

# Few consequences for government hiding records

By Miranda S. Spivack, Reveal

For more than three decades, Nick Maravell and his family farmed on a 20-acre plot in suburban Maryland, tucked between the Potomac River and megamansions in Potomac, a tony suburb that is home to powerful lobbyists, government contractors and other wealthy families.

Nick's Organic Farm, a relaxed place where customers would stop by to pick up some vegetables or simply drop in for a chat, was a tenant on land owned by the county public school system. But one day in 2011, Maravell got some bad news. Montgomery County's top elected official and his aides had been negotiating in secret to get the school board to kick out Maravell's farm and rent the site to a private soccer club.

"It caught everybody by surprise," said Curt Uhre, a neighbor.

## Public contracts shrouded in secrecy

Residents who cherished the farm quickly rallied to Maravell's side. Worried about traffic and the potential loss of open space, they began researching the county's proposal to convert the farm to soccer fields.

During the legal fight, they also began learning about Maryland's open records law. Used frequently by journalists and business interests, the state's public records law allowed them to seek government documents – memos, officials' calendars and other items – that might offer clues to how the deal was done or hints about who had been speaking with whom, when the plans were hatched and why.

But when residents asked for those documents, they hit a wall:

Montgomery County government officials said they could not find many emails, letters and calendars related to their search.

This seemed preposterous, so the residents took the only route available to them – they went to court. A skeptical county judge urged the government to look anew for missing documents. Officials soon managed to find most of what the residents had sought.

The details weren't pretty.

Documents showed that County Executive Isiah Leggett, a Democrat, less than a year from his next election, had been pushing behind closed doors for the private soccer club to take over the site and attempting to pressure a reluctant school board, even though in theory he had no power over school system decisions.

The Maryland Open Meetings Compliance Board also found that the school board had violated the state's open meetings law by discussing the lease deal in closed session.

Patrick Lacefield, Leggett's spokesman, sees the dispute differently.

"The issue was not transparency," Lacefield wrote in an email. "That was a ruse to advance the substance of those opposed to the project – that they opposed using public land located near their exclusive neighborhood so that kids, including disadvantaged kids, could have a place to play soccer."

The battle over the fate of the farm spanned two years and cost the residents at least \$100,000 in legal fees, Uhre said. Was the county's failure to provide key information to the public due to lack of knowledge of the state's open meetings law? Sloppy record keeping? Deliberate obfuscation? It was impossible to tell.

This expensive, drawn-out dispute was over a single plot of land and some soccer fields. But the story of Nick's Organic Farm is far from unique. The same thing is happening across the United States.

While much media attention is focused on federal government secrecy, secretive practices of state and local governments often get less scrutiny but frequently have a more immediate impact on communities.

Details of emergency management plans that would inform residents how their government will operate in a hurricane, earthquake or other catastrophic event can be hidden in the name of national security. Information about an unplanned shutdown at the nuclear plant up the road can be delayed or kept secret. Should residents be able to learn who has guns in their neighborhood, information that most states have in recent years decided to make off-limits to the public? Should police videos be kept out of the public's hands in the name of privacy?

There are no definitive national studies of the scope of state and local secrecy, but the studies, surveys and anecdotal evidence that do exist strongly suggest state and local government secrecy has increased in the past 10 years. While there are many reasons for this, it has coincided with a decline in local news coverage, technological advances that governments haven't been able to afford and an increase in outsourcing of government functions to private entities.

Whatever the causes, lack of transparency by state and local governments can discourage civic discourse and grass-roots engagement with government, as a frustrated public often simply gives up after struggling but failing to find out what is going on close to home.

Robert J. Freeman, executive director of New York's publicly funded Committee on Open Government, one of few such agencies

in the country, says U.S. jurisdictions have fallen behind countries such as Estonia, Mexico and Peru in sharing records and keeping public meetings public.

“You need a government champion who works independently to make the laws work,” he said. But few governments in the U.S. have them. In many states, the only way to pry loose information is to file a lawsuit.

The rise in government secrecy carries a big cost. When governments have to defend lawsuits or other proceedings challenging their practices, the public bears the expense. When governments fail to post documents on a website and instead respond to repeated queries from the public by photocopying the same material again and again, there is waste. Perhaps most significantly, lack of transparency poses a major risk to good government: When the public is shut out and information is hard to get, governments can mask poor practices, corruption, waste, fraud and abuse.

State and local secrecy takes many forms. Some communities fail to provide budget information that is clear and easy to understand, or they list contracts but don't explain why they were awarded. Others try to charge excessive fees for information – sometimes millions of dollars, as the Massachusetts State Police did to a lawyer seeking information about drunken driving tests – hire outside companies to supply data at extraordinary prices or evade open meetings laws by creating small subcommittees that they claim are exempt from the statutes.

Many state and local governments cite national security to withhold information. This means that something relatively simple, such as finding out who is getting a contract to clean the offices at a local nuclear power plant, can become a ridiculously expensive legal battle.

When members of the public seek information – such as the

residents who wanted to find out why Nick's Organic Farm was being evicted – they often bump into impenetrable walls. Information laws in many states are weak, enforcement by governments is limited and appeals are difficult.

Many states have no meaningful internal appeal system, often forcing anyone who wants to appeal to head to the courthouse, which for many people is a fight that becomes out of their financial reach. Among the exceptions are Connecticut, Florida and New York where someone denied information may have an opportunity to appeal administratively and, in many instances, without cost. Maryland recently changed its laws to include a state ombudsman for public information who is supposed to help those seeking government information, without charging fees to do so.

Courts sometimes have enabled state and local secrecy. The U.S. Supreme Court said in 2013 that the Virginia government – and other states, if they choose to – had to provide public information only to state residents. That left thousands of businesses around the world – large and small – scrambling to stay informed about state regulations, contracts and other necessities. And reporters from news organizations outside the state are forced to find local reporters to file requests for information vital to their investigations.

The events of 9/11 caused new retrenchment on openness. The League of Women Voters in 2006 found that there was a “growing difficulty” in gaining access to public information, much of it justified as “critical to protect homeland security.” And the National Freedom of Information Coalition, in more recent surveys, has found “a greater inclination among government officials for gaming the system than complying with existing disclosure and accountability laws.”

There are many examples of what the coalition believes is gaming the system.

As he was poised to launch his campaign for president in 2015, Wisconsin Gov. Scott Walker hatched a plan with Republican colleagues to drastically reduce public access to state government documents and emails in a state with a long history of government transparency. Initially Walker denied that the idea originated in his administration, but emails obtained through open records requests by news organizations in the state revealed that Walker had misled the public about his administration's key role.

Massachusetts State Police demanded \$2.7 million to retrieve documents when a lawyer asked for data on breath alcohol tests. In Tennessee, a state board created to assess state transparency regulations held meetings in secret. In Maryland, the same county government that thwarted residents in the Nick's Organic Farm case asked a resident to pay more than \$58,000 for information about a public library project.

As for Maravell, he eventually moved out, having decided the future in Potomac was too uncertain. In late 2015, Montgomery County officials contemplated a new proposal for the site – a solar farm on the fields Maravell once cultivated. But the neighbors geared up again, ready to do battle. This time, it took the county only a few months to drop its plans.

### **Digital era introduces new problems**

Technological advances have been a mixed bag for state and local government transparency. Megan Rhyne, who leads the Virginia Coalition for Open Government, said the digital era has ushered in new problems for governments that do try to make information more accessible.

“Electronic records have not made things easier,” she said. “Local and state officials are drowning. There are copies floating all over the place, which on the one hand should make them easier to find, but on the other hand, it is harder, because they don't know who has it. They are trying new

solutions for email management and trying to keep track of emails while not jamming their servers. Everyone thought that the digital age would make things easier, but it really hasn't."

In New Jersey, Rutgers University labor studies professor Janice Fine sought state data about a range of government functions, only to find that it existed but wasn't in any useful form.

"It was impossible to disaggregate data," she said, making it impossible to look for trends or patterns of spending when she was investigating contracting and labor practices.

Many governments are struggling to capitalize on the digital age. Overwhelmed by data, they cannot centralize information, ensure that it is understandable and struggle to make it public even when they want to. Often, agencies in the same government have purchased different software and hardware and are unable to produce datasets or lists of contracts that include the entire government.

Many governments, especially smaller municipalities or townships, don't have enough bandwidth to allow them to post data and documents. And if they are able to post information, it can be fairly useless – a list of numbers or dollar values with little to no explanation of what they represent.

"It's not always intentional," Fine said.

That often leaves government officials erring on the side of withholding information.

"When in doubt, leave it out," is the way that Thomas Susman, an American Bar Association official, describes this tendency. Susman, as a top aide to then-Sen. Ted Kennedy, D-Mass., helped shepherd expansion of the federal Freedom of Information Act through Congress when it was amended in 1974.

Tight budgets often are used as a rationale for limiting state and local transparency. In California – where there is a state constitutional right to public access, but also a constitutional right to privacy – the Assembly in 2013 pushed to exempt local governments from disclosure rules because of tight budgets. A year later, voters approved a ballot measure that required local governments to comply with open records regulations.

As public education has become privatized with the rise of charter schools, information about the publicly funded schools has become difficult to obtain, said Lisa Graves, a former Justice Department official who leads a Wisconsin-based nonprofit looking at charters.

In Arizona, for instance, the state has set up nongovernmental nonprofit entities to oversee the charters, immediately putting off-limits for at least a year any information about staffing, salaries, contracts and other information that public school systems usually are required to disclose, she said. (Some of the information is available a year later in the nonprofits' IRS Form 990 filings.)

### **Little enforcement of open records laws**

Only a handful of states in the U.S. have any reliable system for enforcing their own open meetings and open records laws. Most rely on private parties to press for enforcement.

Too often, it is the community activist whose interest in government information is sparked by a local fight – over development, schools, traffic or crime – who bears the burden and cost of trying to enforce those laws.

Data from the John S. and James L. Knight Foundation show journalists' efforts to battle these issues are diminishing and it often is residents who are engaging in the fights. Local and state enforcement is complaint-driven: Attorneys general aren't trying to enforce these laws, only responding



to complaints.

The University System of Maryland Board of Regents, which got into trouble in 2013 for holding illegal closed-door sessions on a proposed move of its flagship campus to the Big Ten athletic conference and offered many mea culpas, apparently isn't eager to change its ways. Earlier this year, the board tried to get the state General Assembly to make it easier to meet in secret, a move that was ignored by major news organizations but chronicled by the campus' student newspaper. The proposed legislation died in Annapolis.

In Texas, several city councils conducted business by email, claiming they had privacy protections under the First Amendment. The U.S. Court of Appeals for the 5th Circuit in 2012 upheld a local statute that criminalized violations of the open meetings law, saying that "there is reason to think that the First Amendment does not protect the right of government officials to deliberate in private, given that it sometimes requires them to open their proceedings to the public."

Lawmakers had complained that it was impinging on their First Amendment rights to speak freely (and in private).

In San Jose, resident Ted Smith filed a public records request seeking information about a downtown development project partly funded with public money. The city turned down his request for official emails because the mayor and council members had sent them on their personal accounts. Smith sued, and the case is now before the California Supreme Court. In San Diego, Donna Frye, a former city council member, is working to win support for a ballot measure that would make city officials' texts, emails and other correspondence on private phones, tablets and other personal devices public information.

Oklahoma's public university regents set up small

subcommittees that don't equal a quorum – allowing them to meet behind closed doors. Officials at the University of Kentucky, who are balking at releasing information about a completed sexual assault investigation implicating a now-former faculty member, in August announced that they were suing the university's student newspaper to try to prevent disclosure. The state attorney general had ordered disclosure of most documents, and the university can appeal that ruling only by going to court against the student newspaper.

In Oklahoma, journalism professor Joey Senat has urged local prosecutors to do more to file complaints against government wrongdoers, but he says that too often, their fear of offending fellow government agencies makes them reluctant to move on a violation that is only a misdemeanor.

"We have asked the DA to press charges, but they rarely do," he said. As for public universities, Senat said the situation in Oklahoma is far from unique. "Public universities across the country don't seem to understand what that means to be a public university," he said.

### **Police body cameras: Whose footage is it?**

One more critical issue is bedeviling open records advocates and the government.

Across the country, thousands of police officers have begun to wear body cameras to record their actions – but in many communities, there are fierce debates about whether the video footage should be public and who actually controls the footage. In most cases, Axon, a Taser company, has control of the footage. Axon body cameras are used by many major city police departments, including Cleveland; Fort Worth, Texas; Los Angeles and Philadelphia.

In North Carolina, the governor in July signed a law excluding body camera footage from the public record. New Hampshire, Minnesota and Louisiana also recently passed laws restricting

public access to such footage. At least 19 states and the District of Columbia have enacted laws limiting access to law enforcement video footage.

Sarah Lustbader, a former Bronx, N.Y., public defender who is examining police policies about who gets access to body and dashboard camera footage, said the cameras have morphed into a tool for police protection instead of a means for the public to get a clearer understanding of incidents.

“We were told these body cameras would help prevent some of the police abuses we have seen over and over again,” she said. “Instead, the federal government, which has poured a lot of money into body cameras, has put (control of) the programs into the hands of the party they were supposed to be a check on.”

“I know of no jurisdictions where police do not have custody and control of their footage,” she said. “Body camera footage has become an evidence tool for police, not a tool for police accountability.”

Dan Bevarly, interim executive director of the National Freedom of Information Coalition at the University of Missouri, said residents increasingly must help fill in the gaps. But he said it’s unclear whether many communities can engage in efforts such as those in Potomac, Maryland, where a sophisticated and expensive legal battle helped give organic farmer Nick Maravell a reprieve.

“As the media disappears from public meetings, will the citizens step up?” Bevarly asked.