Privatization:

Its Impact on Public Record Access

By Harry Hammitt

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Reinstituting the FOI Reports service on behalf of the NFOIC

PREFACE TO FOI REPORT ON PRIVATIZATION

With the publication of *Privatization: Its Impact on Public Record Access* by Harry Hammitt, the National Freedom of Information Coalition is honored to announce the resumption of the FOI Reports, the last of which was written by Penny Loeb in June 1985. We are proud to add Harry's discerning analysis to the proud tradition of FOI publications. In this, the first of a series of working papers initiated by the NFOIC, Harry examines how state legislatures and the courts have dealt with keeping public information accessible as privatization has threatened to change the freedom of information landscape.

From 1958 to 1985, the Freedom of Information Center published the topical studies. The first publication was authored by Judge A.P. Murrah and was the text of a speech he delivered before the Oklahoma Press Association in 1958. Paul Fisher, professor emeritus of the Missouri School of Journalism and former director of the FOI Center, started the FOI Report series. Other early contributors included such FOI stalwarts as John E. Moss, J. Russell Wiggins, Joseph Costas, Basil Walters, Harold L. Cross, Clark Mollenhoff, Samuel J. Archibald, and Jacob Scher. Scher also was responsible for introducing the National Editorial Association Freedom of Information News Digest to Missouri. The NEA, now the National Newspaper Association, has recently become our Missouri neighbor.

While a graduate student in journalism, Harry wrote FOI Report No. 367, *Advertising Pressures on Media.* Harry has promised to provide NFOIC members with more informative pieces on timely topics affecting access.

For more publications by Harry Hammitt, see http://www.accessreports.com.

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As the availability of public money has diminished, driven in large part by decreased taxes and increased deficit spending, governments have turned to ways of streamlining government services. The move towards greater efficiency has often led legislators and policymakers to explore using private businesses to perform functions that were once thought to be quintessentially governmental. This practice of "contracting out" has led to concerns about how the privatizing of government services may affect the statutory right of access expressed at the federal level in the Freedom of Information Act and at the state level by a variety of open records laws. While Connecticut is one of the only jurisdictions to actually legislate to protect access to such records, the issue has come up repeatedly in case law throughout the United States and some state statutes have specific provisions to capture such entities that might otherwise fall through the cracks.

The threat privatization poses to access to public information can have real world consequences. Suppose you are concerned about the performance of the bus driver that carries your child to school, or even about the maintenance of the buses themselves. When you ask the school for information, you may find the answer is that the operation of school buses has been contracted out to a private company and that information is not subject to disclosure under the open records law. That situation happened in Georgia. In *Hackworth v. Board of Education*, 447 S.E. 2d 78 (1994), the court concluded the school board was responsible for hiring bus drivers and that the personnel records of the bus drivers were public records, even though they were in the possession of the private company operating the buses on behalf of the school board.

This report will survey the state of the case law and examine some of the policies governments have adopted for bringing such private or non-profit entities under access laws as well as discussing some of the obstacles to access posed by privatization.

Defining a public body

The federal Freedom of Information Act (FOIA) defines an agency as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."[1] This definition was inserted into the law in 1974 and the legislative history of the 1974 amendments indicated that such quasi-governmental agencies as Amtrak and the Postal Service would be considered agencies under this definition. However, the definitional coverage is often far from clear. For instance, the Smithsonian Institution, which for many years has acted as if it were covered by the FOIA and its companion statute, the Privacy Act, and whose employees are largely civil servants, was found not to be an agency because the U.S. Court of Appeals for the District of Columbia Circuit found it did not fit into any of the definitional criteria.[2]

[1] 5 U.S.C. 552(f)(1)
[2] *Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1997)

Further, what constitutes an "agency record" is not defined in the statute. The Supreme Court established criteria to identify such records in *Forsham v. Harris*, 445 U.S. 169 (1980). In *Forsham*, a public interest advocacy group requested access to raw data used in a scientific study at the University of Pittsburgh funded by the Department of Health and Human Services. Under the agreement between the agency and the university, the agency had a right of access to all records pertaining to the study but had never exercised that right. The Supreme Court ruled that to be considered an "agency record," an agency must have custody or control of the record, which, for all practical purposes, meant that it must have physical possession. Ruling that records of the study were not subject to FOIA because they were never in the possession of the agency, the Court also indicated an agency had no legal obligation to retrieve records to which it had a legal right in order to respond to an FOIA request.

While the restrictions implicit in *Forsham* have been criticized by access advocates, Congress has never seriously considered overturning the decision. However, in 1998 a group of conservative senators slipped in a short amendment that provided a right of access to research data. Known as the Shelby Amendment after its primary sponsor, Sen. Richard Shelby (R-AL), the amendment requires "Federal awarding agencies to ensure that all data produced under an award will be made available to the public through the procedures established under the Freedom of Information Act."[3] The amendment does not apply to contracts, but only to grants to institutions of higher education, hospitals, and other non-profit organizations. Further, because it only provides that records are subject to FOIA, the amendment does not restrict agencies from withholding such records under applicable exemptions. The genesis of the legislation stemmed from concern by conservatives that various agencies were promulgating controversial regulations based on studies not available to the public. To allow advocacy groups to better challenge such regulations, Shelby and others insisted on allowing access to the records. However, the Office of Management and Budget has interpreted the access to research data amendment as applying only when an agency actually uses a study as the basis for a regulation, a requirement that severely restricts its potential application.

Unanswered by *Forsham* was whether an agency could assert such significant control over the records through its supervision of a contract that it essentially possessed the records. It was not until 15 years after *Forsham* that a handful of courts began to answer that question in the affirmative. The first major breakthrough came in *Burka v. Dept. of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). Robert Burka requested a data tape pertaining to a survey on teen smoking conducted by a contractor. Finding that the tape was an agency record, the court noted that the agency had considerable supervision over the contract and exercised significant control over the contractor's use of the data. The agency also relied on the data to set agency policy. In a subsequent case, *Chicago Tribune v. Dept. of Health and Human Services*, 1997 U.S. Dist. LEXIS 2308 (N.D. Ill.1997), the court relied on *Burka* in finding the National Cancer Institute had exercised such significant supervisory control over a contractor's review of the findings of a faulty breast-cancer study that the records qualified as agency records even though they were not in the physical possession of

[3] PL 105-277

the agency. However, in *Gilmore v. Dept. of Energy*, 4 F. Supp. 2d 912 (N.D. Cal. 1998), the court concluded that even though the Department of Energy exercised significant oversight over the operations of Sandia National Laboratory, it did not qualify as an agency for purposes of FOIA because the Energy Department did not exercise day-to-day control over its operations. The *Burka* case remains good law, but there have been no further developments extending coverage to contractors based on the extent of agency supervision.

State law

States have taken several approaches to assessing whether a private organization may be covered by a state's open records law. Broadly, state courts have looked at whether a private entity is performing a governmental function such that, as the Connecticut Supreme Court characterized it, it becomes "the functional equivalent of a public agency." Such an approach requires an analysis of various characteristics, such as whether the entity performs a government function, the level of government funding, the extent of government involvement or regulation, and whether the entity was created by government. A more objective test is embodied in provisions in some states that tie coverage directly to the level of government funding, which can include funding from multiple government sources. Regardless, state case law concerning coverage of private entities breaks down into three broad categories: entities working with or under the auspices of local government to provide services, entities providing services for colleges or universities, and private hospitals providing public services.

a. Totality of factors approach

In his assessment of how states treated private entities that performed governmental functions[4], Craig D. Feiser broke down what he called a flexible approach to coverage into three sub-categories: the "totality of factors" approach., the "public functions" approach," and the "nature of records" approach. While the number of factors included in the totality of factors approach may vary slightly from state to state, in states that apply this analytic model courts look at a variety of factors to determine if, taken together, they support a finding that a private entity is functioning as a public agency. In *Connecticut Humane Society v. Freedom of Information Commission*, 591 A.2d 395 (1991), the Connecticut Supreme Court developed a functional approach that included an assessment of whether the entity performs a governmental function, the level of funding, the extent of government involvement or regulation, and whether the entity was created by government. The Court concluded the Humane Society was not a government agency, even though it had been chartered by the state, because it received no public funds. In *Domestic Violence Services v. Freedom of Information Commission*, 704 A.2d 827 (1998), the Appellate Court of Connecticut subsequently found the organization was not public because the government had not created the organization, it had no power to govern or make decisions or regulations, and it was not controlled by the government. Because it lacked those characteristics, the court concluded it was not an agency even though it received more than half its funding from government entities, was subject to government audit and contract, and the government had a direct interest in preventing domestic violence.

[4] Feiser, Craig D. "Protecting the Public's Right to Know: the Debate Over Privatization and Access to Government Information Under State Law." 27 Fla St. U.L. Rev. 825 (2000).

Florida is another state using the totality of factors approach. The leading case there was *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (1992), in which the Florida Supreme Court concluded that the architectural firm was not acting "on behalf of any public agency" when it was hired by the county to perform professional architectural services for the construction of a school. The court stressed that its flexible approach would prevent public agencies from avoiding their obligations under the access law by contracting out government functions to private companies. The totality of factors approach led the Florida Supreme Court to conclude that a private corporation running a hospital on behalf of a public authority was a public agency. In *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (1999), the court ruled that by transferring responsibilities for running a public hospital to a private entity, the government was essentially delegating its governmental authority and that obligations to provide access to records and meetings followed. However, Memorial Hospital has since asked the courts for relief, arguing that it is no longer operating as a public agency. The appellate court agreed and ruled that "since the sale, Memorial is no longer 'acting on behalf of' the [West Volusia Hospital] Authority and therefore is not subject to the Public Records Act and the Sunshine Act."[5]

Oregon has also adopted the totality of factors approach. In *Marks v. McKenzie High School Fact-Finding Team*, 878 P. 2d 417 (1994), the court found that even though the fact-finding team had been created by the school board, its authority was narrow, it lacked public funding, and the school board exercised little control or authority over its operations. The court indicated the team was largely independent from government authority and that, further, it had no decision-making authority of its own but could only make recommendations to the school board.

b. Public function approach

Other states have adopted a public function approach where the court looks at whether the private entity is performing a public function. Such an approach led the New York Court of Appeals, in *Encore College Bookstores, Inc. v. Auxiliary Service Corp.*, 663 N.E. 2d 302 (1995), to rule that a list of books for courses maintained by a company running the college bookstore under contract was subject to the New York Freedom of Information Act because it was "kept" or "held" by a contractor who was running the bookstore on behalf of the state college. The court observed that as long as the record was kept for a public agency, it was subject to the open records law regardless of whether or not the agency had custody or control of the record. Although the court concluded that the list was a public record, it also found that it was protected from disclosure under the confidential business information exemption.

Ohio also uses a public function approach. In *State ex rel. Gannett Satellite Information Network v. Shirey*, 678 N.E. 2d 557 (1997), the Ohio Supreme Court found that applications received by a private consultant hired by the city manager to help locate qualified candidates for a city position were public records because the consultant was performing a public function. The court noted that a public agency could not circumvent its public records obligations by contracting its functions to private entities.

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[5] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 2006 WL 735965 (Fla.App. 5 Dist.)

The Kentucky Court of Appeals ruled that the insurance commissioner was not performing a public function when he served as a court-appointed rehabilitator of an insolvent insurance company. In *Kentucky Central Life Insurance Co. v. Park Broadcasting of Kentucky, Inc.*, 913 S.W. 2d 330 (1996), the court noted that the position of rehabilitator was separate and apart from the insurance commissioner's government duties and that he was not performing a public function when he took over rehabilitation of the private insurance company. The court decided that "public agency" referred to an entity created to perform a government function and concluded that protecting policyholders and creditors was not a traditional public function. The court's ruling reversed an Attorney General's Opinion which had concluded that the insurance commissioner was selected as rehabilitator solely because of his public position and his duties as rehabilitator flowed directly from his public functions.

c. Nature of records approach

The nature of records approach focuses on the role records play in public business. In *International Brotherhood of Electrical Workers Local 68 v. Denver Metropolitan Major League Baseball Stadium District*, 880 P.2d 160 (1994), the court ruled that records held by the stadium owner must be disclosed under the Colorado Open Records Act because they were used by the public stadium district in hiring an electrical subcontractor and, as such, pertained to public business.

d. Level of public funding

Another more objective, but also more restrictive approach, used by some states is based on the amount of public funds a private organization receives. For example, the Kentucky Open Records Act covers an entity that "derives at least twenty-five percent of its funds expended by it in the Commonwealth of Kentucky from state or local funds."[6] Similarly, Tennessee covers non-profit organizations if they were created for a governmental purpose and if they receive at least 30 percent of their funds from public sources.[7]

Such a funding requirement often results in exclusion of a private organization even if it seems to be performing a public function. The Arkansas Supreme Court, in *Sebastian County Chapter of the Red Cross v. Weatherford*, 846 S.W.2d 641 (1993), rejected the argument that a one-dollar-a-year lease with the City of Fort Smith qualified the organization as being supported primarily by government funds. In Michigan, the Court of Appeals, in *Kubick v. Child and Family Services*, 429 N.W.2d 881 (1988), found that a non-profit foster care service corporation was not covered by the state FOIA because it received less than half its funding from public sources. The court concluded that the phrase "primarily funded" meant that an organization must be principally funded by public sources to qualify under the law. In *Indianapolis Convention & Visitors Association v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (1991), the court found that the Indianapolis Convention & Visitors Association was a public agency because it was supported by taxes collected from Marion County. The court observed that the Association did not have the characteristics of a public agency and if not for the fact that it was funded by taxes the Association would not have been considered an agency.

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[6] KRS 61.870

[7] Tenn. Code 8-44-102(b)

Generally, the fact that a private entity has a contract to provide services to the state or locality is not sufficient to qualify it as a public agency. In what was seen as a setback for the functional equivalency test used in Connecticut, the Appellate Court in *Envirotest Systems Inc. v. Freedom of Information Commission*, 757 A.2d 1202 (2000), decided that Envirotest, which had been hired by the state to conduct auto emissions tests, was providing a service rather than performing a government function. Such an approach was also used in North Dakota, where the Supreme Court, in *Adams County Record v. Greater North Dakota Association*, 529 N.W.2d 830 (1995), ruled that a private entity would be subject to the public records law if it were supported by government, but such support must be more than a bargained-for consideration or a quid pro quo between the private entity and the government. In finding that the Association did not qualify as an agency, the court rejected the idea that an exchange of goods for services qualified as government support for purposes of coverage.

The Connecticut General Assembly responded to the *Envirotest* decision by passing what is perhaps the only piece of legislation directed specifically at providing more access to records of private companies performing government functions. Public Act No. 01-169[8] requires that contracts in excess of $2.5 million between private entities and a public agency "for the performance of a government function" must contain two provisions. The first provides a contract right for the public agency to receive copies of records related to the private entity's performance of the governmental function. The second provision indicates that such information may be disclosed by the agency pursuant to the FOIA.

In something of a reverse of the idea of public funding, the North Carolina Court of Appeals found that total compensation paid to hospital staff at public hospitals was protected under the terms of the Public Hospital Personnel Act.[9] The legislation was passed to help public hospitals compete effectively with private hospitals in attracting qualified practitioners. Although the salary of hospital personnel was public by law, the court concluded that total compensation included factors other than salary and was meant to be protected by the statute.

Relationship Between Public Universities and Private Entities

Nowhere has the fight over the distinction between public and private been more intense than at public schools and universities. In an early case that had significant potential impact, *Kneeland v. NCAA*, 650 F. Supp. 1047 (W.D. Tex. 1986), a federal district court in Texas found that the National Collegiate Athletic Association was subject to the open records laws of various member states, particularly the Texas Open Records Act, because it was an organization created for the benefit of the schools and received much of its funding from public sources. That decision was overturned by the U.S. Court of Appeals for the Fifth Circuit[10], the court concluding that the individual public universities did not exercise sufficient supervision over the decisions and activities of the NCAA to subject it to the public records laws.

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[8] 2001 CONN. ACTS. 01-169 § 2 (Reg. Sess.)
[9] *Knight Publishing Company v. Charlotte-Mecklenberg Hospital Authority*, 616 S.E. 2d 602 (2005)
[10] *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988)

Nearly 20 years later, a decision by the Michigan Supreme Court showed that the law had not moved very far towards access to private athletic associations funded largely by public schools. In *Breighner v. Michigan High School Athletic Association*, 683 N.W. 2d 639 (2004), the court ruled that the Michigan High School Athletic Association, which had once been a state agency and had since been legislatively transformed into a private non-profit organization, was not an agency for purposes of the state FOIA, even though its main business was organizing sports events for public high schools.

The Pennsylvania Supreme Court, in *Community College v. Brown*, 674 A.2d 670 (1996), concluded that the community college system was not subject to the Right to Know Act because it was not created by a statute or pursuant to a statute making the colleges' activities an essential governmental function. This ruling has had the effect of shielding all public colleges and universities in the state. However, a clever reporter obtained salary information concerning Penn State University head football coach Joe Paterno and others by requesting records from the agency in charge of retirement benefits.[11] Although the court admitted that the information would not be available directly from the university since it was not subject to the Right to Know Act, the court said that when the information passed to the State Employees' Retirement Board, whose records were required to be public by state law, Paterno and others implicitly consented to public disclosure of the information.

Another particularly vexing issue has been the status of foundations created to raise and supply money for public universities. Aside from fundraising for the university, some of these foundations have been staffed by university employees. Such foundations have been found to be subject to public access in Michigan and Ohio.[12] The Iowa Supreme Court also rejected a claim made by the Iowa State University Foundation that it was not performing a governmental function by conducting fundraising activities for the university. In *Gannon v. Board of Regents*, 692 N.W. 2d 31 (2005), the court observed that "if ISU stopped its fundraising efforts or quit participating in the Foundation's efforts, ISU students and the legislature would certainly be surprised to learn that such activity was not a government function." In Kentucky, the court of appeals ruled, in *University of Louisville Foundation v. Cape Publications, Inc.*,[13] that the Foundation was a public agency, although a subsequent appellate decision concluded that the Foundation's donor list was protected by the state open records act's privacy exemption. Another example, covering not a foundation but a college student senate, was *Perez v. City University of New York*, 840 N.E. 2d 572 (2005). The New York Court of Appeals ruled that the Hostos Community College Senate and its executive committees were subject to New York's Open Meetings Law because they exercise a "quintessentially governmental function."

While the case law suggests that many of these quasi-governmental organizations associated with universities and colleges are covered, there are certainly a number of instances in which they are not. One particular area has been coverage of campus police, particularly after federal laws were extended to require reporting of various types of campus

[11] *Pennsylvania State University v. State Employees' Retirement Board*, 880 A.2d 757 (2005)
[12] *Jackson v. Eastern Michigan University Foundation*, 544 N.W.2d 737 (1996) and *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E. 2d 464 (1990).
[13] Ky App. 2002-CA-01590-MR (November 21, 2003)

crime statistical information. Yet, courts in Georgia and Massachusetts found that campus police at private universities were not covered even though they could exercise certain police powers.[14]

Charging Commercial Fees for Public Records

An issue related to the privatization of governmental functions has been the debate over fee recovery for certain types of records, particularly ones with significant commercial potential. While this debate has dissipated dramatically in recent years, during the early and mid-1990s, disagreement over the fees associated with sophisticated database programs, particularly Geographic Information Systems, was such that it threatened to run aground the whole idea of public access at marginal costs. As a policy matter, the cost recovery for furnishing government information is limited to the actual costs of furnishing the information – the cost of copying and a pro-rated hourly fee for staff time to search and copy records – and is not intended to recapture costs such as overhead or employee benefits. Costs have been kept at a reasonable minimum so that fees would not become an obstacle to access. If the legislature decides that access to government information is a positive good and a public benefit, then it makes little sense to allow agencies to erect financial barriers that diminish that right. When Congress amended FOIA in 1974, it predicted that implementing the law would cost the government about $100,000 a year. Because that figure proved much too low, by the early 1980s Congress was considering the idea of charging market values for information on the theory that agencies should charge commercial fees for records with commercial value. That idea never made its way into the law, but in1986 amendments to FOIA, Congress for the first time differentiated between categories of requesters for purposes of fees. The media and academic researchers received a preference in terms of the fees an agency could charge, while the scope of fees that could be charged to commercial requesters expanded. Fees for requesters in neither of those categories received two hours of search time and 100 pages free. After that, they would pay normal costs for search and duplication. There is not a great deal of anecdotal evidence that agencies have used commercial fees aggressively, but there are several cases in which substantial fee estimates have been upheld for commercial requesters.[15]

The real concern over fees arose in the early 1990s as more and more states and localities developed GIS mapping systems to be used for city and urban planning and a variety of other uses. These systems typically were very expensive and, as a result, information technology managers began to consider ways to sell the projects as revenue generators in order to secure funding. The idea was that requesters, particularly commercial users, could be charged commercial fees for access as a way to pay for the cost of the system and its continued maintenance. Al Rutherford, Applications Manager for Metro-Dade Computer Services, wrote in 1993 that "although the majority of public records maintained by local governments are funded by local taxpayers, many requests for mass records, clearly intended for commercial use, are not originated by local tax-paying residents. The Florida Local Government Information Systems Association position is that *any* request for commercial use, local or otherwise, should command a commercial fee – a return on

[14] *Corporation of Mercer University v. Barrett & Farahany, LLP*, 610 S.E. 2d 138 (2005) and *Harvard Crimson v. President & Fellows of Harvard College*, 840 N.E. 2d 518 (2006)
[15] *See, for example, OSHA Data/CIH, Inc. v. Dept. of Labor*, 220 F.3d 153 (3rd Cir. 2000)

investment to the local funding source. Taxpayers are not paying to generate public records as a source of raw material for private business exploitation."[16]

Such schemes might seem like a good idea for budget-starved agencies that would benefit from having such a system but cannot justify its cost, but it is a terrible idea as far as information policy is concerned. These systems are not being designed for purposes of commercial access, but because the agency has identified a need to have such information in the performance of its duties. In other words, the justification for such systems is because they benefit government, not the public. As such, they represent nothing more than another source of potential government information that may or may not be available to the public based on the exemptions in state law. While they clearly have a greater potential commercial value than most other sources of information, government is not in the business of making money and it is bad policy to charge fees for access to such information that have no relation to the actual cost of furnishing the information.

Copyright is another way in which state and local agencies have attempted to control the dissemination of information and to maintain commercial fees. While the Copyright Act clearly indicates that the federal government cannot copyright material, the law is less clear when it comes to states and localities and many such public entities have decided to copyright some of their products. In *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179 (2nd Cir. 2001), the federal Court of Appeals for the Second Circuit ruled that Suffolk County's tax maps were protected by copyright and could not be used for commercial purposes unless authorized by the county. The court of appeals reversed the ruling of the district court, which had relied on an opinion issued by the New York Committee on Open Government that concluded that copyright was designed to protect individual creativity by affording protection to intellectual property rights and that garden-variety tax maps did not fit into that category. As such, the Committee observed, the tax maps would normally be accessible under New York's Freedom of Information Law.[17]

Conclusion

Federal and state laws that provide a right of access to government information are most effective when they encompass the largest universe of information. As governments continue an already significant drive towards moving traditional governmental functions to private entities, the universe of information shrinks accordingly. Once open records laws are in place, the legislature has the ability to increase or restrict the availability of information through the extension or contraction of exemptions. But the effects of privatization are often felt as the result of administrative processes, either by contract or other agreement, that allow entities to exist or perform functions that otherwise would be performed by those agencies themselves. The status of these entities is often unchecked until such time as a requester challenges their designation in court. While courts have done a reasonably good job in protecting the rights of requesters where government functions have been transferred to the

[16] "Public Has Right of Access to Government Records, but Commercial Users Should Pay a Larger Share," by Al Rutherford, *Access Reports*, v. 19, n. 7 (March 31, 1993); reprinted by permission from the *Brechner Report*, February 1993.

[17] *County of Suffolk v. Experian Information Solutions and First American Real Estate Solutions*, WL 1010262, SDNY 2000

private sector, the best way to protect those rights is to make sure that they are not delegated away in the first place, that where and when such entities can be justified any agreement creating them must include the right of public access to records that are equivalent to records that would be public if in the custody or control of the public body. Privatization in and of itself is not fundamentally bad, but it can only succeed from an access perspective when the rights of access are retained. While such rights may be ensured through contract, it is preferable whenever possible to follow Connecticut's example and enshrine such rights in law. Privatization is an issue that continues to plague the right of access and it is important for access advocates to actively monitor the creation of such entities in their jurisdictions and to be willing to challenge them in court when necessary.

APPENDIX TO FOI REPORT ON PRIVATIZATION

Sec. 1-218. <u>Records and files concerning certain contracts subject to the Freedom of Information Act.</u> Each contract in excess of two million five hundred thousand dollars between a public agency and a person for the performance of a governmental function shall (1) provide that the public agency is entitled to receive a copy of records and files related to the performance of the governmental function, and (2) indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act. No request to inspect or copy such records or files shall be valid unless the request is made to the public agency in accordance with the Freedom of Information Act. Any complaint by a person who is denied the right to inspect or copy such records or files shall be brought to the Freedom of Information Commission in accordance with the provisions of sections 1-205 and 1-206. (P.A. 01-169, §2).

B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law; or (C) Any "implementing agency," as defined in section 32-222.