Countering the Privatization of Public Records: How Trade Secrets, Purported Competitive Harm and Third-Party Interventions Keep Government Business in the Dark

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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, 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.” Although the spokesman of New York Mayor Bill de Blasio initially denied that the city offered a similar deal to Amazon, that statement turned out to be false. The city’s Economic Development Corporation offered to “give Amazon prior written notice sufficient to allow Amazon to

1 After “fierce backlash from lawmakers” about the nearly $3 billion in incentives and giveaways to Amazon, the company cancelled 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.
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 offered by 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. 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.⁵ 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.⁶ This approach allows 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 has led to absurd outcomes in other situations. For example, the city of McAllen was able to claim the exception to avoid disclosing how

⁵ Boeing Co. v. Paxton, 466 S.W.3d 831 (Tex. 2015).
⁶ Id. at 834.
much money it lost after hosting a holiday parade that featured singer Enrique Iglesias. 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. 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.

Similar issues are arising at the federal level as well. In January 2019, the U.S. Supreme Court granted certiorari in Food Marketing Institute v. Argus Leader Media, agreeing to hear a challenge to a pro-transparency ruling out of the U.S. Court of Appeals for the Eight Circuit that narrowly read the “trade secrets” exemption to the Freedom of Information Act. The court, which rarely takes up FOIA cases, will address circuit splits over the meaning of the word “confidentiality” in Exemption 4 and whether retailers must prove actual competitive harm rather than merely showing potential harm to claim the exemption. After the Department of Agriculture chose 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

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8 TEX. ATT’Y GEN. ORD-5179 (2016).
group, the Food Marketing Institute, intervened to take up the appeal, in an attempt to make it easier to protect corporate privacy interests.\(^\text{10}\)

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,\(^\text{11}\) 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”\(^\text{12}\) of public-private partnerships,

\(^{10}\) Argus Leader v. Department of Agriculture, 889 F.3d 914 (8th Cir. 2018)
\(^{11}\) 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)
dangerously 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 us.

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.” 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 decisionmaking by the people, to whom that function is committed, becomes impossible.”

If there is one principle at the heart of open records laws, it is this. 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, stated it simply but elegantly 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 have but changed their kings.” 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.

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

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14 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.
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”17 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.18 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.19 It’s an issue that has

17 Cross, supra note 15 at 9.
bedeviled transparency advocates and scholars in areas such as university foundations, private prisons, and economic development agencies. 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.”

Although corporations may be people for the purpose of making campaign contributions, they are not extended the same rights of privacy as individual citizens, at least under the language 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 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). Chief Justice Roberts, writing for a unanimous majority, looked at the plain meaning and dictionary definitions of the word “personal”

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21 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).
23 Id. at 320.
and found “little support for the notion that it denotes corporations.”26 Indeed, ruling against A&T, Roberts concluded that the company should “not take it personally.”27 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 flies in the face of what the Supreme Court has identified as the “central purpose” underlying the Freedom of Information Act: shedding light on government operations.

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.28 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.29 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.”30 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

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26 Id. at 405
27 Id. at 410
29 Id. at 797
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.31

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.32 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.

32 489 U.S. at 775 (emphasis in original).
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.”

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 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 the Supreme Court’s pending review in 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 & 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

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33 Pearlman, *supra* note 18 at 75, 79.
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.”34 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

34 What is FOIA?, https://www.foia.gov/about.html
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.”\(^35\) 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.

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.\(^36\) 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

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\(^35\) AK Stat § 40.25.220 (through 31th Leg Sess 2018), available at [http://www.akleg.gov/basis/statutes.asp#40.25.220](http://www.akleg.gov/basis/statutes.asp#40.25.220)

dogs.\textsuperscript{37} 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.\textsuperscript{38} 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.\textsuperscript{39} “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 required to disclose all documents specifically related to the discharge of its duties and responsibilities … with the City of New Orleans.”\textsuperscript{40} 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.”\textsuperscript{41} 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

\begin{footnotesize}
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\item Id. at 681.
\item Id. at 682.
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Court decision in *Marks v. McKenzie HS Fact-Finding Team* represents a fairly typical common law approach. When a private entity is considered functionally equivalent to government, then any records related to that undertaking are subject to disclosure. Georgia, Maine, New Mexico, Vermont and Tennessee take a similar approach in their open records laws.

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” As a result, the state’s FOIA applies to some, but not all, private nongovernmental entities that engage in work for the government. As the Arkansas Supreme Court established in *City of Fayetteville v. Edmark*, the deciding factor is whether the private entity has undertaken “public business.” But that broad term has been severely limited by the state’s courts. The free use of public property alone

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43 *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.*
46 *State ex rel Toomey v. City of Truth or Consequences*, 287 P.3d 364 (N.M. 2012).
50 *See generally* City of Fayetteville v. Edmark, 801 S.W.2d 275 (1990).
will not trigger the FOIA provisions; instead an entity must directly receive public funds.\(^{51}\) 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.\(^{52}\) 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.\(^{53}\)

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.”\(^{54}\) Similarly, although Montana’s Public Records Act doesn’t specifically address whether these kinds of records would be open\(^{55}\), 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

\(^{51}\) *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993)


expending public funds...”.

Other states with similar funding-related approaches include Kansas, Louisiana, Maryland, North Dakota, Oklahoma, South Carolina, Texas, Virginia, and West Virginia. 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.

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 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.”

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.”

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

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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.”

South Dakota represents a similarly troubling approach. Ohio, New Hampshire and New Jersey are among the states who do not clearly articulate how to address nongovernmental entities in their open records laws. 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 & 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

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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.

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, Boeing appealed to the Texas Supreme Court.

In a decision that open government advocate Joe Larsen called “one of the worst ruling 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.” 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 are

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64 “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.” Id.

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.  

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.” But through lazy legislative drafting and 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

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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”\(^{68}\) 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.\(^{69}\) Additionally, trade secret information will not be exempted from disclosure if there is no apparent likelihood of competitive harm.\(^{70}\) 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.\(^{71}\) 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.\textsuperscript{72} Of particular note,

\textsuperscript{72} 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.

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,
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.\(^73\) “All documents, data, records and information
used to build of 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.”\(^74\) 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.\(^75\) 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

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\(^73\) House Bill No. 118, available at 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.” \(Id.\)

\(^74\) \(Id.\)

\(^75\) See generally A.R.S. § 39-121, available at https://www.azleg.gov/arsDetail/?title=39
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 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. “(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.” 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,” 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.”

80 Id.
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.\(^\text{81}\) 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.”\(^\text{82}\) 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 has given rise to the Supreme Court’s grant of certiorari in

\(^\text{81}\) See generally CBS v. Block, 725 P.2d 470 (Cal. 1986).
\(^\text{82}\) California State University, Fresno Assn. v. Superior Court, 90 Cal. App. 4\textsuperscript{th} 810, 834 (2001).
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, citing the trade secrets exemption.\(^\text{83}\) 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.\(^\text{84}\)

In Illinois, a Chicago suburb denied a reporter’s request under the state open records law\(^\text{85}\) for the budget associated with a construction project undertaken by a private contractor, claiming it was a trade secret.\(^\text{86}\) In the case, the city asserted both that the developer submitted the information under the implied promise of confidentiality and

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\(^\text{85}\) See 5 ILCS 140/7(1)(g), available at http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=85&ChapAct=5%26nbsp%3bILCS%26nbsp%3b140/&ChapterID=2&ChapterName=GENERAL+PROVISIONS&ActName=Freedom+of+Information+Act. 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.

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\textsuperscript{87} 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 \textit{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.\textsuperscript{88} Citing differing standards out of the First/D.C.\textsuperscript{89} and Fifth\textsuperscript{90} 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 \textit{Tennessean} details how
governments have capitalized on the trade secrets exemptions, signing non-disclosure
agreements with private companies to keep their business dealings confidential.\textsuperscript{91}

\textsuperscript{87} Chicago v. Janssen Pharmaceuticals, Inc. 78 N.E.3d 446 (Ill. App. 1st. 2017).
\textsuperscript{89} See New Hampshire Right to Life v. United States Dep’t. of Health & Human Services, 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.’” \textit{Id.}
\textsuperscript{90} 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.” \textit{Id.}
\textsuperscript{91} Deborah Fischer, \textit{Tennessee Must Stop Treating Government Business as a Trade Secret},
Tennessean (March, 10, 2019), available at
https://www.tennessean.com/story/opinion/2019/03/10/tennessee-sunshine-law-trade-secret-open-
records/3109008002/.
Pointing to major dealings with Google and Volkswagen in the state, Tennessee Coalition for Open Government Executive Director Deborah Fischer detailed a routine process used to keep the public in the dark. 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. Step two requires they agree not to disclose information to the public even in the meeting where they vote to approve the contract. Typically, the government will even clear news releases with the company before issuing them. 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. 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 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 – will be interpreted awaits in the U.S. Supreme Court this term. The Argus Leader decision has the potential not only to resolve the current circuit split, but also to serve as an example to state courts.

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92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
as they interpret their own open records laws. At issue in the case are 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.”

The Court is set to hear oral argument in *Argus Leader* in late April to address the issues of whether Exemption 4’s use of confidential bears its plain meaning and what standard should be employed to determine competitive harm. Back in 2011, a South Dakota newspaper filed a FOIA request with the Food & Drug Administration seeking names and sales figures for stores in the U.S. that participate in the federal food stamp program, known as SNAP. The FDA released some information, but argued other information was confidential business information under Exemption 4. The newspaper appealed, and it eventually filed a federal lawsuit six months after its initial request.

Initially, the district court granted the USDA’s motion for summary, and the newspaper appealed to the Eighth Circuit, who reversed the grant of summary judgement. At trial in the U.S. District Court for the District of South Dakota, the *Argus Leader* prevailed.

Applying the *National Parks* test from the D.C. Circuit, which had been adopted by the Eighth Circuit, Judge Karen Schreier ruling the USDA could not prove that releasing sales data would cause substantial competitive harm. “Because the USDA received a

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99 *See* Nat’l Parks & Conservation Assn. 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.*

100 *See* Contract Freighters, Inc. v. Sec’y of U.S. Dep’t of Transp., 260 F. 3d 858, 861 (8th Cir. 2001).
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.”\(^1\)

In a 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\(^2\) the trial
court decision, and FMI’s petition for \textit{en banc} review was denied. FMI petition the U.S.
Supreme Court for a writ of certiorari, which was granted on January 11.\(^3\) In its brief,
FMI argues against the \textit{National Parks} test, saying the Court should instead adopt the
plain-language meaning of “confidential,” which it asserts means “private and not
publicly disclosed.”\(^4\) Further FMI argues the substantial competitive harm test is too
stringent, and it urges the Court to rely on a “reasonable possibility” standard.\(^5\)

In its reply brief, filed March 18, the \textit{Argus Leader} addressed a number of key
issues related to open records cases involving nongovernmental entities. First, the
newspaper argues that FMI has no standing to intervene.\(^6\) In addition, the \textit{Argus Leader}
argues that “confidential” is a business term of art that requires an evaluation of
competitive harm.\(^7\) The proper standard for substantial competitive harm, the
newspaper asserts, is outlined in the long-established \textit{National Parks} test.\(^8\)

\(^{102}\) Argus Leader Media v. Food Marketing Institute, 889 F.3d 914 (8th Cir. 2018).
\(^{103}\) No. 18-481.
\(^{104}\) See Brief for the Petitioner, Argus Leader v. Food Marketing Institute, No. 18-481.
\(^{105}\) See Brief for the Petitioner, Argus Leader v. Food Marketing Institute, No. 18-481.
\(^{106}\) See Brief for the Respondent, Argus Leader v. Food Marketing Institute, No. 18-481.
\(^{107}\) See Brief for the Respondent, Argus Leader v. Food Marketing Institute, No. 18-481.
\(^{108}\) See Brief for the Respondent, Argus Leader v. Food Marketing Institute, No. 18-481.
The outcome of the *Argus Leader* case is sure to have substantial impact on open records law across the country. Were the Court to adopt the more lenient standards urged by FMI – a plain language approach to confidentiality or the “reasonable possibility” of competitive harm – it would deal 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 has no standing could dramatically limit the ability of private companies to prevent the public from having access to government information.

**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.¹⁰⁹

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

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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.\(^{110}\)

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.”\(^{111}\) 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.\(^{112}\) 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*.\(^{113}\) 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


\(^{111}\) Tex. Gov’t Code § 552.003(1)(A)(xii) (Vernon 2018).

\(^{112}\) Kneeland v. National Collegiate Athletic Association, 850 F.2d 224, 230 (5th Cir. 1988).

\(^{113}\) Greater Houston Partnership v. Paxton, 468 S.W.3d 51 (Texas 2015).
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,” 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 construction was “irreconcilable” with the express language of the statute. 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.

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

114 Id. at 60-61 (emphasis added)
115 Id. at 68.
116 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.
those groups. The case is often cited in decisions about whether quasi-governmental 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.\(^\text{117}\)

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.\(^\text{118}\)

- 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

11th Dist. 2012).

\(^{118}\) Indianapolis Convention & Visitors Association, Inc. v. Indianapolis Newspapers, 577 N.E.2d
208, 209 (Ind. 1991).
FOIA.”\textsuperscript{119}

- The Greater North Dakota Association, a non-profit pro-business lobbying organization that included “ten state governments which have purchased thirty memberships,”\textsuperscript{120} 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.\textsuperscript{121}

- Cherokee Children & Family Services, a not-for-profit corporation providing social services on contract with the Tennessee Department of Human Services, which the 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.\textsuperscript{122}

In \textit{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

\textsuperscript{120} Adams County Record v. Greater North Dakota Association, 529 N.W.2d 830, 832 (1995).
\textsuperscript{121} \textit{Id.} at 838.
\textsuperscript{122} Memphis Publishing Co. v. Cherokee Children & Family Services, 87 S.W.3d 67, 78-79 (Tenn. 2002).
not subject to the Act, was nevertheless part of a “quid pro quo arrangement” with the city.\textsuperscript{123} 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.”\textsuperscript{124} 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.\textsuperscript{125} 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

\textsuperscript{123} 468 S.W.3d at 54.
\textsuperscript{124} Id. at 63.
\textsuperscript{125} State ex rel. Oriana House, Inc. v. Montgomery, 854 N.E.2d 193 (Ohio 2006)
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 Louis Brandeis famously remarked, “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Transparency and government accountability are “essential ingredients of ‘free consent,’ the sine qua non of a true democracy.”

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. 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.”

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.” Yet myriad examples demonstrate the ways public bodies have collaborated with private businesses to keep both of their operations in the dark.

129 Id.
130 Pearlman, supra note 18 at 78.
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, focusing on the broad democratic policies favoring openness that the U.S. Supreme Court has announced in its decisions interpreting the federal Freedom of Information Act; 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 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.”131 For

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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. 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. 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 illustrates this point. 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. 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 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

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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.”\(^\text{135}\) 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.\(^\text{136}\) 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

\(^{135}\) Edmondson & Davis, *supra* note 22 at 340-41.

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.”

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.

Focus on SCOTUS

The U.S. Supreme Court rarely hears Freedom of Information Act cases. But when it has, at least during the Roberts Court, the decisions have largely favored the transparency goals envisioned by the law’s drafters. And although FOIA decisions are rare, they 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 decisions, even when debating policy matters at the state level.

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

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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;”\textsuperscript{138} 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.

Throughout the past decade, the Supreme Court’s FOIA decisions have been more favorable toward transparency under FOIA. In 2011, the Court decided two cases in favor of disclosure and against asserted privacy interests. In \textit{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).\textsuperscript{139} 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\textsuperscript{140} – 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.”\textsuperscript{141}

\textsuperscript{138} 489 U.S. at 775
\textsuperscript{139} 562 U.S. at 400.
\textsuperscript{140} See James J. Brudney & Lawrence Baum, \textit{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).
\textsuperscript{141} 562 U.S. at 407.
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.  

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. 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.

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.  

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143 *Id.* at 569.

144 *Id.* at 571-72.

145 “All we hold today is that Congress has not enacted the FOIA exemption the Government desires.” *Id.* at 581.
different outcomes in states that have expanded exemptions favoring businesses doing
government work with public funds.

The outcomes and reasoning of these cases can also, one should hope, outweigh
the anti-transparency dicta 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.146
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.”147 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 that lacked importance
because “there is no contention that the Nation’s unity foundered in their absence.”148

The Exemption 4 “trade secrets” case before the Supreme Court in 2019, *Food
Marketing Institute v. Argus Leader Media*, represents a significant test of whether the
newly constituted Court will embrace the narrow construction of exemptions in its recent
precedents, *Milner* and *FCC v. AT&T*. It will also shed light on whether the Supreme
Court’s announcements of federal transparency policy may bear fruit for litigants at the
state level in the future.

*Limit Third-Party Intervention*

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147 *Id.* at 228.
148 *Id.* at 234.
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 requestor. 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.149 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.150 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 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

150 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”).
Court ultimately denied AT&T’s request, it had been seven years since the initial FOIA request was made.151

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.152 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;153 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. The FOIA case before the Supreme Court in the present term, 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.154

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

152 Texas Gov’t Code § 552.104(a).
153 Boeing Co. v. Abbott, 412 S.W.3d 1, 6 (2012).
154 Argus Leader Media v. Dep’t of Agriculture, 889 F.3d 914, 916 (8th Cir. 2018)
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,” 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 or Family Educational Rights and Privacy Act – 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.

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.

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