
PRIVATIZED GOVERNMENT FUNCTIONS AND FREEDOM OF INFORMATION: PUBLIC ACCOUNTABILITY IN AN AGE OF PRIVATE GOVERNANCE

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In recent years, privatization has touched nearly every area of public life. Increased privatization efforts have posed increasing problems for public access to governmental records when a governmental function has been privatized. Records long open to public inspection now are being created, maintained, and controlled by private businesses often at odds with the very purpose of public records laws. The authors examine this problem and offer possible solutions to the problems caused by this increasing trend.

Introduction

In November 1996, two convicted sex offenders scaled a prison fence outside Houston and made it 200 miles, nearly to metropolitan Dallas, before they were apprehended. The state of Texas could do nothing to punish them for escaping; in fact, state authorities had no idea the men were serving time in Texas. The escapees, convicted in Oregon, had broken out of one of Texas's thirty-eight privately operated prisons.¹

In Texas and elsewhere, private prisons reflect the increased political pressure on federal, state, and local governments to cut costs and streamline operations that places renewed emphasis on the concept of privatization.² A dizzying array of governmental agencies has engaged private entrepreneurs to perform governmental functions on a for-profit basis.

In recent years, privatization has touched nearly every area of public life. In addition to prisons,³ hospitals,⁴ schools,⁵ development agencies,⁶ film commissions,⁷ and dog-racing tracks⁸ have been the focus of privatization efforts. Overlooked in the rush to privatization is the threat posed to public access to governmental records. Records long open to public inspection now are being created, maintained, and controlled by private businesses often at odds with the very purpose of public records laws.

In the past few years, businesses operating privatized governmental functions have attempted to deny the public access to a wide variety of records. For example, a private contractor transporting pupils to and from public schools in Atlanta unsuccessfully fought a request for the personnel records of its bus drivers—specifically criminal histories and driving records.⁹ In San Gabriel, California, a waste-disposal company contracted by the city filed suit against the municipality in a failed attempt to halt release of financial records used to evaluate a rate increase that city officials granted to

75th

J&MC Quarterly
Vol. 75, No. 3
Autumn 1998
464-477
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the company.¹⁰ Such disputes are likely to increase as the privatization trend grows.

This article discusses the various types of privatization, examines the current status of public records statutes with regard to privatized records, and analyzes one state's struggle to determine when the records of a private enterprise doing business for the state are subject to disclosure under public records statutes. The focus of the article is upon true privatization – cases in which private actors take on governmental functions – not simply cases in which private enterprises perform some narrow duties for government agencies. The authors conclude that current statutory definitions, combined with the inflexibility of judicial standards used to draw the line between public and private enterprise, may in some cases frustrate the public's ability to scrutinize the activities of private actors performing services for the state. To safeguard the public's right to monitor the functions of government, the authors propose that courts adopt an approach borrowed from the constitutional doctrine of state action. The proposed "public function" approach would bring some measure of order to an otherwise unsettled area of public records law by embracing the notion that certain privatized activities should be treated as "public functions," despite their private appearance.

The notion of private corporations providing governmental services is generating tremendous interest at all levels of government in the United States. As the *New York Times* noted in 1996: "Business does it better. That is the rallying cry on Capitol Hill and in statehouses across the country where legislators are turning over to private companies traditional government functions ranging from running jails to exploring outer space."¹¹

The most common form of privatization in the United States is "contracting out." That is, former governmental functions are delegated to private enterprises by contract. In the United States, contracting out has been applied to prisons, jails, drug treatment facilities, policing, day care, trash collection, transportation services (including road maintenance and toll-road operation), food services, and a variety of other services.

Proponents of contracting out argue that provision of public services by private corporations rests centrally on notions of efficiency and competition. The pursuit of profits by private firms, who will in most circumstances be required to bid competitively to receive contracts, will result in greater efficiency and thus comparable or better services at a lower cost than could be provided by a governmental entity.

Opponents point to a number of problems with privatization in the form of contracting out.¹² Bidding may not truly be competitive, resulting in hidden monopolies. Economies of scale may be lost if duties are delegated to a number of smaller private companies. Government must still expend resources to monitor and regulate the privatized activity. Perhaps more significantly, privatization transforms the essential character of the relationship between the citizen (now consumer) and the provider.¹³ Related to this concern is the problem of accountability, which those on both sides of the privatization debate generally express in terms of accountability to some bureaucratic overseer.

The Move toward Privatization

Access to public records is overwhelmingly a matter of statutory law in the United States. Both the federal government, through the Freedom of Information Act, and all fifty states have statutes creating some level of access to public records. Unfortunately, neither the federal Freedom of Information

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Act (“FOIA”) nor most state public records statutes explicitly allow access to the records of private entities performing public functions.

The FOIA, which allows citizens access to records of federal agencies, seems unlikely to provide access to records of privatized service providers, both because of its statutory language and because of its interpretation by the courts. In a 1995 study, communication law scholar Nicole B. Casarez conducted a thorough analysis of the statute and cases interpreting it and concluded that congressional amendment of the FOIA would be necessary to create access to the records of private prison operators.¹⁴ Casarez noted that the way courts have treated two key FOIA terms make it unlikely privatized government functions would be subject to the Act.

First, what constitutes a “federal agency,” according to federal courts, has often turned on the extent to which the government exercised day-to-day control over an entity.¹⁵ Without extensive control, or other factors such as “holding a federal charter or having a presidentially appointed board of directors,”¹⁶ private organizations are unlikely to be considered federal agencies for FOIA purposes. Second, Casarez analyzed the extent to which private entities’ records could be considered “agency records,” a term the statute does not define. Federal courts have held that many records in the custody and control of federal agencies, but not necessarily created by them, constitute agency records. However, this route to access is also unlikely in the context of private prisons, Casarez concluded, because internal private prison records are unlikely to come into the possession of federal agencies and because FOIA exemptions may apply even if they do.

Casarez’s analysis thus concluded that, at least in the case of private prisons, the FOIA probably would not provide the press and public with access comparable to that for prisons run by the government. This analysis seems sound beyond the narrow context of private prisons as well. The records of most private entities performing federal government functions would probably not be available under the FOIA as currently drafted and interpreted by the courts.¹⁷

The FOIA, however, is only one public records statute. The authors of the present study conducted an analysis of all fifty states’ public records laws to determine whether the statutes explicitly deal with the privatization issue.¹⁸ Overwhelmingly, they do not. One crucial issue is the specification of what sort of entity is subject to the law. Most of the state statutes define the terms “public agency” or “public body” solely in governmental terms. Thus, for example, in a typical statute, Arizona’s records law defines “public body” as “the state, any county, city, town, school district, political subdivision or tax-supported district in the state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by funds from the state or any political subdivision thereof, or expending funds provided by the state or any political subdivision thereof.”¹⁹ This type of definition, with its exclusive focus on “public” entities, makes it unlikely that private entities performing government functions would be brought within its ambit. As a result, records created by such private entities would not be subject to the Arizona law, in all likelihood. Thirty-six states have definitions that similarly limit the types of entities subject to their public records laws.²⁰

A few state statutes extend the definition of the sort of agency subject to the statute to include entities that are not strictly governmental agencies. For example, Louisiana’s definition of public body is primarily limited to governmental entities, but includes “a public or quasi-public nonprofit

corporation designated as an entity to perform a governmental or proprietary function.”²¹ Although broader than most states, this definition would presumably not include for-profit businesses that undertake contracted-out government functions. A few statutes leave the definition sufficiently open that courts, if so inclined, could subject private service providers to public records laws. For example, Oklahoma’s definition of the term “public body” states that it includes “but is not limited to” governmental bodies.²² This statutory language would seem to give an Oklahoma court sufficient interpretive license to expand the category if necessary.²³ Six other states (Georgia, Hawaii, Idaho, Kansas, Missouri, and Pennsylvania) have statutes that also create some leeway that might allow courts so inclined to provide access to records of privatized activities.

It should be noted, of course, that statutory language alone is not dispositive of these issues – state courts could conceivably simply reinterpret their statutes to include privatized functions. The next section discusses and provides citations to such cases. The point here is that the language of most statutes militates against that interpretation, particularly if courts take seriously the maxim of statutory interpretation *“expressio unius est exclusio alterius”* (the expression of one thing is the exclusion of another). In interpreting statutes, courts often infer from the specification of certain items or classes of items a legislative intent to exclude others not mentioned. To the extent that courts in many states strictly construe state access laws, the records of businesses carrying on privatized functions may well be excluded.

Six states have statutory language that could readily include privatized functions. Rhode Island, for example, defines “agency” or “public body” to include the usual governmental units, as well as “any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”²⁴ Florida’s public records statute has nearly identical language.²⁵ Arkansas, rather than focusing on the public body, defines “public records” to include records that “constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds.”²⁶ This definition would seem to include at least some private service providers carrying out government functions. Kentucky, Texas, and Utah also have statutes that might well create such access.

In summary, few state statutes seem prepared to handle the unique public records problems associated with privatization. Most seem designed to provide access only to the records of government agencies. Few explicitly allow the press and public the right to inspect records produced by private companies performing governmental functions.

A few state courts have struggled with the issue of whether records of privatized activities fall within the ambit of public records statutes. Nationally, however, the issue has arisen in relatively few cases, and most jurisdictions have not addressed it. Plaintiffs have sought access to privatized governmental records ranging from the expense vouchers of a metropolitan convention and visitors bureau²⁷ and nonprofit hospital authority records,²⁸ to a college bookstore’s booklist²⁹ and the minutes of a dog-racing association,³⁰ with mixed results.

Although a handful of state courts have accepted the view that, when specifically authorized by statute or explicitly delegated powers by

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a state agency, the records of private actors are considered governmental in nature and subject to inspection, few courts have faced instances of “pure” privatization.³¹ In fact, Florida is one of a handful of states that have developed several years’ worth of precedent involving the issue.

Florida lawmakers struggled to devise a more flexible approach in an effort to bring private entities that perform governmental business under its public records statute. In 1975, the Florida legislature amended its Public Records Act to apply to any entity acting “on behalf of any public agency.”³² The statute further defined “public records” as documents made “in connection with the transaction of official business by any agency.”³³

Despite the seemingly clear wording of the amendment, Florida courts adopted the “traditional government function” test and other federal precedents narrowing the scope of the Florida amendment before developing their own test. In 1989, in one of the first judicial opinions on the issue of privatized records, a Florida appellate court held that a private towing company working under city contract was performing “a governmental function” and thus was subject to the requirements of the Public Records Act.³⁴ The appellate court noted that the 1975 amendment clearly intended to define the types of private enterprise subject to the public records law but nevertheless declined to interpret the statute according to its plain meaning, preferring instead to examine the nature and extent of the private entity’s involvement in traditional government functions.

The Florida Supreme Court also refused to adopt the amendment’s plain meaning, looking instead to federal case law to interpret the amendment. Declaring that “the statute [Fla. Statutes Section 119.011 (2)] provides no clear criteria for determining when a private entity is acting on behalf of a public agency,”³⁵ the Supreme Court in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, adopted a “totality of factors” approach to use as a guide for evaluating whether a private entity is subject to the public records law.

In holding that an architectural firm hired by a local school board to oversee the construction of public schools was not “acting on behalf of” a public agency, the *News* court turned to earlier Florida cases that had applied criteria used by federal courts to determine when a private entity had become an “agency” under the federal Freedom of Information Act.³⁶ The court reasoned that the school board had not created the architectural firm and did not control the firm’s “activities or judgment.”³⁷ Most important, however, the court held that the firm was not performing a government function because the firm had not been delegated any decision-making authority by the school district.³⁸

The Florida Supreme Court instructed lower courts to draw upon a list of nine factors when determining whether a private organization is “acting on behalf of” a public agency, finding six of these factors relevant to the case at hand:

(1) Creation: did the public agency play any part in the creation of the private entity?

(2) Funding: has the public agency provided substantial funds, capital, or credit to the private entity, or is it merely providing funds in consideration for goods or services rendered by the private agency?

(3) Regulation: does the public agency regulate or otherwise control the private entity's professional activity or judgment?

(4) Decision-making process: does the private entity play an integral part in the public agency's decision-making process?

(5) Government function: is the private entity exercising a governmental function?

(6) Goals: is the goal of the private entity to help the public agency and the citizens served by the agency?³⁹

The Florida Supreme Court's "totality of factors" test has created a confusing mix of lower court opinions involving privatized governmental records.⁴⁰ By relying in part on federal precedent and in part on its own factors, the court has weakened the 1975 amendment by requiring an analysis of the statutes, ordinances, or charter provisions establishing the function to be performed by the private entity as well as the contractual document between the governmental entity and the private organization.⁴¹

For example, in 1992, an attorney general's opinion included a review of the Articles of Incorporation and other materials relating to the establishment of the Tampa Bay Performing Arts Center before the attorney general could conclude that the center was an "agency" subject to the public records law. The attorney general never mentioned the "acting on behalf of" language in the 1975 amendment, focusing instead on the center's governance by a board of trustees composed of city and county officials and its utilization of city property.⁴²

In short, Florida's "totality of factors" test ultimately requires an analysis similar to that of federal courts to determine whether a private entity is subject to the public records law. Despite a plainly worded amendment declaring that any entity acting on behalf of a public agency is subject to the public records law, Florida courts now employ contractual analysis, examining organizing statutes, ordinances, and charters to determine whether or not the entity has become an agency. This approach seems to frustrate the legislative intent of the 1975 amendments: to ensure that private entities not be allowed to configure themselves as private actors if they are doing the state's business.

The Florida Supreme Court has stated that the broad definition of "agency" ensures that a public agency cannot avoid disclosure under the Public Records Law simply by contractually delegating to a private entity that which would otherwise be an agency's responsibility.⁴³ Relying on a "totality of factors" approach, however, engenders the very sort of ambiguity the 1975 amendment was to have remedied. Public bodies seeking "pure" privatization deals – particularly in states with no precedent on the issue – could structure contractual agreements in an effort to curtail public access.

The lack of a coherent judicial doctrine concerning privatized governmental records will likely grow as courts face increased efforts by governmental agencies to distance themselves from day-to-day management decisions and limit their involvement in privatized enterprises to remote macro-regulation. As new forms of government – or nongovernment, as the case

may be – emerge, the legal doctrine of privatized public records must change as well.

State Action and the Functional Approach

Access laws at the state and federal levels derive almost exclusively from statutes rather than from constitutional law. The U.S. Supreme Court has held, for example, that the First Amendment grants almost no rights of access to government information.⁴⁴ However, constitutional law can sometimes provide a helpful analytic framework that can be applied to statutory issues.

The state action doctrine holds that the constitutional protections of the Bill of Rights and other individual liberty provisions restrict only governmental conduct. Interference with constitutional rights by private persons or entities is not protected. Thus, for example, a public university, because of its governmental character, must respect students' First Amendment rights, while such rights generally are not enforceable against a private university. The problem in many cases is to determine where government or state action leaves off and purely private action begins.

When the state action doctrine was first articulated in the nineteenth century, in the context of racial discrimination, the realm of governmental action was held to be quite narrow. In the Civil Rights Cases,⁴⁵ decided in 1883, the U.S. Supreme Court suggested that the due process and equal protection clauses of the Fourteenth Amendment applied only to cases of direct action by government. Private acts of racial discrimination were largely held to be outside the reach of the Fourteenth Amendment and thus outside the reach of the federal judiciary.

Toward the middle of the twentieth century, however, the Court began to expand its conception of what constituted state action. One especially noteworthy case, *Marsh v. Alabama*,⁴⁶ decided in 1946, extended First Amendment rights to an individual arrested for distributing religious literature in a town owned by a private company. Chickasaw, Alabama, was owned by the Gulf Shipbuilding Corporation but was to all appearances no different from a "public" municipality, with streets, residences, businesses, and sewage disposal. A member of the Jehovah's Witnesses denomination was convicted of trespassing after she refused to stop distributing religious tracts. In reversing her conviction, Justice Hugo Black's majority opinion articulated a "public function" justification for the Court's finding of state action. Justice Black noted that those who operate bridges, ferries, turnpikes, and other public accommodations are not entitled to complete freedom from government regulation. "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation," Justice Black wrote.⁴⁷

In addition to *Marsh*, a number of other Supreme Court cases extended the notion of state action significantly until the 1970s, when the Court began to pull back from broad readings of state action. For example, in *Jackson v. Metropolitan Edison Co.*,⁴⁸ decided in 1974, the Court held that a monopoly utility company was not subject to constitutional due process requirements and thus could terminate a customer's service without notice and a hearing. The Court's majority held that a number of factors, including the utility company's state-granted monopoly status and its provision of an essential public service, were insufficient to find state action. In denying the state action claim, the Court stated that it had, in the past, "found state action present in the exercise by a private entity of powers traditionally exclusively

reserved to the State," including activities involving elections, municipal parks, and the company town in *Marsh*.⁴⁹

Similarly, in the 1978 case of *Flagg Bros. v. Brooks*,⁵⁰ the Court found no state action in the proposed sale of a woman's household goods by the warehouse that stored them. The warehouse's sale, for nonpayment, was authorized by New York's enactment of the Uniform Commercial Code. The Supreme Court, in rejecting the state action claim, found that settling disputes between debtors and creditors was not traditionally an exclusively public function, despite the fact that a New York statute authorized the warehouse owner to sell the goods. The Court noted that the *Marsh* line of "sovereign-function cases" suggested that functions exclusively administered by states and cities were more likely to justify a finding of state action. "Among these," the Court wrote, "are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment."⁵¹

Legal scholar Daphne Barak-Erez has urged that a strong version of the state action doctrine be used to protect citizens' constitutional rights against privatized government service providers.⁵² Barak-Erez criticized the later public function cases, such as *Jackson* and *Flagg Bros.*, because of the Supreme Court's limited notion of sovereign functions. Tradition should not be the sole guide, she argued, but rather "the operation of the public domain, as it is perceived today, should serve as the basic layer for the application of the state action doctrine to so-called private bodies."⁵³ Barak-Erez claimed that public functions should include areas such as health care, education, and welfare. These categories are of course open to some dispute. Clearly, recent political movements toward "devolution" and smaller government suggest that no clear societal consensus exists as to what might constitute essential government functions.

Despite such disagreements, it seems clear that when government turns over functions it previously operated to private companies, public oversight of the new provider may be important. This is particularly true when public awareness and public pressure may be an important way to prevent corruption and abuse by private providers. As one commentator has noted: "Consigning the provision of municipal functions to private organizations is akin to asking the wolf to guard the henhouse. The private administrator will make decisions based upon what is best for the company, not what is best for the public at large."⁵⁴ While the metaphor may be somewhat overstated, it seems undeniable that abuses would be lessened with openness and public accountability. Although Barak-Erez did not explore access law, an analysis loosely based on hers can profitably be applied to the law of public records. Again, the point is not that constitutional guarantees provide access to records, but rather that the conceptual framework of a revitalized state action doctrine can be a useful analytical tool in applying public records statutes to privatized service providers.

As a preliminary attempt at a standard, the authors suggest that a "public function" analysis could provide access to records of privatized services.⁵⁵ As an initial matter, the very fact that government is "contracting out" a service it previously performed should be treated as *prima facie* evidence that the function is a public function and thus would subject the new provider to public records laws. The mere fact that government once performed a function it is now contracting to private entities cannot be dispo-

tive as to whether it should continue to be regarded as a public function, however. As legal scholar Ronald Cass put it, this would be a "conflation of positive and normative issues."⁵⁶ The authors propose that a number of factors are relevant in determining the extent to which a contracted service should be regarded as a public function. First, any private organization wielding the coercive power of state, including law enforcement and incarceration, should be subject to public records laws. As one expert on privatization has noted, "when the state deprives a private party of his or her life, liberty, or property, the state's moral authority and responsibility should be as unambiguous as possible."⁵⁷ While the quoted statement dealt with the merits of privatization in the first instance, the point is equally relevant to the public accountability of private power in this domain. Second, private entities that take on functions dealing with the public health and welfare should be subject to public records laws. Stated more generally, perhaps, the more "vital" the function, or the greater the potential for harm from abusive or inept performance of the function, the more likely it should be held to be a public function if it has once been treated as such. Clearly, fire protection, infrastructure maintenance, and even education could be regarded as essential to the public health and welfare. Third, private entities should be subject to public records laws when the functions they perform particularly call for disinterested judgment, for example, in the assessment and collection of taxes. This factor incorporates concerns scholars such as Paul Starr have expressed regarding "functions where the very appearance of buying and selling undermines the claim of the state to be acting impartially on behalf of the entire community."⁵⁸ Even in an age of interest-group politics, one of the hallmarks of a "public function" is the notion of a government that stands neutral as between competing groups within the society – an ideal to which private entities can aspire, if at all, only in the open.

The "functional" approach suggested above has some similarities to the "totality of the circumstances" approach Florida courts have taken under that state's public records law. There are important differences as well, however. The extent to which a private entity is performing a governmental function is one factor considered by Florida courts, but only one, and not necessarily even the most important. Florida courts have also considered as a relevant factor whether the government "created" the private entity. Under the functional approach suggested above, this factor seems irrelevant. The pressing question is not how the private entity came into being, but how its performance is likely to affect public welfare. Florida courts have also considered the extent to which the government body regulates or controls the private entity. This factor seems beside the point as well. In fact, in certain circumstances, it could yield a result precisely the opposite of the desirable outcome. For example, private entities performing public functions that are ignored and under-regulated by government agencies may be exactly those entities that should be held more closely accountable through the application of open records laws. Official indifference may point toward the necessity of public accountability.

Conclusion

In determining whether private entities are subject to public records laws, courts have looked at a variety of factors, including the government's day-to-day control over the private entity, the entity's organizational structure, and the entity's decision-making authority. Such approaches ignore the reality of the privatization movement currently sweeping federal and state

governmental agencies: when a governmental agency delegates a public function to a private contractor, records created through the performance of a public duty that would have been subject to public disclosure can become private records solely by virtue of the contractor's nongovernmental status.

Without predictable judicial or legislative standards, the public risks being shut out of the privatization process. Without public awareness, public oversight of the operation of privatized governmental operations will be inadequate. It is clear that public access often suffers once governmental operations are turned over to private entities. Private enterprises serve managers, owners, and shareholders, not taxpayers. According to fundamental democratic principles, governmental services conducted by private operators should be just as accountable as services provided by public agencies. The public and the press must be able to scrutinize the activities of private actors performing governmental services, just as the public and the press already scrutinize public activities under public records statutes.

To ensure that public access is not lost in the rush to privatize governmental services, the authors suggest that courts turn to a "public function" analysis that draws upon the constitutional concept of state action. The current judicial tests for applying public records laws to private enterprises are shaped by visions of the past. Public functions have been limited to the traditional functions of the state, preferring tradition over present realities. The challenge is to update the state action doctrine in a way that preserves the distinction between state and private actions while recognizing new forms of activity in the public sphere. Public function analysis offers the beginning of an approach for courts struggling to extend public records laws to privatized governmental functions. As the range of privatized governmental activities grows, the need to balance the public's right to know against the interests of private contractors doing business for the state will test statutes and judicial doctrine that rely on outdated notions of separation between the state and private enterprise.

NOTES

1. Joan Thompson, "Texas faces problem with private prisons," *Dallas Morning News*, 6 November 1996, sec. A, p. 19.

2. The legal literature concerning privatization reflects the novelty of the issue. For general commentary, see Nicole B. Casarez, "Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records," *University of Michigan Journal of Law Reform* 28 (winter 1995): 249-303; Shirley L. Mays, "Privatization of Municipal Services: A Contagion in the Body Politic," *Duquesne Law Review* 34 (fall 1995): 41-70; Daphne Barak-Erez, "A State Action Doctrine for an Age of Privatization," *Syracuse Law Review* 45 (1995): 1169-92; William T. Gormley Jr., "Privatization Revisited," *Policy Studies Review* 13 (autumn/winter 1994): 215-34; Marguerite Longoria Robinson, "Note, Detectives Following the Wrong Clues: Identification of Private Entities Subject to Florida's Public Records Law," *Stetson Law Review* 22 (spring 1993): 785-816; Charles A. Carlson, "Stepping Into the Sunshine: Application of the Florida Public Records Act to Private Entities," *The Florida Bar Journal* (November 1993): 71-74; Byron C. Keeling, "Attempting to Keep the Tablets Undisclosed: Susceptibility of Private Entities to the Texas Open Records Act," *Baylor Law Review*

- 41 (winter 1989): 203-29; Ronald A. Cass, "Privatization: Politics, Law and Theory," *Marquette Law Review* 71 (spring 1988): 449-523.
3. Gary Bowman et. al., eds., *Privatizing Correctional Institutions* (New Brunswick, NJ: Transaction Publishers, 1993).
 4. Benjamin R. Barber, *Jihad v. McWorld* (NY: Ballantine Books, 1995), 239.
 5. John Hildebrand, "Privatizing a public school? Sharp queries greet proposal in Roosevelt," *Newsday*, 25 October 1996, sec. A, p. 22.
 6. *Swaney v. Tilford*, 898 S.W.2d 462 (Ark. 1995).
 7. Jeffrey D. Zbar, "Commission with a mission," *Variety*, 10 June 1996, 37.
 8. *City of Dubuque v. Dubuque Racing Association*, 420 N.W.2d 450 (Iowa 1988).
 9. *Hackworth v. Board of Education of the City of Atlanta*, 447 S.E.2d 78 (Ga. Ct. App. 1994).
 10. *San Gabriel Tribune v. The Superior Court of Los Angeles County*, 192 Cal. Rptr. 415 (Ct. App. Cal., 2d Dist. 1983).
 11. Leslie Eaton, "Public Money Fooths the Bill for 'Privatized' Foreign Aid," *New York Times*, 2 February 1996, sec. A, p. 1.
 12. See Robert W. Bailey, "Uses and Misuses of Privatization," in *Prospects for Privatization*, ed. Steve H. Hanke (New York: Proceedings of the Academy of Political Science, 1987), 138-52.
 13. Paul Starr, "The Limits of Privatization," in *Prospects*, ed. Hanke, 133.
 14. Casarez, "Furthering the Accountability Principle."
 15. Cesarez, "Furthering the Accountability Principle," 273, citing *Forsham v. Harris*.
 16. Casarez, "Furthering the Accountability Principle," 273.
 17. A noted FOIA treatise puts this point succinctly: "The FOIA does not apply to private companies; persons who receive Federal contracts or grants; tax-exempt organizations; or State and local governments." Justin D. Franklin and Robert F. Bouchard, *Guidebook to the Freedom of Information and Privacy Acts* (New York: Clark Boardman Callaghan, 1996), 3-8. Another good commentary on this issue is provided by Katherine A. Meyer and Patti A. Goldman, "Agency," in *Litigation Under the Federal Open Government Laws*, ed. Allan Robert Adler (Washington, DC: American Civil Liberties Union Foundation, 1993), 183-86.
 18. The text of the statutes, current as of early 1996, was found in the State Statutes Appendix to Franklin and Bouchard, *Guidebook*.
 19. Ariz. Rev. Stat. 39-121.01(2) (1994).
 20. Although the numbers in this section suggest a degree of certainty, individual states' statutes have sufficient ambiguities and idiosyncrasies to make the figures provided here problematic. A perfect example of this uncertainty is the situation in Connecticut, discussed in the next section. Although the Connecticut statute on its face offers little hope for application to privatized activities, Connecticut courts have nonetheless applied it broadly to include at least some private corporations performing public functions. In light of this, the authors can at best provide only a rough count of statutes that fit into the somewhat arbitrarily imposed categories discussed in the text. Particularly for that large majority of states in which privatization records cases have not arisen, legal predictions based on statutory language alone are fraught with uncertainty. Nonetheless, it seems worthwhile to draw some sort of order out of the statutory chaos.
 21. La. R.S. 44:1(1)(A)(1) (1996).

22. 51 Ok. Stat. Ann. 24A.3 (2)(1994).
23. It is also possible, of course, that courts faced with less open-textured statutes might nonetheless choose to read a definition broadly on policy grounds. Such a decision would depend on the court's concern with fidelity to statutory language as opposed to presumed legislative purpose.
24. R.I. Gen. Laws 38-2-2(a) (1994).
25. Fla. Stat. Ann. 119.011 (2) (1995).
26. Ark. Code Ann. 25-19-103 (1993).
27. *Indianapolis Convention & Visitors Bureau v. Indianapolis Newspapers Inc.*, 577 N.E.2d 208 (1991).
28. See, e.g., *Northwest Georgia Health System v. Times-Journal, Inc.*, 461 S.E.2d 297 (Ga. Ct. App. 1995); *Clayton County Hospital v. Webb*, 430 S.E.2d 89 (Ga. Ct. App. 1993); *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.*, 582 So.2d 730 (Fla. 2d DCA 1991).
29. In the Matter of *Encore College Bookstores v. Auxiliary Services Corp. of the State University of New York*, 663 N.E.2d 302 (1995).
30. *City of Dubuque, Iowa v. Dubuque Racing Association*, 420 N.W.2d 450 (1988).
31. Few cases involving instances of "pure," or large-scale, privatization, exist. See, for example, *City of Fayetteville v. Edmark*, 801 S.W.2d 275 (Ark. 1990) (private attorneys acting as functional equivalent of city attorney were covered by open records act); *Connecticut Humane Society v. FOIC*, 591 A.2d 395 (Conn. 1991) (statewide humane society, although performing some governmental functions, not subject to open records act); *Connecticut Bar Examining Committee v. FOIC*, 550 A.2d 633 (Conn. 1988) (bar examining committee acted as arm of the state and thus certain records were subject to open records act); *Board of Trustees of Woodstock Academy v. FOIC*, 436 A.2d 266 (Conn. 1980) (private school providing public secondary education for local citizens subject to open records law); *Marks v. McKenzie High School Fact-Finding Team*, 878 P.2d 417 (Or. 1994) (school investigative panel not subject to open records statute); *Hackworth v. Bd. of Ed.*, 447 S.E.2d 78 (Ga. App. 1994) (records of private bus company providing service for Atlanta city schools were "public records" under state open records statute); *Laine v. Rockaway Beach*, 896 P.2d 1219 (Or. App. 1995) (private fire department subject to open records law); *Brown v. Community College of Philadelphia*, 654 A.2d 32 (Pa. Commw. 1994) (community college subject to open records act). See also, Atty. Gen. Op. No. 93-130, 1993 Kan. A.G. LEXIS 116 (legislatively created turnpike authority performing essential government function is subject to state open meetings and records acts); Atty. Gen. Op., 1994 Op. Atty. Gen. Ky. LEXIS 33 (certain documents of private prison contractor subject to open records statute). Abundant case law exists on single instances of privatization or small, one-time deals between governments and private contractors. See, e.g., *San Gabriel Tribune v. City of West Covina*, 143 Cal. App. 762 (Cal. App. 2d 1983); *Alligator Towing and Recovery Inc. v. News-Press Publishing Co.*, 545 So.2d 941 (Fla. 2d DCA 1989); *State of Louisiana v. Nicholls College Fondation*, 564 So.2d 682 (1990).
32. Fla. Stat. Ann. 119.011(2) (1996).
33. Fla. Stat. Ann. 119.011 (1) (1996).
34. *Fox v. News-Press Publishing Co.*, 545 So.2d 941 (Fla. 2d DCA 1989).
35. 596 So.2d 1029 (Fla. 1992).
36. 596 So.2d at 1031, citing *Schwartzman v. Meritt Island Volunteer Fire Dept.*, 352 So.2d 1230 (Fla. 4th DCA 1977), cert. denied 358 So. 2d 132 (Fla. 1978); *Sarasota Herald-Tribune Co. v. Community Health Corp.*, 582 So.2d 478

(Fla. 2d DCA 1991).

37. 596 So.2d at 1032.
38. 596 So.2d at 1032.

39. 596 So.2d at 1032-36. The court said the factors include, but are not limited to: (1) the level of public funding; (2) commingling of funds; (3) whether the activity was conducted on publicly owned property; (4) whether services contracted for are an integral part of the public agency's chosen decision-making process; (5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for whose benefit the private entity is functioning. 596 So.2d at 1031.

40. In Florida, as discussed earlier, the *News and Sun-Sentinel* court endorsed a multi-factor test for determining when a private business is an "agency" under Florida law. Lower courts were free to draw upon nine factors that might be relevant, depending upon the facts of the particular case. In contrast, the Connecticut Supreme Court endorsed a less complicated four-factor test in *Board of Trustees of Woodstock Academy v. FOIC*, 436 A.2d 266 (Conn. 1980). Those factors are: "(1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government." 436 A.2d at 270-71 (citations omitted). These factors are similar to some of those adopted in the Florida case, although the authors believe neither approach is ideal, as discussed in the next section.

41. Florida Attorney General Opinion No. 91-99 (private nonprofit corporation, leasing hospital facilities of public hospital under lease which requires that private hospital abide by public records law, is subject to public records law).

42. Florida Attorney General Opinion No. 91-99.

43. 596 So.2d 1029 (Fla. 1992).

44. See, for example, *Procurier v. Pell*, 417 U.S. 817 (1974). However, the Court has granted a narrow First Amendment right of access to criminal proceedings. See, for example, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

45. 109 U.S. 3 (1883).

46. 326 U.S. 501 (1946).

47. 326 U.S. at 506.

48. 419 U.S. 345 (1974).

49. 419 U.S. at 352.

50. 436 U.S. 149 (1978).

51. 436 U.S. at 163-64.

52. Barak-Erez, "A State Action Doctrine."

53. Barak-Erez, "A State Action Doctrine," 1190.

54. Mays, "Privatization of Municipal Services," 69.

55. The analysis suggested here applies primarily to cases of large-scale "contracting out," which is the area the authors conclude most urgently requires public oversight. The suggested approach is almost certainly not appropriate for smaller-scale use of private businesses by government agencies, such as cases in which city councils hire consultants for a one-time project, or agencies hire professional firms to perform limited support roles, such as accounting. Such governmental use of private enterprises may also

be deserving of public scrutiny, but is outside the scope of this discussion. The extent to which predominantly private businesses that do very limited business with the state should become entangled in state access laws is an immensely complicated issue. Thus, to the extent that the Florida "totality of the circumstances" test applies to such small-scale transactions, this paper expresses no opinion as to its appropriateness.

56. Cass, "Privatization," 488.
57. William T. Gormley, "Two Cheers for Privatization," in *Privatization and Its Alternatives*, ed. William T. Gormley (Madison: University of Wisconsin Press, 1991), 310.
58. Paul Starr, "The Limits of Privatization," in *Prospects for Privatization*, ed. Hanke, 133.