



# 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?



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*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.



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*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.



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*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.