

IMPACT OF FREEDOM OF INFORMATION ACTS ON

TRAP-NEUTER-RETURN ORDINANCES

Michelle Newton, J.D. Candidate 2012, Seton Hall University School of Law
Neighborhood Cats Legal Intern, 2010; Animal Welfare Trust Student Internship Grant Recipient, 2010

In the United States, records held by government agencies – both federal and state – must be disclosed to members of the public upon request unless the records in question are specifically exempted by the controlling statute. A statute which mandates disclosure of government records is typically referred to as a “Freedom of Information Act” (FOIA). The federal government’s FOIA¹ addresses records held by federal agencies while each state has its own version which governs all government agencies within its borders. Any organization, whether public or private, which plans to operate a Trap-Neuter-Return (TNR) program pursuant to a TNR-enabling ordinance needs to be aware of its own state’s FOIA for several reasons.²

If a TNR-enabling ordinance requires the caretakers of feral cat colonies to register directly with the municipality or one of its agencies (a so-called “caretaker-based” ordinance), then any information collected is subject to public disclosure as no exemptions exist for TNR-related records. This information may include what is usually considered confidential by TNR participants, such as colony locations and caretaker contact information. This is one important reason why, when possible, it may be prudent for a municipality to adopt a TNR-enabling ordinance which assigns administration of the local TNR program, including the gathering and holding of data, to a nongovernmental agency like an animal welfare nonprofit (a so-called “sponsor-based” ordinance).

Even if a sponsor-based ordinance is adopted, the private nongovernmental organization in charge of the TNR program may still face concerns regarding mandated public disclosure of TNR-related information. In some states, it is possible for a private agency to be transformed into a government agency for purposes of public disclosure of records under that state’s FOIA. The factors that may cause this transformation vary by state, but most commonly include the following:

¹ 5 U.S.C. § 552 (2010).

² A list of every state’s Freedom of Information Act can be found at the website of the National Freedom of Information Coalition: <http://www.nfoic.org/state-foi-laws> (last visited August 13, 2010).

- the level of public funding received by the private agency;
- whether the municipality in question controls the private agency's board of directors;
- whether the private agency was created by the government;
- whether the private agency holds itself out as an agent of the government;
- whether the private agency's office is located in a public building; and
- whether the private agency was created or functions for the benefit of the public.

If a private organization acting as a TNR sponsor pursuant to a TNR-enabling ordinance receives a request to disclose its records by a member of the public and refuses to do so, then ultimately a court might decide if disclosure is required. The court might weigh some or all of these factors as well as various factors unique to that state to decide whether the sponsor is acting as a government agency and must comply with the request.

In general, a sponsor-based TNR-enabling ordinance should refrain from identifying particular organizations as sponsors by name. Specifying a particular group in the actual legislation could potentially support a claim that the named organization is acting as a government agency and that its records are subject to public disclosure. In general, it is also usually a poor practice to name specific groups in legislation because if the groups involved are renamed, dissolved, or unable or unwilling to meet the requirements expected of them, the legislation will need to be amended and passed again.

Provided below is a compilation of factors considered by courts in determining whether a private organization has been transformed into a public agency for purposes of a FOIA request. This is not an exhaustive list of either the states in which it is possible for a private group to be transformed into a public agency under the relevant FOIA statute or the possible factors a court may consider. It is meant to serve only as an overview of possible factors that have been considered in the past.

Note: Organizations acting as sponsors under TNR-enabling ordinances that are concerned about whether their records may be accessed by members of the public under the particular state's FOIA should consult an attorney.

COLORADO

- For what purpose was the private agency formed?
- Has the private agency availed itself of public or governmental resources and facilities?
- Could the private agency levy a tax?

Source: Denver Post Corp. v. Stapleton Dev. Corp., 19 P.3d 36, 39-40 (Colo. Ct. App. 2000).

CONNECTICUT

- Does the private agency perform a governmental function?
- What is the level of public funding received by the private agency?
- To what extent does the government regulate the private agency?
- Was the private agency created by the government?

Source: Board of Trustees v. Freedom of Information Com., 436 A.2d 266, 270-271 (Conn. 1980).

FLORIDA

- What is the level of public funding received by the private agency?
- Has there been any commingling of public funds with those of the private agency?
- Were the activities of the private agency conducted on publicly owned property?
- Were any of the private agency's contracted-for services an integral part of a public agency's chosen decision-making process?
- Is the private agency performing a governmental function or a function that a public agency would otherwise perform?
- What is the extent of the public agency's involvement with, regulation of, or control over the private agency?
- Was the private agency created by a public agency?
- Does a public agency have a substantial financial interest in the private agency?
- For whose benefit is the private agency functioning?

Source: News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029, 1031 (Fla. 1992).

HAWAII

- Are the private agency's equipment, assets and property (location) owned or leased by the private agency or the State?
- Does the State or the private agency perform all of the private agency's operating functions?
- Does the State or the private agency "control, direct, administer, take charge of, or exercise skill or judgment over" the private agency's activities or business affairs?
- Is the private agency a representative of the State?
- Does the private agency perform a governmental function in place of the State?

Source: 'Olelo v. Office of Info. Practices, 173 P.3d 484, 496-498 (Haw. 2007).

INDIANA

- Are the incorporators of the private agency private individuals or governmental agents?
 - The composition of the board of directors is likely irrelevant.
- Does statute, rule, or regulation compel the private agency to submit to audit review?
 - Simply agreeing to submit to audit review is not enough standing alone to transform a private agency into a public agency.
- Note: Similarity of goals between a government and private agency does not transform a private agency into a public agency.
- Is the private agency maintained and supported by public funds (not including fees-for-services contracts)?
 - A fees-for-services contract does not transform the private agency into a public agency.

Source: Perry County Dev. Corp. v. Kempf, 712 N.E.2d 1020, 1024 (Ind. Ct. App. 1999); Indianapolis Convention and Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc., 577 N.E.2d 208, 212-213 (Ind. 1991).

LOUISIANA

- Was the private agency created by the Legislature?
- Are the private agency's powers specifically defined by the Legislature?
- Does the property of the private agency belong to the public?
- Are the private agency's functions exclusively performed for the benefit of the public and of a public character?

Source: State v. Smith, 357 So.2d 505, 507 (La. 1978).

NEW HAMPSHIRE

- In determining whether the private agency has been transformed into a public agency, the structure and function of the private agency is examined.
- Also considered are:
 - The private agency's composition
 - How frequently the private agency holds meetings
 - The statutory scheme
 - The financing received by the private agency
 - The private agency's empowerment to work with state and federal agencies
 - Whether the agency is conducting the government's business
 - The private agency's relationship with the government

Source: Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 703-705 (N.H. 2010); Bradbury v. Shaw, 360 A.2d 123, 125 (N.H. 1976); Union Leader Corp. v. N.H. Housing Fin. Auth., 705 A.2d 725, 730-731 (N.H. 1997).

NEW JERSEY

- Is the private agency performing a governmental function?
- Does the government control the membership of the private agency's board of directors?
- Could the private agency have only been created with governmental approval?
- Is the private agency largely controlled by the government?
- Is the private agency supported by tax revenue?

Source: Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 874 A.2d 1064 (N.J. 2005).

NEW YORK

- Does the private agency perform an essential governmental function?
- Was the private agency created to ease the burdens of the government?
- Is the private agency regulated by the government?
- Does the private agency receive its entire source of funding from state and/or federal government entities?
- Are the private agency's services limited to individuals and entities within the city?
- Is the private agency's office in a public building?
- Is the private agency's board of directors made up of governmental figures?
- Does the private agency hold itself out as an agent of the city?
- Is the private agency's annual budget subject to public hearing?

Source: Buffalo News v. Buffalo Enter. Dev. Corp., 644 N.E.2d 277, 279 (N.Y. 1994).

- Note: Fees-for-services contracts or payments are insufficient to transform the private agency into a public agency.

Source: Farms First v. Saratoga Economic Dev. Corp., 222 A.D.2d 861, 862 (N.Y. App. Div. 3d Dep't 1995).

- Note: Merely performing a governmental function is insufficient to transform the private agency into a public agency.

Source: Ervin v. Southern Tier Economic Dev., Inc., No. 1077, slip op. at 2-3 (N.Y. App. Div. 3d Dep't 2006).

NORTH DAKOTA

- Did the private agency receive public funds (not including *quid pro quo*)?

- Fees-for-services contracts are insufficient to transform the private agency into a public agency.

Source: Adams County Record v. Greater N.D. Ass'n, 529 N.W.2d 830, 835-836 (N.D. 1995).

OHIO

- Does the private agency perform a governmental function?
- What level of government funding does the private agency receive?
- What is the extent of the government's regulation of or involvement in the private agency?
- Was the private agency created by the government?
- Was the private agency created to avoid the requirements of Ohio's Public Records Act?

Source: State ex rel. Repository v. Nova Behavioral Health, Inc., 859 N.E.2d 936, 941 (Ohio 2006).

OREGON

- What is the private agency's origin?
 - Did the private agency have an origin that was independent of the government or one that was created by the government?
- What function does the private agency perform and what is the nature of that function?
 - Has the function performed by the private agency been traditionally performed by the government or private agencies?
- What scope of authority is granted to and exercised by the private agency?
 - Is the private agency authorized to make binding governmental decisions, or may it only make nonbinding recommendations?
- Is the government financially involved with the private agency and, if so, what is the nature and scope of that involvement?
 - Consider that governmental financial support includes paying members of the private agency, paying fees of the private agency and providing facilities, supplies, and other forms of non-monetary support.
- Does the government control the private agency's operation and, if so, what is the nature and scope of that control?
- What is the status of the private agency's officers and employees?

Source: Marks v. McKenzie High Sch. Fact-Finding Team, 878 P.2d 417 (Or. 1994).

PENNSYLVANIA

- Does the private agency perform activities that a public agency is empowered to conduct?
- Does the private agency perform activities that a public agency previously performed?
- Does the private agency perform its activities on property owned by a public agency?
- Does a public agency have a continuing financial interest in the private agency's activities?

- Do the private agency's activities affect the quality or cost of goods or services that are offered to the public on property owned by a public agency?

Source: SWB Yankees LLC v. Wintermantel, 2009 Pa. Dist. & Cnty. Dec. LEXIS 99, at *53-54 (Pa. County Ct. 2009).

TENNESSEE

- What is the level of government funding received by the private agency?
- To what extent is the government involved with the private agency?
- To what extent does the government regulate or control the private agency?
- Was the private agency created by the legislature?
- Was the private agency previously determined by law to be open to public access?

Source: Memphis Publ. Co. v. Cherokee Children & Family Servs., 87 S.W.3d 67, 79 (Tenn. 2002).

WASHINGTON

- Does the private agency perform a governmental function?
- What is the level of government funding received by the private agency?
- What is the extent of the government's regulation of or involvement in the private agency?
- Was the private agency created by the government?

Source: Clarke v. Tri-Cities Animal Care & Control Shelter, 181 P.3d 881, 884 (Wash. Ct. App. 2008) (citing Telford v. Thurston County Bd. of Comm'rs, 974 P.2d 886, 894 (1999)).

WISCONSIN

- What is the level of governmental funding received by the private agency?
- Does the private agency serve a public function?
- Is the private agency perceived by public as a government entity?
- Is the private agency subject to government control?
- What degree of access do government agents have to the private agency's records?

Source: State v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295, 307 (Wis. 2008).
