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The “Sole Shareholder” Shield: How the Supreme Court of North Carolina Narrowed the Scope of the Public Records Act and Limited Government Accountability*

In Southern Environmental Law Center v. North Carolina Railroad Co., the Supreme Court of North Carolina considered whether a private corporation, wholly owned by the State, was subject to the Public Records Act. Despite the unique and intertwined nature of the relationship between the railroad corporation and the State, the court held that the railroad was not subject to the Act and therefore did not have to make its records available for public inspection. This Recent Development considers the perceived flaws in the court’s decision to privilege the “sole shareholder” relationship, as well as the potential negative implications of the decision for government accountability.

INTRODUCTION

Classical legal theories portray governments as the protectors and citizens as the protected.¹ In many situations, the government is expected to use its powers to shield its citizens from harm, as well as from infringements on their rights. Traditionally, government protection is reactionary and involves “affording a civil remedy and imposing criminal punishment” for “injuries already suffered,” such as defamation or theft.² Governments also play a proactive role in shielding individuals from danger³ and guaranteeing their rights to certain privileges.⁴ But what happens when the government uses its shield *against* the people, rather than *for* the people?

In *Southern Environmental Law Center v. North Carolina Railroad Co.*,⁵ the Supreme Court of North Carolina gave legal credibility to a new type of government shield: that of a “sole shareholder.”⁶ The central issue in the case was whether, for purposes of the state’s Public Records Act,⁷ the North Carolina

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1. See generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 512–30 (1991) (explaining the origins and meaning of the right to protection).

2. *Id.* at 534.

3. See *id.* at 537.

4. See, e.g., N.C. CONST. art. I, § 15 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”).

5. 378 N.C. 202, 2021-NCSC-84.

6. *Id.* ¶¶ 1, 40.

7. N.C. GEN. STAT. § 132-1 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.).

Railroad Company (“the Railroad”) is “an ‘agency’ or ‘subdivision’ of ‘North Carolina government.’”⁸ The case arose after the Railroad declined a public records request to access its records regarding a failed intercounty light rail transit project.⁹ The Railroad reasoned that it was not subject to the Public Records Act,¹⁰ but the Southern Environmental Law Center (“SELC”) sued, arguing that the Railroad was subject to the Act because of the nature of its relationship with the State.¹¹ On appeal, the majority determined that the State exercised authority over the Railroad through its capacity as the Railroad’s sole shareholder, rather than through the State’s capacity as a sovereign.¹² Accordingly, the majority concluded that the Railroad is not subject to the Public Records Act because the State does not “exercise[] such substantial control over the Railroad that it is necessarily an agency or subdivision of state government.”¹³ Consequently, the Railroad was not required to make its records available for inspection, thus inhibiting public access to information about a wholly state-owned corporation’s involvement with a major public transportation initiative.

This Recent Development analyzes the Supreme Court of North Carolina’s holding and highlights how the majority’s concentration on the State’s role as sole shareholder may lead to the proliferation of private government corporations that “evade public scrutiny under the Public Records Act.”¹⁴ Part I of this analysis provides the history of the North Carolina Railroad Company. Part II examines North Carolina’s Public Records Act and contrasts how it has been interpreted in previous North Carolina Court of Appeals cases with how it was interpreted in *North Carolina Railroad Co.* Part III articulates potential consequences of the sole shareholder shield to the Public Records Act as conceived in *North Carolina Railroad Co.* Finally, Part IV argues that, despite the challenges associated with public records laws, the State must take action to prevent a calculated shift towards private government corporations that will ultimately undermine government accountability by skirting public access requirements.

I. HISTORY OF THE NORTH CAROLINA RAILROAD COMPANY

The Railroad was chartered by the General Assembly in 1849 as a “public-private entity structured as a private business corporation.”¹⁵ Based on the

8. *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 1 (quoting N.C. GEN. STAT. § 132-1 (LEXIS)).

9. *See id.* ¶ 13.

10. *Id.*

11. *See id.* ¶¶ 14, 41.

12. *Id.*

13. *Id.* ¶ 1.

14. *Id.* ¶ 44.

15. *Id.* ¶¶ 2–3.

Railroad's initial projected cost of three million dollars, the legislature pledged two million dollars,¹⁶ conditioned on private investors providing the remaining one million dollars.¹⁷ The State later contributed an additional one million dollars when it was discovered that the initial investment was not enough to finish the project.¹⁸ Thus, when full operations commenced in 1856,¹⁹ the State held a three-quarters interest in the Railroad, while private stockholders held the remaining quarter.²⁰

This public-private arrangement continued for over a century, and despite the State controlling three-quarters of the Railroad's stock and voting shares via a governor-appointed proxy,²¹ it was largely "unobtrusive" in business matters.²² In fact, the State's only consistent exercise of power during this period was through the Governor's appointment of eight of the twelve members of the board of directors, which was proportional to its three-fourths ownership interest.²³ However, this mixed ownership model ultimately proved unworkable due to conflicts between the State's interests in promoting economic development and the private shareholders' desire for enhanced value.²⁴ Thus, in 1998, the Railroad borrowed sixty-one million dollars from the State to buy out the remaining privately held shares of stock, making the State the Railroad's sole shareholder.²⁵

In a typical corporation, shareholders engage in corporate governance by exercising their voting rights.²⁶ Specifically, "shareholders vote to elect the

16. *Id.* ¶¶ 3–4. According to an inflation calculator that uses official records published by the U.S. Department of Labor, \$2,000,000 in 1849 is equivalent in purchasing power to about \$77,327,532.47 today. Ian Webster, *Value of \$2,000,000 from 1849 to 2022*, CPI INFLATION CALCULATOR (Dec. 20, 2022), <https://www.officialdata.org/us/inflation/1849?amount=2000000> [https://perma.cc/6TEZ-TXM6].

17. See Allen W. Trelease, *The Passive Voice: The State and the North Carolina Railroad, 1849-1871*, 61 N.C. HIST. REV. 174, 177 (1984) [hereinafter Trelease, *The Passive Voice*].

18. See *id.* at 178.

19. See *id.* at 183.

20. See *id.* at 175.

21. See *id.* at 179.

22. Allen W. Trelease, *A Southern Railroad at War: The North Carolina Railroad and the Confederacy*, 164 R.R. HIST. 5, 5 (1991) [hereinafter Trelease, *A Southern Railroad*]; see also Trelease, *The Passive Voice*, *supra* note 17, at 180 ("The state's power was exercised very lightly.")

23. See Trelease, *The Passive Voice*, *supra* note 17, at 180–84 (explaining that "the state's hand was not heavy," but that there were "political ramifications" of state involvement, namely that the State-appointed directors were largely politically aligned with the governors who appointed them).

24. See PROGRAM EVALUATION DIV., N.C. GEN. ASSEMBLY, REP. NO. 2012-10, NORTH CAROLINA SHOULD REQUIRE NC RAILROAD COMPANY TO PAY AN ANNUAL DIVIDEND AND STRENGTHEN REPORTING 3 (2012) (explaining that two additional sources of conflict between the State's interest and that of the private shareholders were difficulties with negotiating leases and uncertainty created by shareholder lawsuits and other litigation involving the Railroad).

25. See *id.* See generally N.C. GEN. STAT. § 124 (2021) (codifying the powers, oversight mechanisms, and requirements of the state-owned railroad company).

26. See THOMAS LEE HAZEN, JERRY W. MARKHAM & JOHN F. COYLE, CORPORATIONS AND OTHER BUSINESS ENTERPRISES, CASES AND MATERIALS 399 (5th ed. 2021).

directors who manage and oversee the corporation” and may at times “vote on matters such as an amendment to the articles of incorporation or a proposed merger with another corporation.”²⁷ Accordingly, as the sole shareholder, the State now has exclusive control over the appointment of the Railroad’s thirteen directors.²⁸ Under the statutory mandate, which was updated when the State became the sole shareholder, seven directors are appointed by the Governor and six by the General Assembly.²⁹ The gubernatorial appointees must include one member of the Board of Transportation and either the Secretary of Commerce or the Secretary’s designee.³⁰ Additionally, the Governor has the power and discretion to appoint, direct, and remove the person or persons who serve as the State’s shareholder proxy and vote on behalf of the State’s stock in the Railroad.³¹

While the board operates independently pursuant to its corporate bylaws,³² the Railroad’s status as a state-owned entity grants it special powers beyond those of a normal corporation,³³ subjects it to additional oversight by the State,³⁴ and provides it with unique tax exemptions.³⁵ Regarding State oversight, the Railroad must comply with certain reporting requirements for the benefit of the Governor and the General Assembly,³⁶ and the General Assembly can utilize its unique position to make additional financial investments in the Railroad and to require the payment of dividends.³⁷ For example, the Department of Transportation has previously invested both state and federal funds into efforts to improve the Railroad’s corridor.³⁸ Furthermore, in 2013, at the advice of its Program Evaluation Division,³⁹ the General

27. *Id.*

28. N.C. GEN. STAT. § 124-15(a) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.). When the Railroad was first bought out by the State, the General Assembly reduced the number of directors to nine, with five appointed by the Governor and four by the General Assembly. Act of Aug. 28, 1997, ch. 443, § 32.20(k), 1997 N.C. Sess. Laws 1344, 1843-44 (codified as amended at N.C. GEN. STAT. § 124-6(b) (1999)). Subsequently, during the next general session, the General Assembly increased the size of the board to its current number: thirteen. Act of July 21, 1999, ch. 43, § 3.3(a), 1999 N.C. Sess. Laws 1726, 1737 (codified as amended at N.C. GEN. STAT. § 124-6(b) (1999)).

29. *See* N.C. GEN. STAT. § 124-15(a) (LEXIS).

30. *Id.* (LEXIS).

31. N.C. GEN. STAT. § 124-6(a) (LEXIS).

32. *See* *S. Env’t L. Ctr. v. N.C.R.R. Co.*, 378 N.C. 202, 2021-NCSC-84, ¶ 8.

33. *See* N.C. GEN. STAT. § 124-12 (LEXIS) (granting the Railroad the power to “lease, license, or improve its right-of-way and property” and “exercise the power of eminent domain to acquire property in fee simple”).

34. *See infra* text accompanying notes 36-40.

35. *See infra* note 41 and accompanying text.

36. *See* N.C. GEN. STAT. § 124-17 (LEXIS) (mandating “enhanced” annual reporting by the Railroad).

37. *See infra* note 40 and accompanying text.

38. *See N.C.R.R. Co.*, 2021-NCSC-84, ¶ 12.

39. *See* PROGRAM EVALUATION DIV., N.C. GEN. ASSEMBLY, *supra* note 24, at 30-31.

Assembly directed the Railroad to pay the State a one-time dividend of \$15.5 million.⁴⁰ The Railroad's state-owned status also exempts it from paying federal taxes, as well as state property taxes, though it does pay county property taxes and state franchise taxes.⁴¹ Ultimately, the Railroad's unique relationship with the State subjects it to significant oversight and influence by government officials in exchange for valuable financial benefits that other private North Carolina corporations do not receive.

II. NORTH CAROLINA PUBLIC RECORDS ACT: HISTORY AND CONFLICTING PRECEDENTS

A. *North Carolina Public Records Act*

The North Carolina Public Records Act was enacted in 1975 to ensure that "the people may obtain copies of their public records and public information"⁴² and therefore access "the information they need to hold the government accountable to the citizens it serves."⁴³ According to the Act, "public records" include all varieties of documents and documentary material "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions."⁴⁴

Despite providing a lengthy explanation of what constitutes an "agency or North Carolina government or its subdivisions," the statute's definition is not exhaustive.⁴⁵ Thus, to interpret the Public Records Act, courts reckon with the "totality of the circumstances" by examining the nature of each arrangement "anew and in its own context."⁴⁶ Importantly, though the Public Records Act is

40. See *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 10 (citing Act of July 26, 2013, ch. 360, § 34.14(f), 2013 N.C. Sess. Laws 308, 311).

41. See *id.* ¶ 11. According to its annual report, the Railroad spent \$950,800 on franchise and property taxes in 2021. NORTH CAROLINA RAILROAD COMPANY, 2021 ANNUAL REPORT 8 (2021). It is unclear what the Railroad's additional tax burden would be if it were not exempt from federal taxes and state property taxes.

42. N.C. GEN. STAT. § 132-1(b) (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.).

43. *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 49.

44. N.C. GEN. STAT. § 132-1(a) (LEXIS).

45. *Id.* (LEXIS) ("Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.").

46. See, e.g., *N.C.R.R. Co.*, 2021-NCSC-84, ¶¶ 1, 72 (conducting the "totality of the circumstances" evaluation); *News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548 (1981) (examining arrangement "anew and in its own context"); *Chatfield v. Wilmington Hous. Fin. & Dev., Inc.*, 166 N.C. App. 703, 707, 603 S.E.2d 837, 840 (2004) (same).

notably vague and therefore requires nuanced judicial interpretation, courts have held that it is “intended to be liberally construed.”⁴⁷

B. *North Carolina Court of Appeals Holdings*

Prior to *North Carolina Railroad Co.*, two cases decided by the North Carolina Court of Appeals interpreted the meaning of “agency” and “subdivision” for purposes of the Public Records Act.⁴⁸

In the first case, *News & Observer Publishing Co. v. Wake County Hospital System, Inc.*,⁴⁹ the court considered whether a nonprofit hospital corporation had to provide a newspaper with records regarding settlements of three claims that alleged wrongful termination of agreements.⁵⁰ The hospital was originally established as a charitable, nonprofit hospital by the Wake County Hospital Authority, which was formed and overseen by the Wake County Board of Commissioners.⁵¹ Subsequently, the hospital converted to a nonprofit corporation, but it maintained close relationships with the county via lease agreements and other agreements regarding operations and treatment of indigent patients.⁵² To evaluate whether the hospital corporation was an “agency of North Carolina government or its subdivisions,” the court reviewed the “nature of the relationship between the [Wake County Hospital] System and the county.”⁵³ Specifically, the court considered nine unique factors—including financing, board approvals, reporting mandates, budget reviews, revenue sharing, and post-dissolution options—that purportedly demonstrated “Wake County’s supervisory responsibilities and control over the System.”⁵⁴

47. *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 60 (quoting *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257 (2020)).

48. *See id.* ¶¶ 27–28 (first citing *News & Observer Publ’g Co.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981); and then citing *Chatfield*, 166 N.C. App. 703, 603 S.E.2d 837 (2004)).

49. 55 N.C. App. 1, 284 S.E.2d 542 (1981).

50. *See id.* at 6, 284 S.E.2d at 545.

51. *See id.* at 3–4, 284 S.E.2d at 544.

52. *See id.* at 4–5, 284 S.E.2d at 544–45.

53. *Id.* at 11, 284 S.E.2d at 548.

54. *Id.* The following nine factors were considered:

The System’s articles of incorporation provide (1) that upon its dissolution, the System would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the Commissioners’ approval. The lease agreement provided (3) that the System occupy premises owned by the county under a lease for \$1.00 a year; (4) that the Commissioners review and approve the System’s annual budget; (5) that the county conduct a supervisory audit of the System’s books; and (6) that the System report its charges and rates to the county. The operating agreements also provide (7) that the System be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the System would not change its corporate existence nor amend its articles of incorporation without the county’s written consent.

Id. at 11, 284 S.E.2d at 548–49.

Ultimately, the court was persuaded that while the hospital corporation exercised some degree of independent authority, it was “so intertwined with the county” that it must be an “agency of North Carolina government or its subdivisions” and was therefore subject to the Public Records Act.⁵⁵ Notably, the dispositive factor in determining the applicability of the Public Records Act was the *nature* of the relationship between the entity and the government, not the title of the entity.⁵⁶

In the second case, *Chatfield v. Wilmington Housing Finance & Development, Inc.*,⁵⁷ the court considered whether individuals working on a renovation project with a private nonprofit corporation could use the Act to access records after they determined something was “‘amiss’ at the job site.”⁵⁸ The corporation, Wilmington Housing Finance and Development, Inc. (“WHFD”), was originally incorporated and overseen by the City of Wilmington’s Housing Authority (“WHA”), but its charter was subsequently amended to effectively privatize WHFD and remove the oversight powers of WHA, including requirements to share revenue, to transfer assets upon dissolution, and to only perform functions to benefit WHA.⁵⁹ Years later, WHFD made additional structural changes that further eliminated WHA and the City of Wilmington’s remaining authority, including the ability to inspect books and records, appoint board members, or request WHFD’s performance of certain functions.⁶⁰ Ultimately, by the time the lawsuit commenced, the court determined that the government was no longer exercising supervisory responsibility or control over WHFD, and therefore WHFD did not qualify as a government agency.⁶¹ Importantly, again, the dispositive factor in determining the applicability of the Public Records Act was the *nature* of the current relationship between the entity and the government.⁶²

C. Southern Environmental Law Center v. North Carolina Railroad Co.

This lawsuit came about due to a dispute between SELC and the Railroad over access to records regarding an intercounty light rail project.⁶³ Specifically, the Durham-Orange light rail transit project proposed the construction of a

55. See *id.* at 12, 284 S.E.2d at 549.

56. See *id.* at 11–12, 284 S.E.2d at 548–49 (“[T]he title of the authority in question . . . is irrelevant to assessing the power it exerts.” (quoting James O. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 9 (1970))).

57. 166 N.C. App. 703, 603 S.E.2d 837 (2004).

58. See *id.* at 704–05, 603 S.E.2d at 838.

59. See *id.*

60. See *id.* at 705–06, 603 S.E.2d at 839.

61. See *id.* at 708–09, 603 S.E.2d at 840.

62. See *id.* at 707–08, 603 S.E.2d at 840.

63. See *S. Env’t L. Ctr. v. N.C.R.R. Co.*, 378 N.C. 202, 2021-NCSC-84, ¶¶ 13–14.

17.7-mile line between Durham and Chapel Hill.⁶⁴ According to the regional public transit authority that was managing the project, the light rail was designed to “connect three major universities, three major medical facilities and three of the top 10 employers in the state.”⁶⁵ SELC was involved as one of several organizations advocating for the project.⁶⁶ Despite years of planning and more than \$150,000,000 invested in design, engineering, administration, and real estate, the project was discontinued in March 2019.⁶⁷ The project’s discontinuation was due, in part, to the Railroad’s refusal to sign a necessary cooperative agreement.⁶⁸

Seeking to learn more about this refusal, which was allegedly predicated on the light rail project’s failure to meet the Railroad’s “last-minute impossible demands,” SELC submitted a request to inspect the Railroad’s records regarding the project.⁶⁹ The Railroad declined to provide the records, taking the position that it was not subject to the Public Records Act.⁷⁰ In response, SELC filed a complaint in July 2019 requesting, among other things, “an order declaring that the Railroad was an agency of the State of North Carolina for purposes of the Public Records Act.”⁷¹

Due to its designation as a mandatory complex business case, this matter was first heard by the North Carolina Business Court (“Business Court”).⁷² SELC subsequently appealed the Business Court’s grant of summary judgment in favor of the Railroad, arguing that the Railroad should be subject to the Public Records Act because the State exercises sufficient control over the Railroad, making it “the functional equivalent of an agency of the State.”⁷³ Disagreeing with SELC, the Supreme Court of North Carolina ultimately affirmed the Business Court’s order, holding that the Railroad is not subject to

64. See *id.* ¶ 13; see also *Durham-Orange Light Rail Transit Project*, GOTRIANGLE, <https://gotriangle.org/dolrt> [<https://perma.cc/CHS9-C2XE>].

65. *Durham-Orange Light Rail Transit Project*, *supra* note 64.

66. *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 13.

67. See Laura Brache, *GoTriangle Spent \$157 Million on Failed Light Rail Project. Here’s Where It All Went.*, NEWS & OBSERVER (May 2, 2022), <https://www.newsobserver.com/news/local/counties/durham-county/article260975047.html> [<https://perma.cc/WAF9-9TDM> (staff-uploaded, dark archive)].

68. See *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 13.

69. *SELC Seeks Transparency from the North Carolina Railroad Company*, SELC NEWS (July 1, 2019), <https://www.southernenvironment.org/news/selc-seeks-transparency-from-the-north-carolina-railroad-company/> [<https://perma.cc/9P3E-EDCP>]; see also *N.C.R.R. Co.*, 2021-NC-84, ¶ 13.

70. *N.C.R.R. Co.*, 2021-NCSC-84, ¶ 13.

71. *Id.* ¶ 14.

72. See *S. Env’t L. Ctr. v. N.C.R.R. Co.*, No. 19 CVS 500268, 2020 WL 5224259, at *2 (N.C. Super. Ct. Aug. 20, 2020), *aff’d*, 378 N.C. 202, 2021-NCSC-84. The North Carolina Business Court is a specialized forum of the superior court division that hears “[c]ases involving complex and significant issues of corporate and commercial law.” *Business Court*, N.C. JUD. BRANCH, <https://www.nccourts.gov/courts/business-court> [<https://perma.cc/Z8LT-6W5G>].

73. See *N.C.R.R. Co.*, 2021-NCSC-84, ¶¶ 19–20.

the requirements of the Public Records Act.⁷⁴ The majority reached this decision after conducting a “totality of the circumstances evaluation,” in which it “weighed all of the relevant facts and circumstances in order to determine whether the record, when viewed in its entirety, showed that the government exercised such substantial control over the operations of the [Railroad] as to render it a governmental agency or subdivision.”⁷⁵

First, the majority reviewed past laws and governmental opinions⁷⁶ regarding the Railroad, from which it concluded that the State has “consistently treated the Railroad as a private corporation rather than a public agency or subdivision.”⁷⁷ Given that the sources cited were only opinions, not binding law, the majority admitted that they were not independently outcome-determinative.⁷⁸ Accordingly, this Recent Development focuses on the determinative aspect of the majority opinion—the extent of the State’s control over the Railroad.

SELC argued that many of the factors that established the government’s responsibilities and control over the hospital system in *News & Observer*—including financing, board appointments, reporting mandates, budget reviews, revenue sharing, and post-dissolution options⁷⁹—also exist in the relationship between the State and the Railroad.⁸⁰ However, many of those factors that were presented as evidence of the State’s substantial control⁸¹ were instead held to “exist in all situations in which the corporation is owned by a single

74. *Id.* ¶ 29.

75. *Id.* Despite the fact that two previous cases from the North Carolina Court of Appeals had developed a set of nine factors to interpret the meaning of an “agency” or “subdivision” for purposes of the Public Records Act, the majority opted not to treat those factors as “outcome-determinative.” *Id.* Instead, it determined that “the Court of Appeals utilized a totality of the circumstances approach in both” cases. *Id.*

76. The relevant governmental opinions included a 2000 opinion letter from the Attorney General, as well as a 2010 vote by the State Ethics Commission. *Id.* ¶¶ 36–37.

77. *Id.* ¶ 43.

78. *See id.* ¶ 30.

79. *See News & Observer Publ’g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548–49 (1981).

80. *See N.C.R.R. Co.*, 2021-NCSC-84, ¶ 19.

81. The complete list of factors included:

[T]hat the State is the Railroad’s sole shareholder, that the members of the board are chosen by the Governor and the General Assembly, that certain members of the board must be members of the Governor’s administration, that the Railroad’s property must be transferred to the State upon dissolution, that the State must approve fundamental changes to the Railroad’s corporate documents, that the Railroad is entitled to favorable tax treatment in some instances, and that the General Assembly has exercised authority over the Railroad for the purpose of requiring the provision of certain information and the making of certain dividend payments.

Id. ¶ 40.

stockholder.”⁸² For example, the State’s control of board appointments, power to approve of fundamental changes to corporate documents, and authority to require information and dividend payments were all attributed to the State’s status as sole shareholder and viewed only as sources of “indirect control” of the Railroad’s day-to-day operations.⁸³ Accordingly, despite the majority’s assertion that “the Railroad’s separate corporate existence does not . . . control the outcome of this case,”⁸⁴ the different outcome from *News & Observer* implies that the State’s relationship as sole shareholder was dispositive and shielded the private railroad corporation from the Public Records Act.

Minimizing this evidence of State control, the majority ultimately determined that the “countervailing factors arising from the Railroad’s status as a separate corporate entity outweigh the factors that favor classifying the Railroad as a governmental agency or subdivision.”⁸⁵ Specifically, the majority emphasized the purported independence of the Railroad’s directors, property holdings, generation and management of revenues, and payment of local property taxes and State franchise taxes.⁸⁶ Notably, the majority acknowledged that the Railroad’s management of dividend payments is subject to State orders, though it attempted to reason that the board of directors still plays an independent role in those payments.⁸⁷ The majority also acknowledged the evidence of the Railroad’s State-granted benefits, including interest payment forgiveness, access to government funds, and federal and state income tax exemptions, but was still ultimately unpersuaded that the Railroad was sufficiently under the State’s control to subject it to the Public Records Act.⁸⁸

Defending its decision, the majority maintained that it did not want to “cumulate both the fact that the State is the Railroad’s sole shareholder and the fact that the State’s status as the Railroad’s sole shareholder gives it the right to make certain decisions relating to the Railroad,” because that would “result in the placing of impermissible weight upon those more specific factors in the required totality of the circumstances analysis.”⁸⁹ The ultimate holding suggests that in attempting to avoid overly weighing such factors, the majority effectively eliminated much of the evidence of the State’s control from consideration altogether. This miscalculation resulted in the creation of this

82. *Id.*

83. *See id.*

84. *Id.* ¶ 42.

85. *Id.* ¶ 39. Notably, when presenting the factors that allegedly supported its conclusion, the majority started multiple sentences with the word “although.” *See id.* This phrasing suggests that the majority was going to great lengths to downplay those unique aspects of the Railroad’s status that could have supported a different outcome in this case.

86. *Id.*

87. *Id.*

88. *See id.* ¶¶ 38–39.

89. *Id.* ¶ 40 n.5.

new sole shareholder shield against the Public Records Act, which has incredibly troubling consequences. As the dissent warned, this decision “allows a corporate entity—fully owned by the State and operationally intertwined with numerous government officials and agencies—to shield from public scrutiny its records made in connection with the transaction of public business.”⁹⁰

III. CONSEQUENCES OF WIELDING THE “SOLE SHAREHOLDER” SHIELD

This shielding of the Railroad’s records is undoubtedly concerning in light of the fact that it strips the citizens of North Carolina from “access to records of the railroad company they own.”⁹¹ This is particularly notable given that, in North Carolina, shareholders of public companies are entitled to inspect certain records of the corporation.⁹²

Still, this decision is even more problematic on a larger scale because it “risks allowing the State to sidestep the requirements of the Public Records Act by conducting its business through a nominally private entity.”⁹³ While the Railroad’s long history and corporate evolution does not suggest that the State pursued this ownership model specifically to evade the Public Records Act, a key consequence of the decision is that future public-private partnerships can be structured like the Railroad to benefit from this sole shareholder shield.

To understand the dangers of the privatization phenomenon, it is necessary to recognize the benefits of public records laws. Primarily, public records laws “enhance democratic governance” by holding the government accountable and providing a check against corruption.⁹⁴ Importantly, at the state level, public records laws apply to a “broad[] set of government officials,” which enables the monitoring of many aspects of institutional activity.⁹⁵ Secondly, public records laws are used to exchange information between government entities, thereby facilitating cooperation that may be otherwise overlooked or deprioritized.⁹⁶

In light of the important role public records laws serve in society, many legal and political scholars have warned that the increasing privatization and

90. *Id.* ¶ 47 (Earls, J., dissenting).

91. *Id.* ¶ 21.

92. *See* N.C. GEN. STAT. § 55-16-02 (LEXIS through Sess. Laws 2023-12 of the 2023 Reg. Sess. of the Gen. Assemb.). While the Railroad may have contested whether the specific records requested in this case qualified for inspection under the statute, many of the Railroad’s records that can now be completely shielded would otherwise be subject to inspection if citizens were treated as traditional shareholders.

93. *Id.* ¶ 47.

94. *See* Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1482 (2020).

95. *See id.* at 1485–86.

96. *See id.* at 1489–91 (reviewing public records logs at various government levels and finding that public records requests “offer officials at all levels of government a process by which to obtain and exchange a variety of information,” therefore underscoring “the extent to which these laws can foster cooperation between and among different levels of government”).

quasi privatization of public business could have severe consequences.⁹⁷ For example, some highlight that public oversight, enabled by public records laws, is “critical to preventing corruption, mismanagement and abuse.”⁹⁸ Thus, in allowing public records laws to be undermined, we “open[] the door to unparalleled waste [and] fraud.”⁹⁹ Furthermore, others caution that privatization causes citizens to “lose whatever recourse they previously possessed to provide redress for their grievances.”¹⁰⁰

Examples abound of state and federal public records requests facilitating the discovery of government corruption and misuse of public resources. For example, in 2010, a news investigation of layoffs in a California city led reporters to discover a corruption scandal in which city administrators were being paid exorbitant salaries and hiding it from citizens using falsified documents.¹⁰¹ More recently, in 2019, a union used records obtained through public records requests to discover corruption within San Francisco’s Public Utilities Commission, which led to arrests and criminal charges of government officials.¹⁰² Importantly, even in cases where requests do not produce evidence of corruption or misuse, they can still provide a deterrent effect and serve the important role of informing the public.

While the possibility of private entities wielding the sole shareholder shield is not a guaranteed outcome, it would be naïve to disregard this consequence as improbable or minor. Considering the increasing “proliferation of government favoring privatization in areas of public programs, such as local economic development efforts, operation of prisons and hospitals, parks and land management, and even public education,”¹⁰³ the sole shareholder shield poses an urgent threat.¹⁰⁴ In addition to shielding entities performing

97. See *infra* notes 98–100 and accompanying text.

98. Koningisor, *supra* note 94, at 1515.

99. Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions To Privatize Public Records*, 1 J. CIVIC INFO. 1, 4 (2019).

100. Craig D. Feiser, *Protecting the Public’s Right To Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 825 (2000) (quoting Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 68 (1995)).

101. *Public Records Request Reveals Corruption in City Government*, REPS. COMM. FOR FREEDOM PRESS (Sept. 28, 2010), <https://www.rcfp.org/public-record-request-reveals-corruption-city-government/> [<https://perma.cc/ULQ5-6Y5C>].

102. See Beverly Banks, *Union Says San Francisco Retaliated Against Members*, LAW360 (Feb. 9, 2022, 10:44 PM), <https://www.law360.com/employment-authority/articles/1463544/union-says-san-francisco-retaliated-against-members> [<https://perma.cc/63GW-U68D> (staff-uploaded, dark archive)].

103. Stewart & Sanders, *supra* note 99, at 5; see also Feiser, *supra* note 100, at 864 (“Privatization has been a continuing trend since the 1980s.”).

104. While the privatization of government can be effectuated through various forms of public-private partnership, the sole shareholder corporate structure at issue here is one troubling mechanism for this phenomenon.

outsourced government duties, politicians are also conspiring “to subvert transparency laws as an inducement to lure private businesses.”¹⁰⁵

Moreover, while the Supreme Court of North Carolina did not explicitly invite entities to abuse this shield, decisions concerning public records laws in other jurisdictions have confirmed that entities can evade these laws if they so choose, depending on their respective corporate structures. For example, an opinion from the Supreme Court of Wisconsin held that a quasi-governmental area development corporation was subject to public records laws, but that the entity at issue “could be organized differently” to avoid public records laws.¹⁰⁶ Although such a judicial declaration is likely intended to affirm that being subject to public records law is the natural consequence of operating as a quasi-governmental corporation, it is troubling for a court to even insinuate that a corporation could evade scrutiny through strategic organization, especially given the rapid privatization and narrowing interpretation of the vague terminology in many public records laws.¹⁰⁷

Public records laws are often imperfect in form and administration, such that they “can be intentionally misused as tools to prevent the effective functioning of government.”¹⁰⁸ Such abuse is of particular concern in states like North Carolina that liberally interpret public records laws under the totality of the circumstances.¹⁰⁹ Scholars have expressed concern that a seemingly “unbounded right of access” to public records leads to submissions of requests that are solely intended to “create mischief or work for the public servant.”¹¹⁰

Given the consequences of public misuse, some might argue that narrow interpretations of public records laws, like the one producing the sole shareholder shield, are ultimately better for society at large. However, the benefits of public records laws—accountability, government cooperation, and

105. See Stewart & Sanders, *supra* note 99, at 3–4 (describing the recent Amazon headquarters bidding in which governments sought to lure the company with “bundles of cash and tax incentives”).

106. See *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 90, 312 Wis. 2d 84, 752 N.W.2d 295.

107. See Stewart & Sanders, *supra* note 99, at 19–21 (“Some jurisdictions have broader definitions that require private entities to be subject to open records laws. . . . But even that plain language has been whittled away, rendered almost meaningless by courts favoring business privacy over public transparency interests.”); Feiser, *supra* note 100, at 853–60 (“The other twelve states that have dealt with the issue of privatization and public access in their court systems have taken a more narrow, or restrictive, approach. . . . Arguably, it is easier in these states for government agencies to delegate functions to private entities without being subject to freedom of information laws.”).

108. See Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 STETSON L. REV. 425, 448 (2015).

109. See Feiser, *supra* note 100, at 836–43 (identifying that North Carolina, Florida, and a number of other states use a “totality of the factors” approach classified as “flexible” and “[f]avoring [a]ccess”).

110. See, e.g., Rizzardi, *supra* note 108, at 448–51 (explaining that Florida’s approach to public records law, like other states, results in requests that are “to the detriment of the public interest”).

deterrence, among others¹¹¹—far outweigh any concerns of misuse;¹¹² therefore, the sole shareholder shield must be eliminated.

IV. ABANDONING THE SOLE SHAREHOLDER SHIELD

When the legislature drafted North Carolina's Public Records Act many decades ago, it "may not have contemplated the growing privatization trend."¹¹³ That trend remains strong,¹¹⁴ so the State should seek to abandon the sole shareholder shield to minimize the risk that it will be exploited.

One possible avenue for diminishing the power of the shield—inspired by the dissent in a recent case in Ohio—is through the legislature.¹¹⁵ The General Assembly could amend the Public Records Act to precisely define the terms "agency" and "subdivision" in order to further minimize the need for judicial interpretation of such terms. Concurrently, the legislature could also provide instruction for future interpretation, specifically clarifying the need to weigh all factors informing the analysis of government control, rather than eliminating those associated with the State's role as sole shareholder. Alternatively, in the absence of legislative action, the courts could broaden the interpretation of the Public Records Act and return to considering the *nature* of the State's oversight, rather than the *source*.¹¹⁶

There are, of course, challenges associated with both solutions. Namely, they may be unpopular among government officials who prioritize efficiency over transparency, and they may require overruling recent precedent. Moreover, both solutions are likely to be perceived as anti-business, and therefore may be unpopular in North Carolina given the state's significant investments in fostering a "pro-business environment."¹¹⁷ However, the elimination of the sole shareholder shield is necessary to protect the public and the integrity of our democratic government, and therefore it must be pursued.

111. See Koningisor, *supra* note 94, at 1482–86, 1489–91.

112. While overburdened government entities and increased operational expenses are not ideal side effects, they are a natural consequence of such laws and, in most cases, a nominal price to pay in pursuit of public trust and government accountability.

113. See Feiser, *supra* note 100, at 864.

114. See *supra* notes 103–05 and accompanying text.

115. See State *ex rel.* Oriana House, Inc. v. Montgomery, 110 Ohio St. 3d 456, 2006-Ohio-4854, 854 N.E.2d 193, at ¶ 38 ("Our long line of cases and the majority opinion in this case should convince the General Assembly that it, rather than this court, should define the terms in a manner that would settle the policy issues that are determined each time a court applies the broad statutory language to the facts in individual cases.").

116. See *supra* note 56 and accompanying text.

117. *Why North Carolina*, N.C. DEP'T COM., <https://www.commerce.nc.gov/business/why-north-carolina> [<https://perma.cc/2UCC-VEU6>].

CONCLUSION

The Public Records Act is intended to inform the public and enable citizens to hold the State accountable.¹¹⁸ By interpreting the law according to the *source* of the State's oversight, the Supreme Court of North Carolina created a sole shareholder shield that impedes the public's ability to supervise an entity that is fully owned by the State and spends State resources. Concerningly, this undemocratic arrangement could be exploited by future public-private partnerships seeking to evade the scrutiny of its citizens. To avoid this troubling consequence, the General Assembly or the judiciary must step in to eliminate the shield and fortify the reach of the Public Records Act. Without such action, government entities could wield this shield against their citizens, and government accountability would decline as a result.

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118. See *supra* notes 42–43 and accompanying text.

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