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Venue Law is a monthly column that addresses issues of interest and compelling concern for venue owners and operators. We identify an issue, examine the circumstances and suggest the actions you might consider for your venue. We welcome your suggestions.

Open Records Made Easy

By

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As more governmental bodies and private entities look to negotiate extremely complicated transactions, you can be certain the public's desire to know the facts will be an ongoing issue. Heavily negotiated public-private deals will be under more scrutiny than ever before given the current fiscal state of most local and state governments. It is important to remember that most open records statutes are a direct result of scandals involving public-private partnerships which provided the motivation for opening up government to the people. For teams and venue operators looking to partner with local governments to develop stadiums, multipurpose arenas, convention centers and other such venues, understanding open records issues is crucial to a successful on-going relationships between the private and public sector.

There is a fundamental tension that arises when the government contracts with private entities to deliver governmental services such as trash collection, prison operation and the maintenance and operation of sports and entertainment venues. While some applaud the efficiency of privatization, others worry about the potential public sacrifices. Among these worries is the fear that these public-private partnerships will undermine the public's right to know as most state statutes providing for freedom of access to government documents do not explicitly grant access to documents that are in the hands of private entities. Without legislative or judicial intervention interpreting these statutes broadly, most state governments could effectively transfer their documents into the hands of private partners and avoid the reach of freedom of information requests.

Nearly every state has its own version of the Federal Freedom of Information Act, referenced variously as Open Records, Open Meetings, Open Government, etc. These laws basically give every citizen the right to request information and have access to government records without having to explain to the government the reason behind the request. Public information includes any information that is collected, assembled, or maintained by or for a governmental entity. The statutes usually apply to records regardless of their format; including information that is maintained in paper, tape, microfilm, video, electronic data held in a computer's memory, as well as other mediums specified under the respective state statute. All government information is presumed to be available to the public and, while certain exceptions may apply, all governmental bodies are obligated to promptly release requested information that is not confidential by law or for which a legal exception has been shown. Certain non-governmental agencies' records can be covered under the statutes if these agencies are supported by public funds or if they are responsible for the expenditures of public funds. Other entities

subject to the law are governmental bodies holding records for another and private entities holding records for governmental bodies.

Most states have drafted their legislation to address the issue of government records being held by private entities and have had help from the judicial branch which has typically interpreted the definitions of such terms as “agency” and “agent” broadly to encompass more than just records exclusively in the hands of traditional government entities. In some states certain specially created entities are specifically made subject to open records laws.

The stakes are high for governmental officials that handle open record requests as there are strict time lines for making determinations on what records to release, and officials must make such decisions knowing that there are potential criminal penalties at state if the government releases information that is considered confidential under state law. Similarly, officials may face criminal [and civil] penalties if they refuse to release information that is considered open to the public.

For example, in 2001, Armen Yousofian was awarded just over \$100,000 in a public records victory against King County, Washington. The judge awarded the amount to Yousofian for King County’s failure to release documents related to the development of a new NFL stadium for the Seattle Seahawks. It was the largest open records act penalty in Washington state history. Why such a large fine? The court determined that it took King County more than four years to provide Yousofian with all the documents he requested in his effort to learn more about the King County negotiations with the team, its plan to implode the Seattle Kingdom and its campaign to build a new football stadium.

Under federal and state law, all information held by governmental bodies is open to public disclosure unless it falls within one of the specific exceptions to disclosure. There are few exceptions to these statutes, but there are some available that are useful in the transactions contemplated in this article. For instance, in some states, the following exceptions could be presented in order to prevent disclosure of documents produced during contract negotiations:

- Confidential information
- Information related to competition or bidding
- Information related to location or price of property
- Certain legislative documents
- Certain legal matters
- Certain private communications of an elected office holder
- Trade secrets; certain commercial or financial information
- Agency memoranda
- Certain information relating to regulation of financial institutions or securities
- Audit working papers
- Certain information submitted by potential vendors or contractors
- Economic development information
- Information involving privacy or property interest of a third party

Most states place on the custodian of records the burden of demonstrating that records are excepted from public disclosure; however, in cases such as a transaction between a governmental body and a private third party, where the third party's private commercial interest is involved, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interest.

As in the Yousofian case in Washington, many open records request involve public financing of stadiums and arenas that will host professional sports franchises. The significant difference is that a majority of these request come from the media and not private citizens. As the need to build new facilities and to renovate existing facilities continues, the debate over who should pay for the buildings intensifies. Once a governmental entity decides to pursue such a project, the battle with media begins. In a perfect world, negotiation of a multi-million dollar transaction is extremely difficult and doing so on the front page of the local newspaper is almost impossible. Fortunately, most open records statutes provide the means for the orderly process of requests for information and allow the parties a legitimate opportunity to successfully negotiate these complicated transactions in a productive manner.

If a government agency plans to withhold certain information, it usually must request an attorney general's ruling.

Once you have a clear understanding of the process, government agencies and private entities can establish a set of rules to limit their exposure to open records requests. Some things to consider include:

- Limiting personal notes kept by government officials
- Limiting the number and circulation of draft documents, memorandum and other written materials to government officials
- Taking full advantage of the attorney-client privilege
- Limiting the number of public attendees at closed door private negotiating sessions
- Limiting the public entities' participation in facility revenue streams
- Once public, providing regular but appropriate status updates of the negotiation

An appreciation of these issues and careful planning by both public and private parties will allow for successful negotiations and the continued confidence of the taxpayers that their government will protect both their economic and civic interests.

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Venue Law is a monthly column written by Winstead Sechrest & Minick P.C. attorneys experienced in the full range of issues related to venue ownership, management and operation. This column provides a perspective on current issues and the law but does not constitute specific legal advice or counsel. For more information on the monthly topics discussed in *Venue Law*, the authors or firm, please visit www.winstead.com/sportsvenuepractice.