The Goals of Democracy and Those of Economic Development: Bridging the Two While Valuing Public Participation

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State, city, and county governments have long pursued the expansion of local economies through the promotion of private sector activity. Government economic development departments, committees, and commissions spur growth through activities such as marketing campaigns, local infrastructure improvement investments, and the establishment of tax increment finance districts. Notably, lucrative economic development subsidies, or the corporate preferred term “incentives,” are increasingly a common tool governments utilize to attract companies to relocate within their borders.

Sunshine laws enable the citizenry to engage in the democratic process (including the process by which economic development decisions are made) through accessing government information and monitoring government meetings to ensure that government activity is conducted in the public interest. In crafting sunshine laws, legislatures balance democratic values of transparency and accountability against protecting corporate profit margins, such as through trade secrets exemptions.1

As state and local governmental entities navigate how to increase depleted revenues and create jobs, more are turning to economic development corporations (EDCs) to assist in developing economic strategies, luring businesses, and promoting job growth. For example, World Business Chicago (WBC) is a publicly funded, not-for-profit group of business leaders chosen by the City of Chicago’s Mayor.2 As an EDC, it makes economic development decisions including whether to recommend the city give taxpayer subsidies to corporations.3 Recent news reports cite that Mayor Rahm Emanuel pledged to expand the role of WBC in city affairs.4 DuPage County has its own EDC that was created by the DuPage County Board in 2007. Originally named “DuPageBiz,” it was a not-for-profit EDC charged with advancing the economy of the County through job creation, among other methods.5 DuPage Biz became “Choose DuPage” in 2008 and continues “to maintain and improve the county’s economic vitality and quality of life.”6 A major project recently highlighted in the news and by Choose DuPage was the relocation of the Navistar Corporate headquarters to Lisle.7

1 The Illinois Freedom of Information Act exempts records evidencing trade secrets and other proprietary information yielded in the economic development negotiations between government and private enterprise. 5 ILL. COMP. STAT. § 140/71(I)(g) & (l) (Lexis 2011).

2 Jeff Cohen & David Heinzmann, “Mayor, business group, shut out of meeting,” CHICAGO TRIBUNE, Nov. 4, 2011.

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5 DUPAGE COUNTY BOARD, Res. ED-0003-07

6 www.choosedupage.com

The City of Chicago and DuPage County are by no means unique in relying on non-public entities to promote economic development to benefit the public good. A corollary element equally important to the public good, but not often discussed, is the need to safeguard the role of the public in economic decision making through expanding Illinois' transparency laws. In Illinois, most of these entities do not fall under the umbrella of state transparency laws. In Chicago, for example, despite Mayor Emanuel's emphasis on increased transparency, the WBC meets behind closed doors when making economic development decisions, including whether to recommend the city give taxpayer subsidies to corporations.

In DuPage County, a concerned citizen sought information about the proposed Navistar project through a Freedom of Information Act request to DuPage County, which included an inquiry with respect to Choose DuPage. Within the records DuPage County provided in response, Choose DuPage voluntarily produced a substantial amount of documents, including a statement that its cooperation should not be construed as consenting to a FOIA request, including the one at hand.

Often times when a government entity intends to take action on an issue where an EDC is involved, the first details received by the public are through a news release, a specific governmental body agenda, or public notice related to a public hearing. The Illinois citizenry is already plagued with poor civic health due to a variety of reasons but when there is civic interest and motivation to participate in the economic development process, systemic barriers present themselves that relate to the lack of information flowing to the public and little time to adequately assess and act on information. By the time the public is provided with information, government, EDCs, and corporations already have made significant investments. Notice to the public, which is supposed to expand public involvement, becomes nothing more than a pro forma activity.

When the public attempts to obtain information to evaluate development decisions that involve EDCs, the stark reality hits that meetings are closed, and information disclosure about an EDC's activity is based on the EDC's discretion or through individual Freedom of Information Act requests to the various public bodies with which the EDC liaisons. A civically combustible environment emerges when there is a lack of balance with respect to the free flow of information to the public on clear issues of public concern in favor of economic development and the role of private corporations. When citizens attempt to fully avail themselves of what limited political process may remain to independently determine if the public good is indeed served, the perceptions are polarized as ei-

8 Jeff Cohen & David Heinzmann, “Mayor, business group, shut out of meeting,” CHICAGO TRIBUNE, Nov. 4, 2011.
9 DuPage County response to January 8, 2010 FOIA request.
10 MCCORMICK FOUNDATION & CITIZEN ADVOCACY CENTER, ILLINOIS CIVIC HEALTH INDEX 2010 (National Conference On Citizenship 2010). Less than 10% of those surveyed attended a meeting where a public issue was discussed. Id. at 1.

11 The citizenry's interest in influencing economic development decisions in their communities is not misplaced. Although governments purportedly pursue economic development as a means to increase the quality of their residents' lives ostensibly through job creation, a recent study has shown that programs in the name of economic development require little if any job creation. GOOD JOBS FIRST, MONEY FOR SOMETHING: JOB CREATION AND JOB QUALITY STANDARDS IN STATE ECONOMIC DEVELOPMENT SUBSIDY PROGRAMS (2011). The report rated 238 subsidy programs, including five in the state of Illinois. It gave Illinois a "D" ranking among 37 states and the District of Columbia, with a score of 29, well below the national average of 40 on a 100-point scale. Id. It criticized Illinois for failing to require companies to offer workers health benefits and adequate wages, measures that indicate quality of life. Id., but that are sacrificed in the pursuit of increased numbers of low-paying jobs. To further complicate matters, strong performance requirements need to be coupled with aggressive enforcement, on which Good Jobs First will issue a forthcoming report. Id. at 4.
ther democracy in action or an inhibition of economic development.12

The purpose of this article is to review how private EDCs are treated under Illinois sunshine laws and broadly examine how other states have addressed EDCs and private corporations relative to transparency. As it is the opinion of the authors that the goals of democracy are broader than the goals of economic development, reform recommendations have also been included to restore the balance between transparency and accountability related to economic development against the reliance on EDC to stimulate economic growth.

**Illinois Law.** Illinois law addresses the question of whether a non-governmental entity is subject to the state’s sunshine laws given its government-related activity through the framework of whether the entity meets the definitions of “public body” in the Freedom of Information Act (FOIA)13 and the Open Meetings Act (OMA).14 Both statutes contain a substantially identical definition of “public body,” which includes all legislative, executive, administrative, advisory, or subsidiary bodies of the foregoing. Economic development corporations, whether nonprofit or for-profit, are not legislative, executive, administrative, or advisory bodies of state or local government. The inquiry, therefore, becomes whether such entities fall under “subsidiary bodies” for purposes of FOIA and OMA. Illinois sunshine statutes are absent a definition; and without plain meaning, Illinois courts have ruled to narrowly define the term, making it tremendously difficult to include private corporations created and even funded by a public body under the purview of Illinois’ transparency laws. Two appellate cases, Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence15 and Hopf v. Topcorp, Inc.,16 are controlling.

In Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence (NICADD), a newspaper publisher attempted to apply the OMA to a not-for-profit organization, the Northern Illinois Council on Alcoholism and Drug Dependence (NICADD), which administered drug and alcohol treatment programs.17 The newspaper contended that the OMA should apply to NICADD because NICADD was a “subsidiary body” due to the facts that: (1) 90% of its funding comes from government grants and contracts; (2) its activities and programs are regulated and monitored by federal, state, and local governments; and (3) it operates programs that are the statutory responsibility of the Illinois Dangerous Drug Commission.18 NICADD argued that it should not fall under the statute’s scope because of NICADD’s formal status as a private, not-for-profit corporation.19 Also, NICADD argued that its personnel had no direct relationship with the government because its board members were selected according to its own bylaws and not appointed nor elected by government officials, among other things.20

The court started its analysis with the OMA, which allows the public to access meetings of “public bodies.”21 The OMA provides the definition of “public body,” in pertinent part: “ ‘Public body’ includes all legislative, execu-

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13 5 ILL. COMP. STAT. 120/1.02 (Lexis 2011).
14 5 ILL. COMP. STAT. 140/2 (Lexis 2011).
18 Id. at 95; 1193.
19 Id. at 95-96; 1193.
20 Id. at 96; 1193.
21 Id.
tive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue . . . 22

Noting that the statute failed to define "subsidiary" and

that "dictionary definitions of the word [subsidiary] fail to provide any significant guidance," 23 the court ultimately sided with NICADD, finding that the organization's formal status and its freedom from direct governmental control were both "extremely significant factors." 24 The general supervision exerted by the government over organizations such as NICADD, as opposed to day to day control, did not meet the direct relationship that "subsidiary body" demands. 25 Additionally, branding NICADD's work performed as a "traditional government function" was not enough to bring it under the definition. 26 To deem otherwise, according to the court, would effectuate an intent that the legislature could not have intended, because it would bring within its definition all parties contracting with the state. 27

With respect to funding, the court noted that the OMA does not state that public funding alone will make a partic-

ular entity subject to the statute, even if it does provide that a particular entity need not be publicly funded in order to be required to hold open meetings. 28 The court reasoned that if it were to extend the definition of "subsidiary body" to include all those entities that receive public funding, too many would fall under OMA's purview, which also could not have been the legislature's intent. 29

In Hopf v. Topcorp, Inc. (Hopf II), citizens sought to apply Illinois sunshine laws to two for-profit corporations, Topcorp and Research Park, Inc. (RPI), which were formed pursuant to a Statement of Understanding between the City of Evanston and Northwestern University to develop a research park on downtown Evanston property owned principally by Evanston and Northwestern. 30 The project was part of the redevelopment plan adopted by the city, and a tax increment financing district had been established to pay for public improvements in the infrastructure of the redevelopment area. 31 The agreement stipulated that the corporations were created to (1) enhance the tax base of the Evanston; (2) provide jobs for city residents; and (3) encourage new business development. 32 Topcorp was created to acquire the land within the redevelopment area, with assistance from the city when necessary to use eminent domain or otherwise. 33 RPI was responsible for developing the park through negotiating sale or lease, marketing, managing and overseeing operations. 34 Among other ties, Evanston appointed half of the initial RPI directors; the three Evanston designated Topcorp directors were Evanston's mayor, an alderman, and the city manager; and the corporations were created after a series of public debates. 35

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22 5 ILL. COMP. STAT. 120/1.02 (Lexis 2011). FOIA allows the public to access government records, and it defines records as belonging to public bodies. Essentially identical to the definition in the Illinois Open Meetings Act, it defines "public body," in pertinent part: "Public body means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof . . . ."
24 Id.
25 Id. at 96-97; 1193-94.
26 Id.
27 Id.
28 Id. at 96; 1193.
29 Id.
31 Id. at 889; 312.
34 Id.
35 Id. at 891; 331-14.
The Hopf II court cited Rockford as controlling, stating the test required three factors (1) whether the entity has a legal existence independent of government resolution; (2) the nature of the functions performed by the entity; and (3) the degree of government control exerted. The court repeated the findings of fact from a prior case involving the same parties ("Hopf I"), characterizing the functions of RPM "to oversee the private development of real estate" and the functions of Topcorp to purchase land from the city and Northwestern University. With respect to the role of the government entity, the court reiterated Hopf I that previously characterized the government's supervision as being limited to its motivation as a shareholder, and stated that the government lacked any other proprietary interest in the corporation's day to day operations. The Hopf II court found that the new evidence brought forth to illustrate entanglements between the public and private entities was unpersuasive in demonstrating day-to-day control.

Hopf II also reiterated the Hopf I court's finding of "significant" factors, citing Topcorp's and RPM's legal status as for-profit corporations and the respective independence of the corporations' boards. It concluded, "although both the City and Northwestern are able to influence the direction and decision of the two corporations through their appointment power, neither the City nor Northwestern can control the two corporations." The court also found that public funding by itself was not dispositive. The Hopf II Court cited Rockford for the proposition that "[t]he amount or percentage of governmental funding of a private entity should have no bearing on whether that entity is characterized as a subsidiary for purposes of the [OMA]. Although [OMA] itself provides that a particular entity need not be publicly funded in order to be required to hold open meetings, it does not state that public funding alone will make a particular entity subject to [OMA]. To imply such a statutory intent would affect large numbers of completely private entities that receive a large portion of their funding from the State." As such, Illinois court's overall emphasis on the legal structure of an entity and the day to day control over execution of activities within the entity outweighs the central role that such an entity may play in strategizing and executing plans for economic development or the funding inextricably linked to a public body.

The Federal Standard and Practices in Other States. The authors surveyed all fifty states' statutes that bear on the subject to identify what trends drive transparency and public participation with respect to non-governmental economic development entities that are intrinsically bound with the government sector. To identify the contours of transparency and its intersection with private activity delegated by, funded by, or relied on by the public sector, the authors reviewed the federal standard in determining what constitutes "agency" for federal FOIA purposes, and 22 appellate or state Supreme Court cases that answer whether a given entity falls under that states' sunshine laws or if records of an economic development arm of government should be accessible by the public. The volume of cases indicate that the a particular court's focus on pure public/private distinctions that favors transparency in the former and privacy and confidentiality in the latter does not provide easy answers in the realm of economic development. Additionally, as the court did in Hopf II as outlined supra, it is also important to note that the universe of cases considered with regard to this issue expand beyond controversies that affected an EDC, and reach private entities generally.

The value of open government is driven by legislative intent and is purely a creature of statute throughout the nation. Federal courts have considered the government control factor in determining if an entity falls under the federal FOIA's definition of "agency" since the United States Supreme Court ruled on Forsham v. Harris. The Court in Forsham reasoned that Congress did not intend federal funding and supervision alone to create an agency under the federal FOIA, but rather substantial control by the federal government was imperative to inclusion in the federal FOIA. Lower federal courts followed suit: For example, in Roope v. Indiek, the court of appeals found that the Federal Home Loan Mortgage Corporation (FHLMC) was an agency under federal FOIA because it met the statute's definition of "government-controlled"

36 Id. at 892; 314.
37 Id. at 892; 315.
38 Id.
39 Id.
40 Id. at 893; 315.
41 Id. at 894; 315.
42 Id. at 896; 317 (citing Rockford, 64 III. App. 3d 94, 96; 380 N.E.2d 1192, 1193).
43 See cases cited infra notes 53 and 55.
44 But see R. James Assaf, "Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings," 40 CASE W. RES. 227, 241-42 (1990) (arguing that the nation's tradition of open legislative meetings is rooted in our common law heritage and the public's interest in government information is constitutionalized in Article I, 5, cl. 3).
45 Forsham v. Harris, 445 U.S. 169 (1980). See also Craig D. Feiler, "Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law," 52 FED. COMM. L.J. 21, 37 (1999). In the alternative, federal courts will look to the functional equivalent factor to determine whether private entities are subject to the federal FOIA. In this scenario, the entity is functioning independently but making decisions for the government, and in effect, acting as the functional equivalent of the federal government.
corporation” due to the following combination of factors: 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.47

States’ laws vary widely in their application of transparency to private entities that undertake the delivery of public services, but there is a clear bifurcation in the states’ legislative approaches, which is reflected in the states’ case law. With respect to cases involving EDCs: on one end of the spectrum, where a state has a provision in its sunshine laws to exempt records and/or meetings of economic development corporations,48 or has a provision that expressly protects the confidentiality of the economic development process in the enabling statute for the corporation,49 courts have disposed of controversies by ruling that such entities do not fall under state sunshine laws or their records and/or meeting(s) are not subject to public disclosure.50 On the other end of the spectrum, where a state lacks such a statutory provision, courts apply the state’s sunshine laws to economic development corporations citing dedication to the idea that it is in the people’s best interest to thwart secretive meetings and deals.51 Congruent with the notion that open government is in the people’s best interest, as indicated above, some states also have a public records request laws that specifically include a provision that will reach a non-profit EDC that executes a contract with a public entity.52

The survey of the 22 court cases reveals that the inquiry whether a given EDC or other private entity falls under the state’s sunshine laws is usually fact intensive with no one factor outcome determinative across the nation. The factors considered by the courts varied in number, type, and emphasis, and they all relate to either structure or function of the entity in question. The authors compiled a list of ten variables reflecting structure or function, any of which may have been considered by a given court in its interpretation of a state’s statutes: (a) the formal legal nature of the entity; (b) whether public funding is at issue; (c) whether commingling of private and public funds exists, or wheth-

48 The following sunshine statutes in 11 states provide protection to EDCs from public record access and/or meeting access: ARK. CODE ANN. § 25-19-105(9)(A) (Lexis 2011); IDAH. CODE ANN. § 9-340D(6) (Lexis 2011); IOWA CODE § 22.7(h) (Lexis 2011); IND. CODE §§ 5-14-3-4(b) (5)(A) & 5-14-3-6(b)(4) (Lexis 2011); KAN. STAT. § 45-2211(a)(31) (Lexis 2011); KY. REV. STAT. §§ 61-878-3(d) (Lexis 2011); KANS. REV. STAT. § 44-222A (Lexis 2011); ME. REV. STAT. tit. 1 § 405(6)(c) (Lexis 2011); N.C. GEN. STAT. §§ 132-111(b); 143-318,11(a)(4) (Lexis 2011); N.D. CENT. CODE § 44-04-18,4(b)(a) (Lexis 2011); OKLA. STAT. § 25-307(C)(10) (Lexis 2011); S.C. CODE §§ 30-4-55 (Lexis 2011); TEX. GOV’T CODE § 551.087(1); 552.131(a) (Lexis 2011); VA. CODE § 2.2-3705.63(b) (Lexis 2011); WASH. REV. CODE § 42.56.270(12)(ii) (Lexis 2011).
49 The following enabling statutes in 15 states for state and/or local EDCs provide varying levels of “confidentiality” behind EDC activity affecting record and meeting access: ALA. CODE §§ 41-9-202 (Lexis 2011); 1 FLA. STAT. ANN. § 288 (Lexis 2011); MISS. CODE ANN. § 57-11-14 (Lexis 2011); MO. REV. STAT. §§ 620.014 (Lexis 2011); NEV. REV. STAT. § 18-231.069 (Lexis 2011); N.M. STAT. Ann. § 6-25-27(A) (Lexis 2011); OR. REV. STAT. §§ 26A-285A.075(1)(b) (Lexis 2011); S.D. CODIFIED LAWS §§ 3-33-19.2; 1-52-3.4 (Lexis 2011); TENN. CODE ANN. §§ 4-3-733(c)(1) (Lexis 2011); UTAH CODE ANN. §§ 63M-1-1224 (Lexis 2011); WASH. CODE § 5B-2-1 (Lexis 2011).
50 KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382,386 (Iowa 1989) (holding that marketing and production of intercollegiate sports television broadcasts was not a duty or function of government, and therefore records were not accessible under the public record request act), partially overruled by Gunnan v. Iowa State Bd. of Regents, 692 N.W.2d 31, 40 (2005); Maready v. City of Winston-Salem, 467 S.E.2d 615, 629 (N.C. 1993) (finding that defendants did not violate the North Carolina Open Meetings Law where an appropriate exception existed for closed session to discuss matters relating to the location or expansion of business, and the intent to approve land acquisition may be formed in closed session); Leader v. Hagen, 739 N.W.2d 475, 480 (S.D. 2007) (finding that the Governor’s Hunt invitation list, which was used in the course of business by the Governor’s Office of Economic Development, was not required by statute to be kept or maintained and therefore not subject to the state’s public record request act); Evergreen Freedom Found. v. Locke, 110 P.3d 858, 862 (Wash. Ct. App. 2005) (finding that the requested records’ redacted portions fell under the trade secrets exemption in Washington’s Public Disclosure Act).
51 Denver Post Corp. v. Stapleton Dev. Corp., 19 P.3d 36, 39 (Colo. Ct. App. 2000) (“[W]e note that the failure specifically to include a particular type of agency within the definitional sections of the [Colorado Open Records Act] has not precluded such an agency form being subject to its provisions if exclusion of the agency would be contrary to the General Assembly’s intent in enacting the Act.”); Central Atlanta Progress, Inc. v. Baker, 278 S.E.2d 840, 842 (Ga. App. 2006) (“The Open Records Act was enacted in the public interest to protect the public from ‘closed door’ politics and the potential abuse of individuals and misuse of power such policies entail...”); The State of the General Assembly was to encourage public access to information and to promote confidence in government through openness to the public.”); Northwest Georgia Health System, Inc. v. Times Journal, Inc., 461 S.E.2d 297 (Ga. App. 1995); Time of Trenton Pub’g Corp. v. Lafayette Yard Community Dev. Corp., 874 A.2d 1064, 1071-72 (N.J. 2005) (describing the state’s policy in favor of open meetings as valuing the right of the public to be present at all meetings of public bodies, to witness in full detail all phases of deliberation, policy formulation, and decision making of public bodies, ultimately all being vital to the democratic process) (citing N.J. STAT. ANN. 10:47-7); Buffalo News Inc. v. Buffalo Enter. Dev. Corp., 644 N.E.2d 277, 279 (N.Y. 1994) (“The Freedom of Information Law, was enacted to provide the People with the means to access governmental records, to assure accountability and to thwart secrecy and is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.”) (citations omitted); Wisconsin v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295, 297-98 (Wis. 2008) (“On the one hand we cannot countenance a government body circumventing the legislative directive for an open and transparent governmental function. On the other hand, we have to be cognizant of the realities of economic development and the need, at times, for flexibility and confidentiality.”). Notably, Illinois strays from this trend: the Illinois courts in Rockford and Hopf, both of which reflect a highly conservative outlook in favor of secrecy.
52 See, e.g., News & Sun-Sentinel Co. v. Schwab, Twitt & Hansen Architectural Group, 596 So.2d 1029, 1031 (Fla. 1992) (noting that Florida’s Public Records Act is defined broadly to include private entities “acting on behalf of any public agency” because “this broad definition serves 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”).
er the government obtains assets in case of dissolution; (d) whether a governmental function is at issue; (e) whether the entity is created by the public agency; (f) whose benefit the private entity was functioning; (g) the level of supervision exerted by the public body over the private entity; (h) whether the entity's annual budget is subject to governmental access or public disclosure; (i) the composition of the entity's board; and/or (j) the type and breadth of control exerted by the entity's board.

Of the 22 appellate or state Supreme Court cases that bear on the subject, fourteen cases had outcomes in favor of transparency, subjecting the particular entity in question to the state transparency statutes (seven of those involved an EDC); however, four of those cases found that despite being subject to the states transparency laws, an exception allowed the non-profit entity to withhold documents. Eight cases (five of which involved an EDC) found that the totality of the circumstances, or another

53 Denver Post Corp. v. Stapleton Dev. Corp., 19 P.3d 36 (Colo. Ct. App. 2000); Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm’n, 436 A.2d 266, 270-71 (Conn. 1980) (employing the federal functional equivalent test: whether the entity performs a governmental function; the level of government funding; the extent of governmental involvement or regulation; whether the entity was created by the government); Central Atlantic Progress, Inc. v. Baker, 278 S.E.2d 840 (Ga. App. 2005); Northwest Georgia Health System, Inc. v. Times-Journal, Inc., 461 S.E.2d 297, 300 (Ga. App. 1995) (holding that private hospitals were subject to state's sunshine laws because non-profit corporations that contractually agreed to operate public hospital authority assets for the public good became the vehicle through which the public hospital authorities carried out their official responsibilities); Harwood v. McDonough, 344 Ill. App. 3d 242; 799 N.E.2d 859 (2003); Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208 (Ind. 1991); Citizens for a Better Env't, Inc. v. Ohio County Indus. Found., Inc., 156 S.W.3d 307, 308 (Ky. Ct. App. 2004) (applying bright line definition in state's open records act where public agency includes any body which derives at least 25% of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds). Note that the Kentucky legislature responded by passing legislation protecting such records. KY. REV. STAT. § 61-878-3(d) (Lexis 2011); City of Baltimore Dev. Corp. v. Carmel Realty Assocs., 910 A.2d 406 (Md. 2006) (finding the EDC subject to the state’s public information act); Time of Trenton Publ'y Corp. v. Lafayette Yard Community Dev. Corp., 874 A.2d 1064 (N.J. 2005); Buffalo News Inc. v. Buffalo Enter. Dev. Corp., 644 N.E.2d 277, 278-79 (N.Y. 1994) (holding a not-for-profit corporation that administered loan programs and encouraged community development, thought not subject to substantial governmental control over its daily operations, was still a "government entity" performing a governmental function and therefore an "agency" subject to New York’s Freedom of Information Law); Marendy v. City of Winston-Salem, 467 S.E.2d 615 (N.C. 1993); Leader v. Hagen, 739 N.W.2d 475 (S.D. 2007); Coleman v. Kisber, 338 S.W.3d 895 (Tenn. Ct. App. 2010); Wisconsin v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295 (Wis. 2008).


55 News & Sun-Sentinel Co. v. Schwab, Twitt & Hansen Architectural Group, 596 So.2d 1029, 1031-33 (Fla. 1992) (setting forth a nonexclusive list of nine factors to be considered in determining whether a private entity was subject to the state's open records act, and finding that none of these factors applied to the private architectural firm); Rockford Newspapers, Inc. v. N. Ill. Council on Alcoholism & Drug Dependence, 64 Ill. App. 3d 3d 94; 380 N.E.2d 1192 (1978); Harwood v. McDonough, 344 Ill. App. 3d 242; 799 N.E.2d 859 (2003); Hopf v. Topcorp, Inc., 256 Ill. App. 3d 887; 628 N.E.2d 311 (1993) (Hopf II); Perry County Dev. Corp. v. Kempf, 712 N.E.2d 1020 (Ind. Ct. App. 1999) (finding in favor of Perry County Development Corporation on summary judgment for four factors because: (a) funding by government is fee-for-service; (2) the membership of PCDC's board is not relevant to the question, (c) 100% public funding not dispositive, and (d) PCDC not subject by operation of law to audit by State Board of Accounts); but remanding for two factors in deciding if the public records act applies to PCDC: (e) whether PCDC is a public agency because it exercised delegated governmental powers or (f) have been given the power to direct the expenditure of public funds); KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382 (Iowa 1989); In re Ervin v. S. Tier Econ. Dev. Inc., 809 N.Y.S.2d 268, 269-70 (N.Y. App. Div. 2006) (distinguishing Buffalo News, 644 N.E. 2d 295, because the economic development entity at issue was created by private business persons, none of the board members exercised any financial control over the entity, the government did not control the management of the property in question, the entity's audit was not subject to public disclosure, and the entity did not administer loan programs or disburse funds on behalf of the government); Safety, Agric., Vills. & Env't, Inc. v. Delaware Valley Reg’l Planning Comm’n, 819 A.2d 1235, 1242 (Pa. Commw. Ct. 2003) (finding that the economic development entity acts only in an advisory capacity and as such does not qualify as an organization performing an essential government function to qualify as an "agency" under the Pennsylvania Right-To-Know Act).
development goals one way or another whether subject to sunshine laws or not, although both their activities inures to the benefit of the public. The arbitrary nature of this distinction in a democracy is demonstrated by the contrast in the outcome of two New York court cases that considered whether records from economic development corporations were accessible under New York’s Freedom of Information Law (FOIL).

In Buffalo News Inc. v. Buffalo Enterprise Development Corporation, a New York court considered whether the Buffalo Enterprise Development Corporation (BEDC) was an agency under FOIL, which defines “agency” as “any state or municipal department, board, bureau division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof.” Although the BEDC urged the court to adopt the Federal precedent to the Federal Freedom of Information Act that requires “substantial governmental control over [] daily operations” of the agency (which was lacking in BEDC’s case), the court found that the BEDC’s purpose is undeniably governmental because it was created by and for the City of Buffalo to attract investment and stimulate growth in the community, was required to disclose its annual budget that was subject to public hearing, and it described itself as an “agent” of the City. Thus, it was subject to FOIL.

Twelve years later, the In re Ervin v. Southern Tier Economic Development, Inc. court reached a different decision with respect to records requested from another economic development agency. The city acquired the real estate and loaned the EDC municipal funds to develop the land; and in the meantime, the city paid the economic development corporation’s management fee if it was unable to do so itself. The court distinguished Buffalo News, emphasizing structure over function: that the EDC at issue was created by private business persons; and although three of its nine members were ex officio government officials, the corporation’s board did not have financial control over the entity; and it did not hold itself out as an agent of the city or administer loan programs or disburse funds. The city’s promotion and financial entanglement in the redevelopment were not considered, and although the economic development corporation was performing a governmental function by fostering the economic development of the City, it is not an agency for the purposes of FOIL.

When a court bypasses the structural inquiry and instead focuses on or emphasizes the functional inquiry, a given non-profit or EDC might readily fall under the state’s sunshine laws. The New Jersey Supreme Court in The Times of Trenton Publishing Corporation v. Lafayette Yard Community Development Corporation was not swayed by an economic development corporation’s structural argument in claiming that it was not created by a governmental agency but instead by private citizens interested in assisting Trenton in redeveloping a parcel of land. “To accept it without further discussion would be to elevate form over substance to reach a result that subverts the broad reading of [the Open Public Records Act] as intended by the Legislature.” The relevant test in the New Jersey case presented two alternatives in finding the EDC a “public body” under the law: whether the entity performs a governmental function or whether it is authorized to expend public funds. The court was swayed by the municipality’s large measure of control over the EDC as evidenced by the incorporation papers and bylaws and agreements with the city, as well as the city’s support as a taxing power. Thus, it held that Lafayette Yard Community Development Corporation was subject to the states’ sunshine statutes because it is a public body that performs a governmental function within the meaning of the Open Public Meetings Act and an instrumentality or agency created by a political

56 Wisconsin v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295, 298 (Wis. 2008) (“This opinion should not be read as disfavoring the desire to engage in economic development without being subject to open meetings and public records law. Indeed many private entities operate throughout this state without being subject to those laws and successfully promote economic development to the benefit of us all. Likewise, there are many governmental economic development corporations that have for years operated successfully while being subject to the open meetings and public records laws. We take no position as to what is the best structure for the enhancement of economic development in a particular area.”). The Wisconsin Supreme Court emphasized the functional analysis, and in so doing, found that the Beaver Dam Area Development Corporation met the definition of a “quasi-governmental corporation” under the state’s sunshine laws in function, effect, and status. Id. at 307-08.


58 Id.


60 Id. at 269.

61 Id. at 270.

62 Id.


64 Id. at 1074.

65 Id. at 1071.

66 Id.
The structural analysis in determining the mandate of transparency as applied to an economic development agency is lacking when one considers the goals of democracy.

67 Id. at 1072.


69 5 ILL. COMP. STAT, 140/7(2) (Lexis 2011).
whether the entity is performing a governmental function in tandem with “whether an organization’s conduct could cause unjustifiable harm to fundamental interests, and whether transparency requirements might avoid such harm.”

The New Jersey court in *Times of Trenton* had a legislative framework before them that allowed for such inquiry and protected such interests. Its Open Public Meetings Act states a policy: “that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society; and [that] it is the public policy of the State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger.”

Beyond the policy statement of the statute, New Jersey also explicitly defines “public body” to describe entities that “perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person.”

Conducting the analysis through this framework that involves a functional analysis with a broader inquiry looking at fundamental interests, better safeguards the public’s role in an ever-evolving, complex democracy in which governments look to new models of delivering services and performing government activity. As applied to EDCs, that inquiry would consider environmental concerns, including pollution and noise; concerns over the granting of subsidies to corporations; job creation issues; and land use concerns, to name several interests that affect the quality of life of residents.

The approach suggested here recognizes that the “confidentiality imperative” at the local level is wielded at the expense of the citizenry. As one author has written: “[A]t the local level of government, many of the compelling reasons for closure disappear. Whatever reasons remain, such as discussion of personnel matters and real estate transac-

tions, lead to far less dangerous results in the event the information become public. Yet the consequences of closure at the local level are more dangerous. The citizen must rely on his own ability to gather information with regards to local matters, since he does not have the national media and public advocate groups to acquire information for him. Without a government enforced right to guarantee him access to the political process, he could be rendered ignorant of the deliberations that most directly affect him.”

Recognizing that in balancing the needs of the public against the needs of the corporation, where ultimately corporations have a fiduciary duty to their shareholders first and the public second, legislative language like the following might also achieve that balance: “No public officer or employee shall enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of information pursuant to [an act regarding Economic Development Agencies], until 90 days after such information is made public.” A ninety day window gives the public satisfactory time to gather, review, and digest information it receives and contribute to the dialogue.

In addition, the following would safeguard public interests: (1) require public hearings on all subsidy deals with adequate protections to ensure meaningful participation; (2) disclose information on all current subsidy applications; (3) require disclosure of subsidy spending by corporations receiving government subsidies and corporate compliance; (4) utilize clawbacks routinely (money back guarantees), and (5) utilize and enforce Community Benefit Agreements (CBAs). A Community Benefit Agreement (CBA) is a project-specific, negotiated agreement between a developer and a broad community coalition that outlines the project’s contributions to the community and ensures community support for the project. Covering a wide range of issues, CBAs are legally binding and are commonly incorporated into the city’s developer agreements.

**Conclusion.** As more public bodies rely on EDCs to promote the economic development of communities in difficult financial times, it is easy to lose sight of bedrock democratic principles under the guise that a healthy local economy equates to a healthy democracy. Now is an opportune time to re-evaluate how competing values might be better balanced through local and state legislative reforms.

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71 N.J. STAT. ANN. § 10:4-7 (Lexis 2011) (emphasis added).
72 N.J. STAT. ANN. § 10:4-8(a) (Lexis 2011).