

CONTRACT

Michigan's Transparency Loophole

By Steve Delie | September 2022

Michigan has significant problems with transparency, and a recent lawsuit by the Mackinac Center may be one way to keep government officials from creating a loophole in the state's open records law. In our suit against the Michigan Economic Development Corporation, we challenge the state's ability to escape accountability by outsourcing public work to private actors and then claiming they cannot reveal information created by a business or other private organization.

To be clear, there is nothing wrong with the state contracting with private entities, particularly when a private business can do a better job at a lower cost. Public-private partnerships are one way to stretch taxpayer dollars to serve public ends.

The work of a government office, including the documents it uses to compile reports and make recommendations, should be open to public review. A private business, on the other hand, is under no obligation to open all its books to the public, even if it has a government contract.

It's a different case, however, when the private contractor's work is used only to make public

policy. Our case against the Michigan Economic Development Corporation, the state vehicle for subsidizing certain businesses, illustrates the problem.

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The state spends money to lure tourists to Michigan, and for years, the MEDC has used data compiled by private actors to evaluate the return on investment of these efforts. If citizens are prevented from seeing the data and assumptions used in calculating the

reported return on investment, it is very difficult for them to evaluate the state's claims. In short, public access to this data is necessary for holding the state accountable.

If the state had prepared, owned, used, possessed, or retained this data on its own, watchdogs could have obtained it through the state's Freedom of Information Act, or open records law. But the MEDC claims that it had no role in preparing the data and has thus refused to produce it. The contractor worked at the state's direction on a state project of public importance, which should subject the records to FOIA law. By outsourcing, the MEDC has found a way to argue it has the authority — even

the obligation — to withhold key information from the public. This weakens transparency and government accountability.

The MEDC is not the first government office in the state to try to shield itself from public scrutiny. In 2020, the Michigan Supreme Court issued a ruling in *Bisio v. the City of the Village of Clarkson*, a case that was meant to address the question of whether the records of a private entity acting as the government's agent were subject to FOIA. The court decided this case on other grounds, however, leaving that question unanswered. Are the records created by a private entity only for the purpose of helping government officials make public policy subject to FOIA law? Or are they, as the MEDC has argued, subject to a public-private loophole?

A similar issue arose with how the Michigan Department of Health and Human Services responded to the COVID-19 pandemic. By using FOIA, the Mackinac Center was able to obtain certain records relating to the state health department's contract with McKinsey and Company, a consulting firm which helped the department with data gathering and processing. McKinsey sent the records to state officials. Any purely internal records, even those specifically intended to serve as the basis for immensely important policy decisions, would not have to be disclosed unless the agency theory of FOIA applies.

That is, if a business is acting as an agent of government, the government must disclose any records it obtained from the business. Given that the

health department's response to COVID-19 shaped the daily lives of every Michigander, it would be unreasonable to exempt these records from FOIA's disclosure requirement.

That isn't to say that private companies should be subject to FOIA directly. Instead, the government should be required to request records from a contractor, and then provide to the public any records the company created as part of a public project. The records of the contractor, used to shape public policy, should not be withheld from the public simply because someone other than the state created them.

As governments depend more and more on contracts with outside organizations, it is important to ensure that the public has access to the records needed to hold government officials accountable. If the public cannot obtain these records, the people of Michigan will be left without a key way of understanding government policies that affect their daily lives. Government bodies should not be able to sidestep transparency by using organizations in the private sector to help them make policy.

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Steve Delie is the senior director of transparency and open government for the Mackinac Center for Public Policy.