# City and County of Denver, Inc.: Public Access to "Private" Records of Quasi-Public Entities

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City and state governments are increasingly forming partnerships with various private entities to run prisons, operate sanitation facilities, manage utilities, promote development, and perform other governmental functions.[1] As the line between government and private enterprise blurs, journalists and concerned citizens face greater obstacles to gaining access to the documents that show how the public's business is being conducted. This phenomenon has spawned litigation to determine whether the growing number of quasi-public entities are subject to state open records laws.

Although these cases are largely statute- and fact-specific, there is an expanding body of case law in which courts have determined that quasi-public entities are subject to open records laws.[2] This article surveys those cases and focuses on one recent high-profile case, *Denver Post Corp. v. Stapleton Development Corp.*,[3] which is instructive to practitioners in other jurisdictions.

Although tests used by courts in different states vary in the number and detail of factors considered,[4] a review of these cases reveals several unifying themes that are discussed in this article.

**Who Created the Nonprofit?**

When a nonprofit corporation is established by a governmental entity to accomplish what is traditionally a public function, courts are likely to find that the entity is subject to open records requirements. In deciding these cases, the courts generally favor function over form and declare that a public entity cannot circumvent accountability by creating an entity and delegating to it a public function.[5] As one court stated: "When the state or a political subdivision thereof seeks to conduct its affairs through private entities, it seems clear that those entities are for all practical purposes the government itself."[6] The following activities have been held to be public functions: managing, operating, and promoting a city zoo;[7] managing and redeveloping city owned property;[8] gathering marketing information to solicit potential investors in development projects;[9] helping residents to resolve complaints with agencies of the county government;[10] and towing wrecked and abandoned vehicles from city streets.[11]

However, even if a private entity is performing a public function, if it is a preexisting private entity (not created by the government) that receives payment for providing services, a court may find that it is not subject to open records laws. For example, in *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, a private nonprofit organization contracted with the state to provide day care for low-income families.[12] The Tennessee Court of Appeals held that, although the entity performed a public function and received all of its funding from the state, it had not been "created by the legislature" and therefore was not a state agency merely because of its contractual arrangements with the state.[13]

**How Much Analysis Is Really Necessary?**

Although a majority of jurisdictions have adopted one or another multifactor test to determine whether an entity was created to perform governmental functions,[14] a Florida Court of Appeals decision held that under certain circumstances such detailed and fact-intensive analysis was unnecessary.[15] The case involved a decision by Marion County, Florida, to delegate the authority to investigate and protect abused animals to the local branch of the humane society, which was not an entity created by the government. The court held that "factor-by-factor analysis . . . is not necessary when the delegation of governmental responsibility is clear and compelling."[16] The court stated that previous judicial decisions had "noted that 'agency' [in the open records law] has been defined broadly in the statute 'to ensure that a public agency cannot avoid disclosure under the act by contractually delegating to a private entity that which otherwise would be an agency responsibility.' "[17] Citing an earlier Florida Supreme Court decision,[18] the court emphasized the common sense "distinction between providing materials or services to a public body to facilitate a public body's own performance of its public function and an agreement under which a private actor performs the public function in place of the public body." Thus, "when [an] agreement transfers the actual public function [to a private actor], public access follows."[19]

**The Questionable Importance of Governmental "Control"**

Several courts have held that "control" by a governmental entity determines whether a nongovernmental entity is subject to open records acts. This theory is derived from a case decided under the federal Freedom of Information Act, *Washington Research Project v. Department of Health, Education & Welfare*.[20] Although the court in *Washington Research Project* listed day-to-day control by the government body as only one of several factors, two Illinois decisions, known as the *Hopf* cases, focused almost exclusively on the question of governmental control as the decisive factor.[21] In the *Hopf* cases, a private university and a municipal government created two corporations to develop a research park on private property located within the city.[22] One of these corporations was solely responsible for negotiating the sale or lease of the land to the

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developers.[23] In determining whether the private corporation was subject to Illinois open records laws, the court in *Hopf II* focused on three factors: (1) whether the corporation enjoyed a legal existence separate from the city; (2) whether the corporation performed a government function; and (3) whether the city controlled the corporation and to what degree.[24] The court held that, although the mayor appointed half of the corporate board of directors, the city did not exercise a sufficient degree of control over the operations of the corporation necessary to render the corporation subject to the open records law.[25]

It makes no sense to require that the government exercise significant day-to-day control in order to bring an outside entity's records within the ambit of an open records law. The purpose of open records laws is to increase governmental accountability by permitting meaningful citizen oversight of the government's conduct.[26] If the government partners with a private organization and delegates substantial decision-making authority to the outside entity without maintaining day-to-day control, citizens will not be able to hold the government (or anyone) accountable unless they have access to the entity's records. Accordingly, the greater the delegation of authority to the private entity, the stronger is the case for providing access to the entity's records.

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**Quasi-Public Agencies and Open Records Acts**

The New York Court of Appeals seized upon this theory in *Buffalo News, Inc. v. Buffalo Enterprise Development Corp.*[27] A not-for-profit local development corporation, Buffalo Enterprise Development (BEC), was under the control of several city employees, including the mayor and a commissioner, as well as several private individuals.[28] BEC argued that it was not an "agency" of the city subject to the open records act because the government did not exercise substantial control over the corporation's daily operations.[29] As in the *Hopf* cases discussed above, BEC's argument relied primarily on federal precedents interpreting the Freedom of Information Act.[30] However, New York's highest court rejected the argument and held that the government's lack of substantial control over BEC's day-to-day operations did not preclude a finding that the corporation was subject to the open records law.[31]

**A Case Study: *Denver Post Corp. v. Stapleton Development Corp.***

Denver's Stapleton International Airport was closed in 1995 when the new Denver International Airport began operations. In order to develop the site, the City and County of Denver, along with the Denver Urban Renewal Authority (DURA), formed the Stapleton Development Corporation (SDC), a private nonprofit corporation. SDC was created in accordance with the Stapleton development plan, which had been approved by the Denver City Council.[32] In essence, the City of Denver delegated to SDC its authority to supervise the redevelopment of the former Stapleton Airport.

SDC has an eleven-member board of directors; nine are appointed by the mayor and two by DURA. All eleven members are subject to approval by the Denver City Council.[33] SDC's bylaws also provide that two ex-officio members of the board are Denver city officials: the manager of aviation and a member of the City Council.[34]

From its inception, SDC was primarily funded by city revenues; it received more than $12 million in public funds during 1997 and 1998.[35] SDC had entered into a series of contracts with the city in which SDC committed to perform property management and redevelopment services, culminating in a fifteen-year agreement starting in 1999. Each of these contracts declared that SDC was an "independent contractor" and that its employees were not city workers.[36] One of SDC's primary tasks was to find a "private development partner" to purchase and redevelop the former Stapleton International Airport property.

When four private development firms submitted bid proposals, a reporter for the *Denver Post* sought access to the proposals under the Colorado Open Records Act (CORA).[37] SDC refused to allow the reporter to inspect and copy the bid proposals, asserting that it was not an agency of the City and County of Denver and therefore not subject to CORA.[38] The *Denver Post* and the reporter sued SDC demanding access.

After the suit was filed, SDC turned over to the *Denver Post* all the information that it claimed was required to be disclosed under the open records law. SDC withheld "confidential, commercial, [and] financial data" as authorized by one of the exemptions contained in CORA. SDC further claimed that its "voluntary" disclosure of the requested information (in accordance with its bylaws[39]) rendered the case moot. However, the *Denver Post* continued with the litigation, asserting that the redactions went far beyond what was allowed under CORA and seeking a judicial declaration that SDC was subject to the law, a proposition that SDC continued to dispute.

After a two-day bench trial, Denver District Court Judge Warren Martin ruled that SDC was subject to the open records law because it was conducting government business.[40] SDC appealed the district court's ruling and obtained a stay of the court's order requiring disclosure of the bid proposals.

In November 2000, the Colorado Court of Appeals affirmed the trial court's decision. First, the court held that the trial court did not err in finding that the case was not mooted by SDC's "voluntarily" compliance with the open records law. Because there were additional issues regarding compliance with CORA and because there was no certainty that SDC would continue to comply if the case were dismissed, the case was not moot.[41]

Second, the court held that SDC was subject to CORA.[42] In determining that SDC was operating as an "agency or instrumentality" of a "political subdivision," the court looked at both Colorado case law and persuasive authority from other jurisdictions. In particular, the court adopted and applied the nine-factor test set forth by the Florida Supreme Court in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*[43] to determine when an ostensibly private entity

is subject to open records laws.[44]

The *Sun-Sentinel* court looked at nine factors to determine whether an entity is subject to open records legislation. Among those factors are whether the private entity was created by the public agency,[45] whether the private entity performs a function which the public agency otherwise would perform, and whether the services contracted for were an integral part of the public agency's chosen decision-making process.[46] The facts in the Colorado case satisfy all these tests. The Colorado Court of Appeals held that SDC was incorporated by DURA, an entity that is an arm of the City and County of Denver.[47] In addition, Denver's City Council had authorized the creation of SDC; its articles of incorporation identified SDC's stated mission as "facilitat[ing] the redevelopment of the Stapleton site."[48] DURA would have surely been charged with this function if the city had not created SDC. Moreover, the municipal charter vests exclusive authority to manage, supervise, and control the city's airport properties in the manager of aviation, an appointed position in the mayor's cabinet.[49]

The *Sun-Sentinel* test also examines the extent of the public agency's involvement with, regulation of, or control over the private entity.[50] Because Denver's mayor appointed nine of the eleven SDC directors and because all of the directors were subject to approval by the Denver City Council, the court concluded that Denver retained significant control over SDC.[51]

Another criterion is whether the activity engaged in by the quasi-public entity is conducted on public property.[52] The Colorado Court of Appeals noted that SDC was responsible for managing and disposing of nearly 3,000 acres of municipal real estate[53] and that the redevelopment effort had been "characterized as one of the largest urban infill projects in the country."[54]

Another *Sun-Sentinel* factor analyzes whether the public agency has a substantial financial interest in the private entity.[55] The appellate court concluded that Denver would receive direct benefits from the sale of the former airport property because the proceeds of all land sales must be used to reduce the city's bond indebtedness for the construction of the new Denver International Airport.[56] The final *Sun-Sentinel* factor looks at the level of public funding of the private entity.[57] The court found that in 1997 and 1998 Denver had provided SDC with more than $12 million, and had promised an additional $400,000 a year for the next three years for SDC to develop and maintain park space within the former airport property.[58]

After analyzing and applying all nine factors set forth in *Sun-Sentinel*, the court concluded that SDC was "effectively an instrumentality of Denver" and was therefore subject to CORA.[59] As the court pointedly stated:

> Given the scope of the project, its public nature, and especially that it involves the development of several thousand acres of publicly owned lands over several decades, it would be inappropriate to insulate the decision-making process from public scrutiny merely because control of the development was given to a nongovernmental entity.[60]

## Legislative Initiatives to Clarify Ambiguities

Although the outcome of litigation over whether quasi-public entities are "governmental entities" will be largely statute- and fact-specific, a growing body of case law sets forth the appropriate criteria to be applied by the courts. In addition, press associations and other interested groups are turning to their state legislatures for help. For example, Connecticut recently enacted an amendment to the state freedom of information act that expressly opens records for any agency or person performing a "governmental function." The statute specifically defines governmental function to mean:

> the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, persuasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency.[61]

This new legislation makes it clear that when a private entity or individual contracts with a state agency to perform public functions, the records of that entity or person will be subject to Connecticut's freedom of information act and thus open to the public.

Although most courts are willing to construe open records laws broadly, many such laws have ambiguous definitions for "governmental entity" or "agency" or "governmental function." Turning to state legislatures to clarify the scope of coverage is a step in the right direction and can lessen the need for litigation in the future.

## Conclusion

As state and local governments continue to delegate more governmental tasks to private entities, the media and interested citizens will seek to hold such quasi-public entities accountable under state open records laws. Although day-to-day control over the private entity by the government has been considered a dispositive factor in some cases, courts should refocus their analysis and follow the lead of cases like *Buffalo News* and *Putnam County Humane Society*. Purported private entities should be subject to state open records laws even when there is little or no governmental control, so that the private entities can be held accountable directly through citizen scrutiny and oversight. Furthermore, while the various formulations of multifactor tests are workable in many situations, where the delegation or transfer of governmental authority or public functions is wholesale and transparent, public access to records should automatically accompany that delegation or transfer. The purpose of open records laws is to render governmental actors accountable to the people. The realization of that objective requires that courts and legislatures do not elevate form over function. "We the People" should have access to the documents showing how the public's business is being carried out, regardless of the name of the entity that is performing those public functions.

## Endnotes

1. *See, e.g.*, Diane Kittower, *Guide to Privatization: The Practice of Partnering*, GOVERNING, May 2000, at 79; *Privatizing Government*, FUTURIST, Mar. 1989, at 55; *Privatizing Landfills: Market Solutions for Solid-Waste Disposal*, SPECTRUM, June 22, 2000, at 15; Penelope Lemov, *Jailhouse, Inc.*, GOVERNING, May 1993; Julie Anderson, *Still Up in the Air: Private Management of Airports*, SPECTRUM, June 22, 1999, at 5.

2. Two helpful compendiums of such cases are: A. Nadel, Annotation, *What Con-*

*stitutes an Agency Subject to Application of State Freedom of Information Act*, 27 A.L.R.4th 742 (1984); 37A AM. JUR. 2D 1, 46, 48, *Freedom of Information Laws* §§ 20, 23 (1994). *See also* the fifty-state survey of open records and open meetings laws by the Reporters Committee for Freedom of the Press, *Tapping Official Secrets*, § I.B.4., *available at* http://www.rcfp.org/tapping.

3. 19 P.3d 36 (Colo. Ct. App. 2000).

4. *See, e.g.*, Marks v. McKenzie High Sch. Fact-Finding Team, 878 P.2d 417, 424–25 (Or. 1994) (applying a six-factor test); News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992) (applying nine-factor test); *Denver Post Corp.*, 19 P.3d at 36 (adopting and applying nine-factor test of *News & Sun-Sentinel Corp.*).

5. City of Fayetteville v. Edmark, 801 S.W.2d 275, 279 (Ark. 1990); *see also* State *ex rel.* Toledo Blade Co. v. Econ. Opportunity Planning Ass'n of Greater Toledo, 582 N.E.2d 59, 65 (Ohio Common Pleas 1990) ("A governmental decision-making body cannot assign its decisions to a nominally private body in order to shield those decisions from public scrutiny"); State *ex rel.* Mazzaro v. Ferguson, 550 N.E.2d 464, 467 (Ohio 1990) ("when a private entity carries out the duties or responsibilities of a public office and the public office has a right of access to records documenting this, . . . the public office must make them available for public inspection"); Forum Publ'g Co. v. City of Fargo, 391 N.W.2d 169, 172 (N.D. 1986) ("We do not believe the open-records law can be circumvented by the delegation of a public duty to a third party."). *See also* State *ex rel.* Strothers v. Wertheim, 684 N.E.2d 1239 (Ohio 1997) (finding that a private, nonprofit corporation established to assist residents in resolving complaints with agencies of county government exercised a governmental function, and as a result, was subject to the open records statute); N.W. Georgia Health Sys., Inc. v. Times-Journal, Inc., 461 S.E.2d 297, 300 (Ga. Ct. App. 1995) (holding that certain private, non-profit hospital corporations were public agencies subject to the state open records act because they were the "vehicle" through which certain political subdivisions in Georgia "carried out their official responsibilities"); Macon Tel. Publ'g Co. v. Bd. of Regents, 350 S.E.2d 23, 24–25 (Ga. 1986) (holding that the University of Georgia Athletic Ass'n is subject to the state's open records law because the University had chosen to use this private entity as "the management tool which [the university president] uses to carry out his responsibility to control the University's intercollegiate athletic program"); A.S. Abell Publ'g Co. v. Mezzanote, 464 A.2d 1068, 1074 (Md. 1983) (holding that a private, nonprofit unincorporated association which acted as a guarantor of state-chartered insurance companies performed a government function, and as a result, was subject to the state's open records law).

6. *Edmark*, 801 S.W.2d at 279 (quotation omitted).

7. Andy's Ice Cream, Inc. v. City of Salisbury, 724 A.2d 717, 724 (Md. Ct. Spec. App. 1999).

8. Creative Restaurants, Inc. v. City of Memphis, 795 S.W.2d 672, 678 (Tenn. Ct. App. 1990).

9. Shaw v. Bradbury, 360 A.2d 123, 125 (N.H. 1976).

10. State *ex rel.* Strothers v. Wertheim, 684 N.E.2d 1239, 1241 (Ohio 1997).

11. Fox v. News-Press Publ'g Co., 545 So. 2d 941 (Fla. Dist. Ct. App. 1989).

12. 29 Media L. Rep. 1545 (Tenn. Ct. App. 2001).

13. *Id.*

14. *See supra* note 4.

15. Putnam County Humane Soc'y, Inc. v. Woodward, 740 So. 2d 1238, 1239 (Fla. Dist. Ct. App. 1999).

16. *Putnam County Humane Soc'y*, 740 So. 2d at 1239.

17. *Id.*

18. Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 381 (Fla. 1999).

19. *Id.*

20. 504 F.2d 238 (D.C. Cir. 1974).

21. Hopf v. Topcorp, Inc. (*Hopf I*), 527 N.E.2d 1 (Ill. Ct. App. 1988) (affirming denial of preliminary injunction); Hopf v. Topcorp, Inc. (*Hopf II*), 628 N.E.2d 311 (Ill. Ct. App. 1993) (affirming summary judgment).

22. *Hopf II*, 628 N.E.2d at 313.

23. *Id.*

24. *Id.* at 314–15.

25. *Id.* at 317.

26. *See* Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp., 619 N.Y.S.2d 695, 697 (N.Y. 1994) ("FOIL was enacted to provide the People with the means to access governmental records, to assure accountability, and to thwart secrecy."); *see also* Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) (Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and *official records and documents open to the public are the basic data of government.* (emphasis added)).

27. *Id.*

28. *Id.* at 696.

29. *Id.*

30. *Id.* at 697.

31. *Id.*

32. Denver Post Corp. v. Stapleton Dev. Corp., 19 P.3d 36, 38 (Colo. Ct. App. 2000).

33. *Id.*

34. *Id.*

35. *Id.* at 41.

36. *Id.* at 38.

37. COLO. REV. STAT. § 24–72–201, et. seq.

38. Colorado's Open Records Law applies to any "agency" of the state or of any political subdivision of the state. *See* COLO. REV. STAT. § 24–72–202(6)(a)(I) (2000); *see also* Zubeck v. El Paso County Retirement Plan, 961 P.2d 1150 (Colo. Ct. App. 1998).

39. The SDC's bylaws require it to operate in a manner "generally consistent with the Colorado Open Records Act." Denver Post Corp. v. Stapleton Dev. Corp., 19 P.3d 36, 37 (Colo. Ct. App. 2000)

40. *Id.* The trial court ordered that, "except for certain information supplied by the 'development partner,' the redacted information should be released upon the earlier of the following dates: (1) when the 'option agreement' between SDC and the 'development partner' was final and enforceable; or (2) November 30, 1999." *Id.* at 37.

41. *Id.* at 38.

42. *Id.*

43. 596 So. 2d 1029 (Fla. 1992).

44. The nine factors are: (1) the level of public funding; (2) whether there had been a commingling of funds; (3) whether the activity was conducted on publicly owned property; (4) whether services contracted for were an integral part of the public agency's chose decision-making process; (5) whether the private entity was performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for whose benefit the private entity was functioning. *Id.*

45. *Id.*

46. *News and Sun-Sentinel Co.*, 596 So. 2d at 1031.

47. *Denver Post Corp.*, 19 P.3d at 40.

48. *Id.*

49. *Id.* at 37.

50. *Id.* at 40.

51. *Id.*

52. *News and Sun-Sentinel Co.*, 596 So. 2d at 1031.

53. *Denver Post Corp.*, 19 P.3d at 41.

54. *Id.* The court also noted that Denver's Stapleton Development Plan "envisioned a mixed-use community capable of supporting more than 30,000 jobs and 25,000 residents." *Id.*

55. *News and Sun-Sentinel Co.*, 596 So. 2d at 1031.

56. *Denver Post Corp.*, 19 P.3d at 40.

57. *News and Sun-Sentinel Co.*, 596 So. 2d at 1031.

58. *Denver Post Corp.*, 19 P.3d at 41.

59. *Id.*

60. *Id.*

61. H.B. 6636, 2001 Reg. Sess. (Conn. 2001) (enacted July 6, 2001).