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Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records

Daxton "Chip" Stewart & Amy Kristin Sanders *

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Abstract

As governments engage in public-private partnerships, they have devised ways to shield the public's business from the traditional level scrutiny offered by citizens and journalists, watchdogs of the public trust. The authors propose rethinking public oversight of private vendors doing government business. First, the authors explore the historical and legal background of open records laws. This core purpose is undermined by overly broad interpretations of trade secrets and competitive harm exceptions, a trend exacerbated by the U.S. Supreme Court in a 2019 ruling. The authors demonstrate why public-private collusion to sabotage transparency demands a reinvigorated approach to the quasi-government body doctrine, which has been sharply limited for decades. The authors conclude with recommendations on reversing the trend.

* Daxton "Chip" Stewart, Texas Christian University; Amy Kristin Sanders, University of Texas at Austin. Please send correspondence about this article to Daxton "Chip" Stewart at d.stewart@tcu.edu. An earlier version of this work earned first-place paper at the National Freedom of Information Coalition summit FOI Research Competition, April 12, 2019, in Dallas, Texas.

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Introduction

As cities and regions were climbing over one another with bids to become the location of Amazon's new headquarters in 2018, some local governments began offering a new perk: the cover of darkness. The two winning bidders, New York and Northern Virginia,[1] both offered billions of dollars of investment and tax incentives to draw the Internet retail behemoth to their respective areas. And they also both offered aid in dodging open records requests made under their states' freedom of information laws.

Virginia promised to give Amazon at least two days' notice of any public records request regarding the company, to cooperate with Amazon in responding to records requests, and to "limit disclosure, refuse to disclose, and redact and/or omit portions of materials to the maximum extent permitted by applicable law."[2] Although New York Mayor Bill de Blasio's spokesperson initially denied the city offered a similar deal to Amazon, that statement turned out to be false.[3] The city's Economic Development Corporation offered to "give Amazon prior written notice sufficient to allow Amazon to seek a protective order or other remedy" upon the city receiving an open records request regarding the company.[4]

These concessions represent a growing challenge to open records laws. As governments engage in public-private partnerships or otherwise outsource government work to private companies, they have devised ways to shield the public's business from the traditional level scrutiny afforded to citizens and journalists, watchdogs of the public trust.

The trend toward secrecy is emerging in other areas as well, as courts carve out special exceptions to open records laws that favor private business interests. In 2015, the Texas Supreme Court fashioned an enormous loophole in the state's Public Information Act, essentially exempting government contracts with private vendors from public disclosure.[5] The high court allowed aerospace giant Boeing to intervene into a citizen's request for a copy of the company's 20-year lease agreement with the Port Authority of San Antonio to use and redevelop city property.[6] Further, the court ruled that the lease, which included the amount of government expenditures, could be exempted from disclosure because releasing it "would give advantage" to Boeing's competitors.[7] This approach allowed Texas government bodies to prevent disclosure of information a company claims would be "competitively sensitive," analogizing the records to property or personal privacy interests. And it led to absurd outcomes in other situations. For

[1] After "fierce backlash from lawmakers" about the nearly $3 billion in incentives and giveaways to Amazon, the company canceled its plans to build a headquarters in New York. J. David Goodman, *Amazon Scraps New York Campus*, N.Y. TIMES, Feb. 14, 2019, at A1.

[2] Robert McCartney, *Amazon HQ2 to benefit from more than $2.4 billion in incentives from Virginia, New York and Tennessee*, WASH. POST, Nov. 13, 2018, https://www.washingtonpost.com/local/virginia-news/amazon-hq2-to-receive-more-than-28-billion-in-incentives-from-virginia-new-york-and-tennessee/2018/11/13/f3f73cf4-e757-11e8-a939-9469f1166f9d_story.html?utm_term=.689f11d22c04.

[3] Cale Guthrie Weissman, *New York will give Amazon an early warning about HQ2 records requests after all*, FAST COMPANY, Dec. 11, 2018, https://www.fastcompany.com/90279607/report-new-york-will-give-amazon-a-heads-up-to-any-foia-requests.

[4] Sally Goldenberg & Dana Rubinstein, *Top city official gave Amazon a role in public records release*, POLITICO, Dec. 11, 2018, https://www.politico.com/states/new-york/city-hall/story/2018/12/11/top-city-official-gave-amazon-a-role-in-public-records-release-737885.

[5] On June 14, Texas Gov. Greg Abbott signed into law Senate Bill 943, designed to remedy the loopholes created by the Texas Supreme Court in *Boeing Co. v. Paxton.*

[6] Boeing Co. v. Paxton, 466 S.W.3d 831 (Tex. 2015).

[7] *Id*. at 834.

example, the city of McAllen was able to claim the exception to avoid disclosing how much money it lost after hosting a holiday parade that featured singer Enrique Iglesias.[8] The attorney general, citing *Boeing*, upheld the McAllen's decision not to release the information in a letter ruling, saying that the city had established that release of the cost of hiring Iglesias to perform "would give advantage to a competitor or bidder," presumably another city spending tax dollars to hire performers.[9] The ludicrous policy result of this, of course, is that cities wind up bidding against one another, paying even more for services than they would if they engaged in basic transparency typically required by open records laws. It took nearly four years for the Texas legislature to remedy the loophole created by the Texas Supreme Court, but not before nearly 4,000 requests for government contracts with private vendors had been denied by the attorney general on *Boeing* grounds.[10]

Similar issues have arisen at the federal level as well. In June 2019, the U.S. Supreme Court in *Food Marketing Institute v. Argus Leader Media*, overturned a pro-transparency ruling out of the U.S. Court of Appeals for the Eighth Circuit that narrowly read the "trade secrets" exemption to the Freedom of Information Act, striking down 45 years of lower court precedent that had interpreted "confidentiality" under Exemption 4 to include a showing of substantial competitive harm, rather than mere assertion of harm.[11] The ruling came after the Department of Agriculture had chosen not to appeal a decision that required release of how much money grocery stores were receiving from the government under the Supplemental Nutrition Assistance Program (SNAP), a third-party industry group, the Food Marketing Institute, intervened to take up the appeal, in an attempt to make it easier to protect corporate privacy interests.[12]

These moves, along with gutting of the quasi-government entity doctrine that typically would mandate transparency of government deals to conduct public business through private vendors,[13] are emblematic of a parade of darkness that appears to be advancing largely unabated. Courts broadly interpret "trade secrets" and other exemptions favoring private vendors on government contracts. Private businesses are enabled to intervene in court as a third party in an open-records matter typically handled by an administrative agency or attorney general, dragging issues into litigation to frustrate and delay citizens seeking to provide oversight. Government entities conspire to subvert transparency laws as an inducement to lure private businesses such as Amazon with bundles of cash and tax incentives. The practice in the recent Amazon headquarters bidding has the look of a new "Ashcroft memo"[14] for public-private partnerships, dangerously

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[8] Jason Cobler, *Bill takes aim at open records loophole made infamous by Enrique Iglesias show*, SAN ANTONIO EXPRESS-NEWS, Feb. 22, 2019, https://www.expressnews.com/news/politics/texas_legislature/article/Bill-would-close-open-records-loophole-made-13637808.php.

[9] TEX. ATT'Y GEN. ORD-5179 (2016).

[10] *See* Jeremy Blackman, *No right to know? Texas public records get harder and harder to acquire*, HOUSTON CHRONICLE, Mar. 14, 2019, https://www.houstonchronicle.com/news/investigations/article/Texas-public-records-get-harder-and-harder-to-13683497.php.

[11] Food Mktg. Inst. v. Argus Leader Media, ____ U.S. _____ (2019); *see also* Food Mktg. Inst. v. Argus Leader Media, 202 L. Ed. 2d 641 (2019).

[12] Argus Leader v. Dep't of Agric., 889 F.3d 914 (8th Cir. 2018).

[13] *See* Greater Houston Partnership v. Paxton, 468 S.W.3d 51 (Texas 2015) (in which the Texas Supreme Court went beyond the plain language of the word "support" to find that the government paying a chamber-of-commerce-like entity to do public business did not make the entity subject to the Public Information Act because "support" means more than financial support, instead requiring fuller "sustenance" from the government).

[14] The "Ashcroft memo" is an infamous part of recent FOIA history. Shortly after the terrorist attacks of Sept. 11, 2001, U.S. Attorney General John Ashcroft essentially told federal agencies that denial of any FOIA requests would be defended by his office unless they "lacked a sound legal basis." It overturned the "strong presumption in favor of information disclosure" by previous Attorney General Janet Reno and ushered in an era of unprecedented obstinance

creating incentives that favor secrecy over government transparency. Government bodies are essentially telling private vendors, "We'll help you spend tax dollars without any pesky oversight. Do whatever you want. We've got your back." The public-private collusion to undermine open records laws, if left unchecked, opens the door to unparalleled waste, fraud, and corruption.

In this article, we propose rethinking public oversight of private vendors doing government business. First, we explore the historical and legal background of open records laws to demonstrate the core purposes behind their enactment, and how that purpose has transparency of government contracts at its center. Next, we look at how overly broad interpretations of trade secrets and competitive harm exceptions undermine this core purpose, especially when paired with procedural advantages that allow private businesses to intervene in open-records disputes as a third party. Finally, we demonstrate why public-private collusion to sabotage transparency demands a reinvigorated approach to the quasi-government body doctrine, which has been sharply limited for decades. At a time when government corruption and exporting public business to private vendors is on the march, it is time for open-records advocates to reclaim transparent democracy and draw the swords that a century of freedom of information law have provided.

Background

The watchdog function is at the heart of the guarantee of a free press. As legal historian Tim Gleason noted, scrutiny by a free press was "a means of combating what 18th-century men in America viewed as an inevitable condition – the abuse of government power" which was "the core of the dominant theory of freedom of the press at the time of the adoption of the First Amendment to the Constitution of the United States and state constitutional free-press clauses."[15] Constitutional scholar Thomas Emerson, writing on the heels of Watergate, argued that the right to know had grounds to be observed as an "emerging constitutional right," rooted in the First Amendment. "The public, as sovereign, must have all information available in order to instruct its servants, the government," Emerson wrote. "As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decision-making by the people, to whom that function is committed, becomes impossible."[16]

If there is one principle at the heart of open records laws, it is most succinctly stated by Harold L. Cross, the attorney and scholar who addressed the failings of government transparency in the burgeoning administrative state during the middle of the last century, in his 1953 treatise *The People's Right to Know*: "Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy

by federal agencies handling FOIA requests. *See* Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 491 (2006); Keith Anderson, *Is There Still a "Sound Legal Basis?": The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L. J. 1605 (2003). President Obama revoked the memo on his first day in office in 2009, ordering federal agencies to once again approach FOIA with a clear presumption that "(i)n the face of doubt, openness prevails." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OPEN GOVERNMENT DIRECTIVE (Dec. 8, 2009).

[15] TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA 24 (1990).

[16] Thomas Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 14 (1976). While Emerson acknowledged that the "right to gather information from private sources" was not encompassed by this, he focused exclusively on "private people" and not businesses; additionally, he did not address businesses doing public work funded by government sources. *Id*. at 19.

have but changed their kings."[17] Cross' work was hugely influential in the push to enact the federal Freedom of Information Act and remains a foundational work in our understanding of the origins of transparency and the law in the United States.[18]

Although *The People's Right to Know* was a comprehensive report on state and federal approaches to open records and meetings at the time, it did not specifically address transparency of public business done in conjunction with private companies. The closest Cross came to this topic was mentioning advances in secrecy "covering financial dealings between government and citizens" such as collection of income taxes or penalties paid to government, as well as distribution of government benefits through "public assistance programs"[19] such as SNAP. But the latter part of the 20th century saw the proliferation of government favoring privatization in areas of public programs, such as local economic development efforts, operation of prisons and hospitals, parks and land management, and even public education. Privatization is done "in the expectation of realizing greater operational efficiency and cost savings," as Mitchell Pearlman, the longtime attorney and executive director of the Connecticut Freedom of Information Commission, said.[20] But this has also come with an expectation built into the law that because private companies are not subject to transparency laws, they may be able to avoid similar public oversight.

This notion, of course, frustrates not only the purpose of open-records laws, but also the foundations of informed democracy in the United States. And state and federal courts and legislatures have largely failed to reconcile the public-private tensions regarding records access, putting into place "complicated, indeterminate rules to resolve the fundamental conflict between laws intended to cover government agencies and the increasing reliance by those agencies on private firms for research and for the operation of traditional government functions," as Mark Fenster noted.[21] It's an issue that has bedeviled transparency advocates and scholars in areas such as university foundations,[22] private prisons,[23] and economic development agencies.[24] And even when traditional open government arguments carry the day when access matters are raised in court, Aimee Edmondson and Charles Davis noted, the process quickly devolves into a cycle in which private entities on contract to do public business seek protection from legislators instead to protect them from scrutiny, part of a "recent push by lawmakers and developers to bring unprecedented secrecy to efforts to lure businesses to their communities."[25]

Although corporations may be people for the purpose of making campaign contributions,[26] they are not extended the same rights of privacy as individual citizens, at least under the language

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[17] HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW XIII (1953).

[18] *See* David Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 COMM. L. & POL'Y 433 (2016).

[19] Cross, *supra* note 17 at 9.

[20] MITCHELL W. PEARLMAN, PIERCING THE VEIL OF SECRECY: LESSONS IN THE FIGHT FOR FREEDOM OF INFORMATION 75 (2010).

[21] Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 918 (2006).

[22] *See* Scott Reinardy & Charles N. Davis, *A Real Home Field Advantage: Access to University Foundation Records*, 34 J. L. & EDUC. 389 (2005); Alexa Capeloto, *A Case for Placing Public University Foundations Under the Existing Oversight Regime of Freedom of Information Laws*, 20 COMM. L. & POL'Y 311 (2015) (arguing in favor of recognizing university foundations as public agencies subject to open records laws).

[23] *See* Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689 (2014) (arguing that private prisons should not be able to avoid public oversight because of an "essentially meaningless distinction concerning their legal status" as a private entity).

[24] *See* Aimee Edmondson & Charles N. Davis, *"Prisoners" of Private Industry: Economic Development and State Sunshine Laws*, 16 COMM. L. & POL'Y 317 (2011)

[25] *Id*. at 320.

[26] *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

of the Freedom of Information Act. In 2011, the Supreme Court declined telecommunication company AT&T's request to be afforded the same personal privacy as an individual person. AT&T intervened as a third party in a FOIA request by a competitor for records involving an FCC enforcement action against AT&T, arguing that it was a "'private corporate citizen' with personal privacy rights" that should be shielded from disclosure under Exemption 7(C).[27] Chief Justice Roberts, writing for a unanimous majority, looked at the plain meaning and dictionary definitions of the word "personal" and found "little support for the notion that it denotes corporations."[28] Indeed, ruling against A&T, Roberts concluded that the company should "not take it personally."[29] Yet companies, and the governments that try to entice them into contract agreements, seem to be arguing that their relationship is on par with personal privacy concerns that are well within the policy allowing exemptions to open records laws. The notion is absurd, and it is unsupported by the history of FOIA and its interpretation by federal courts during the past five decades.

Despite recent dicta from courts asserting that FOIA is equally about balancing citizen access to records and government interest in secrecy,[30] the actual purpose of the law could not be clearer. When Congress was drafting FOIA in 1966, it was in response to the failures of provisions of the Administrative Procedure Act to allow access to government records in a timely and effective manner. The purpose of FOIA, the House of Representatives asserted in a report on the bill, was "to establish a general philosophy of full agency disclosure."[31] After agencies and federal courts frustrated these purposes through broad construction of exemptions favoring government secrecy, turning FOIA into a "freedom from information law" according to some critics, Congress responded with revisions in 1974, 1976, 1996, 2007, and 2016, each one favoring broader transparency and narrower interpretation of exemptions.[32] In 1985, the Supreme Court recognized this purpose, noting that FOIA "established a broad mandate for disclosure of governmental records," with exemptions "narrowly tailored" to serve "the fundamental goal of disclosure."[33] In 2005, the House Committee on Government Reform drafted a guide for citizens to use FOIA to access records, commenting, "Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public…The history of the act reflects that it is a disclosure law."[34]

Indeed, the notion of corporate privacy and a purpose-agnostic FOIA flies in the face of Supreme Court interpretation of the law. In 1989, even in one of the most notoriously anti-transparency decisions in the court's history, a unanimous court identified the "central purpose" underlying the Freedom of Information Act as shedding light on government operations.

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[27] FCC v. AT&T Inc., 562 U.S. 397, 401 (2011).
[28] *Id*. at 405.
[29] *Id*. at 410.
[30] The Court dismissed what it called a "policy argument about the benefits of broad disclosure" in efforts by Argus Leader that would favor narrow construction of exemptions, instead suggesting that Congress sought a "'workable balance' between disclosure and other governmental interests." Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019).
[31] H.R. REP. NO. 89-913, at 38 (1965).
[32] *See* Martin Halstuk & Bill Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 533 (2006); Daxton R. "Chip" Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 515, 519-21 (2016).
[33] CIA v. Sims, 471 U.S. 159, 182 (1985).
[34] "A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records," H.R. REP. NO. 109-226, at 2 (2005).

The decision in which this determination was made has long been reviled by open records advocates, not to mention fans of statutory interpretation. In *Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court unanimously ruled that the FBI did not have to release the criminal "rap sheet" of convicted felon Charles Medico to journalists seeking it under FOIA because it would invade his personal privacy.[35] In doing so, the court asserted that the "central purpose" of FOIA was "to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny," rather than merely allowing public access to all documents held by the government about private citizens.[36] The "central purpose" standard is nowhere to be found in the language of FOIA, as Justice Ruth Bader Ginsburg later noted, and "changed the FOIA calculus of" a previous series of "prodisclosure decisions."[37] The standard essentially created a new burden for requesters that "seemingly contravenes the legislative intent of the FOIA by narrowly defining a disclosable record as only official information that reflects an agency's performance and conduct," said Martin Halstuk and Charles Davis as they examined the havoc the new standard had caused FOIA requesters in the decade after it was decided.[38]

The outcome of the case and its long-term effect may have been outright harmful to transparency efforts so far, serving as a shield for government agencies to defend against citizens and journalists seeking access to records. But the "central purpose" doctrine, and the logic underlying it, should be wielded by freedom of information advocates as well – as an argument endorsed by the highest court in the land undergirding open records laws. For three decades now, a unanimous ruling has identified records that "contribute significantly to public understanding *of the operations or activities of the government*" are the "core purpose" of FOIA.[39] This is not a terrible basis, altogether, for reclaiming the point of accounting for public funds doing public work that have been designated to private businesses. Nothing is more illustrative of the "operations or activities of government" than records detailing how the government spends taxpayers' money. Whether these records are in the possession of the government or the agencies it authorizes to do government business, they clearly shed light on government operations. This is why freedom of information laws exist. Although each state law has a statement of purpose or legislative history that may be slightly distinct, they all rest on this same bedrock principle that transparent government is good government, that the policy of the state is to favor openness and for courts to construe provisions liberally to favor disclosure, and that governments are the servants of citizens rather than their masters.

The new twist, of public-private collusion to subvert open records law compliance as part of contracts awarding public money to private entities for public purposes, is a shocking escalation. It is what Pearlman called a "cloaking device" for government spending, a brazen effort to dodge public oversight in a way that would cover up "issues of self-dealing, excessive compensation at the public's expense—and even corruption in the awarding of these arrangements."[40]

Corporate privacy is not a real thing. The "central purpose" of freedom of information laws – as advocated by the government while trying to avoid releasing private information – is disclosing records that allow oversight of government spending. Even when that spending is funneled through a private organization, it is no less the business of the public. To ensure that this

[35] Dep't of Justice v. Reporters Committee for Freedom of the Press (hereinafter, "RCFP"), 489 U.S. 749 (1989).
[36] *Id*. at 797
[37] Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487, 507 (1994) (Ginsburg, J. concurring).
[38] Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the Reporters Committee 'Central Purpose' Reformulation*, 54 ADMIN. L. REV. 983, 991 (2002).
[39] *RCFP*, 489 U.S. at 775 (emphasis in original).
[40] Pearlman, *supra* note 20 at 75, 79.

purpose is fulfilled, transparency advocates must look to limit the expansion of business privacy exemptions in the name of potential competitive harm and revelation of trade secrets that are becoming more commonplace. The *Boeing v. Paxton* decision and *Food Marketing Institute v. Argus Leader Media*, a pair of cases driven by third-party interveners seeking to assert business privacy interests, are illustrative of this downward spiral toward secrecy.

Open records laws and non-governmental entities

Since it took effect in 1967, the federal Freedom of Information Act has been grounded in the presumption of openness, and many state open records laws modeled after it followed suit. Even the current About Page on FOIA.gov details this purported commitment to disclosure: "The FOIA provides that when processing requests, agencies should withhold information only if they reasonably foresee that disclosure would harm an interest protected by an exemption, or if disclosure is prohibited by law. Agencies should also consider whether partial disclosure of information is possible whenever they determine that full disclosure is not possible and they should take reasonable steps to segregate and release nonexempt information."[41] But, as we have briefly outlined above, that fundamental commitment to transparency has been eroding. It's nearly impossible to identify a singular watershed moment when the scales began to tilt more heavily toward secrecy, but key court cases around the country have charted the course away from transparency, interpreting federal and state open records laws in ways that provide the public with less potential for oversight as the government continues to engage the private sector in more of its daily activities. To be sure, the convergence of the government's increasing privatization efforts and the courts' broadening of open records exemptions is troubling.

Statutory open records provisions regularly define the term "public record" in a way that limits disclosure of records not created directly by a government agency, and very few state open records law specify that all documents produced by a government contractor, or for the government, are subject to disclosure. In general, state open records laws fall into one of several categories with regard to their position on whether the records of nongovernmental bodies should be public. At one end of the spectrum, a number of state laws do not even mention nongovernmental bodies. Others condition availability of records on whether the entity receives government funding, with some specifying how much funding the entity must receive. A few states have a "functional equivalence" test that suggests entities acting in ways comparable to a public agency are subject to disclosure.

Finally, the broadest approach, taken by Alaska, encompasses even records of private contractors created for public agencies. After amending its open records law in the 1990s, Alaska defines public records to include "books, paper, files, accounts, writing, including drafts and memorializations of conversations, and other items … that are developed or received by a public agency, or by a private contractor for a public agency, and that are preserved for their informational value or as evidence of the organization or operation of the public agency."[42] To date, no relevant court interpretations of the private contractor language have been issued, but the plain language meaning suggests an atypically broad interpretation of the term "public records" that places significant importance on the public's right to information about government business.

[41] U.S. Dep't of Justice, *What is FOIA?* https://www.foia.gov/about.html.
[42] ALASKA STAT. § 40.25.220 (2018).

A promising decision out of the Louisiana Supreme Court took a similarly broad approach, ruling that the Louisiana Society for the Prevention of Cruelty to Animals, a private 501(c)(3), was subject to the state's open records law.[43] In that case, the LSPCA had entered into a contract with the City of New Orleans to provide animal control for the municipality. The New Orleans Bulldog Society, a nonprofit animal rescue, had filed a public records request with the City of New Orleans, seeking release of the LSPCA's standard operating procedures related to adoption eligibility determinations for stray dogs.[44] In typical fashion, the city referred the animal rescue to the LSPCA, saying it did not have the documents that New Orleans Bulldog was seeking. In response to Bulldog's request, the LSPCA asserted it was not a "public body" under the Louisiana Public Records Act.[45] However, the Louisiana Supreme Court, in its 2017 decision, found the LSPCA to be an "instrumentality" of the city and required that it comply with the open records law.[46] "Through the discharge of its responsibilities … with the City of New Orleans, as well as the receipt of public money as remuneration for such services, we find the LSPCA is functioning as an instrumentality of a municipal corporation, and is therefore subject to the Louisiana Public Records Act. … The LSPCA is requires to disclose all documents specifically related to the discharge of its duties and responsibilities … with the City of New Orleans."[47] The statutory approach taken in Alaska and the judicial interpretation by the Louisiana high court represent the high-water mark of the public's right to access information about private companies engaged in government business.

A few states have a functional equivalence test to determine whether records should be released. Rhode Island specifically codifies this approach noting that the use of the terms "agency" or "public body" in the public records law includes "any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.[48] Often this functional approach may not be clearly articulated in the statute itself, but it exists as a product of case law. The Oregon Supreme Court decision in *Marks v. McKenzie HS Fact-Finding Team* represents a fairly typical common law approach.[49] There, the court established a six-part test aimed at evaluating whether the entity is functionally equivalent to a government entity.[50] When a private entity is considered functionally equivalent to government, then any records related to that undertaking are subject to disclosure. Georgia[51], Maine[52], New Mexico[53], Vermont, and Tennessee take a similar approach in their open records laws.[54]

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[43] New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals, 222 So. 3d 679 (La. 2017).
[44] *Id.* at 681.
[45] *Id.* at 682.
[46] *Id.* at 681.
[47] *Id.* at 687.
[48] R.I. GEN. LAWS § 38-2-2(1).
[49] *Marks v. McKenzie High School Fact Finding Team*, 319 Or 451, 878 P.2d 417 (Ore. 1994).
[50] *Id.* Essentially, the factors include: (1) Whether the government created the entity? (2) Is the entity's function typically performed by the government (3) Does the entity have decision-making authority or is it advisory to the government? (4) How much financial and nonfinancial support does the entity receive from the government? (5) How much control does the government maintain over the entity's operations? and (6) Are the entity's officers or staff public employees? *Id.*
[51] GA. CODE ANN. § 50-18-70(b)(2).
[52] *Turcotte v. Humane Society of Waterville*, 103 A.3d 1023 (Me. 2014).
[53] *State ex rel Toomey v. City of Truth or Consequences*, 287 P.3d 364 (N.M. 2012).
[54] *See generally* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE, https://www.rcfp.org/open-government-sections/4-nongovernmental-bodies/.

More typically, though, state open records laws contain language similar to the Arkansas Freedom of Information Act, which covers records related to the performance of work carried out by "any other agency … that is wholly or partially supported by public funds or expending public funds."[55] As a result, the state's FOIA applies to some, but not all, private nongovernmental entities that engage in work for the government.[56] As the Arkansas Supreme Court established in *City of Fayettville v. Edmark*, the deciding factor is whether the private entity has undertaken "public business."[57] But that broad term has been severely limited by the state's courts. The free use of public property alone will not trigger the FOIA provisions; instead an entity must directly receive public funds.[58] The court also exempted from the state FOIA private entities that sell equipment and supplies to the government because the government cannot be expected to produce all the materials it uses or provide all the services it requires.[59] Although these carve-outs may seem to gut the law's effect, open government scholars John J. Watkins and Richard Peltz-Steele note that some limitation makes sense "or anyone who received government largesse, including welfare recipients and private hospitals that receive Medicare and Medicaid payments" would be subject to disclosure.[60]

Not surprisingly, many of the state statutes requiring support by or expenditure of public funds operate similarly, but they provide little guidance as to how much financial support is required. Michigan law, for example, defines a public body as one that "is primarily funded by or through state or local authority."[61] Similarly, although Montana's Public Records Act doesn't specifically address whether these kinds of records would be open,[62] Section 9 of the Montana Constitution provides citizens with the "right to examine documents … of all public bodies or agencies of state government and its subdivisions." Under the state's open meetings provision, Montana defines "public body" to include "organizations or agencies supported in whole or in part by public funds or expending public funds…"[63] Other states with similar funding-related approaches include Kansas, Louisiana, Maryland, North Dakota, Oklahoma, South Carolina, Texas, Virginia, and West Virginia.[64] As a result, litigation over whether an organization falls under the open records laws regularly ensues in states that don't provide clear guidance as to how much funding is required to consider a private entity as a public body.[65]

The Kentucky Open Records Act, however, provides a very specific definition of public agency that includes specific funding thresholds. "Any body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds. However, any funds derived from a state or local authority in

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[55] ARK. CODE ANN. § 25-19-103(7)(A) (2017). *See also Denver Post v. Stapleton Dev. Corp.*, 19 P.3d 36 (Colo. App. 2000); 29 DEL. C. § 10002(c); IND. CODE § 5-11-1-16(e); KAN. STAT. ANN. § 45-217(f)(1).

[56] *See generally* Ark. A.G. Opin. No. 2001-069, *available at* http://www.arkansasag.gov/assets/opinions/2001-069.pdf.

[57] *See generally* City of Fayetteville v. Edmark, 801 S.W.2d 275 (1990).

[58] *Sebastian County Chapter of American Red Cross v. Weatherford*, 846 S.W.2d 641 (1993)

[59] *See generally* Ark. A.G. Opin. No. 2003-064, *available at* https://www.arkansasag.gov/assets/opinions/2003-064.pdf.

[60] JOHN J. WATKINS & RICHARD PELTZ, THE ARKANSAS FREEDOM OF INFORMATION ACT, at 50-51 (4th ed. 2004).

[61] MICH. COMP. LAWS ANN. § 15.232(h)(iv).

[62] *See generally* MONT. CODE ANN. §§ 2-6-1002(10), 2-6-1002(13).

[63] MONT. CODE ANN. § 2-3-203(1).

[64] *See generally* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE, https://www.rcfp.org/open-government-sections/4-nongovernmental-bodies/.

[65] *See, e.g., Great Falls Tribune Co. Inc. v. Day*, 959 P.2d 508 (Mont. 1998); *Kubick v. Child and Family Serv. of Michigan, Inc.,* 429 N.W. 2d 881 (Mich. App. 1988).

compensation for goods or services that are provided by a contract obtained through a public competitive procurement process shall not be included in the determination of whether a body is a public agency under this subsection."[66] As a result, those agencies are required to disclose any records pertaining to the "functions, activities, programs or operations funded by state or local authority."[67] Although the 25% benchmark certainly provides a bright-line test for how much funding is required, it also means that whether a private entity is considered a public body for open-records law purposes can vary from year to year, despite the entity engaging in the same function.

Perhaps the worst-case scenario exists in states where the open records law does not even mention nongovernmental bodies. South Dakota's law contains a definition of public record that only mentions government entities. "[P]ublic records include all records and documents … of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission council, subunit, or committee of any of the foregoing."[68] Ohio represents a similarly troubling approach.[69] Idaho, New Hampshire, and New Jersey are among the states that do not clearly articulate how to address nongovernmental entities in their open records laws.[70] Such an oversight in the language, in the era of increasing public-private partnership, leaves open the possibility of arguing the open records law intends no public accountability for these activities.

Exemptions for trade secrets and competitive harm

Even if a state clearly articulates that records of nongovernmental entities are covered by its open records law, public access can still be thwarted in a number of ways. Perhaps the most common approach to limiting transparency can be found when legislatures broadly draft, or courts liberally construe, exemptions to state open records laws. Often this occurs when a private entity claims disclosure of information would result in a disclosure of trade secrets or cause competitive harm for the entity. The previously mentioned Texas Supreme Court decision in *Boeing* typifies these judicially created carve-outs, highlighting an instance – discussed in greater detail below – where judicial overreach bastardized the plain-language meaning of the state's open records statute in a manner that has resulted in significant harm to the public's right to access information.

The case stems from a real estate deal involving the aerospace giant's attempt to lease property for its military maintenance operations. Originally, Boeing had leased property in Oklahoma from American Airlines for this aspect of its business, but it was in need of a new facility when the lease expired. Around the same time, the Department of Defense was scheduled to close Kelly Air Force Base in San Antonio, a location that would be well-suited to Boeing's needs. In 1998, the aerospace company signed a 20-year lease for the parcel of land. This undertaking, Boeing asserted, included nearly a dozen employees and consultants who worked for nearly two years developing a long-term strategy that would allow the company to negotiate a lease deal with would result in the successful execution of military aircraft maintenance contracts over the course of the two-decade lease period.

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[66] KY. REV. STAT. § 61.870(1)(h).
[67] KY. REV. STAT. § 61.870(2).
[68] S.D. CODIFIED LAWS § 1-27-1.1.
[69] OHIO REV. CODE § 149.011.
[70] *See generally* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE, https://www.rcfp.org/open-government-sections/4-nongovernmental-bodies/.

After the lease had been executed, a former Boeing employee requested the company's lease agreement and other documents under the Texas Public Information Act. The Port, who oversaw the redevelopment of Kelly Air Force Base, notified Boeing of the request, which allowed the company to intervene as a third party. Boeing provided redacted documents and filed an objection with the state Attorney General's office, noting that release of the information would advantage its competitors. "[A] competitor could take the detailed information in Boeing's lease and determine Boeing's physical plant costs at Kelly, allowing the competitor to underbid Boeing on government contracts by enticing another landlord to offer a lower lease rental." However, the Attorney General ruled against Boeing, concluding that none of the information withheld would be considered exempt from disclosure under the state's open records law.

Using a provision in the Texas Public Information Act that allows third parties to raise concerns about a request for information prior to the information's disclosure, Boeing went to court, asserting the release of bid information would cause competitive harm. At the initiation of the case, Boeing was a key tenant in the base's redevelopment project. In ruling against Boeing, the state trial court concluded that the information was not exempt under the public information law's trade secrets provision. It also concluded Boeing could not assert the competitive disadvantage claim because it lacked standing. Boeing, appealed, but the appeals court affirmed the lower court decision. Citing the appellate court's interpretation of Section 552.104(a) of the Texas Public Information Act,[71] Boeing appealed to the Texas Supreme Court.

In a decision that open government advocate Joe Larsen called "one of the worst rulings to ever come out of the Texas Supreme Court," the justices ruled 7-1 in favor of Boeing and "blew a hole in the Texas Public Information Act."[72] Four years have transpired since the Texas high court ruled that information submitted to the state government by private businesses may be withheld from disclosure under the state's public information law if it were deemed to cause competitive harm, and similar attempts to thwart transparency are on the rise around the country. In many instances, attorneys in a vast number of states are specifically pointing to the *Boeing* precedent to justify intervention by private companies as third parties, illogical readings of state open records statutes or abandonment of the quasi-government doctrine, which we discuss in detail below.

Defining trade secrets and competitive harm – a task not undertaken

Broad use of the trade secrets exemptions – found in the federal and nearly all state open records laws – to protect companies contracting with the government contravenes the original intent of the law. In the beginning, FOIA Exemption 4 was largely designed to protect regulated industries from being harmed as a result of the information they were required to submit to the government. In essence, it was designed to encourage business to disclose information as part of the regulatory process.[73] Fundamentally, these laws and their exemptions were never intended to protect the government when it was "acting as a customer and not as a regulator, because secrecy is not abetting the government's regulatory power."[74] But through lazy legislative drafting and

[71] "Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder." TEXAS GOV'T CODE ANN. § 552.104(a).

[72] DALLAS MORNING NEWS, *Editorial: Texas court ruling lets government keep contracts secret, inviting corruption to fester*, Aug. 9, 2016, https://www.dallasnews.com/opinion/editorials/2016/08/09/editorial-texas-court-ruling-triggered-unacceptable-loss-public-accountability.

[73] *See generally* Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

[74] *See generally* Robert Brauneis & Ellen P. Goodman, *Algorithmic Transparency for the Smart City,* 20 YALE J. L. & TECH. 103, 158 (2018) (summarizing the intent behind trade secrets exemptions in open records laws).

creative judicial interpretation, the trade secrets exemption in many state open records laws has lost its meaning and become subject to abuse. On the federal level, a current circuit split has left the jurisprudence in a disarray. Often, open records laws do not contain specific definitions for either "trade secrets" or "competitive harm." In the best-case scenarios, this means governments must look to other parts of the law – either statutes or case decisions – for the meaning of these terms. In the worst-case scenarios, it leaves agencies free to make ad-hoc decisions about the meaning. Although some state attorneys general and courts have begun to limit this abuse and articulate clearer standards in some areas, it continues to be a serious issue.

The Delaware Freedom of Information Act contains a pretty typically drafted exemption for trade secrets that is modeled after the federal law's Exemption 4. "Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature"[75] are not deemed to be public. However, a series of recent Attorney General Opinions in the state has narrowed the scope of the broadly worded exemption in way that supports access to information. First, the state does not recognize third-party assertions of trade secret status as binding.[76] Additionally, trade secret information will not be exempted from disclosure if there is no apparent likelihood of competitive harm.[77] In addition, these opinions clearly articulate a standard for both trade secrets and competitive harm, drawing on other sources of law. But, Delaware's approach certainly is not representative of the situation in most states with broadly worded trade secrets exemptions that keep much information from being disclosed.

Idaho's Public Records Act provides for more than 40 exemptions, many of which relate to proprietary business information, trade secrets, and economic development, among other areas of corporate interest.[78] As an example of its largess, the Idaho Public Records Act exemption titled "Trade Secrets, Production Records, Appraisals, Bids, Proprietary Information" is more than 2,200 words long and provides extremely broad definitions for what records can be withheld.[79] Of

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[75] 29 DEL. CODE ANN. § 10002(l)(2).

[76] *See* Del. Op. Att'y Gen. No. 13-IB07 (Nov. 21, 2013), https://opinions.attorneygeneral.delaware.gov/2013/11/21/13-ib07-112113-foia-informal-opinion-letter-to-mr-chase-re-foia-complaint-concerning-delaware-department-of-corrections/.

[77] *See* Del. Op. Att'y Gen. No. 14-IB04 (July 18, 2014), https://opinions.attorneygeneral.delaware.gov/2013/11/21/13-ib07-112113-foia-informal-opinion-letter-to-mr-chase-re-foia-complaint-concerning-delaware-department-of-corrections/; https://opinions.attorneygeneral.delaware.gov/2014/07/18/14-ib04-071814-foia-opinion-letter-to-mr-myers-re-foia-complaint-concerning-the-department-of-technology-and-information/.

[78] *See* IDAHO CODE § 74-101 *et seq*.

[79] IDAHO CODE § 74-107. "The following records are exempt from disclosure:
(1) Trade secrets including those contained in response to public agency or independent public body corporate and politic requests for proposal, requests for clarification, requests for information and similar requests. "Trade secrets" as used in this section means information, including a formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in-progress research that:
(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
(2) Production records, housing production, rental and financing records, sale or purchase records, catch records, mortgage portfolio loan documents, or similar business records of a private concern or enterprise required by law to be submitted to or inspected by a public agency or submitted to or otherwise obtained by an independent public body corporate and politic. Nothing in this subsection shall limit the use which can be made of such information for regulatory purposes or its admissibility in any enforcement proceeding.
(3) Records relating to the appraisal of real property, timber or mineral rights prior to its acquisition, sale or lease by a public agency or independent public body corporate and politic.

particular note, legislative efforts are under way in Idaho to require the government to disclose the algorithms used in pretrial risk assessments to determine whether a criminal defendant should receive bail. House Bill No. 118, which was passed by the Idaho House in early March specifically prohibits reliance on the trade secrets exemption or other protections as a means of withholding disclosure.[80] "All documents, data, records and information used to build or validate the risk assessment and ongoing documents, data, records, information, and policies surrounding the usage of the risk assessment shall be open to public inspection, auditing and testing."[81] Although any effort to ensure records are open to the public is a welcome one, mandating access to individual types of information – here related to the privately created algorithms used in criminal justice – fails to address the serious problem of exemption creep.

Not all state open records laws contain a specific exemption for trade secrets. Arizona, for example, does not list trade secrets among the possible types of records that may be withheld.[82] It does, however, set out procedures for those who seek records for a commercial purpose as well as penalties for those who misuse records for a commercial purpose.[83] Punishing the misuse of information by competitors seems far favorable to preventing the disclosure of information in the name of preventing speculative harm. Other statutes, though they may not make specific mention

(4) Any estimate prepared by a public agency or independent public body corporate and politic that details the cost of a public project until such time as disclosed or bids are opened, or upon award of the contract for construction of the public project.
(5) Examination, operating or condition reports and all documents relating thereto, prepared by or supplied to any public agency or independent public body corporate and politic responsible for the regulation or supervision of financial institutions including, but not limited to, banks, savings and loan associations, regulated lenders, business and industrial development corporations, credit unions, and insurance companies, or for the regulation or supervision of the issuance of securities.
(6) Records gathered by a local agency or the Idaho department of commerce, as described in chapter 47, title 67, Idaho Code, for the specific purpose of assisting a person to locate, maintain, invest in, or expand business operations in the state of Idaho.
(7) Shipping and marketing records of commodity commissions used to evaluate marketing and advertising strategies and the names and addresses of growers and shippers maintained by commodity commissions.
(8) Financial statements and business information and reports submitted by a legal entity to a port district organized under title 70, Idaho Code, in connection with a business agreement, or with a development proposal or with a financing application for any industrial, manufacturing, or other business activity within a port district.
(9) Names and addresses of seed companies, seed crop growers, seed crop consignees, locations of seed crop fields, variety name and acreage by variety. Upon the request of the owner of the proprietary variety, this information shall be released to the owner. Provided however, that if a seed crop has been identified as diseased or has been otherwise identified by the Idaho department of agriculture, other state departments of agriculture, or the United States department of agriculture to represent a threat to that particular seed or commercial crop industry or to individual growers, information as to test results, location, acreage involved and disease symptoms of that particular seed crop, for that growing season, shall be available for public inspection and copying. This exemption shall not supersede the provisions of section 22-436, Idaho Code, nor shall this exemption apply to information regarding specific property locations subject to an open burning of crop residue pursuant to section 39-114, Idaho Code, names of persons responsible for the open burn, acreage and crop type to be burned, and time frames for burning.
(10) Information obtained from books, records and accounts required in chapter 47, title 22, Idaho Code, to be maintained by the Idaho oilseed commission and pertaining to the individual production records of oilseed growers. [Sections 11-29 have been redacted for length considerations]." *Id.*

[80] H.B. 118, 65th Sess. (Idaho 2019) https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2019/legislation/H0118A2.pdf. "No builder or user of a pretrial risk assessment tool may assert a trade secret or other protections in order to quash discovery in a criminal or civil case." *Id.*

[81] *Id.*

[82] *See generally* ARIZ. REV. STAT. ANN. § 39-121.

[83] ARIZ. REV. STAT. ANN. § 39-121.03.

of trade secrets, outline scathes of information that could be argued would result in competitive harm, if disclosed. The Arkansas Freedom of Information Act does not include trade secrets in a list of exemptions, but instead the law exempts myriad records related to economic development.[84] "(A) Files that if disclosed would give advantage to competitors or bidders and (B)(i) Records maintained by the Arkansas Economic Development Commission related to any business entity's planning, site location, expansion, operations, or product development and marketing, unless approval for the release of those records is granted by the business entity."[85] In essence, the Arkansas legislature has specifically codified the troubling practice of allowing third parties to intervene in open records requests into its open records law. Although, as one scholar points, out "Arkansas courts have not interpreted its version of the § 552.104 exception in a way that grants third parties standing to raise the exception,"[86] that doesn't mean they won't in the future. Currently "Arkansas has held that the burden is on government agencies to show that the information requested qualifies for the exception to disclosure, and that state agencies may raise the exception on behalf of third parties."[87]

Some state statutes contain sweeping exemptions allowing the withholding of information in the name of the public interest, a nebulous construct that begs to be misused. The California Public Records Act lists, among its provisions, Section 6255(a), which states "The agency shall justify withholding any record by demonstrating that the record in question is exempt under the express provisions of this chapter *or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record*" [emphasis added]. Under the California law, the determination of whether the "catch-all" exemption applies is conducted on a case-by-case basis, with the burden on the government to justify non-disclosure.[88] Case law in California has suggested this burden is a heavy one for the government to bear, but the "catch-all" nature of this exemption remains troubling. A California appellate court, for example, ruled that a university foundation could not use the exemption to withhold the names of athletic licensees and license agreements. "We … can conceive of many examples where the licensee's identity could be of significant interest to the public. … If so, the public has an interest in knowing the licensee's identity to determine whether that licensee is receiving special consideration in contract negotiations."[89] However, broad exemptions that use vague language open the door for those who favor secrecy to demand information be withheld from disclosure.

But the real challenge in nearly all instances where records requests have been denied on the basis of trade secrets or competitive harm is the lack of clarity about what the words actually mean – or should mean – under state open records laws. Even at the federal level, a circuit split gave rise to the Supreme Court's grant of certiorari in *Argus Leader*. The actual practice of allowing exemptions based on trade secrets or competitive harm suggests a possible need to allow third parties to intervene in records requests, though government entities seem to have no trouble asserting these rights for private companies. In one recent example, the City of New York denied a request for information about Palantir's predictive policing algorithm under New York's FOIL,

[84] *See generally* ARK. CODE ANN. § 25-19-105 *et seq*.
[85] ARK. CODE ANN. § 25-19-105(9).
[86] Alexandra Schmitz, Comment, *Don't Mess with the Texas Public Information Act: The Threat to Government Transparency Posed by Boeing v. Paxton and How to Fix It*, 50 TEX. TECH. L. REV. 249, 272 (2018).
[87] *Id.*
[88] *See generally* CBS v. Block, 725 P.2d 470 (Cal. 1986).
[89] California State Univ., Fresno Ass'n. v. Superior Court, 90 Cal. App. 4th 810, 834 (2001).

citing the trade secrets exemption.[90] The New York trial court agreed with the Brennan Center, ruling that the New York City Police Department had produced no evidence to support its claim that turning over vendor documents would reveal trade secrets. The documents sought by the Brennan Center included email correspondence with Palantir, historical output of the system through mid-2017, notes on the development of the current algorithm and summary results of NYPD's various trials of Palantir products.[91]

In Illinois, a Chicago suburb denied a reporter's request under the state open records law[92] for the budget associated with a construction project undertaken by a private contractor, claiming it was a trade secret.[93] In the case, the city asserted both that the developer submitted the information under the implied promise of confidentiality and that release of the information would result in competitive harm because other developers could use the information that had been submitted. Citing a 2017 decision[94] out of the Illinois Court of Appeals, The Illinois Attorney General's Office ruled the trade secrets exemption required both that the information was provided under a claim of confidentiality *and* that there was evidence of substantial competitive harm. Specifically, in the Attorney General's Opinion noted that the legislature revised the exemption in 2010, and the addition of the requirement "indicates its intention to limit the scope" of the exemption.[95] Citing differing standards out of the First/D.C.[96] and Fifth[97] Circuits, the ruling noted that the city failed to present evidence of substantial competitive harm under either approach.

Despite these recent wins in New York and Illinois, the use of the trade secrets exemption has flourished in a number of states in part because of lax definitions that provide little guidance. A March 2019 opinion piece in the *Tennessean* details how governments have capitalized on the trade secrets exemptions, signing non-disclosure agreements with private companies to keep their business dealings confidential.[98] Pointing to major dealings with Google and Volkswagen in the state, Tennessee Coalition for Open Government Executive Director Deborah Fisher detailed a

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[90] *See* Brennan Center for Justice v. New York City Police Dept., No. 160541/2016 (N.Y. Sup. Ct. Dec. 27, 2017), https://www.brennancenter.org/sites/default/files/opinion12222017.pdf.

[91] Rachel Levinson-Waldman & Erica Posey, *Court: Public Deserves to Know How NYPD Uses Predictive Policing Software,* Brennan Center (Jan. 26, 2018), https://www.brennancenter.org/blog/court-rejects-nypd-attempts-shield-predictive-policing-disclosure.

[92] *See* 5 ILL. COMP. STAT. § 140/7(1)(g). The exemption protects "[t]rade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that the disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested." *Id.*

[93] Ill. A.G. Op. 18-004, http://illinoisattorneygeneral.gov/opinions/2018/index.html.

[94] Chicago v. Janssen Pharm., Inc. 78 N.E.3d 446 (Ill. App. 1st. 2017).

[95] Ill. A.G. Op. 18-004, http://illinoisattorneygeneral.gov/opinions/2018/index.html.

[96] *See* New Hampshire Right to Life v. United States Dep't. of Health & Human Serv., 778 F.3d 43, 50 (1st Cir. 2015) (quoting Public Citizen Health Research Group v. Food & Drug Administration, 704 F.2d 1280, 1291 (D.C. Cir. 1983)). "Parties opposing disclosure need not demonstrate actual competitive harm; instead, they need only show actual competition and a likelihood of substantial competitive injury in order to 'bring [that] commercial information within the realm of confidentiality.'" *Id.*

[97] *See* Calhoun v. Lyng, 864 F.2d 36, 36 (5th Cir. 1988). "To show substantial competitive harm, the agency must show by specific factual or evidentiary material that: (1) the person or entity from which information was obtained actually faces competition and (2) substantial harm to a competitive position would likely result from the disclosure of information in the agency's records." *Id.*

[98] Deborah Fisher, *Tennessee Must Stop Treating Government Business as a Trade Secret,* TENNESSEAN, Mar. 10, 2019, https://www.tennessean.com/story/opinion/2019/03/10/tennessee-sunshine-law-trade-secret-open-records/3109008002/.

routine process used to keep the public in the dark.[99] The first step is for the government and private business to enter a nondisclosure agreement, saying that information in any contract with the government should be considered a trade secret under the state open records law.[100] Step two requires they agree not to disclose information to the public even in the meeting where they vote to approve the contract.[101] Typically, the government will even clear news releases with the company before issuing them.[102] And, the final nail in the transparency coffin involves the government notifying the company about public records requests to allow time for the company to intervene in court.[103] At least in Tennessee, some legislators have banded together in an attempt to stop these secretive contracts between the government and private industry. A new piece of legislation[104] in the Tennessee General Assembly, House Bill 370/Senate Bill 1292, aims to curtail the use of the trade secrets exemption to cloak payments from the government to private entity.

Although the legislation in Idaho and Tennessee suggest that some parties are concerned with the erosion of transparency at the state level, the greatest test of how the trade secrets exemption – and the definition of competitive harm – was decided by the U.S. Supreme Court in June 2019 in *Food Marketing Institute v. Argus Leader Media*.[105] At issue were two key issues related to FOIA Exemption 4, which covers trade secrets. It exempts from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[106]

The Court granted certiorari in *Argus Leader* to clarify whether Exemption 4's use of confidential bore its plain meaning and to determine the proper standard to determine competitive harm. The case arose after a South Dakota newspaper filed a FOIA request with the Food & Drug Administration in 2011 seeking names and sales figures for stores in the U.S. that participate in the federal food stamp program, known as SNAP. Initially, the FDA released some information, but argued other information was confidential business information under Exemption 4. The newspaper appealed the agency decision, and it eventually filed a federal lawsuit. The district court granted the USDA's motion for summary judgment, causing the newspaper to appeal to the Eighth Circuit, who reversed the grant of summary judgment. At trial in the U.S. District Court for the District of South Dakota, the *Argus Leader* prevailed. Applying the *National Parks* test[107] from the D.C. Circuit, which had been adopted by the Eighth Circuit,[108] Judge Karen Schreier ruling the USDA could not prove that releasing sales data would cause substantial competitive harm. "Because the USDA received a small percentage of responses from SNAP retailers, there is little evidence that supports the inference that the majority of SNAP retailers are not concerned about any competitive harm that might stem from the disclosure of individual store data."[109]

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] H.B. 370/S.B. 1292 (Tenn. 2019), http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0370.
[105] Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019).
[106] 5 U.S.C. § 552(b)(4) (2006).
[107] *See* Nat'l Parks & Conservation Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). "Information is confidential if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*
[108] *See* Contract Freighters, Inc. v. Sec'y of U.S. Dep't. of Transp., 260 F. 3d 858, 861 (8th Cir. 2001).
[109] Argus Leader Media v. U.S. Dep't. of Agric., 224 F.Supp.3d 827 (D. S.D. 2016).

In an unusual (and troubling) twist of facts, the USDA decided not to appeal, but an industry group known as the Food Marketing Institute intervened to prevent the information from being disclosed. A three-judge panel of the Eighth Circuit eventually affirmed[110] the trial court decision, and FMI's petition for *en banc* review was denied. FMI petitioned the U.S. Supreme Court for a writ of certiorari.[111]

In a 6-3 decision, Justice Gorsuch wrote for the Court that FMI did have proper standing under Article III in the case, noting that "it has suffered an actual or imminent injury that is 'fairly traceable' to the judgment below and that could be 'redress[ed] by a favorable ruling.'"[112] Although the Court failed to adopt the standard articulated by FMI, who asserted that confidential should be interpreted to mean "private and not publicly disclosed,"[113] it was not willing to accept the *Argus Leader*'s assertion that "confidential" was a business term of art that requires an evaluation of competitive harm.[114] Instead, the Court carved its own path, with Justice Gorsuch looking at the term's "ordinary, contemporary, common meaning"[115] in 1966 at the time of FOIA's enactment.[116] Relying on his handy copy of Webster's Seventh New Collegiate Dictionary from 1963 as well as a 1961 version of Webster's Third New International Dictionary and the Revised 4th Edition of Black's Law Dictionary, Justice Gorsuch deduced that information that owners share freely cannot be considered confidential.[117] Noting that retailers do not publicly disclose store-level SNAP data, he concluded the information had not been shared freely. Noting that under the SNAP program, the government promises to keep information provided by retailers private, Justice Gorsuch then avoids addressing whether information provided without such a promise would be considered confidential. As a result, the Court ruled that any information customarily and actually treated as private by its owner and provided to the government under an assurance of privacy constitutes confidential information under Exemption 4 of FOIA.

The outcome of the *Argus Leader* case is sure to have substantial impact on open records law across the country. The Court's adoption of the more lenient standards urged by FMI – a plain language approach to confidentiality or the "reasonable possibility" of competitive harm – deals a serious blow to the public's right to access important government information. Whether third parties have the right to intervene to prevent disclosure of information held by the government represents a significant issue in cases involving trade secrets exemption, and a ruling that FMI had no standing would have dramatically limited the ability of private companies to prevent the public from having access to government information. Moving forward, the *Argus Leader* decision likely sets the stage for greater intervention by third parties and stands to prevent significant disclosure of information to the public. In addition, it also opens the door for organizations to balk at providing the government with certain information without a promise of confidentiality.

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[110] Argus Leader Media v. Food Marketing Inst., 889 F.3d 914 (8th Cir. 2018).
[111] Petition for a Writ of Certiorari, Food Marketing Inst. v. Argus Leader Media, No. 18-48, 2018 WL 5016257 (Oct. 11, 2018).
[112] Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019), *quoting* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149-150 (2010).
[113] *See* Brief for the Petitioner, Argus Leader v. Food Marketing Inst., No. 18-481, 2019 WL 929007 (Feb. 15, 2019).
[114] *See* Brief for the Respondent, Argus Leader v. Food Marketing Inst., No. 18-481, 2019 WL 1310225 (Mar. 18, 2019).
[115] Perrin v. United States, 444 U.S. 37, 42 (1979).
[116] Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019).
[117] *Id.* at 2363.

The narrowing of the quasi-government doctrine

When government and private entities work together to undertake government businesses, open records and meetings laws occasionally extend to the private entity on the theory that it is acting as a quasi-governmental agency. Although the degree of transparency required of such quasi-governmental agencies varies greatly from state to state, in general, the principle is that at a bare minimum, the quasi-government designation attaches to private entities that are both (1) funded by the government and (2) exist to serve a government function. Examples include operating public facilities such as stadiums and parks, public school bus services, and private prisons and other security services.[118]

In some jurisdictions, such as the federal government, the government must also establish and control the agency. The D.C. Circuit held in 1998, for example, that the Smithsonian museums were not quasi-government agencies subject to FOIA because the federal government had neither created them by statute or other executive-branch action nor controlled them, even though the government funded the Smithsonian, which also had government employees serving on its board.[119]

Some jurisdictions have broader definitions that require private entities to be subject to open records laws. Texas, for example, includes in its definition of "government body" an "agency that spends or is supported in whole or in part by public funds."[120] But even that plain language has been whittled away, rendered almost meaninglessness by courts favoring business privacy over public transparency interests. In 1988, the U.S. Court of Appeals for the Fifth Circuit, reviewing Texas law in *Kneeland v. National Collegiate Athletic Association*, ruled that the Southwest Conference and the NCAA, despite receiving funding from public universities in Texas, were not subject to open records requests under state law because the contract involved a "*quid pro quo*" exchange of money for services that did not involve any additional level of government oversight or control.[121] And shortly after its widely criticized 2015 ruling in *Boeing v. Paxton*, the Texas Supreme Court delivered another blow to transparency by further restricting the application of the Public Information Act in *Greater Houston Partnership v. Paxton*.[122] The court ruled that Greater Houston Partnership (GHP) – a private, nonprofit corporation that essentially serves as a "chamber of commerce" – was not subject to the requirements of the Public Information Act, even though it received funds from the City of Houston and served in an "agency-type relationship" with the city. The state supreme court rejected the plain meaning of the phrase "supported in whole or in part by public funds," which the attorney general and lower courts had relied upon for decades to make similar entities "government bodies" for the purpose of the act. Instead, the court held that "supported" *actually* meant "*sustained* by public funds,"[123] finding the GHP was a *quid pro quo* arrangement with the government, and not one in which the government "maintains" an agency with financial support. Three justices dissented, noting that the majority opinion "discards over forty years of legal interpretations and announces a brand new interpretation that, at best, reflects the Court's concerns instead of the Legislature's language," and finding that the majority's

[118] *See* Rani Gupta, *Privatization v. The Public's Right to Know*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS 1-5 (Summer 2007).
[119] Dong v. Smithsonian Inst., 125 F.3d 877, 878 (D.C. 1997), *cert. denied*, 524 U.S. 922 (1998).
[120] TEX. GOV'T CODE § 552.003(1)(A)(xii) (Vernon 2018).
[121] Kneeland v. National Collegiate Athletic Ass'n, 850 F.2d 224, 230 (5th Cir. 1988).
[122] Greater Houston Partnership v. Paxton, 468 S.W.3d 51 (Tex. 2015).
[123] *Id*. at 60-61 (emphasis added).

construction was "irreconcilable" with the express language of the statute.[124] Basically, although Texas law says support can be "in whole or in part," the majority opinion wrote out the words "in part" to limit the Public Information Act's application only to bodies that could not exist or survive without government funds, a limitation found neither in the text of the law nor its legislative intent, which expressly calls for liberal construction of the provisions of the law to serve the purpose of the broadest transparency possible.[125]

The "quid pro quo" nature of a relationship with the government – that is, an arms-length bargain for goods or services – is at the heart of many quasi-government determinations, including the aforementioned Fifth Circuit ruling in *Kneeland* between the NCAA and Southwest Conference and the state universities that were members of those groups. The case is often cited in decisions about whether quasi-government bodies are subject to public records laws, both in Texas and out. For example, relying on the logic of *Kneeland*, a Texas court of appeals found that Rural Hill Emergency Medical Services, a not-for-profit organization providing ambulance and other medical transportation services, was not a "government body" even though it received public funding; rather, it was a *quid pro quo* payment for services that was not "so closely associated with the governmental body" in its management or operation to render it subject to the Public Information Act.[126]

But several other state supreme courts have applied the *Kneeland* standard to hold that private entities on contract with governments were quasi-governmental and thus subject to state records laws. These include:

- The Indianapolis Convention and Visitors Association, as a "private not-for-profit corporation that receives revenue from both public and private sources," which the Indiana Supreme Court held was subject to the state's Public Records Law, in part because the amount of money it received was neither negotiated nor designated as fees, but rather dictated by contract as a portion of city hotel-motel taxes.[127]
- The Carolina Research and Development Foundation, a body funded entirely by public funds to benefit the University of South Carolina, led the South Carolina Supreme Court to reach the "unavoidable conclusion that the Foundation is a 'public body'…mandated by the clear language of the FOIA."[128]
- The Greater North Dakota Association, a non-profit pro-business lobbying organization that included "ten state governments which have purchased thirty memberships,"[129] and which the state's attorney general had found to be public body in part because of the public funds it received to publish a magazine. The North Dakota Supreme Court ruled it to be arguably at least enough of a public body to overcome a summary judgment motion, thus supporting the legislature's preference of transparency to read the statute broadly to give "expansive meaning" to its definitions.[130]
- Cherokee Children & Family Services, a not-for-profit corporation providing social services on contract with the Tennessee Department of Human Services, which the

[124] *Id*. at 68.
[125] The majority dismissed this language by saying that "the TPIA's liberal-construction clause" was not a problem here because "even liberal construction must remain grounded in the statute's language and cannot overwhelm contextual indicators limiting public intrusion into the private affairs of non-governmental entities." *Id*. at 62.
[126] CareFlite v. Rural Hill Emergency Med. Serv., Inc., 418 S.W.3d 132, 139 (Tex. App. 2012).
[127] Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, 577 N.E.2d 208, 209 (Ind. 1991).
[128] Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403 (S.C. 1991).
[129] Adams County Record v. Greater North Dakota Ass'n, 529 N.W.2d 830, 832 (N.D. 1995).
[130] *Id*. at 838.

> Tennessee Supreme Court held operated as the "functional equivalent of a government agency," as it received most of its funding from the government and had some level of government control; thus, as part of the state's policy favoring liberal construction of the Public Records Act, was thus subject to requests made under the law.[131]

In *Greater Houston Partnership*, the Texas Supreme Court found that GHP, which was under contract to "provide consulting, event planning, and marketing services to the city of Houston," and was ruled by both the attorney general and the lower court to be a body subject to the Public Information Act in spite of a contract provision that the body was not subject to the Act, was nevertheless part of a "*quid pro quo* arrangement" with the city.[132] Curiously, the majority referenced each of the aforementioned four cases out of Indiana, South Carolina, North Dakota, and Tennessee to support its decision, citing dicta about *quid pro quo* agreements while neglecting to mentioning the actual outcome of those cases to support the dubious proposition that "our sister courts have unanimously construed the phrase ('supported in whole or in part by public funds') to exclude, as a general matter, private entities receiving public funds pursuant to quid pro quo agreements without regard to whether such an agreement is the entity's only funding source."[133] In fact, the only case it cited that reached an outcome denying access to records was from the Ohio Supreme Court, which found that Oriana House, a private non-profit company operating "community-based correctional facilities," was not a public agency subject to the state's Public Records Act. Even though it was largely funded by government and served a historic government function, the entity was not managed on a day-to-day basis by government, nor was it created specifically to avoid the Public Records Act, at least to the point that it could satisfy the "clear and convincing evidence" standard required to establish a private entity as a public office under Ohio law.[134] This evidentiary burden is significantly higher than the broad policy of liberal construction to favor openness stated in the Texas statute.

The lengths to which the Texas Supreme Court was willing to bend both plain language and precedent are indicative of the trend in which quasi-government arguments are being crafted. When a valid quasi-government argument is to be made, a court limits the construction to favor business privacy. When a court rules in favor of transparency, the legislature swoops in to exempt the business from future scrutiny. And now, government agencies have ditched the pretense and engaged in direct collusion with private companies – such as Amazon and Boeing – to shield them from open records laws by notifying them in advance of open records requests. This allows private companies to intervene as third parties in litigation, making such requests an expensive and time-consuming proposition for citizens and journalists.

Conclusion

Privatization has allowed government bodies to surrender public oversight of the entities they pour money into for the purpose of doing government work. By negotiation, by litigation, and by legislation, the government our tax dollars pay to support has come down firmly on the side of business privacy at the expense of transparency. This flies in the face of more than two centuries of democratic philosophy, rooted in the very real and practical concerns of our nation's founders that an unwatched government will necessarily be a corrupt government, and a recognition that, as

[131] Memphis Publ'g Co. v. Cherokee Children & Family Serv., 87 S.W.3d 67, 78-79 (Tenn. 2002).
[132] 468 S.W.3d at 54.
[133] *Id*. at 63.
[134] State ex rel. Oriana House, Inc. v. Montgomery, 854 N.E.2d 193 (Ohio 2006).

Louis Brandeis famously remarked, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[135] Transparency and government accountability are "essential ingredients of 'free consent,' the *sine qua non* of a true democracy."[136]

We are living in a time when unprecedented numbers of public-private partnerships are finding ways to avoid transparency, with the blessing of government groups who seem eager to let businesses hide their activities after receiving public funding, tax waivers, and other government-granted handouts. At the highest level of United States government, we are also witnessing unavoidable entanglements between the Executive Branch and the personal businesses of the president, drawing numerous lawsuits and ethics complaints. The president's businesses received payments from foreign governments; he awarded government contracts and federal jobs to club members from his golf courses; and he operated a hotel in Washington, D.C., on property leased from the federal government that has become a hotspot for conservative lobbyists and donors.[137] An analysis by *USA Today* found that it was largely impossible to tell whether Donald Trump had kept his promises to keep his role as president separate from his entanglements in his private businesses, as "information about his businesses is so secretive … the only way to know whether Trump kept his promise is to take his word for it."[138]

Open records laws exist to make government acts transparent, and classic freedom of information doctrine holds that, although private businesses are not required to be open to public scrutiny, those receiving government funds to do government business should be subject to some level of public oversight. As Pearlman put it, "It's simply unacceptable in a democratic society to permit government to avoid popular oversight and accountability merely by entering into a contract with a private entity."[139] Yet myriad examples demonstrate the ways public bodies have collaborated with private businesses to keep both of their operations in the dark.

How can freedom of information advocates and oversight-minded citizens curb the tide? We offer three potential routes. In short, they are (1) radically rethinking the quasi-government doctrine through legislative amendments to shed light on what has become an increasingly prevalent tactic of government handouts to private businesses with few strings attached; (2) in litigation, emphasizing the broad democratic policies favoring openness that the U.S. Supreme Court has announced in its decisions interpreting the federal Freedom of Information Act, even despite its recent ruling in *FMI v. Argus Leader*; and (3) pushing for legislative limits on the ability of third parties to intervene in the open records request process, particularly when matters are within public officials' discretion rather than laws barring release of certain information.

Reclaiming and expanding the quasi-government doctrine

Countering the trend favoring business privacy over public transparency requires radical rethinking of the quasi-government doctrine, which has become quite narrow and seemingly extends only to situations in which the government establishes, pays for, and directs the private entity doing work on its behalf. But what if the quasi-government doctrine were extended to serve

[135] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913.
[136] Pearlman, *supra* note 20 at 31.
[137] Steve Reilly, Christal Hayes & Bart Jansen, *Did Trump keep his 19 promises to insulate himself from his business? Only he knows*, USA TODAY, March 18, 2019, https://www.usatoday.com/in-depth/news/politics/2019/03/18/president-donald-trumps-promises-didnt-end-business-entanglements/3030377002/.
[138] *Id*.
[139] Pearlman, *supra* note 20 at 78.

the aforementioned "central purpose" of open records laws – that is, to ensure transparency of government operations and decision-making so the public could serve as an effective watchdog for abuse, fraud, waste, and corruption?

Think about it as an "Overton Window" situation. The "Overton Window of Political Possibilities," outlined by political scientist Joe Overton in the 1990s, is the idea is that within a full, wide-ranging spectrum of political ideas on a topic, "only a portion of this policy spectrum is within the realm of the politically possible at any time."[140] For example, on matters of health care in the United States, at one time it may have been less politically palatable – and thus impossible – for single-payer, socialized medicine to be a legitimate consideration at one end of the spectrum; likewise, abandoning long-standing services like Medicare and Medicaid and turning to full privatization is also very likely outside the range of political possibility. But the window can shift with waves of events and public opinion, perhaps broadening the range of political possibilities.[141] The scope of proper discussion about freedom of information laws has been centered on the notion that it is only official acts of government – rather than the conduct of government business – that should be subject to open records laws, with very limited exceptions covering a narrow interpretation of private bodies receiving public funding and other quasi-government agencies. The increase of public-private partnerships and government funding of private operations, though, renders that approach to quasi-government records outdated and ineffectual. The window of debate must now shift, aided by freedom of information advocates and transparency-concerned citizens watching government action increasingly take place behind closed doors. It's a trend that even bothered the most conservative voices on the Texas Supreme Court. Don Willett, a conservative darling and strict constructionist appointed to the Fifth Circuit in 2017 and shortlisted for a U.S. Supreme Court nomination, joined the dissenters in *Greater Houston Partnership*, finding the majority's tortured explanations outside of the bounds of statutory interpretation that he could support.[142] Transparency must be an issue whose appeal transcends partisanship.

Consider multimillion-dollar tax giveaways to private businesses, done ostensibly to serve the public interest through job creation and economic stimulation. The private businesses get all the benefit of government funding without any of the concomitant responsibilities of serving the public interest. One recent example would be the building of the Foxconn LCD screen factory in Wisconsin. Under a deal negotiated by local government bodies and the governor's office, Foxconn would receive nearly $4 billion in public subsidies, with the promise of creating 13,000 jobs and investing $10 billion in the local economy. Local governments are investing hundreds of millions of dollars in land purchases, infrastructure improvements, and "incentive payments" to the private business to lure it to the region.[143] Although some limits exist on how much the government will pay in exchange for what return of jobs and local investment, the extent to which the records generated in these transactions would be open to public inspection to determine

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[140] Nathan J. Russell, *An Introduction to the Overton Window of Political Possibilities*, MACKINAC CENTER FOR PUBLIC POL'Y (Jan. 4, 2006), https://www.mackinac.org/7504.

[141] *See* Chris Weigant, *Bernie Moves the Overton Window on Single-Payer*, HUFFINGTONPOST, Sept. 13, 2017, https://www.huffingtonpost.com/entry/bernie-moves-the-overton-window-on-single-payer_us_59b9d3dfe4b06b71800c36a3.

[142] Rachel Cohrs, *Texas judge Don Willett is back under consideration to be Trump's next Supreme Court pick*, DALLAS MORNING NEWS, June 27, 2018, https://www.dallasnews.com/news/politics/2018/06/27/texas-judge-don-willett-back-consideration-betrumps-next-supreme-court-pick.

[143] Rick Romell & Molly Beck, *After discussions with Trump, Foxconn says it will build factory in Racine County*, MILWAUKEE J. SENTINEL, Feb. 1, 2019. https://www.jsonline.com/story/money/business/2019/02/01/foxconn-now-says-indeed-build-lcd-factory-wisconsin/2744111002/.

whether the deal actually benefits the public as promised is unclear. Under the Wisconsin Open Records Law, emails of government officials with Foxconn would likely be open for inspection, but Foxconn leaders discussing tax payments and receipt of public dollars and conduct of business in conjunction with those incentives with one another would not be subject to the same scrutiny. The "central purpose" of open records laws – providing oversight of public expenditures used for public purposes – would be frustrated.

In their examination of economic development companies, Edmondson and Davis concluded that from a legislative perspective, sunshine laws "should be rewritten to spell out that quasi-public development entities always must be subject to the law. Such entities might be defined as any entity that utilizes public resources, including tax dollars or office space in public buildings, among other things."[144] This would be a good starting place for freedom of information advocates, particularly in this moment, when large swaths of the public are skeptical about government in general, and tax giveaways to large companies in particular. The main reason the Amazon HQ2 deal in New York fell apart was that it was so unpopular with citizens and activists that it became bad politics for legislators at the local, state, and federal level.[145] The more the public learned about the deal, the worse it sounded, to the point that the pushback was more than Amazon was willing to accept. The "Overton Window" may have opened enough to rethink the definition of when a public entity qualifies as a "government body" or "quasi-government agency" by expanding to include any private business receiving public funds. At the very least, the amount of public funds expended should be made transparent; no legitimate reason justifies the government being able to hide how much it spent to secure the services of an entertainer at a holiday parade. Indeed, an example from Oklahoma demonstrates how interesting (and detailed) these contracts can be. In 2015, *OU Daily*, the student newspaper at the University of Oklahoma, reported the university paid guitar legend Jack White $80,000 to perform a concert, but the contract also revealed the dining preferences of the band, including specifications on how they prefer their guacamole: "We want it chunky."[146]

From multibillion-dollar government handouts to massive private companies to eccentric details in a performer's contract, the public's business is the public's business. When a tax dollar is spent, citizens are entitled to know how and why. As courts have chipped away at this transparency, carving out new exceptions and expanding others in the name of protecting trade secrets and competitive advantages, freedom of information advocates must continue advocating for legislative changes that address business privacy creep.

Don't let SCOTUS get you down

The U.S. Supreme Court rarely hears Freedom of Information Act cases. But when it does, the decisions have the potential to carry significant weight as a statement on democratic principles by the highest court in the country despite only addressing the application and interpretation of federal open records law. Advocates of the right to know should not neglect these important opinions, even when debating policy matters at the state level. Likewise, advocates should not let the Court's adverse ruling in *Food Marketing Institute v. Argus Leader* get them down, as it can

[144] Edmondson & Davis, *supra* note 24 at 340-41.

[145] *See* Seth Fiegerman, *Amazon cancels plans to build New York headquarters*, CNN, Feb. 15, 2019, https://www.cnn.com/2019/02/14/tech/amazon-hq2-nyc/index.html.

[146] Paighten Harkins, *"We want it chunky" and other gems from Jack White's contract with OU*, OU DAILY, Jan. 29, 2015, http://www.oudaily.com/blogs/we-want-it-chunky-and-other-gems-from-jack-white/article_e6b4f946-a804-11e4-a216-4bdde136d4fa.html.

largely be seen as more about the Court's conservative wing opining on statutory construction principles than directly undermining the purpose of FOIA.

As argued above, although the Court's 1989 ruling in *Department of Justice v. Reporters Committee for Freedom of the Press* is decidedly not pro-transparency, the language the Court used to articulate the "central purpose" of FOIA should be used to identify the kinds of records that fall squarely within the ambit of open records laws. How the government spends tax dollars is unquestionably illustrative of the "operations or activities of the government;"[147] indeed, it is hard to imagine any record held by government to be more reflective of how our elected and appointed officials conduct the public's business.

Before *FMI v. Argus Leader*, the Roberts Court's FOIA decisions had been more favorable toward transparency under FOIA. In 2011, the Court decided two cases in favor of disclosure and against asserted privacy interests. In *FCC v. AT&T*, the Court unanimously ruled against AT&T as a third-party intervener, when it asserted a corporate privacy right in its letters from the federal regulatory agency as an expansion of "personal privacy" in the language of Exemption 7(C).[148] Although Chief Justice Roberts did not get into the fundamental purposes underlying FOIA – as a constructionist, he is less moved by legislative intent, and more likely to turn to statutory language and a dictionary in his decisions[149] – he certainly, in his writing, illustrated how exemptions detailed by Congress in FOIA should be read, favoring "ordinary meaning" and consistency within the context of the statute. The majority declined, for example, to invoke other areas of privacy law such as the Fourth Amendment or double jeopardy to expand the reach of the personal privacy provision, noting, "this case does not call upon us to pass on the scope of a corporation's 'privacy' interest as a matter of constitutional or common law."[150]

Shortly after *FCC v. AT&T*, the Court again ruled in favor of transparency and narrow construction of exemptions, but this time with more discussion of FOIA's purpose. *Milner v. Department of the Navy* concerned a citizen's request for "data and maps used to help store explosives at a naval base" that was denied by the Navy on grounds that the requested materials were "personnel matters" under Exemption 2.[151] Justice Kagan, writing for the Court and joined by Chief Justice Roberts, said the 12 words in Exemption 2, "related solely to the internal personnel rules and practices of an agency," could not be read in a way that plausibly included data and maps about explosives, turning to the dictionary for examples of what "personnel" meant in plain language.[152] But she went on to invoke FOIA's preference for broad disclosure of government records, coupled with narrow interpretations of exemptions in furtherance of that purpose:

> We would ill-serve Congress's purpose by construing Exemption 2 to reauthorize the expansive withholding that Congress wanted to halt. Our reading instead gives the exemption the "narrower reach" Congress intended, through the simple device of confining the provision's meaning to its words.[153]

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[147] 489 U.S. at 775

[148] 562 U.S. at 400.

[149] *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 522 (2013) (noting that Roberts used a dictionary in 35.7 percent of his decisions regarding statutory interpretation between 2005 and 2010, tying Justice Thomas for the highest rate of justices on the court for that entire time period).

[150] 562 U.S. at 407.

[151] Milner v. Dep't of the Navy, 562 U.S. 562, 564-65 (2011).

[152] *Id*. at 569.

[153] *Id*. at 571-72.

These are important points for freedom of information advocates. Narrow construction of exemptions serves the purpose of open records laws by setting transparency and openness as the default positions for government records. When a government agency fears the consequences of transparency, it may, as Justice Kagan pointed out, "seek relief from Congress," rather than requiring the courts to rewrite legislative acts to address those concerns.[154] This approach cuts both ways, as Justice Gorsuch detailed in *FMI v. Argus Leader*, undoing 45 years of lower court precedent and Congressional acceptance of that interpretation through inaction in reading that "confidential" in Exemption 4 meant only what the dictionary said in 1966, and not what courts had interpreted it to mean in the half a century since. But the decision itself was not a broadside at FOIA or an endorsement of corporate privacy; rather, it was an exercise in statutory construction that the right wing of the Court has embraced to undo court discretion in interpreting the meaning and purpose of federal laws. It was purpose agnostic; according to Gorsuch, FOIA has no purpose other than what the dictionary says.

In the face of this, if legislative purpose and practical functioning of laws is meaningless without specific words to support them, freedom of information advocates should push for a statement of purpose in FOIA that mirrors similar statements in state laws, which courts have often relied upon to favor transparency. The statement of purpose in the Texas Public Information Act, for example, specifically notes the "American constitutional form of representative government that adheres to the principle that government is servant and not the master of the people" as a driving factor in the law, establishing that "The people insist on remaining informed so that they may retain control over the instruments they have created," and thus the Public Information Act "shall be liberally construed to implement this policy" of transparency.[155] As noted above, the history of FOIA is replete with similar examples favoring transparency, both legislatively and in the courts. And though there is no explicit presumption in FOIA favoring openness, Congress has recognized that one has seemingly emerged; the Committee on Government Reform in 2005 commented that FOIA "establishes a presumption that records in the possession of agencies and departments of the executive branch of the U.S. government are accessible to the people."[156]

And when, in the absence of strong pro-transparency language explicitly in FOIA, the Supreme Court hands down purpose-agnostic decisions that favor secrecy, right-to-know advocates should push for quick revisions to the law to fix the problem the Supreme Court creates. Within days after the ruling in *FMI v. Argus Leader,* Congressional leaders began to express disapproval of the decision. Senate Judiciary Chairman Chuck Grassley said he would work on legislation to correct the ruling, with which he disagreed. "In a self-governed society, the people ought to know what their government is up to," Grassley said in a statement on the Senate Floor three days after the Supreme Court ruling. "Transparency laws like the Freedom of Information Act help provide access to information in the face of an opaque and obstinate government."[157] Grassley also commented in his inimitable Twitter style:

> Americans deserve 2kno what their govt is up to Freedom of Information Act designed to promote transparency when govt lacks openness but recent SCOTUS ruling+EPA

[154] "All we hold today is that Congress has not enacted the FOIA exemption the Government desires." *Id*. at 581.
[155] Texas Gov't Code § 552.108.
[156] H.R. 109-226, *supra* note 34 at 2.
[157] Chuck Grassley, *Grassley on the Importance of the Freedom of Information Act*, June 27, 2019. https://www.grassley.senate.gov/news/news-releases/grassley-importance-freedom-information-act.

> &Interior regs undermine FOIA I will write legislation 2fix TRANSPARENCY BRINGS ACCOUNTABILITY[158]

Where right-to-know advocates should be concerned, and where they should push back the hardest, is against anti-transparency dicta that has emerged in recent years. In *McBurney v. Young*, a 2013 case that held that Virginia could deny records requests made by people who were not citizens or residents of the state without offending the U.S. Constitution's Privileges and Immunities Clause.[159] Justice Alito did not entirely reject the important transparency goals of state public records laws, recognizing that Virginia's FOIA "essentially represents a mechanism by which those who ultimately hold sovereign power (*i.e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power."[160] And although Justice Alito was quite dismissive of any constitutional grounds for transparency, his dicta overreached in pointing out the relative newness of freedom of information laws and concluding they lacked importance because "there is no contention that the Nation's unity foundered in their absence."[161] The "workable balance" language favored by Justice Gorsuch in *FMI v. Argus Leader* likewise undermined decades of expressions of legislative purpose and court interpretation of words meant to make FOIA functional. It will be up to Congress, pushed by advocates for transparency, to make the law so explicit it cannot be undone by strict adherence to the dictionary and turned into more misinformed dicta regarding the importance of transparency to the American style of government.

Limit third-party intervention

Perhaps the most troubling trend in recent years is the readiness with which governments are willing to allow, and encourage, private entities to intervene in court to assert reasons to keep records closed, as well as the willingness of government and quasi-government bodies to collaborate in this behavior, as evidenced by the New York and Virginia promising secrecy to draw Amazon headquarters to their regions. It is particularly troubling when private businesses engage in this tactic to deny or delay access to records that are well within a government body's discretion to disclose under freedom of information laws, even if an exemption may apply.

Exemptions or exceptions in public records laws are often discretionary rather than mandatory. If an exemption applies, the government is not completely barred from disclosing the record; rather, it may choose not to provide the record to the requester. For example, the exemptions to the federal Freedom of Information Act do not create an affirmative right to privacy for all matters encompassed in them. Instead, FOIA's language says that the law "does not apply to matters" in the exemptions.[162] Permissive language – that exemptions "may" (not "shall" or "must") be invoked to avoid disclosure – rather than mandatory language is present throughout the law enforcement records exemption.[163] So when AT&T intervened to prevent the FCC from disclosing regulatory letters under FOIA, it did so not by asserting an affirmative right to have the

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[158] Chuck Grassley (@ChuckGrassley), Twitter (June 26, 2019, 12:17 p.m.), https://twitter.com/ChuckGrassley/status/1143961565080760320.
[159] McBurney v. Young, 569 U.S. 221 (2013).
[160] *Id*. at 228.
[161] *Id*. at 234.
[162] 5 U.S.C. § 552(b) (2018).
[163] *See* 5 U.S.C. § 552(c)(1)(B) ("the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section").

records protected in the name of corporate privacy, but rather in an effort to compel a court to determine that Exemption 7(C) prohibited disclosure by the FCC. When the Supreme Court ultimately denied AT&T's request, it had been *seven years* since the initial FOIA request was made.[164]

Likewise, in *Boeing v. Paxton*, Boeing intervened as a third party regarding application of a discretionary exception to the Texas Public Information Act. The law says that information that "would give advantage to a competitor or bidder" is "excepted from requirements" of the Act – not that it is affirmatively deemed private and confidential.[165] A Texas government body has the discretion to release this information, even if it finds that the statutory exception applies. The Boeing employee seeking the records filed his records request in 2005; [166] Boeing was allowed to intervene, against the objection of the attorney general, litigating the case up to the state's highest court, which issued a decision *ten years* later saying that, indeed, the Port Authority of San Antonio was not mandated by law to release the documents. *Food Marketing Institute v. Argus Leader*, began with a request by the newspaper in 2011; the Department of Agriculture chose not to appeal a bench trial ruling in favor of disclosure in 2016, but the third-party trade group intervened to continue litigating to preserve its claims of business privacy after losses at the district court and the Eighth Circuit.[167] It took eight years from the time the request was made for the Supreme Court to reverse decades of FOIA jurisprudence and ultimately deny access to the records.

Argus Leader raised the argument that Food Marketing Institute, as a trade industry group, should not have standing to intervene in what is ultimately a discretionary decision by a federal agency. However, the USDA "represented unequivocally that, consistent with longstanding policy and past assurances of confidentiality to retailers, it 'will not disclose' the contested data unless compelled to do so" by a court. The Supreme Court essentially found this surrender of statutory discretion to agency policy to be equivalent to a statutory mandate, dismissing the standing argument and allowing FMI to intervene.[168]

The ability of private companies to intervene in discretionary matters bestows upon them an enormous procedural advantage to run out the clock on requesters, employing attorneys at costs that private citizens or freedom of information advocates simply cannot match. As a U.S. House of Representatives committee considering FOIA revisions in 2016 found, the greatest barrier to access is "Delay, Delay, Delay," [169] a situation that is exacerbated when third-party litigation and appeals enter the process. When an affirmative right to privacy is invoked – such as under the federal Privacy Act[170] or Family Educational Rights and Privacy Act[171] – that would mandate agencies to protect individual privacy, it makes more sense to allow third parties to intervene to assert those rights. Otherwise, their intervention into discretionary matters has a deleterious effect on the freedom of information process, creating stronger incentives for secrecy and disincentives for transparency, counter to the fundamental purpose at the heart of open records laws.

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[164] *See* In the Matter of FCC Communications Inc.; On Request for Confidential Treatment, 45 Comm. Reg. (P&F) 1335 (2008).
[165] TEXAS GOV'T CODE § 552.104(a).
[166] Boeing Co. v. Abbott, 412 S.W.3d 1, 6 (Tex. App. 2012).
[167] Argus Leader Media v. Dep't of Agric., 889 F.3d 914, 916 (8th Cir. 2018).
[168] Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019).
[169] U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, FOIA IS BROKEN: A REPORT 34 (2016).
[170] Privacy Act of 1974, Pub. L. No. 93-579 (1974).
[171] Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380 (1974).

A troubling trend toward secrecy when private entities receive public funds to serve government functions has emerged. But the trend does not guarantee a final destination. Using the strategies detailed above, freedom of information advocates can combat encroachments on the transparency that our democracy demands, resist judicial and legislative efforts to narrow the scope of public transparency, and reclaim the important role of citizen oversight of government business.