



BRIEFLY

Competition does not provide a justification for exempting public enterprises from the provision of the Public Disclosure Act.

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It's Our Business

Under state law, government agencies have broad obligations to disclose public records to the citizens. Government-run businesses that compete with private firms claim that the obligation is unfair as it applies to them, since their private competitors do not have a similar obligation. Openness of records is one of the fundamental tools used to make sure government remains accountable to the people. It should apply to all government activities.

The Public Disclosure Act

The right of Washington citizens to access the records of their state and local governments is guaranteed by the Public Disclosure Act. The Act was part of Initiative 276, approved by voters in 1972. Besides provisions concerning public records, the Act mandates the disclosure of campaign contributions and expenditures, lobbyist spending and public officials' financial affairs.

Information is power. To guarantee that government remains transparent and accountable to the state's citizens, the Public Disclosure Act gives the public broad rights of access to public records.¹

“The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.”²

The Act defines a public record to be “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” “Writing” is broadly construed, to include not just ink on paper but every form of recorded communication including e-mails, computer files, photographs, audio recordings, movies and videos.

The Act does provide a number of exemptions to the government's obligation to disclose information. All records not explicitly exempted are to be disclosed, however. And even in cases where there are exemptions, government is required to disclose the records if the portions that would violate personal privacy or harm vital governmental interests can be deleted.

Public agencies don't always live up to their obligations to disclose records, however. A recent investigative series produced by a consortium of Washington newspapers found legitimate requests for public records were commonly rejected. (See the box Washington: Your Right to Know on page 3.)

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Public Enterprises and Public Disclosure

As is clear in the definition of public record quoted above, the Public Disclosure Act applies equally to records of traditional governmental activities and to the records of government-run businesses.

In recent years deregulation of the electricity and telecommunications markets have created situations where public enterprises compete against private firms. An area of growing controversy is the application of the Public Disclosure Act in these settings. Claiming that their public competitors are pricing predatorily – that is selling at prices below the costs of production – the private firms have tried to use the Public Disclosure Act to obtain information to make their case. The public enterprises have resisted and argued that it is unfair that they be forced to reveal strategic information to competitors.

The public enterprises have a number of countervailing advantages, however, including the ability to issue tax-free bonds.³ Transparency and accountability are paramount public interests. Public disclosure of records does not place an undue burden on the enterprises.

When should the public produce?

Arguably, public enterprises should not be competing with private firms in the first place.

The last several decades have brought a sea change in the view of the economics profession on the questions of whether and when government-owned enterprises should be used to provide goods and services in place of private firms. In the period following the Great Depression and the Second World War, many prominent economists accepted government ownership as being a desirable antidote to market failures such as monopoly power.⁴

Today, in contrast, there is a strong presumption against public ownership. Two recognitions underlie this change. First, private ownership provides a much greater incentive for innovation than does public ownership. The innovativeness of private enterprise is driven by competition. And as Joseph Schumpeter recognized, even those private firms that appear to be monopolies face competition from “the new commodity, the new technology, the new source of supply, [and] the new organization.”⁵ Second, government agencies are subject to a number “governmental failures” that compromise their efficiency. Among these are the absence of the bankruptcy threat, the relative inability of public managers to dismiss employees for poor performance, the incentives that the managers themselves face to maximize the size of their agency, and excessive aversion to risk.

Economist Andrei Shleifer concludes, “Private ownership should generally be preferred to public ownership when the incentives to innovate and to contain costs must be strong. . . . Many of the concerns that private firms fail to address “social goals” can be addressed through government contracting and regulation, without resort to government ownership.”⁶

Nobel laureate Joseph Stiglitz, who served as chairman of President Clinton’s Council of Economic Advisors, coauthored a recent paper that examines the proper role of government in the information age economy.⁷

The paper concludes that the “government should only provide private goods, even if private sector firms are not providing them, under limited



Washington: Your Right to Know

During the summer of 2001 the Associated Press and a consortium of 25 Washington newspapers conducted an "audit" of local governments responses to requests for public records. Reporters posing as ordinary citizens made requests for public records for five sorts of public records from local governments: property assessments, restaurant inspection reports, sex offender lists, school district superintendent contracts, and crime incident reports. Local governments in all of the state's 39 counties were included in the survey.

All 39 of the requests for assessed values of property were honored. Health department denied three of 36 requests for a copy of a restaurant inspection report, and only partially complied in another three cases. Auditors who asked county sheriff departments for lists of sex offenders living near to their homes were denied the information in seven of thirty-eight cases. In another ten cases compliance was only partial. For example in one county the auditor was shown the list but denied the opportunity to make a copy or to take written notes. Reporters asked 66 school districts for copies of the superintendent's contract. In eight cases the request was denied and in another 14 cases only partial compliance occurred.

Reporters also asked for incident reports on 74 property crimes. In 41 of the cases, the request was denied. Crime records occupy a gray area: the public disclosure act allows agencies to withhold "specific investigative records" when it "is essential to effective law enforcement or the protection of any persons right to privacy." Many departments interpret this to allow a blanket policy against the release of incidence reports.

Source: www.openwashington.org

circumstances."⁸ In particular, "the government should exercise substantial caution in entering markets in which private-sector firms are active,"⁹ since the existence of private suppliers is a strong indication that market failures are not severe.

Trade Secrets

Often public enterprises argue against disclosure on the grounds that it would disadvantage them as they compete in the marketplace.

The law does provide some protection for proprietary secrets. The Public Disclosure Act exempts from disclosure certain public enterprise secrets under the research exemption: "Valuable formulae, designs, drawings, computer source code or object code, and research data . . . are exempt from public inspection and copying . . . when disclosure would produce private gain and public loss."¹⁰

In addition, the Uniform Trade Secrets Act has been adopted by

Washington state.¹¹ A trade secret is information that "derives independent economic value . . . from not being known to . . . other persons who can obtain economic value from its disclosure."¹² examples include information such as customer lists, business plans or manufacturing processes. Courts have ruled that the Trade Secrets Act creates an exemption to the general obligation to disclose public records.

The case for exemption is strongest when the secret contained in the public record belongs to a private firm and was provided to the public agency subject to a promise that it would remain secret. It is not clear whether the Trade Secrets Act creates an exemption for a public enterprise's own trade secrets beyond the Public Disclosure Act's research exemption.

When public enterprises do compete with private suppliers exemptions to the public disclosure requirement should be narrow.

Trade secrets are a type of intellectual property. (Other examples of intellectual property include patents and copyrights.) From an economic perspective, efficient use of intellectual property is torn between two contradictory considerations: On the one hand, because the use is nonrival, efficiency is promoted if the property is as widely used as possible. On the other hand, an incentive for self interested private parties to invest to create the property will be promoted if the creator is given exclusive use.

Stiglitz and his coauthors stress that there is less need to protect the intellectual property rights of public entities since they "are not governed by the



same profit incentives that apply in the private sector.”¹³ The analysis concludes, “a governmental entity should generally not be allowed to withhold information from the public solely because it believes such withholding increases its net revenue.”¹⁴ If the public enterprise is motivated by the desire to act in the public interest, the profit incentive is unimportant. And, as a result, the public interest in the broad dissemination of information becomes the paramount consideration.

Within the last year, public disclosure has been an issue in Tacoma with regard to the municipal cable TV system, in Bellingham with regard to the Public Utility District, and in California with regard to state purchases of electricity.

Click!

Several years ago, Tacoma Power, the city of Tacoma’s municipal electrical utility, went into the cable television business in competition against the existing local franchisee, TCI Cablevision, which was subsequently purchased by AT&T. The municipal system is called Click! Some city leaders credit the system with accelerating the availability of high bandwidth Internet services within the city and increasing the number of TV channels available to cable TV subscribers.

From a financial perspective, Click! has been less successful. It has yet to meet projections as to the number of households that would subscribe to its services. AT&T has argued that Click!’s revenues are not sufficient to cover its costs and that the losses are subsidized by Tacoma Power’s electricity customers. Determining Click!’s profitability is complicated by the fact that many of its assets are jointly used by the electricity system.^{15, 16}

The Public Disclosure Act was one tool that AT&T used in pressuring the utility to accurately report its financial results. Not surprisingly, Click!’s leadership argues that the public disclosure requirements are unfair as they apply to a public entity that competes with private firms. Certainly the obligation to disclose information has been inconvenient for them. But arguably the controversy over Click!’s profitability confirms the wisdom of the authors of the Public Disclosure Act.

Puget Sound Energy, Inc. v Public Utility District No. 1 of Whatcom County

A recent case before the superior court in Whatcom County concerned disclosure requests that Puget Sound Energy (PSE) made to the local Public Utility District (PUD).¹⁷

PSE provides electrical service to customers in the city of Bellingham and to most of the rest of Whatcom County. The PUD petitioned the city for authorization to provide competitive service within the city, particularly to two large customers, Georgia Pacific and Bellingham Cold Storage. In support of this petition, the PUD prepared a brochure explaining the benefits to customers in Bellingham were permission granted.

PSE requested that the PUD disclose a number of documents relating to the claims made in the brochure. The PUD refused to provide 121 of the documents, claiming that it was not required to disclose these records either because they fell under the research data exemption of the Public Disclosure Act or because they were protected by the Trade Secrets Act. The PUD argued that its contracts



with Georgia Pacific and Bellingham Cold Storage specifically prohibited the disclosure of contract details.

The court found substantially in PSE's favor. The company received complete copies of 106 of the documents and edited copies of the remaining 15.

California

The recent California electricity crisis provides another example of government managers' use of secrecy to avoid public oversight.

The California electricity debacle had its roots in the state's decision to deregulate the wholesale market for electricity while leaving the retail market regulated. When prices in the wholesale spot market peaked, the state's private retail electricity distributors were badly squeezed.

Rather than allowing the retail distributors to raise their prices, California Gov. Gray Davis chose to put the state into the power supply business. He ordered the state Department of Water Resources to enter into contracts with power generators to supply electricity for the state's utilities. Gov. Davis chose to keep the details of these contracts private, claiming that their release would compromise the state's ability to negotiate future deals. In the spring of 2001, several newspapers sued for access to the contracts under the state's Public Disclosure Act. On the eve of a court hearing on the suit, the state provided the newspapers with some contract details. The total value of the contracts was placed at \$43 billion. Still, one paper reported, on the basis of this information it is "difficult to gauge the true extent of the state's financial commitment." The state claimed that complete disclosure would violate the rights of the suppliers with which it had contracted.¹⁸

Later, in the summer of 2001, the Department of Water Resources asked the state Public Utility Commission (PUC) to adopt a bond financing agreement and guarantee that the costs of state's contracts would be paid by California electricity consumers. Ratepayer advocates argued that the PUC should require the state to provide the public with a full accounting of its power buying costs. The state claimed it had no obligation to do so.

When the issue finally came to a vote in early October, the PUC turned the agreement down, by a 4 to 1 vote. PUC president Loretta Lynch, a Davis appointee, said that the contracts had transformed the energy crisis into a "price crisis" that threatened the state economy.^{19, 20}

By October, the prices that the state was paying under the contracts were well in excess of spot market prices. Officials at the Department of Water Resources were warning the head of the new state Public Power Authority that signing further contracts could lead to a supply glut and "unnecessary costs for Californians." A Davis spokesman said that the governor hoped to be able to renegotiate some of the contracts to obtain more favorable terms for the state.²¹

In November, the Federal Energy Regulatory Commission ordered an end to a practice under which the operator of the California electrical grid had been giving power traders for the Department of Water Resources advance information on hourly electricity demands and bid prices. Private firms were not provided with this information. As a result, the Department of Water Resources was able to be first in line to supply the system's needs, putting the private generators at a competitive disadvantage.²²

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Discussion

In the wake of the September 11 terrorist attacks, Gov. Locke and Attorney General Gregoire have proposed that the state's public disclosure rules be modified to limit access to "information vital to public safety."²³ Any new exemption should be crafted very narrowly, so not to compromise the public's access to the every day workings of their government.²⁴

Citizens have a fundamental right to know what their government is up to. This right is protected by the Public Disclosure Act.

Public enterprises that compete in private markets find compliance with the Act particularly inconvenient and argue that many of their records should be exempt from disclosure. Competition does not provide a justification for exempting public enterprises from the provisions of the Act.

Endnotes

- ¹ The part of the Public Disclosure Act that deals with public records is sometimes identified as the Public Records Act.
- ² RCW 42.17.251.
- ³ Washington Research Council, *Taxing Power: Electric Utility Taxes in a Competitive Environment*, Special Report, February 11, 1997.
- ⁴ Andrei Shleifer, "State versus Private Ownership," *The Journal of Economic Perspectives*, v. 12 n. 4, Fall 1998, pp. 133-150.
- ⁵ Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, New York: Harper Torchbooks 1975, p. 84.
- ⁶ Shleifer, pp. 147-148.
- ⁷ Joseph E. Stiglitz, Peter R. Orszag, and Jonathan M. Orszag, *The Role of Government in a Digital Age*, Sebago Associates, October 2000. This paper was commissioned by the Computer & Communications Industry Association.
- ⁸ Stiglitz et al, p. 62
- ⁹ Stiglitz et al, p, 71.
- ¹⁰ RCW 42.17.310.
- ¹¹ RCW 19.108.
- ¹² RCW 19.108.10.
- ¹³ Stiglitz et al, p. 69.
- ¹⁴ Stiglitz et al, p. 70.
- ¹⁵ Marcelene Edwards and Bill Kellman, "Click! faces uncertain future," *The News Tribune*, June 4, 2001.
- ¹⁶ Martha Modeen, "Click! Feels the pressure of being a public entity," *The News Tribune*, June 4, 2001.
- ¹⁷ Puget Sound Energy, Inc., v. Public Utility District No. 1; Cause No. 00-2-02190-5.
- ¹⁸ Robert Lopez and Rich Connell, "Power deals exceed prices on spot market," *Los Angeles Times*, June 13, 2001.
- ¹⁹ Burnadette Tansey and Robert Salladay, "PUC czar warns of 'price crisis' in power pacts," *San Francisco Chronicle*, October 2, 2001.
- ²⁰ Burnadette Tansey and Robert Salladay, "PUC won't OK state's long-term contracts," *San Francisco Chronicle*, October 3, 2001.



- ²¹ Lynda Gledhill and Matthew Stannard, "State may have overbought power," San Francisco Chronicle, October 19, 2001.
- ²² Lynda Gledhill, "Grid operators told to stop tipping off state about power needs," San Francisco Chronicle, November 21, 2001.
- ²³ "Washington state anti-terrorism and security initiative," http://www.wa.gov/ago/pubs/Anti-terrorism_and_Security_Summary112101.htm.
- ²⁴ "Draft allowed chilling level of secrecy," *Seattle Post-Intelligencer*, December 12, 2001.

