Coates' Canons Blog: When Do Government Transparency Laws Apply to Private Entities?

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Article: http://canons.sog.unc.edu/?p=4676

This entry was posted on June 01, 2011 and is filed under Open Government, Open Meetings, Public Records (General)

A city contracts with a private company to collect solid waste within the city. If not for this contract, city employees would carry out this function. The only connection between the city and the company is the contract. It's a small company and the contract accounts for a significant portion of its revenue. Is the private company subject to the public records law, the open meetings law, or other transparency requirements that apply to public agencies? The answer is clearly: no. The same city contracts with a nonprofit organization that promotes arts in the community. If not for this contract, city employees would carry out this function. The city appoints three of the five members of the nonprofit board. The city owns the property the nonprofit uses for its offices, and leases it to the nonprofit for nominal consideration. The nonprofit receives most of its funding from the city. Is the nonprofit organization subject to the transparency laws? The answer is probably: yes.

Courts around the country have applied transparency requirements to private entities under several theories. Some jurisdictions focus on the fact that the private entity is carrying out a governmental function. Others base decisions on whether the government exercises such control over the private entity that it is should be treated as an agency of the government, rather than as an independent contractor. (For a summary of cases in this area, see, David M. Lawrence, **Public Records Law for North Carolina Local Governments,** pp 5-10.) The case law in North Carolina focuses on factors demonstrating extensive control, rather than on the exercise of a governmental function. Although there is no bright line and public/private arrangements vary significantly, it's useful to review the key cases and consider what factors make it more or less likely that a private entity will be subject to government transparency laws.

The leading case in North Carolina is *News & Observer Publishing Co. v. Wake County Hospital System, Inc.,* 55 N.C. App. 1 (1981). That case involved a hospital that started out as a public authority and was later transferred to a private, nonprofit corporation – the Wake County Hospital System, Inc. The case arose when the Hospital System settled several lawsuits and refused a request from the newspaper to view the settlements and other hospital records. The question before the court was whether the Hospital System was an agency of county government within the meaning of **G.S. 132-1** of the public records act. The court concluded that the Hospital System was subject to the public records act because Wake County exercised significant oversight and control of the Hospital System, and it functioned as an agency of the county rather than as an independent contractor.

The decision establishes a few important principles, but no bright line test. Clearly, the corporate structure itself is does not determine the outcome. Simply transferring a public function to a private entity does not necessarily avoid the application of the public records law. A court will look at the details of the actual relationship between the government and the private entity. Nine key facts from the News & Observer case are regularly recited as factors to be considered in evaluating this issue. Here they are: The articles of incorporation provided (1) that upon its dissolution, the corporation would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the county's approval. The lease agreement provided (3) that the corporation would occupy premises owned by the county under a lease for $1.00 a year; (4) that the county commissioners would review and approve the corporation's annual budget; (5) that the county would conduct a supervisory audit of the corporation's books; and (6) that the corporation would report its charges and rates to the county. The operating agreements also provided (7) that the corporation would be financed by county bond orders; (8) that revenue collected pursuant to the bond orders would be revenue of the county; and (9) that the corporation would not change its corporate existence nor amend its articles of incorporation without the county's written consent. *See News & Observer,* 55 N.C. App. at 11-12.

Other cases have reached similar results focusing on the type and extent of control by the government. The markers of control are so much a part of the analysis that in a case where factors indicating significant control originally existed, but

were removed by the time the case came to trial, the court held that the public records and open meetings laws did not apply. *See* Chatfield v. Wilmington Housing Finance & Development, Inc., 166 N.C. App. 703 (2004)(rejecting arguments based on the "governmental function" analysis).

Unfortunately, the cases don't really help determine which factors are most important, or what combination of factors must be present for a private entity to be subject to public laws. Consider, for example, the various arrangements between city or county governments and volunteer fire departments (VFDs). Some VFDs are explicitly part of city or county government, while others are independent nonprofit organizations that operate under contracts with public agencies. Most VFDs receive the bulk of their funds from these contracts, and in many cases, they are supported by taxes levied specifically for the purpose funding the VFD. On the other hand, there is rarely the degree of control and oversight of a VFD that there was in the News & Observer case. Applying the factors in the case law, it seems likely that most VFDs would not be considered agencies of local government, though the combination of dedicated tax funds and the governmental nature of the function might cause a court to reach a different conclusion. Similar situations exist with economic development commissions and other nonprofit organizations that carry out functions for local government with a mix of funding, appointment, staffing, and fiscal controls. Each must be considered in light of the factors enunciated in the case law.

The North Carolina cases that address this issue involve only the application of the public records and open meetings laws. It's possible that a court would apply a similar analysis if a case were to arise under the bidding laws, conflict of interest laws or budgeting laws, although it's important to note that each of these has its own distinct set of definitions and purposes, which would affect the analysis. The court in *Chatfield* actually based its holding as to the open meetings law on the fact that the nonprofit, under its bylaws, was not appointed by the city, and therefore did not meet the definition of "public body" under the open meetings law. The case leaves open the question of whether the nine factors in the News & Observer case apply to an analysis under the open meetings law.

The interpretations from our courts focus on the extent of control over private agencies and not necessarily on how much public money is involved or whether the function is one that is considered governmental in nature. The views of taxpayers may be different. Indeed, citizens or the press may demand more transparency than the law requires.

Must the matter be left to the courts? Certainly not. Local governments may include requirements for accountability in the contracts they make with private organizations. A bill pending in the state legislature would create accountability for nonprofit organizations that receive federal, state or local funds and other forms of support. The bill (**HB 572**), would require nonprofits to provide general public access to their latest annual financial statements, as well as details about the amount of public funds received and how those funds were used.

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