

# Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law

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I. INTRODUCTION.....	22
II. FEDERAL GOVERNMENT PRIVATIZATION EFFORTS .....	24
III. PRIVATIZATION AND THE FREEDOM OF INFORMATION ACT.....	31
A. <i>The Definition of “Agency” Under the Act</i> .....	31
B. <i>“Agency Records” Under the Act</i> .....	33
IV. PRIVATIZATION AND FREEDOM OF INFORMATION IN FEDERAL COURTS .....	36
A. <i>Determining What Is an “Agency” Under the FOIA</i> .....	37
1. The Control Factor .....	37
2. The Functional Equivalence Factor .....	42
B. <i>Determining What Is an “Agency Record” Under the FOIA</i> .....	43
1. The Supreme Court Official Control Approach.....	44
2. The Lower Court Control Approaches.....	49
V. AN ANALYSIS OF THE AGENCY AND RECORD APPROACHES .....	54
A. <i>The Public Function Approach</i> .....	59

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B. <i>The Nature of Records Approach</i> .....	61
VI. CONCLUSION .....	62

## I. INTRODUCTION

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the [n]ation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.<sup>1</sup>

With this statement over thirty years ago, President Lyndon B. Johnson signed the Freedom of Information Act (FOIA)<sup>2</sup> into law. Although the Act had lofty goals, neither the President nor Congress could have realized, in 1966, the problems that would result once the Act was applied to the myriad of government operations. One of these problems, especially important since the 1980s, is whether to apply the Act to private entities.<sup>3</sup> This issue is important because, as government agencies turn to private entities in order to function more efficiently,<sup>4</sup> courts have had to deal with FOIA requests for information relating to the government but created or possessed by entities not explicitly covered under the Act.<sup>5</sup> Debates therefore have developed regarding the benefits and drawbacks of privatization, including its effects on freedom of information.<sup>6</sup>

As privatization of government services continues into the late 1990s, some commentators worry that the desire for government efficiency will cause information that is important to the public to become shrouded in secrecy.<sup>7</sup> Commentators say unless Congress amends the FOIA to ensure

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1. Statement by the President upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, WEEKLY COMP. PRES. DOC. 887, 895 (July 11, 1966).

2. Pub. L. No. 89-487, 80 Stat. 250 (1966) (current version at 5 U.S.C. § 552).

3. See Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249 (1995); Matthew D. Bunker & Charles B. Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance 1-7* (1997) (unpublished manuscript, on file with the *Federal Communications Law Journal*).

4. See, e.g., Cásarez, *supra* note 3, at 249-64 (discussing federal government efforts to privatize prisons); Bunker & Davis, *supra* note 3, at 5 (discussing the various private entities handling government operations).

5. See, e.g., *Forsham v. Harris*, 445 U.S. 169 (1980); *Washington Research Project, Inc. v. Department of Health, Educ. and Welfare*, 504 F.2d 238 (D.C. Cir. 1974).

6. Compare Bunker & Davis, *supra* note 3 with Joseph F. Caponio & Janet Geffner, *Does Privatization Affect Access to Government Information?*, 5 GOV'T INFO. Q. 147 (1988) (discussing the benefits of federal privatization when used properly as a management tool).

7. See, e.g., Cásarez, *supra* note 3 (suggesting that private prison operators must be held accountable, and thus the public must have access to private prison records); Jane

that private entities performing government functions fall within its reach, courts must come forward to protect the public's right to know because privatization is affecting a wide variety of services and operations associated with the federal government.<sup>8</sup> These services include prison operations,<sup>9</sup> the National Aeronautics and Space Administration (NASA),<sup>10</sup> medical research,<sup>11</sup> and railroad operations.<sup>12</sup> As the federal government contracts with private entities to handle these services, citizens are finding it very difficult to obtain important information related to the government because these private entities often do not fall under the definition of "agency" in the FOIA.<sup>13</sup> Additionally, the Act does not define the term "agency records," and private entities may not be holding records with a sufficient nexus to the government to qualify as agency records under judicial analysis.<sup>14</sup> Thus, federal government privatization can have a substantial impact on important information that was public while in the government's hands but becomes secret once it is farmed out to private entities.

The purpose of this Article is to discuss what definition of "agency" and "agency record" best protects the public's right to know and retains the spirit of the FOIA in light of the government's privatization efforts. This Article discusses the federal government's privatization efforts and how they have been handled in the federal courts dealing with requests under the FOIA. This Article analyzes the definition of "agency" under the Act, as well as the judicial interpretations of what constitute "agency records," followed by a detailed analysis of the federal court opinions applying these terms to private entities dealing with the federal government. This Article concludes with an analysis of the strengths and weaknesses of the various court approaches, including a discussion of how they square with the stated

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Kirtley, Remarks at the Meeting of the Florida Sunshine Summit Regarding Access and Privatization in Public Hospitals (Oct. 17, 1997), (transcript, on file with *Federal Communications Law Journal*); Bunker & Davis, *supra* note 3.

8. See generally Cásarez, *supra* note 3; Bunker & Davis, *supra* note 3.

9. See generally PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary W. Bowmant, et al. eds. 1993); Cásarez, *supra* note 3.

10. See, e.g., Caponio & Geffner, *supra* note 6, at 150.

11. See, e.g., Forsham v. Harris, 445 U.S. 169 (1980).

12. See, e.g., Ehm v. National Ry. Passenger Corp., 732 F.2d 1250, 1253 (5th Cir. 1984) (holding that it is unclear whether Congress intended to include Amtrak in its definition of "agency" under the FOIA); Railway Labor Executives' Ass'n v. Consolidated Rail Corp., 580 F. Supp. 777 (D.D.C. 1984).

13. See 5 U.S.C. § 552(f) (Supp. II 1996); see also Katherine A. Meyer & Allan R. Adler, *Agency*, in LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 190-93 (Allan R. Adler ed., 1997); Cásarez, *supra* note 3.

14. See, e.g., Ann H. Wion, Note, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 STAN. L. REV. 1093 (1979).

legislative purposes behind the Act. This Article then suggests an approach that best comports with the spirit of the FOIA and can be applied to federal privatization efforts in the future.

## II. FEDERAL GOVERNMENT PRIVATIZATION EFFORTS

Several types of privatization are undertaken by state and federal governments in the United States. For example, the federal government engaged in "load shedding" by cutting social welfare programs and allowing private for-profit or not-for-profit companies to take over the programs.<sup>15</sup> Government subsidies allow consumers to choose private entities through a voucher system, such as in the federal food stamp program.<sup>16</sup> The most common form of privatization, however, is "contracting out," where former government functions are delegated to private entities through a contract.<sup>17</sup>

Since the beginning of the 1990s, media professionals have made their voices heard regarding the potential impact of privatization, particularly contracting out, on access to government information.<sup>18</sup> Communications law scholars also express concern that important government functions, such as the safeguarding of federal prisoners, are now shielded from the public through the use of private companies.<sup>19</sup> Because of the importance of these government services, commentators believe that a lack of oversight due to the failure of the FOIA to reach these entities poses a very real danger to the public.<sup>20</sup> This danger is likely to grow in the future as governments continue to seek more efficient ways to provide services, perhaps at the expense of constitutional protections.<sup>21</sup> Unless Congress or the courts craft liberal definitions of "agency" and

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15. See Bunker & Davis, *supra* note 3, at 7.

16. See *id.*

17. See *id.*; see also Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 43 (1995).

18. See, e.g., Elliot Krieger, *Privatization Raises Issues of Accountability*, PROVIDENCE J.-BULL., Dec. 15, 1996, at 7B.

19. See generally Cásarez, *supra* note 3; Bunker & Davis, *supra* note 3.

20. See Cásarez, *supra* note 3, at 257-58, 263-64 (arguing that privatization of federal prisons can result in corruption and the exploitation and mistreatment of inmates, because the public cannot monitor the activities of private companies that are not subjected to the FOIA); see also Mays, *supra* note 17, at 45-46 (discussing the fact that the Due Process Clause of the Fourteenth Amendment does not apply to private entities and arguing that a state action approach should be applied by the courts in order to force private companies to comply with due process).

21. See Mays, *supra* note 17, at 45 (discussing the lack of due process protections in privately-run businesses); Bunker & Davis, *supra* note 3, at 5 (citing several examples of disputes between private entities and the public over access to information and arguing that these disputes have been a growing trend).

“agency records” under the FOIA, it is possible that simply by filtering records out of their possession, federal agencies can circumvent the Act and its spirit of open government.

One frequently debated area of federal privatization has been the trend toward privatized federal prisons. Commentators suggest that due to the rising costs of housing inmates and persistent overcrowding, the government increasingly has turned to private prison operators since the Reagan era in the 1980s.<sup>22</sup> In fact, as of 1996, state and federal private prisons house as many as 74,000 inmates, with an annual growth rate of over thirty percent expected in the next several years.<sup>23</sup> Because federal legislation allows private federal prisons,<sup>24</sup> this trend led to worries over the quality of services being offered by private companies, as well as the treatment of inmates by private operators.<sup>25</sup>

Commentators worry that private prisons will allow operators to take liberties with prisoners that would not be allowed by the government.<sup>26</sup> Additionally, private prison operators that are not subject to public oversight could operate against the public’s interest by taking a more relaxed approach with such important functions as security measures.<sup>27</sup> Private prison operators have a financial motive and may sacrifice individual constitutional rights and prison quality in the name of the profits

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22. See, e.g., Warren L. Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 375 (1997). For a discussion of the issues involved in privatization of prisons, as well as the chronological development of private prison industries in various states, see BARBARA J. AUERBACH ET AL., *WORK IN AMERICAN PRISONS: THE PRIVATE SECTOR GETS INVOLVED* (1988).

23. See Ratliff, *supra* note 22, at 372. In fact, the Clinton administration endorsed federal prison privatization in order to look “tough” on crime and reduce the federal deficit. See *id.* at 404-05. At least 21 federal private prison facilities currently exist. See *id.* at 405.

24. See 18 U.S.C. § 4013 (1994).

25. See Ratliff, *supra* note 22.

26. See *id.* at 373; see also IRA P. ROBBINS, *THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION 2-5* (1988) (arguing that districts contemplating privatization of prisons must ensure accountability to the government, public, and inmates to protect the constitutional rights of the public and of inmates). This study by the American Bar Association was conducted as a follow-up to the Association’s 1986 recommendation that “jurisdictions that are considering the privatization of prisons and jails not proceed . . . until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved.” *Id.* at 6.

27. An Associated Press writer, writing on the 30th anniversary of the FOIA in 1997, commented that private entities performing public functions need to understand that their work will be subject to public scrutiny. See Bob Rivard, *30th Anniversary of Freedom of Information Act Is Time to Reflect*, ASSOCIATED PRESS POL. SERV., May 12, 1997. Rivard pointed out that the escape of a convicted murderer from a privately-run prison in San Antonio in 1996 is an example of a security breach that “would not be tolerated” if the prison was run by the government. *Id.*

to be gained by saving on management and maintaining a full house.<sup>28</sup> Because of the strong public demand to stay tough on crime, governments are likely to feel the pressure to expand prison space while at the same time struggle with the difficulty and expense of day-to-day monitoring, thus overlooking the deficiencies of private prison operators.<sup>29</sup> The public should provide the necessary oversight by classifying private operators as agencies and their records as agency records, for purposes of the FOIA.

Communications law scholar Nicole Cásarez argued that private prison operators should at least be as accountable as government officials in order to ensure that contractors “in no way abuse the public trust or prisoners’ rights.”<sup>30</sup> The FOIA, if applied to private contractors, would help accomplish this oversight.<sup>31</sup> While private prison operators are subject to marketplace restrictions that increase service quality because of competition,<sup>32</sup> Cásarez makes clear that it is the government that should retain the ultimate authority over prison operations.<sup>33</sup> The public can make sure this monitoring is being performed, but only if the FOIA allows access to private contractors.<sup>34</sup>

Because courts have failed to hold private entities accountable under the FOIA,<sup>35</sup> Cásarez argues that the federal government can frustrate the

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28. See Ratliff, *supra* note 22, at 373-74; see also *McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1996) (“[W]hile privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large.”); *ROBBINS*, *supra* note 26, at 2-5; Rivard, *supra* note 27.

29. See Ratliff, *supra* note 22, at 379-80. In fact, Ratliff argues that the financial interest of private prison operators makes privatization potentially unconstitutional because due process requires the disinterest of the person affecting prisoners’ liberties, and private operators cannot remove their own profit interests from the decisions that affect prisoners’ constitutional rights. See *id.* at 385-86. At the very least, close scrutiny of private prison operations is essential, and enabling statutes should closely proscribe the conduct of private operators. See *id.* at 393, 398-99.

30. Cásarez, *supra* note 3, at 250. (describing an example of prison operator abuse when prisoners were forced to remain outside for many hours a day in intense heat).

31. See *id.* at 300.

32. See *id.* at 259-60. Marketplace restrictions theoretically exist because if a private operator does not provide a level of quality that is acceptable to the government, it will lose out on future bids for private operation. Thus, the private operator will strive to provide the same quality as the government would provide. See *id.*

33. See *id.* at 303. This government authority could be achieved if the government is contractually allowed to oversee private prison operations, demand information from private prison operators, and replace private operators for insufficient performance. See *id.* at 274-75.

34. See *id.* at 268-69 (discussing the application of the Act’s terms “agency” and agency “records” as being the ultimate deterrent to public access to information as the law currently stands). See discussion *infra* Parts III-IV.

35. See *infra* Part IV.

public disclosure purposes behind the Act by delegating services to the private sector.<sup>36</sup> Therefore, Congress must step in to enact legislation holding private prison operators accountable or to amend the FOIA's definition of "agency" to include entities performing "significant agency functions."<sup>37</sup> This Article makes a similar argument by stating that agency and agency records should include any entity or records relating to a government function, even if that function is now being performed by the private sector. Congress should amend the FOIA to make sure public information does not become private simply because it is no longer in agency hands.

Other examples of federal privatization could have a direct impact on the public's ability to obtain important information. In January 1998, the U.S. Department of Energy (DOE), the federal government's largest contracting agency, refused to allow nuclear watchdog groups access to documents in the hands of its contractors.<sup>38</sup> The result of the pending litigation in the DOE's case could have a major impact on the government's accountability for its energy operations because the DOE contracts with private corporations and nonprofit organizations to perform over eighty percent of its work.<sup>39</sup> Records such as travel expenses of top officials and descriptions of new weapons projects, which are important for public oversight of how its money is spent, could be closed off to the public if the federal courts in New Mexico and California do not hold the contractors accountable as agencies holding agency records under the FOIA.<sup>40</sup> Under the prevailing federal case law, this is not likely to happen,<sup>41</sup>

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36. See Cásarez, *supra* note 3, at 292-93.

37. See *id.* at 293, 296. Essentially, Cásarez argues that the federal government cannot be trusted to monitor private prisons effectively due to the expense and difficulty involved. See *id.* at 294-95. Additionally, corruption plays a role when government overseers turn a "blind eye" to abuses because of the potential for payoffs or private sector jobs. See *id.* at 295. However, Cásarez admits that amending the FOIA would cause a severe swell in the number of records available for requests from entities performing government functions, and defining the parameters of what constitutes a government function would be difficult. See *id.* at 296-97. Therefore, FOIA access itself is not enough to ensure adequate public monitoring, and the enabling legislation itself should make private prison records the public records of the contracting government agency. See *id.* at 303.

38. See Ian Hoffman, *DOE Fights Records' Release*, ALBUQUERQUE J., Jan. 23, 1998, at A1.

39. See *id.*

40. See *id.* In fact, even when it does not directly refuse to release records, nuclear watchdog groups say the DOE delays the release of records for months or years. See *id.* The DOE's attorney says other federal agencies, such as the Department of Defense and NASA, also engage in delays even though they have guidelines for the release of information. See *id.* According to the DOE's lawyer, the DOE guidelines go beyond what the FOIA requires. See *id.*

41. See *infra* Part IV.

and the federal courts are not likely to force the DOE to comply with its own guidelines because unlike the FOIA, the guidelines are not law.<sup>42</sup>

Additionally, the federal government considered removing impediments to privatizing airports. In 1996, the federal government began discussing the possibility of easing the federal restrictions on privatizing state or municipality-run airports.<sup>43</sup> These discussions could lead to the easier sale of airports to private companies, which could put a large amount of important aviation information out of the public's reach. The potential for further federal privatization highlights the need for a broader application of the FOIA to entities performing important public functions and controlling important public information.

Although the FOIA may not reach private entities, some commentators argue that privatization can be an effective tool for the government, if used properly. Communications scholars Joseph Caponio and Janet Geffner discussed privatization as an economically beneficial alternative for government, as long as the government promotes access to important information.<sup>44</sup> They state that this can be done through guidelines imposed on the federal government when it chooses to privatize.<sup>45</sup> In fact,

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42. See Hoffman, *supra* note 38.

43. See Martha M. Canan, *House Committee Looks at Paving Way for Easier Airport Sales*, BOND BUYER, Mar. 8, 1996, at 7, available in LEXIS, News Library, ABBB File.

44. See Caponio & Geffner, *supra* note 6, at 148. Caponio and Geffner admit, however, that there is agreement that some important services are "inherently governmental" and should not be privatized. *Id.* They say these services have not been explicitly enumerated. *See id.*

In 1986, the first national conference on privatization opportunities was held in New York City, with a focus on how privatization can increase efficiency without decreasing services to the public. See *Privatization; National Conference to Be Held in June*, BUS. WIRE, Apr. 22, 1986. At the conference, issues relating to the benefits and difficulties of privatizing health care, correctional facilities, transportation, waste management, energy supply, and hazardous waste management were discussed. *See id.* This conference shows that officials are interested in increasing efficiency and decreasing the cost deficit of many government services, but the article did not discuss any possible impact on freedom of information.

45. See Caponio & Geffner, *supra* note 6, at 149. For example, in 1989, the Information Industry Association proposed before the House Subcommittee on Government Information, Justice, and Agriculture a policy framework that would "guarantee continuing public access to government information" in the face of technological advances and new strategies for managing government information. *IIA Proposes Policy Framework to Guarantee Continuing Public Access to Government Information*, INFO. TODAY, May 1, 1989, at 35. The National Association of Information President also testified before the Senate Committee on Rules and Administration in 1997, stating that Congress "should institute and enforce policies that ensure that citizens can access government information from a wide diversity of public and private resources." *Title 44, U.S. Code—Proposal for Revision: Hearings on Title 44 Before the Subcomm. on Rules and Administration*, 105th Cong. 74 (1997) (testimony of Ronald G. Dunn, Information Industry Association).



Caponio and Geffner argue that private entities could provide for more efficient distribution of information as long as they are subjected to specific guidelines when contracting for government services.<sup>46</sup>

Such guidelines have been successfully implemented for certain government agencies wishing to contract out certain services in order to save money for use in other agency operations.<sup>47</sup> For example, the National Oceanic and Atmospheric Administration (NOAA), the National Technical Information Service (NTIS), and the federal libraries successfully participated in privatization programs for the management of scientific and technical information of interest to the public.<sup>48</sup> According to Caponio and Geffner, these programs succeeded because of government monitoring of services, the value added to the public information, and the efficiency of dissemination.<sup>49</sup> However, Caponio and Geffner do not recognize that if the private entities refused to provide access to the information, they would not be subject to the FOIA because they would not be considered agencies holding agency records.<sup>50</sup> Thus, public information could potentially be lost should public access come in conflict with the goals of the agencies and their private contractors.

In short, while some commentators recognize the efficiency of privatization, others fear a loss of important public access and oversight.<sup>51</sup> Commentators argue that without oversight, the free flow of information, important abuses, and constitutional violations could be shielded from

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46. See Caponio & Geffner, *supra* note 6, at 149-50. These guidelines, according to Caponio and Geffner, should include not only adequate public access, but guard against "monopolistic controls," such as unreasonably high prices for access to information. *Id.* at 150.

47. See *id.* at 150.

48. See *id.* at 150-53.

49. See *id.* However, Caponio and Geffner admit that information can become more expensive if the private contractor employs more staff than previously needed by the government to disseminate the information. See *id.* at 153. Thus, not all "management problems" can be solved through privatization. *Id.* at 154.

50. See *infra* Part IV.

51. This debate also reached the legal profession in recent years as West Publishing, a contractor with the federal government for legal information, sought to protect its "value-laddered" information from disclosure under the FOIA. John J. Oslund, *West Publishing, Competitors Spar over Bill Provision over Information*, MINNEAPOLIS-ST. PAUL STAR-TRIB., Feb. 10, 1995, at D1. West is likely to win this debate because the documents are no longer in possession or control of the government, and, therefore, they are likely to be considered private documents when held by West Publishing. See *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989); discussion *infra* Part IV-B.

Additionally, other national governments exempt private companies dealing with the government from the reach of freedom of information initiatives, sparking a debate over the need to know how government money is being spent. See, e.g., *Saskatchewan Gets Information Bill*, OTTAWA CITIZEN, Apr. 20, 1991, at A7.

public knowledge.<sup>52</sup> Some argue that the appropriate method for ensuring that private entities follow legal prescriptions is through a concept of state action, which effectively makes private operators responsible as if they were the government.<sup>53</sup> One possible consequence of this extension of the state action doctrine is to make private entities subject to the FOIA as if they are government agencies, as long as they are performing a public function.<sup>54</sup>

In determining whether or not the FOIA applies to private entities delegated functions by the federal government, courts currently conduct two separate inquiries. First, they must determine whether private entities can be considered agencies as defined under the Act.<sup>55</sup> Second, the court must determine if the records are agency records, a term that was not given any meaning under the Act until the 1996 amendments.<sup>56</sup> Even if the entities are not agencies, courts could nonetheless require them to disclose records if there is a sufficient nexus between the records and an agency to create agency records.<sup>57</sup> The purpose of Part III is to discuss the explicit language of the FOIA and the stated purposes behind it as discussed by Congress. Part IV then analyzes federal court application of the FOIA to private entities dealing with the government and with information of interest to the public. Lastly, Part V analyzes the various court approaches and suggests an approach to defining “agency” and “agency records” that would better comport with the spirit of the FOIA.

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52. See Cásarez, *supra* note 3, at 260; see generally Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 496-523 (1988) (discussing the legal difficulties that result from privatization, such as the application of constitutional guarantees to private entities and the application of governmental immunity to private entities).

53. See Cásarez, *supra* note 3, at 303; Cass, *supra* note 52, at 505; Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995) (discussing the need to extend the current state action doctrine to government delegation to private entities in order to ensure constitutional guarantees, particularly through requiring private entities performing public services that are not also provided by the state to abide by constitutional limitations); Mays, *supra* note 17, at 68-69; Bunker & Davis, *supra* note 3, at 18.

54. See Bunker & Davis, *supra* note 3, at 18-24. This adaptation of the state action doctrine would make private entities comply with the FOIA because, if they are performing a “public function,” they are considered state actors for other purposes. *Id.* In essence, this approach eliminates the possibility that an entity will be considered a state actor for all purposes except the FOIA. See discussion *infra* Part V.

55. See Cásarez, *supra* note 3, at 267-68.

56. See Electronic Freedom of Information Act, 5 U.S.C. § 552(f)(2) (Supp. II 1996) (defining the term “record” but not defining “agency record”).

57. See *id.*

### III. PRIVATIZATION AND THE FREEDOM OF INFORMATION ACT

Commentators point out that due to the rise in government delegation to administrative agencies, Congress passed the FOIA in 1966 as an attempt to better allow citizens to find out about government action.<sup>58</sup> Because it was suggested that the Administrative Procedure Act (APA) was actually being used to withhold information from the public,<sup>59</sup> Congress amended the APA with the FOIA in order to foster a government founded on a policy of disclosure.<sup>60</sup> As commentators and the FOIA's legislative history make clear, the FOIA's purposes are to allow the public to be informed about public policy and to protect the public from a secret government, which breeds mistrust and corruption.<sup>61</sup> Communications law scholar Nicole Cásarez narrowed these goals down to one word: accountability.<sup>62</sup> However, an entity will only be accountable for access if it can be subjected to the specific terms of the FOIA.

#### A. *The Definition of "Agency" Under the Act*

The FOIA and its legislative history provide some guidance in determining whether private entities doing business with the government will be subject to access. Under 5 U.S.C. § 552(f)(1), the definition of "agency" is expanded beyond the entities provided for in the APA.<sup>63</sup>

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58. See Cásarez, *supra* note 3, at 264-65; HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEDURES 231-34 (1953) (discussing the rise in administrative regulations during this century); JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS § 1.02 (1997).

The U.S. Supreme Court discussed the public's ability to find out what its government is up to as the central purpose behind the FOIA. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). Justice Douglas mentioned this central purpose concept when he quoted an author in the *New York Review of Books* for the proposition that "a democracy cannot function unless the people are permitted to know what their government is up to." *EPA v. Mink*, 410 U.S. 73, 105 (Douglas, J., dissenting) (quoting from Henry Steele Commager, *New York Review of Books*, Oct. 5, 1972, at 7).

59. See H.R. REP. NO. 89-1497, at 1 (1966); CROSS, *supra* note 58, at 227-28; FRANKLIN & BOUCHARD, *supra* note 58, at 14; Cásarez, *supra* note 3, at 265.

60. See Cásarez, *supra* note 3, at 265.

61. See 112 CONG. REC. H13,660 (1966) (statement of Rep. Matsunaga); Cásarez, *supra* note 3, at 265-66; see generally Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1966-67).

62. See Cásarez, *supra* note 3, at 266.

63. See 5 U.S.C. § 551(1) (1994) (defining "agency" as "any authority of the Government of the United States, whether or not it is within or subject to review by another agency"). The APA makes "any administrative unit with substantial independent authority in the exercise of specific functions" an agency. *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

Section 552(f)(1) provides:

For purposes of this section, the term “agency” as defined in section 551(1) of this title includes any executive department, military department, [g]overnment corporation, [g]overnment[-]controlled corporation, or other establishment in the executive branch of the [g]overnment (including the Executive Office of the President), or any independent regulatory agency.<sup>64</sup>

When Congress amended FOIA in 1974, it added section 552(f)(1) and broadened the definition of “agency” to include entities not explicitly mentioned under the APA, but which “perform governmental functions and control information of interest to the public.”<sup>65</sup> For example, the term “government-controlled corporation” was meant to reach corporations that receive federal funds and operate under federal control, such as the Postal Service and Amtrak.<sup>66</sup> However, the FOIA’s legislative history clearly states that merely receiving federal funding will not create a government-controlled corporation under the FOIA; the entity must be chartered or controlled by the government.<sup>67</sup>

Once an entity falls under the FOIA’s definition of “agency,” the entity must comply with the FOIA when it adopts a rule or guideline, or when it receives an access request.<sup>68</sup> Some suggest that the drafters of the 1974 amendments intended to create a broad definition of “agency” that would include federal organizations and entities, specifically excluding certain entities such as Congress and the courts.<sup>69</sup> However, the actual

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64. 5 U.S.C. § 552(f)(1) (Supp. II 1996).

65. H.R. REP. NO. 93-876, at 8 (1974).

66. See H.R. REP. NO. 93-1380, at 14-15 (1974); see generally *Aug v. National R.R. Passenger Corp.*, 425 F. Supp. 946 (D.D.C. 1976) (finding Amtrak subject to disclosure requirements); *National W. Life Ins. Co. v. United States*, 512 F. Supp. 454, 459 (N.D. Tex. 1980) (holding the Postal Service is a public agency even though it operates like a private business).

67. See *National W. Life Ins. Co.*, 512 F. Supp. at 454; Meyer & Adler, *supra* note 13, at 191. The Ninth Circuit Court of Appeals provided a detailed discussion of the legislative history behind the Act’s definition of “agency.” See *Irwin Mem’l Blood Bank v. American Nat’l Red Cross*, 640 F.2d 1051, 1052-54 (9th Cir. 1981); Cásarez, *supra* note 3, at 268-73.

Congress itself can also choose to define what entities are subject to disclosure requirements through the enactment of other laws, such as the Rail Passenger Service Act, which made Amtrak subject to the provisions of the FOIA. See *Aug*, 425 F. Supp. at 950.

68. See 5 U.S.C. § 552(a)(3) (Supp. II 1996); JAMES T. O’REILLY, *FEDERAL INFORMATION DISCLOSURE* § 4.02, at 4.3 (2d ed. 1999).

69. See O’REILLY, *supra* note 68; *Taylor v. Diznoff*, 633 F. Supp. 640 (W.D. Pa. 1986). One commentator stated that a private entity can only be considered an agency if it has statutory authority to make decisions for the contracting agency. See Anne H. Wright, *The Definition of “Agency” Under the Freedom of Information Act as Applied to Federal Consultants and Grantees*, 69 GEO. L.J. 1223, 1240 (1981). Wright refers to the stance taken by the Circuit Court of Appeals for the District of Columbia in *Washington Research Project v. Department of Health*, 504 F.2d 238, 245 (D.C. Cir. 1974). See discussion *infra*

application of the “agency” definition has proved difficult for the courts, considering “the myriad [of] organizational arrangements for getting the business of the government done.”<sup>70</sup> Because the FOIA must establish the right of access and no right exists unless an agency is involved, the construction of this definition by the courts is crucial to the public’s ability to monitor government operations.<sup>71</sup>

### B. “Agency Records” Under the Act

In order to obtain information under the FOIA, the information must be considered an agency record.<sup>72</sup> But unlike the Act’s definition of “agency,” the term “record” was not defined under the Act until the 1996 amendments.<sup>73</sup> After the 1996 amendments, section 552(f)(2) defines “record and any other term used in this section in reference to information” as including “any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.”<sup>74</sup> However, federal courts agree that in addition to the agency and record requirements, the record must be sufficiently linked to agency operations in order to label the information an

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Part IV.A. This Author’s research has not revealed other commentators taking this stance with regard to the law in other federal circuits.

70. *Washington Research Project v. Department of Health*, 504 F.2d 238, 246 (D.C. Cir. 1974).

71. *See* O’REILLY, *supra* note 68, § 4.02. In his treatise on freedom of information, O’Reilly gives a thorough description of the various entities considered to be agencies under the FOIA, as interpreted by the federal courts. *See id.*; *see generally* Richard P. Shafer, Annotation, *Meaning of Term “Agency” For Purposes of Freedom of Information Act*, 57 A.L.R. FED. 295 (1982) (providing a detailed overview of the various cases applying the agency definition to various entities). For a discussion of the federal court cases discussing the meaning of this term, *see infra* Part IV.

72. *See* 5 U.S.C. § 552(a)(3) (Supp. II 1996) (referring to the disclosure of “records”); 5 U.S.C. § 552(a)(4)(B) (Supp. II 1996) (referring to “agency records” for enforcement); *Forsham v. Harris*, 445 U.S. 169, 178 (1980) (“The use of the word ‘agency’ as a modifier demonstrates that Congress contemplated some relationship between an ‘agency’ and the ‘record’ requested under the FOIA.”); Katherine A. Meyer et al., *Agency Records*, in *LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 194-200* (Allan R. Adler ed., 1997).

73. *See* 5 U.S.C. § 552(f)(2). There was originally no legislative history construing the term “agency record.” *See Nichols v. United States*, 325 F. Supp. 130, 134 (D. Kan. 1971), *aff’d*, 460 F.2d 671 (10th Cir. 1972). The 1996 amendments, commonly known as the Electronic Freedom of Information Act (EFOIA), added the definition of “record” and were meant to provide for public access to information in an electronic format. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048.

74. 5 U.S.C. § 552(f)(2). This arguably vague definition suggests that a record should include something held in any format, but does not hint at the link between the record and an agency that is required to create an agency record. This Author has not discovered recent cases construing this new definition of “record” to mean anything different than the previous cases discussed in this Article.

agency record.<sup>75</sup> The 1996 amendments do not provide any insight as to what the term “agency record” means, as they only expand the definition of “record” to include information stored in an electronic format.

The question is what relationship between the agency and the record must exist to create an agency record under the FOIA. One commentator argued that defining “agency record” too narrowly effectively expands the FOIA’s nine exemptions and obstructs the Act’s goals of obtaining “the fullest responsible disclosure,” which enable citizens to have a hand in their own government.<sup>76</sup> If the government holds the information itself or makes a decision based on information contained in records created by a nonagency, it can be argued that these should be agency records and subject to disclosure.<sup>77</sup> Regardless of whether the agency possesses the

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75. See Marie Veronica O’Connell, Note, *A Control Test for Determining “Agency Record” Status Under the Freedom of Information Act*, 85 COLUM. L. REV. 611, 614 (1985); see also FRANKLIN & BOUCHARD, *supra* note 58, at 32-39; Stephen D. Hall, *What Is a Record? Two Approaches to the Freedom of Information Act’s Threshold Requirement*, 1978 BYU L. REV. 408, 427 (1978) (arguing that to achieve flexibility on the record question, courts should use their equitable powers instead of being tied to rigorous definitions).

Since the passage of the EFOIA, some argue that Congress intended the 1996 amendments to ensure that the FOIA’s definition of “record” would be interpreted broadly. For example, Senator Patrick Leahy, who commented on the amendments in the Senate before EFOIA’s passage, stated that “the legislative finding for the [E]FOIA [a]mendments clarifies that the purpose of the FOIA is to allow any person to access government information for any purpose.” Patrick Leahy, *The Electronic FOIA Amendments of 1996: Reformatting the FOIA for On-Line [sic] Access*, 50 ADMIN. L. REV. 339, 340 (1998). In fact, Senator Leahy stated that the amendments were meant to ensure that agency records mean more than just records that directly shed light on the operations of the government agency. See *id.*; see also Michael E. Tankersley, *How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age*, 50 ADMIN. L. REV. 421, 457 (1998) (“For the first time, all federal agencies are required to make broad categories of agency records immediately available to the public at agency records depositories and on-line [sic].”).

However, the argument that EFOIA actually broadens any definition of “agency record” has not been adopted by the federal courts, and it has also been argued that if Congress wanted to broaden access, it would have been more explicit in the amendments. See, e.g., Martin E. Halstuk, *Bits, Bytes, and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases*, 15 SANTA CLARA COMP. & HIGH TECH. L.J. 73 (1998) (arguing that Congress should be more specific by amending the FOIA further to ensure that its purpose of broad disclosure is fulfilled). EFOIA simply states that records maintained in an electronic format are to be treated the same as those records held in paper format, and it did not explicitly change the U.S. Supreme Court’s ruling in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) that the FOIA is meant to allow access to information dealing directly with government agency performance. See *id.* Thus, the EFOIA amendments do not change the case law that determines what is an agency record under the FOIA.

76. Wion, *supra* note 14, at 1095.

77. See *id.* at 1097.

record or relies on it in the decision-making process, disclosure would nonetheless be in keeping with the FOIA's purpose of allowing oversight of the entities that "control information of interest to the public" because, in either case, the record relates to a public function.<sup>78</sup> This Article argues that as long as the record relates to a public, government function, it should be accessible under the FOIA without a narrow focus on who possesses or controls the record. In other words, the information is public and should therefore be open to the public.

Some note, however, that research held by independent companies, which forms the basis of government reports and is used for government decisions, nonetheless falls outside of the Act under the federal courts' interpretation of agency records.<sup>79</sup> While government possession of information will usually create an agency record,<sup>80</sup> absent possession or significant day-to-day control by the government agency, a mere use or reliance on nonagency-created information will not turn it into an agency record.<sup>81</sup>

In short, the requirement that the subject of a FOIA request be an agency record is a threshold requirement under the Act, and information possessed by researchers and other private entities will not generally be considered agency records.<sup>82</sup> Commentators both fear that a narrow definition of "agency record" will create a new exemption to the FOIA and that an overly broad meaning of the term will discourage private contractors and grantees by subjecting their confidential information to public scrutiny.<sup>83</sup> Because Congress has thus far left the issue undecided, it becomes an issue for the courts to decide whether to read the words "agency record" literally and let Congress decide on their true meaning or to form a judicial definition of "agency record."<sup>84</sup> This can allow

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78. H.R. REP. NO. 93-876, at 9 (1974); *see also* Wion, *supra* note 14, at 1097.

79. *See* Wion, *supra* note 14, at 1102-06. For a summary of many of these cases, see discussion *infra* Part IV.

80. *See* Wion, *supra* note 14, at 1107; *Forsham v. Califano*, 587 F.2d 1128, 1134 n.11 (D.C. Cir. 1978). Possession will generally suffice to create agency records unless the records are created by a group specifically excluded from the Act by Congress. *See, e.g.*, *Warth v. Department of Justice*, 595 F.2d 521 (9th Cir. 1979). In these cases, courts have generally required control of the record by the covered agency. *See, e.g.*, *Goland v. CIA*, 3 Media L. Rep. 2341 (D.C. Cir. 1978). Thus, possession is a necessary requirement for agency record status, but it is not sufficient in all cases. For a discussion of this official control requirement, see *infra* Part IV.B.

81. *See Forsham*, 587 F.2d at 1133; *Ciba-Geigy Corp. v. Mathews*, 428 F. Supp. 523, 529 (S.D.N.Y. 1977). For a discussion of these cases, see *infra* Part IV.B.

82. *See* Note, "Agency Records" *Under the Freedom of Information Act: An Analysis of Forsham v. Califano*, 13 GA. L. REV. 1040, 1042-43 (1979).

83. *See id.* at 1054-55 (discussing the fears of both access and privatization advocates).

84. *See id.* at 1056-57. The note describes these two approaches taken by the majority

government agencies to challenge FOIA requests for information originating in or transferred to entities not technically covered under the Act.<sup>85</sup>

Congress intended the FOIA's terms to be read liberally in favor of disclosure "unless information is exempted under clearly delineated statutory language."<sup>86</sup> But commentators continually argue that judicial interpretations of the agency and agency records requirements have effectively narrowed the Act's application, allowing government agencies to avoid the Act's requirements by transferring records out of the government's hands.<sup>87</sup> The next section of this Article analyzes the various federal court opinions, giving meaning to the "agency" and "agency records" definitions under the Act. Part IV classifies the decisions based on their approaches to applying the Act to private entities. Part V then discusses how these approaches affect the ability of government agencies to avoid the requirements of access through privatization, and how a more liberal definition of "agency" and "agency record" would better square with the spirit of the FOIA.

#### IV. PRIVATIZATION AND FREEDOM OF INFORMATION IN FEDERAL COURTS

In determining whether to subject private entities to the FOIA, federal

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and dissent, in *Forsham v. Califano*, as the property and government involvement approaches, respectively. *See id.* The property approach relies on specific and literal meanings of "agency records," while the government involvement approach is fashioned by the judiciary to take a more flexible account of the government's involvement with the records—making it more likely that private entities will be subject to the Act. *See id.* at 1066-67.

85. *See* O'Connell, *supra* note 75, at 612. In this note, O'Connell concludes that agency record should be defined broadly by looking at the function of the record, thus determining if it is used by the government for its functions. *See id.* Otherwise, the purposes of disclosure behind the FOIA will be undermined. *See id.* at 615-16.

Neither Congress nor the courts have determined what is sufficient control to make private documents agency records. *See id.* at 624. O'Connell argues that "[b]y letting the public eye follow where agency hands reach, a control standard promotes a more informed electorate and a more accountable government." *Id.* at 626. In short, if the government produces part of the material or relies on it in its decision, that material is part of the decision-making process and should be subject to the FOIA, to hold otherwise would actually allow agencies to avoid disclosure by transfer to nonagencies. *See id.* at 626-27.

86. S. REP. NO. 89-813, at 3 (1965); *see also* 112 CONG. REC. H13,654 (1966) (statement of Rep. Rumsfeld, a member of the House Subcommittee that drafted the FOIA); O'Connell, *supra* note 75, at 620.

87. *See, e.g.,* O'Connell, *supra* note 75, at 617-20, 626-27; Wion, *supra* note 14, at 1093. O'Connell argues that this can be avoided by fashioning a "control test" that focuses on the agency's superior ability to control and use the records. O'Connell, *supra* note 75, at 629-30.



courts have taken a variety of approaches. While they have had some direction from Congress in determining what is an agency under the Act,<sup>88</sup> they must also determine if the record in question is an agency record, a finding they must make without direction from Congress.<sup>89</sup> The purpose of Part A of this section is to analyze two federal court factors used in determining what is an agency under the Act. Part B then analyzes the factors used by the federal courts in attempting to define the term “agency record.”

#### A. *Determining What Is an “Agency” Under the FOIA*

In construing the FOIA’s definition of “agency,”<sup>90</sup> federal courts have considered two factors. One factor asks whether the entity has substantial independent authority in performing a function of the government, making it the functional equivalent of the government.<sup>91</sup> The other factor asks whether the government substantially controls the entity’s day-to-day operations or organizational framework.<sup>92</sup> In using either factor, the court is essentially asking to what degree the entity is performing a government function. In one case, the government is pulling nearly all of the strings; in the other case, the entity is making decisions independently for the government. Although these two factors can overlap, they will be treated separately in this Part in order to distinguish the reasoning behind each factor.

##### 1. The Control Factor

The seminal case in determining what constitutes an agency under the FOIA is the U.S. Supreme Court’s decision in *Forsham v. Harris*.<sup>93</sup> In that case, the petitioners sought the release of raw data possessed by a group of private physicians and scientists conducting research under federal grants from the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD).<sup>94</sup> Although the NIAMDD supervised the grantees and had a right of access and permanent custody of their documents, it did not exercise these rights and left the day-to-day operations of the program to the grantees.<sup>95</sup> The raw data ultimately led to the restriction of certain

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88. *See supra* Part III.A.

89. *See supra* Part III.B.

90. *See* 5 U.S.C. § 552(f) (Supp. II 1996); *see also* discussion *supra* Part III.A.

91. *See e.g.*, *United States v. Orleans*, 425 U.S. 807, 814 (1976).

92. *See e.g.*, *Forsham v. Harris*, 445 U.S. 169 (1980). For a discussion of the factors determining what constitutes an agency under the Act, *see* Shafer, *supra* note 71, § 4.02.

93. 445 U.S. 169 (1980).

94. *See id.* at 172.

95. *See id.* at 173.

drugs by the Secretary of Health, Education, and Welfare (HEW) and the Food and Drug Administration (FDA).<sup>96</sup>

Although the Court admitted that a federal grantee could potentially be considered a federal agency, that status could only be conferred on entities subjected to substantial federal supervision, not merely federal “regulatory authority necessary to assure compliance with the goals of the federal grant.”<sup>97</sup> Private grantees, which are neither chartered by the government nor controlled by it, cannot be considered agencies under the Act.<sup>98</sup> Because the grantees in *Forsham* retained their decision-making authority, there was no extensive, day-to-day supervision by the government necessary to turn the grantees into a federal agency.<sup>99</sup> Without this substantial control by the government, the Court reasoned that Congress did not intend federal funding and supervision alone to create an agency under the Act.<sup>100</sup>

The Court based its decision in *Forsham* on an earlier decision involving a private corporation, *United States v. Orleans*.<sup>101</sup> In that case, a federally funded community action agency was sued under the Federal Tort Claims Act.<sup>102</sup> Although the agency was completely funded by the government, it was independently operated and not subject to the control of the government.<sup>103</sup> The government did not have the power to supervise the day-to-day operations of the community action agency, but was instead free to contract with the agency in order to protect its investment.<sup>104</sup> This did not turn acts of the agency into acts of the government for purposes of the Tort Claims Act,<sup>105</sup> and this reasoning was carried over to the FOIA definition of “agency” in *Forsham*.

Lower federal courts have followed the *Forsham-Orleans* approach

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96. *See id.* at 174-75.

97. *Id.* at 180 n.11.

98. *See id.* at 179 (citing H. CONF. REP. NO. 93-180, at 14-15 (1974)).

99. *See id.* at 180. The Supreme Court essentially followed the reasoning of the U. S. Court of Appeals for the District of Columbia Circuit, which held that entities receiving federal grants do not on that factor alone become government agencies. *See Forsham v. Califano*, 587 F.2d 1128, 1135 (D.C. Cir. 1978), *aff'd*, *Forsham v. Harris*, 445 U.S. 169 (9180). Even with the multimillion dollar federal grant, which entirely funded the study, the government had not exercised its contractual right to review or retain the raw data. *See id.* at 1136. Without the exercise of its “audit rights,” the government essentially exercised no control over the project. *Id.*

100. *See Forsham*, 445 U.S. at 181. Additionally, the Court would not allow access though a broadening of the agency records definition. *See id.*; discussion *infra* Part IV.B.

101. 425 U.S. 807 (1976).

102. *See id.*

103. *See id.* at 814.

104. *See id.* at 815.

105. *See id.* at 815-16.

by requiring government control of a private entity before holding the entity accountable under the FOIA. In *Rocap v. Indiek*,<sup>106</sup> the court of appeals found that the Federal Home Loan Mortgage Corporation (FHLMC) was an agency under the FOIA because it met the definition of “government-controlled corporation” under section 552(f) of the Act.<sup>107</sup> This was due to several factors: the FHLMC was chartered under federal law; it was controlled by federal statute; its employees were federal employees; it operated solely on federal funds; and it was subject to the complete control of federal officials.<sup>108</sup> In essence, it was “subject to such substantial federal control over its day-to-day operations” that it was clearly an agency under the Act.<sup>109</sup> While one of these factors alone would not be enough to make the FHLMC an agency under the Act, the court held that when combined, the factors meant that the FHLMC was the kind of entity Congress intended to include in the “government-controlled corporation” definition.<sup>110</sup>

Four years after *Rocap*, the D.C. Circuit held in *Public Citizen Health Research Group v. Department of Health, Education and Welfare*<sup>111</sup> that a medical foundation contracting with the HEW to conduct a professional standards review for the Medicare and Medicaid programs was not an agency under the FOIA.<sup>112</sup> The foundation was a private, nonprofit corporation organized pursuant to state law, and its operations were the responsibility of private physicians, not the government.<sup>113</sup> Because the foundation was independently run by private physicians, with little review by the government, the court concluded that Congress did not intend for these review entities to be subject to public access.<sup>114</sup> Although the private foundation was making decisions with direct implications for the federal Medicare and Medicaid programs, it had to remain closed to public scrutiny because it was independent of government.<sup>115</sup>

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106. 539 F.2d 174 (D.C. Cir. 1976).

107. *See id.* at 175; 5 U.S.C. § 552(f) (Supp. II 1996).

108. *See Rocap*, 539 F.2d at 176.

109. *Id.* at 177.

110. *See id.* The court noted, however, that Congress did not intend to extend the agency definition to “corporations which receive appropriated funds but are neither chartered by the [f]ederal [g]overnment nor controlled by it.” *Id.* at 174 n.4 (citing S. CONF. REP. 93-1200, at 14-15 (1974)).

111. 668 F.2d 537 (D.C. Cir. 1981).

112. *See id.* at 538.

113. *See id.* at 542.

114. *See id.* at 543. The court noted that just because an organization makes decisions that impact the government does not make it a government agency because “each new arrangement must be examined anew and in its own context.” *Id.* at 542.

115. *See id.* at 543-44. The court described the foundation’s function as though the

Writing in concurrence, Chief Judge Edward Tamm pointed out that each case determining whether an entity is an agency under the Act must be examined in its own context.<sup>116</sup> He wrote to express his belief that the factors used to determine agency status are not necessarily cumulative. It would not be necessary, for example, to show that an entity has authority to make decisions for the government *and* that it is controlled by the government.<sup>117</sup> A “galaxy of factors,” such as control, the nature of the entity, what portion of its business is conducted through government contract, and the nature of the function performed should be considered to ensure that the values of the FOIA are protected, rather than applying a rigid, cumulative approach.<sup>118</sup>

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physicians were acting as expert advisors to the government. *See id.* The court reasoned that it would be impractical and unfair to subject groups such as this to public scrutiny just because they render opinions for the government. *See id.* Statutory provisions and regulations which govern the private group, standing alone, did not provide the degree of government control necessary to turn the foundation into an agency under the FOIA. *See id.* at 544; *St. Mary Hosp. v. Philadelphia Prof'l Standards Review Org.*, No. 78-2943, 1980 WL 19448 (E.D. Pa. June 25, 1980) (holding that a Professional Standards Review Organization (PRSO) was not an agency under the FOIA because Congress intended PRSOs to be private and did not want the federal government to assume any day-to-day responsibilities for running the organizations).

116. *See Public Citizen Health Research Group*, 668 F.2d at 544 (Tamm, J., concurring).

117. *See id.* The authority to make decisions for the government is discussed *infra* Part IV.A.2. The district court previously held that the medical foundation was an agency under the FOIA because it had independent authority to make decisions; it was required to review health care and to make final, binding determinations as to whether the care rendered was necessary; and thus qualified for federal reimbursement under the Medicare and Medicaid programs. *See Public Citizen Health Research Group v. Department of Health, Educ. and Welfare*, 449 F. Supp. 937 (D.D.C. 1978). The lower court found that because the foundation had the authority to make crucial decisions, the foundation qualified as an agency. The federal circuit court relied, however, on a control test, finding that the lack of federal day-to-day control made the foundation a private entity not subject to FOIA. *See Public Citizen Health Research Group*, 668 F.2d at 537.

118. *Id.* at 545. In dissent, Judge Mikva also expressed the concern that the majority was applying a rigid, cumulative test to determine when an entity is an agency under the Act. *See id.* (Mikva, J., dissenting). Judge Mikva did not want “independence from the government” to be dispositive because other factors could necessitate finding that the values of the FOIA would be served by disclosure. *Id.* He wanted some discussion about which factors should be given more weight and which factors could necessitate a result in certain situations. *See id.*

In seeking a more generalized explanation of the process to be employed, Judge Mikva explained the difference between independent decision making and government control by stating that “[b]odies with the delegated authority to make significant decisions are agencies in their own right. They act in the place of a preexisting government body in the exercise of a central function.” *Id.* at 546. In contrast:

Bodies that are very closely controlled by the government are also subject to FOIA, but for the opposite reason. They possess *too little* independent authority to be considered entities separate from the government agency to which they are related. Their records are equivalent to the records of the controlling agency.

Similar to the majority in the second *Public Citizen Health Research Group* case, the Ninth Circuit Court of Appeals used a control test in *Irwin Memorial Blood Bank of the San Francisco Medical Society v. American National Red Cross*<sup>119</sup> to determine that the American Red Cross is not an agency under the FOIA.<sup>120</sup> Even though the Red Cross has a close relationship with the federal government, it is not subject to the kind of “substantial federal control” by the government that would make it an agency under the Act.<sup>121</sup> The court admitted that each case must be decided on its own facts because entities could differ so drastically that one case provides little precedential value in determining when an entity should be considered an agency.<sup>122</sup> But, as a threshold showing, the court reasoned that “substantial federal control or supervision” is required before an entity can be considered part of the federal government.<sup>123</sup>

By using the substantial federal control criteria, the *Irwin* court stated that it intended to separate entities truly controlled by the federal government from those that are merely “quasi-public or quasi-governmental.”<sup>124</sup> To determine the proper degree of federal control, the court stated it would be necessary to analyze the various “federal characteristics” possessed by the entity.<sup>125</sup> The court stated that the Red Cross does not employ federal employees; it does not function through federal funding unless under specific purpose grants; and while it is supervised to some extent by the government, the Red Cross is not directed by federal officials in its day-to-day operations.<sup>126</sup> Essentially, the court reasoned that the Red Cross exists to provide voluntary aid, and it exists on

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*Id.* at 546. In order to prevent government from farming out functions to private entities to avoid disclosure, Judge Mikva sought a “consistent, predictable body of law” in the agency area. *Id.* Because the foundation in the present case had sufficient independent decision-making authority, Judge Mikva would have allowed public access. *See id.* at 547.

119. 640 F.2d 1051 (9th Cir. 1981).

120. *See id.* at 1053.

121. *Id.* at 1054-55.

122. *See id.* at 1054.

123. *Id.* at 1054-55.

124. *Id.* at 1055.

125. *Id.*

126. *See id.* at 1056-57. The government supervised the Red Cross’s filing of reports and use of federal buildings, and even though the President appoints members to the Red Cross’s Board of Governors that was not the kind of control or direction that would make the Red Cross a government agency. *See id.*; *Lombardo v. Handler*, 397 F. Supp. 792, 802 (D.D.C. 1975) (holding that the National Academy of Sciences is not an agency under the FOIA because it is not subject to significant day-to-day control by the government, even with the existence of the following federal factors: it was established by and reports to Congress; it is obligated to function for the federal government upon request; and it is funded almost completely by the government).

an international forum without any substantial control by one particular government.<sup>127</sup> It is a “close ally” of the U.S. government, but it is not under the direct control of the government on a daily basis.<sup>128</sup>

## 2. The Functional Equivalence Factor

This factor basically represents the opposite situation from the control factor. Here, the entity is functioning independently, but making decisions for the government, as opposed to having its decisions made by the government. In effect, it is the functional equivalent of the federal government, and, therefore, it should be an “agency” under the FOIA.

The earliest case to use this functional equivalence analysis was *Soucie v. David*,<sup>129</sup> decided before the 1974 FOIA amendments expanded the definition of “agency.” In *Soucie*, the court held that the Office of Science and Technology (OST) had an independent governmental function of evaluating federal scientific programs, making it an agency under the APA and the FOIA.<sup>130</sup> The OST functioned as a distinct government agency, and not merely as an arm of the President, because it fully transferred responsibilities from the National Science Foundation.<sup>131</sup>

Three years after *Soucie*, the D.C. Circuit again discussed the functional equivalence factor in *Washington Research Project, Inc. v.*

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127. See *Irwin*, 640 F.2d at 1057-58.

128. *Id.*; *Dong v. Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997) (holding that the Smithsonian Institute is not an agency subject to the Privacy Act, which borrows its definition of “agency” from the FOIA, because the Smithsonian is not subject to the day-to-day control of the government).

In contrast to *Dong*, the D.C. District Court previously held that the Smithsonian Institute was an agency subject to the FOIA. See *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992). The court reasoned that the Smithsonian performs government functions as a center of scholarship and national treasures because it is chartered by Congress, receives federal funding, enjoys immunity, and employs mainly civil service employees. See *id.*; *Cotton v. Heyman*, 63 F.3d 1115 (D.C. Cir. 1995) (affirming the district court opinion, while holding that the Smithsonian could reasonably believe that it was not an agency subject to the Act; therefore, the plaintiffs were not entitled to attorney’s fees).

The *Dong* case does not cite the earlier opinion, perhaps because the latter case deals with the Privacy Act as opposed to the FOIA. The two cases still appear to be in conflict. See *Alexander v. FBI*, 971 F. Supp. 603, 606 (D.D.C. 1997) (reasoning that Congress essentially adopted the agency definition from the FOIA for use in the Privacy Act, but that the Privacy Act also has explicit language which may make the agency definition somewhat different; for example, the Privacy Act includes the Office of the President, while the FOIA does not).

129. 448 F.2d 1067 (D.C. Cir. 1971).

130. See *id.* at 1075.

131. See *id.* Therefore, because the OST was considered to be an agency, a report that it generated was an agency record subject to disclosure because it was created as part of OST’s functions, unless one of the Act’s exemptions applied. See *id.* at 1075-76.

*Department of Health, Education and Welfare.*<sup>132</sup> In that case, the court held that initial review groups that pass on research applications to the National Institute of Mental Health are not agencies under the FOIA because they do not have legal authority to make decisions.<sup>133</sup> Instead, the court considered the groups “advisory committees” performing staff functions and not independent agencies under the FOIA.<sup>134</sup>

The court reasoned that “[e]mploying consultants to improve the quality of the work that is done cannot elevate the consultants to the status of the agency for which they work unless they become the functional equivalent of the agency, making its decisions for it.”<sup>135</sup> In the court’s view, influence over the federal government is not enough; instead, there must be independent authority to make decisions.<sup>136</sup> Because the groups were not agencies, their recommendations could only be subject to disclosure when they were expressly adopted by a government agency in making its decisions.<sup>137</sup>

An analysis of the case law determining when a private entity is an agency under the FOIA reveals that a high degree of government involvement is necessary. Unless the government substantially controls the operations of a private entity, or unless the private entity is substantially acting for the government, the private entity will not be subject to the Act. The entity must, essentially, be an arm of the government.

In short, if the government desires, it could farm out operations to private entities and avoid disclosure, as long as it stays out of the day-to-day operations of the private entity, yet retains its own important decision-making authority. The private entity would not be an agency, and its records are not likely to be considered agency records, unless they become government records. The agency record requirement is the subject of the next Part.

#### *B. Determining What Is an “Agency Record” Under the FOIA*

In addition to the requirement that the entity petitioned under the FOIA be an agency, there must be a sufficient link between the government agency and the record to justify calling it an agency record.<sup>138</sup> Although the FOIA does not define “agency record,” the U.S. Supreme Court has

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132. 504 F.2d 238 (D.C. Cir. 1974).

133. *See id.* at 246.

134. *Id.*

135. *Id.* at 247-48.

136. *See id.* at 248.

137. *See id.*

138. *See O’Connell, supra* note 75, at 614.

determined that there must be “some relationship between an ‘agency’ [and a] ‘record’ requested.”<sup>139</sup> However, courts have had difficulty in determining the degree of this relationship, leading some to fear that the “agency record” definition will be construed too narrowly, thereby frustrating the purposes behind the FOIA.<sup>140</sup> Questions arise as to what degree of control by the federal government over the record is necessary before it can be considered an agency record.<sup>141</sup> The purpose of this Part is to analyze the various federal cases that attempted to determine what constitutes an agency record. As this Part demonstrates, the U.S. Supreme Court requires that the record be both possessed and controlled by an agency under the FOIA, a test that can be termed “official control.” This test has also been followed by lower federal courts.

### 1. The Supreme Court Official Control Approach

In determining what requested materials constitute agency records, the U.S. Supreme Court uses a two-prong test. First, the Court mandates that the government agency must “either create or obtain” the materials as a threshold requirement for agency record status.<sup>142</sup> In other words, it must first determine whether the record was originally created by a government agency, or, if it was created by a private entity, it must be obtained by the federal agency in order to meet this threshold requirement.

Second, the Court requires direct control by the government agency over the records at the time the FOIA request is made before they can be considered agency records.<sup>143</sup> Possession is a necessary requirement for control, but it is not sufficient unless there is some sort of possession of the

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139. Forsham v. Harris, 445 U.S. 169, 178 (1980).

140. See O’Connell, *supra* note 75, at 615; “Agency Records” Under the Freedom of Information Act, *supra* note 82, at 1066 (arguing that a narrow definition of “agency record” could have the effect of expanding the exemptions under the Act).

141. See O’Connell, *supra* note 75, at 617-19; United States v. Charmer Indus., Inc., 711 F.2d 1164 (2d Cir. 1983) (requiring documents to originate in a government body subject to the FOIA); Carson v. United States Dep’t of Justice, 631 F.2d 1008, 1015 (D.C. Cir. 1980) (holding that records central to the function of an agency are controlled by the agency); Berry v. Department of Justice, 733 F.2d 1343, 1348-49 (9th Cir. 1984) (requiring some type of “meaningful control” by an agency over the record before it can be considered an agency record).

142. United States Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144 (1989). The Court noted that creation is not an essential prerequisite to information becoming agency records; it is enough that the agency acquire the information because “[t]o restrict the term ‘agency records’ to materials generated internally would frustrate Congress’[s] desire to put within public reach the information available to an agency in its decision-making processes.” *Id.* (citing Chrysler Corp. v. Brown, 441 U.S. 281, 290 n.10 (1979)).

143. See *Tax Analysts*, 492 U.S. at 145; United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772 (1989).



record for use in the agency's official duties.<sup>144</sup> The record cannot simply be located at the agency; it must become a part of the agency's official business.

In short, this two-prong test focuses first on creation or possession by a federal agency in order to establish that the record has a governmental purpose and is not purely private. It then moves to whether the necessary control is present through both possession and use in the agency's official duties at the time the FOIA request is made. By focusing on both an official purpose of the record<sup>145</sup> and control over the record at the time of the FOIA request, this two-prong test can be termed an "official control" test.

Discussing the creation or possession prong of the test, the Court in *Forsham* held that data created by a group of private physicians could not be considered agency records because the data was not at any time obtained by the Secretary of HEW.<sup>146</sup> In order for records that are created, owned, and possessed by a private entity to become agency records, they must first be obtained by a FOIA agency.<sup>147</sup> Because the FOIA agency in *Forsham* only had rights of access and permanent custody of the records, and did not in fact possess the records, the data did not have the necessary link to be considered agency records.<sup>148</sup> The first prong of the agency records test was not satisfied—there was no creation or possession by a FOIA agency.<sup>149</sup>

The Court reasoned that federal funding and supervision alone did not make the private group an agency under the FOIA, and therefore its records could not be considered agency records as long as they remained in private hands.<sup>150</sup> The *Forsham* Court, therefore, created a threshold requirement of creation or possession, and in that case, it was not necessary to inquire further into the nature of the records because the FOIA agency had never possessed the records.<sup>151</sup>

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144. *See Tax Analysts*, 492 U.S. at 145.

145. This would be established by showing either that the government created the record itself, or that a private entity created the record and it was later obtained by the agency, suggesting that the record was used by an agency for an official governmental purpose.

146. *See Forsham v. Harris*, 445 U.S. 169, 171 (1980).

147. *See id.*

148. *See id.* at 173. The Court pointed out that even the *Code of Federal Regulations* states that until the records are obtained by the federal agency, they are only "records of grantees." *Id.* at 181 (quoting 45 C.F.R. § 74.24 (1979)). Under the FOIA itself, the records must have been in fact obtained, not merely could have been obtained, before they can be considered agency records. *See id.* at 186.

149. *See id.*

150. *See id.* at 181.

151. *See id.* at 182. The Court also noted that "Congress has associated creation or acquisition with the concept of a governmental record" in other statutory contexts, such as the Records Disposal Act and in the legislative history of the FOIA itself. *Id.* at 183-85.

In dissent, Justice William Brennan preferred to weigh each case on its merits, noting that where the nexus between the agency and the information is close and where the information is important to the public's understanding of agency operations, the information should be an agency record under the FOIA.<sup>152</sup> For Justice Brennan, the issue was "the importance of the record to an understanding of [g]overnment activities" and the extent to which the agency has treated the record as part of the regulatory process, not actual possession.<sup>153</sup> Because the government agencies at issue in *Forsham* significantly relied on the private study, and were "deeply involved" in the creation of the data, Justice Brennan would have held the information to be an agency record under the Act.<sup>154</sup>

The second prong of the official control test—the requirement that the records be in the possession of a FOIA agency at the time of the request for use in its official duties—was solidified in 1980 in *Kissinger v. Reporters*

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The Court agreed with the lower court's reasoning that a federal agency should not be required to exercise its right of access in order to create an agency record because the FOIA does not require agencies to create records. *See Forsham v. Califano*, 587 F.2d 1128, 1136-37 (D.C. Cir. 1978), *aff'd*, *Forsham v. Harris*, 445 U.S. 169 (1980). Only if a federal agency has created or obtained a record, or if it has some duty to obtain it in the course of doing its work, can the record be considered an agency record. *See id.* at 1136. The majority, however, acknowledged that "[o]bviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." *Id.* at 1136 n.19. Additionally, the court stated: "Scientists engaged in research on federal grants must accept the fact that any documents filed with the federal government, whether on the scientists' own initiative or an audit or other lawful demand, are subject to FOIA." *Id.* at 1137. Thus, the lower court equated control with possession.

152. *See Forsham*, 445 U.S. at 188-89 (Brennan, J., dissenting).

153. *Id.* at 189-90.

154. *Id.* at 191-92. Justice Brennan pointed out that the government agencies were also "deeply involved" with the records because they "remain with the grantee only at the pleasure of the [g]overnment." *Id.* He feared that by relying on private grantees to perform important government services, governments could avoid the FOIA if the courts do not define "agency record" in a broader sense. *See id.*

Judge Bazelon, who dissented in the lower court opinion, also agreed that factors other than simple possession should be considered in determining agency record status. *See Forsham*, 587 F.2d at 1140 (Bazelon, J., dissenting). Because the government had an unrestricted right of access to the records, provided all of the funding for the private physicians group, and extensively relied on the study data, Judge Bazelon felt there was sufficient government involvement with the data to create agency records. *See id.* The funding, access, and reliance factors, taken together, established agency records in Judge Bazelon's opinion. *See id.* at 1142.

Judge Bazelon also pointed out that records need not be located at the government agency to be considered agency records because "[r]ecords may be bailed to a privately-owned warehouse, loaned to a private entity, or may have been sold or donated to the [g]overnment but not delivered." *Id.* at 1144. The most determinative factor, in Judge Bazelon's opinion, was the extreme reliance by the government on the data generated by the private physicians, especially because it was a controversial study. *See id.*

*Committee for Freedom of the Press*.<sup>155</sup> In that case, the Reporters Committee for Freedom of the Press sought to gain access to records and notes of Henry Kissinger's official telephone conversations made during his service as Assistant to President Nixon for National Security Affairs and as Secretary of State.<sup>156</sup> Holding that the records were not agency records under the FOIA at the time of their creation because the Act does not include the Office of the President, the Court reasoned that they did not acquire agency record status when Kissinger transferred them to his office at the State Department, an agency under the FOIA.<sup>157</sup>

While the records were technically located at the FOIA agency, they were not in the Department's official control because they were not used by the Department for any purpose.<sup>158</sup> Although the *Forsham* creation or possession requirement was technically met, the *Kissinger* Court added the additional requirement that the possession be for official purposes, creating the two-prong official control test.<sup>159</sup> The possession requirement must first be met, but the records cannot be mere personal records located at an agency. Instead, they must be used by the agency in the conduct of its official duties.<sup>160</sup> Because the records were personal to Kissinger and his donee, the Library of Congress, the State Department did not have official possession or control over the documents at the time of the FOIA requests.<sup>161</sup>

The Court noted that it was not deciding at what point records that relate to agency affairs become records of that agency.<sup>162</sup> However, noting that the records related only to Kissinger's employment in the Office of the President, the Court ruled that something more than the mere physical location of records in a FOIA agency was needed, otherwise Kissinger's "personal books, speeches, and all other memorabilia stored in his office would have been agency records subject to disclosure under the FOIA."<sup>163</sup> This would create public records out of personal information. In essence,

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155. 445 U.S. 136 (1980).

156. *See id.* at 139-40.

157. *See id.* at 156-57.

158. *See id.*

159. *See id.*

160. *See id.* at 157. The Court cited the Attorney General guidelines issued shortly after Congress passed the FOIA, stating that the FOIA "refers, of course, only to records in being and in the possession *or* control of an agency . . ." *See id.* at 151 (emphasis added) (citations omitted). Under the requirements laid out in *Forsham* and *Tax Analysts*, however, there must be *both* possession and control—neither factor alone is sufficient to create agency records.

161. *See id.* at 155.

162. *See id.* at 156.

163. *Id.* at 157.

the Court was looking for official control by a FOIA agency, which must include possession for use in its official capacity.<sup>164</sup>

The Supreme Court further solidified the official control test in *United States Department of Justice v. Tax Analysts*<sup>165</sup> by focusing not only on the creation or possession requirement, but also requiring that the records be under the agency's control at the time of the FOIA request.<sup>166</sup> There, the Court required the Tax Division of the Department of Justice to make available to the public district court cases received while litigating tax cases because the Department obtained the records from the district courts and was in control of the records when the FOIA requests were made.<sup>167</sup> The Court spelled out the two prongs of the official control test laid out in *Forsham* and *Kissinger*: an agency must first create or obtain the records and must be in control of the requested records at the time of the FOIA request, meaning that "the materials have come into the agency's possession in the legitimate conduct of its official duties."<sup>168</sup> Creation or possession of the record is not enough without possession and official use of the record at the time of the FOIA request.

In discussing both prongs of the official control test, the Court emphasized that it was not restricting agency records to those actually created within the FOIA agency.<sup>169</sup> The Court noted that FOIA agencies frequently use privately-generated materials in performing their official duties, and these materials are still a part of the decision-making process, even if not created within the agency.<sup>170</sup> The Court noted, however, that agency records would not include personal materials in an agency employee's possession; instead, they must be acquired by the agency itself

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164. In his opinion, concurring in part and dissenting in part, Justice Stevens worried that applying a strict possession and control approach would allow agencies to simply remove documents from their physical possession and, therefore, frustrate the purposes behind the FOIA. *See id.* at 161-62 (Stevens, J., concurring in part and dissenting in part). In fact, Justice Stevens commented that the Court's strict possession approach "creates an incentive for outgoing agency officials to remove potentially embarrassing documents from their files in order to frustrate future FOIA requests." *Id.* at 161. In his opinion, an agency withholds a record when it refuses to produce a record for which it has a legal right to possess or control. *See id.* at 162. In other words, Justice Stevens would require an agency to produce records in private hands if the records could legally be acquired by the agency. *See id.* at 164-65.

165. 492 U.S. 136 (1989).

166. *See id.* at 145.

167. *See id.* at 138.

168. *Id.* at 144-45.

169. *See id.* at 144.

170. *See id.*; *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (noting that FOIA agencies frequently obtain potentially confidential information from private entities in the course of doing business).

in connection with its official business.<sup>171</sup> In other words, creation or possession alone would not satisfy the agency record test unless the agency possessed the records for its own use at the time of the FOIA request.<sup>172</sup> There must be official control over the records, beyond mere physical location at the agency.<sup>173</sup> Both prongs of the official control test must be met.

The Court in *Tax Analysts* held that the district court tax opinions were agency records because they were both possessed and controlled by the Department in the course of its official duties. It did not matter that the cases were created by a nonagency under the FOIA.<sup>174</sup> The FOIA's goal should be to give the public access to records received by an agency in conducting its business, regardless of the actual author of the records.<sup>175</sup> The Court reiterated the threshold requirement of creation or possession, but it also required more than just possession—the records must be located at the FOIA agency *and* be a part of its official business at the time of the FOIA request.

## 2. The Lower Court Control Approaches

Lower federal courts have also required some degree of control over a record by a FOIA agency in the conduct of its official duties in order to make the record an agency record. In *Berry v. Department of Justice*,<sup>176</sup> the Ninth Circuit Court of Appeals held that presentence reports prepared by the courts for use by the Federal Bureau of Prisons and the Parole Commission, both FOIA agencies, were agency records when in the possession of the agencies for their official use.<sup>177</sup> The records were not court documents, which would not be subject to the FOIA, because they were in the possession of agencies, used in their official duties, and subject to the free disposition of the agencies.<sup>178</sup> Therefore, they were agency

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171. See *Tax Analysts*, 492 U.S. at 145 (citing *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 157 (1980)); *Forsham v. Harris*, 445 U.S. 136, 183 (1980).

172. See *Tax Analysts*, 492 U.S. at 145.

173. See *id.* at 143-45.

174. See *id.* at 146-47. The Court noted that disputes over control should be infrequent, but that it was “leaving for another day” those cases where records are “purposefully routed . . . out of agency possession in order to circumvent [an impending] FOIA request,” or “wrongfully removed by an individual after a request is filed.” *Id.* at 146 n.61 (quoting *Kissinger*, 445 U.S. at 155 n.9).

175. See *id.* at 147.

176. 733 F.2d 1343 (9th Cir. 1984).

177. See *id.* at 1344.

178. See *id.* at 1346; *Crooker v. United States Parole Comm'n*, 760 F.2d 1 (1st Cir. 1985) (holding presentence reports used by the U.S. Parole Commission are agency records); *Carson v. United States Dep't of Justice*, 631 F.2d 1008, 1015 (D.C. Cir. 1980)

records because they were within the official control of the agencies.

The court in *Berry* followed Supreme Court precedent by holding that creation alone is not dispositive of the control test.<sup>179</sup> Otherwise, all documents of nonagencies would be shrouded in secrecy.<sup>180</sup> If the records are possessed by the agency, the court stated they could still be subject to access as agency records even if they were originally created by a nonagency because they essentially become a part of government business.<sup>181</sup> The court relied on an official control test focusing on whether the records are in the possession of an agency and “prepared substantially to be relied upon in agency decisionmaking [sic].”<sup>182</sup> Possession by the agency is a prerequisite, but the record must also reflect how an agency conducts its official duties.<sup>183</sup> Since presentence reports are routinely prepared by courts and forwarded to the federal agencies for use in their duties, the reports were agency records because they were both in the possession of the agencies and within their control.<sup>184</sup> Therefore, in keeping with the official control approach solidified in the Supreme Court cases ending with *Tax Analysts*, the *Berry* court required both possession and control.<sup>185</sup>

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(finding that presentence reports prepared by the probation service but in the possession of the Parole Commission, a FOIA agency, are central to the Commission’s primary function and are therefore agency records); *cf.* *Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978) (holding that Congress had not relinquished its control over documents even though they were in the temporary possession of the CIA; thus, the CIA did not have sufficient control over the records to render them agency records).

179. *See Berry*, 733 F.2d at 1348; *see also Forsham v. Harris*, 445 U.S. 136, 181 (1980) (stating that “[r]ecords of a nonagency certainly could become agency records as well.”).

180. *See Berry*, 733 F.2d at 1348.

181. *See id.* at 1350. The court stressed the record’s creation for agency decision making as important for disclosure, but it also suggested that data created outside the agency but possessed by the agency could also be subject to access, particularly if other factors such as federal funding are involved. *See id.* at 1350 n.10.

182. *Id.* at 1349.

183. *See id.* at 1350.

184. *See id.* at 1350-51.

185. *See Burka v. United States Dep’t. of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). The court held that data tapes and questionnaires regarding smoking habits and attitudes conducted at the direction of the Department of Health and Human Services (HHS) by the National Cancer Institute and a private company were agency records because HHS exercised extensive control over the data and documents were created on behalf of HHS. Also, the National Cancer Institute planned to take possession of the materials and use them in its official duties. *See id.* at 515.

In essence, this case contrasts *Forsham*, where the federal agency did not have the extensive control over the private entity study present in *Burka*. *See Forsham v. Harris*, 445 U.S. 169 (1980). In *Burka*, a federal agency assisted in the creation of the records, and another federal agency exercised extensive day-to-day control over the study. *See Burka*, 87 F.3d at 515. In short, the entities were agencies under the *Forsham* approach, and their

Similar to the *Berry* court's approach, the Court of Appeals for the Seventh Circuit in *General Electric Co. v. United States Nuclear Regulatory Commission*<sup>186</sup> held that the term "agency record" covers not only documents created by a federal agency, but also documents submitted to the agency for use in its official duties.<sup>187</sup> Otherwise, the court reasoned that the purpose behind the FOIA—"to give the public access to information on which the government bases action"—would be impeded if agency records excluded documents that moved the agency to act and were possessed by the agency.<sup>188</sup> This reasoning resulted in the conclusion that a record compiled during a nuclear licensing proceeding was an agency record used by the Nuclear Regulatory Commission (NRC), a FOIA agency, even though the record was prepared by General Electric, a private company.<sup>189</sup> This was because the NRC had possession and control over the document for its official use, which satisfied the two prongs of the official control test.

Other federal courts also used an official control test in determining what records are subject to the FOIA. In *Teich v. Food and Drug Administration*,<sup>190</sup> the court held that a summary of consumer complaints about a private manufacturer's breast implants was an agency record subject to the FOIA because it was filed with the FDA, an agency under the Act, and was obtained as part of the FDA's official duties.<sup>191</sup> The court based its decision on a finding that the FDA was conducting its official business when it requested documents from Dow Corning regarding breast implants.<sup>192</sup> Therefore, it was irrelevant whether the FDA planned to return

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records would eventually be under the official control of HHS. *See id.*

186. 750 F.2d 1394 (7th Cir. 1984).

187. *See id.* at 1400.

188. *Id.*; *see also* Weisberg v. United States Dep't. of Justice, 631 F.2d 824, 828 (D.C. Cir. 1980) (discussing purposes behind FOIA); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (discussing purposes behind FOIA).

189. *See General Electric Co.*, 750 F.2d at 1400. The court added that even though the Commission did not rely extensively on the report, it was still an agency record. *See id.* This was because the public still had an interest in knowing what portions of the report the Commission relied on and what exact uses it made of the report. *See id.*

190. 751 F. Supp. 243 (D.D.C. 1990).

191. *See id.* at 248.

192. *See id.*; *see also* Ryan v. Department of Justice, 617 F.2d 781, 786 (D.C. Cir. 1980) ("Unless there is evidence of control by some other entity, [the court] must conclude that [the agency] controls these documents"); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1411 (D. Haw. 1995) (holding that inventory of Native American that remains under the Native American Graves Protection and Repatriation Act was an agency record because the Secretary of the Navy contracted for and obtained the inventory, and it was in the federal agency's control indefinitely); *see generally* Rush v. Department of State, 716 F. Supp. 598 (S.D. Fla. 1989) (holding that documents possessed by the Department of State regarding negotiations on the status of Berlin were agency records since the Department was

the documents, as long as they were possessed by the Agency and used in its official business.<sup>193</sup> The two prongs of the official control test were met.

In contrast, the Southern District of New York in *Ciba-Geigy Corp. v. Mathews*<sup>194</sup> provided extensive reasoning for why records of a university research group, which was not an agency under the FOIA,<sup>195</sup> were not agency records. The court stated that it was not shown that the records were controlled or substantially utilized by a federal agency under the Act.<sup>196</sup> Because agency records reach only records owned or controlled by the government agency and used in its official business, the court reasoned that “it must appear that there was significant [g]overnment involvement with the records themselves in order to deem them agency records.”<sup>197</sup>

The district court first held that government funding alone would not make the underlying private research data agency records.<sup>198</sup> Otherwise, all entities gaining regular federal government support would be subject to disclosure, an effect that would chill research progress.<sup>199</sup> Additionally, the data produced by the entity was intended to be private research data. The data remained in control of the private entity and the government did not exercise any dominion over the data.<sup>200</sup> Lastly, while the FDA relied on reports submitted by the private grantees, it did not rely on the underlying data.<sup>201</sup> Thus, funding, access, and partial reliance were insufficient to

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the only entity in control of the documents since obtaining them in 1977).

193. See *Teich*, 751 F. Supp. at 248. Additionally, the court seemed troubled by the fact that the FDA itself attempted to determine that the documents were not agency records by promising confidentiality during the review process. See *id.* at 248. In effect, the court stated that the FDA was attempting to evade the Act by making this information regarding breast implants, which was of extreme importance to the public, confidential by its own determination. See *id.* at 249. The court would not allow this agency determination of confidentiality. See *id.*

194. 428 F. Supp. 523 (S.D.N.Y. 1977).

195. Since the research group had no independent authority to perform government functions, no legal authority to make decisions, and was not under any federal control, the group is not an agency under the Act. Its only power was to make recommendations to federal agencies, not decisions. See *id.* at 528; see generally *Wolfe v. Weinberger*, 403 F. Supp. 238 (D.D.C. 1975) (holding that an FDA advisory review panel played an important part in the FDA’s decision-making process, but it was still not an agency under the Act because it was empowered only to make recommendations, not decisions, for the FDA). See discussion *supra* Part IV.A.

196. See *Ciba-Geigy*, 428 F. Supp. at 529.

197. *Id.*

198. See *id.* at 530; *Lombardo v. Handler*, 397 F. Supp. 792, 802 (D.D.C. 1975) (holding that substantial federal funding did not make the National Academy of Sciences subject to the FOIA because it was not controlled by the government and its studies were not conducted as an adjunct to government operations).

199. See *Ciba-Geigy*, 428 F. Supp. at 530.

200. See *id.* at 530-31.

201. See *id.* at 531; see also *Illinois Inst. for Continuing Legal Educ. v. United States*



create agency records without some actual government agency possession and control in an official capacity.<sup>202</sup>

The D.C. Circuit Court of Appeals agreed with the *Ciba-Geigy* court's reasoning in *Wolfe v. Department of Health and Human Services*.<sup>203</sup> In *Wolfe*, the Federal Circuit Court held that a report prepared by the President-elect's transition team regarding the HHS was not an agency record because HHS did not create or maintain control over the documents, even though two copies were physically located at the Department.<sup>204</sup> The court reasoned that the agency must have possession of documents in order to have obtained them, but there must also be some nexus between the agency and the documents other than the mere incidence of location.<sup>205</sup> Similar to *Kissinger*, the mere fact that two of the documents were "within the four walls of the agency" was not enough to turn the documents into agency records without official use by the FOIA agency.<sup>206</sup>

Although an individual brought the documents within the four walls of HHS, the court stated that they were not integrated into the agency's files or records.<sup>207</sup> In other words, they did not become official records of the agency itself and were not used by the agency in its official business. Physical location provided the only nexus between the private documents and the agency, and this would not create agency records absent possession by the agency in its official capacity, the second prong of the official control test.<sup>208</sup> Documents must still retain their private character even

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Dep't. of Labor, 545 F. Supp. 1229, 1233-35 (N.D. Ill. 1982) (holding that a two-volume briefing book on the Department of Labor (DOL) prepared by the President-elect's transition staff, a nonagency under the FOIA, was not an agency record). The court based its opinion on the fact that the book was only possessed by an official at the DOL, which offered an insufficient nexus to establish control. *See id.*

202. *See Ciba-Geigy*, 428 F. Supp. at 531. The court stressed that "[m]ere access without ownership and mere reliance without control will not suffice to convert the [private entity's] data into agency data." *Id.* The research data was never turned over to the FDA; instead, it was prepared according to the methods of the private grantee, and the documents only passed into the FDA's hands at a particular point in time, not on a permanent basis. *See id.* Although private documents directly relied upon or memoranda expressly adopted by an agency are subject to disclosure even if created by a private entity, the government agency did not expressly rely on or adopt the underlying data created by a private research group. *See id.* at 532.

203. 711 F.2d 1077 (D.C. Cir. 1983).

204. *See id.* at 1078-81.

205. *See id.* at 1079-80.

206. *Id.* at 1080.

207. *See id.*

208. *See id.* at 1080-81; *cf. Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (holding that Attorney General's possession of documents was tantamount to possession by the Justice Department because the Attorney General possessed the documents during his tenure in his official capacity, therefore the Department had control over the documents).

though they may relate to an agency's business, as long as they remain within the exclusive control of the private individual and do not become a part of the agency's business.<sup>209</sup> In short, the court followed the official control approach laid out by the Supreme Court in determining the reach of agency records under the FOIA, wherein both prongs must be present to satisfy the test.<sup>210</sup>

Federal courts construing the undefined "agency record" term under the FOIA therefore looked at creation or possession as a threshold requirement, but also required more than just physical location at the agency to establish the second prong of the official control test. Some type of control by the agency, comprising not only of possession but also of use in an official capacity by the agency, is required in order for the records to be considered agency records. This control provides the necessary link between the agency and the record to establish the agency's control over the record required by the Supreme Court, potentially allowing private entities to be covered under the FOIA.

The next Part focuses on the likelihood that courts allow public access to records of private entity and analyzes the various federal court approaches in light of the purposes behind the FOIA. In this way, the effects of federal privatization on freedom of information can be shown.

## V. AN ANALYSIS OF THE AGENCY AND RECORD APPROACHES

In applying the FOIA to private entities, federal courts have jurisdiction to grant relief only to requesters who have been denied access

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209. See *Wolfe*, 711 F.2d at 1081. The documents in *Wolfe* did not become a part of the agency's official business because they were never integrated into the agency's files and were not used by the agency in any way. See *id.* at 1080. Additionally, the court took the approach in *Forsham* by ruling that access to the documents by the agency alone would not create agency records unless the agency in fact exercised this ability to access the records. See *id.*; see also *Illinois Inst. for Continuing Educ. v. United States Dep't of Labor*, 545 F. Supp. 1229, 1233-35 (N.D. Ill. 1982) (finding that the documents of the transition team were not agency records because they had never been used by the agency).

210. See *Katz v. National Archives & Records Admin.*, 862 F. Supp. 476, 479-80 (D.D.C. 1994) (holding that autopsy photographs of President John F. Kennedy were not agency records because, even though they were created and possessed by a government agency, they were never officially used for government business, and the Kennedy family retained control over the photographs); *International Bhd. of Teamsters v. National Mediation Bd.*, 712 F.2d 1495, 1496 (D.D.C. 1983) (holding that National Mediation Board's possession of labels bearing names of employees eligible to vote did not constitute control over the labels because possession was limited to one-time attachment of labels subject to a court order); *Martin Marietta Aluminum, Inc. v. Administrator, Gen. Servs. Admin.*, 444 F. Supp. 945, 948-49 (D.C. Cal. 1977) (holding that documents created by private consultants at the request of the agency were agency records because they were prepared for the agency and officially used by the agency).

and can show that an agency has improperly withheld agency records.<sup>211</sup> As this Article demonstrates, interpreting the FOIA's definition of "agency" and deciding what falls under the term "agency records" have been difficult tasks for the federal courts. While they have some guidance from Congress on defining "agency,"<sup>212</sup> the definition of "agency record" has been left solely to the judiciary. Narrow definitions of these terms will effectively create a tenth exemption to the FOIA, allowing government agencies to farm out services to private entities and keep those services shrouded in secrecy.<sup>213</sup>

At the same time, it has been argued that an expansive FOIA could hurt the government's ability to seek services from private entities not wishing to deal with public scrutiny and could violate business privacy interests when private entities are required to submit confidential information to the government.<sup>214</sup> Thus, a balance needs to be achieved to protect the nongovernmental information held by private entities, but at the same time, allow access to information created or held by private entities that clearly relates to governmental operations.<sup>215</sup> The question posed by this Article asks what approach to defining "agency" and "agency record" would best protect the public's right to know and comport with the spirit of the FOIA.

The FOIA was clearly meant to open the workings of the government to public scrutiny.<sup>216</sup> But the diversification of the operations of government in this century has made it harder for the public to find out what its government is doing.<sup>217</sup> Because the Act's purpose is to open up agency

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211. See *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989).

212. See 5 U.S.C. § 552(f) (Supp. II 1996).

213. See, e.g., Cásarez, *supra* note 3, at 293 ("When a federal agency delegates a public function to a private contractor, the agency, in effect, frustrates the purpose of the FOIA."); O'Connell, *supra* note 75, at 627 ("If nonacquisition of nonagency records and transfer of agency records to a nonagency are legitimate means of avoiding [the] FOIA disclosure, then agency officials will be tempted to contract out sensitive agency business . . . they wish to shield from public view."); Wion, *supra* note 14, at 1095 ("[A] narrow definition of 'agency records' . . . risks both expanding the exemption to the Act . . . and obstructing Congress's goal of obtaining 'the fullest responsible disclosure.'").

214. See, e.g., Cásarez, *supra* note 3, at 292; Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 43-44 (1994) (discussing the use of the FOIA to gain access to information concerning competitors).

215. Cásarez essentially makes this argument when she states that the FOIA could mandate too much disclosure of private business information, but, at the same time, protect too much information that relates to governmental functions. See Cásarez, *supra* note 3, at 292-93.

216. See S. REP. NO. 89-813 at 3 (1965); KENT R. MIDDLETON & BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATIONS* 455 (3d ed. 1994).

217. See Cásarez, *supra* note 3, at 264-65.

decision making to public scrutiny, it becomes necessary to limit its exemptions to protect the public's right to know.<sup>218</sup> By creating narrow definitions for "agency" and "agency records"—the Act's threshold requirements—however, it is possible that the courts could broaden the Act's exemptions and shield information directly relevant to agency decision making from the public eye. In other words, courts can frustrate the Act's core purpose.<sup>219</sup>

In 1974, Congress amended the FOIA to effectively broaden its definition of "agency."<sup>220</sup> The legislative history of the 1974 amendments to the FOIA make clear that the definition of "agency" was meant to reach entities that "perform governmental functions and control information of interest to the public."<sup>221</sup> However, courts interpreting the 1974 definition seemingly ignored this congressional statement by construing the term "agency" more narrowly than the congressional intent would suggest. By defining "agency" to mean governmental control over the private entity or legal decision-making authority of the entity,<sup>222</sup> it can be argued that courts have ignored some entities that may control information of interest to the public.

Because courts defined "agency" to mean an entity that is the functional equivalent of the government, they left out other entities that may perform government functions and control public information but do not make decisions for the government and are not completely controlled by the government. A good example of the function of these definitions is organizations that perform important research functions for governmental agencies, but do not make government decisions and are not controlled by the government. These organizations would clearly be performing a function that the government would otherwise perform itself, and they would certainly possess information of potential interest to the public. However, they would not be considered agencies under the courts' interpretation of the FOIA.

Unless the entities themselves make decisions for the government or

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218. See *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (stating that the FOIA's exemptions must be "narrowly construed").

219. See *supra* note 58 and accompanying text. It is important to note that courts must function within the limitations of the FOIA's definition of "agency," as described in *supra* Part III.A, as well as the somewhat vague definition of "record" described in *supra* Part III.B. However, Congress specifically intended the definition of "agency" to include entities that "perform governmental functions and control information of interest to the public." H.R. REP. NO. 93-876, at 8-9 (1974). Therefore, it is arguable that the courts could read the federal statute more broadly than requiring both possession and control.

220. See H.R. REP. NO. 93-876, at 8-9 (1974).

221. *Id.*

222. See *supra* Part IV.A.

are controlled by the government, they are not covered by the judicial interpretation of agency. This is true even if the government substantially bases its important decisions on private entity's information.<sup>223</sup> It would also be true even if the private entity is performing important governmental services but is not controlled by or making decisions for the government.<sup>224</sup> In both of these situations, it can be argued that the entity is performing a government function or, at least, controlling information of interest to the public. As another example, the private entity could be operating a federal prison, but the public would know nothing about its operations under a narrow "agency" definition.<sup>225</sup>

Similarly, a narrow definition of "agency record" leads to decisions that appear to conflict with the FOIA's legislative history, as well as the purpose of letting the public know what its government is doing. An approach based on possession of the record is arguably a narrow definition of "agency record" because it could exclude records directly dealing with a governmental agency or information affecting the public but held outside the agency.<sup>226</sup> An approach based on possession and control is even narrower because it requires more than simple possession; it requires the

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223. For example, the medical foundation at issue in *Public Citizen Health Research Group* was under contract with the HEW to conduct professional standards reviews of doctors under the Medicare and Medicaid programs. See *Public Citizen Health Research Group v. Department of Health, Educ. and Welfare*, 668 F.2d 537, 538-39 (D.C. Cir. 1981). The purpose of this program was to review the appropriateness, necessity, and quality of medical services under the Medicaid and Medicare reimbursement programs and PRSO findings were to guide government decisions regarding the future operations of the programs. See *id.* However, because the group was private and did not directly make decisions for the government, it was not an agency, even though it held important information regarding federal programs of direct interest to the public. See *id.* at 543.

224. For example, the group of private physicians in *Forsham* were performing an important service for the government, with government funding. The group was conducting a long-term study on the effectiveness of diabetes treatment programs that was to be very important to the NIAMDD, a federal agency, and was to be the basis of future decisions of the NIAMDD. See *Forsham v. Harris*, 445 U.S. 169, 172 (1980). Even though this information was important and of interest to the public, the private group was not an agency because the government did not control their day-to-day operations, and the group did not make decisions for the government. See *id.* at 178-80.

225. See generally, Cásarez, *supra* note 3.

226. For example, the information in *Forsham* concerned federal treatment regimens and was designed for use by the federal government. Nonetheless, the records were not agency records because they were not created or obtained by the federal government, even though the information had public interest. See *Forsham*, 445 U.S. at 186. The private research information in *Ciba-Geigy* also had public interest because it dealt with FDA labeling of drugs, and it was to be used by the FDA. See *Ciba-Geigy v. Matthews*, 428 F. Supp. 523, 526 (S.D.N.Y. 1977). But the records were not agency records because substantial use or control was not present, even with the information's potential effect on the public. See *id.* at 528-30.

additional elements of use or reliance.<sup>227</sup> This official control definition of “agency record” therefore permits government to keep important public information secret by relinquishing possession or control of the records.<sup>228</sup> Even though the entity may be performing a government function and controlling important public information, this approach would keep its records out of the public eye unless the FOIA agency actually possesses and uses the documents.

These cramped “agency” and “agency records” definitions could certainly be remedied by one sweep of the legislature’s pen. It is possible that Congress could amend the definition of “agency” under the FOIA<sup>229</sup> to include entities that are performing functions for federal agencies and controlling information directly relevant to agency functions and to the public. Additionally, Congress should at long last define the term “agency records,” making it broad enough to include records directly relating to governmental agency functions, even if they are not possessed by a governmental agency and are not under its direct control. The important inquiry is whether the records relate to government, not technical issues of who is in possession and control of the records. If the records relate to government functions, they should be public records. Therefore, Congress should amend the FOIA to ensure that federal agencies cannot violate its spirit by simply transferring their important functions and records to an outside private entity.

In the absence of a congressional amendment to the FOIA, however, the federal courts should develop more flexible definitions of “agency” and “agency record” to protect the public’s right to information. In his *Forsham* dissent, Justice Brennan advocated a more flexible approach that would weigh “the importance of the record” based on the “understanding of [g]overnmental activities” it offered, as well as the agency’s use of the information in the record.<sup>230</sup> Courts would do well to protect the public’s right to find out what its government is up to by adopting Justice Brennan’s approach because this would focus on the nature of the record itself, rather than looking at where the record is located, who has control over it, and the technical nature of the agency that created it. This new approach would make the record public simply because it relates directly to the government, and thus it is of obvious importance to the public.

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227. Similarly, the information in *Kissinger* was arguably personal information because it was kept at the Department of State and could have been of direct relevance to the public’s interest in knowing more about the operations of the Nixon presidency. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 141-43 (1980).

228. See O’Connell, *supra* note 75, at 627.

229. See 5 U.S.C. § 552(f)(1) (Supp. II 1996).

230. *Forsham*, 445 U.S. at 189 (Brennan, J., dissenting).

In short, Congress should clarify its 1974 definition of “agency” laid out in the FOIA<sup>231</sup> to include private entities controlling information of interest to the public, and the term “agency record” should be defined similarly through a congressional mandate.<sup>232</sup> In absence of this action by Congress, however, the judiciary is left with some discretion in upholding the spirit of the Act while protecting the rights of private parties. Two approaches would arguably allow more access to important public information, either through a public function definition of “agency” or a focus on the public nature of the record itself in determining whether it should be termed an “agency record.”

#### A. *The Public Function Approach*

One approach to interpreting the Act’s definition more broadly could be through a test focusing on the nature of the function performed by the agency. As the plaintiffs argued in *Forsham*, if the entity is performing a function for the government, and the results will clearly be used by the government, the public should have a right to access.<sup>233</sup> Commentators discussed this public function approach as an extension of the U.S. Supreme Court’s state action concept, where entities performing functions for the government are deemed state actors for constitutional purposes.<sup>234</sup> Arguably, if these entities can be termed “state actors” under the Constitution, they should be subject to access as governmental agencies under the FOIA.<sup>235</sup>

This public function approach to state action has been endorsed by the U.S. Supreme Court in cases where a private entity was performing functions exclusively administered by the state or city, such as the upkeep

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231. See 5 U.S.C. §552 (f)(1); discussion *supra* Part III.A.

232. See, e.g., Cásarez, *supra* note 3, at 296-97. Additionally, O’Connell suggests that a more flexible approach to defining “agency record” is to include in the definition when an agency “clearly has the legal right to determine the ultimate disposition of records—whether they remain within its possession or not—agency control over those records is conclusively established.” O’Connell, *supra* note 75, at 629. In other words, where the agency has a right to the record (as opposed to the actual exercise of that right as required by *Forsham*), and its right is dominant over the private entity, the record is an agency record. See *id.* This control test is more flexible than the one used by federal courts because it focuses on rights to the document, as opposed to the actual exercise of those rights.

233. See *Forsham v. Califano*, 587 F.2d 1128, 1133-35 (D.C. Cir. 1978), *aff’d*, *Forsham v. Harris*, 445 U.S. 169 (1980).

234. See *Bunker & Davis*, *supra* note 3, at 18-24; see generally Barak-Erez, *supra* note 53; ROBBINS, *supra* note 26, at 82-94 (discussing the development of the public function approach in the Supreme Court).

235. See Barak-Erez, *supra* note 53, at 1190 (operating in the public domain should serve to make private entities government actors).

of streets and roads, sewage disposal, and other public accommodations.<sup>236</sup> However, unless the function was exclusively administered by a state or city, the Court refused to find state action in cases beginning in the 1970s.<sup>237</sup> Thus, even if this public function approach became a part of the FOIA determination of agency status, it is possible that governments could delegate services to private entities and still avoid the reach of the Act, as long as those services are not traditionally the exclusive prerogative of the government.<sup>238</sup> This has led commentators to criticize the Supreme Court's approach to public function status and to comment that services previously operated by the government do not lose their importance when delegated to private entities.<sup>239</sup>

It is possible that a private entity could be subject to the FOIA's definition of "agency" if it is a delegated function by the government, and if it has the power of the state (dealing with public health and welfare) or where its methods of judgment are particularly important to the public, such as tax collection.<sup>240</sup> If the state delegates a function that affects the

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236. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 163-64 (1978) (finding that functions exclusively administered by the state or city, such as education, fire and police protection, and tax collection, are more likely to result in a finding of state action when they are delegated to a private entity); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79 (1972) (finding state action where the state regulatory scheme required a private club to adhere to its own discriminatory by-laws in order to maintain its liquor license); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding that private discrimination of restaurant owner turned into state action because the restaurant owner was a lessee in a publicly-funded parking garage that was owned by the Wilmington Parking Auth., an agency of the State of Delaware); *Marsh v. Alabama*, 326 U.S. 501 (1946) (finding a town operated by private company was by all appearances no different than any other public town, and thus the company could not deny a Jehovah's Witness her First Amendment rights; town was operating for the public's benefit and was performing a public function, therefore it was subject to state regulation). These cases show how the acts of private entities can become acts of the state when they are sufficiently under state control or acting within the purview of the state. Arguably, the same amount of state control can be found in many contracting out situations for purposes of the FOIA, and in other cases, the private entity is performing a necessary public function for the government and therefore has a close relationship with the state that should allow public access.

237. See, e.g., *Flagg Bros.*, 436 U.S. at 160-63 (1978) (settling disputes between debtors and creditors is not an exclusive state function, thus there was no state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (finding a monopoly utility company was not subject to constitutional due process requirements because utilities are not exclusively provided by the state).

238. For example, research functions and health care may not be traditionally exclusive state functions, but prison operation may be considered an exclusive function. Thus, it is possible that some "essential services" could be included in this new agency definition, while other important public services are still left out of the definition. See *Bunker & Davis*, *supra* note 3, at 21-22.

239. See *id.* at 22; *Mays*, *supra* note 17, at 69.

240. See *Bunker & Davis*, *supra* note 3, at 23; *Two Cheers for Privatization*, in



public welfare and makes the need for accountability high, it can be argued that the entity is performing a public function and should be a state actor for all purposes, including the FOIA.<sup>241</sup> This definition of “agency” is in line with the Act’s purpose of allowing access to entities that “perform governmental functions and control information of interest to the public,” such as private prison operators and health care entities.<sup>242</sup>

### B. *The Nature of Records Approach*

Additionally, if the record relates in any way to government operations or is used in any way by the government agency, it could be an agency record under the FOIA. In essence, this approach would make the substance of the record paramount, as opposed to the nature of the agency. This approach comports with Justice Brennan’s view that the issue is “the importance of the record to an understanding of [g]overnment activities.”<sup>243</sup> Even if the entity does not fall under the FOIA, the record should still be an agency record if it has to do with the official functions of government. This should be true because even if the entity is not performing a governmental function, it would still be controlling information relating to the government and information of interest to the public.<sup>244</sup>

This nature of records approach would better square with the underlying core purpose of the FOIA—the public’s interest in knowing about agency operations—than the more cramped official control definition of “agency record” that often leaves important government-related information shrouded in secrecy. Additionally, it is an approach that is even more favorable to disclosure of important public information than the public function approach because it looks at the subject of the record itself, instead of focusing on the nature of the entity’s function. As long as the record relates to a governmental function, it is public.<sup>245</sup>

In short, the narrower definitions of “agency” and “agency record”

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PRIVATIZATION AND ITS ALTERNATIVES 310 (William T. Gormley ed., 1991).

241. See Bunker & Davis, *supra* note 3, at 24; see generally Cásarez, *supra* note 3.

242. H.R. REP. NO. 93-876 at 8-9 (1974).

243. *Forsham v. Harris*, 445 U.S. 169, 189 (Brennan, J., dissenting).

244. See H.R. REP. NO. 93-876, at 8-9 (1974).

245. It should be noted that the public function approach could be equally favorable to access, however, because most private entities of interest to the public will be performing services for the public’s health and welfare. However, it is conceivable that there is a public interest in some operations that are not vital to the general public’s health and welfare, such as some research operations. Although the public cares about how its money is spent, some operations do not have a direct impact on the public at large. Treatment of prisoners could fall under this classification. Nonetheless, the nature of records approach would make these records public because they relate to a previous governmental function, without the necessity of scrutinizing the entity itself.

allow governmental agencies to use privatization of either governmental functions or record-keeping services to avoid disclosure under the FOIA. Without some flexibility through either a public function or nature of records approach, governmental privatization will result in exactly the opposite of the Act's intention—to avoid the evils of a secret government.

## VI. CONCLUSION

The FOIA was meant to ensure that the public would always be able to keep track of the events happening behind governmental agency doors. But in an age of privatization of governmental services in the name of efficiency, the Act needs to be adapted to ensure that its original purpose remains sound. Thus far, courts have not kept pace with this purpose by interpreting agency and agency record under the Act too narrowly. This may very well result in government secrecy as services are farmed out to entities not covered under the Act, and then the records are used but never technically controlled by the government.

The fact that the governmental agency does not control the information in a technical sense, or that the private entity is not acting as the functional equivalent of the government, does not make the information any less important to the public. The information relates directly to public functions, such as the FDA, HEW, and other governmental agencies. But by privatizing, cases show that the government can avoid the disclosure requirements under the FOIA.

Unless Congress steps in with more specific definitions of “agency” and “agency record” under the Act, it is up to the courts to protect the public's right to know by using a test that focuses on the public function of the entity or the nature of the information in its records, rather than their technical location or the attributes of the entity holding them. In the end, if the records pertain to the government, they are of interest to the public and should be opened for scrutiny. By using the nature of records approach, courts would best keep the “curtains of secrecy” from being pulled around public information.<sup>246</sup>

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246. Statement by President Lyndon B. Johnson Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, July 4, 1966, 2 WEEKLY COMP. PRES. DOC. 895 (July 11, 1966).