up the phone.

Vanessa Pyatt, the director of public relations for Baltimore city schools, said that is "absolutely not" the proper response.

She said school administrators are briefed at the beginning of each school year on the public relations policy, which Pyatt said requires public information requests to be forwarded to the district's office of legal counsel to be processed.

"Regardless of who it's sent to, the process is in place for the request to be forwarded," Pyatt said.

'Around the obstructionism'

Though contracting out may be the most difficult form of privatization to access in most places, there is another type that can prove problematic for reporters: the public-private agency.

These entities typically have aspects of both private corporations and public agencies. And since many public records and open meetings laws say that an entity defined as a public "agency" (or a similar term, such as a "public office"), they are often easier to get access to than a typical contractor.

That doesn't mean they throw open their doors to reporters. Some statutes do not acknowledge quasi-public entities at all, while others provide only a vague description.

With unclear guidance — or none at all — about how the public records laws apply to these public-private organizations, the courts have typically established a procedure for finding out. *(See related story, page 10)*

However, it is tough to design a consistent test in the absence of clear legislative direction because there are so many types of public-private entities.

Some of these organizations are small nonprofit or for-profit companies established solely to execute a single contract — for instance, to run one hospital. Others receive significant taxpayer money but perform some duties that are not historically government responsibilities. Others do not receive direct public tax money but enjoy indirect benefits (such as the rent-free use of a public building) to perform duties that would be considered public services. Still others are for-profit companies created through government charters and have public officials as members of their boards.

The murkiness of the law means public-private agencies can put up a fight to ensure the press never attends their meetings or examines their books.

Take the Smithsonian Institution, which has been roiled by scandals that led Secretary Lawrence Small and other high-ranking officials to step down amid revelations of sky-high salaries and questionable perks.

The institution received $715 million in taxpayer money through appropriations, grants and contracts in the 2006 budget year. It was established by an act of Congress in 1846. Its board members include Chief Justice John Roberts, Vice President Dick Cheney and six members of Congress.

Other quasi-public agencies are subject to FOIA, largely because Congress revised the definition of an agency in 1974 to include entities such as the U.S. Postal Service and the Federal Deposit Insurance Corp.

But despite the Smithsonian's close government ties, the institution does not consider itself subject to FOIA. In 1997, a three-judge panel of the federal appeals court in Washington, D.C., ruled that the institution was not bound by the federal Privacy Act. Since the act borrows its definition of an agency from FOIA, the Smithsonian presumably does not have to comply with FOIA as well.

That has made it more challenging for *The Washington Post* to break the stories of Small's compensation and the institution's other scandals.

Post investigative reporter James V. Grimaldi has said the Smithsonian has declined to give him documentation about Small's expenses for years. Without full access to FOIA, the newspaper has had to rely on independent agencies, Congress, the Government Accountability Office and

AP PHOTO BY RICK BOWMER

Reporting on the compensation and perks of Smithsonian Institution Secretary Lawrence Small was made more difficult because the Smithsonian is not bound by the Freedom of Information Act. Soon after *The Washington Post* published details of a confidential report, Small resigned as head of the institution.

inside sources for its reporting.

"We've had to find our way around the obstructionism regarding FOIA," Grimaldi said.

Originally, an independent accountant's report detailing Small's "lavish" and "extravagant" expenses — including thousands in unauthorized gifts and travel expenses such as a chartered $14,509 flight to attend a museum opening in Texas — was kept confidential. It was made public only after the *Post* obtained a copy and reported on it in February.

The 'spirit' of FOIA

In light of the recent scandals, Smithsonian officials have promised to increase accessibility to the institution's records.

In a June letter, the Smithsonian governance committee said the institution "embraces the principles of disclosure reflected in the Freedom of Information Act" and "follows its spirit in considering public requests for information."

Spokeswoman Linda St. Thomas said the institution plans to issue a formal FOIA policy soon.

A commission that conducted an independent review of the Smithsonian recommended as much. If the institution does not adopt policies about complying with FOIA, the Sunshine Act and other laws, the report says that "Congress should consider appropriate legislation."

But even if the Smithsonian does adopt a new policy as planned, it would still likely be up to the institution — not the courts — to ensure it is complying.

Now, Smithsonian officials say they voluntarily follow FOIA and only deny requests under valid FOIA exemptions. However, with a voluntary policy, there is no way to contest the institution's reliance on these exemptions in the court short of challenging the Washington appeals court's determination that the Smithsonian is not an "agency."

With federal agencies and quasi-public agencies covered by FOIA, it is possible to directly challenge the use of an exemption. For instance, when Federal Deposit Insurance Corp. employee Terry Wayne Dean requested documents relating to an investigation of himself, the FDIC cited the FOIA privacy exemption, among other reasons, to deny Dean some of the documents. Dean sued, and a federal judge in Kentucky ruled in 2005 that the FDIC could not rely on the privacy exemption to withhold information about Dean himself.

"When the person identified in the document is the person requesting the document, the Court is unable to determine how any potential or realized 'invasion of personal privacy' could possibly be considered 'unwarranted' in this circumstance," Senior Judge Karl Forester wrote.

By contrast, when the Smithsonian in 2002 refused to release medical records for the National Zoo's animals to the *Post*, citing the privacy rights of animals, there was no legal recourse for the newspaper.

The *Post* eventually got those records through an unofficial method: public pressure. After Grimaldi wrote a column quoting legal scholars flabbergasted by the idea that animals have privacy rights, the Smithsonian gave the *Post* access to the records, though not in electronic form.

'Restoring the public's faith'

There are some signs that public access to records in the age of privatization may improve. Amey pointed to a bill signed into law in September that will create a searchable database of government contracts and grants.

"I think we're starting to see the pendulum swing to add more transparency to the federal contracting system," Amey said. "Nevertheless, it's far from a perfect system."

Amey would like to see a wide variety of contractor information posted online, including electronic versions of contracts, task and delivery orders, no-bid contracts and federal contractor misconduct data. Amey thinks that data should be available without having to use FOIA.

Making the information easily accessible "may have the impact of learning some horror stories," Amey said, "but also of restoring the public's faith in government and the integrity of the contracting system."

Often, legislative action will not occur until a high-profile horror story about privatization emerges, said Charles Davis, a journalism professor at the University of Missouri at Columbia and director of the National Freedom of Information Council.

"The way legislative agendas are shaped are when it looks at an incident and says wow, it's really bad we're pulling people off the public grid," he said. ◆

Public records, private control

Government bodies that contract out their record-keeping can add a whole new layer of difficulty to gaining access.

With only 16 full-time employees and a population of about 3,400, the tiny village of Thiensville, Wis., has to contract with private companies to handle many of the responsibilities that larger cities might be able to handle in house.

That includes its record-keeping. Since the 1980s, the village has hired Grota Appraisals to handle its property tax assessments and records, according to Village Administrator Dianne Robertson.

That previously harmonious relationship has resulted in a court battle that is now before the Wisconsin Supreme Court, which will address the thorny issue of accessing public records held by a contractor.

The situation has occurred in other states as private companies responsible for government record-keeping have thrown up roadblocks to public access.

When governments privatize, the resulting relationships can make it harder to see public records. But when oversight of the public records is itself privatized, it can mean a whole new headache for the press.

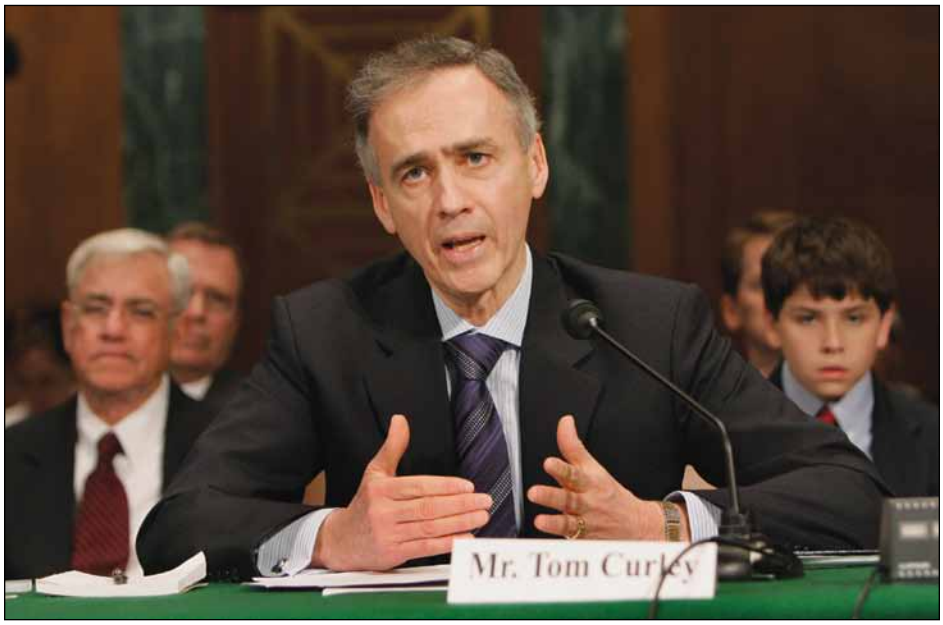
This relationship can add new arguments to the arsenal of those who do not want to release records. One is that the records are not, in fact, public because they are held in private hands. Another, which has been a stumbling block in the Wisconsin case, is copyright protection.

The court battle started when a company called WIREdata requested detailed property records from three small municipalities — Thiensville, Sussex and Port Washington — in an electronic format to use for its subscription-based database used by real estate brokers.

The cities directed the company to the contractors that maintained the property records — Grota Appraisals for Thiensville and Sussex, and Matthies Assessments for Port Washington.

The companies said they used a program copyrighted by another company, Assessment Technologies, owned by the same man who owns Grota Appraisals, in conjunction with Microsoft Access to arrange the data. If WIREdata wanted the records, it would have to pay large fees — more than $6,600, and more if they were reselling the data.

WIREdata sued in state court and Assessment Technologies filed its own suit in federal court to prevent the release of the records. After a federal appeals court in Chicago (7th Cir.) ruled against Assessment Technologies, the contractors provided the property record information to WIREdata as Portable Document Format (PDF) files.



AP PHOTO BY SUSAN WALSH

Tom Curley, president and chief executive of The Associated Press, testifies about a bill that would reform the federal Freedom of Information Act. One of the bill's provisions would ensure records held by a government contractor are public.

In January, a Wisconsin appeals court said that was not enough. The court rejected the argument that the state's open records law required only access to the raw property data, emphasizing that taxpayers footed the bill for entering the data into the electronic database.

"This inputted data, maintained at public expense in the Microsoft Access database, is as much a part of the public record as if it were written on paper property cards and organized and stored in a file cabinet," Judge Daniel P. Anderson wrote for the three-judge panel.

The court's decision was a welcome one for press advocates, including the Wisconsin Freedom of Information Council and the Wisconsin Newspaper Association, which filed a friend-of-the-court brief in the case.

"We felt that the local units of government were delegating, inappropriately delegating, their public record-keeping responsibilities to private contractors," said Peter Fox, executive director of the newspaper association.

As the case has progressed, some of the municipalities have found that it as difficult for them to gain access to their own data as it has been for the public.

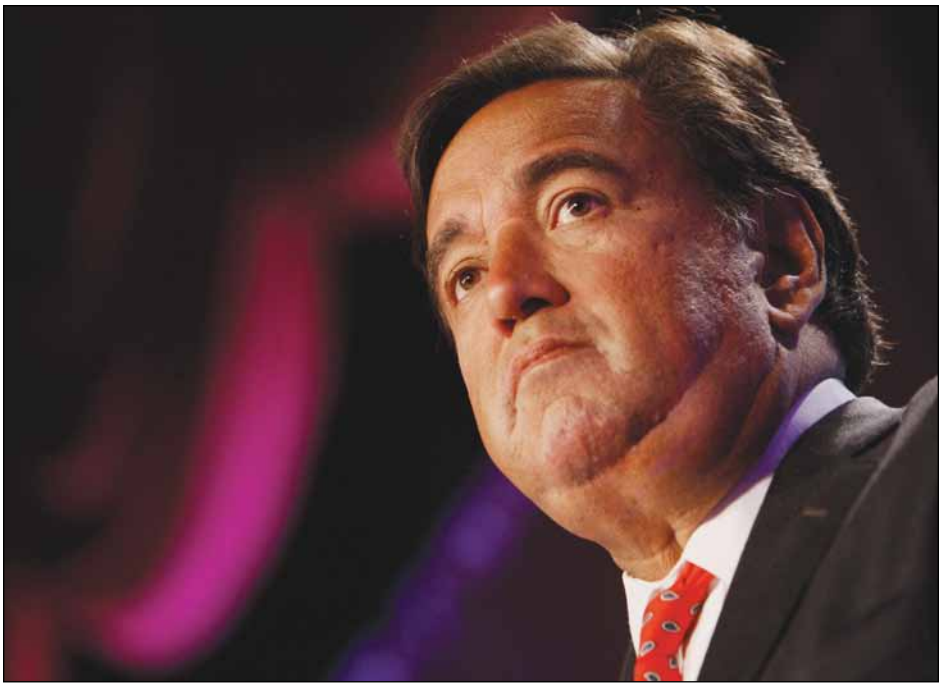
One village involved in the lawsuit, Sussex, announced in February that it planned to sue Grota Appraisals because the company refused to hand over property records after the appeals court's decision, despite a provision in its contract stating that all records are the village's property, according to press reports.

Sussex officials did not return calls for comment. But they told the *Sussex Sun* they planned to seek a new contractor to handle property assessments and records.

Thiensville has asked Grota Appraisals for passwords and data sought by WIREdata to no avail, said the village's attorney, Steven Cain, who himself works under a contract with Thiensville.

Cain said the case has changed the way public contracts are written.

"If it hasn't, it will," he said. "There's no question on that. Because of this case, we have taken steps to advise our municipal clients to handle assessment records and their independent contractor records differently."



AP PHOTO BY CHARLES DHARAPAK

In 2004, New Mexico legislators rejected a proposal, supported by Gov. Bill Richardson (above), to lease electronic state databases to a private company to resell to the public. Open government groups worried the proposal would increase the price of records.

An opportunity for revenue?

In rejecting the copyright claims of Assessment Technologies, the Chicago-based federal appeals court noted the large fees the company was seeking in order to release the data as WIREdata requested.

The company "is trying to use its copyright to sequester uncopyrightable data, presumably in the hope of extracting a license fee from WIREdata," U.S. Circuit Judge Richard Posner wrote for the three-judge panel.

Around the country, as the media and open government groups have fought attempts to give private companies exclusive control over public records, those same questions have surfaced: Do these companies consider the records the property of the public? Or a potential source of revenue?

"To me, those are royalties being created," said Tonda Rush, director of public policy for the National Newspaper Association. "If the public's paid for the records to be created, they shouldn't have to pay to get it back."

The battles in state legislatures have often concerned electronic access to records.

One case occurred in New Mexico in 2004, when the state's information technology office proposed a bill that would release the state's electronically stored databases to a vendor who could resell the data to the public.

The bill's backers, who included Gov. Bill Richardson, touted the so-called Electronic Government Act as a way to broaden access to records. They brought in records vendors from Texas, Kansas and Arizona to make their case, said Bob Johnson, executive director of the New Mexico Foundation for Open Government.

Johnson and others worried that the government and the private sector viewed these records as a way to make money — at the expense of records requesters who would have to pay "search" and "convenience" fees.

"The proponents said profit wasn't really the object, the object was to make electronic records more easily available," Johnson said, "which of course was just propaganda."

Ultimately, the bill was rejected by the state House and died in committee in the Senate.

Similarly, a decade ago, Illinois media organizations fought off an attempt by telephone giant Ameritech to contract with several local counties to put court records online.

For the first 72 hours, the company would have an embargo on the records so that they could only be accessed online through paid subscriptions, said Beth Bennett, director of government relations for the Illinois Press Association.

For the counties, Bennett said, "it all looked so good. But the larger interest of the public maintaining access to public records — and not a private entity — was lost."

A media blitz succeeded in thwarting those efforts. Shortly afterward, the press association also persuaded the Illinois General Assembly to amend the state's public records act to prohibit any private contractor from gaining exclusive access to public records. The association also went to the clerk of courts to make sure a similar agreement could not be approved through the courts.

> "If the public's paid for the records to be created, they shouldn't have to pay to get them back."
>
> TONDA RUSH

"We were very cognizant of the fact that this could happen again, and then the toothpaste is out of the tube and how do you get it back?" Bennett said.

'Out of sight, out of mind'

On the federal level, a bill proposing changes to the Freedom of Information Act that has received House approval includes a provision stating that records maintained by a private entity contracting with the government are subject to FOIA.

When federal agencies contract out their record-keeping, Rush said, "the FOIA test becomes fuzzy because the FOIA test is: Does the agency have possession and control of the records?"

Records held by a private contractor may not show up when a public agency searches for records in response to a FOIA request because the agency may adopt an "out of sight, out of mind" mindset in regards to documents held under a contract, Rush said.

In written comments, the Justice Department said this provision of the bill is unclear and worried that it would overrule Supreme Court precedent saying records created by a private organization under a government grant do not have to be released. If that were the case, the department would have "very serious concerns," Acting Assistant Attorney General Richard Hertling wrote.

However, Hertling said the department did not object if the provision was meant "solely to clarify that agency-generated records held by a Government contractor for records-management purposes are subject to FOIA."

Kevin Goldberg, counsel to the American Society of Newspaper Editors, said the bill's proponents "just saw an opportunity to clarify at the federal level" that such records maintained by a government contractor are public.

"It's actually less of a change than a restatement of what everyone understands the law to be: If a record is created by the government and held in a private storage facility, it is still a public record," he said. ◆

Confusion in the courts

For journalists seeking records, judicial rulings on privatization can leave more questions than answers.

AP PHOTO BY KIICHIRO SATO

Ohio Supreme Court Justice Paul Pfeifer, Chief Justice Thomas Moyer and Justice Evelyn Lundberg Stratton listen to arguments. The court's jurisprudence on privatization shows how a court's interpretation of public records laws can change.

In Ohio, a corporation that solicits donations for a university is subject to the state public records law. So is a nonprofit association that leases and runs a once-public hospital, according to the state's highest court.

But a nonprofit that provides mental health services for an Ohio county and receives more than nine-tenths of its money from taxpayers? Its records are closed. So is a company that runs a halfway house and receives a similar percentage of support from the public.

When members of the press or the public seek access to quasi-public agencies or organizations with government contracts, they often find that the issues are governed by a murky and inconsistent body of law.

Part of the problem is that few states clearly lay out in their statutes what entities are bound by open meetings and public records laws. Because of the lack of clarity, that responsibility has been left largely to the courts, which have come up with myriad and often confusing ways to decide the issues.

Craig Feiser, a professor at Florida Coastal School of Law, divided every state's judicial approaches to privatization and public access into categories for a 1999 law review article he wrote. But he often found it difficult to find out what the courts meant by their decisions.

"I don't think they're very clear at all," Feiser said. "When I wrote the article, I had a hard time figuring out just from reading the case what the court is looking for… You kind of have to read between the lines in some cases."

Many state legislatures, in passing their public records and open meeting laws, completely ignore the issue of privatization. Others statutes include only a vague or passing reference to contractors or quasi-public agencies.

Still others might address one type of privatization but not another. For instance, many state laws are patterned after the federal Freedom of Information Act, which depends on a definition of "agency" to determine whether records should be public. Included as an agency are any "Government corporation" or "Government controlled corporation."

Courts have interpreted that definition to apply to quasi-public entities such as the Federal Home Loan Mortgage Corp., which does not receive federal tax money for its operating expenses but was created by congressional charter.

But that limited "agency" definition can make it difficult for a FOIA requester to prove that a private company with a government contract or grant is an "agency," even if the private group has some publicly important role.

For instance, in 1980, the U.S. Supreme Court ruled 7-2 that the raw data collected by a group of private physicians as part of a controversial government-funded diabetes study that influenced public policy were not "agency records" under FOIA.

"Grants of federal funds generally do not . . . convert the acts of the recipient from private acts to governmental acts absent extensive, detailed and virtually day-to-day supervision," Justice William Rehnquist wrote for the court.

Many questions

The vagueness of public records laws leads to difficulties for the courts charged with interpreting the laws. When statutes are unclear, courts often fashion tests to provide guidance to lower courts and to citizens and agencies struggling to understand the laws.

In adapting these laws to quasi-public bodies, the courts typically establish multipart tests meant to determine whether an agency is public. But the tests can be difficult to use in predicting whether records will be public because of the many questions they raise.

Does an agency have to meet all of the parts of the test? Most of them? Some of them? Do all the parts count equally, or is one factor weighed more than the others?

Even within each prong of the test, there can be questions. If one requirement is the level of public funding, does that mean that any agency that receives 51 percent of its money meets that part of the test? Is 49 percent enough? Or does it have to be 90 percent?

In contrast to these complicated, multipart legal tests, some courts have more straightforward tests using just one factor, most commonly the level of public funding. Those tests are often based on text from a public records statute such as Michigan's, which applies to any body that is "primarily funded by state or local authority."

These tests have benefits. It is often easier for a media outlet to determine whether a contractor is subject to a public records law without resorting to a potentially costly and time-consuming lawsuit.

But a funding-based approach raises its own questions. What counts as public funding? Is it actual cash in the agency's bank account, or does indirect support such as providing a rent-free building count? What if funding varies year to year?

Under a straightforward funding test, many quasi-governmental entities — such as the nonprofit economic development corporations that receive limited public money but have considerable power and may have public officials as their board members — would be excluded. These tests could also make public the records of a corporation created to run a single juvenile detention center. But it could keep private all the documents of a national company with a state contract to run 10 juvenile prisons if that money makes up a small part of the company's revenue to run hundreds of prisons nationwide.

Judges' tests may test patience

There are many factors that can lead to unpredictable outcomes when journalists go to court to gain access to the records or meetings of an organization with both public and private characteristics. Here are some of the reasons:

Unclear laws

Most state public record laws make no reference to private contractors, instead relying on vague terms such as "agency" and "public office" that courts interpret in varying ways. Even when laws do address contractors, they often do so in unclear ways.

For instance, the Kansas public records act includes "any . . . entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state" but does not include "[a]ny entity solely by reason of payment from public funds for property, goods or services of such entity."

Perplexing court tests

In the absence of clear statutory guidance, many courts have developed complicated "tests" that the public must meet to prove that a contractor or quasi-public body is an agency for the purposes of the public records or open meetings law. But it's not always clear how the tests should be applied.

For instance, the Connecticut Supreme Court in 1980 devised a four-part test for dealing with public-private entities that took into account whether the entity performs a governmental function, the level of public funding, the extent of government regulation, and whether the entity was created by the government. It found that a publicly funded school charted by the state legislature met all four parts of the test and was therefore subject to the state Freedom of Information Act.

But did that mean an entity had to meet all parts of the test? The state intermediate court thought so when it ruled in 1989 that a bond counsel was not sufficiently regulated by the government and therefore was not subject to the act. It was not until 1991 that the Supreme Court made clear that an agency did not have to meet all four prongs of the test.

Disagreement over parts of the test

Even if a state's test is in place, judges may disagree about whether a particular group meets each specific part of the test. For instance, Ohio considers four factors, including whether a contractor is extensively regulated by the government.

The majority in a December decision found that a group that contracted with a county mental health board did not meet this part of the test because there was no evidence the county board controlled the contractor's daily operations.

But the dissenting justices disagreed, noting that Nova Behavioral Health's contract with the county board required its records and data to be available to the county board and mandated that the board be allowed to "monitor and review" the contractor's performance

These kinds of disagreements can make it difficult for the media and the organizations to judge whether they will meet a complicated multipart test.

Flip-flopping courts

Even if courts have decided cases and established tests regarding privatization and public access, they are subject to change along with the courts' membership or views on the subject.

Though Ohio had established a test in the 1980s that led to many public-private agencies being ordered to open up their records to the press and public, a more conservative court reversed course, developing a new four-part test that was used to deny records to two contractors late last year.

Changing court philosophies

In the absence of legislative direction, some courts have come up with interpretations that provide access to many quasi-public agencies, said Charles Davis, a journalism professor at the University of Missouri at Columbia and director of the National Freedom of Information Coalition. Other courts have "annihilated" good public records laws with their decisions, Davis said.

A court's treatment of public access in a privatized world may be subject to frequent change, as evidenced by Ohio's evolving jurisprudence.

In 1988, the state's high court ruled in favor of an Ohio newspaper in saying a hospital association was subject to the public records act because it had a lease to run the hospital as a public general hospital, did not pay rent to the city, and provided a "public service" to residents as the only public hospital in the city.

AP PHOTO BY MARK DUNCAN

Thomas Moyer

In subsequent years, the court also established access to a publicly funded nonprofit county ombudsman office, a nonprofit foundation that raised money for the University of Toledo but paid the university rent and other expenses, and a nonprofit with contracts to provide firefighting services to municipalities.

But last year, a divided Ohio Supreme Court threw out the old test emphasizing whether an entity was performing a public service and receiving taxpayer dollars. It created a new, less inclusive test that considers whether an organization is performing a governmental function, the amount of public funding, the amount of government involvement, and whether the organization was created by the government or to evade the public records law.

The court ruled 4-3 that a nonprofit that ran a halfway house under a state contract did not have to turn over personnel records, despite meeting two parts of the test by administering a prison and by receiving 88 percent of its revenue from taxpayers. Two months later, it used the new test in ruling against *The (Canton) Repository*, which sought access to the records of a contractor that provided mental health services for one county.

The turnaround may be a function of the court's changing membership.

Attorney Richard Panza, who represented the *Repository*, said the court has grown increasingly conservative since the first major public records case in the 1980s, and its public records decisions have been "watered down" accordingly as the court changed.

"This is a very different court with very different philosophies," he said.

For instance, Chief Justice Thomas Moyer took the more conservative track in a 1988 privatization case, rejecting an approach by two justices that advocated broader access. Less than two decades later, Moyer was on the dissenting side, writing for the justices who said the court was taking an overly restrictive approach to public records.

In the halfway house decision, Moyer suggested the legislature should clarify the law.

"Our long line of cases and the majority opinion in this case should convince the General Assembly that it, rather than this court, should define the terms in a manner that would settle the policy issues that are determined each time a court applies the broad statutory language to the facts in individual cases," he wrote.

On the Web

An expanded online version of this report is available on the Reporters Committee's Web site at www.rcfp.org/privatization

The ideal solution?

The best way for courts to handle privatization and access issues is still up for debate. Harry Hammitt, publisher of the newsletter *Access Reports*, likes an approach used by states such as Ohio and Connecticut, in which the courts consider whether a contractor or quasi-public agency is acting as the "functional equivalent" of the government.

That distinguishes an organization providing a government service, such as the American Red Cross' coordination of blood donations, from a traditional government function such as running jails, Hammitt said.

"These can be fact specific, but I think there's a commonsensical way of performing whether they're providing a function of government as opposed to a service," Hammitt said.

Feiser prefers an approach used by some courts that considers the nature of the records being sought and whether the records are relevant to government.

Focusing on the records, he said, distinguishes between "a record that reflects what government or public monies are being used for . . . as opposed to a private board meeting about the running of the company." ◆

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