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Dark Clouds: Can Government Agencies Evade Public-Records Laws by Storing Documents in Privately Owned Digital Portals?

Frank D. LoMonte *

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Abstract

This article examines government officials using privately owned communication portals to exchange messages, asserting that documents do not become public records if government agencies avoid taking possession of them. This may be defensible under the literal wording of some state public records statutes, but it is inconsistent with the remedial good-government purposes of those laws. The use of private “cloud portals” raises tricky practical problems, since a private custodian may be beyond the reach of state FOI statutes or records-retention requirements. For this reason, the author recommends, states should consider banning public employees from conducting business on platforms that are not built for retaining and producing their communications.

* Frank D. LoMonte, J.D., is an adjunct instructor at University of Georgia School of Law and newsroom legal counsel for Cable News Network. He is former director of the Brechner Freedom of Information Project and Student Press Law Center. He prepared this article in his role as a university researcher and not as a representative of any employer. He can be reached at flomonte@uga.edu.

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I. Introduction

President Bill Clinton famously became an object of ridicule for his slipperiness when he testified that whether his attorney had misled a grand jury about Clinton’s adulterous relationship with a White House intern “depends on what the meaning of the word ‘is’ is.”¹ While this exchange seems laughably hair-splitting, government agencies regularly offer their own Clinton-esque evasion to concerned citizens who use freedom-of-information laws to see the records that their government has: It depends on what the meaning of the word “has” is.

Laws enabling the public to inspect government records are regarded as foundational to a well-functioning democracy.² However, reminiscent of a playground game of “keep away,” government agencies increasingly are taking advantage of technology to withhold records from inquisitive requesters by claiming—in sophistry reminiscent of Clinton’s—that they do not actually *possess* particular documents, because the records are stored in a digital “cloud” operated by a third party. Indeed, government decision-makers have taken to using virtual storage methods for the express purpose of evading laws that require agencies to disclose documents in their custody. No custody, the argument goes, no disclosure.

In one especially vivid example, the presidents of some of the nation’s largest universities jointly agreed to use a secure online portal to correspond secretly about their plans to resume intercollegiate football in 2021 after the COVID-19 pandemic shut down in-person activities in 2020.³ Although emails exchanged by state university presidents normally would qualify as open records subject to public inspection, journalists were rebuffed when making freedom-of-information requests for messages posted to the privately maintained Big Ten conference portal.⁴

This Article looks at the issue of whether government agencies may legitimately ignore requests for public records on the basis that the records never came into the physical possession of agency employees. It concludes that interpreting open-records laws in such a narrowly literal way would undermine the purpose of these disclosure statutes, which are supposed to be generously interpreted in favor of access to give effect to their remedial good-government intent.

Section II explains the workings of state freedom-of-information (FOI) laws: Why they exist, how they are interpreted, and what records they cover. Section III turns to the question of whether the method of transmitting or storing records is decisive in determining their status for FOI purposes. It catalogs the varying ways in which state open-records laws define the scope of a public document, and examines how those varying definitions may determine whether cloud-stored documents are within reach of FOI requesters. Section IV focuses specifically on whether records that are accessible to government officials online, and used in government business, can still be withheld if the agency avoids actually taking custody of them. Starting with a signature case decided by a Florida appellate court involving a college football scandal and the NCAA, Section IV examines how courts have adjudicated this new breed of “FOI-in-the-cloud” disputes. It concludes that most, though not all, cases have been resolved in favor of the requester, consistent

¹ Timothy Noah, *Bill Clinton and the Meaning of “Is”*, SLATE (Sept. 13, 1998), <https://slate.com/news-and-politics/1998/09/bill-clinton-and-the-meaning-of-is.html>.

² See Peter Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public’s Right to Know*, 5-SUM COMM. LAW. 17, 17-18 (2007) (“An informed citizenry is a necessary prerequisite to any meaningful democracy, and access to public records provides a critical source of information to citizens about the conduct of government.”).

³ Emily Giambalvo & Rick Maese, *Big Ten presidents kept return-to-school, football communications out of public eye*, WASH. POST (Mar. 5, 2021), <https://www.washingtonpost.com/sports/2021/03/05/big-ten-presidents-portal-football-covid/>.

⁴ *Id.*

with the principle that the legal status of documents should not depend on how and where they are stored. Section V concludes that the majority, and better, view from the first generation of “cloud portal” cases is that government agencies cannot frustrate the purpose of FOI law by making form-over-substance arguments that they do not “have” the documents that they view online. It recommends that, to the extent that some state FOI laws are unclear on this point, lawmakers should work toward a nationally consistent definition in favor of maximizing access. Consistency, the article concludes, is particularly important in the context of economic development, where lack of uniformity can produce inequities as states generate competing bids—some public and some not—in pursuit of the same company.

II. Public records 101

Every state and the federal government maintain statutes that entitle the public to inspect and copy records held by public entities.⁵ These laws go by varying names—open-records acts, public-records acts, freedom-of-information acts—but are often referred to colloquially as FOI laws.⁶ The purpose of these laws is to give the public a window into the operations of government, which is understood to have salutary effects both in producing better-quality government decisions and in assuring the public that government is run honestly and fairly.⁷ Laws entitling the public to information have been lionized as “[o]ne of the greatest checks on government inefficiency or corruption(.)”⁸ In more pedestrian fashion, the public uses government records in all manner of workaday decisions, including deciding what a house is worth or whether a particular licensed professional is trustworthy to hire.⁹ Courts have long insisted that FOI laws should be liberally construed, so that doubtful judgment calls are resolved in favor of access.¹⁰ These statutes are

⁵ Helen Vera, “Regardless of Physical Form”: Legal and Practical Considerations Regarding the Application of State Open-Records Laws to Public Business Conducted by Text Message, 32-SPR COMM. LAW. 24, 24 (2017).

⁶ See Justin Cox, *Maximizing Information’s Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 413 (2010) (observing that “state FOI laws go by a multitude of names”).

⁷ See ARK. ST. ANN. § 25-19-102 (“It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy.”); 29 DEL. C. § 10001 (“It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic.”); HAW. STAT. § 92F-2 (“In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.”).

⁸ Michelle Bush Kimball, *Law Enforcement Records Custodians’ Decision-Making Behaviors in Response to Florida’s Public Records Law*, 8 COMM. & POL’Y 313, 313 (2003).

⁹ See Brian N. Larson & Genelle I. Belmas, *Second Class for the Second Time: How Commercial Speech Doctrine Stigmatizes Commercial Use of Aggregated Public Records*, 58 S.C. L. REV. 935, 936 (2007) (enumerating ways consumers depend on access to government records).

¹⁰ See *Morris Pub. Group, LLC v. Florida Dept. of Educ.*, 133 So.3d 957, 960 (Fla. Dist. Ct. App. 2013) (“If there is any doubt as to whether a matter is a public record subject to disclosure, the doubt is to be resolved in favor of disclosure.”); *Rathmann v. Bd. of Dirs. of the Davenport Cmty. Sch. Dist.*, 580 N.W.2d 773, 777 (Iowa 1998) (“The right of persons to view public records is to be interpreted liberally to provide broad public access to public records.”); see also IND. STAT. § 5-14-3-1 (stating that FOI statute “shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record”).

essential for the public to have some visibility into the processes of governance, because the Supreme Court has refused to recognize any constitutionally based right of access to information from the government.¹¹

The mechanics of these laws are straightforward: Any member of the public may request the opportunity to inspect and copy a public record from its government custodian, for any reason.¹² The record must be furnished unless the agency can point to an exemption that excuses compliance; for instance, records that might compromise ongoing police investigations are widely recognized as exempt from FOI requests.¹³ Agencies cannot be forced to generate compilations of information that are not already in existence; in other words, FOI laws require agencies to produce responsive records they already have, not to create new ones.¹⁴

A directive for agencies to make their records available to the public raises obvious threshold definitional questions: What is an “agency,” and what is a “record?” The federal Freedom of Information Act provides that covered agencies include “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ... or any independent regulatory agency,”¹⁵ which conspicuously excludes Congress or the courts. But states are free to adopt their own formulations for records held by state or local government entities.

At a minimum, “agency” universally includes executive-branch departments, answerable at the federal level to the White House and at the state level to the governor. This includes state colleges and universities, which—with rare exceptions—are treated as governmental entities for purposes of FOI law.¹⁶ Beyond the executive branch, the scope of FOI laws varies. Some states, for instance, cover their legislative bodies and others exempt them.¹⁷ Two states, Massachusetts

¹¹ See Kevin M. Blanchard, *From Sunshine to Moonshine: How the Louisiana Legislature Hid the Governor’s Records in the Name of Transparency*, 71 LA. L. REV. 703, 708 (2011) (observing that, under Supreme Court precedent, “the people have no affirmative, federal constitutional ‘right to know’ what is contained in the records” of public officials).

¹² See *Legal v. Monroe Sch. Dist.*, 423 P.3d 915, 920 (Wash. App. 2018) (stating that government agencies are “forbidden to inquire into the purpose of a [records] request” and “cannot examine the nature of a requestor’s interest”).

¹³ See Christina Koningsor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 663 (2023) (explaining that police records are often concealed from public inspection, based on the rationale that disclosures “will either allow bad actors to circumvent or thwart police investigations, or they will interfere with or hinder criminal prosecutions”).

¹⁴ See Steve Zansberg, *Cloud-Based Public Records Pose New Challenges for Access*, 31 COMM. LAW. 12, 16 (2015) (“[T]he government is not required to generate a new record in response to a records request, nor to provide access to a record that no longer exists.”).

¹⁵ 5 U.S.C. § 552(f)(1).

¹⁶ See David Pritchard & Jonathan Anderson, *Forty Years of Public Records Litigation Involving the University of Wisconsin: An Empirical Study*, 44 J.C. & U.L. 48, 58 (2018) (“Media organizations make frequent use of Wisconsin’s public records law for the purpose of obtaining newsworthy information about university affairs.”); *Red & Black Publ’g Co. v Board of Regents*, 427 S.E. 2d 257 (Ga. 1993) (holding that state Board of Regents and its universities are state entities for purposes of Georgia Open Records Act); *Carter v. Alaska Pub. Employees Ass’n*, 663 P.2d 916 (Alaska 1983) (deciding that state university was “agency” for purpose of public records disclosure statute). *But see* Adam Smeltz, *Stricter Right-to-Know Law may have helped in PSU case, advocates for transparency argue*, PITT. TRIB. (Dec. 10, 2013), <https://archive.triblive.com/news/pennsylvania/stricter-right-to-know-law-may-have-helped-in-psu-case-advocates-for-transparency-argue/> (noting that Pennsylvania exempts major state universities from compliance with FOI law, contrary to prevailing practice elsewhere).

¹⁷ See Ryan Mulvey and James Valvo, *Opening the State House Doors: Examining Trends in Public Access to Legislative Records*, 1(2) J. CIVIC INFO. 17, 18 (2019) (reporting results of survey showing that twelve states affirmatively exempt their legislative branches from FOI requests).

and Michigan, even exempt the governor's office.¹⁸ State approaches vary when dealing with quasi-governmental organizations, such as privatized prisons, with some states treating them as public for FOI purposes and others as private.¹⁹ States with an expansive view of FOI law extend the duty of compliance to private entities that perform government functions or stand in the shoes of government agencies.²⁰

As tricky as it has been for legislatures and courts to decide which agencies are obligated to open their records for public inspection, defining the scope of covered "records" has been trickier still.

III. The medium and the message

What constitutes a "record" available for the public to inspect seems like a straightforward question. In practice, it has been anything but straightforward. Courts have regularly been asked to interpret states' varying statutory definitions of "record" to decide whether a particular document qualifies as a public record for access purposes. The common denominator of these statutes is that a document must pertain to the transaction of government business to qualify as a public record.²¹ But beyond that broad point of agreement, states diverge as to how broadly or narrowly they define a public record.²²

Alabama's statute is perhaps the most skeletal, entitling citizens to inspect "any public writing of this state."²³ Others are more detailed; a typical formulation is that documents qualify

¹⁸ Paul Egan, *Governor, lawmakers off limits under public records law*, DETROIT FREE PRESS (Sept. 21, 2014), <https://www.freep.com/story/news/local/michigan/2014/09/21/michigan-foia-law-exempts-governor-legislature/15881735/>.

¹⁹ For instance, courts have reached diverging results as to the FOI status of privately incorporated foundations affiliated with otherwise-public state universities. *Cf.* *Transparent GMU v. George Mason Univ.*, 835 S.E.2d 544 (Va. 2019) (finding university foundation to be beyond reach of state FOI law); *State Bd. of Accounts v. Ind. University Found.*, 647 N.E.2d 342 (Ind. App. 1995) (same), *with* *East Stroudsburg Univ. Found. v. Office of Open Records*, 995 A.2d 496 (Pa: Commonw. 2010) (concluding that university foundation's activities were "governmental," making its records subject to public inspection); *Gannon v. Bd. of Regents*, 692 N.W.2d 31 (Iowa 2005) (same).

²⁰ *See, e.g.*, *Human Rights Defense Center v. Correct Care Solutions, LLC*, 263 A.3d 1260 (Vt. 2021) (holding that private contractor providing medical care to prison inmates was acting as "instrumentality" of state, performing traditional state functions, and thus subject to state FOI law); *State v. Beaver Dam Area Development Corp.*, 752 N.W.2d 295 (Wis. 2008) (deciding that privately incorporated development authority was subject to state FOI law because it was subsidized by public tax monies and otherwise operated as extension of city government). *But see* *Memphis Publ'g Co. v. City of Memphis*, No. W2016-01680-COA-R3-CV, 2017 WL 3175652 (Tenn. App. July 26, 2017) (ruling that nonprofit association contracted to conduct executive search for city police chief was not "functional equivalent" of city government for FOI purposes).

²¹ *See, e.g.*, ARK. STAT. § 25-19-103(7)(A) (defining public record as "a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency ... that is wholly or partially supported by public funds or expending public funds"); CONN. GEN. STAT. § 1-200(5) (defining scope of public records as "data or information relating to the conduct of the public's business"); ORE. REV. STAT. § 192.005(5)(B) (stating that record qualifies as public if it "[r]elates to an activity, transaction or function of a state agency or political subdivision"); VA. CODE ANN. § 42.1-77 (defining public records as "recorded information that documents a transaction or activity by or with any public officer, agency, or employee of an agency").

²² *See* Spencer Willems, *Tape Don't Lie*, 67 DRAKE L. REV. 797, 808 (2019) ("[S]tates' laws are hardly uniform. Differences in wording and structure also preceded departures in interpretation by courts, resulting in a checkerboard of standards for what is and is not a matter of public record.").

²³ ALA. CODE § 36-12-40.

as “public” for access purposes if they are “made or received” by a government agency, expressly encompassing documents that are submitted to the government by outside third parties.²⁴

Other statutes reach more broadly, implicitly suggesting that a record can qualify as “public” even when held by a nongovernmental custodian. For instance, California’s Public Records Act defines the right of access as extending to “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”²⁵ Alongside the terms “owned” or “retained,” the term “used” indicates that a record can be public even though it is neither owned nor retained by the government. Similarly, the Texas Public Information Act extends to information “that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” as long as the government “(A) owns the information; (B) has a right of access to the information; or (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information(.)” Plainly, the Texas statute covers a record held by a non-governmental actor to which the government has a right of access, or for which the government has paid.

A few states go further still and expressly extend their FOI statutes to private as well as public custodians, such as Pennsylvania, which specifies:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.²⁶

Similarly, Georgia’s statutory definition of an accessible public record extends to records maintained or received “by a private person or entity in the performance of a service or function for or on behalf of an agency(.)”²⁷ The Georgia statute even encompasses records that a government agency has transferred to a private entity “for storage or future governmental use,” effectively foreclosing a form of the FOI keep-away game.²⁸

While the starting point is always the text of the statute, state courts have not hesitated to apply a generous construction to statutory terms like “possession” or “custody” where necessary to reach a result consistent with the purposes of FOI law. In North Carolina, for instance, the state Public Records Act applies on its face to records “in the custodian’s custody.”²⁹ But “custody” has been interpreted to include “constructive possession,” so that a government agency can be compelled to provide access to its outside counsel’s billing records, even if the records are not in the agency’s physical possession.³⁰

²⁴ See R.I. PUB. LAWS § 38-2-2(4) (defining public records as those “made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency”); TENN. CODE ANN. § 10-7-301(6) (defining public records as including those “made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency”).

²⁵ CALIF. GOV’T. CODE § 7920.530(a).

²⁶ 65 PA. STAT. § 67.506(d)(1).

²⁷ GA. CODE ANN. § 50-18-70(b)(2).

²⁸ *Id.*

²⁹ N.C. GEN. STAT. § 132-6(a).

³⁰ *Womack Newspapers v. Town of Kitty Hawk*, 639 S.E.2d 96, 104-05 (N.C. App. 2007). California courts have likewise recognized that the obligation to produce records can extend to records within a government agency’s “constructive possession.” *Cnty. Youth Athletic Ctr. v. City of National City*, 220 Cal.App.4th 1385, 1428 (Cal. Ct.

The issue of whether records are beyond the reach of FOI requests because they are stored in privately maintained, online portals implicates an existential open-government question: When can a document qualify as a “public record” even if the agency neither owns nor possesses it? Courts have wrestled with this question in several recurring factual scenarios: (1) When public employees use non-governmental accounts and devices for official-business communications, including social-media accounts and (2) when agencies do business through, or in collaboration with, private contractors. In each scenario, judges have typically—though not always—taken a substance-over-form approach and broadly applied FOI laws to reach nominally “private” records.

A. “But, her emails...”—public records on private devices

As more and more government business is transacted by way of electronic communication rather than face-to-face meetings, it became increasingly important for last-century public records laws to modernize to enable the public to have a meaningful window into how official decisions are formulated.³¹ After decades of legislating and litigating, it is now widely accepted that email or text-message communications do not magically become “private” and beyond the scope of FOI law merely because a non-governmental account, or device, is used to transmit them.³² Indeed, the issue of concealing email messages from FOI requests by using non-governmental accounts became central to the dispute over an in-home email server that is widely blamed for torpedoing former Secretary of State Hillary Clinton’s presidential campaign.³³ What controls is not where the messages are stored, but whether they qualify as records memorializing governmental activities.³⁴ For example, California’s Supreme Court decided in 2017 that the California Public Records Act extends to messages city employees create on personal email or text-messaging

App. 2013). But the doctrine has been interpreted rather parsimoniously and inconsistently. In several instances, California courts have refused to order agencies to honor requests for privately held records without proof that the government actually owns, controls or uses the records, even if the government has a right to demand them. *See Anderson-Barker v. Superior Court*, 31 Cal. App.5th 528, 539 (Cal. Ct. App. 2019) (finding that city’s right of access to data about vehicle impoundments from private vendors was not sufficient to make the data a public record, absent evidence that the city actually had control over the data); *Consolidated Irrigation Dist. v. Superior Court*, 205 Cal.App.4th 697, 710-11 (Cal. Ct. App. 2012) (stating “we conclude an agency has constructive possession of records if it has the right to control the records,” but concluding that city’s control over records prepared by environmental engineering consulting firm did not extend to consultant’s subcontractors).

³¹ *See* Bill Aleshire, “*Hillary*” *Emails and the Unenforceable Texas Public Information Act*, 17 TEX. TECH ADMIN. L.J. 175, 188 (2016) (commenting, in regard to emails that government officials store on nongovernmental accounts or devices, that “at least some of the information in those emails reveals not only what these officials are doing but also why they take the actions they take. Voters become better educated and more likely to cast votes with informed intent if they understand, as directly as possible, what they public officials are doing and why.”).

³² *See* Vera, *supra* note 5, at 29 (stating that FOI litigation over government officials’ texts has become increasingly common, and that “[i]n the majority of these cases, state and federal courts have interpreted state open-records laws to apply to text messages”).

³³ *See* Luke J. Cole, *Let’s Meet in the Middle: Constitutional Challenges and Policy Problems with Iowa’s Open Meetings Law, with Suggestions for Improvement*, 104 IOWA L. REV. 2055, 2058 (2019) (commenting that “the 2016 Presidential Election arguably turned on Secretary Hillary Clinton’s sidestepping of public record laws”); Joshua Jacobson, *The Secretary’s Emails: The Intersection of Transparency, Security, and Technology*, 68 FLA. L. REV. 1441, 1444 (2016) (observing that “Clinton’s practices exposed a gaping hole in transparency laws in the United States: government officials could conduct their official duties from a private email account and personally retain their email records until someone made a formal request.”).

³⁴ *See* Zansberg, *supra* note 14, at 14 (collecting cases and stating that, as of 2015, judges in nine states and the District of Columbia “have held that if the content of an email, text message, or other electronic record send or received by a government employee related to the conduct of government business, it is subject to those states’ open records acts” and adding that 10 state attorney generals’ advisory opinions are in agreement).

accounts, if the communications are about “official agency business.”³⁵ Courts have reached this position to avoid enabling hidebound government officials to frustrate the intent of FOI law simply by moving their official conversations to unofficial devices or accounts.³⁶ As the D.C. Circuit memorably phrased it, “an agency always acts through its employees and officials. If one of them possesses what would otherwise be agency records, the records do not lose their agency character just because the official who possesses them takes them out the door(.)”³⁷

Just as courts and legislatures were achieving clarity around the consensus that messages on personal electronic devices or email accounts can still be public records, a new wrinkle arose: Social media accounts. Increasingly, government agencies are using Facebook, Twitter and other privately owned platforms as the conduit for official pronouncements.³⁸ The question thus became: Do the same rules of document retention and document production apply to a post on a platform like Facebook, which by its nature is ephemeral and where the owner of the platform can delete postings without needing the speaker’s consent?³⁹ In one instructive case, a Washington appellate court decided that posts made to a Facebook page, even one ostensibly created and maintained for personal use, can become public records “if the posts relate to the conduct of government and are prepared within a public official’s scope of employment or official capacity.”⁴⁰ Though only a relative handful of cases have worked their way through the courts, the early indication is that the same principles will apply to Facebook or Instagram posts as to emails, texts or other electronic messages: As long as the posts were created by public employees in the course of transacting government business, they are within the reach of FOI law, regardless of whether the social media page is itself government-operated.⁴¹

³⁵ *City of San Jose v. Superior Court*, 389 P.3d 848, 852 (Cal. 2017). *See also* *Toensing v. Atty. Gen’l*, 178 A.3d 1000, 1012-13 (Vt. 2017) (rejecting state agency’s assertion that FOI law extends only to emails within agency’s custody or control, and directing agency to also ask employees to produce emails on personal accounts generated in the course of conducting public business); Iowa Att’y Gen’l Op. 21AO:0009 (Jan. 20, 2022), <https://ipib.iowa.gov/privately-owned-electronic-devices> (“If a government official or employee uses privately owned electronic devices or services, such as cell phones, computers, email accounts, smart phones, or such to conduct official government business, then the record generated is a public record.”).

³⁶ *See* *Barkeyville Borough v. Stearns*, 35 A.3d 91, 97 (Pa. Commw. Ct. 2012) (observing that Pennsylvania’s Right to Know Law must extend to emails about city business that council members exchange on personal home computers, or else “the law would serve no function and would result in all public officials conducting public business via personal email”).

³⁷ *Competitive Enterprise Inst. v. Ofc. of Sci. & Tech. Policy*, 827 F. 3d 145, 149 (D.C. Cir. 2016).

³⁸ James Toscano, *Does social media help the government-citizen relationship? Depends who you ask*, THE CONVERSATION (May 12, 2016), <https://theconversation.com/does-social-media-help-the-government-citizen-relationship-depends-who-you-ask-58481>.

³⁹ *See* Nicole Rodriguez, *Investigation: Are officials inadvertently breaking records law online?*, TREASURE COAST NEWSPAPERS (Dec. 16, 2016), <https://www.tcpalm.com/story/news/local/florida/2016/12/16/investigation-government-officials-inadvertently-breaking-law-online/95374630/> (quoting Florida prosecutor’s interpretation that state FOI law extends to discussions about government business posted by government officials on social media pages).

⁴⁰ *West v. Puyallup*, 410 P. 3d 1197, 1199 (Wash. App. 2018). *See also* *Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783 (Pa. Commw. Ct. 2023) (citing *West* case and stating that post on non-governmental social media account can qualify as public record if it meets statutory definition that it “documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency”). In *Cagle*, the Pennsylvania court set forth a list of instructive guideposts to consult in deciding whether a post qualifies as an agency record, including whether the account has the “trappings” of being official, whether the posts on the account indicate that agency business is being transacted, and whether the author appeared to be acting as an official representative of the agency. *Id.* at 801-02.

⁴¹ *See* *Bear v. Escambia Cty. Bd. of Cty. Comm’rs*, No. 3:19cv4424, 2022 WL 602266 (N.D. Fla. Mar. 1, 2022) (holding that comments and messages on county commissioner’s social media pages were covered by Florida’s FOI

B. Contracting for confidentiality

When government agencies do business with—or through—private vendors, records of that activity become more challenging to obtain, for various reasons. First, the government may assert the “keep-away-game” argument, that the records are not public because they are beyond the government’s custody. Second, the government agency may argue that it is contractually bound to preserve the vendor’s secrets. Neither is a persuasive justification for concealment up against the legal and public-policy imperatives that weigh heavily on the side of transparency.

Hiring is an especially secretive function of government, with growing reliance on private search consultants who insist on confidentiality.⁴² Secrecy is particularly aggressive when it comes to recruiting and hiring college presidents. Colleges have held committee meetings in faraway hotels, and forced search-committee members to sign onerous nondisclosure agreements and shred their notes, all in the name of evading public scrutiny.⁴³ While the dominance of private executive-search firms has been widely noted and critiqued in the context of secretive university hires,⁴⁴ their influence extends well beyond the college campus.

In Knoxville, Tennessee, for instance, the local newspaper was forced to sue the city government over a closed-door hiring process for police chief that, the newspaper contended,

Law, because they were made and received “in connection with” official county business); *Ltr. to Mr. Samuel S. Goren*, Fla. Att’y Gen. Op. 2009-19 (Apr. 23, 2009) (advising that, when city elected officials post on city-created Facebook page “regarding city business,” posts are public records subject to statutory production and retention duties); *cf. Blackwell v. City of Livonia*, 984 N.W.2d 780 (Mich. App. 2021) (finding that Facebook page maintained for purposes of mayor’s campaign was not subject to Michigan’s FOI law, regardless of whether mayor occasionally discussed city business on page, because page was not maintained for official-business purposes and messages sent to page were not accessible to city employees); *Pacheco v. Hudson*, 415 P.3d 505 (N.M. 2018) (concluding that contents of Facebook page created for judge’s campaign were not public records, because page was not used to conduct official business and judge was not acting in governmental role in maintaining it).

⁴² See Paul Basken, *Executive search firms blamed for shrinking presidential tenures*, TIMES HIGHER EDUC. (Nov. 23, 2021), <https://www.timeshighereducation.com/news/executive-search-firms-blamed-shrinking-presidential-tenures>. (citing study showing that “in 1975 almost no universities used search firms, while 79 percent did in 2005 and 92 percent did in 2015”).

⁴³ See Ryan Dailey, *Non-disclosure agreements now required in Florida university president searches*, CITY AND STATE FLA. (Aug. 22, 2023), <https://www.cityandstatefl.com/policy/2023/08/non-disclosures-required-university-president-searches/389582/> (revealing that Florida universities recently began requiring presidential search committee members to sign confidentiality agreements that carry potential criminal prosecution for breach); Doug Lederman, *An Expanded Faculty Role in the Presidential Search*, INSIDE HIGHER ED (Feb. 22, 2023), <https://www.insidehighered.com/news/2023/02/23/college-widens-faculty-involvement-search-president> (explaining how secrecy is now customary in university presidential hiring, with search committees conducting off-site interviews at airport hotels); Katie Bayard, *UA leader search to be secretive*, AKRON BEACON J. (Dec. 5, 2018), <https://www.beaconjournal.com/story/news/education/campus/2018/12/06/ua-leader-search-to-be/7102064007/> (describing new process for hiring University of Akron president, under which finalists would no longer be brought to campus to keep their identities confidential); Robert Skinner, *Kent State’s Presidential Search Still Raising Eyebrows At Journalism School*, IDEASTREAM PUB. MEDIA (Apr. 22, 2014), <https://www.ideastream.org/2014-04-22/kent-states-presidential-search-still-raising-eyebrows-at-journalism-school> (describing how Kent State University hired president in secretive process, giving private headhunting firm control over key documents and instructing search committee members to shred their notes).

⁴⁴ See Judith A. Wilde, *No reason to hide names in higher ed searches*, GAINESVILLE SUN (Feb. 23, 2021), <https://www.gainesville.com/story/opinion/2021/02/23/judith-a-wilde-no-reason-hide-names-higher-ed-searches/4505326001/> (describing how “[w]ith the help of search firms ... searches in Florida have become much less transparent”).

violated Tennessee’s Public Records Act.⁴⁵ Journalists criticized the opacity of the search process, in which committee members were shown copies of candidates’ resumés over a video conference but were not given physical copies, to avoid creating a trail of records.⁴⁶ The city argued that the records belonged to the private contractor that conducted the search, and hence were beyond the reach of the Act.⁴⁷ The newspaper filed suit in July 2022 seeking records identifying the candidates who were considered for the position and the process that the selection committee followed.⁴⁸ The case remains ongoing.

In comparable executive-search situations, courts have interpreted FOI laws to reach records held by private headhunting firms acting as agents of public entities. For instance, in North Dakota, the state Supreme Court ruled that records about the hiring of a new police chief—a process that the city tasked-off to a private search firm, which would otherwise have been conducted in-house by government employees—were subject to disclosure regardless of where they were held:

We do not believe the open-record law can be circumvented by the delegation of a public duty to a third party, and these documents are not any less a public record simply because they were in the possession of [the contractor]. ...[The] purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records.⁴⁹

Even outside of the executive-search setting, courts typically have held that the physical location of a record is less important than its character. A document held by an external third party may be subject to disclosure on the theory that the record is within the government’s custody (albeit not physical possession), or that the third party is functionally an arm or equivalent of the government when performing a governmental function.⁵⁰ In an influential case, Florida’s Supreme Court set forth a checklist of factors to consider in determining whether a private entity’s records were amenable to public inspection on the basis of the entity’s relationship to the government.⁵¹ They include:

⁴⁵ Tyler Whetstone, *Knoxville wants judge to protect documents it said it didn't create in police chief search*, KNOXVILLE NEWS (Aug. 22, 2022), <https://www.knoxnews.com/story/news/politics/2022/08/23/city-knoxville-wants-judge-protect-police-chief-hiring-documents-said-didnt-create/7863629001/>.

⁴⁶ *Id.*

⁴⁷ See Tyler Whetstone, *Knox News can put city leaders under oath about police chief search, judge rules*, KNOXVILLE NEWS (Dec. 14, 2022), <https://www.knoxnews.com/story/news/local/2022/12/14/knox-news-can-put-knoxville-leaders-under-oath-judge-rules-police-chief-search/69654145007/> (reporting that mayor resisted requests for records regarding chief search “claiming the only documents about the process are held by the private firm the city hired to identify and screen candidates”)

⁴⁸ Tyler Whetstone, *Why Knox News is suing Knoxville for public records about the police chief hiring process*, KNOXVILLE NEWS (July 6, 2022), <https://www.knoxnews.com/story/news/local/2022/07/06/knox-news-suing-knoxville-public-records-police-chief-hiring-process/7396194001/>.

⁴⁹ *Forum Publ’g Co. v. City of Fargo*, 391 N.W.2d 169, 172 (N.D. 1986).

⁵⁰ See *State ex rel. Toomey v. City of Truth or Consequences*, 287 P.3d 364, 368-71 (N.M. App. 2012) (surveying caselaw from five other states that have considered the applicability of FOI statutes to privately incorporated entities, and concluding that contractor engaged to operate public-access cable television station on behalf of city was subject to FOI requests, where contractor received all of its funding from the city, operated for the sole benefit of the municipality, used public owned property, and was closely regulated by the city).

⁵¹ *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So.2d 1029, 1031 (Fla. 1992).

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.⁵²

A case illustrating the “custody versus possession” issue played out in Pennsylvania, where a health care provider sought access to agreements between the state’s Medicaid agency and private managed-care vendors who contracted to administer Medicaid benefits.⁵³ The state denied the request, insisting—in a refrain reminiscent of today’s “cloud portal” disputes—that the records were in the possession of the private health plan and therefore not “maintained” by the state.⁵⁴ An appellate court sided with the requester, finding that Pennsylvania’s Right to Know Law extends not just to records held by the government, but to records “within an agency’s possession, custody, or control.”⁵⁵ The court noted that, while the contract documents were physically held by the vendors, the state had the legal right to demand access to the documents, and in fact contractually required the vendors to retain them.⁵⁶ The judges emphasized the underlying intent of the FOI law: “[T]o open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds.”⁵⁷ That intent, the judges wrote, would be easily frustrated without a generous understanding of what it means for the government to “maintain” a record: “To conclude otherwise would promote the very mischief the Law seeks to remedy by permitting agencies to place records in the hands of third parties to circumvent disclosure.”⁵⁸

A case illustrating the “functional equivalent” issue took place in Tennessee, where reporters from the *Memphis Commercial Appeal* and the state auditor each requested records documenting the operations of a state-subsidized child care center.⁵⁹ The child care facility, known as Cherokee, rebuffed both requests, leading to two parallel lawsuits that were consolidated on appeal.⁶⁰ When the case reached Tennessee’s Supreme Court, the justices noted that the statutory definition of a public record—documents “made or received pursuant to law or ordinance or in connection with the transaction of official business”—offered only “imperfect guidance.”⁶¹ The court surveyed how other states had approached the scenario of privatized government services, and decided to join the consensus that “functional equivalency” should determine when records of

⁵² *Id.*

⁵³ *Lukes v. Dept. of Pub. Welfare*, 976 A.2d 609 (Pa. Commw. Ct. 2009).

⁵⁴ *Id.* at 614.

⁵⁵ *Id.* at 620 (emphasis in original).

⁵⁶ *Id.* at 614.

⁵⁷ *Id.* at 617.

⁵⁸ *Id.* at 621. For another illustrative Pennsylvania case, see *Indiana Univ. of Pa. v. Atwood*, No. 633 C.D. 2010 (Pa. Commw. Ct. Aug. 10, 2011) (holding that state agency was obligated to produce payroll records held by outside contractor performing work under state contract, because Pennsylvania’s FOI law, PA. STAT. § 67.102, extends to records “created, received or retained” in connection with state business, even if no agency retains no physical copies).

⁵⁹ *Memphis Publ’g Co. v. Cherokee Children & Family Serv., Inc.*, 87 S.W.3d 67, 71-72 (Tenn. 2002).

⁶⁰ *Id.* at 72-73.

⁶¹ *Id.* at 75, citing TENN. CODE ANN. § 10-7-503(a)(6).

a private entity become accessible to the public.⁶² The justices explained why, as a matter of policy, the public's right of access must extend to records held by private contractors delivering governmental services:

[T]he public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor. When a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.⁶³

To determine when an ostensibly private actor is the functional equivalent of a government agency, the court set forth factors including: “(1) the level of government funding of the entity; (2) the extent of government involvement with, regulation of, or control over the entity; and (3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.”⁶⁴ Applying those factors, the court found that Cherokee's records were public based on its heavy dependence on state funding (95 percent of its budget) and the “undeniably public” nature of its child care services, which the state was delivering itself before the contract arose.⁶⁵

Even where a close enough relationship exists that records held by a private entity are functionally government records, the custodian may resist disclosure on the grounds of a contractual duty to maintain confidentiality. However, courts generally have told government agencies that they cannot end-run their FOI obligations by entering into contracts with private entities to keep their communications secret. For instance, the federal Fourth Circuit held that the Freedom of Information Act overrode a promise that the U.S. Environmental Protection Agency made to homeowners not to disclose survey data about their property.⁶⁶ Similarly, the federal D.C. Circuit opined that a promise of confidentiality between federal health regulators and private consultants “should not be given determinative weight” if there is an overriding public interest in access to the information: “[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate.”⁶⁷ This scenario regularly recurs in the context of settlement agreements requiring payment of taxpayer money to resolve claims against the government, which are understood to be public record even if both sides of the transaction agree to keep the terms confidential.⁶⁸

⁶² *Id.* at 78-79.

⁶³ *Id.*

⁶⁴ *Id.* at 79.

⁶⁵ *Id.* at 79-80.

⁶⁶ *Robles v. Env'tl Protection Agency*, 484 F.2d 843, 845-46 (4th Cir. 1973).

⁶⁷ *Washington Post Co. v. U.S. Dept. of Health & Human Serv.*, 690 F.2d 252, 263 (D.C. Cir. 1982).

⁶⁸ *See, e.g., N.M. Found. for Open Govt. v. Corizon Health*, 460 P.3d 43, 51 (N.M. App. 2019) (ruling that agreement settling dispute between state prison agency and privatized healthcare provider was subject to New Mexico's FOI law, because they pertained to performance of public function of delivering medical services to state prisoners); *Gates v. Memorial Hosp. of Converse County*, ___ P.3d ___, 2023 WL 5028985 at *7 (Wyo. Aug. 8, 2023) (holding that settlement document by public hospital's insurance carrier resolving malpractice suit qualified as public record, because it constituted agreement to which government agency was a party).

IV. The portal problem

It is now clear that government records can qualify as “public” even when stored with a third-party custodian, or in a device not owned by the government. But that does not conclusively answer whether a document that is merely used by—but does not belong to—a government agency can still be a public record. Taking advantage of this in clarity, some government agencies have attempted to dodge their FOI obligations by entering into relationships with private parties to view and use documents without taking ownership or possession of them.

A. The majority view: Access granted

College sports regularly produce disputes over access to public records, for understandable reasons: The public is intently interested in the workings of college athletic programs, the programs are frequently the subject of unflattering media coverage, and billions of dollars are at stake. Predictably, college administrators will take advantage of every loophole—or seek to create new ones—to avoid scrutiny that might disclose scandalous behavior. Although the officials of state colleges unquestionably are subject to FOI statutes, athletic departments regularly interact with private entities—including the NCAA and athletic conferences—that are beyond the reach of FOI law. These interactions add a degree of uncertainty when a requester seeks records that originated with a private entity, but are used by a public entity.

During the 1990s, under the leadership of legendary coach Bobby Bowden, the Florida State University football program became a nationally ranked powerhouse, winning two NCAA championships.⁶⁹ But with success came scrutiny. In 2007, FSU parted ways with two academic counselors working in its athletic department, after concluding that nearly two dozen athletes received illicit assistance completing online tests.⁷⁰ The NCAA opened an investigation, and in 2009 imposed stiff penalties, including limiting athletic scholarships and forcing teams to forfeit tainted victories.⁷¹ FSU invoked the NCAA’s appeal process and challenged the sanctions.⁷²

To prepare FSU’s appeal, the university’s law firm signed a confidentiality agreement to obtain access to the transcript of the key NCAA committee hearing where the penalties were debated.⁷³ The NCAA made the transcript, and other case-related documents, available by way of an online portal that FSU’s attorneys could log into remotely.⁷⁴ When news organizations asked to see the committee transcript, as well as the response that the NCAA staff prepared to FSU’s appeal, they were told that the records were not in the university’s custody and therefore not public.⁷⁵ They sued the NCAA, FSU and the law firm under Florida’s Open Records Act, winning at the trial-court level.⁷⁶

⁶⁹ Mark Schlabach, *The case for FSU's dynasty*, ESPN.COM (Dec. 22, 2012), https://www.espn.com/college-football/bowls12/story/_/id/8772406/if-florida-state-1990s-dynasty-college-football.

⁷⁰ ASSOCIATED PRESS, *Twenty-three FSU athletes accused of cheating on Internet exams*, ESPN.com (Sept. 26, 2007), <https://www.espn.com/college-sports/news/story?id=3038041>.

⁷¹ Lynn Zinser, *N.C.A.A. Penalizes Florida State for Academic Fraud*, N.Y. TIMES (Mar. 6, 2009), <https://www.nytimes.com/2009/03/07/sports/ncaafootball/07ncaa.html>.

⁷² Brett Kallestad, *Florida State Will Appeal NCAA Forfeits*, ASSOCIATED PRESS (Mar. 17, 2009), <https://www.theledger.com/story/news/2009/03/16/florida-state-will-appeal-ncaa-forfeits/26000503007/>.

⁷³ NCAA v. Associated Press, 18 So.3d 1201, 1205 (Fla. Dist. Ct. App. 2009).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1205-06.

⁷⁶ *Id.* at 1206.

On appeal, the NCAA argued that records created and owned by a private corporation cannot be transformed into public records merely because government officials view them.⁷⁷ But the appeals court disagreed, adopting a purposefully broad understanding of Florida’s FOI law in keeping with the state’s policy of furthering openness in government.⁷⁸

The appeals court was unpersuaded that the location of the records carried decisive weight. Rather, the judges wrote, what matters is whether a document is “made or received ... in connection with the transaction of official business.”⁷⁹ Under that definition of a public record, the NCAA documents at issue clearly qualified: “Although these documents were prepared and maintained by a private organization, they were ‘received’ by agents of a public agency and used in connection with public business.”⁸⁰ To the NCAA’s argument that documents viewed on a cloud platform are not really “received,” the court noted that FSU and its lawyers did not merely peruse the documents, but actively *used* them in formulating the university’s position – enough to bring them within the ambit of the Public Records Act.⁸¹ That FSU’s lawyers obtained access only by signing a confidentiality agreement was of no consequence, the judges wrote, because a contract to evade the Public Records Act is unenforceable: “The right to examine these records is a right belonging to the public; it cannot be bargained away by a representative of the government.”⁸²

The FSU case notwithstanding, neither public universities nor the NCAA abandoned the “cloud reading room” artifice as a dodge to evade public records laws. In 2019, North Carolina State University told reporters who requested records pertinent to a college basketball recruiting scandal that many of the responsive documents would not be produced, because they resided on an NCAA portal where N.C. State employees could view them, but not download them or print copies.⁸³

The athletic department at the University of Louisville tried a similar maneuver when confronted with a request for public records relating to the same recruiting scandal. Beginning in 2016, Louisville’s national powerhouse basketball program went into a tailspin, as tawdry allegations about hiring strippers and prostitutes to lure prized players came to light.⁸⁴ As the scandal spiraled, legendary head coach Rick Pitino lost his job,⁸⁵ an assistant coach pleaded guilty to extortion,⁸⁶ and the basketball program was implicated in a nationwide pay-for-play scandal that resulted in indictments against an Adidas executive and others.⁸⁷ In 2021, the NCAA presented

⁷⁷ *Id.* at 1208.

⁷⁸ *Id.* at 1206-08.

⁷⁹ *Id.* at 1207, citing FLA. STAT. § 119.011(12).

⁸⁰ *Id.*

⁸¹ *Id.* at 1208.

⁸² *Id.* at 1209.

⁸³ CHARLOTTE OBSERVER, *How the NCAA is helping NC State (and other schools) hide from scrutiny* (Oct. 16, 2019), <https://www.charlotteobserver.com/opinion/editorials/article236193418.html>. There is no indication that the university’s position was challenged in court.

⁸⁴ John Burr, *Source: Louisville recruits told NCAA about sex, stripper parties*, ESPN.COM (Mar. 11, 2016), https://www.espn.com/espn/otl/story/_/id/14951432/three-former-louisville-basketball-recruits-told-ncaa-investigators-attended-stripper-parties-had-sex-them.

⁸⁵ Alexis Cubit, *Louisville men’s basketball got handed its punishment by NCAA IARP. How we got here*, COURIER JOURNAL (Nov. 3, 2022), <https://www.courier-journal.com/story/sports/college/louisville/2022/11/03/timeline-of-louisville-mens-basketballs-ncaa-investigation/69601281007/>.

⁸⁶ ASSOCIATED PRESS, *Ex-Louisville hoops assistant Dino Gaudio pleads guilty on extortion charge, will avoid prison time* (June 4, 2021), https://www.espn.com/mens-college-basketball/story/_/id/31566177/ex-louisville-hoops-assistant-dino-gaudio-pleads-guilty-extortion-charge-avoid-prison.

⁸⁷ Justin Sayvers & Danielle Lerner, *Louisville basketball scandal: Adidas executive, sports agent among 8 indicted*, COURIER JOURNAL (Nov. 8, 2017), <https://www.courier->

Louisville with an extensive notice of findings of serious rule violations, giving the university an opportunity to respond.⁸⁸ The local newspaper, the *Louisville Courier Journal*, invoked the Kentucky Open Records Act to request a series of records from the Louisville athletic department related to the NCAA investigation.⁸⁹ The requests included exhibits and supporting documents attached to the NCAA’s Amended Notice of Allegations.⁹⁰ The university told the newspaper that the documents would not be produced, explaining:

[T]he university does not hold, use, possess, or retain these records and does not have the ability to provide access to them. The University’s outside legal counsel has the ability to review these recordings on a secure portal provided by the NCAA, but there is no ability to download or copy the recordings.⁹¹

The newspaper sued, and in May 2022, a circuit judge granted its motion for summary judgment and ordered the records produced, finding that the university acted with “conscious disregard” for the law.⁹² The primary issues litigated before the circuit court were unrelated to the “secure portal” issue, but in its limited engagement with that issue, the court made short work of it, writing:

The University of Louisville has never articulated a plausible legal basis for denying the Courier-Journal access to the records by viewing them on the secure portal if that is, in fact, the only way to see them, ... The record is undisputed that the University of Louisville had access to the records that the Courier-Journal was seeking and could have easily arranged to schedule a date for [the requester] to view the records through the secure portal.⁹³

In other words, the court—as with the FSU case—regarded “access” to the NCAA attachments and exhibits as sufficient to bring them within the ambit of the Open Records Act, regardless of who owned the records and where they were stored.

Another “cloud portal” case arose at Louisiana State University, during LSU’s 2013 search for a new president. The university hired a private headhunting firm that winnowed the initial applicant pool to a list of 35 potential candidates, whose resumés were posted to a secured platform where committee members could view the resumés and rank their top choices—without coming into possession of actual documents.⁹⁴ The Baton Rouge newspaper sued for access to the resumés, and the university resisted disclosure, arguing that only records within the state’s “custody or control” qualify as public records.⁹⁵ But a state appeals court rejected that narrow interpretation of the law. The court noted that state statutes explicitly provided that the public is entitled to the

[journal.com/story/sports/college/louisville/2017/11/08/louisville-basketball-scandal-christian-dawkins-james-gatto-others-indicted/842848001/](https://www.courier-journal.com/story/sports/college/louisville/2017/11/08/louisville-basketball-scandal-christian-dawkins-james-gatto-others-indicted/842848001/).

⁸⁸ Matthew McGavic, *Louisville Receives Amended Notice of Allegations from NCAA*, SPORTS ILLUSTRATED FAN NATION (Oct 1, 2021), <https://www.si.com/college/louisville/basketball/louisville-receives-amended-noa>.

⁸⁹ See *Louisville Courier-Journal, Inc. v. Univ. of Louisville*, No. 21-CI-006789, Memorandum and Order (Ky. Cir. Ct., May 27, 2022) (slip op.) at 2-5 (describing newspaper’s requests).

⁹⁰ *Id.*

⁹¹ *Id.* at 6.

⁹² *Id.* at 20.

⁹³ *Id.* at 19.

⁹⁴ *Capital City Press L.L.C. v. Louisiana State Univ. Sys. Bd. of Supervisors*, 168 So.3d 727, 740-41 (La. App. 2014).

⁹⁵ *Id.* at 742.

names of presidential applicants, and contemplated that the hiring process might be conducted by an agent on behalf of a state agency.⁹⁶

Outside the higher-education context, requesters in Utah recently overcame the “keep-away” tactic to obtain access to a rulebook furnished to the state’s largest jail by a private vendor. The ACLU of Utah and the Disability Law Center sought access to a set of operating standards for the Davis County Jail in Salt Lake City, expressing concern over a string of deaths at the facility.⁹⁷ The county refused to provide the records on several grounds, including the fact that the county did not have a physical copy of the standards, because they were made available for viewing through a private vendor’s online portal.⁹⁸ The requesters took the dispute to an administrative review board, the State Records Committee, which refused to order full disclosure, agreeing with the county’s position that only the “owner” of the records could be required to produce them.⁹⁹ The requesters then took the case to court, where the issue of ownership of the records ceased to focus on physical access and instead focused on protecting the creator’s copyright and trade-secret interests.¹⁰⁰ A state district judge ruled in favor of disclosure, finding that the vendor’s intellectual-property concerns did not foreclose providing a copy of the records for the requesters’ nonprofit advocacy purposes.¹⁰¹ The court opinion did not explicitly grapple with whether mere access to records—without any ownership interest or right of control—is enough to make them “public.” But the result at least implicitly rejects the proposition that FOI access is limited to records the government owns.

In the most recent wrinkle on the “cloud portal” scenario, a North Carolina appellate court ordered the City of Charlotte to honor a request to produce surveys of city council members that the members completed using a vendor’s online submission portal.¹⁰² The *Charlotte Observer* newspaper sought to obtain access to the surveys, but the city argued that the records were not subject to the North Carolina Public Records Act, in part because they never came into the possession of the city.¹⁰³ On appeal, the city conceded that if the council members had completed the surveys via email, the surveys would have been public record even if the emails resided on a private third party’s server.¹⁰⁴ The court did not find the city’s distinction between email and an online submission portal to be meaningful; what mattered, said the court, was that the Public Records Act requires producing documents regarding the transaction of public business “regardless of physical form or characteristics.”¹⁰⁵ As in other such cases, the Court of Appeals rejected a form-over-substance interpretation of the statute that would frustrate the goal of

⁹⁶ *Id.* at 738, 742.

⁹⁷ Whitney Evans, *Utah Jails Can’t Hide Records In The ‘Cloud,’ Lawsuit Claims*, KUER 90.1 (June 8, 2018), <https://www.kuer.org/news/2018-06-08/utah-jails-cant-hide-records-in-the-cloud-lawsuit-claims>.

⁹⁸ *Id.*

⁹⁹ ACLU of Utah v. Davis County, Case No. 18-15, Decision and Order (Utah Rec. Comm. Apr. 23, 2018), <https://archives.utah.gov/src/srcappeal-2018-15.html> (stating that “the Committee finds that those records are not Respondent’s records. Therefore, since Respondent is not the owner of the records, Respondent is not required under [the FOI law] to produce the records to Petitioner.”).

¹⁰⁰ See Samantha Michaels, *Want to Know How Your Local Jail Operates? Sorry, That May Be a Trade Secret.*, MOTHER JONES (Mar./Apr. 2019), <https://www.motherjones.com/crime-justice/2019/03/want-to-know-how-your-local-jail-operates-sorry-that-may-be-a-trade-secret/> (critiquing county’s assertion of copyright and trade-secret protection, and noting how commonly counties rely on private vendors to supply rulebooks).

¹⁰¹ ACLU of Utah Found., Inc. v. Davis Cty., No. 180700511, Ruling and Order (Utah Dist. Ct. Mar. 25, 2021) (slip op.).

¹⁰² Gray Media Grp. v. City of Charlotte, ___ S.E.2d ___, 2023 WL 5925600 (N.C. App. Sept. 12, 2023).

¹⁰³ *Id.* at *2.

¹⁰⁴ *Id.* at *7.

¹⁰⁵ *Id.*, citing N.C. GEN. STAT. § 132-1(a).

furthering public access; the city’s reading, the court held, “would defeat the purpose of the statute, creating a clear path to hide huge swaths of governmental work from public scrutiny.”¹⁰⁶

B. The minority view: Access denied

During 2017-18, online retailing giant Amazon ignited a “frenzied” coast-to-coast bidding war by soliciting pitches to host a new corporate headquarters campus (“HQ2”), a project that was estimated to bring as many as 50,000 jobs to the successful bidder.¹⁰⁷ Many of the competing communities treated their submissions as a closely guarded secret, working through private go-betweens such as nonprofit development authorities in hopes of avoiding creating a trail of public records.¹⁰⁸ A nonprofit transparency organization, Public Record Media, sued Minnesota’s state economic development agency for records of the Minneapolis-St. Paul bidding package.¹⁰⁹ The state countered that the records did not qualify as public under the Minnesota Data Practices Act, because—while state employees may have viewed the documents—they were prepared, submitted and owned by a nonprofit entity, not a government agency.¹¹⁰

As the case played out in court, the facts demonstrated how elaborately the participants in crafting the bid package had choreographed their dealings to make sure government employees never came into possession of sensitive competitive records. Government officials were given access to an online cloud portal—unironically titled “The Box”—where they could submit information for inclusion in the final proposal and view preliminary drafts of the proposal.¹¹¹ But the requester was unable to demonstrate that state officials actually downloaded the as-filed Amazon pitch package, and in the absence of such proof, the court found that the package was not a public record.¹¹² The judge found that the Minnesota Data Practices Act requires agencies to turn over only documents that they have “collected, created, received, maintained or disseminated,” none of which applied to the HQ2 proposal.¹¹³ Nor was there any documented contractual arrangement under which the private entity, Greater MSP, agreed to prepare and submit the proposal as an agent representing the state, which might have been enough to trigger the FOI statute.¹¹⁴ In a perhaps ironic coda to the dispute, once Amazon decided against selecting Minneapolis-St. Paul, the entire 122-page pitch package was made public—by the state Department of Employment and Economic Development, which had spent months insisting in court that it did not own or possess the document.¹¹⁵

¹⁰⁶ *Id.*

¹⁰⁷ Gregory Scruggs, *Amazon's 'HQ2' will bring strain as well as gain to winning city, say experts*, REUTERS (Jan. 29, 2018), <https://www.reuters.com/article/us-usa-amazon-hq/amazons-hq2-will-bring-strain-as-well-as-gain-to-winning-city-say-experts-idUSKBN1FI1DJ>.

¹⁰⁸ See Sabrina Conza, *Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Development Secrecy*, 2(3) J. CIVIC INFO. 1, 6-7 (2020) (describing bidding process and critiques of its secrecy).

¹⁰⁹ Peter Callaghan, *Lawsuit over Amazon bid reveals the latest way Minnesota officials are attempting to sidestep public disclosure laws*, MinnPost (Jun. 28, 2018), <https://www.minnpost.com/politics-policy/2018/06/lawsuit-over-amazon-bid-reveals-latest-way-minnesota-officials-are-attemptin/>.

¹¹⁰ Brian Bakst, *Judge weighs disclosure of Minnesota's pitch to Amazon*, MPR NEWS (Nov. 20, 2018), <https://www.mprnews.org/story/2018/11/20/judge-weighs-disclosure-of-minnesota-pitch-to-amazon>.

¹¹¹ Public Record Media v. Minn. Dept. of Employment & Econ. Dev., No. 62-CV-18-4335, 2019 WL 1648742 (Minn. Dist. Ct. Jan. 3, 2019) at *8.

¹¹² *Id.* at *7

¹¹³ *Id.*, citing MINN. STAT. §13.02, subd. 7.B.

¹¹⁴ *Id.* at *9.

¹¹⁵ See Kevin Featherly, *Advocacy group ends its appeal of ruling on Amazon HQ2 bid*, MINN. LAWYER (May 10, 2019), <https://minnlawyer.com/2019/05/10/advocacy-group-ends-its-appeal-of-ruling-on-amazon-hq2-bid/>

C. To have and have not: The retrieval problem

Given the increasingly robust body of caselaw holding that records can be “public” even if stored in non-governmental accounts or devices, it is reasonable to ask why officials like the presidents of Big Ten universities might believe that using a privately owned communications portal insulates them against FOI requests. One likely answer is that a non-governmental custodian simply might refuse to turn over the records, arguing that the documents are private property and do not belong to the government.¹¹⁶ This raises practical questions that 1970s-vintage FOI statutes may not be fully prepared for: Who can be held responsible for gathering and producing offsite documents?

FOI statutes typically assign the burden for compliance on the government agency or employee who is the legal custodian of the records.¹¹⁷ For this reason, there may be no practical way of enforcing the right of access if a private custodian simply refuses to hand over documents that qualify as “public.” Such was the situation in a Texas case, where a requester was unable to obtain various business and financial records from a privately incorporated physician group affiliated with a state university medical center.¹¹⁸ Although the medical center itself was subject to FOI law, and the requester showed that the medical center owned the requested records and had a right of access to them, an appeals court found that the state Public Information Act (PIA) imposes no duty of production on private corporations:

[U]nder the PIA, it is a ‘governmental body’ that must promptly produce ‘public information’ on request unless an exception to disclosure applies. . . . And only if a ‘governmental body’ fails to disclose the requested public information, does the requestor have a method of enforcing his statutory right by suing for a writ of mandamus to compel the ‘governmental body’ to make the information available.¹¹⁹

In other words, there may be limited recourse to compel a non-governmental entity—such as the privately incorporated Big Ten conference that provided a conduit for university presidents to

(reporting that Public Record Media dropped appeal of trial court’s FOI denial once state released disputed proposal documents).

¹¹⁶ A variation of this argument has already arisen when government agencies try to retrieve emails or text from officials using personal accounts and devices: It is not always clear that the officials, particularly those who hold elected office, can be forced to surrender messages that are beyond their agency’s physical control. *See City of El Paso v. Abbott*, 444 S.W.3d 315, 324 (Tex. App. 2014) (stating that Texas Public Information Act provides no mechanism by which a municipality can retrieve records possessed by individual city council members, other than by asking them to cooperate); *see also* Aleshire, *supra* note 31, at 209 (critiquing *City of El Paso* decision and commenting that, as a result of the loophole exposed by the ruling, “a governmental body can exercise discretion and refuse to bring suit against those employees who refuse to turn over government records without the governmental body [being held liable for] refusing to supply public information”).

¹¹⁷ *See, e.g.*, LA. REV. STAT. § 44:31(A) (“Providing access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees.”); *see also* Pacheco v. Hudson, 415 P. 3d 505, 516 (N.M. 2018) (holding that New Mexico Inspection of Public Records Act, which provides at N.M. STAT. § 14-2-11(C) for a cause of action against a custodian who wrongfully denies a request, makes the designated agency custodian the only person amenable to an enforcement action).

¹¹⁸ *Fallon v. MD Anderson Physicians Network*, 586 S.W.3d 58 (Tex. App. 2019).

¹¹⁹ *Id.* at 79, citing TEX. GOV’T CODE § 552.321(a) (emphasis in original) (internal quotes and brackets omitted).

exchange messages¹²⁰—to turn over records, even if the messages are legally subject to disclosure.¹²¹

Indiana law is one of the few that explicitly contemplates retrieving records from third-party custodians. The statute provides that the government agency—not the private custodian—should field the FOI request, and that if a fee is assessed for making copies, the fee should be remitted to the entity holding the records.¹²² Applying that provision, a state appeals court dealing with a “keep-away-game” argument held a public university responsible for retrieving and producing payroll records from a private construction contractor that the university had employed to renovate a library.¹²³ Similarly, Florida’s statutory regime delegates responsibility for compliance to “the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.”¹²⁴ The custodian’s statutory duties include not merely retrieving and producing public records, but also affirmatively obtaining custody of public records that rightfully belong to the agency if the records are being held wrongfully by an unauthorized party, as well as making sure upon leaving office that the records have been delivered to the proper successor custodian.¹²⁵

Other states have inferred by way of judicial interpretation that a government agency’s obligations go beyond just gathering and producing the records within the agency’s immediate physical possession. A Pennsylvania appellate court held that the statutory obligation to determine “whether the agency has possession, custody or control of”¹²⁶ a requested record includes an obligation to make inquiries to individual employees who might have retained records.¹²⁷ A California ruling obligated a municipality to make reasonable efforts to gather records held off-site by a consultant, where the contractual relationship gave the city ownership of the records and the right to control them.¹²⁸

An accompanying risk with the rise of privately owned reading portals is that, unlike a government agency, a private custodian may destroy documents that it owns without adhering to governmental records-retention schedules. Every state and the federal government require, by law or regulation, that custodians of government records save the most important documents for a specified duration, or even indefinitely.¹²⁹ These schedules have been updated over time to account

¹²⁰ See *supra* notes 3-4 and accompanying text.

¹²¹ See *Filippi v. Wallin*, No. A-1-CA-37195, 2020 WL 7393241 (N.M. App. Dec. 16, 2020) at *5 (declining to entertain FOI claim against county government’s outside law firm, because state law provides for enforcement action only against government agency’s designated custodian).

¹²² 65 IND. CODE § 506(d)(3).

¹²³ *Indiana Univ. of Pa. v. Attwood*, No. 633 C.D. 2010 (Pa. Commw. Ct. Aug. 10, 2011) (unpubl’d).

¹²⁴ FLA. STAT. § 119.011(5).

¹²⁵ See Ofc. of Fla. Att’y Gen’l, Ltr. to Hon. Chris Smith, (Jan. 22, 2006), [https://www.myfloridalegal.com/ag-opinions/records-duties-of-record-custodian#:~:text=Section%20119.011\(5\)%2C%20Florida,Florida%20Statutes%2C%20speaks%20to%20the](https://www.myfloridalegal.com/ag-opinions/records-duties-of-record-custodian#:~:text=Section%20119.011(5)%2C%20Florida,Florida%20Statutes%2C%20speaks%20to%20the) (interpreting various provisions of Florida Public Records Act).

¹²⁶ 65 PA. STAT. § 67.901.

¹²⁷ *Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Commw. Ct. 2012).

¹²⁸ *Community Youth Ath. Ctr. v. City of National City*, 220 Cal.App.4th 1385, 1427-29 (Cal. Ct. App. 2013). However, the duty did not extend to records held by a subcontractor with whom the city had no such contractual relationship conferring ownership and control. *Id.* at 1427.

¹²⁹ See Richard J. Peltz-Steele, *Arkansas's Public Records Retention Program: Finding the FOIA's Absent Partner*, 28 U. ARK. LITTLE ROCK L. REV. 175, 175 (2006) (discussing importance of well-enforced records retention regimes and commenting that “without an obligation on government to retain records of its affairs, there is nothing for the journalist to investigate, nothing for the public to learn”); see also Daxton R. Stewart, *Killer Apps: Vanishing Messages, Encrypted Communications, and Challenges to Freedom of Information Laws When Public Officials "Go*

for storage of electronic messages as well, so that an FOI requester can realistically expect to receive a meaningful response when asking for archival correspondence.¹³⁰ Retention laws are the unseen but essential undergirding supporting FOI laws; without them, every unwelcome records request could be avoided simply by pushing the “delete” key.¹³¹ But these schedules typically are binding only on government records custodians,¹³² meaning that a private business is free to destroy the records it owns and holds, even if those records reflect communications with government employees. This final, practical hurdle means that even if an FOI requester succeeds in proving that documents retained by a private entity like the Big Ten athletic conference are public records, the requester might be “rewarded” with an empty bag of results.

V. Conclusion

Public-records laws have always had to adapt—not always seamlessly—to technological advances in the way information is stored and transmitted.¹³³ The increasing use of non-governmental communication channels, where records might be viewed and used but never actually “owned” or “possessed,” risks undermining the strong presumption of accessibility that lawmakers and judges have built into FOI law over the past half-century. The persistence of college athletic departments in continuing to hide behind the artifice of an NCAA reading portal—even after a court ruling discredited the practice¹³⁴—demonstrates that hidebound government agencies are likely to continue fashioning such workarounds until FOI statutes catch up with the practice and thwart it.

It will be challenging to formulate a 21st-century public-records act that adequately captures the essential documents used in making important government decisions and cannot easily be gamed. To prevent one variation of the keep-away game, lawmakers and courts have told agencies that they must produce not only the records they possess, but records they have the legal authority to possess; this avoids the FOI workaround of “parking” otherwise-public documents

Dark,” 10 CASE W. RES. J.L. TECH. & INTERNET 1, 16-17 (2019) (discussing Texas approach, which sets one year as default retention period, unless varied by law). The Joseph L. Brechner Freedom of Information Project at the University of Florida maintains a list of the retention schedules of all 50 states at <https://brechner.org/records-retention-schedules-by-state/>.

¹³⁰ See Vera, *supra* note 5, at 25 (describing how Georgia, New Mexico and Texas updated their retention schedules to account for text messages and other electronic communications).

¹³¹ See Sofia Terenzio, *Where the SRA and FOIA Fall Short: The Ephemeral Message Loophole in Illinois Transparency Laws*, 35 DBCA BRIEF 6, 7 (2022) (“Arguably, the essential purpose of public record preservation is for the public to have the means to request records to monitor state and local government and ensure that the government is working in the public’s best interest.”).

¹³² For example, Arizona law assigns “[t]he head of each state and local agency” the tasks of submitting a periodic inventory of the agency’s records to the director of the state archives, along with proposed schedules for the retention of each category of documents, with no parallel statutory duty for a nongovernmental entity. ARIZ. STAT. § 41-151.14. Similarly, Louisiana’s retention statute directs the Secretary of State to “establish standards for the selective retention of records of continuing value, and monitor state and local agencies in the application of such standards to all records in their custody.” LA. REV. STAT. § 44:411(A). The statute imposes no obligations on nongovernmental custodians.

¹³³ See Leanne Holcomb & James Isaac, *Wisconsin’s Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records*, 2008 WIS. L. REV. 515, 520 (2008) (commenting that emergence of electronic communication media “has complicated the application of existing public-records law to records-retention practices and the disclosure of public records”).

¹³⁴ See *supra* notes 73-82 and accompanying text.

with a law firm or accounting firm.¹³⁵ But even such an expansive FOI law is an imperfect solution, because it does not obligate the private custodian to preserve, or surrender, the records. Given the seemingly boundless creativity of government officials in inventing workarounds to evade their FOI obligations,¹³⁶ it is long overdue for lawmakers to patch the dark cracks and crevices where secrets hide.

The online-publishing revolution makes it increasingly meaningless to ask where documents reside, or to treat location as a legally decisive concept. There is no longer much practical distinction between a document saved to a computer hard drive versus a document saved to Google Drive, or a photo stored in a desk drawer versus a photo stored in Apple's iCloud Photos feature.¹³⁷ Popular document-creation suites such as Microsoft Office now offer the option of cloud storage, so that a creator might switch seamlessly between a document that "resides" locally on the hard-drive of a laptop and a document that "resides" half a continent away.¹³⁸ Given the rapid migration of office work into cloud-hosted applications, it would kneecap FOI statutes if courts regarded the location or medium in which records are stored as being decisive of their accessibility.

When government officials argue that they need secrecy to recruit businesses to locate in their cities or states, they typically argue that disclosure would pose a competitive disadvantage.¹³⁹ Unless all competitors' bids are transparent, the argument goes, the less-transparent bidders can craft their proposals strategically to beat out the more-transparent bidders.¹⁴⁰ But that argument could just as easily support consistency in *transparency* as well as consistency in *secrecy*; if all states and municipalities were required to lay their cards on the table, then none could benefit from concealment. Rather than enabling economic development authorities to "game" FOI laws by using private communication conduits, states should consider harmonizing their statutes in favor of uniform disclosure, so that taxpayer money is not being committed to corporate giveaways without public buy-in.¹⁴¹

¹³⁵ See, e.g., *Evertson v. City of Kimball*, 767 NW 2d 751, 760 (Neb. 2009) (interpreting Nebraska FOI statute to reach not only documents in agencies' possession but "any documents or records that a public body is entitled to possess — regardless of whether the public body takes possession"); *Tober v. Sanchez*, 417 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1982) (rejecting agencies' argument that they did not have to produce records transferred to the custody of their attorneys: "To permit an agency head to avoid his responsibility simply by transferring documents to another agency or office would violate the stated intent of the Public Records Act"). Pennsylvania, too, has recognized the possibility of reaching into the files of a nongovernmental custodian if there is evidence of a "shell game" in which an agency purposefully transfers records to an outside party to avoid producing them. *Ofc. of the Budget v. Ofc. of Open Records*, 11 A.3d 618, 623 (Pa. Commw. Ct. 2011).

¹³⁶ See generally Stewart, *supra* note 124 (discussing how government officials have used ephemeral messaging apps that automatically delete their communications, to avoid creating records subject to FOI requests).

¹³⁷ See Sarah Palmer, *The end of printing: Will our holiday photos stay on our phones forever?*, EURONEWS (July 9, 2021), <https://www.euronews.com/travel/2021/09/07/the-end-of-printing-will-our-holiday-photos-stay-on-our-phones-forever> (citing estimate that 52 percent of all photos taken now reside exclusively in cloud storage and are never printed).

¹³⁸ See Tom Warren, *Microsoft 365 Basic is a new \$1.99 a month subscription with 100GB of storage and more*, THE VERGE (Jan. 11, 2023), <https://www.theverge.com/2023/1/11/23549800/microsoft-365-basic-cloud-storage-office-price-release-date-features> (explaining how Microsoft offers monthly subscription plans to store data and documents accessible through the web or on mobile devices).

¹³⁹ See Conza, *supra* note 103, at 6 (observing, in context of nationwide competition to recruit new Amazon.com corporate headquarters, that bidders "were fearful that disclosing their proposals could harm their position and tip off opponents").

¹⁴⁰ *Id.*

¹⁴¹ See Nathan M. Jensen, *Five economic development takeaways from the Amazon HQ2 bids*, BROOKINGS (Mar. 4, 2019), <https://www.brookings.edu/articles/five-economic-development-takeaways-from-the-amazon-hq2-bids/>

It should not make a conclusive difference whether agencies *create* documents in the cloud or merely *use* documents created by others. Documents used in the course of government business are routinely treated as public records even when the government did not create them and when the original author still owns them, such as filings that regulated industries make with environmental regulators or zoning boards.¹⁴² Indeed, the existence of ubiquitous “trade secret” exemptions throughout FOI statutes is a tacit acknowledgement that, but-for such an exemption, a record created by a private business that is submitted to a government agency is a public record.¹⁴³ If an applicant’s resumé would be recognized as a public record if a state university administrator held the resumé in her hands and passed it to a colleague, then it should not lose its character as a public record merely because the medium is a tablet screen and not the printed page.

Policymakers have perhaps understandably hesitated to extend FOI law to cover records that are merely *used by* government decision-makers rather than *possessed* by them, because of the practical problem of laying hands on third-party records to produce them in response to an FOI request. To envision the practical difficulty of a more expansive rule, imagine a variation of the Florida State University athletics scenario—but one in which the NCAA refuses to surrender the records that reside in its cloud repository. Florida State has no ownership or control over the NCAA’s records, so it cannot be held responsible for being unable to retrieve them. And the NCAA is an untraditional defendant in an FOI suit, since it is not a government agency. But this is not a prohibitive impediment. As has been shown with contractually privatized government services, it is possible to hold a contractor accountable for retaining and producing records when the contractor stands in the shoes of a public entity.¹⁴⁴ It is no great stretch, then, to hold an organization like the NCAA responsible for obeying FOI law when it is in custody of records that memorialize governmental decision-making. Ultimately, however, the law should assign primary responsibility to the government agency engaging an outside vendor to structure the contractual relationship to ensure preservation and production of public records; as between the government agency and the vendor, the government is in the superior position to know the FOI law, and it is the government’s conduct that FOI law is most concerned with.

Concededly, there must be a logical stopping point to the duty to retain and produce records that might have been fleetingly viewed in formulating a government decision. For example, no one would seriously argue that, if a government official consults Webster’s Dictionary in writing

(discussing backlash in New York City after generous incentive package to lure HQ2 belatedly became public, and observing “[o]ne lesson to take away from the HQ2 process secrecy is that excessive secrecy and lack of community involvement in the construction of bids can backfire”). A New York-based watchdog group, Fiscal Policy Institute, is among those calling for nationwide transparency standards in tax abatements, to avoid costly bidding wars that result in states and cities overpaying to lure jobs. FISCAL POLICY INST., POLICY BRIEF: ECONOMIC DEVELOPMENT (Feb. 2017), <http://fiscalpolicy.org/wp-content/uploads/2017/03/Economic-Development-Brief.pdf>.

¹⁴² See *McKelvey v. Pa. Dept. of Health*, 255 A.3d 385 (Pa. 2021) (holding that applications submitted to state health department for permits to operate marijuana dispensaries were public records); *Reno Newspapers v. Sheriff*, 234 P.3d 922 (Nev. 2010) (ruling that, absent explicit statutory exemption, applications for concealed weapons permits processed by county sheriff’s office were subject to public disclosure); *State ex rel. Gray v. Brigham*, 622 S.W.2d 734 (Mo. App. 1981) (stating that public records law applies to occupancy permits issued by municipality).

¹⁴³ See generally Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1(1) J. CIVIC INFO. 1 (2019) (discussing features of various state and federal trade-secret exemptions, and critiquing their broad application in ways that can frustrate public accountability).

¹⁴⁴ See 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, 836-53 (2000) (analyzing caselaw from 22 states where courts have found that nominally private entities are subject to FOI law because they perform public functions, or are funded by or otherwise intertwined with government agencies).

a report, the dictionary becomes a public record. But that concern can be readily addressed by defining “records” as documents created by, or made available to, a public employee in the course of conducting government business. A definition of this kind would exclude records that a government employee fleetingly consulted but which have an independent existence apart from their governmental use.

If there is no practical way to ensure that records posted to privately maintained “cloud reading rooms” can be retained and archived for production, the answer is obvious: State law can ban the use of such mechanisms. There is already a roadmap for such a reform, in Michigan’s recent decision to ban public employees from using messaging services that are built to prevent retrieval of messages, either by encrypting all communications or by setting the messages to auto-delete on a short turnaround.¹⁴⁵ Had Florida State University been constrained by a statutory prohibition against using the NCAA’s online viewing portal without the ability to save a copy, the NCAA would have had no realistic alternative but to provide the records in a downloadable format. Just as Michigan has outlawed using messaging technologies that put correspondence beyond the reach of state FOI law, states can make it illegal for public agencies and employees to enter into schemes with outside record custodians to prevent public records from coming into existence.

To allow government officials to dodge public accountability by “privatizing” their communications – as the Big Ten college presidents did in discussing their plans for emerging from the COVID-19 pandemic¹⁴⁶ – rewards trickery and breeds contempt for FOI compliance. A decision as consequential as whether sports can be played safely without endangering the health of thousands of college athletes and fans is the type of public-policy decision for which open-government requirements exist. When government officials use subterfuge to make decisions secretly, the public’s logical inference will be that the decisions lack legitimacy, and would have been made differently had the public been included. Open government is strong and occasionally bitter-tasting medicine, but it is the most promising cure for the epidemic of distrust that threatens to undermine public confidence in government.

¹⁴⁵ See MICH. COMP. L. § 18.1270 (providing that Michigan state employees “must not use any app, software, or other technology that prevents it from maintaining or preserving a public record as required by law on an electronic device that is used to create a public record”); Benjamin Freed, *Michigan poised to ban most state workers’ use of encrypted messaging*, STATESCOOP (Nov. 3, 2021),

<https://statescoop.com/michigan-ban-encrypted-messaging/> (describing how news report about Michigan State Police officers’ use of vanishing messages led to legislative response); see also Kaveh Waddell, *The Risks of Sending Secret Messages in the White House*, ATLANTIC (Feb. 15, 2017), <https://www.theatlantic.com/technology/archive/2017/02/white-house-secret-messages/516792/> (suggesting that use of disappearing messaging apps by White House employees in course of official business is already illegal under Presidential Records Act, which requires retaining and archiving White House correspondence, which cannot be destroyed without consultation with National Archives).

¹⁴⁶ See *supra* notes 3-4 and accompanying text.