

Caught in the Balance: Information Access in an Era of Privatized Public Higher Education

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Introduction

Public information laws at the federal and state level enshrine a citizen's right to petition public agencies for access to records and meetings related to the business of governance. Most such laws make no explicit mention, however, of private entities that do public work either instead of or in addition to what public agencies provide. As a result of vague or insufficient laws and ambiguous court decisions, information that might once have been accessible could potentially be withheld from the public because it has moved into the private domain. The tension between privatization and public access today is intensifying as public agencies increasingly contract out services, accept corporate sponsorship, create quasi-public entities or otherwise transact with private organizations and individuals. Nowhere is this more evident than at public colleges and universities, which are turning to privatization as state revenue, fiscal prioritizing and even the philosophical underpinnings of public education shift around them. In every state, student media journalists and advisers at public colleges should study relevant legislation and case law surrounding this issue, review contracts and communications with private entities and, when warranted, push for access when schools close the door on information that might once have been obtained with a simple request. This article is meant to provide a beginning for that process.

The Path to Transparency

Transparency is one of the ideological roots of democracy in the United States of America. In this country citizens are given the right to scrutinize the records of public agencies – to review written guidelines, examine finances, trace communications – as a means of keeping such agencies accountable and preserving public trust. Thomas Jefferson made this intent clear in 1803: “We 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” (Randolph 1829, 489).

President Lyndon Johnson echoed that sentiment when he signed the federal Freedom of Information Act (FOIA) into law on July 4, 1966, stating that “a democracy works best when the people have all the information that the security of the Nation permits” (Johnson 1966). To that end, transparency has been codified in the form of public access or “sunshine” laws

not only at the federal level but in all 50 states, the District of Columbia and some territories. The Freedom of Information Act and corresponding laws in each state, most of which were drafted in the post-Watergate 1970s (Cleveland 1987, 24), protect a citizen's right to petition for documents related to the operations of public governance, allowing for certain exemptions when privacy or security are at risk. (Sunshine laws also include Open Meetings acts, but this research focuses on records access.) States have various names for such laws, including the Freedom of Information Act in Michigan, the Public Records Act in California and the Access to Public Records Act in Indiana, and can have vastly different stipulations within those laws (Hearn 2004, iii). Federal and local government agencies are subject to such laws, but so are institutions of public education, from K-12 school boards up to state universities. 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 (Hearn 2004, iii).

The statutory definition of a public agency differs from state to state, but most state laws do not explicitly grant access to information that is in the hands of private entities. Public agencies or bodies are generally defined in governmental terms, making it unlikely that private firms performing government services would be included (Bunker 1998, 465; Frankel 2009, 1494; Gupta 2007, 2). For example, Section 552(f)(1) of the federal FOIA law defines an agency as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." The logic behind such a definition was self-evident when public and private institutions were more clearly delineated, when the balance between privacy and disclosure was easier to weigh. Agencies that are funded by taxpayer money in order to benefit or facilitate a community should be accessible and accountable to those taxpayers so that they can make informed decisions about their representatives. Private companies that must stay competitive in a capitalist system and serve a fundamental goal of generating revenue have a right to protect trade secrets, finances and other proprietary information. It is the blurring of the distinction, the breakdown of the delineation, that shadows public access today.

The Privatization Trend

In its broadest sense, privatization is defined as "the transfer of assets or services from the tax-supported and politicized public sector to the entrepreneurial initiative and competitive markets of the private sector" (Reed 2003, author's emphasis). Privatization gained new momentum during the recent economic downturn, but it first became popular in the 1970s and '80s, when bureaucracies 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 (Reed 2003; Savas 2005). Municipal leaders adopted competitive bidding, allowing private companies to compete for public services, and over time grew comfortable ceding larger and larger swaths of work to outside providers. The answer, many mayors came to feel, was not in bigger checks from federal government or higher taxes, but in "private enterprise, private capital, neighborhood empowerment, and a market-based economy" (Savas 2005, 3). Since then, most counties, cities, school districts and even some states have privatized assets or services in one way or another, from wastewater treatment to street lighting to tree-trimming to snow removal to parking meters to jails. And privatization can mean more than contracting out. Public-private partnerships such as economic development corporations and university foundations have also blurred the boundaries between the two domains. Such entities are arguably more beholden to access laws than contractors because they have characteristics of public agencies, and in fact are explicitly

covered in a few states, but the laws are still murky in most states. Some statutes include but only vaguely define quasi-public agencies, while others don't acknowledge them at all (Gupta 2007, 6).

Much has been written on the perks and pitfalls of privatization. The process, at least as far as its proponents are concerned, can transform the bureaucratic and financial morass of government monopolies into a competitive marketplace that fosters increased efficiency, faster delivery of services, higher quality, less potential for corruption and more choices (Savas 2005). Cash-strapped governments unburden themselves of employee payrolls and other expenses associated with any given service, while constituents are assured that the service will likely improve because the competitive process incentivizes providers to remain in good standing. Opponents contend that privatization actually ends up costing more taxpayer money in the end because by relinquishing control, governments give up the oversight required to keep service providers accountable, responsive and efficient (Rahamatulla 2009). As law professor Shirley Mays wrote in 1995, "The private corporation cannot be entrusted with the responsibility of maintaining and nurturing the rights of the individual... When decision-making, planning and programming that were under the auspices of the public government are transferred to the control of a private corporation, the city residents lose whatever recourse they previously possessed to provide redress for their grievances" (68).

Whether it is a panacea or plague for a government's bottom line, privatization is unquestionably part of public governance today, yet sunshine laws overwhelmingly have not acknowledged or accounted for the changed model. Even without a consideration of privatization, public access laws raise what educator and author Harlan Cleveland once called a "trilemma" of three overriding and somewhat conflicting principles: the public's right to know, the individual's right of privacy and the public institution's mandate to serve the public interest (23). Given a private entity's legitimate right to secrecy, the question of how to maintain the right of access is complex and potentially controversial, yet it is one in crucial need of addressing because information in the public interest hangs in the balance. As lawyer and journalist Harry Hammitt notes: "Federal and state laws that provide a right of access to government information are most effective when they encompass the largest universe of information. As governments continue an already significant drive towards moving traditional governmental functions to private entities, the universe of information shrinks accordingly" (9). A few authors have delved into this particular challenge as the privatizing trend continues, including journalist Rani Gupta, who compiled a 2007 special report for the Reporters Committee for Freedom of the Press titled "Privatization vs. the Public's Right to Know"; and attorney Craig Feiser, who has examined the interplay of privatization and sunshine laws both statutory and judicial, and both state and federal, for various law journals.

But nowhere has the tension between public access and private enterprise been more intense than at public schools and universities (Hammitt 2006, 6), and it requires particular vigilance. These institutions already face challenges in remaining transparent while effectively conducting business and preserving their mission, most notably when it comes to governing board functions, such as deliberations over controversial topics, research agreements, and presidential search and selection, especially concerning whether and when to identify applicants (Hearn 2004). Little has been written about the interplay of sunshine laws and public higher education regardless of the privatization trend (Hearn 2004, 1). The continuing strength of that trend and a steady decline in public funding suggest that the need to preserve the spirit of sunshine laws will only grow with time.

A Public Mission Redefined

The state-owned college is becoming a relic. Public higher education has become a prime

victim of state budget shortfalls, which totaled more than \$530 billion from 2009 to 2012, according to the Center on Budget and Policy Priorities. States like California and Michigan, struggling to close projected deficits, have winnowed their appropriations for certain public services, and for higher education in particular (Heller 2006, 29). According to the Center for the Study of Education Policy, state funding for higher education nationwide declined by 7.6 percent from fiscal 2010-11 to 2011-12.

But the decline in relative state support is not as ephemeral as a financial downturn, and it likely won't reverse course if and when the economy fully recovers. About 7.3 percent of state expenditures went toward higher education in 1977; by 2000 that portion was down to 5.3 percent. If the 1977 share had been maintained, public colleges would have received \$21 billion more in 2000 (Kane 2003, 3). This is certainly due in part to budget constraints, but is also part of a more lasting shift in fiscal priorities. State spending on higher education declined 14 percent between 1986 and 1996, while the portion for Medicaid nearly doubled and the portion for corrections rose more than 25 percent (Yudof 2002). With the cost of medical and pension priorities, corrections, transportation and other infrastructure needs pressing in, states "are unlikely to revive their former role as the primary funding agent for public higher education" (Douglass 2007, 251).

The shift has not only been in fiscal prioritizing, but also in the philosophical apportioning of responsibility for educating the nation's public college students. The Morrill Act, signed by President Abraham Lincoln in 1862, granted federal land to states as an endowment for public colleges that would focus on technical training and public service, and it led to the establishment of many of today's largest state research universities (Conley 2006, 154). In the years before and certainly after these land-grant universities came to be, public universities were considered part of a broad social mandate to open and equalize higher education in a way that private schools had not. The idea of federal incentives and state responsibility worked for more than a century in establishing a national system of public higher education (St. John 2006, 249). As the University of Wisconsin president put it in a 1910 commencement address, the "state owns the university; and every citizen feels himself to be a stockholder in that ownership" (Douglass 2007, 5).

During the Reagan era in particular, when public funding was reduced for everything except national defense, this philosophy shifted toward a belief that public universities benefit not the state or society at large, but instead the individual who receives the education (Berdahl 2000). As such, the financial burden or "ownership" has moved away from state and local municipalities and toward students. In 1980, fees and tuition accounted for about 15 percent of public university operating costs; by 2000 they grew to about 28 percent (Douglass 2007, 274). In 1994, tuition income overtook state appropriations as the largest revenue source for higher education for the first time since a mid-century mass expansion of public colleges and universities (Conley 2006, 158). As Donald Heller writes, "The era of universally low tuition in the public sector, an era that dominated most of the nation's history, is over and will not return" (29). Graham Spanier, president of Pennsylvania State University, said in 2005 that the end of this era and the onset of skyrocketing tuition was part of "public higher education's slow slide toward privatization" (Dillon 2005). At the time, only 12 percent of his college's budget came from state funds (Businessweek 2004).

Recent efforts to raise tuition and increase admission of out-of-state students, so-called "cash cows" who pay higher tuition (Denver 2011), have been met with media scrutiny and raucous student protests nationwide. Losing out on public appropriations, and unable to shift the burden entirely to students, public colleges are increasingly turning to private models and industry for salvation. This includes actively pursuing extramural support for research, courting private donors by offering naming rights and other perks, contracting out services such as bookstore

operations and food vending, forming start-up companies and ventures related to university research discoveries, and seeking more freedom from government authority (Douglass 2007, 252).

Research agreements between public colleges and private corporations have drawn particular attention because they spark fears of diminished intellectual freedom and commodification of the academic pursuit. Several books have articulated this anxiety, including *The University in Ruins* (1996) by Bill Readings, *University Inc.: The Corporate Corruption of Higher Education* (2005) by Jennifer Washburn, and *The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University* (2010) by Ellen Schrecker.

Research agreements highlight what is potentially at stake in the sometimes conflicting principles of public accountability and private enterprise, but these days it is not uncommon to find private companies behind any number of services on a public college campus. Some schools have taken especially bold steps toward a privatized model as they clutch at new revenue sources. In July 2004, the three-campus University of Colorado system won “enterprise status,” meaning it is no longer governed by the same rules as state agencies (Businessweek 2004; Kaplan 2009, 113). In Texas, Gov. Rick Perry filled the board of regents at all six state college systems with those who shared his vision that “colleges (should be run) like businesses whose customers are students” (Denvir 2011). UCLA’s Anderson School of Management decided to go completely private and charge students private-school level tuition (Denvir 2011).

The level of privatization at public educational institutions is important because it can directly affect information access and disclosure. In Pennsylvania, four universities including Penn State are considered “state-related” rather than state-owned, a legal status allowing them independent control while still bestowing public funding, which totaled \$600 million in 2008. Because of their status, these four universities are primarily exempt from the same public access laws to which the state’s community colleges and 14 State System of Higher Education universities are explicitly beholden (Schackner 2008).

What the Laws and Courts Say

As public colleges and universities continue to embrace the privatization trend, particular attention must be paid to how information access is affected on those campuses. In their respective publications, Feiser and Gupta examine the public information statutes and judicial interpretations that have shaped the level of access citizens are granted in situations of privatization. Their work is not aimed toward higher education but is instructive for student journalists, media advisers and journalism professors, as examining relevant state legislation and case law is a necessary foundation for both assessing a state’s codified commitment to transparency in the face of privatization, and a public college’s adherence to the spirit and letter of those standards.

Sunshine laws tend to govern the level of access public colleges and universities provide (Katz 2012). In most states, such laws are not on the side of those seeking information about privatized services or research because they expressly apply only to public agencies (Frankel 2009, 1494). That said, state legislatures continually debate the issue of government openness and transparency, and a small few have strengthened and broadened their laws as privatization grows. Florida has one of the strongest public access statutes, amended in 1975 to apply to a “public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency” (119.011(2)). In 1999, Georgia’s Open Records Act was amended to state that records maintained by a private entity on behalf of a 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” (50-18-70(a)). Connecticut expanded its law in 2001 to include anyone deemed a “functional equivalent to a public agency” (Public Act 01-169.1(1)(B)), and Rhode Island passed a law in 2006 to ensure that information access would not be hindered by privatization of services.

When it comes to public colleges and universities in particular, California took a significant legislative step toward transparency in September 2011, when Gov. Jerry Brown signed a bill that extended the state’s Public Records Act to the auxiliaries and foundations that conduct fundraising for the state’s two public college systems and community colleges (Lin 2011). A state senator drafted the bill after Cal State Stanislaus’ foundation refused to release a speaking contract with former Alaska Gov. Sarah Palin (Lin 2011). The college systems opposed the bill until the senator amended it to protect the identity of donors in all cases except when the donor receives something from the university valued at over \$2,500 or when the donor receives a no-bid contract within five years of the donation.

These are rare examples of explicit statutory affirmation 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. Relevant rulings have occurred in most but not all states, and those courts have decided the issue in “myriad and often confusing ways” (Gupta 2007, 10), resulting in a “hodgepodge of case law” (Edmonson 2011, 327). Even Feiser, the attorney who set about classifying each state’s judicial approach to access and privatization for a law review article published in 2000, said it was often difficult to determine what the courts meant by their rulings (Gupta 2007, 10). At the time of his work, courts in 34 states had ruled on such cases. Those that granted access did so by interpreting their respective state statutes’ definitions of “agency” and/or “agency records” to include more than just traditional government entities and/or explicitly public records (Feiser 2000, 826). He classified courts in 22 states as “flexible” in their approach to access and courts in 12 as “restrictive.” 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.” Sub-approaches among the restrictive states include “public funds,” “prior legal determination,” “possession” and “public control.”

Totality of factors: Under this approach, no one factor is enough to grant access to information that is not explicitly covered by the law. Courts weigh a number of factors and rule on a case-by-case basis. Six states have used this approach, according to Feiser: Connecticut, Florida, Maryland, North Carolina, Oregon and Kansas (837). Factors can include the level of public funding, whether the activity was conducted on public property, whether the private entity is performing a governmental function, whether the private agency was created by a public agency, and more (839).

Public function: This approach narrows the review to the question of whether an entity “is performing a public function,” rather than considering funding or other factors (845). Attorney and journalist Hammitt prefers this 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 (Gupta 2007, 12). Courts in 10 states have relied on this approach, according to Feiser, including Georgia, New York, Ohio, California, Louisiana, Missouri, Utah, Kentucky, Delaware and New Hampshire.

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, regardless of the entity that actually has possession of them (851). 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 ideally would be the philosophy of courts in every state and the substance of any amendments to public access laws, but courts in only six states have used this approach, including Colorado, Maine, Minnesota, Montana, Washington and Wisconsin.

The more restrictive approaches to interpreting public-access statutes in cases of privatization tend to involve consideration of only one factor in making a determination and result in either denial of access or access under very limited circumstances (853):

Public funds: Under this approach, courts allow access only if a specific level of public funding is evident. 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. Six states have employed this approach: Arkansas, Michigan, North Dakota, Indiana, South Carolina and Texas.

Prior legal determination: Courts in four states – Pennsylvania, Tennessee, New Jersey and West Virginia – have taken this approach. Feiser writes that this approach limits access to cases where the private entity “was created by the legislature or in some way previously determined by law to be subject to freedom of information laws” (857). 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 courts’ rulings for guidance.

Feiser applies the two remaining restrictive approaches to the two states left on his list of 34. He writes that the Iowa Supreme Court takes a possession approach, in that it strictly limits access to records that are in possession of a public entity (859). In Illinois, an appellate court has taken the public control approach, limiting access to cases in which the private agency is essentially controlled by a public agency (860).

In a March 2012 email to the author, Feiser said he hasn’t tracked relevant case law since his classifications were published in 2000. A May 2012 LexisNexis search of relevant cases and law reviews yielded a few noteworthy updates. For example, Massachusetts could join Iowa on the list of states that employ a restrictive “possession” approach. In *Harvard Crimson, Inc. v. President & Fellows of Harvard College* (840 NE2d 518, 521 (Mass. 2006)), the state Supreme 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. Tennessee courts rely on prior legal determination, but they seem to have moved toward a “public function” approach in defining a private entity that performs public services. In *Memphis Publishing Company v. Cherokee Children & Family Services* (87 SW3d 67 (Tenn. 2002)), the state Supreme Court ruled that a nonprofit contracting with the state for childcare services was not a government agency, but its records were state property because it “operates as the ‘functional equivalent’ of a governmental (state) agency.”

The hodgepodge of case law can sometimes come from a single court. In examining court rulings related to the state of Washington’s Public Records Act, Jeffrey A. Ware writes that the state Court of Appeals ruled in 2006 that a nonprofit provider of government-funded services was not subject to the act. One year later, the same court ruled that a for-profit corporation can be the functional equivalent of a government agency and therefore subject to the act. “Thus, the PRA’s definition of agency has been turned on its head through incremental actions,” Ware writes (742).

Conclusion

Tracking the sometimes confusing course of case law is an important part of assessing in-

formation access in an era of privatization, but that is not where examination or advocacy should stop. Any form that privatization takes on a public campus – outsourcing, fundraising, licensing, research agreements and other transactions – must be weighed against legally stipulated transparency by those with an interest in and understanding of the need for access. Emily Francke, executive director of Californians Aware, a nonprofit that assists journalists in advocating for open government in that state, says the growing influence of privatization represents one of “the big black holes when it comes to access to public agencies” today. Her organization scored a victory last year in pushing for the California bill on college auxiliaries and foundations, but it took many years of trying and two vetoes of previous incarnations by former Gov. Arnold Schwarzenegger. The larger question of privatization versus public access might be taken up by CalAware in coming years, Francke said, and perhaps is a ripe cause for journalists and other advocates of access.

There are any number of directions to take this issue on individual campuses. Student journalists and media advisers at public community and four-year colleges should find out more about the level of privatization in policing, vending, research sponsorship, management services, athletics, fundraising and other elements that facilitate the academic and extracurricular experience. Understand the legitimate need for privacy in some cases, especially as codified in sunshine law exemptions, but push back when it seems the exemptions or vague wording of the laws are being used to skirt access in situations of privatization. Request contracts and examine stipulations regarding information disclosure, being especially attuned to any reference to confidentiality. Keep in mind that once information makes contact with an agent of a public entity, it is typically subject to disclosure, such as in the case of emails between a college employee and a private contractor.

Also be aware of the potential privatization of physical space as well as information. This pertains to meetings, but it also matters when private contractors are hired to manage space that might once have been considered public. Frank LoMonte, executive director of the nonprofit Student Press Law Center, says he sees a showdown brewing over student journalists being told they can't take photographs in bookstores, cafes and other campus spaces now managed by private companies. He doesn't know of any court challenges yet, but he encourages students to test whether photos and video are restricted in spaces that once were clearly the domain of public institutions, and whether there is any discrimination between student journalists and other students.

Just as state support is unlikely to return to previous levels, the path toward privatization is unlikely to slow at public colleges and universities. This raises delicate questions of how to balance privacy against transparency, but student journalists and media advisers should remind officials and remember themselves the essential spirit of sunshine laws. Members of the press have a great responsibility, as the media functions “not only as a vocal advocate of greater public access to information about governmental decision-making, but also as an institutionalized adversary of powerful institutions in American society” (Hearn 2004, 5). Ignoring the changing responsibilities on their campuses – and the shift in accessibility that might ensue – would be a disservice to such responsibility.

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