Doing it in the Dark:
How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Intervention to Privatize Public Records

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Overview

• Recent trend toward secrecy – Amazon & others
• Historical/legal background – central FOI purpose
• Trade secrets, competitive harm, 3P intervention
• Case study: *FMI v. Argus-Leader*
• Reinvigorating quasi-governmental body doctrine
• Fending off 3P interventions
The Erosion of Public Records

- Amazon’s search for its second headquarters:
  - Virginia promised to “limit disclosure, refuse to disclose, and redact and/or omit portions of materials to the maximum extent permitted by applicable law.

- Impact of Boeing v. Paxton (Tex. 2015)

- Food Marketing Institute v. Argus Leader
  - Oral argument before SCOTUS on April 22
FMI v. Argus Leader:

◎ Oral Argument before SCOTUS on April 22.
◎ Whether confidential in Exemption 4 bears its ordinary meaning?
◎ What is the proper meaning of substantial competitive harm test?
Public business is the public’s business. The **people have a right to know**. Freedom of information is just their heritage. Without that the citizens of a democracy have merely changed their kings.

-Harold L. Cross
FOI – The Central Purpose

- The Press as Watchdog
- Increased privatization with no oversight
  - Corporations have no personal privacy rights under FOIA. FCC. v. AT&T (2011).
- FOI’s central purpose: shedding light on government operations.
  - DOJ v. Reporters Committee (1989)
- Oversight of government spending of taxpayer money through private organizations is part of the central purpose of FOI laws.
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.

-Thomas Emerson
Making Public Records Private

Even if a record is public, government may try to prevent its release:

**Trade Secrets**
Lax definitions of what constitutes a trade secret have allowed use of this exemption to flourish. Recent wins in IL and NY have limited scope there somewhat.

**Competitive Harm**
Questions exist about whether actual likelihood of competitive harm must be shown or whether the nature of information as confidential implies competitive harm.

**3P Intervention**
Issues related to allowing third party intervention to prevent disclosure of government records. Governments often notifying third parties when records are requested.
Reinvigorating Quasi-Govt Doctrine

- Entities that are funded by government and serve a government function should be considered as quasi-government.
  - As such, their records should be subject to open records laws.
  - A number of states, including Texas, have narrowed or attempted to extinguish this legal principle.
  - In some instances the courts have narrowed the application; in others, legislatures have taken action.
Fending of 3P Intervention

- More and more, third parties – like Amazon, Boeing and the Food Marketing Institute – are intervening as parties in litigation.

- Often governments offer/promise to provide notice to these parties when they are engaging with the government in public/private partnerships.

- Courts and legislatures should be skeptical of attempts by third parties to intervene to protect information held by the government.

- Laws favoring transparency should place narrow limits on the ability of private actors to prevent disclosure of government records.
Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

-Justice Louis Brandeis
Thanks!

Any questions?

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What is a Public Record?

○ Approaches vary dramatically under state public records laws.
    ○ Many states don’t even mention records produced by non-governmental bodies.
    ○ Some condition the openness of a record on whether the non-governmental body receives govt. funding.
    ○ Some states use a “functional equivalence” test that looks at the task being performed.
    ○ Alaska includes any records produced by private contractors for government bodies.