

# Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization

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## I. INTRODUCTION

Transparency is part of the foundational framework of the United States. Those who helped form this nation understood that if citizens are to be entrusted with electing their leaders, they must be provided a view of the work of those leaders and the functions they oversee. Thomas Jefferson alluded to this need in 1803: “[W]e might hope to see the finances of the Union as clear and intelligible as a merchant’s books, so that every member of Congress, and every man of any mind in the Union should be able to comprehend them, to investigate abuses, and consequently to control them.”<sup>1</sup>

Following this precept, the federal government, all fifty states, and some U.S. territories have Freedom of Information, or “sunshine,” laws that govern one’s right to access public information. These laws are predicated on the belief that “a democracy works best when the people have all the information that the security of the Nation permits,” as President Lyndon Johnson stated when he signed the federal Freedom of Information Act (FOIA) into law on July 4, 1966.<sup>2</sup> Looking to the FOIA as a model, most states’ sunshine laws define the terms “public agency” and “public record,” while also laying out the process of requesting and receiving responsive records, and the exemptions that shield certain information from view, typically related to privacy and security.<sup>3</sup> The laws

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<sup>1</sup> MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 489 (Thomas Randolph ed., 1829).

<sup>2</sup> Johnson signed the FOIA into law, but he did so reluctantly, as the rest of his statement suggests. See Presidential Statement on Signing the Freedom of Information Act, 2 PUB. PAPERS 316 (July 4, 1966). Five of the eight paragraphs detail the need to protect certain information, while only three hail the importance of transparency. See Freedom of Information Act, Pub. L. No. 89-487, 1966 U.S.C.A.N. (80 Stat. 250) (codified at 5 U.S.C. § 552 (West 2009)). Johnson also pointedly declined to hold a formal signing ceremony for the act.

<sup>3</sup> The U.S. Securities and Exchange Commission lists nine exemptions of the federal law. See *Freedom of Information Act Exemptions*, U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 1, 1999), <http://perma.cc/48UV-TZUG>. The Reporters Committee for Freedom of the Press provides an online guide to all state sunshine laws, including exemptions. See *Open Government Guide*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (2011), <http://perma.cc/ZFD7-BDDH>.

have various names, such as the Public Records Act in California<sup>4</sup> or the Open Records Law in Iowa,<sup>5</sup> and widely varying definitions of responsive agencies and records.

These laws have served well enough to facilitate and regulate public access to information, but they were devised and most effective when the public and private sectors were more clearly delineated. Jefferson and even Johnson could not have foreseen a time when “the finances of the Union” would become as deeply enmeshed with private enterprise as they are today. Governments have long worked with private entities, but the relationship was limited to “a few in-house functions and a very limited number of direct services” until the mid-1980s,<sup>6</sup> when bureaucracies that were stifled by tax burdens, debts, and deficits began to look for new modes of survival and a Reagan-era ethos of self-reliance took hold.<sup>7</sup> Thus emerged privatization, defined by the U.S. General Accounting Office as “any process aimed at shifting functions and responsibilities, in whole or in part, from the government to the private sector.”<sup>8</sup> Through public-private partnerships, contracting out of services, franchising, subsidies, quasi-governmental corporations, and other forms of privatization, many municipalities have found new ways to maintain services and save money. As a result, the trend has only grown since the 1980s, resulting in a restructuring of the public sector and a blurring of the once-clear line between public and private.<sup>9</sup>

The privatization phenomenon has prompted many debates about the financial, societal, and philosophical reverberations of such a restructuring of the public sector.<sup>10</sup> A crucial but often-overlooked consideration is the effect of privatization on the guaranteed right of public information access, and the failure of sunshine laws to keep pace with this restructuring. Private entities are typically able to protect their finances and trade secrets in order to remain competitive in a free market economy, and, understandably, would be less willing to engage with government if it

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<sup>4</sup> CAL. GOV. CODE, §§ 6250–6270 (West 2011).

<sup>5</sup> IOWA CODE ANN. §§ 22.1–22.14 (2013).

<sup>6</sup> Van R. Johnston & Paul Seidenstat, *Contracting Out Government Services: Privatization at the Millennium* [sic], 30 INT’L J. PUB. ADMIN. 231, 232 (2007).

<sup>7</sup> See generally Lawrence Reed, *Public Policy and American Business: The Privatization Revolution*, MACKINAC CTR. (Dec. 24, 2003), <http://perma.cc/EF4M-BL5D>; E.S. SAVAS, *PRIVATIZATION IN THE CITY: SUCCESSES, FAILURES, LESSONS* (CQ Press, 2005).

<sup>8</sup> *Terms Related to Privatization Activities and Processes*, GAO/GGD-97-121 (July 1997), available at <http://perma.cc/FUJ7-ETWY>. The U.S. General Accounting Office is now known as the U.S. Government Accountability Office.

<sup>9</sup> See Alasdair S. Roberts, *Structural Pluralism and the Right to Information*, 51 U. TORONTO L.J. 243 (2001).

<sup>10</sup> Some examples of texts on different sides of this debate include Shirley Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41 (1995); Reed, *supra* note 7; Savas, *supra* note 7.

meant forfeiting this protection.<sup>11</sup> Inevitably and increasingly, their interests come into conflict with the principle of transparency in the public sphere. As law professor Alasdair S. Roberts notes:

[A]uthority has flowed out of the now-familiar bureaucracy and into a new array of quasi-governmental and private bodies. The relocation of authority has provoked another doctrinal crisis: the old system of administrative controls, built to suit a world in which power was centered within government departments and agencies, no longer seems to fit contemporary realities.<sup>12</sup>

Sunshine laws were borne of and remain rooted in the “old system of administrative controls.”<sup>13</sup> In most states, such laws define public agencies or bodies in governmental terms, making it unlikely that private firms performing government services would be included.<sup>14</sup> As a result, as more public functions are undertaken by entities that are not beholden to the same standards of transparency imposed on governmental ministries, the effectiveness of sunshine laws becomes undermined.<sup>15</sup>

Even worse, there is little consensus on how to address this problem.<sup>16</sup> Each state has the right to control its own FOI law, and each state legislature is free to update its law or pass amendments that change the standards of information access. Most state legislatures have refined their laws via amendments over the years, proving the legislation to be fluid and open to updates when deemed necessary,<sup>17</sup> and a few have statutorily acknowledged the emergence of privatization. Florida was one of the first to do so, amending its sunshine law in 1975 to apply to a “public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”<sup>18</sup> In 1999, Georgia’s Open Records Act was amended to state that records maintained by a private entity on behalf of a

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<sup>11</sup> See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 907 n.97 (2006); Linda B. Samuels, *Protecting Confidential Business Information Supplied to State Governments: Exempting Trade Secrets from State Open Records Laws*, 27 AM. BUS. L.J. 467, 468–69 (1989).

<sup>12</sup> Roberts, *supra* note 9, at 270.

<sup>13</sup> *Id.*

<sup>14</sup> See Matthew D. Bunker & Charles N. Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 JOURNALISM & MASS COMM. Q. 464, 465–66 (1998); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1494 (2009); Rani Gupta, *Privatization v. the Public’s Right to Know*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Aug. 1, 2007), <http://perma.cc/ZDF2-NFP4>.

<sup>15</sup> Roberts, *supra* note 9, at 244.

<sup>16</sup> *Id.*

<sup>17</sup> James C. Hearn, Michael K. McLendon & Leigh Z. Gilchrist, *GOVERNING IN THE SUNSHINE: OPEN MEETINGS, OPEN RECORDS, AND EFFECTIVE GOVERNANCE IN PUBLIC HIGHER EDUCATION* 23 (Apr. 2004), <http://perma.cc/AXN5-BSRF>.

<sup>18</sup> FLA. STAT. ANN. § 119.011(2) (2011).

public agency “shall be subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by such agency.”<sup>19</sup> Connecticut expanded its law in 2001 to include anyone deemed to be a “functional equivalent to a public agency,”<sup>20</sup> and Tennessee revised its statute in 2008 to state, “[a] governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity.”<sup>21</sup>

These are rare examples of explicit statutory grants of information access in instances of privatization. In reality, the courts have had to do the heavy lifting by applying judicial interpretation when disputes are brought before them.<sup>22</sup> There have been relevant decisions in most, but not all, states, and those courts have decided the issue in “myriad and often confusing ways,”<sup>23</sup> resulting in a “hodgepodge of case law.”<sup>24</sup> The problem, as law professor Mark Fenster notes, is that when it comes to resolving 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,” state courts and legislatures have “failed to develop a consensus or clarity for their open government laws.”<sup>25</sup>

In light of this confusion, in 1999 attorney Craig D. Feiser<sup>26</sup> assumed the task of reviewing state court cases in which petitioners sought information about what they claimed were public services, were denied because the affected agency or records were deemed non-public, and the dispute made its way to the courts. In these cases, the courts were asked to determine whether the agency or record could be considered subject to state sunshine law for the purposes of information disclosure in the particular instance before them. Feiser’s review, published in 2000 in the *Florida State University Law Review*,<sup>27</sup> was an act of vigilance against the slow, deleterious effects of privatization on public access. It provided an

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<sup>19</sup> GA. CODE ANN. § 50-18-70(a) (2012).

<sup>20</sup> Conn. Pub. L. No. 01-169.1(1)(B).

<sup>21</sup> TENN. CODE ANN. § 10-7-503(a)(6) (2012).

<sup>22</sup> Gupta, *supra* note 14, at 10.

<sup>23</sup> *Id.*

<sup>24</sup> Aimee Edmonson & Charles N. Davis, “Prisoners” of Private Industry: Economic Development and State Sunshine Laws, 16 COMM. L. & POL’Y 317, 327 (2011).

<sup>25</sup> Fenster, *supra* note 11, at 919.

<sup>26</sup> Feiser obtained a J.D. and an M.A. in Mass Communications from the University of Florida in 1998, and a B.A. in Journalism from Michigan State University in 1992. At the time of this writing, he was an Assistant General Counsel for the City of Jacksonville, Florida. Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMM. L.J. 21 n.\* (1999).

<sup>27</sup> Craig D. Feiser, *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). Feiser conducted a separate review of federal case law. Feiser, *supra* note 26, at 21. Similarly, updated federal case law is under separate review by the author. All citations of Feiser herein refer to his state court review.

unparalleled audit of the variety of ways courts were and were not affirming the spirit of FOI laws, and it became an oft-cited resource not only for scholars examining the interplay of these sometimes conflicting forces, but also state justices considering petitions for access.<sup>28</sup>

Nearly fifteen years later, another case law review is warranted. As privatization becomes an even more normalized component of public governance, are courts becoming more or less vigilant in preserving public access? What are their approaches today, how varied have they become, and what are the considerations that drive such approaches? In other words, what is the legal status of transparency in these early years of the 21<sup>st</sup> Century?

## II. INITIAL CASE LAW REVIEW AND IDENTIFIED COURT APPROACHES

Feiser's review was comprehensive, covering all fifty states and including any cases decided prior to early 1999.<sup>29</sup> The cases he compiled occurred primarily in the 1980s and '90s, as privatization took hold and grew, but they went as far back as 1972.<sup>30</sup> In all that time, according to Feiser, courts in thirty-four states had issued decisions that helped define how to approach access in cases of privatization, leaving sixteen that had not. Among the thirty-four, those that granted access did so by interpreting their respective state statutes' definitions of "agency" or "agency records" to include more than just traditional government entities and/or explicitly public records.<sup>31</sup> As many courts and legislators have noted, a private entity does not sign away its rights by contracting or partnering with a public agency, so each request for access is handled on a case-by-case basis by balancing the entities' right to privacy against the public's right to know. As Feiser showed, the chosen path to resolving this conflict varied from court to court.

Within the thirty-four that considered cases, Feiser classified courts in twenty-two states as "flexible" in their approach to access and courts in

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<sup>28</sup> State supreme court decisions cite Feiser's review. *See, e.g.*, *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1043 n.17 (Pa. 2012); *Memphis Publ'g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 76 (Tenn. 2002); and *Wis. v. Beaver Dam Area Dev. Corp.*, 752 N.W.2d 295, 304 n.10 (Wis. 2008). The author cites Feiser's review in Alexa Capeloto, *Caught in the Balance: Information Access in an Era of Privatized Higher Education*, 50 C. MEDIA REV. (Sept. 6, 2012), <http://perma.cc/A3C8-U6LQ>.

<sup>29</sup> *See generally* Feiser, *supra* note 27, at 864 (discussing, in broad outline, the article's purpose in analyzing the sunshine laws of "all fifty states" and the state courts' interpretation of these laws "as of early 1999"). Although sunshine laws can pertain to records and meetings, Feiser focused on cases related to records. *See id.* at 836, n.63. He primarily limited his review to decisions by state supreme courts, which are the ultimate judicial tribunals in interpretations of state law, though he sometimes looked to lower courts when cases went no further. *See generally id.* For the sake of continuity and comparability, this review generally hews to his methodology and covers the period between January 1999 and January 2013.

<sup>30</sup> *Id.* at 858 nn.207–08, 211–12.

<sup>31</sup> *Id.* at 826.

twelve as “restrictive.”<sup>32</sup> Further, he designated “sub-approaches” within the two categories. Such sub-approaches among the flexible states include “totality of factors,” “public function,” and “nature of records.”<sup>33</sup> Sub-approaches among the restrictive states include “possession,” “public control,” “public funds,” and “prior legal determination.”<sup>34</sup> As detailed below, many of these approaches focus on factors separate from or tangential to the consideration of whether the disclosure of sought-after information is in the interest of the public good.

#### *A. Flexible Approaches to Considering Information Access*

##### *1. Totality of Factors*

Under this approach, courts weigh a number of factors and rule on a case-by-case basis whether an entity is subject to the state’s sunshine law. Typically the fulfillment of a single factor is not sufficient to grant access, and the absence of a single factor is not enough to deny it.<sup>35</sup> Factors can include the level of public funding to a private entity, whether the private entity is performing a governmental function, whether the private agency was created by a public agency, and more.<sup>36</sup>

##### *2. Public Function*

This approach narrows the review to the sole question of whether an entity “is performing a public function,” in that it has taken over an activity that public authorities are typically expected to administer or be responsible for,<sup>37</sup> rather than considering funding, creation or other factors.<sup>38</sup> Whereas function might be one circumstance weighed by courts that employ a multi-factor test, it would be only one, and perhaps not even the most important one.<sup>39</sup> This approach, as well as those described in the following sections, privileges one factor as determinative.

##### *3. Nature of Records*

This approach does not look at the function of an entity itself, but rather the public or private nature of the records being sought. A court asks whether the contents of the documents include public information,

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<sup>32</sup> *Id.* at 836, 853.

<sup>33</sup> Feiser, *supra* note 27, at 836.

<sup>34</sup> *Id.* at 853, 857, 859–60.

<sup>35</sup> *Id.* at 837.

<sup>36</sup> *Id.* at 839.

<sup>37</sup> Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1175 (1995).

<sup>38</sup> Feiser, *supra* note 27, at 845.

<sup>39</sup> Bunker & Davis, *supra* note 14, at 472.

regardless of the entity that has physical possession of them.<sup>40</sup> This is perhaps the most aggressive assertion of transparency and Feiser's preferred method, because it reasons that information pertaining to the public should be made public regardless of other factors. It is also the closest in nature to a hypothetical "public good" standard of consideration.

### *B. Restrictive Approaches to Considering Information Access*

More restrictive approaches to interpreting public-access statutes tend to involve the consideration of only one factor in making a determination and result in either denial of access or access under very limited circumstances<sup>41</sup>:

#### *1. Public Funds*

Under this approach, courts allow access only if a specific level of public funding is in evidence. If a private nonprofit receives less than half its funding from the government—for example—a court might decide that is not enough to make that entity a public agency subject to the sunshine law.

#### *2. Prior Legal Determination*

Feiser writes that this approach limits access to cases in which the private entity "was created by the legislature or in some way previously determined by law to be subject to freedom of information laws."<sup>42</sup> In other words, a court is not free to determine whether a private entity might be subject to disclosure laws and must rely on previous legislative or judicial action for guidance.

#### *3. Possession and Public Control*

The two that remain in the restrictive category are the "possession" approach, which strictly limits access to records that are in possession of a public entity,<sup>43</sup> and the "public control" approach, which limits access to cases in which the private agency is essentially controlled by a public agency.<sup>44</sup>

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<sup>40</sup> Feiser, *supra* note 27, at 851.

<sup>41</sup> *Id.* at 853.

<sup>42</sup> *Id.* at 857.

<sup>43</sup> *Id.* at 859.

<sup>44</sup> *Id.* at 860.

### III. UPDATED CASE LAW REVIEW

In the fourteen years since Feiser's review, appellate and supreme courts in six more states have considered cases on this issue, leaving ten that have not.<sup>45</sup> Eventually, this question will come before high courts in all states, and justices will have to interpret their FOI laws when it comes to defining public records and public agencies vis-à-vis privatization. Some will perhaps be guided by clear statutory language set forth by their legislatures, but more likely they will have to rely on case-by-case interpretation of sometimes vague or insufficient sunshine laws, as other courts have learned and lamented. The Fifth Appellate District Court in California stated in a 2001 decision that:

The Legislature's decision to narrowly define the applicability of the [California Public Records Act], balanced against its sweeping goal to safeguard the public, leaves us scratching our judicial heads and asking, "What was the Legislature thinking?" . . . However, courts "do not sit as super-legislatures to determine the wisdom, desirability or propriety of statutes enacted by the Legislature."<sup>46</sup>

Ohio Chief Justice Thomas Moyer expressed a similar frustration in a dissent from the state supreme court's 2006 decision that a nonprofit contracted to run a correctional facility was not a public institution subject to the state's sunshine law:

This case, and many that have come before it, is an example of the difficult position in which courts are placed when legislatures adopt statutes that include words that are critical to the application of the statute, but then fail to define those words. . . . Our long line of cases and the majority opinion in this case should convince the General Assembly that it, rather than this court, should define the terms in a manner that would settle the policy issues that are determined each time a court applies the broad statutory language to the facts in individual cases.<sup>47</sup>

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<sup>45</sup> As of January 2013, the six additional states were Alabama, Hawaii, Idaho, Massachusetts, Nebraska, and Virginia. Courts that had yet to consider pertinent cases are those in Alaska, Arizona, Mississippi, Nevada, New Mexico, Oklahoma, Rhode Island, South Dakota, Vermont, and Wyoming.

<sup>46</sup> Cal. State Univ., Fresno Ass'n v. Superior Court, 108 Cal. Rptr. 2d 870, 883–84 (Cal. Ct. App. 2001), (quoting *In re Estate of Horman*, 95 Cal. Rptr. 433, 485 (1971)).

<sup>47</sup> State ex rel. Oriana House, Inc. v. Montgomery, 854 N.E.2d 193, 202 (Ohio 2006). Judicial critiques of sunshine laws can be found in other similar cases. In *Frankfort Publ'g Co. v. Ky. State*



In addition to the decisions in the six states that had not considered this issue prior to 1999, twenty-one of the thirty-four states' courts that had previously taken up this issue found themselves confronted with new cases in the 21<sup>st</sup> Century. Eight applied the same approach they had used prior, but thirteen issued decisions that seemed to contradict or depart from previous rulings. In some cases, the courts were responding to changes in their states' FOI laws. In Feiser's review, for example, the Pennsylvania Supreme Court was deemed to have taken a restrictive "prior legal determination" approach in 1996, ruling that a community college was not subject to the state's Right to Know Law because "it was not created by statute or pursuant to a statute making the college's activities an essential government function."<sup>48</sup> In 2008, the Pennsylvania Legislature passed a more expansive Right to Know Law, making clear that records directly related to governmental function are subject to disclosure, even if they are in the possession of a third party. With new statutory guidance, a lower court in 2010 ruled that a state university foundation's fundraising records must be disclosed because the records pertain to public business, representing a flexible "nature of records" approach.<sup>49</sup>

Among the other courts that contradicted prior decisions, judges were more often led to different conclusions because they felt guided by emergent case law out of other states, or because they interpreted sunshine laws differently from their predecessors. The Iowa Supreme Court in 1989 used a restrictive "possession" approach in denying access to the records of a government subcontractor, according to Feiser, but sixteen years later in *Gannon v. Iowa Board of Regents*,<sup>50</sup> the court stated that it was "disavow[ing] any language"<sup>51</sup> of the previous decision in favor of applying a flexible "public function" approach, ruling that the Iowa State University Foundation is subject to the state's Open Records Law because it performs a government function. As the court acknowledged in its decision, "Perhaps because of the differing statutory schemes involved and the fact-intensive nature of open-records challenges a consensus has not

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*Univ. Found. Inc.*, 834 S.W.2d 681, 683 (Ky. 1992), justices focused on the legislative intent behind the Kentucky Open Records Law rather than the "somewhat inartfully drawn" statute, whose punctuation became a central consideration of the case. In Alabama, justices observed that "it would be helpful for the legislative department to provide the limitations by statute as some states have done." *Tenn. Valley Printing Co. v. Health Care Auth.*, 61 So. 3d 1027, 1035 (Ala. 2010) (quoting *Stone v. Consol. Publ'g Co.*, 404 So. 2d 678, 681 (Ala. 1981)).

<sup>48</sup> Feiser, *supra* note 27, at 857.

<sup>49</sup> See *E. Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa. Commw. 2010). Although *East Stroudsburg* was decided by the Commonwealth Court of Pennsylvania, the decision has guided the state supreme court, which cited *East Stroudsburg* in *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1036 (Pa. 2012).

<sup>50</sup> *Gannon v. Iowa Bd. of Regents*, 692 N.W.2d 31 (Iowa 2005).

<sup>51</sup> *Id.* at 42.

emerged in these courts on how best to approach such matters.”<sup>52</sup>

### A. *Spectrum of Transparency*

Feiser has said that during his review, he often found it difficult to discern what the courts meant by their decisions, which in turn made it difficult to categorize their approaches.<sup>53</sup> It has become somewhat easier, as courts increasingly look to the growing body of case law for guidance, but it is still no simple task.

In general, Feiser’s categories and sub-categories are still applicable to the more than fifty cases that have been decided since 1999. Using his designations, where once there were twenty-two flexible and twelve restrictive states, now there are twenty-seven flexible and thirteen restrictive. This signals that courts have become more adept at liberally construing sunshine laws via judicial interpretation and case law, rather than narrowly construing such laws.<sup>54</sup> Of the forty states that have now considered these cases, thirteen have used the “totality of factors” approach and eleven have employed the “public function” approach. By far these are the two most popular standards of review, despite the fact that access advocates like Feiser favor a “nature of records” approach, which only three states’ courts employ.

### B. *The Flexible Approaches*

#### 1. *“Totality of Factors”*: Colorado, Connecticut, Florida, Kansas, Maine, Maryland, Nebraska, North Carolina, Ohio, Oregon, Tennessee, Washington, Wisconsin

Seven additional states have followed in the footsteps of Connecticut, Florida, and others by adopting a “totality of factors” approach, the most common shift in approach since early 1999.<sup>55</sup> This could mean that weighing a balance of factors in deciding whether an agency and/or records are subject to an FOI law, with no single factor being determinative, will become the predominating approach to this issue. Courts in Maine, Tennessee, and Washington explicitly modeled decisions on a four-part functional equivalence test developed by the Connecticut

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<sup>52</sup> *Id.* at 38.

<sup>53</sup> Gupta, *supra* note 14, at 10.

<sup>54</sup> As further evidence of an overall shift toward flexibility, four states that had previously used a restrictive approach that did not favor disclosure have since used approaches deemed flexible under Feiser’s designations. Those states are Iowa, Pennsylvania, South Carolina, and Tennessee. Only two—California and Louisiana—have done the opposite, showing themselves to be restrictive in their approach when, under Feiser’s review, they had been deemed flexible.

<sup>55</sup> The states that have adopted this approach are Colorado, Maine, Nebraska, Ohio, Tennessee, Washington, and Wisconsin.

Supreme Court in 1980, when the court found that a charter school was subject to the state Freedom of Information Act.<sup>56</sup> The Connecticut test looks at the governmental influence in the funding, function, creation, and oversight of the agency in question.

The Ohio Supreme Court developed its own three-factor test in 2001, looking at function, oversight, and access, and it too became a model.<sup>57</sup> The Nebraska Supreme Court adopted Ohio's test in *Everston v. Kimball*, ruling that a private investigator's reports to a mayor regarding a city police department are subject to the Nebraska Public Records Law, even though the law makes no mention of private entities or nonprofits.<sup>58</sup> Noting that "accepting the City's argument would mock the spirit of open government,"<sup>59</sup> the court concluded:

We agree with other courts that public records laws should not permit scrutiny of all a private party's records simply because it contracts with a government entity to provide services. But we prefer the Ohio Supreme Court's test, which applies to a broader range of circumstances. For a private entity's records to fall within Ohio's public records act, three requirements must be satisfied: (1) The private entity must prepare the records to carry out a public office's responsibilities; (2) the public office must be able to monitor the private entity's performance; and (3) the public office must have access to the records for this purpose.<sup>60</sup>

In Connecticut, the courts continue to use the 1980 four-part test in order to determine whether a private or quasi-public entity is the functional equivalent of a government agency. In *Meri-Weather, Inc. v. Freedom of Information Commission*, an appellate court determined that a nonprofit economic development corporation in the city of Meriden was a public agency and therefore subject to the state FOIA because it performed a public function, was supported by public funding, was created by a city agency and was in effect controlled by the city.<sup>61</sup>

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<sup>56</sup> See *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266, 271 (Conn. 1980). The court's four-part test was itself modeled on criteria previously utilized by federal courts: *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976); *Wash. Research Project v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238 (D.C. Cir. 1974); *Pub. Citizen Health Research Grp. v. Dep't of Health, Educ. & Welfare*, 449 F. Supp. 937 (D.D.C. 1978); *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523 (S.D.N.Y. 1977); and *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975).

<sup>57</sup> See *State ex rel. Cincinnati Enquirer v. Krings*, 758 N.E.2d 1135, 1139 (Ohio 2001).

<sup>58</sup> *Everston v. City of Kimball*, 767 N.W.2d 751, 761 (Neb. 2009).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Meri-Weather, Inc. v. Freedom of Info. Comm'n*, 778 A.2d 1006, 1007 (Conn. App. Ct. 2001).

Florida is home to one of the more vigorous sunshine laws, as noted, as well as a seminal case in determining whether a private entity is subject to such law: In 1992, the Florida Supreme Court took the Connecticut test even further by developing nine factors<sup>62</sup> to consider in weighing whether a private entity is “acting on behalf of any public agency” under the state Sunshine Law.<sup>63</sup> However, Feiser noted in his review that some believed the access law was “still in a state of confusion,”<sup>64</sup> and cases since then suggest as much. Courts continue to weigh a number of factors, but one particular factor has grown in significance – whether the agency in question has “decision-making authority” (versus fact-finding or information-gathering) in line with that of a public entity. In *Sarasota Citizens for Responsible Government v. Sarasota*,<sup>65</sup> the Florida Supreme Court affirmed a decision that a negotiations team consulted by a county official in a deal to bring the Baltimore Orioles’ spring training operations to Sarasota was not subject to the Sunshine Law because the team served an “informational role,” not an advisory one.<sup>66</sup>

The Judicial Supreme Court of Maine has applied a four-pronged test in at least three cases since 1999, also looking at public function, funding, control, and creation.<sup>67</sup> In two cases, disclosure was denied because an advisory group for the attorney general and a city chamber of commerce, respectively, met none of the four standards in the court’s estimation.<sup>68</sup> The chamber received 60 percent of its funding from the city, but the court ruled “the fact that an entity receives a substantial amount of governmental funding is also not sufficient to render that entity a public agency.”<sup>69</sup> The weighing and considering of four factors did not lead to disclosure in these cases, and this approach is more strict than the “nature of records” approach assigned to Maine by Feiser in 1999, but the consideration of multiple factors still demonstrates a flexible nature that favors access.

Maryland’s high court, the Court of Appeals, has developed its own

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<sup>62</sup> See *News & Sun-Sentinel v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992). The nine factors are: (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.

<sup>63</sup> Feiser, *supra* note 27, at 839.

<sup>64</sup> *Id.* at 842.

<sup>65</sup> *Sarasota Citizens for Responsible Gov’t v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010).

<sup>66</sup> *Id.* at 763.

<sup>67</sup> See *Moore v. Abbott*, 952 A.2d 980, 985 (Me. 2008); *Dow v. Caribou Chamber of Commerce*, 884 A.2d 667, 670 (Me. 2005); *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 769 A.2d 857, 863 (Me. 2001).

<sup>68</sup> *Moore*, 952 A.2d at 984; *Dow*, 884 A.2d at 672.

<sup>69</sup> *Dow*, 884 A.2d at 671.

test to determine whether an agency is an “instrumentality” of government and therefore subject to the Maryland Public Information Act. In 2006, the court ruled that the City of Baltimore Development Corporation was an instrumentality because of its close ties with the city via function, funding, and control.<sup>70</sup>

As noted, Tennessee and Washington courts have looked to Connecticut’s four-part test to determine whether private or quasi-public entities are subject to sunshine laws. Acknowledging that the Tennessee Public Records Act “does not identify with precision”<sup>71</sup> how courts should determine whether records are public, the Tennessee Supreme Court employed the Connecticut test as a “functional equivalency analysis” in 2002.<sup>72</sup> The court determined that Cherokee Children & Family Services, a nonprofit contracted by the state to administer a state-subsidized daycare program, was subject to the PRA.<sup>73</sup> Just after Feiser’s review, in April 1999, an appellate court in Washington applied the same test in *Telford v. Thurston County Board of Commissioners*,<sup>74</sup> finding that both the Washington State Association of Counties and the Washington State Association of County Officials were subject to the state’s Public Disclosure Act.<sup>75</sup> The test is now known as the *Telford* test<sup>76</sup> and represents the state’s shift from a “nature of records” to a “totality of factors” approach.

Courts in Colorado made the same switch. In *Denver Post v. Stapleton Development Corp.*,<sup>77</sup> an appellate court weighed a number of factors, finding that the nonprofit Stapleton Development Corporation was subject to the Colorado Open Records Act because it was created, partially funded and controlled by a municipality, and because it benefited the public via property development.

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<sup>70</sup> City of Balt. Dev. Corp. v. Carmel Realty Assocs., 910 A.2d 406, 428 (Md. 2006).

<sup>71</sup> Memphis Publ’g Co. v. Cherokee Children & Family Servs., 87 S.W.3d 67, 75 (Tenn. 2002).

<sup>72</sup> *Id.* at 78.

<sup>73</sup> *Id.* at 80. Nine years later, even after the statutory revision, the Tennessee Supreme Court applied the same test to determine that a nonprofit foundation that provided administrative support for the University of Tennessee College of Medicine-Chattanooga Unit was not subject to the disclosure law. (*Gautreaux v. Internal Med. Educ. Found., Inc.*, 336 S.W.3d 526, 531 (Tenn. 2011)).

<sup>74</sup> *Telford v. Thurston Cnty. Bd. of Comm’rs*, 974 P.2d 886 (Wash. Ct. App. 1999).

<sup>75</sup> *Id.* at 895. The PDA was re-codified in 2006 and is now referred to as the Public Records Act. There is still no specific reference to non-public agencies in the law, putting the onus on courts to determine access in instances of privatization. See WASH. REV. CODE § 42.56 (2010).

<sup>76</sup> Jeffrey A. Ware, Clarke v. Tri-Cities Animal Care & Control Shelter: *How Did Private Businesses Become Government “Agencies” Under the Washington Public Records Act?*, 33 SEATTLE U. L. REV. 741, 742 (2010). Ware’s article analyzes *Clarke v. Tri-Cities Animal Care & Control Shelter*, 181 P.3d 881 (Wash. Ct. App. 2008), in which an appellate court used the “Telford Test” to determine that the animal shelter, which contracted with the Animal Control Authority of Richland, Pasco, and Kennewick, was the functional equivalent of a government agency and therefore subject to the state’s public access law. The case reinforces the judicial preference for the “totality of factors” approach in Washington.

<sup>77</sup> *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36 (Colo. App. 2000).

The Wisconsin Supreme Court adopted its own four-part test to determine in 2008 that the Beaver Dam Area Development Corporation was a quasigovernmental entity subject to the state's Open Records Law.<sup>78</sup> The case was an important one, according to the court, because "preserving an open government and promoting economic development represent two defining principles which we value as a people and strive to accomplish as a state. This case represents the intersection of these two principles."<sup>79</sup> The court presented the multi-part test as the most appropriate method of balancing the needs of both:

On one hand we cannot countenance a government body circumventing the legislative directive for an open and transparent government by paying an entity to perform a governmental function. On the other hand, we have to be cognizant of the realities of economic development and the need, at times, for flexibility and confidentiality . . . . We must examine the totality of circumstances.<sup>80</sup>

Courts in Kansas, North Carolina, and Oregon had used a "totality of factors" approach prior to 1999 and have not encountered relevant cases since then.

2. "Public Function": *Alabama, Delaware, Georgia, Iowa, Kentucky, Missouri, Montana, New Hampshire, New York, South Carolina, Utah*

Some courts prefer to look at only one factor in determining whether agencies and/or records are subject to sunshine laws, rather than applying multi-part tests. In Feiser's review and in this one, the most common single factor employed by judges is whether an agency is performing a function that might once or otherwise have been the responsibility of public authorities. Attorney and journalist Harry Hammitt, who has written about the interplay of privatization and public access, prefers this

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<sup>78</sup> See *Wisconsin v. Beaver Dam Area Dev. Corp.*, 752 N.W.2d 295, 307 (Wis. 2008).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 297–98. A supreme court decision filed in a separate case just one month prior reinforces the principle expressed in first portion of this quote. In *WIREdata Inc. v. Village of Sussex*, 751 N.W.2d 736, 757 (Wis. 2008), the court states that "municipalities here may not avoid liability under the open records law by contracting with independent contractor assessors for the collection, maintenance, and custody of property assessment records, and by then directing any requester of those records to the independent contractor assessors." Indeed, WIS. STAT. ANN. § 19.36(3) (2011) states that the Open Records Law applies to "any record produced or collected under a contract entered into by the authority with a person other than an authority to the same extent as if the record were maintained by the authority." The court narrowly upheld that provision in early 2013 in *Juneau County Star-Times v. Juneau County*, 824 N.W.2d 457, 473 (Wis. 2013), finding that invoices between a county's law firm and insurance carrier are public record.

approach because he considers the determination of whether a contractor or quasi-public agency is the “functional equivalent” of the government to be fairly straightforward and commonsensical.<sup>81</sup> Similarly, journalism scholars Matthew D. Bunker and Charles N. Davis favor this approach as one that “would bring some measure of order to an otherwise unsettled area of public records law.”<sup>82</sup>

Alabama, Iowa, Montana, and South Carolina have either switched to this approach after employing a different one prior to 1999, or adopted this method since then in reviewing pertinent cases for the first time.

The Alabama Supreme Court had not considered a case on this issue, according to Feiser, but in two cases since his review the court has ruled for transparency after determining “public corporations” to be governmental agencies. In *Water Works and Sewer Board of Talladega v. Consolidated Publishing, Inc.*,<sup>83</sup> the court in 2004 found a city water board to be subject to the Open Records Act because it “performs a municipal function, namely, supplying water and sewer services to the residents of Talladega.”<sup>84</sup> Six years later, in considering *Tennessee Valley Printing Company v. Health Care Authority of Lauderdale County*, the court looked to the Talladega case as a guide in determining that records relating to the sale of assets of the health care authority were also subject to the records act, and that the body was a governmental agency.<sup>85</sup>

Montana’s Supreme Court had employed a “nature of records” approach in 1995,<sup>86</sup> but it moved toward a slightly narrower “public function” consideration for *Bryan v. Yellowstone County Elementary School District No. 2*<sup>87</sup> in 2002. A parent in the district sued after being denied access to ratings sheets and other documents submitted by a committee tasked with advising the district on school closures. The court found that, “in researching the school closure proposition and submitting a recommendation to the School Board, the Facilities Committee performed a legislatively designated governmental function”<sup>88</sup> and was therefore subject to the Montana Public Records Act.

The Supreme Court of South Carolina similarly held that an advisory committee set up by Myrtle Beach’s city manager to review proposals for a city towing contract was subject to the state’s Freedom of Information

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<sup>81</sup> Gupta, *supra* note 14, at 12.

<sup>82</sup> Bunker & Davis, *supra* note 14, at 465.

<sup>83</sup> *Water Works and Sewer Bd. of Talladega v. Consol. Publ’g, Inc.*, 892 So. 2d 859 (Ala. 2004).

<sup>84</sup> *Id.* at 863.

<sup>85</sup> *Tenn. Valley Printing Co. v. Health Care Auth. of Lauderdale Cnty.*, 61 So. 3d 1027, 1034, 1039 (Ala. 2010).

<sup>86</sup> *See* *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 906 P.2d 193, 196–98 (Mont. 1995).

<sup>87</sup> *Bryan v. Yellowstone Cnty. Elementary Sch. Dist. No. 2*, 60 P.3d 381, 387 (Mont. 2002).

<sup>88</sup> *Id.*

Act.<sup>89</sup> While the law and previous decisions reviewed by Feiser had suggested a more narrow “public funds” approach in South Carolina,<sup>90</sup> this 2001 case went in favor of disclosure simply because “the Committee was formed to help determine the award of a City contract.”<sup>91</sup>

The Iowa Supreme Court’s switch from a narrow, restrictive “possession” approach in 1989 to a flexible “public function” approach in 2005 has already been discussed here, and it represents the collective shift toward flexibility seen across this case review.

Delaware, Georgia, Kentucky, Missouri, New Hampshire, New York, and Utah were deemed by Feiser to have taken a “public function” approach, and all either have not considered a new case since then, or have continued to use that approach.<sup>92</sup>

### 3. “Nature of Records”: Idaho, Minnesota, Pennsylvania

Feiser prefers this flexible approach because arguably peripheral factors such as funding and physical possession are set aside in favor of these simple questions: Do the records relate to public business? Regardless of who created them and who has them, should they be disclosed in keeping with the spirit of government transparency?

However, these questions might be too difficult for courts to embrace because of the legitimacy of some of the other considerations, and the need to balance the request for access against the rights of private entities. Indeed, though Feiser counted six states that had used this method prior to early 1999, four have since switched to the higher “totality of factors” standard and one to the “public function” standard. Only Minnesota can still be said to use this determination, and that is because no new cases have emerged since Feiser’s review.

Minnesota is now joined by Pennsylvania, which switched to a “nature of records” approach in keeping with the updates to the state’s Right to Know Law in 2008, as already detailed here, and Idaho, which had not reviewed relevant cases under Feiser’s analysis and therefore had no stated approach before 1999. Even Idaho’s approach, however, could be considered more of an anti-possession approach than a full embracing of a “nature of records” method. In *Idaho Conservation League, Inc. v. Idaho Dept. of Agriculture*,<sup>93</sup> the state supreme court ruled in 2006 that records

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<sup>89</sup> See *Quality Towing, Inc. v. City of Myrtle Beach*, 547 S.E.2d 862, 864 (S.C. 2001).

<sup>90</sup> Feiser, *supra* note 27, at 856.

<sup>91</sup> *Quality Towing*, 547 S.E.2d at 865.

<sup>92</sup> Courts in Kentucky, New Hampshire, and New York have kept to the “public function” approach in cases reviewed since 1999. See *Cape Publ’ns v. Univ. of Louisville Found.*, 260 S.W.3d 818 (Ky. 2008); *Prof’l Firefighters of N.H. v. HealthTrust*, 861 A.2d 789 (N.H. 2004); and *Perez v. C.U.N.Y.*, 840 N.E.2d 572 (N.Y. 2005). No new cases have arisen in Delaware, Georgia, Missouri or Utah.

<sup>93</sup> *Idaho Conservation League, Inc. v. Idaho State Dept. of Agric.*, 146 P.3d 632 (Idaho 2006).



submitted to a state agency and then returned to their owner could not be shielded by virtue of leaving public possession. In the same vein, the court decided in 2011<sup>94</sup> that records requested of a public hospital could not be denied just because the hospital was sold to a private entity subsequent to the request:

The determination of whether a document qualifies as a public record is based on the content of the document and surrounding circumstances as they existed at the time the request was made. It would be irrelevant to make such a determination based on the circumstances that exist months or years after a request, because agencies could alter the nature of the document or change its location in order to remove the documents from the ambit of the Act.<sup>95</sup>

In this ruling, the records were deemed public because the responding agency was public at the time of the request, not because of the inherently public nature of the documents themselves. This nuance, combined with the path other courts have taken in relation to this approach in the last fourteen years, suggests that this will not be adopted as a predominant method for reviewing access in relation to privatization going forward.

### *C. The Restrictive Approaches*

#### *1. "Possession": Arkansas, California, Louisiana, Massachusetts*

Feiser deemed this and the other approaches in this section restrictive because they more narrowly construe public access statutes and consequently reduce the odds of disclosure. That does not mean, however, that disclosure is impossible, just as flexible approaches do not guarantee access.

Arkansas had taken a restrictive “public funds” approach under Feiser’s review, but the supreme court applied an even more restrictive “possession” approach to the two pertinent cases that came before justices in the years after. In 2000, the court found that library logs for a prison run by a private corporation in contract with the state Department of Correction were public records subject to disclosure because the logs were being “kept or maintained” by the department.<sup>96</sup> By the same token, the court denied disclosure seven years later in *Nabholz Construction Corp. v.*

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<sup>94</sup> See *Ward v. Portneuf Med. Ctr., Inc.*, 248 P.3d 1236 (Idaho 2011).

<sup>95</sup> *Id.* at 1240.

<sup>96</sup> *Orsini v. Beck*, No. 98-1011, 2000 Ark. LEXIS 211, at \*4 (Ark. Apr. 20, 2000).

*Contractors for Public Protection Association*.<sup>97</sup> In that case, the Pulaski County Circuit Court had ruled that a contractor for a public university housing project should disclose documents related to the project because “competitors need to know that this is part of the cost of doing business with the state.”<sup>98</sup> The Arkansas Supreme Court reversed the judgment, however, because the records were in possession of Nabholz Construction, and Nabholz was a private corporation not subject to the Arkansas Freedom of Information Act.<sup>99</sup>

Appellate judges in California declared themselves bound by the narrow language of the California Public Records Act when the Fifth District Court of Appeals determined in 2001 that a state university’s auxiliary organization was not subject to the act, and therefore that records in its possession were not subject to disclosure: “A nongovernmental auxiliary organization is not a ‘state agency’ for purposes of the CPRA. The words ‘state body’ and ‘state agency’ simply do not include a nongovernmental organization.”<sup>100</sup> This is the case that had judges “scratching [their] judicial heads” over the Legislature’s decision to narrowly define “state agency.”<sup>101</sup> And it is akin to Feiser’s description of another court’s use of the “possession” approach 25 years ago: “The court, therefore, took an official capacity approach mandated by the access statute, limiting public access to those cases where the documents are in the ‘lawful possession’ of the public entity.”<sup>102</sup> The narrow language of the California Public Records Act has not changed, but the 2001 case likely would be decided differently today because the state passed a law in 2011 that extends the CPRA to the auxiliaries and foundations of state colleges.<sup>103</sup>

In Louisiana, the supreme court has not considered a case relevant to this research since Feiser’s review, but in 2000 an appellate court held that the Louisiana Public Service Commission could not be required to turn over documents related to electricity pricing because the documents were in the hands of a utility corporation, not the commission.<sup>104</sup> Even though the documents were made available to attorneys for the commission, that

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<sup>97</sup> Nabholz Constr. Corp. v. Contractors for Pub. Prot. Ass’n, 266 S.W.3d 689, 694 (Ark. 2007).

<sup>98</sup> *Id.* at 691.

<sup>99</sup> *Id.* at 694.

<sup>100</sup> Cal. State Univ., Fresno Ass’n. v. Superior Court, 108 Cal. Rptr. 2d 870, 883 (Cal. Ct. App. 2001). In the same decision, the court ruled that C.S.U. Fresno must disclose licensing agreements to a newspaper company because the records were “used and/or maintained” by a public body, i.e. C.S.U. Fresno. *Id.* at 880, 888.

<sup>101</sup> *Id.* at 883–84.

<sup>102</sup> Feiser, *supra* note 27, at 859 (citing City of Dubuque v. Dubuque Racing Ass’n., 420 N.W.2d 450 (Iowa 1988)).

<sup>103</sup> See Judy Lin, *Brown Signs Bill Requiring University Disclosure*, ASSOCIATED PRESS, Sept. 7, 2011, available at <http://perma.cc/7UUL-EKJN>.

<sup>104</sup> See CII Carbon, L.L.C. v. St. Blanc, 764 So. 2d 1229, 1232 (La. App. 2000).

was not enough to constitute possession. In the court's opinion, the deciding factor was that "in addition to not having possession of those documents, LPSC never had possession of those documents. They were not prepared by the LPSC, nor were they ever retained by the LPSC."<sup>105</sup>

Courts in Massachusetts had not examined relevant cases prior to 1999, under Feiser's review, but the state supreme court adopted a "possession" approach in deciding *Harvard Crimson, Inc. v. President & Fellows of Harvard College*.<sup>106</sup> In that case, the court upheld a ruling that although Harvard College police are partly authorized by state and local police, their records are not subject to disclosure because the records are in possession of the private university and not the police.<sup>107</sup>

### 2. "Public Control": *Hawaii, Illinois*

Using public control as a standard limits the applicability of sunshine laws to instances in which the agency is under the control of a governmental entity. Illinois was the only state to use this approach under Feiser's review, and it remains in that category because no new cases have occurred since then.

Hawaii had not considered a case before 1999, but in 2007 the Hawaii Supreme Court ruled that a state-chartered nonprofit tasked with managing public and governmental cable channels was not subject to the state's Uniform Information Practices Act because it was not "owned, operated, or managed by or on behalf of this State" under the act.<sup>108</sup> The court noted that a consideration of other factors, and Connecticut's four-pronged test in particular, were "of limited utility" to the court because Hawaii's sunshine law is substantially different from Connecticut's and the court was able to hew to the UIPA's plain and unambiguous language.<sup>109</sup>

### 3. "Public Funds": *Indiana, Michigan, North Dakota, Texas*

Courts in Indiana, North Dakota, and Texas used this approach according to Feiser's review, and no new cases have arisen in those states since then. In Michigan, the courts used this restrictive approach prior to 1999, and they have kept with the same approach since then. Following the language of the state's Freedom of Information Act, which states that a public agency includes any body created or primarily funded by government, the Michigan Supreme Court in 2004 affirmed a ruling that

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<sup>105</sup> *Id.*

<sup>106</sup> *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 840 N.E.2d 518, 522 (Mass. 2006).

<sup>107</sup> *Id.* at 523.

<sup>108</sup> *Ölelo v. Office of Info. Practices*, 173 P.3d 484, 494 (Haw. 2007).

<sup>109</sup> *Id.* at 493-94.

the Michigan High School Athletic Association, a nonprofit with a voluntary membership of public and private schools, was not a public agency subject to FOIA because it “is primarily funded by the sale of its own tickets to private individuals who have voluntarily paid a fee to observe an MHSAA-sponsored athletic event.”<sup>110</sup>

#### 4. “Prior Legal Determination”: New Jersey, Virginia, West Virginia

In the years since Feiser’s review, a high court in only one state – Virginia – has adopted this restrictive approach and in fact two states, Pennsylvania and Tennessee, have moved away from it, suggesting that this will not predominate as an approach on this issue.

In 2011 the Virginia Supreme Court was asked to review a decision<sup>111</sup> that the State Corporation Commission, a government department with broad regulatory authority over state business and economic interests,<sup>112</sup> is not subject to the Virginia Freedom of Information Act because it is governed by a separate and parallel structure of laws under the state constitution. The court affirmed the decision, finding that the VFOIA is “functionally unenforceable” against the commission despite its government-delegated administrative, legislative, and judicial powers.<sup>113</sup>

New Jersey’s supreme court used the “prior legal determination” approach in 1997,<sup>114</sup> and held to it in 2011 when it deemed the New Jersey League of Municipalities a public agency because it was created by a political subdivision, in this case a 1915 act of the state legislature.<sup>115</sup> Looking back to a 2005 decision by the same court, in which a community development corporation was found to be a public agency because of its public creation, the court explicitly rejected a “public function”-type review, stating that the plain language of the New Jersey Open Public Records Act pays no heed to function.<sup>116</sup> In 2005 and 2011, according to the latter decision, “the creation test, not the governmental-function test, controlled.”<sup>117</sup>

The Supreme Court of Appeals of West Virginia employed the “prior legal determination” method in 1989, according to Feiser, and no new

<sup>110</sup> *Breighner v. Mich. High Sch. Athletic Ass’n*, 683 N.W.2d 639, 645 (Mich. 2004).

<sup>111</sup> See *Christian v. State Corp. Comm’n*, 718 S.E.2d 767 (Va. 2011).

<sup>112</sup> *Overview of the Commission*, VA. STATE CORP. COMM’N, <http://perma.cc/PW3T-W4TN> (last visited Dec. 4, 2013).

<sup>113</sup> *Christian*, 718 S.E.2d at 772.

<sup>114</sup> *Keddie v. Rutgers*, 689 A.2d 702, 711 (N.J. 1997).

<sup>115</sup> *Fair Share Housing Ctr., Inc. v. N.J. League of Municipalities*, 25 A.3d 1063, 1071 (N.J. 2011).

<sup>116</sup> *Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 874 A.2d 1064, 1073–74 (N.J. 2005).

<sup>117</sup> *Fair Share Housing Ctr., Inc.*, 25 A.3d at 1074 (citing *Times of Trenton Publ’g Corp. v. Lafayette Yard Cmty. Dev. Corp.*, 874 A.2d at 1074 (N.J. 2005)).

cases have arisen since then.<sup>118</sup>

#### IV. DISCUSSION

Feiser's review showed that courts differ from each other in how they approach the issue of public information access in instances of privatization. This review reinforces that finding, but it also indicates that courts differ from their own previous determinations, showing how fluid and inconsistent this case law can be, independent of the variations among state sunshine statutes. A municipal league might be required to turn over records in one state, but a direct counterpart in another state might not. A university foundation might successfully withhold its donor records one year, but might be compelled to disclose those records a few years later. These potential scenarios are just as true for third-party contractors, athletic associations, economic development corporations, and other entities that have come to represent the privatization of the public sphere.

The variability within individual courts is not confined to the temporal line that divides Feiser's review from this one. The Hawaii Supreme Court, for example, took a restrictive "public control" approach in 2007, as already noted,<sup>119</sup> but the court took a restrictive "possession" approach less than a year later in the case of *Nuuanu Valley Association v. Honolulu*,<sup>120</sup> ruling that engineering reports rejected by the city's planning department were not government records because they were returned to the developer and no longer in the department's possession or control.<sup>121</sup> Maryland's high court used a "totality of factors" approach in 2006,<sup>122</sup> but the same court in 2011 applied a restrictive "prior legal determination" approach, holding that the University of Maryland Medical System Corporation is an instrumentality of the government, but is not subject to the law because it

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<sup>118</sup> There have been no new cases regarding the determination of whether a non-public agency is subject to the state's Freedom of Information Act. However the state's high court, the West Virginia Supreme Court of Appeals, employed somewhat of a "totality of factors" approach in *Mayo v. West Virginia Secondary School Activities Commission*, 672 S.E.2d 224, 232 (W. Va. 2008), determining that the commission, a voluntary association of secondary schools that oversees interscholastic athletics, was not a state agency. The court looked at five factors: (1) whether the organization's powers are substantially created by the legislature; (2) whether the governing board is controlled by the legislature; (3) whether the organization operates on a statewide basis; (4) whether the organization relies on public funds; and (5) whether the organization is required to deposit its funds into the state treasury. *Id.* Finding that the commission satisfied only the third factor, the court determined that the commission was not a state agency. *Id.* at 233. Although *Mayo* could be cited in future challenges regarding the FOIA, this case revolved around questions of administrative review and constitutionality of the commission's rules, not information access. And the court in this case still found legislative control to be "of more importance" than other factors, suggesting a continuing inclination toward a "prior legal determination" review. *Id.*

<sup>119</sup> See *supra* Part III.C.2.

<sup>120</sup> *Nuuanu Valley Ass'n v. City of Honolulu*, 194 P.3d 531, 539 (Haw. 2008).

<sup>121</sup> *Id.* However, the planning department was found to have violated its own rules by not maintaining and disclosing the records. *Id.* at 540-41.

<sup>122</sup> See *Balt. Dev. Corp. v. Carmel Realty Assocs.*, 910 A.2d 406, 427-28 (Md. 2006).

is exempted by statute.<sup>123</sup>

Sometimes the confusion resides within individual approaches. Even the mini-trend of adopting a “totality of factors” approach detected in this review shows variation among courts. The multi-part tests are meant to offer guidance to lower courts, agencies, and citizens, yet following their lead can prove complicated and confusing. The number and types of factors differ from state to state. Typically no one factor is determinative, but some state courts, like Ohio and Nebraska, look at whether all factors are satisfied, while others do not. Individual factors can be perplexing in and of themselves; if an agency receives public funding, for example, the determinative level of funding, whether it be total or half, might change from court to court.<sup>124</sup>

The over-arching challenge of determining information access in cases where documents or agencies are not explicitly public is still a difficult one for courts. As further indication of the struggle to identify determinative factors, quite often the cases described in this review prompted dissenting opinions among respective judiciaries. In at least eleven instances since 1999, justices took pains to contradict or critique the majority opinions of their courts, sometimes because access had been favored, sometimes because it had not, and once because a high court declined to review a case: “This case involves a significant question of coverage under the Freedom of Information Act (FOIA), specifically where the public sphere ends and the private sphere begins for purposes of this act,” Michigan Justice Stephen J. Markman wrote in a 2003 dissent from the state supreme court’s denial of an application for leave to appeal.<sup>125</sup> “There is, in my judgment, a significant question presented here whether the Policemen and Firemen Retirement System of the city of Detroit is a ‘public body,’ subject to FOIA. I would grant leave in order to address this question.”<sup>126</sup>

## V. CONCLUSION

The purpose of this review is not to call for the practice of blanketly subjecting contractors or quasi-governmental entities to public access laws. As some authors have noted, burdening such entities with too much mandated transparency can be dangerous because it potentially “opens the door for citizens to invade the privacy of organizations with which the government does business.”<sup>127</sup> Courts themselves have expressed a

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<sup>123</sup> See *Napata v. Univ. of Md. Med. Sys. Corp.*, 12 A.3d 144, 144–52 (Md. 2011).

<sup>124</sup> Gupta, *supra* note 14, at 11.

<sup>125</sup> *Detroit News, Inc. v. Policeman & Fireman Ret. Sys. of Detroit*, 662 N.W.2d 743 (Mich. 2003).

<sup>126</sup> *Id.* at 744.

<sup>127</sup> Ware, *supra* note 76, at 743.

reluctance “to permit piercing of the corporate veil.”<sup>128</sup> Indeed, none of these groups should be asked to sign away its rights simply because it has engaged with the public sphere.

But there is also a danger when inconsistency and mutability govern the legal path to information access across and within states. Faced with such varying and discordant precedents as outlined here, citizens might be discouraged from requesting records that are not explicitly public by statute, let alone challenging for access in court if their requests are denied. More clarity and consistency across states and courts would aid both public and private parties in understanding where the lines are drawn. Additionally, those lines should always be predicated on the belief that transparency is a cornerstone of democracy, and that citizens are entitled to information pertaining to the public good.

As such, non-public groups and/or their records should be subject to Freedom of Information laws in the specific instances and points of contact where the public good is at stake. None of the court approaches delineated by Feiser and still in use today amounts to a “public good” standard, in which the primary consideration is whether nondisclosure harms or impedes the general well-being of a citizenry. Roberts argues for this standard in general terms, writing that “information rights should generally be recognized where organizational opacity can be shown to have an adverse effect on the fundamental interests of citizens,”<sup>129</sup> but these words should be a concrete guiding principle for legislatures and courts in regulating and determining access.<sup>130</sup> Such an approach, most akin to the “nature of records” review used less and less frequently by courts, sidesteps the tangential considerations that preoccupy justices. These include possession of records, level of government funding. It also safeguards against an abuse of access laws by private entities simply seeking the secrets of a competitor.

In that vein, it is worth noting that being subject to a sunshine law means being protected by its exemptions as well as bound by its requirements. Information whose disclosure would constitute an invasion of privacy, a threat to public safety, a breach of confidentiality and, in many states, the exposure of a trade secret<sup>131</sup> would still generally be

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<sup>128</sup> *Wigand v. Wilkes*, 65 Va. Cir. 437, 439 (2004) (quoting *Dana v. 313 Freemason, A Condo. Ass’n*, 266 Va. 491, 502 (2003)).

<sup>129</sup> Roberts, *supra* note 9, at 244.

<sup>130</sup> The “public good” factor has been considered when weighing secondary elements of public access cases. The Supreme Court of Ohio, for example, denies attorney fees to plaintiffs when the court determines that their public-records claims lack merit and are primarily beneficial to the plaintiff “rather than the public in general.” *See State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist.*, 959 N.E.2d 524, 531 (Ohio 2011).

<sup>131</sup> Trade secret has been defined as consisting of “any formula, pattern, device, or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” *Hulsenbusch v. Davidson Rubber Co.*, 344

withheld. In the Talladega decision, for example, the Alabama Supreme Court deemed the water board subject to the Open Records Act, but remanded the case for further consideration of whether the requested personnel records were subject to an exemption under the act and therefore protected.<sup>132</sup>

The statutory right of public access is immutable, and the trend toward privatization is inevitable. Feiser concluded his 2000 article with the entreaty that “vigorous public and legal debate over the effect of privatization should continue, lest the freedom of information laws develop huge loopholes for governments to jump through in this new millennium.”<sup>133</sup> Nearly fifteen years later, this review suggests there is less reason to worry, but only slightly. Perhaps the trend of greater flexibility will continue and lead to a more uniform standard by which legislatures amend their sunshine laws and courts determine petitions for access. Perhaps the guiding principle will be whether shielding information harms or otherwise impacts the public good. That time has not yet come.

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F.2d 730, 734 (8th Cir. 1965). In 1989, Linda B. Samuels published a statutory review stating that twenty-six state FOI laws contained no mention or specific exemption of trade secrets. *See* Samuels, *supra* note 11, at 474–76.

<sup>132</sup> *Water Works & Sewer Bd. of Talladega v. Consol. Publ’g Inc.*, 892 So. 2d 859, 867 (Ala. 2004).

<sup>133</sup> Feiser, *supra* note 27, at 864.