The Journal of Civic Information

Volume 2 | Number 3 November 2020

Journal homepage: https://journals.flvc.org/civic/ ISSN (online): 2641-970X

The Journal of Civic Information is an interdisciplinary peer-reviewed open-access online journal published by the Brechner Center for Freedom of Information through the Public Knowledge Project and is supported by the University of Florida College of Journalism and Communications.

Contact:
David Cuillier, Ph.D.
cuillier@arizona.edu

DOI: https://doi.org/10.32473/joci.v2i3

Table of Contents

Editor's Note

Legal Analysis

JCI Editorial Board

the journal of CIVIC INFO

The Journal of Civic Information

Volume 2 | Number 3 November 2020

Journal homepage: https://journals.flvc.org/civic/ ISSN (online): 2641-970X

Editor's Note
The Business of Information

David Cuillier, Ph.D., Editor, *University of Arizona*

Civic information is big business.

Government data fuels the economy, and where money is involved, so is power, and the desire to control that information and power.

It is no wonder that commercial interests comprise two-thirds or more of public records requests in the United States.[1] Public information matters to law firms, private investigators, contractors, title companies, and corporations seeking information about competitors.

Often the public interest in information outweighs the privacy interests of corporations, resulting in safer restaurants[2] and cleaner drinking water.[3] Transparency well serves companies and their customers.

The reality is, though, corporate interests often use civic data for their own profits while hiding as much information about themselves, applying trade secrets or other privacy exemptions. Through the decades, the business lobby has worked hard to shape the U.S. Freedom of Information Act to its advantage.[4]

Case in point: The battle over details in the $2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act, passed in March to support ailing businesses in the United States. Initially, the Small Business Administration refused to provide details of the Paycheck Protection Program bailouts, but eventually relented following litigation by news organizations

[1] Numerous studies have found this through analyzing U.S. Freedom of Information logs, including Mark Tapscott & Nicole Taylor, *Few Journalists Use the Federal Freedom of Information Act,* THE HERITAGE FOUNDATION (2001), http://www.heritage.org/Press/MediaCenter/FOIA.cfm; *Frequent Filers: Businesses Make FOIA Their Business,* COALITION OF JOURNALISTS FOR OPEN GOVERNMENT (July 3, 2006), http://www.humanrightsinitiative.org/old/programs/ai/rti/international/laws_papers/intl/businesses_make_foia_their_business.pdf; Derigan Silver, *The News Media and the FOIA,* 21 COMM. LAW & POL'Y 493 (2016), https://www.researchgate.net/publication/308394652_The_news_media_and_the_FOIA; and Margaret Kwoka, *FOIA Inc.*, 65 DUKE L.J. 1361 (2016), https://scholarship.law.duke.edu/dlj/vol65/iss7/2/.

[2] Barbara A. Almanza, Joseph Ismail, & Juline E. Mills, *The Impact of Publishing Foodservice Inspection Scores,* 5 J. FOODSERV. BUS. RES. 45 (2002).

[3] Lori S. Bennear & Sheila M. Olmstead, *The Impacts of the "Right to Know": Information Disclosure and the Violation of Drinking Water Standards,* 56 J. ENVIRON. ECON. MANAGE. 117 (2008).

[4] Jeannine E. Relly & Carol B. Schwalbe, *How Business Lobby Networks Shaped the U.S. Freedom of Information Act: An Examination of 60 Years of Congressional Testimony,* 33 GOV. INFO. Q. 404 (2016).

and the Center for Public Integrity. However, most of the details remain hidden, as the federal government balks and stalls.[5]

This issue of the *Journal of Civic Information* features a timely article that illustrates the dilemma between the need to restrict information for business interests and the public's interest in civic information. Sabrina Conza focuses on the various ways corporations hide economic development information when negotiating incentive deals with state and local governments.

This isn't the first time someone has examined this issue. Aimee Edmondson and Charles Davis provided one of the first deep dives into the subject, in 2011.[6] More recently, Daxton "Chip" Stewart and Amy Kristin Sanders built on that analysis for the first issue of the *Journal of Civic Information*.[7] Also, this was the focus of a white paper just issued by the National Freedom of Information Coalition and Brechner Center for Freedom of Information.[8]

What is interesting about Conza's contribution is that she melded two types of research – legal analysis and interviews, a sort of scholar/journalist hybrid that we embrace in exploring issues of civic information. She points out rationales for secrecy and the benefits and drawbacks that can come with it, citing specific lessons learned by governments throughout the United States. While a case can be made for secrecy in some cases, Conza demonstrates that when it comes to information of importance to the public, even if involving private companies, ultimately transparency pays.

Most of the articles published in this journal's first year have followed standard research practices in legal analysis and social science, and we are proud of the authors' work. We welcome new approaches, as well, in research methodology and presentation, such as that used by Conza. The advantage of an open access online journal is that it is not constrained by the limitations of print, nor of established norms in research presentation. Also, we are not shackled by history or institutional structures that limit exploration. We encourage future submissions to build on this sense of experimentation, even including multimedia to effectively communicate research results. Civic information comes in many forms today, and so should its research.

In the meantime, we have excellent future issues in the works, including the next issue focusing exclusively on research pertaining to access to COVID-19 information. We had hoped that such an issue would be out of date by this winter, the pandemic perhaps long gone, but that is unfortunately not to be the case.

So, we forge on, researching and writing in home offices, continuing to explore the critical issues that affect citizens' ability to acquire information they need to self-govern. At any price.

DOI: https://doi.org/10.32473/joci.v2i3.127269
** Please send correspondence about this article to David Cuillier, University of Arizona, cuillier@arizona.edu.*

---

[5] Nate Jones & Aaron Gregg, *SBA Seeks to Delay Release of Loan Records Following Court Order,* THE WASHINGTON POST (Nov. 17, 2020), https://www.washingtonpost.com/business/2020/11/17/sba-loan-records/.

[6] Aimee Edmondson & Charles N. Davis, *"Prisoners" of Private Industry: Economic Development and State Sunshine Laws*, 16 COMM. LAW & POL'Y 317 (2011).

[7] 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, 3 (2019), which won first place in the 2019 National Freedom of Information Coalition freedom of information research competition.

[8] Steve Miller, *Invisible Incentives: How Secrecy Impedes Evaluation and Accountability of Economic Development Subsidies,* NAT. FREEDOM OF INFO COALITION (November 2020), https://www.nfoic.org/sites/default/files/2020-11/Invisible_Incentives_Nov2020%282%29.pdf.

The Journal of Civic Information

Volume 2 | Number 3 November 2020

Journal homepage: https://journals.flvc.org/civic/ ISSN (online): 2641-970X

Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Development Secrecy

Sabrina Conza *

Article Information

Received: Aug. 7, 2020

Accepted: Sept. 22, 2020

Published: Nov. 30, 2020

Keywords

Freedom of information
Public records
Government transparency
Economic development

Abstract

The 2017 competition for Amazon's second headquarters, which drew more than 200 applications, is a prime example of how states and localities are attempting to keep confidential information about tax benefits and other deals with private companies. While Amazon's competition may be a more dramatic example, states and localities regularly craft deals with private companies. Hundreds of deals—with tax breaks, offers of public property, and other sweeteners—are proposed annually to attract companies that promise to bolster the local economy with new jobs and spin-off industries. This paper, utilizing legal analysis and interviews, explores the pattern of confidentiality in economic development deals nationwide, providing recommendations for balancing secrecy and transparency.

* Sabrina Conza researched and wrote this piece as an undergraduate student at the University of Florida. She currently works as a program analyst at the Foundation for Individual Rights in Education. This article reflects her personal views only. The author thanks Miranda Spivack for editing and guidance in formulating this article. Please send correspondence about this article to Sabrina Conza at sabrina.conza@gmail.com.

To cite this article in Bluebook style: Sabrina Conza, *Chasing Smokestacks in the Dark: The Amazon HQ2 Quest Revives Debate Over Economic Development Secrecy,* 2(3) J. CIVIC INFO 1 (2020).
To cite this article in APA style: Conza, S. (2020). Chasing smokestacks in the dark: The Amazon HQ2 quest revives debate over economic development secrecy. *Journal of Civic Information, 2*(3), 1-28.

DOI: https://doi.org/10.32473/joci.v2i3.127270

I. Introduction

When Braidy Industries announced it would build an aluminum-rolling mill in eastern Kentucky, the state touted the project as the savior to the area's brain-drain problem. To ensure the deal would go through, the state government in 2017 directly invested $15 million in the project, which was projected to create about 600 full-time jobs.[1] The $15 million gave Kentucky at least 20 percent of the company, but when news organizations asked the identity of the other owners, the Kentucky Cabinet for Economic Development withheld several names, claiming that records of the transaction were confidential under state law.[2]

It took two-and-a-half years, a lawsuit, and a change in gubernatorial administrations for Kentuckians to find out that one of the undisclosed investors was Rusal, a Russian aluminum company that, at the time of the investment, was under U.S. Treasury Department sanctions because of the suspect activities of its Kremlin-tied owner, Oleg Deripaska.[3]

The Braidy deal became the flashpoint for a series of pull-and-tug legislative initiatives in Kentucky. Some lawmakers used the controversy to call for greater accountability when companies promise to deliver jobs in exchange for state incentives, while others attempted to claw back even more information from the public record. The Kentucky experience is a microcosm of debates taking place everywhere about what level of disclosure — if any — is proper when public money is pledged in exchange for job creation.

The public's entitlement to information about economic development incentive packages is a patchwork of inconsistency across the country. Controversy about the public's inability to keep tabs on corporate incentives reached a boil during 2017-18, as more than 200 cities across the United States and Canada pitched online retail giant Amazon to lure a $5 billion "second headquarters" supplementing the company's Seattle home base.[4] Yet despite widespread criticism of both the generosity of the giveaway offers offered to Amazon and the opaqueness of the offers in many locations, nothing much has changed since.

Legislation to liberalize public disclosure of incentives was proposed in multiple states following the "Amazon HQ2" controversy — including Florida, Indiana, Nebraska, New York, Ohio and Virginia[5] — but none of those states enacted any significant transparency reform. To the contrary, there is pressure in the opposite direction to make incentives even more secretive.

---

[1] Matthew Glowicki & Morgan Watkins, *Braidy Industries Lands Russian Investor for Kentucky Aluminum Mill*, THE COURIER-JOURNAL (Apr. 15, 2019), https://www.courier-journal.com/story/news/2019/04/15/braidy-industries-kentucky-aluminum-mill-lands-russian-investors/3470777002/.

[2] Morgan Watkins & Tom Loftus, *Kentucky Sank $15 Million in Braidy Industries, but Gov. Bevin Doesn't Know its Other Owners*, THE COURIER-JOURNAL (Oct. 12, 2017), https://www.courier-journal.com/story/news/2017/10/12/kentucky-gov-bevin-doesnt-know-owners-state-subsidized-company-braidy/754296001/.

[3] Sydney Boles, *Congressional Leaders Seek Investigation into Russian Investment in Ky. Aluminum Mill*, W.V. PUBLIC BROAD. (May 20, 2019), https://www.wvpublic.org/post/congressional-leaders-seek-investigation-russian-investment-ky-aluminum-mill#stream/0.

[4] Jeffrey Dastin, *Amazon Receives 238 Proposals for its Second Headquarters*, REUTERS (Oct. 23, 2017), https://www.reuters.com/article/us-amazon-com-headquarters/amazon-receives-238-proposals-for-its-second-headquarters-idUSKBN1CS21O.

[5] *See infra* Sec. IV.A.

Inducements for businesses to expand or relocate are ubiquitous across every level of state and local government.[6] This article focuses on three primary types of incentive — direct payments, tax abatements, and tax rebates.[7]

Economic development incentives may evade public scrutiny in three distinct but related ways. First, states may simply carve out economic development incentives as impervious to disclosure, or interpret existing "trade secret" exemptions broadly to cover the terms of recruitment packages. Second, states may create "privatized" entities through which economic development initiatives are run, seeking to avoid creating a trail of records that the law will regard as "governmental." And third, states may enter into contractual agreements to conceal their exchange of information with corporate entities. This article examines each of these scenarios in turn, through the use of illustrative test cases supplemented by interviews with some of the key participants.

In 2011, Edmondson and Davis published the definitive study on the state of statutory devices that enable government officials to conceal the details of corporate incentives.[8] This article builds on that research by looking at more recent developments in courts and legislatures, and how the Amazon HQ2 debate provoked newfound questions about the opacity of corporate inducement packages — in particular in Kentucky, where litigation about the transparency of economic development, including the city of Louisville's offer to Amazon, has been especially intense.

This article uses a combination of legal research and interviews with 14 professionals on all sides of the access issue — those advocating for transparency and those supporting confidentiality — to gather a picture of how much the public can and can't find out about economic development incentives. It concludes by examining recent reform proposals and suggesting that federal intervention may be necessary, because it is unlikely that states will "unilaterally disarm" in the competition for prized jobs, perhaps more now than ever after the devastating COVID-19 pandemic led to job losses unseen in the United States since the Great Depression of the 1920s.[9]

II. The incentive debate

A. Does 'buying jobs' pay?

While the Amazon HQ2 competition may be one of the most dramatic examples of state and local economic development deals, many states and localities are regularly engaged in crafting deals with private companies to attract jobs. Hundreds of deals, with tax breaks, offers of public property, property tax abatements and other sweeteners are proposed each year by state and local governments to attract private companies who promise to bolster the economy by creating jobs, purchasing materials, and incubating spinoff industries. By one estimate, state and local governments forgo $40 billion to $70 billion in revenue every year in the form of incentives to

---

[6] Stephen Ellis, Grant Hayden & Cynthia Rogers, *A Game Changer for the Political Economy of Economic Development Incentives*, 56 ARIZ. L. REV. 953, 955 (2014).

[7] Although city and county governments at times formulate their own incentive packages, this article will use the nomenclature "state" throughout, as the duty to disclose or the ability to conceal is a creature of state freedom-of-information ("FOI") law.

[8] Aimee Edmondson & Charles N. Davis, *"Prisoners" of Private Industry: Economic Development and State Sunshine Laws*, 16 COMM. LAW & POL'Y 317 (2011).

[9] *See* Scott Hosley, *One For The History Books: 14.7% Unemployment, 20.5 Million Jobs Wiped Away*, NPR.ORG (May 8, 2020) (describing historic loss of jobs during April 2020 as large segments of U.S. economy shut down during quarantine to diminish spread of novel coronavirus COVID-19).

businesses for expanding or relocating.[10] A 2012 study by *The New York Times* found 1,874 incentive programs at the state and local levels worth $80.4 billion a year in direct and indirect subsidies.[11] The benefits to the public are often difficult to calculate. In particular, the headline value of "jobs created" fails to account for offsetting economic effects that may make the net benefit much less impressive, such as the "crowding out" of competitors' economic activity when a new rival arrives.[12]

There is substantial debate over the value of the subsidies and incentives and how best to measure their effectiveness. Former Treasury Secretary Paul O'Neill, in his 2001 Senate confirmation hearing, said that smart business people will take a subsidy if it is offered, but that ultimately business decisions are not based on incentives, but on an array of other considerations.[13] A 2017 study by Timothy Bartik at the Upjohn Institute found that incentives only make a marginal impact on development goals, can be excessively expensive for a locality and may not live up to their promises.[14] An Urban Institute-Brookings study in 2018 said that "efforts to win over businesses with tax exemptions and subsidies may not be fiscally fruitful for overall job generation for regional economies."[15] An analysis by Good Jobs First, an advocacy organization that tracks corporate accountability, estimated that in "mega-deals" for corporate expansions or relocations, the average cost per job is $658,000.[16] Competition for high-tech jobs, in particular, is so intense that jurisdictions can end up forfeiting seven-figure sums for each job created, such as the $2 million per job in tax abatements that Oregon offered Google to locate data centers in the state.[17]

Focusing their research on city and county-level incentives, Ellis, Hayden and Rogers identify three primary pitfalls that local governments encounter when offering inducements: They may wastefully pay a business for something the business would have done even without the incentive, they may overpay because of a frenzied "bidding war" with competing jurisdictions in which "winning" becomes an end in itself, and they may suffer the "winner's curse" of landing a business that ends up inflicting costs that exceed its benefits.[18] Their 2014 study concluded that

---

[10] Jackson Brainerd, *Tax Break Tug-of-War: Results Are Mixed, but States Continue to Lure Big Employers With Tax Incentives*, NAT'L CONFC. OF STATE LEGISLATORS (Sept. 25, 2019), https://www.ncsl.org/research/fiscal-policy/tax-break-tug-of-war637050154.aspx.

[11] Louise Story, *United States of Subsidies: As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012).

[12] Robert Louis Perkins, *The Need for a New Political Playbook Which Mitigates the Public Harm Caused by Tax Incentives*, 38 MISS. C. L. REV. 1, 13 (2019).

[13] O'Neill, the former CEO of aluminum giant Alcoa, testified: "[I]f you're giving money away, I'll take it, you know. If you want to give me inducements for something I'm going to do anyway, I'll take it. But good business people don't do things because of inducements. They do it because they can see that they're going to be able to earn the cost of capital out of their own intelligence and organization of resources." *See* Clip of Treasury Secretary Nomination Hearing, C-SPAN (Jan. 17, 2001), https://www.c-span.org/video/?c4686204/user-clip-paul-oneill-tax-inducements.

[14] Timothy J. Bartik, *A New Panel Database on Business Incentives for Economic Development Offered by State and Local Governments in the United States*, W.E. UPJOHN INST. FOR EMPLOY. RESEARCH (Jan. 1, 2017), https://research.upjohn.org/cgi/viewcontent.cgi?article=1228&context=reports.

[15] Brett Theodos, Aravind Boddupalli & Megan Randall, *Footloose or Stuck in Place? A Six Metro Look at Firm Mobility*, THE URBAN INSTITUTE (Nov. 2018), https://www.urban.org/sites/default/files/publication/99332/footloose_or_stuck_in_place_1.pdf.

[16] *See* Greg LeRoy, *Amazon's HQ2 and the Rise of Big-Ticket Megadeals*, BLOOMBERG CITYLAB (Sept. 11, 2017), https://www.bloomberg.com/news/articles/2017-09-11/the-problem-for-cities-and-states-with-amazon-s-hq2 (column by founder of Good Jobs First, analyzing how economic distress resulting from the 2007-09 recession created even more pressure for cities and states to overpay for jobs).

[17] Perkins, *supra* n. 12, at 6.

[18] Ellis *et al.*, *supra* n. 6, at 959.

incentives generally ended up subsidizing unworthy projects or overpaying for worthy ones: "The empirical evidence suggests that offering incentives, in general, does not work."[19]

B. A decades-old debate: Disclosure vs. confidentiality

For the company that is fielding competing offers to open or expand a business, the benefits of secrecy are obvious: It is easier to play one state off against another when the bidders do not know the size of the offer they are being asked to beat.[20] In other words, cities and states know that secrecy accrues to the benefit of the negotiator on the opposite side of the table and that there is every chance they will end up overpaying with the public's money — yet they resist disclosure anyway. That resistance largely seems rooted in one perception, however well-founded: That businesses would prefer to negotiate in confidence, so insisting on transparency may drive off potential future employers.

Transparency advocates say that releasing the details of economic development deals is important to maintain public trust in local governments and provide a check on government actions. They assert that, without disclosure about the details of proposed incentives to lure companies, overly generous promises may be made by unaccountable "quasi-public" bodies that make commitments with which taxpayers will be saddled for decades to come, potentially to the detriment of the schools and roads that forsaken tax revenues could have paid for. Kasia Tarczynska, a research analyst at Good Jobs First, the non-profit promoting government accountability, says transparency enables the public to make sure companies are living up to the commitments they made in exchange for government incentives.[21]

Advocates for confidentiality argue that keeping deals secret while they are being negotiated can, contrary to popular belief, actually improve a jurisdiction's bargaining position. Chris Morrill, executive director and CEO of the Government Finance Officers Association, said concealing the details of what's on the table may be a strategic benefit to state and local governments, because it is harder to get into a bidding war without knowing what the competing bid looks like.[22] Greg Wathen, of the Economic Development Coalition of Southwest Indiana, a nonprofit that serves as the economic development agency for four Indiana counties, said transparency should be expected once a deal is completed — but if a deal fails, the details of the offer should not be released to the public.[23] His reasoning is that disclosure can be used to set the standard for future negotiations, putting bargaining power in the hands of the companies: "If the project doesn't move forward, it shouldn't be released."[24]

---

[19] *Id.* at 954.

[20] *See* 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 J. CIVIC INFO. 1, 3 (2019) (noting that, as a result of secrecy, "cities wind up bidding against one another, paying even more for services than they would if they engaged in basic transparency typically required by open records laws").

[21] Sabrina Conza, *Why There's Little Sunshine On Many Economic Development Deals In Florida — And Beyond*, WUFT.ORG (Jul. 1, 2020), https://www.wuft.org/news/2020/07/01/why-theres-little-sunshine-on-many-economic-development-deals-in-florida-and-beyond/.

[22] Interview with author (Oct. 28, 2019) (notes on file with author).

[23] Conza, *supra* n.21.

[24] *Id.*

C. Amazon, primed: High states, high cost, high controversy

The competition in 2017 for Amazon's second headquarters is a prime example of how states and localities are taking an array of steps to keep information about tax benefits and other deals with private companies, as they seek to attract jobs. The Amazon competition drew more than 200 applications from the U.S., Canada and Mexico, most offering extensive tax breaks and other incentives.[25] But the public was often left in the dark about how their tax dollars were being used, even after the winners were announced. Many states and localities have refused to make public the size of tax breaks and other fiscal support they were offering to lure Amazon, a company headed by the world's richest person.

The competing jurisdictions, seeking to buttress their efforts to win the deal for HQ2, instead turned to loopholes in state open government laws that allowed them to shield information from the public, even when public funds and tax breaks are at stake. To do this, many used private entities, such as the local Chamber of Commerce or economic development authority, to submit their applications. By doing so, they reaped a little-known benefit. They could claim that even though the proposals were relying on public funds and tax incentives, the applicant was not really part of the government, but a private entity that was shielded from complying with state open government laws. Many officials overseeing the bids to the behemoth company said they were not gaming the system. Instead, they were fearful that disclosing their proposals could harm their position and tip off opponents. Keeping the details secret, they insisted, would benefit their communities by discouraging competitors from sweetening their offers for HQ2, and prevent other companies from strategically using that information in seeking concessions in the future.[26]

It was also in Amazon's interest to have the applicants keep the details under wraps. It would allow the company to try to play one community off another, without letting any of them know about the other proposals. Amazon further cemented the secrecy in the process by asking for non-disclosure agreements, which government officials from all 20 finalists signed.[27] Some cities took the terms so literally that they refused to even disclose the existence of the non-disclosure agreements.[28] Most of the competing communities seemed willing to do whatever it might take—including keeping the public in the dark about how public funds and tax incentives would be used—to land the promised 50,000 jobs. The non-disclosure agreements from the finalists left some jurisdictions believing that they could never disclose the details of their proposals. Even now that

---

[25] Dennis Green, *It's Official: 238 Cities and Regions are Duking it Out to be the Site of Amazon's New $5 Billion Headquarters*, BUSINESS INSIDER (Oct. 23, 2017), https://www.businessinsider.com/amazon-says-238-cities-are-competing-for-hq2-2017-10.

[26] *See* James Briggs, *Amazon's HQ2 Search is Over, but Indianapolis' Bid is Still a Secret*, INDIANAPOLIS STAR (Nov. 13, 2018) (quoting Indiana Economic Development Corp. explanation for secrecy); Monica Nickelsburg, *County Exec on Pittsburgh's Amazon HQ2 secrecy: 'You Can't Have 1.3M People Negotiating a Deal,'* GEEKWIRE (Feb. 13, 2018), https://www.geekwire.com/2018/county-exec-pittsburghs-amazon-hq2-secrecy-cant-1-3m-people-negotiating-deal/ (quoting Pittsburgh county executive on strategic advantages of secrecy).

[27] *See* Martin Austermuhle, *Amazon Insists On Silence From Twenty HQ2 Finalists*, WAMU-FM (Jan. 30, 2018), https://wamu.org/story/18/01/30/amazon-insists-silence-twenty-hq2-finalists/ (reporting that "[o]fficials from all the jurisdictions — including the three in the Washington region — have signed non-disclosure agreements with the company that largely bar them from revealing anything to the public about the next steps in the search process."); Elizabeth Weise & Marco della Cava, *Amazon Names Top 20 Finalists in Second Headquarters Race*, USA TODAY (Jan. 18, 2018), https://www.usatoday.com/story/tech/2018/01/18/amazon-names-top-20-finalists-second-headquarters-race/1040710001/ (reporting identities of the 20 chosen finalist cities who emerged from among "at least 238" competing applicants).

[28] Austermuhle, *supra* n. 27.

the competition has ended, many of the details of the offers for HQ2 from various jurisdictions remain unknown. Some finalists, including Boston[29] and Toronto,[30] did publicly release their proposals after being eliminated from contention. But according to Good Jobs First, no details at all were released by Indianapolis, Los Angeles or Miami.[31]

Some locations that were not finalists, and therefore did not sign mandatory nondisclosure agreements, also declined requests to disclose their bid packages, including Tacoma, Washington.[32] In a statement responding to adverse publicity about the secrecy of its bid package, the Tacoma economic development authority said that it guarantees confidentiality to every prospective business recruit, not just Amazon: "We'll leave it to your imagination why a company might not want their plans for a possible move or expansion made public."[33] Similarly, Calgary, Alberta, kept its proposal under wraps. "We are in this to win," Mary Moran, head of Calgary's economic organization, said in an interview with the *Seattle Times*, Amazon's hometown newspaper. "I don't want to expose our competitive advantage. That's our choice."[34]

MuckRock, a nonprofit that helps investigative reporters and researchers compile large data sets, sent nearly 300 requests for public records to jurisdictions believed to be in contention for the Amazon expansion.[35] According to a search of the website's database, 56 of the total 293 requests were rejected entirely.

One common reason that localities gave for refusing to disclose their records is that private economic development authorities, local chambers of commerce and other nonprofits created and submitted the bids, rather than the government agencies themselves. For example, Jacksonville, Florida, said in its response that it "did not put together the proposal," which was done in tandem with the local Chamber of Commerce.[36] Similarly, a representative from the Denver Metro Chamber of Commerce, responded by saying that it is not subject to Colorado Public Records Law because it is not a government agency. A similar response came from a representative of the Los Angeles County Economic Development Corporation, which responded that it is a nongovernmental nonprofit and does not need to comply with public records law. Cities in New York and Virginia cited exceptions in their state laws to protect proprietary information, which they told MuckRock included their HQ2 proposals. As difficult as it has been to obtain a complete picture of what Amazon was offered, Nathan Jensen, a government professor at the University of Texas at Austin who studies economic development strategies, said more is known about Amazon's courtship than about the typical incentive deal, because of the intense level of public

---

[29] Leticia Miranda, Nicole Nguyen & Ryan Mac, *Here Are the Most Outrageous Incentives Cities Offered Amazon in Their HQ2 Bids*, BUZZFEED NEWS (Nov. 14, 2018), https://www.buzzfeednews.com/article/leticiamiranda/amazon-hq2-finalist-cities-incentives-airport-lounge.

[30] TORONTO GLOBAL, TORONTO REGION, RESPONSE TO AMAZON H2Q RFP (Oct. 19, 2017), https://s3.ca-central-1.amazonaws.com/torontoglobal/TorontoRegionResponsetoAmazonHQ2RFP_PD.pdf.

[31] GOOD JOBS FIRST, OF THE 20 AMAZON HQ2 FINALIST CITIES, 17 HAVE NOW RELEASED AT LEAST PARTIAL INFORMATION ON THEIR BIDS, https://www.goodjobsfirst.org/blog/20-amazon-hq2-finalist-cities-17-have-now-released-least-partial-information-their-bids.

[32] Matt Day, *Cities are Free to Discuss Amazon HQ2 Bids, but Many Won't*, SEATTLE TIMES (Oct. 19, 2017), https://www.seattletimes.com/business/amazon/cities-are-free-to-discuss-amazon-hq2-bids-but-many-wont/.

[33] ECON. DEV. BD. OF TACOMA-PIERCE CTY, WHY OUR HQ2 PROPOSAL TO AMAZON IS CONFIDENTIAL WHAT'S THE BIG SECRET?, https://www.edbtacomapierce.org/why-our-hq2-proposal-to-amazon-is-confidential/.

[34] Day, *supra* n. 32.

[35] Grace Raih, *Which Cities are Refusing to Share Their #AmazonHQ2 Bids — and Why*, MUCKROCK (Jan. 10, 2018), https://www.muckrock.com/news/archives/2018/jan/10/amazon-rejections/.

[36] Jim Piggott, *Jacksonville Offers Amazon Free Riverfront Land for its 2nd HQ*, NEWS4JAX (Dec. 15, 2017), https://www.news4jax.com/news/2017/12/15/jacksonville-offers-amazon-free-riverfront-land-for-its-2nd-hq/.

inquiry: "As opaque as Amazon seems, we have more information on that than the average deal," he said. "The average program is a lot smaller, but it's a lot quieter."[37]

From among the 238 applicants, Amazon ultimately decided on Crystal City in Arlington, Va., for its second headquarters, with a second location slated for New York City, until community opposition resulted in withdrawal of that plan, despite a generous incentive package estimated at $3 billion.[38] Virginia and Arlington County offered the company $573 million for the creation of 25,000 jobs and offered to make $223 million in transportation improvements.[39] The state also agreed to help provide $1.1 billion over 20 years to strengthen the state's technology-related higher education, giving Amazon the prospect of a state-funded trained workforce. The county announced the details in March 2019, four months after Amazon had announced that it had picked the Northern Virginia site.[40]

The public's inability to find out what Virginia was offering to Amazon until months after the decision was finalized is illustrative of the shortcomings of state open-government laws when sensitive business deals are at issue. The Virginia Freedom of Information Act has multiple exemptions that shield records about industries that state and local agencies deal with. For instance, the statute exempts marketing activities that would reveal to other states Virginia's plans for economic development projects.[41] It also exempts proprietary information voluntarily submitted to a government agency under a promise of confidentiality, specifically mentioning business "development" or "retention" as recognized justifications for confidentiality.[42]

Outside advocacy organizations give Virginia mixed reviews for transparency. In 2014, Good Jobs First rated Virginia an above-average 18th of the 50 states in online subsidy transparency, though noting that improvement was needed in the level of detail provided about particular projects.[43] However, a 2019 study by the consumer watchdog U.S. Public Interest Research Group rated Virginia 36th of the 50 states for its online development subsidy transparency, giving Virginia an F rating.[44] The study noted that the state fails to publish grant expenditures in its "online checkbook," where the public can search transactions for each state agency.[45] A study by the Pew Charitable Trust, by contrast, rated Virginia more positively, saying it was "leading" in its 2017 State Tax Incentive Evaluation Ratings.[46] The system aims to measure each states' efforts to evaluate tax incentives and measure their impact. Pew explained that Virginia is highly rated because it has a "well-designed plan to regularly evaluate tax incentives,

---

[37] Conza, *supra* n. 21.
[38] Laura Stevens, Jimmy Vielkind & Katie Honan, *Amazon Cancels HQ2 Plans in NYC*, THE WALL STREET JOURNAL (Feb. 14, 2019).
[39] Jonathan O'Connell, *D.C. Offered Amazon up to $1 Billion for Headquarters*, THE WASHINGTON POST (Nov. 19, 2018).
[40] Monica Nickelsburg, *Full Details of Amazon's HQ2 Deal with Arlington County, Va., Revealed for the First Time*, GEEKWIRE (Mar. 5, 2019), https://www.geekwire.com/2019/amazons-hq2-deal-with-arlington-county-gives-big-concessions-asks-little-of-the-company/.
[41] Va. Code Ann. § 2.2-3705.7(33) (2019).
[42] Va. Code Ann. § § 2.2-3705.6(3) (2019).
[43] GOOD JOBS FIRST, ACCOUNTABLE USA—VIRGINIA, https://www.goodjobsfirst.org/states/virginia.
[44] R.J. Cross, Linus Lu & Andre Delattre, *How the 50 States Rank on Online Economic Development Subsidy Transparency*, U.S. PIRG EDUC. FUND & FRONTIER GRP. (Dec. 2019), https://uspirg.org/feature/usp/following-money-2019-economic-development-subsidies-1.
[45] Virginia state government transactions are searchable at https://www.datapoint.apa.virginia.gov/.
[46] John Goodman & Jeff Chapman, *State Tax Incentive Evaluation Ratings*, PEW CHARITABLE TRUSTS (May 3, 2017), https://www.pewtrusts.org/en/research-and-analysis/articles/2017/05/03/state-tax-incentive-evaluation-ratings.

experience producing quality evaluations that rigorously measure economic impact, and a process for informing policy choices." The evaluation did not examine transparency, however.

Virginia does provide some information about development deals that have been agreed to through its online data tables from the Virginia Economic Development Partnership, a state government agency.[47] On its website, the economic development agency shares status reports about development partnerships as well as the grant amount for each company. When Nestlé decided to move its headquarters to Arlington, Virginia, in 2017, the county released the economic development contract, as required by state law, after it was requested by *The Washington Post*. Relying on the records produced by the county, the *Post* reported that Nestlé promised to create 750 new jobs, in exchange for a package of state, county and city incentives that included $14 million in direct grants plus $2 million in infrastructure improvements.[48]

Where state disclosure laws fail to provide sufficient access, there is one alternative method to get some details about tax incentives offered by governments. In August 2015, the Governmental Accounting Standards Board issued Statement 77, also known as GASB 77, which requires that state and local government financial statements disclose information regarding tax breaks that affect their revenue-raising abilities.[49] GASB is an independent organization that creates the accounting and financial reporting standards for the nation's state and local governments. It is recognized nationally as the key authority that establishes the standards. Although reporting to GASB is optional, about 90,000 state and local governments do report, so GASB 77 has provided the public with a much clearer picture of tax incentives in the localities they report on.[50] Using GASB disclosures, Good Jobs First maintains an online "subsidy tracker" that contains details of some 672,000 federal, state and local incentive deals, including 178 separate deals attributable to Amazon alone, worth collectively more than $2.3 billion.[51]

III. How the law treats public access to incentives

As Edmondson and Davis explained in their examination of economic development and sunshine laws, incentive deals evade public scrutiny in three major ways: By way of state statutory exemptions that enable agencies to withhold confidential information that businesses believe would put them at a strategic disadvantage, by the use of private "authorities" that may not be covered by open-government statutes to manage recruitment efforts, and by nondisclosure agreements that purport to bind government agencies to conceal information businesses deem sensitive.[52] The Amazon HQ2 deal implicated all three of these strategies, with varying degrees of success for the company's concealment efforts.

[47] VA. ECON. DEV. PARTNERSHIP, INCENTIVES REPORTING, https://www.vedp.org/incentives-reporting.
[48] Abha Bhattarai, *Nestle to Move US Headquarters to Arlington, Bringing 750 Jobs*, THE WASHINGTON POST (Feb. 1, 2017).
[49] GOVT'L. ACCTG. STAND. BD., SUMMARY OF STATEMENT NO. 77, TAX ABATEMENT DISCLOSURES (Aug. 2015), *available at* https://www.gasb.org/cs/ContentServer?c=Pronouncement_C&cid=1176166392168&d=&pagename=GASB/Pronouncement_C/GASBSummaryPage.
[50] Mya Frazier, *How an arcane, new accounting standard is helping reporters follow the money*, COLUMBIA JOURNALISM REVIEW, May 29, 2018.
[51] The tracker is available at https://www.goodjobsfirst.org/subsidy-tracker.
[52] *See* Edmondson & Davis, *supra* n. 8, at 346-47.

A. Are government giveaways a 'trade secret'?

Businesses have made aggressive use of "trade secret" exemptions in state FOI law to conceal information of public importance.[53] There is considerable debate over how broadly state "trade secret" exemptions should be interpreted, and the scope of those exemptions is regularly a source of litigation as journalists, researchers and activists try to use freedom-of-information law to get access to information about regulated industries.[54] When a public entity seeks to deny access to documents about a private business on the grounds of a trade secret exemption, state courts will consider such factors as the extent to which the information is already known outside the business, how zealously the business safeguarded the information, how valuable the information would be to competitors, the effort that the business expended in developing the information, and how easily competitors could replicate it.[55]

But courts have not always deferred to companies' insistence on trade-secret protection, particularly where public money is changing hands. For instance, when a New Jersey stadium authority fought to withhold copies of contracts with promoters who brought musical acts to the stadium, a state appeals court found that the contracts were, with minimal privacy redactions, subject to disclosure under the state Open Public Records Act.[56] The court brushed aside the promoters' insistence that the entertainers' payments were a "trade secret," finding that the contracts "merely related to the terms negotiated with the State to use the facility" and not to any internal workings of the promoters' business operations.[57]

A few states go even further than the generic "trade secret" statutory exemption and explicitly exempt information submitted to government agencies for purposes of seeking economic development incentives. An example in this category is Michigan, where state law provides that any record held by the state "in connection with" an application for tax credits that "relates to financial or proprietary information" is not subject to disclosure.[58] When a Detroit activist and former General Motors employee sued for access to an incentive package offered to GM — later revealed to be in excess of $2.2 billion — a state appeals court found that the statutory exemption allowed the state to withhold the amount of tax concessions.[59] Although the requester argued that the records were needed to satisfy the public that GM had created all of the jobs promised to the state, the court found that the statute applied not just to GM's proprietary financial information but even to the amount of the tax subsidy package, because the amount was calculated in reliance on GM's confidential submission and therefore "related to" it.[60] This 2020 ruling evidences just how broadly confidentiality provisions may be interpreted when influential industries and state agencies align on the side of secrecy and predict dire ramifications if company secrets are disclosed. The existence of a tailored carve-out above-and-beyond ordinary "trade secret" exemptions undoubtedly was a factor in convincing the court that the legislature intended to shield this very information, even when the state purse was involved.

---

[53] Stewart & Sanders, *supra* n. 20.

[54] *See* Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 21 (2013) (observing that the interests of private government contractors in protecting trade secrets "come into conflict with the principle of transparency in the public sphere").

[55] Comm. Workers of America v. Rousseau, 9 A.3d 1064, 1076 (N.J. App. 2010).

[56] Newark Morn. Ledger Co. v. N.J. Sports & Expo. Auth., 31 A.2d 623 (N.J. App. 2011).

[57] *Id.* at 638.

[58] M.C.L. § 125.2005(9).

[59] Sole v. Mich. Econ. Dev. Corp., No. 350764, 2020 WL 3002302 (Mich. App. Jun. 4, 2020).

[60] *Id.* at *4.

The temptation to categorize anything about a private entity's finances as a "trade secret" is likely only to worsen as a result of the U.S. Supreme Court's 2019 decision interpreting the term expansively in the context of a federal FOIA dispute. In *Food Marketing Institute v. Argus Leader Media*, the Court found that records sought by a South Dakota newspaper — reflecting how much local retailers received from the U.S. Department of Agriculture by redeeming food stamps — could be withheld as compromising trade secrets, even though they involved public money changing hands.[61] The issue is arising once again with the U.S. Treasury Department's initial refusal to disclose the identities of businesses that received bailouts as part of a $2 trillion federal stimulus bill enacted during the spring 2020 novel coronavirus pandemic.[62]

The notion that corporations have privacy interests of constitutional dimension that might override the public's right to be informed was rejected in a 2011 Supreme Court ruling, *FCC v. AT&T, Inc.*[63] In that case, telecom conglomerate AT&T attempted to claim "personhood" for purposes of asserting the exemption in the federal Freedom of Information Act that enables agencies to withhold law enforcement records that would "constitute an unwarranted invasion of personal privacy."[64] The Court decided the case largely by looking to the everyday usage of the exemption's key term — "personal" — which in the justices' view was in fact the antonym of "professional."[65] So, while legislators can fashion exemptions that protect companies' secrets, there is no constitutional imperative to do so.

In Pennsylvania, requesters succeeded in getting access to details about the unsuccessful attempt to recruit Amazon HQ2 despite the state's attempts to invoke "trade secret" protection. Three different news organizations — the *Pittsburgh Post-Gazette*, the *Morning Call* and nonprofit news site PublicSource — each asked the state for variations of the same documents: Records of what was offered to Amazon to locate its second headquarters in the Pittsburgh and/or Philadelphia areas. The state Department of Community and Economic Development rejected the requests by citing the exemption for trade secret materials in Pennsylvania's Right-to-Know Law.[66] But in a series of three separate rulings, the state Office of Open Records (an administrative agency empowered to hear right-to-know complaints) found the exemption inapplicable.[67]

The OOR concluded that the trade secret exemption applied only to confidential information about a business enterprise, and that the Department's strategies for recruiting businesses to the state were not themselves a business enterprise.[68] The OOR found that the state could not claim a "competitive" disadvantage as a result of the disclosure, because the dictionary definition of "competition" is "the effort or action of two or more commercial interests to obtain the same business from third parties," and the state is not a commercial interest: "Contrary to the

---

[61] 139 S. Ct. 2356 (2019).
[62] Chris Prentice, *Watchdogs, White House at Odds Over Scrutiny of Pandemic Aid*, REUTERS (June 18, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-watchdog-insig/watchdogs-white-house-at-odds-over-scrutiny-of-pandemic-aid-idUSKBN23P3E4.
[63] 562 U.S. 397 (2011).
[64] *Id.* at 399, *citing* 5 U.S.C. § 552(b)(7)(C).
[65] *Id.* at 403.
[66] 65 Pa. Stat. § 67.708(b)(11).
[67] *See* In re Belko v. Pa. Dept. of Econ. & Community Dev., Docket No. AP 2018-0849, 2018 WL 3091293 (Pa. Off. Open Rec. Jun. 13, 2018); In re Opilo v. Pa. Dept. of Econ. & Community Dev., Docket No. AP 2018-0145, 2018 WL 1542109 (Pa. Off. Open Rec. Mar. 26, 2018); In re Sohemaker v. Pa. Ofc. of the Gov., Docket No. AP 2017-2254, 2018 WL 704197 (Pa. Off. Open Rec. Jan. 31, 2018). Because the legal reasoning in all three rulings was the same, for simplicity this article will henceforth cite the *Belko* case as the most recently decided with the benefit of the two preceding decisions.
[68] *Belko*, supra n.67, at *9.

Department's claims, it is not 'competing' against other jurisdictions when offering incentives: it has not made a bid to Amazon, but instead provided an economic incentive package for entities to include in their own Amazon proposals."[69] Although the state signed the nondisclosure agreement that Amazon required of all HQ2 bidders, the OOR assigned no weight to the agreement, both because the purported five-year duration was not shown to be reasonable, and because the only purported competitive disadvantage was a disadvantage to the state as a governmental agency, not to Amazon.[70] The outcome in Pennsylvania demonstrates that it is possible to gain access to incentive proposals if they are viewed as disclosing information of "competitive" value only about the government itself and not about the industry being courted.

B. 'Quasi-public,' yet private

When a public entity creates or maintains records, the default assumption under every state's law is that those records are open for public inspection, and when a public body convenes its governing board to discuss or decide government policy, the default assumption under every state's law is that those meetings must be announced and opened to public attendance. But the definition of a "public entity" or "public body" has proven to be hard to pin down. When an agency like a state or city government enters into a joint undertaking with private-sector entities, the public's entitlement to access becomes less clear.

A recent Ohio situation illustrates how the involvement of quasi-public bodies can obscure what would otherwise be clearly publicly accessible records and meetings. In 2017, Facebook announced — a month after sealing a deal in Ohio — that it would build a data center in New Albany, Ohio.[71] Facebook announced that it would invest $750 million to build the data center and create at least 50 full-time jobs, while the Ohio Development Services Agency announced the company would receive $37.1 million in tax incentives. Until the announcement was made, the public was not informed of the name of the company or the details of incentive deals.[72] The project was so secretive that, even when state officials were voting to approve a $37.1 million package of tax incentives, the recipient was referred to by a code name, "Sidecat."[73]

The deal was negotiated by JobsOhio, Ohio's economic development nonprofit. The complex structure of JobsOhio is notable for how closely it is tied to Ohio state government despite being nominally a private entity, and the pains that the state has taken to make sure that its records do not fall into public hands.

JobsOhio was created by state legislation in 2011, run by a board of gubernatorial appointees with a $1 million state start-up appropriation.[74] The organization is funded through revenues from liquor sales through an affiliated nonprofit, JobsOhio Beverage System, that in 2013 became the "franchise" holder for the state's liquor business, which it administers in tandem with

---

[69] *Id.* at *10.
[70] *Id.* at *9.
[71] Julia Horowitz, *Facebook is Building a New $750 Million Data Center in Ohio*, CNN BUSINESS (Aug. 15, 2017), *available at* https://money.cnn.com/2017/08/15/technology/facebook-ohio-data-center/index.html.
[72] Mya Frazier, *Big Tech's Bid to Control FOIA*, COLUMBIA JOURN. REV. (Feb. 2, 2018), https://www.cjr.org/business_of_news/facebook-amazon-foia.php.
[73] Mark Williams, *Facebook is Behind Plan for Data Center in New Albany*, THE COLUMBUS DISPATCH (Aug. 11, 2017), https://www.dispatch.com/news/20170811/facebook-is-behind-plan-for-data-center-in-new-albany.
[74] State ex rel. JobsOhio v. Goodman, 133 Ohio St. 3d 297, 297 (Ohio 2012).

the state Division of Liquor Control.[75] According to its most recently available financial statement, this liquor business produces $195 million a year for JobsOhio. JobsOhio says on its website that it is "designed to drive job creation and new capital investment in Ohio through business attraction, retention and expansion efforts."[76] Its annual audited financial statements call JobsOhio a "Component Unit of the State of Ohio."[77] However, JobsOhio regards itself as a private entity not subject to public records laws.[78] Indeed, the organization's website boasts that its structure is "unlike the funding model for any economic development organization in the country in that absolutely no tax dollars or other public dollars are used to support it,"[79] which — while perhaps technically a true statement — ignores that the organization's revenues come from a former state revenue source (liquor sales) that was, essentially, "loaned" to JobsOhio under a 25-year financing arrangement. As governor, John Kasich, who had been a founder and champion of JobsOhio, protected the organization against legislative attempts to give the state auditor authority to independently audit the organization's books, which would have created a trail of public records.[80]

Under virtually any state's understanding of open-government law, this level of entanglement with state government would make JobsOhio the functional equivalent of a government agency and therefore subject to public-records and open-meetings obligations. When the openness of quasi-governmental organizations is at issue, state courts typically look to such considerations as whether the entity was created by the state, whether it is subject to government oversight or "intertwined with" government agencies, whether its powers were delegated by the government, and whether it receives direct or indirect government financial support.[81] All of these factors point in favor of public access in the case of JobsOhio. Nevertheless, the organization holds a trump card: It has an explicit statutory carve-out from the Ohio Public Records Act.

The state open records law expressly states that "records created by JobsOhio" are exempt and may be withheld from disclosure.[82] Disgruntled over the agency's lack of accountability, progressive critics (including two members of the Ohio legislature) filed suit, arguing that the organization's unique structure violated the state constitution in multiple ways, including giving a private corporate the ability to incur debt on behalf of the state.[83] But in 2014, the state Supreme Court threw out the case on a threshold standing issue — finding that the plaintiffs did not have a

---

[75] JOBSOHIO, UNDERSTANDING JOBSOHIO'S FUNDING, https://www.jobsohio.com/about-jobsohio/about-us/understanding-jobsohios-funding/. *See also* OHIO LIQUOR, ABOUT OHIO LIQUOR, https://www.ohlq.com/about (explaining that JobsOhio Beverage System owns the liquor that private retailers sell on "consignment," yielding proceeds that support state economic development).

[76] JOBSOHIO, ABOUT US, https://www.jobsohio.com/about-jobsohio/about-us/.

[77] JOBSOHIO, FINANCIAL STATEMENTS (June 30, 2019 and 2018), https://www.jobsohio.com/wp-content/uploads/2019/09/JobsOhio-Financial-Statements-with-Independent-Auditor-Report-FY1921.pdf.

[78] Email to author, Matt Engelhart, JobsOhio (copy on file with author).

[79] JOBSOHIO, UNDERSTANDING JOBSOHIO'S FUNDING, https://www.jobsohio.com/about-jobsohio/about-us/understanding-jobsohios-funding/.

[80] *See* Dylan Scott, *The Strange Case of JobsOhio and Public Auditing of Private Firms*, GOVERNING (June 10, 2013), https://www.governing.com/blogs/view/gov-ohio-officials-battle-over-auditing-of-economic-development-money.html (reporting that Kasich championed legislation enacted in 2013 to keep the state auditor from subpoenaing records of how JobsOhio was using $100 million in profits after taking over the state's liquor business)).

[81] *See* Frank D. LoMonte & Harrison O'Keeffe, *Show Us the Money: How Patchwork State Freedom-of-Information Laws Impede Accountability in High School Athletics*, 50 N.M. L. REV. 87, 116-17 (2020) (enumerating factors applied by Texas and Oregon courts in public-records disputes).

[82] Ohio Rev. Code Ann. § 187.04(C)(2) (2019).

[83] ProgressOhio.org, Inc. v. JobsOhio, First Amend. Cmplt., No. 11CV0810807 (Oh. Ct. Cmmn. Pleas Nov. 16, 2011), 2011 WL 12583871.

sufficiently concrete stake in the outcome — without reaching the merits of how JobsOhio is structured.[84]

A recent study by the U.S. Public Interest Research Group Education Fund and Frontier Group ranks Ohio the best state for online economic development transparency with an A-rating.[85] But that study only looked at the Ohio Development Services Agency and did not include an assessment of JobsOhio. One of the co-authors told *Cleveland.com* that the methodology focused on the primary economic development agency of state government itself (in Ohio's case, the Ohio Development Services Agency), and that if JobsOhio were incorporated into the study, the state likely would have had a lower score for transparency.[86]

In 2019, a largely Democratic coalition of legislators in Ohio's Republican-majority legislature introduced a bill to make JobsOhio subject to the Ohio Public Records Law and to require the organization's governing board to conduct its meetings in public.[87] The bill remained in committee and failed to advance, even though Gov. Mike DeWine has pledged to make the organization more transparent.[88]

In a recent challenge to the secrecy of public/private economic development partnerships, a Tennessee appeals court sided with citizen watchdogs who wanted access to the meetings and records of a county-created "development oversight committee."[89] The court found that, although nominally established as a nonprofit corporation distinct from its host county, the committee in fact "performs a governmental function, receives a substantial amount of taxpayer funding, and is significantly involved with a regulated by the governing city and county legislative bodies," which was enough to bring it within the reach of the state open-meetings and open-records laws.[90] The "cornerstone" of the analysis was whether the entity "performs a governmental or public function," such that it is the "functional equivalent" of a state or county agency.[91] Indicia that pointed in favor of "public" status included the facts that: (1) the committee was set up by resolution of a county commission and two city councils to perform "a primary governmental purpose," (2) the committee received at least 60 percent of its operating budget from taxpayers, and (3) public officials held four of the eight seats on the committee's governing board.[92]

Researchers William Hatcher and Augustine Hammond have found that, while the use of nonprofits to manage economic development without public disclosure is a common practice throughout the country, the practice is more widely used in the Northeast and in smaller

---

[84] ProgressOhio. org, Inc. v. JobsOhio, 139 Ohio St. 3d 520 (Ohio 2014).
[85] Cross *et al.*, supra n. 44.
[86] Jeremy Pelzer, *Ohio is Only U.S. State to Have Adequate Transparency about Business Subsidies, Study Finds*, CLEVELAND.COM (Dec. 11, 2019), https://www.cleveland.com/open/2019/12/ohio-is-only-us-state-to-have-adequate-transparency-about-business-subsidies-study-finds.html.
[87] Ohio H.B. 185 (proposed 2019).
[88] *See* Andrew J. Tobias, *JobsOhio, the State's Private Economic Development Arm, Could be Forced to be More Open About What it Does*, CLEVELAND.COM (Apr. 3, 2019), https://www.cleveland.com/news/g66l-2019/04/66b55a92039666/jobsohio-the-states-private-economic-development-arm-could-be-forced-to-be-more-open-about-what-it-does.html (explaining that JobsOhio releases limited information, including monthly financial reports, but quoting DeWine saying it should also release its employee salaries).
[89] Wood v. Jefferson Cty. Econ. Dev. Oversight Comm., Inc., No. E2016-01452-COA-R3-CV, 2017 WL 427711 (Tenn. App. Sept. 26, 2017).
[90] *Id.* at *1.
[91] *Id.* at *3-4.
[92] *Id.* at *4-5.

communities.[93] The use of nonprofit development entities is sometimes justified on the basis of efficiency and insulating decisions from direct political interference, they wrote.[94]

Ned Hill, a professor of economic development policy at The Ohio State University, said that there are advantages to using a non-profit, outside of the regular government staff, to do economic development deals. He said the advantages include the ability to pay better compensation to outside experts than a government agency would be allowed to pay, insulation from politically motivated funding decisions by legislators, and the ability to draw on private funding sources to save taxpayer money.[95]

But there are risks to this system, said UT-Austin's Jensen. In addition to being exempt from public disclosure laws, a private development authority may have undisclosed ethical conflicts on the part of officials who make decisions based on motives other than careful stewardship of the public's money.[96] Finkle, of the International Economic Development Council, downplayed the risk that hidden agendas and conflicts will lead to disadvantageous deals, saying that state and local government must ultimately approve the bargains struck by private development authorities and can exercise independent oversight.[97]

The Amazon HQ2 pursuit provides a window into how government agencies can successfully use private entities to avoid disclosure. In 2018, a nonprofit transparency advocate, Public Record Media, sued Minnesota's Department of Employment and Economic Development for records of the HQ2 bid package submitted on behalf of the Minneapolis area, which PRM had requested under the Minnesota Data Practices Act.[98] Rather than trying to invoke an exception to the Act, the state simply responded: We don't have the records — they were prepared by a nonprofit regional economic development entity, Greater MSP, which is not subject to public-records requests. A state district judge agreed.

The judge ruled that state law requires agencies to turn over only records that they have "collected, created, received, maintained or disseminated," none of which applied to the Department.[99] Even though the plaintiffs were able to show that the state had access to an online cloud portal — referred to as "The Box" — in which the bid documents were posted, the court held that merely having viewed the documents and having the ability to download copies did not satisfy the literal requirements of the statute.[100] Nor, the judge found, had Public Record Media shown any formal contractual relationship under which Greater MSP prepared the documents at the behest of or under the direction of the state, which might have been enough to make them public records.[101] Minnesota's use of cloud-based portals as a means of avoiding coming into

[93] William Hatcher & Augustine Hammond, *Nonprofit Economic Development Organizations and the Institutional Arrangement of Local Economic Development*, 4 J. OF PUB. & NONPROFIT AFFAIRS, 4 21-40 (2018), https://doi.org/10.20899/jpna.4.1.21-40.
[94] *Id.* at 22.
[95] Conza, *supra* n. 21.
[96] *Id.*
[97] *Id.*
[98] Peter Callaghan, *Lawsuit Over Amazon Bid Reveals the Latest Way Minnesota Officials are Attempting to Sidestep Public Disclosure Laws*, MINNPOST (June 28, 2018), https://www.minnpost.com/politics-policy/2018/06/lawsuit-over-amazon-bid-reveals-latest-way-minnesota-officials-are-attemptin/.
[99] 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 *7, *citing* Minn. Stat. §13.02, subd. 7.B.
[100] *Id.* at *8.
[101] *Id.* at *9.

physical possession of records is not a new phenomenon,[102] but it is a practice worth watching for the community of transparency advocates, as there seems little doubt that the records would have been public had Greater MSP mailed a copy to the Department rather than hosting them on a server, the modern equivalent of mailing them.

C. When an NDA is DOA

In several communities over the past decade, Google has negotiated millions of dollars of economic development deals, keeping the public in the dark by using non-disclosure agreements and an alias for the company name.

In Tennessee, for instance, the Clarksville and the Montgomery County Industrial Development Board signed a 2015 non-disclosure agreement with Google.[103] After a private negotiation process, the company agreed to build a data center in the county, investing $600 million and making 34 direct hires.[104]

Google announced in 2019 that it would make $13 billion in investments in data centers and offices across the country, expanding in 14 states and promising to create 10,000 construction jobs.[105] But details were vague. Google required non-disclosure agreements from the competing jurisdictions. The agreement that the Clarksville economic development nonprofit entered into also carried another requirement that benefited Google. It agreed to a Google request that required the city to notify Google if it received a public records request for confidential information.[106] That would give Google advance notice and time to gear up to fight the request. Amazon exacted a similar agreement from its initial two choices for the HQ2 location, New York/Long Island City (which ultimately was dropped from consideration) and Arlington County, Virginia.

Contracts obligating government agencies not to disclose information shared by private parties are not always binding and enforceable. A government agency cannot "agree" to violate a state open-records statute any more than the agency could enter into a contract to perform any other unlawful act. Contracts in which the parties agree to jointly violate the law are considered contrary to public policy and subject to judicial voiding. Attempts by state and local governments to "contract their way around" public disclosure laws have been largely unsuccessful.[107]

For instance, in one recent Louisiana case, a sheriff's department entered into a confidentiality agreement after paying a settlement to the surviving relatives of a man shot to death in the back of a police cruiser, purportedly using his own gun that a deputy failed to discover

---

[102] *See* NCAA v. Associated Press, 18 So. 3d 1201 (Fla. App. 2009) (rejecting state university's argument that documents provided to and used by the university did not qualify as public records because the NCAA posted them to an online portal where university employees viewed them, but never printed or copied them).

[103] The Partnership for Working Families, a nationwide network of progressive organizations focused on environmental and worker-rights issues, provided a copy of the NDA to *The Washington Post,* which uploaded the document at https://www.washingtonpost.com/nda:-google,-clarksville/3aeaf91e-22a6-4f7c-8adf-6c4a3f1a5abb_note.html?questionId=d4544c25-9f17-4954-a5df-5baab1669d9d.

[104] Elizabeth Dwoskin, *Google Reaped Millions in Tax Breaks as it Secretly Expanded its Real Estate Footprint Across the U.S.*, THE WASHINGTON POST (Feb. 15, 2019).

[105] *Id.*

[106] *Id.*

[107] *See, e.g.,* State *ex rel.* Sun Newspapers v. Westlake Bd. of Educ., 601 N.E.2d 173, 175 (Ohio App. 1991) (finding that a public agency "cannot enter into enforceable promises of confidentiality with respect to public records" in a dispute over access to a settlement agreement between a school district and a fired employee); Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1181, 1193 (Alaska 1989) ("[W]e hold that a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential.").

during a pat-down search.[108] Although all parties to the settlement wanted the amount of the payment to the dead man's child to remain undisclosed, the federal Fifth Circuit found that there was a larger public interest in knowing how much money changed hands. As Judge James E. Graves, Jr., wrote in overturning the trial court's order sealing the agreement: "[A]t least one of the parties is a public official or party of a public nature, and the public's interest in the settlement amount is particularly legitimate and important, not least because disclosure will allow the public to monitor the expenditure of taxpayer money."[109] In other words, even the unanimous consent of all parties to an agreement cannot automatically overcome the public's interest in access, particularly where taxpayer expenditures are at stake.

The Louisiana ruling aligns with those in many other contexts, in which courts have long refused to give effect to agreements that purported to override a public entity's duty to comply with state open-government law. In *Robles v. EPA*, the federal Fourth Circuit held that the Environmental Protection Agency's promise to homeowners to keep certain environmental survey information confidential did not override the presumption of disclosure under the federal Freedom of Information Act.[110] Similarly, in *Washington Post Co. v. U.S. Department of Health and Human Services*, the federal D.C. Circuit ruled that a government promise to HHS consultants not to disclose information they submitted to determine whether they had ethical conflicts-of-interest was not a legitimate basis to reject a FOIA request: "[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate."[111]

In short, unless a recognized statutory exemption enables government agencies to withhold records, a purported contractual agreement to do so is unlikely to override the public's right of access if a requester pursues legal action.

IV. 'Alexa, show me public records': Post-Amazon reform proposals

A. Amazon fails to deliver legislative reform

The secrecy that Amazon insisted on maintaining, combined with the sheer size of the incentive offers, provoked widespread public criticism. Tech columnist Casey Newton called the entire bidding competition a "distasteful" stunt and a "ruse," particularly the insistence on non-disclosure.[112] In a column for the *USA Today* network, UT-Austin's Jensen wrote: "The communities refusing to reveal their bids may signal that they fear backlash because what they are offering is unpopular and could crumble if revealed to the public. What they are offering to Amazon may not be credible."[113] A Cleveland columnist questioned the rationale for the city's continued insistence on maintaining secrecy even after losing the bid — that, the city claimed,

---

[108] Bradley v. Ackal, 954 F.3d 216 (5th Cir. 2020).
[109] *Id.* at 233.
[110] 484 F.2d 843, 845-46 (4th Cir. 1973).
[111] 690 F.2d 252, 263 (D.C. Cir. 1982),
[112] *See* Casey Newton, *Amazon's HQ2 Stunt Could Come Back to Haunt It*, THE VERGE (Nov. 14, 2018), https://www.theverge.com/2018/11/14/18093726/amazon-hq2-backlash-giveaway-public-records ("There's plenty in here to be upset about. But I'll highlight just one thing that I think most people can agree on: the way these companies demand such strict secrecy from the public that is handing them the welfare checks.").
[113] Nathan Jensen, *To Win Amazon HQ2, Cities Should Abandon Secrecy*, USA TODAY (Nov. 4, 2017), https://www.usatoday.com/story/opinion/2017/11/04/secret-amazon-headquarters-bids-undermine-transparency-could-spark-backlash-column/825423001/.

disclosure would give future corporate prospects access to strategically useful information — by noting that plenty of information about the range of incentive offers across the country was already widely available.[114]

Although the secrecy of the HQ2 beauty contest was widely regarded as excessive, state legislators have failed to translate the public revulsion into concrete reform. In Florida, for instance, efforts to reform the state's "trade secrets" law to more narrowly define the information that can be withheld have foundered despite a high-profile controversy that provoked public condemnation.

During 2016, a quasi-public entity supported by state tax dollars, Visit Florida, inked a secretive deal with Miami-based rap artist Armando Christian Pérez, better known by his stage name "Pitbull," to appear in Florida tourism promotions.[115] The terms of the contract were designated "trade secret," including the sum paid to the rapper — but after a lawsuit against Visit Florida, the artist himself disclosed the amount, $1 million, provoking further criticism.[116] The controversy soured legislators on Visit Florida, which faced a defunding threat.[117]

Notwithstanding the controversy over either the Pitbull contract or the Amazon pursuit, Florida legislators have resisted enacting legislation to clarify what can and cannot be withheld as a trade secret. A bill aimed at helping the public better understand the scope of government giveaways to private businesses died in the 2020 legislature for the third year in a row. The measure, which would have made it more difficult to withhold information about public contracts, failed to even win a hearing in the state Senate after passing the House.

Rep. Tommy Gregory, R-Sarasota, the bill's chief sponsor, said the measure would have allowed the public to have more details about economic development deals with private industry than are now afforded. Gregory explained that the net effect of his legislation would result in more disclosure because state and local agencies would no longer be able to withhold the financial details of their contracts by characterizing that information as a "trade secret."[118]

Gregory said he introduced House Bill 799[119] to define secrets in the same way as the Uniform Trade Secrets Act, international model legislation that defines the scope of commercially strategic information that companies may insist on keeping confidential.[120] Although the bill passed the Florida House during the 2020 legislative session, the similar Senate bill did not move through its assigned committees, so the session adjourned without a final vote on the proposal.

---

[114] Sam Allard, *The Secret Amazon Bid Dramatizes a Huge Cultural Problem in Cleveland. The Media Can Do Something About It*, CLEVELAND SCENE (Jan. 22, 2018), https://www.clevescene.com/scene-and-heard/archives/2018/01/22/the-secret-amazon-bid-dramatizes-a-huge-cultural-problem-in-cleveland-the-media-can-do-something-about-it.

[115] Monivette Cordiero, *Pitbull Releases 'Sexy Beaches' Video for Florida Tourism Agency*, ORLANDO WEEKLY (Jul. 16, 2016), https://www.orlandoweekly.com/Blogs/archives/2016/07/16/pitbull-releases-sexy-beaches-video-for-florida-tourism-agency.

[116] Jeremy Wallace, *Here's How Much Florida Paid Pitbull to Promote its 'Sexy Beaches'*, THE MIAMI HERALD (Dec. 15, 2016).

[117] *See* Jim Turner, *Visit Florida Slashes Staff After Funding Gets Cut*, THE (LAKELAND) LEDGER (May 24, 2019) (reporting that Visit Florida staved off a legislative threat of elimination by accepting a 34 percent reduction in its state appropriation).

[118] Sabrina Conza, *Florida Trade Secret Bills Fail For The Third Consecutive Session*, WUFT.ORG (Mar. 17, 2020), https://www.wuft.org/news/2020/03/17/florida-trade-secret-bills-fail-for-the-third-consecutive-session/.

[119] A copy of the as-filed legislation is available at https://www.flsenate.gov/Session/Bill/2020/799/BillText/Filed/PDF.

[120] Florida's codification of the UTSA appears at Fla. Stat. § 688.001 *et. seq.*

Under Gregory's bill, the company is responsible for determining what is a trade secret and marking it as such at the time it first provides the information to the government. It is the government's responsibility, however, to verify that the information should be considered a trade secret and, if so, to ensure it is not duplicated or released in any way. In an accompanying bill,[121] Gregory also proposed to remove broad exemptions to the Florida public records act that enabled local government entities to withhold information they designated as "trade secret," essentially trading a patchwork of exemptions left to local discretion for a more clearly standardized statewide definition of "trade secrets." Similar versions of these bills were filed in the 2018 and 2019 legislative sessions, but also failed to advance.

Inaction on making economic development information more accessible is not unique to Florida. In New York, two separate bills meant to strengthen transparency and accountability in the state's economic development act died in committee. The first bill, sponsored by a group of Democratic legislators led by state Sen. Liz Krueger, D-Manhattan, required, among other things, for recipients of development subsidies to submit progress reports to ensure all provisions of the agreement are being followed.[122] The other New York proposal that failed, N.Y. A07096, would have enacted a subsidy cap of $6,000 per new full-time job created and would have required an annual corporate performance report.[123] The annual report would have laid out how many new jobs the deal required as well as how many jobs were actually created and how many jobs were lost in the previous year and other financial information about the outcomes after the deal.

During the 2020 legislative session in Nebraska, state Sen. Tom Brandt, R-Lincoln, introduced a bill amending the state's Taxpayer Transparency Act, requiring the publishing and reporting of information relating to tax incentive programs.[124] The bill failed in committee. Similarly, in Indiana in 2019, state Sen. Lonnie Randolph, D-East Chicago, introduced a bill that would have required those receiving incentives to submit an annual compliance report, including the number of jobs created or retained, employee pay, and other information pertinent to the provided incentive.[125] The bill would have required this information to then be compiled by the Indiana Economic Development Corporation and included in its annual report. However, the bill died in committee.

One state that did enact post-Amazon legislation is a state that was never a serious HQ2 contender: Mississippi. Although not generally renowned as a bastion of open government, Mississippi already had one of the higher ratings for economic-development transparency in the U.S. PIRG national rankings (rated #4 nationally with a grade of B-minus).[126] Sen. David Parker, R-Olive Branch, introduced Senate Bill 2563 to increase disclosure of information about incentive packages by clarifying that the public is entitled to see annual progress reports submitted by incentive recipients to the Mississippi Development Authority.[127] The annual reports reflect whether companies are fulfilling their part of the incentive bargain (number of jobs created, average wage paid, percentage of new hires eligible for benefits, and so on). While the bill did pass with Parker's proposal clarifying the public's right of access to the annual reports, legislators also amended the annual reporting requirement so that only companies receiving incentives worth

---

[121] Fla. H.B. 801 (2020), https://www.flsenate.gov/Session/Bill/2020/801/BillText/Filed/PDF.
[122] N.Y. S.B. 01923 (2019-20), https://www.billtrack50.com/BillDetail/1023237.
[123] N.Y. A.B. 07096 (2019-20), https://www.billtrack50.com/BillDetail/1114354.
[124] Neb. L.B. 1045 (2020), https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=41277.
[125] Ind. S.B. 0157 (2019), https://legiscan.com/IN/bill/SB0157/2019.
[126] Cross *et al.*, *supra* n.44, at 1.
[127] Miss. S.B. 2563 (as introduced, Feb. 17, 2020), https://legiscan.com/MS/text/SB2563/id/2139884.

$5 million or more must report, instead of the previous $1 million threshold.[128] In this way, the bill represents one step forward for transparency (clearer entitlement to see whether companies are creating the jobs they've promised) and one step back (many fewer recipients required to file public disclosures).

B. Bluegrass backlash

In Kentucky, where the public has relatively broad access to information about economic development activities, momentum has been swinging in the direction of less disclosure, not more. During the 2019 Kentucky legislative session, state Rep. Jason Petrie, R-Elkton, introduced a bill to keep economic development deals confidential.[129] The bill would have broadened exemptions in the Kentucky Open Records Act to enable the state to withhold broad swaths of economic development information, including records of incentive offers if no deal ends up being made, the business plans of companies receiving incentives, and any other information designated "confidential" by the Kentucky Economic Development Finance Authority. The legislation got as far as the House floor but did not advance further.[130] In an editorial, Louisville's *Courier Journal* called the bill "an assault on government openness and accountability and an attack on democracy."[131] In an interview, Petrie explained that his legislation was a response to what he viewed as overly broad court rulings in Kentucky making almost all economic development information public, which puts the state at a strategic negotiating disadvantage akin to showing one player's cards in a poker game.[132]

The bill immediately followed a controversy over access to information about the Braidy Industries economic development incentive package. When Braidy announced a plan to build an aluminum rolling mill in eastern Kentucky in 2017, the state government directly invested $15 million.[133] The *Courier Journal* newspaper requested the names of the company's other investors, but the Kentucky Cabinet for Economic Development claimed the documents couldn't be released under state law. (The Petrie legislation included a specific exemption for the identities of shareholders of companies that receive public incentives.[134])

Braidy had been linked to a deal involving Russian oligarch Oleg Deripaska's company Rusal.[135] Deripaska has been barred from traveling to the United States because of the federal government's concerns that he has ties to organized crime.[136]

---

[128] Miss. S.B. 2563 (as enacted, Jul. 8, 2020), https://legiscan.com/MS/text/SB2563/2020.
[129] John Cheves & Daniel Desrochers, *Kentucky Wants More Secrecy for the Public Incentives it Offers Corporations*, LEXINGTON HERALD LEADER (Feb. 19, 2019), https://www.kentucky.com/news/politics-government/article226453720.html.
[130] A status report on the legislation, House Bill 387 (2019), is available at https://apps.legislature.ky.gov/record/19rs/HB387.html.
[131] Editorial, *Kentucky Lawmakers Must Reject Bill that Limits Access to Public Records*, THE COURIER JOURNAL (Mar. 6, 2019), https://www.courier-journal.com/story/opinion/2019/03/06/kentucky-open-records-bill-lawmakers-must-reject/3078964002/.
[132] Interview with Rep. Petrie, Nov. 22, 2019 (notes on file with author).
[133] Matthew Glowicki & Morgan Watkins, *Braidy Industries Lands Russian Investor for Kentucky Aluminum Mill*, THE COURIER JOURNAL (Apr. 15, 2019).
[134] Cheves & Desrochers, *supra* n. 129.
[135] Tom Hamburger & Rosalind S. Helderman, *How a McConnell-Backed Effort to Lift Russian Sanctions Boosted a Kentucky Project*, THE WASHINGTON POST (Aug. 13, 2019).
[136] Andrew Higgins & Kenneth P. Vogel, *Two Capitals, One Russian Oligarch: How Oleg Deripaska Is Trying to Escape U.S. Sanctions*, THE NEW YORK TIMES (Nov. 4, 2018).

The U.S. Senate, in an effort led by Kentucky's Sen. Mitch McConnell, the Republican majority leader, blocked an attempt in January 2019 by Democrats to continue U.S. Treasury Department sanctions on Rusal, Russia's largest aluminum producer and the second largest in the world.[137] A short time later, Rusal announced a deal with Braidy. Rusal said it would provide $200 million in capital to buy a 40 percent stake in Braidy's new aluminum rolling plant to be built in Ashland. The federal government lifted the sanctions on Rusal, saying that Deripaska had diminished his stake in Rusal, handing some of it off to allies.[138]

Journalists and others in Kentucky and elsewhere had already raised questions about the deal, long before the agreement was announced. The *Courier Journal*'s efforts to get information about the deal dated to 2017. Then-Kentucky Attorney General Andy Beshear, now the state's governor, issued an opinion in October 2017 finding that information about the company's owners was not exempt from production under the Open Records Act.[139]

The state economic development agency challenged Beshear's interpretation, but a trial judge ordered the documents produced and, in a November 2019 ruling, the Kentucky Court of Appeals agreed.[140] Although the open records law authorizes public agencies to withhold records "containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy," the appeals court found the privacy exemption inapplicable.[141] The court noted that the identity of Braidy's owners became "unquestionably a matter of public interest" when the state "made an extraordinary investment of public funds in Braidy."[142] The state, Judge Joy A. Kramer wrote, "is now in business with those shareholders. This creates a heightened public interest in disclosure."[143] Because the newspaper's request was relatively modest — just the identities of the shareholders, not details about their personal finances — the court found no offsetting privacy interest outweighing the public's right of access.[144] Nor could the state take advantage of a second open-records exemption that applies to trade-secret information shared in confidence with a public agency, the court decided, because the identity of shareholders is not information traditionally kept confidential that would give potential competitors an unfair advantage if disclosed.[145]

Notably, the Amazon HQ2 controversy produced a pro-disclosure ruling in Kentucky, narrowly applying a targeted economic-development exemption that enables government agencies to withhold information about the prospective locations of business prospects if the information has not been previously disclosed.[146] In 2018, Louisville's *Courier-Journal* sued the consolidated Louisville-Jefferson County government after being denied access to records of the community's

---

[137] Patricia Zengerle, *Bid to Keep U.S. Sanctions on Russia's Rusal Fails in Senate*, REUTERS (Jan. 16, 2019), https://www.reuters.com/article/us-usa-russia-sanctions/bid-to-keep-u-s-sanctions-on-russias-rusal-fails-in-senate-idUSKCN1PA2JB.

[138] Polina Devitt & Arshad Mohammed, *Questions Linger Over Deripaska's Rusal Influence After U.S. Deal,* REUTERS (Feb. 4, 2019), https://www.reuters.com/article/us-usa-russia-sanctions-rusal-analysis/questions-linger-over-deripaskas-rusal-influence-after-us-deal-idUSKCN1PT0K9.

[139] Morgan Watkins, *Attorney General Andy Beshear: Reveal 'Secret Partners' in Company Getting $15M from State*, THE COURIER JOURNAL (Oct. 6, 2017).

[140] Cabinet for Econ. Dev. v. Courier-Journal, Inc., No. 20180-CA-001131-ME, 2019 WL 2147510 (Ky. App. May 17, 2019).

[141] *Id.* at *5, citing K.R.S. § 61.878(1)(a).

[142] *Id.* at *7.

[143] *Id.*

[144] *Id.*

[145] *Id.* at *8-9.

[146] K.R.S. § 61.878(1)(d).

failed courtship of H2Q.[147] A trial judge found in favor of the newspaper, and the state Court of Appeals agreed.[148]

The court readily concluded that the exemption for unreleased plans about prospective business relocations or expansions was inapplicable, because "Amazon's interest in relocating was extensively publicized."[149] The government's backup argument — that the documents could be withheld under a Kentucky Open Records Act exemption that applies to "preliminary drafts" prepared in advance of final agency action, proved more difficult to resolve. The Kentucky attorney general's office had previously opined that proposals about economic incentive packages forever remained "preliminary" — and hence, not subject to mandatory disclosure — if nothing came of the pursuit.[150] But the appeals court disagreed with that longstanding interpretation, concluding that the agency's decision effectively became "final" once a decision was made either to accept or reject the incentive offer.[151]

This outcome is significant not just for public scrutiny of the Amazon recruitment effort but for all future such pursuits, because it means every offer will eventually become subject to inspection, even if nothing ever comes of the courtship. This narrow understanding of what it means for a document to be a "preliminary draft" is a break with the way the comparable federal FOIA exemption in 5 U.S.C. § 552(b)(5) has been interpreted; under the prevailing understanding of federal FOIA, a "predecisional" draft never becomes public, even after the agency reaches a final decision.[152]

C. Why disclosure matters

After two years of courting the U.S. Olympic Committee, Boston was designated as the U.S. candidate to host the 2024 Summer Olympic Games, beating out bidders including Los Angeles, Washington, D.C., and San Francisco.[153] The bid package was the handiwork of a public-private entity, Boston 2024, and the secrecy of the financial package offered to lure the summer games only escalated public skepticism over the value of the Olympics. A July 2015 poll showed that the support for a Boston 2024 Olympics was not high, with about 50 percent of Bostonians opposed.[154]

Boston 2024 did not release its official bid package until two weeks after the announcement was made that the city would be the U.S. entry in the bidding,[155] and did not release the original

---

[147] Phillip M. Bailey, *Courier Journal Sues Louisville for Withholding Details on Failed Amazon HQ2 Bid*, THE COURIER-JOURNAL (Mar. 9, 2018), https://www.courier-journal.com/story/news/politics/metro-government/2018/03/09/amazon-headquarters-louisville-incentives-offer-courier-journal-lawsuit/411802002/.

[148] Louisville/Jefferson County Metro Gov. v. Courier-Journal, Inc., No. 2018-CA-001560-ME, 2019 WL 3756332 (Aug. 9, 2019).

[149] *Id.* at *2.

[150] *Id.* at *3.

[151] *Id.* at *5.

[152] *See* Russell v. Dept. of the Air Force, 682 F. 2d 10450 (D.C. Cir. 1982) (accepting agency's position that decade-old manuscript remained a "predecisional" document exempt from disclosure under the (b)(5) exemption to FOIA).

[153] Shannon Sims, *How Bostonians Defeated the Olympics*, BLOOMBERG CITYLAB (June 5, 2017), https://www.bloomberg.com/news/articles/2017-06-05/how-boston-citizens-defeated-the-city-s-olympic-bid.

[154] Curt Nickish, *WBUR Poll: Deadline Looming, Public Support Of Boston's Olympic Bid Largely Unchanged*, WBUR (Jul. 10, 2015), https://www.wbur.org/news/2015/07/10/wbur-july-olympics-poll.

[155] Zeninjor Enwemeka, *Boston 2024 Releases Olympic Bid Documents*, WBUR (Jan. 21, 2015), https://www.wbur.org/news/2015/01/21/boston-2024-olympics-bid-images.

bid until it was threatened with a subpoena,[156] leaving many members of the public wondering why the bids were hidden. Once the multibillion-dollar cost of the Games became known, and experts began questioning the assurance that private dollars could fully cover the expense,[157] public support collapsed and Boston took the unusual step of withdrawing its candidacy. Boston's exit cleared a path for Paris, which happily grabbed the offer.

The experience of Boston Olympic organizers dramatizes the risk that government officials run when they make guarantees with public money that the public finds overly generous for the benefit received. Boston and the U.S. Olympic Committee were humiliated, and the United States lost a shot at hosting the 2024 Games, because civic leaders formulated the city's offer in secrecy without getting public buy-in.

In his 2019 analysis questioning the value of tax abatements, Robert Louis Perkins prescribed greater transparency as a remedy for the bidding frenzy that can lead states and cities to overpay for job creation:

> The lack of information available to communities in the midst of the bidding process to attract a new company creates a climate where political actors unwisely offer tax incentive packages without properly considering the consequence. … Through increased transparency in the bidding process and imposing the use of more rigorous evaluation models for assessing incentives, public officials will be more strategic in their use of incentives.[158]

The "disarmament" effect of transparently disclosing incentives, Perkins concludes, could induce communities to compete based on more societally beneficial qualities, such as a qualified workforce and modern infrastructure.[159] In this way, disclosure could produce not just greater political accountability for those who wastefully agree to disadvantageous deals, but also substantively better community outcomes.

Disclosure enables the press and public to provide an independent reality check on the ambitions of economic development boosters who may get carried away with bidding fervor — or, worse, may corruptly use incentives for personal political or financial gain. If the public, generally by way of the news media, does not have information to evaluate whether incentive packages are worthwhile, states may not do the job themselves; in its 2017 study of the oversight of economic development incentives, the Pew Research Center identified just 10 states regarded as "rigorously" evaluating the merits of their deals, while 23 were identified as "trailing," performing little-to-no independent assessment.[160]

Public scrutiny is especially valuable because public-private entities, accustomed to operating in darkness, may cut corners or get sloppy with the public's money. A 2016 audit of Utah's public-private job-recruiting partnership, the Economic Development Corporation of Utah (EDCU), found "problematic practices in ... financial management and governance" in the

---

[156] Adam Vaccaro, *Facing Subpoena Threat, Boston 2024 to Release Original Bidding Documents*, BOSTON.COM (Jul. 22, 2015), https://www.boston.com/news/business/2015/07/22/facing-subpoena-threat-boston-2024-to-release-original-bidding-documents.

[157] *See* Sims, *supra* n. 153 (reporting that opponents challenged the Boston bid committee's assurances that taxpayers would not be on the hook to pay for the Olympics as "unreliable and statistically improbable").

[158] Perkins, *supra* n. 12, at 21-22.

[159] *Id.* at 23.

[160] John Goodman & Jeff Chapman, *State Tax Incentive Evaluation Ratings*, PEW CHARITABLE TRUSTS (May 3, 2017), https://www.pewtrusts.org/en/research-and-analysis/articles/2017/05/03/state-tax-incentive-evaluation-ratings.

organization, which gets more than 60 percent of its money from taxpayers.[161] The audit documented such a profound breakdown in oversight that the agency's top managers and board remained unaware for more than two years that EDCU had been stripped of its tax-exempt status for failing to file three years' worth of tax returns.[162]

In New Jersey, journalists have used access to public records of business incentives to raise serious questions about the role of political connections in securing economic development deals. In 2013, the New Jersey legislature approved the Economic Opportunity Act, which aimed to encourage businesses to relocate to or remain in the state through tax credits.[163] Subsequently, *The New York Times* reported that the law has been used by political insiders to promote their business interests[164] and by companies to get more tax breaks by pretending to relocate.[165]

ProPublica and WNYC reported in a detailed account that Holtec, a nuclear parts manufacturer, had told New Jersey that other states were seeking its business.[166] But Holtec failed to disclose that, a few weeks before submitting its application, the state of Ohio already had stripped the company of tax credits for failing to create the jobs it had promised. New Jersey went on to give Holtec $260 million in assistance, the second largest tax break in state history, according to ProPublica.[167] The news reports cited a lack of oversight by the state government as a factor in how some companies could game the system. In its 2017 State Tax Incentive Evaluation Ratings, Pew Charities rated New Jersey "trailing," which is the lowest rank given.[168]

In the wake of the news reports citing potential abuse of the incentive system, New Jersey has been reevaluating its incentives in conjunction with Rutgers University. Governor Phil Murphy, who took office in 2018, has suggested caps on incentives.[169] State Sen. Bob Smith, D-Piscataway, also proposed improving the incentives' transparency.[170] Meanwhile, the *Philadelphia Inquirer,* citing unnamed sources, reported in September 2019 that the programs are being probed by federal investigators.[171]

In Los Angeles, transparency proved to be important for an economic development deal and contract between the city's transit authority and a bus manufacturer. But it took a court battle to reveal the details to the public.

---

[161] OFC. OF THE LEGIS. AUDITOR GEN'L, A PERFORMANCE AUDIT OF THE ECONOMIC DEVELOPMENT CORPORATION OF UTAH (Oct. 2016), https://le.utah.gov/audit/16_07rpt.pdf.
[162] *Id.* at 39-40.
[163] N.J. Stat. Ann. § 34:1B-114
[164] *See* Nick Corasaniti and Matthew Haag, *The Tax Break Was $260 Million. Benefit to the State Was Tiny: $155,520.*, THE NEW YORK TIMES (May 1, 2019) (reporting that influential Democratic lawyer obtained changes in Economic Opportunity Act legislation that directed tax benefits to politically connected businesses with no public disclosure).
[165] *See* Nick Corasaniti and Matthew Haag, *How One Address Led to a $100 Million Tax Credit Scheme*, THE NEW YORK TIMES (Sept. 24, 2019) (reporting that 12 companies reaped windfall tax concessions by making unfounded threats to move their headquarters to New York).
[166] Jeff Pillets, Nancy Solomon & Alex Mierjeski, *A Huge Tax Break Went to a Politically Connected Company in New Jersey Despite Red Flags*, PROPUBLICA (June 26, 2019), https://www.propublica.org/article/a-huge-tax-break-went-to-a-politically-connected-company-in-new-jersey-despite-red-flags.
[167] *Id.*
[168] Goodman & Chapman, *supra* n. 46.
[169] John Reitmeyer, *Experts: NJ's Tax Incentives Are Not The Only Way To Grow An Economy*, N.J. SPOTLIGHT (Sept. 6, 2019), https://www.njspotlight.com/2019/09/19-09-05-experts-njs-tax-incentives-are-not-the-only-way-to-grow-an-economy/.
[170] *Id.*
[171] Jeremy Roebuck, Andrew Seidman & Catherine Dunn, *FBI, Philly Prosecutors Investigating N.J. Corporate Tax Breaks, Sources Say*, PHILADELPHIA INQUIRER (Sept. 26, 2019).

The Los Angeles County Metropolitan Transportation Authority, also known as LA Metro, in 2013 selected New Flyer, a Canadian company with an American branch, to produce up to 900 compressed natural gas buses. The company agreed to create more than 50 full-time positions that would pay from $11 to nearly $50 an hour.[172]

Jobs to Move America, a nonprofit that promotes the creation of higher wage and local jobs, requested public records from the transit authority to determine if New Flyer was fulfilling its job creation and salary commitments. In response, New Flyer sued the transit authority to prevent the release of the records.

The company claimed that the information sought by Jobs to Move America was proprietary and not subject to public release, even though the company had won a public contract based on commitments to specific numbers of new jobs and wage levels. The transit authority opted not to get involved in the case, which left it to Jobs to Move America to litigate the case and defend the public's right to know.[173] The case dragged on for more than 18 months.

In October 2017, a Los Angeles County Superior Court judge ruled that New Flyer must release the job creation and salary details.[174] The judge did not invalidate California's trade secret or proprietary information exemption. Instead, she determined that New Flyer had not done enough to keep the information secret and had effectively waived the exemption. The judge also said that the public's interest in learning whether New Flyer had met the terms of the public contract overrode the company's privacy concerns.[175] In March 2018, the court ordered New Flyer to pay Jobs to Move America $170,000 in legal fees.[176]

Following the release of the job creation and salary records, Jobs to Move America is suing New Flyer on behalf of the state of California, alleging that the company is not living up to its promises about wages and other issues.[177] New Flyer could face up to $11,000 in penalties for each false claim the company made.

As the Los Angeles experience, and others like it, amply demonstrate, public scrutiny can make the difference between action and inaction to hold businesses responsible when economic development deals fail to produce results. Even if there is no outright corruption or malfeasance, transparency plays a role in making sure that those paying for the incentives are getting the promised value for their dollars.

V. Conclusion

During the spring of 2020, as the United States went into a lockdown to "flatten the curve" of transmission of the novel coronavirus that causes COVID-19, the country's employers largely shut their doors, cut millions of jobs, and experienced devastating revenue losses. In response, Congress and the White House enacted what might be viewed as the ultimate in economic development incentives: $2 trillion in stimulus payments, including forgivable loans earmarked to

---

[172] Noam Scheiber, *Fraud Case Against Bus Maker Shows Risk of Pay Promises,* THE NEW YORK TIMES (Aug. 9, 2019).
[173] Miranda S. Spivack, *Bus Company to Pay Legal Fees in LA Public Records Case*, REVEAL NEWS (Apr. 24, 2018), https://www.revealnews.org/blog/bus-company-to-pay-legal-fees-in-la-public-records-case/.
[174] New Flyer of America, Inc. v. L.A. County Metro. Trans. Auth., No. BC621090, Final Ruling on Petition for Writ of Mandate (Calif. Super. Ct. Oct. 12, 2017), https://www.inthepublicinterest.org/wp-content/uploads/2017-10-12-Final-Ruling.pdf.
[175] Spivack, *supra* n. 173.
[176] *Id.*
[177] Scheiber, *supra* n. 172.

bail out struggling businesses with 500 or fewer employees.[178] As with more modest local-level economic development packages, corporate recipients balked at releasing information about their finances, and U.S. Treasury Secretary Stephen Mnuchin took their side, agreeing that disclosure would compromise proprietary information.[179]

Under pressure from Congress and an outraged public, however, the Trump administration relented and agreed that details about who received bailout payments would be made public.[180] The initial wave of disclosures, while incomplete, provoked widespread outrage when it came to light that questionably needy recipients — including rap mogul Kanye West, prosperous Wall Street law firms and hedge funds — received aid meant for struggling businesses.[181] Public shaming after an initial round of disclosures forced hugely profitable businesses of national prominence, including Shake Shack and the NBA's Los Angeles Lakers, to withdraw their applications for stimulus checks or refund what was received.[182] Manifestly, the public cares about which companies receive taxpayer-subsidized aid and whether those recipients are deserving.

Based on the recent legislative inaction after Amazon HQ2, it expects too much to believe that state and local governments will "unilaterally disarm" of secrecy without assurance that competing jurisdictions will lay down their weapons as well. Potentially, an "interstate compact" — a device that has been employed in other contexts, such as management of water rights[183] — could be the device that brings about systemic transparency reforms.

Some skeptics of economic development incentives have proposed an interstate compact as a method to reduce unseemly bidding wars that drive up the price ultimately paid by the chosen state. During 2020, bills to implement what is known as the "Interstate Compact to Phase Out Corporate Giveaways" were filed in 14 states, although none has yet become law.[184] Interest in pursuing these agreements increased after the widespread distaste in both public and official circles over the Amazon HQ2 bidding war.[185]

---

[178] Jacob Pramuk, *Here's What's in the $2 Trillion Coronavirus Stimulus Bill*, CNBC.COM (Mar. 25, 2020), https://www.cnbc.com/2020/03/25/coronavirus-stimulus-bill-updates-whats-in-the-2-trillion-relief-plan.html.

[179] Aaron Gregg, *Trump Administration Won't Say Who Got $511 Billion in Taxpayer-Backed Coronavirus Loans*, THE WASHINGTON POST (Jan. 11, 2020).

[180] Aaron Gregg & Jeff Stein, *In Big Reversal, Treasury and SBA Agree to Disclose Details About Many Small Business Loan Recipients*, THE WASHINGTON POST (Jan. 19, 2020).

[181] *See* Robert Frank, *The Billionaires and Country Clubs that Received Small Business Loans from the Government*, CNBC (Jul. 6, 2020), https://www.cnbc.com/2020/07/07/the-billionaires-and-country-clubs-that-received-ppp-loans.html (identifying prosperous companies, including one owned by billionaire music mogul Kanye West, that received forgivable loans meant for small businesses).

[182] Sarah Hansen, *Potbelly, Shake Shack, Axios: Here Are All The Companies Returning PPP Money After Public Backlash*, FORBES (Apr. 29, 2020), https://www.forbes.com/sites/sarahhansen/2020/04/29/potbelly-shake-shack-axios-here-are-all-the-companies-returning-ppp-money-after-public-backlash/#408b7b9a7ea0.

[183] *See generally* LAW LIBRARY OF CONGRESS, INTERSTATE COMPACTS IN THE UNITED STATES (June 2018), https://www.loc.gov/law/help/interstate-compacts/us-interstate-compacts.pdf (explaining how compacts are formed by state legislation and, at times, ratification by Congress, including those governing transit, fisheries, higher education, water rights and other matters of cross-border importance).

[184] CCH Tax Grp., Wolters Kluwer, *States Consider Compact to Phase Out Corporate Giveaways,* http://news.cchgroup.com/2020/04/24/compact-to-phase-out-corporate-giveaways/news/state-tax-headlines/. *See also States Seek Tax Incentives Truce After Amazon HQ2*, FORBES (Mar. 16, 2020), https://www.forbes.com/sites/taxnotes/2020/03/16/states-seek-tax-incentives-truce-after-amazon-hq2/#2e05ff71ac90.

[185] Tax Notes Staff, *States Seek Tax Incentives Truce After Amazon HQ2*, FORBES (Mar. 16, 2020), https://www.forbes.com/sites/taxnotes/2020/03/16/states-seek-tax-incentives-truce-after-amazon-hq2/#15faf1c11ac9

These proposals are meant as a kind of truce among states — with states agreeing not to offer incentives to prevent or encourage companies from moving across state lines.[186] The proposal is open for each state and the District of Columbia to adopt, and it prevents states from offering company-specific tax incentives, such as those dangled in the Amazon HQ2 pursuit.[187] It does, however, allow tax incentives that are generically offered to all companies to remain in place. Kansas and Missouri took a comparable step in an August 2019 agreement, ending subsidies to induce corporations to move across state lines in Kansas City, which straddles both states.[188]

The interstate compact will be put into place once two states agree, and then a board of directors will be appointed to draw in more states and decrease tax dollars spent by states competing against each other.[189] The Coalition to Phase Out Corporate Tax Giveaways, which refers to itself as a bipartisan campaign by state legislators aiming to phase out corporate tax giveaways, is leading the way in promoting these deals.[190] Hawaii state Sen. Mike Gabbard said he supports the compact because these deals only make corporations richer at the expense of communities.[191]

Given the tepid initial reception given to these legislative proposals, it may take intervention by the federal government to bring states to the negotiating table. The financial exigency created by the COVID-19 pandemic, which has ravaged the tax receipts of states across the country as businesses and individuals generate less income,[192] could be the prompt that states have needed to consider joint strategies to avoid overpaying for job creation. While the proposed interstate phase-out legislation contemplates phasing out competitive incentive payments entirely and does not mention public disclosure, making incentive payments transparent to the public would seem to be a more modest step that might be more politically attainable than doing away with the payments altogether.

Ellis, Hayden and Rogers liken economic development incentives to a private enterprise's decision to invest shareholder money in expanding the business.[193] In the private sector, a business would not knowingly invest more of its assets than the investment can be anticipated to return. So the Ellis proposal suggests imposing corporate-like obligations, enforceable in court by the public as "shareholders," to exercise a "duty of care" in making incentive commitments comparable to the duty that corporate law recognizes to avoid the waste of shareholder assets.[194]

Either explicitly or implicitly, transparency is the common denominator to all reform proposals. Voters cannot hold elected officials accountable for making knowingly rash bargains

---

[186] *See* Peter Hancock, *New Bill is Part of National Effort to Phase Out Corporate Tax Incentives*, CAPITOL NEWS ILLINOIS (Jan. 28, 2020), https://capitolnewsillinois.com/NEWS/lawmakers-call-to-end-state-to-state-corporate-poaching.

[187] *Id.*

[188] Marcia Brown, *Kansas and Missouri Call a Truce in Corporate-Welfare Border War*, THE AMERICAN PROSPECT (Aug. 6, 2019), https://prospect.org/economy/kansas-missouri-call-truce-corporate-welfare-border-war/.

[189] *Id.*

[190] CCH Tax Grp, *supra* n. 184.

[191] *Gabbard, Takumi Lead Effort to Phase Out Corporate Giveaways,* MAUINOW (Jan. 28, 2020), https://mauinow.com/2020/01/28/gabbard-takumi-lead-effort-to-phase-out-corporate-giveaways/.

[192] *See* Jeffrey Bartash, *U.S. GDP Likely Sank a Record 35% in the 2nd Quarter After Coronavirus Ravaged the Economy*, MARKETWATCH (Jul. 27, 2020), https://www.marketwatch.com/story/us-gdp-likely-sank-a-record-35-in-the-2nd-quarter-after-coronavirus-ravaged-the-economy-2020-07-29 (reporting that "unprecedented" drop in consumer spending resulting from stay-at-home orders during pandemic produced historic drop in economic activity exceeding "Great Recession" of 2007-08).

[193] Ellis *et al.*, *supra* n.6, at 957.

[194] *Id.* at 973-74.

unless voters have access to the same information that their representatives had at the time. As was seen in the example of the Boston Olympic bid, the public at times will get ahead of its elected officials and decide that the pursuit of an opportunity is not worth the cost. Ultimately, government officials benefit — whether they appreciate it or not — from knowing before they make irrevocable concessions that those concessions will be unacceptable to their constituents.