The Implications of Privatization on Low-Income People
As governments put more reliance on private sector contractors to perform traditional government services, what becomes increasingly important is that legislators and policymakers consider the ramifications for access to information. When the federal Freedom of Information Act, or FOIA, and other state open-record laws came into being, a clearer line distinguished between functions government performed and others the private sector did. But the distinction has blurred today, and the likelihood that a private contractor has records pertaining to an important government function has increased. For the intent of access laws—access to information government maintains—to continue to prosper, litigators need to know how to approach these issues from a legal standpoint. But, even more important, legislators need to give thoughtful consideration to the conflicts among public records the private sector holds and create mechanisms to preserve access.

I. Background of the FOIA

The FOIA passed Congress in 1966 and became effective in 1967. It has frequently served as a model for state statutes, many of which passed several years to a decade later. But today, as many typical functions of government are being contracted out to the private sector, the model Congress created thirty-five years ago has not kept pace with changes in the way government does business. Of particular concern here is the extent to which records created or maintained by private contractors may or may not be accessible under open-record statutes.

Congress limited the scope of the federal statute to agency records of the executive branch. As a legal matter, this meant that records must be in the possession of an “agency,” and, beyond that, they must be “agency records.” While records private companies submit as the result of contract solicitations or because of regulatory requirements are subject to possible disclosure under the statute, Congress did not initially intend for the scope of the statute to reach the private sector directly.

Neither the term “agency” nor “agency record” had a clear definition in the original Act. However, Congress included the current definition of “agency” in amendments it passed in 1974. An agency is, as section 551(1) defines it, “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 legislative history of the 1974 amendments indicat-

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ed that this definition would consider such quasi-governmental agencies as Amtrak and the Corporation for Public Broadcasting as agencies. However, the definitional coverage is often far from clear. For instance, the Smithsonian Institution, which for many years has acted as if it were covered by the FOIA and its companion statute, the Privacy Act, and whose employees are largely civil servants, was, according to the U.S. Court of Appeals for the District of Columbia Circuit, not an agency because it did not fit into any of the definitional criteria.

II. Access to Contractor Records

The term “agency record” has no statutory definition, but the U.S. Supreme Court established criteria to identify such records in *Forsham v. Harris*. The case involved a request for raw data involved in a medical study conducted at a university under a federal grant. Although the U.S. Department of Health and Human Services had a right to the data, it had never exercised that right. Forsham argued that the records were “agency records” and that the department had a legal obligation to retrieve them and process them for disclosure. The Supreme Court disagreed. Instead it found that a record qualified as an “agency record” only if the agency had custody and control of the record; this meant, in essence, physical possession. Regardless of whether the agency had a right to possession, if it had not exercised that right, it did not control the records.

*Forsham* left open the question of whether an agency might exercise such significant control over the records through its supervision of a contract or grant that, for all intents and purposes, it possessed the record. However, this has proven to be a high threshold to meet, and only recently have courts begun to find factspecific situations in which agency control was sufficient to bring contractor records under the scope of the FOIA.

In *Burka v. Department of Health and Human Services*, Robert Burka requested a data tape pertaining to a teen-smoking survey a contractor conducted. In finding that the tape was an agency record, the court observed that the agency had considerable supervision over the contract, exercised significant control over the contractor’s use of the data, and relied on the data to set agency policy. Subsequently in *Chicago Tribune v. Department of Health and Human Services* the federal district court cited *Burka* with approval in ruling that the National Cancer Institute had exercised considerable control over the way in which a contractor analyzed data from a breast cancer study. The court ordered the agency to disclose the records to the *Chicago Tribune*.

While the FOIA community has supported legislative attempts to overturn *Forsham*, Congress has never shown interest in doing so. However, in a dispute over the wisdom of certain regulations promulgated during the Clinton administration, a group of Republican senators led by Sen. Richard Shelby (R–Ala.) was able to pass a research data provision that is not part of the FOIA itself. The short amendment provided that data generated under a federal grant was subject to the FOIA. The law applies only to grantees, not contractors, and the Office of Management and Budget issued interpretive guidance indicating that the amendment would apply only when the data were used in the creation of a regulation.

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6 *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508 (D.C. Cir. 1996).
III. Access Under State Law

States have taken several different approaches to the question of access to records of nongovernmental entities. Rather than look at the issue of who controls the record, some states, Connecticut for example, have looked at the function the nongovernmental organization performs. This test focuses on a determination of whether the outside organization is performing a function that the government would have to do in the absence of the nongovernmental body, or whether the outside entity exists solely to perform a function for the benefit of the governmental body. For instance, a bookstore run under contract with a university was found to be subject to the law in New York, formerly public hospitals now operated by nonprofit organizations have been found subject in Florida, and university foundations whose primary function is to raise money for their school and are frequently staffed by university employees have been found subject in several states such as Ohio and Michigan.9 On the other hand, the Red Cross was found not to be subject to the FOIA in Arkansas; the Connecticut Supreme Court reached the same conclusion concerning the Humane Society.10

States have also looked at the source of funding to determine FOIA coverage. Kentucky’s Open Records Act covers an entity that “derives at least twenty-five percent of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.”11 Other states have different formulas, often requiring at least 50 percent or a majority of funding from government sources. Such a formulation has been criticized because of the potential for inconsistent coverage. In application, an organization can be subject to the statute one year when it receives a sufficiently large government stipend but not be covered in a subsequent year because of the lack of sufficient government funding.

IV. Expanding the Reach of State Freedom of Information Statutes: The Connecticut Example

One state on the cutting edge of the access to records issue is Connecticut. On July 6, 2001, Connecticut Gov. John G. Rowland signed into law an amendment to the state’s Freedom of Information Act; the amendment represents a unique attempt legislatively to address the issue of public information access to the records of privatized entities that administer or manage programs formerly run by government agencies. As revised, the statute employs a definitional approach to allow the public to obtain certain records of organizations that essentially act in the stead of state government, by contracting to perform specified types of “governmental functions.”12 This statute may eventually serve as a model for extending the reach of state freedom-of-information laws to the records of these privatized contractors.

The revisions contained in Public Act 01-169 expand upon the existing framework of Connecticut’s Freedom of Information Act. Connecticut’s law allows a basic right of public access to “public records” that “public agencies” maintain:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to inspect such

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12 Connecticut Freedom of Information Act, CONN. GEN. STAT. §§ 1-200 to 1-241 (2001); 2001 CONN. ACTS. 01-169 §§ 1, 2 (Reg. Sess.).
The state law broadly defines “public agencies” to incorporate state and local governmental entities and their related subdivisions. The statutory reference to “public records or files” in turn encompasses virtually all forms of documents related to a public agency’s “conduct of the public’s business.” Read together, the express statutory language of the two sections of the statute conveys an apparent intent to subject a fairly extensive grouping of public agencies, both state and local, to the disclosure requirements related to an equally extensive array of public documents.

A. Judicial Decisions Leading up to the Connecticut Amendment

The judicial interpretation of the statutory definition of agencies bound by the state Act began in 1980 with the Connecticut Supreme Court’s addressing, as a matter of first impression, “the significant question of what may constitute a ‘public agency’ for purposes of the FOIA.” The court dealt with a request for disclosure of financial documents from the Woodstock Academy, which the legislature had established by special charter to operate a school in a town without a public high school of its own. Pursuant to statute, the town annually designated the academy as the secondary educational facility for its children and paid their tuition fees from public taxation funds. Rejecting a “formalistic” definition of “public agency” and looking for guidance to federal case law, the Connecticut Supreme Court adopted a four-part “functional equivalent” test: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.

The court found each of these conditions satisfied in the case of the academy. Its provision of public education constituted the performance of a basic governmental function; it was virtually completely publicly financed; the state board of education examined and certified the school; and it was created by statute for the sole purpose of maintaining a public school for town inhabitants. Accordingly the court found the academy to be bound by the disclosure requirements of the state FOIA.

Subsequent Connecticut judicial applications of the “functional equivalent” test for determining public agency status took a more restrictive approach. For example, in Connecticut Humane Society v. Freedom of Information Commission, the Connecticut Supreme Court held that, although a humane society arguably performed functions traditionally relegated

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14 Pub. Act 01-169, Conn. Gen. Stat. § 1-210(a) (2001); a “public agency” refers to “any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only [with] respect to its or their administrative functions . . . .” Id. § 1-200(1).
15 Conn. Gen. Stat. § 1-200(5) (2001). “Public records or files” refers to “any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any other method.”
17 Id. at 546–47.
18 Id. at 553–54 (citations omitted).
19 Id. at 554–55.
to government and authorized by statute, as a “hybrid public/private entity” it was nevertheless not to be considered a public agency under the FOIA, due to a lack of government-based funding or state control or regulation.20 Similarly the Connecticut Appellate Court in Domestic Violence Services of Greater New Haven Inc. v. Freedom of Information Commission held that a nonprofit domestic violence shelter and service subcontractor was not a FOIA public agency.21 Despite its performance of a government function, the entity “has no power to govern, to regulate or to make decisions affecting government; it provides advocacy services to the victims of domestic violence pursuant only to its contractual obligation.”22 This may have set the stage for future problems in monitoring private entities doing business with state government.

Most recently, in the case of Envirotest Systems Corp. v. Freedom of Information Commission, the Connecticut Appellate Court employed the functional equivalent test to decide the public agency status of a for-profit corporation administering the state’s statutorily mandated automobile emissions inspections program pursuant to a $25 million contract with the department of motor vehicles, and ultimately sparked a legislative response. The Envirotest court found the corporation’s status as a contractor with the state to be especially significant in holding that none of the four prongs of the functional equivalent test was met.23 First, the court determined that the Envirotest corporation did not perform a governmental function.24 Citing Domestic Violence Services and Connecticut Humane Society, the court observed that while the corporation “performs a governmental function in that it provides automobile emissions inspections for the public,” it did so not by statutory mandate, but merely by virtue of a contract with the state.25 The court similarly found the second prong—the level of government funding—to be unmet because state payments made to the corporation simply constituted “consideration for the services it provided pursuant to a contract,” not “an allotment of government funds.”26 Finally the court found the third prong of the functional equivalent test, which assesses the extent of government involvement or regulation, to be also unmet because the state department of motor vehicles “did not control the day-to-day operations” or “exert[ed] direct, pervasive or

In a move aimed at reversing the impact of the Envirotest holding, the Connecticut General Assembly enacted Public Act No. 01-169, which provides an alternative version of the functional equivalency test the state courts used.

20 Conn. Humane Soc’y v. Freedom of Info. Comm’n, 218 Conn. 757, 761 (1991). The Connecticut Humane Society court did hold that the functional equivalent test was to be applied case by case and that no single factor was to be considered conclusive. Id. at 760–61.


22 Id. at 475.

23 Envirotest Sys. Corp. v. Freedom of Info. Comm’n, 59 Conn. App. 753 (2000). The court dealt primarily with the first three prongs of the test. The parties agreed that the fourth prong was not met since the Envirotest Corp. had not been a governmental creation. Id. at 762.

24 See note 18 and accompanying text supra.


26 See note 18 and accompanying text supra; Envirotest, 59 Conn. App. at 758–59 (citing Domestic Violence Servs., 47 Conn. App. at 475–76, 704 A.2d at 833) (footnote and further citation omitted).
continuous regulatory control” over the corporation’s business.27 The Envirotest holding was indicative of a continuing trend of Connecticut decisions that essentially exempted from FOIA disclosure requirements various entities doing contractual business with state government. That the contractor was actually performing a service or function traditionally accomplished by state government was in itself insufficient. Without an additional showing of a more extensive interrelationship between the state and the contractor—as a requirement mandated by statute or regulation, or by public funding ties standing apart from the contract itself—the private contracting entity would not easily be held to be the functional equivalent of a public agency.

B. The Connecticut Legislative Response

During the 2001 legislative session, in a move aimed at reversing the impact of the Envirotest holding, the Connecticut General Assembly enacted Public Act No. 01-169, which provides an alternative version of the functional equivalency test the state courts used.28 The statutory amendment uses the “governmental function” prong of the test as a trigger actually to focus upon the status of government contractor instead of disregarding it in order to determine whether an entity administers or manages a public agency program in a manner that obligates it to comply with the disclosure requirements of the Connecticut FOIA. Instead of downplaying the importance of the contractor’s role, the contract now forms the basis of assessing which entities must comply with the FOIA. For purposes of the FOIA, section 2 of Public Act No. 01-169 specifically emphasizes the existence of a contractual relationship between private entities and public agencies. It states that each contract in excess of $2.5 million between a public agency and a person “for the performance of a governmental function” must now contain two provisions. First, the contract must allow the public agency to receive copies of records and files related to the private entity’s performance of that governmental function. Second, the contract must “indicate that such records and files are subject to the Freedom of Information Act and may be disclosed by the public agency pursuant to the Freedom of Information Act . . . .”29

Instead of allowing the contract-based relationship to form the basis for private entities to escape the obligations of the Connecticut FOIA, the amended Act now actually focuses on the document itself. Major contracts in excess of $2.5 million must now specifically allow the transfer of documents to the public agency, which is in turn obligated to disclose them under the FOIA. These records must be related to the entity’s performance of a “governmental function.”

The contractual obligation to disclose records is now specifically tied to the performance of a “governmental function.” Section 1 of Public Act No. 01-169 in turn adds to the Connecticut FOIA a new definition of what this term now means:

“Governmental function” means the administration or management of a program of a public

27 See note 18 and accompanying text supra; Envirotest, 59 Conn. App. at 761, (citing Hallas v. Freedom of Info. Comm’n, 18 Conn. App. 291, 296, cert. denied, 212 Conn. 804 (1989)). The court further quoted the U.S. Supreme Court decision in Forsham v. Harris, 445 U.S. 169, 180 (1980), for the proposition that, “absent extensive, detailed, and virtually day-to-day supervision,” a private entity receiving federal funding grants is not subject to the federal Freedom of Information Act, or FOIA.

28 Government Administration and Elections Committee, Report on Bills Favorably Reported by Committee, File No. 438, Bill No. H.B.-6636, Connecticut General Assembly (2001 Reg. Sess.), available at www.cga.state.ct.us/2001/jfr/h/2001HB-06636-R00GAE-JFR.htm; the amendment does not discard the judicially adopted version of the functional equivalent test. It revises the statutory definition of “public agency” contained in CONN. GEN. STAT. § 1-200(1) to incorporate any otherwise defined “person” that is “deemed to be the functional equivalent of a public agency pursuant to law.” 2001 CONN. ACTS. 01-169 § 1 (Reg. Sess.).

29 2001 CONN. ACTS. 01-169 § 2 (Reg. Sess.).
agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person’s administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency.

“Governmental function” shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.30

This definition both incorporates and modifies elements of prior Connecticut judicial interpretations of the functional equivalent test.

As an initial proposition, the statute now separates out the “governmental function” element of the judicially adopted functional equivalent test and makes it the overall focal point of the determination of which entities are subject to the statute. The “mere provision of goods or services” to a public agency, without more, will not trigger the governmental function definition.31 Instead the essential threshold element of governmental function is the lawfully authorized “administration or management” of a public agency program. The statute is now meant to refer specifically to entities that actually run a governmental program.

The amendment then attaches this threshold showing of administration or management to a three-part test, each component of which must be met. First, the entity must receive public agency funding for the purpose of running the program. Since the governmental function definition refers to FOIA disclosure requirements incorporated into public contracts, this element should now refer to the funds the entity receives pursuant to the contract, not just to separate government funding allotments given to the entity.32 Second, the public agency must be regulating or be otherwise involved “to a significant extent” in the entity’s administration or management of the program. This showing does not necessarily require, however, a level of a “direct, pervasive, continuous or day-to-day” inter-relationship between the parties. The public agency does not have to be closely controlling the operations of the private entity.33 Third, in connection with the program administration or management, the private entity must participate in formulating “policies or decisions” which bind the agency. This last element truly reflects the position of the private contractor as a decision maker standing in the place of the public agency and conducting policy, making decisions, participating in adjudications, and otherwise performing the functions formerly reserved to state government but now delegated by contract.

V. Conclusion

Read together, the provisions of Public Act No. 01-169 reflect a legislative attempt to allow more public disclosure by acknowledging the increasing presence of private contractors doing business with state government and running, by virtue of those contracts, what used to be state programs. The reach of the newly amended Connecticut FOIA should now extend, for example, to contractors performing

30 2001 CONN. ACTS. 01-169 §§ 1–2 (Reg. Sess.) (codified as CONN. GEN. STAT. § 1-200(11)). The Connecticut FOIA defines “person” as a “natural person, partnership, corporation, limited liability company, association or society.” CONN. GEN. STAT. § 1-200(4).
31 Certain agreements between state agencies and foundations are also exempted from the FOIA. 2001 CONN. ACTS. 01-169 § 3 (Reg. Sess.).
32 See Envirotest, 59 Conn. App. at 759–60; see also note 23 and accompanying text supra.
33 See Envirotest, 59 Conn. App. at 761; see also note 27 and accompanying text supra.
child care and disability eligibility decisions on behalf of state social service agencies, entities running public assistance employment service programs for the state, and the like.

The new statute presents several problematic questions, however. For example, the relatively high $2.5-million contractual threshold may allow a significant number of government contractors to escape the reach of the Connecticut FOIA statute. Only those entities running highly funded programs will be compelled to comply. Additionally, the interplay of other sections of the state FOIA statute with the new statute is unclear. For-profit corporate entities will presumably still assert that “trade secrets” are exempt from FOIA disclosure, despite the mandate of the new statute to open the books of contractors doing the state government’s business. Nevertheless, the Connecticut statute may now serve as an example of how some private contractors can be expressly brought within the purview of FOIA disclosure requirements.

Federal and state open-record laws can be useful tools for accessing records of contractors performing traditional government functions as the result of the trend toward privatization. Generally these statutes were not designed to get at records held outside government, and so access rights continue to be dependent on an analysis of control issues either through physical custody, close supervisory control, or funding. Other states should look closely at Connecticut’s recent privatization statute and consider it as a basis for needed changes in their own laws.