

Public access limited when Idaho agencies hire contractors

By REBECCA BOONE, Associated Press

BOISE, Idaho (AP) — Idaho relies on private contractors to carry out government functions ranging from running prisons to keeping schools connected online.

The state's public records law clearly states that no matter who holds the documents — government vendor or public agency — public records are always public. But a test of the law by The Associated Press shows the reality is murkier.

The AP sent public records requests to five major companies and the state agencies that they contract with: The Department of Health and Welfare and Medicaid contractors Molina and Optum; Department of Correction and private prison companies MTC and Corrections Corporation of America; and the Department of Administration and former school broadband contractor Education Networks of America.

The record requests asked the companies for internal emails involving the contracted work. All the companies declined to provide the requested documents directly to the AP, but Molina and Optum both turned over their emails to the Idaho Department of Health and Welfare to be included in its response to the record request.

Education Networks of America said it wasn't bound by the public records law, though the AP's request was for emails written while the company was still under state contract.

"Education Networks of America is not a public agency, is not an agency with whom a public agency has contracted to perform any duties or functions required under the Act, is not a custodian of any public records, and is not subject to the Act," wrote Phillip Oberrecht, an attorney representing ENA.

Private prison company MTC didn't respond to AP's request; Corrections Corporation of America said the request needed to go through the department of corrections.

"In deference to our government partner, we encourage you to submit your request to the Department of Corrections. While taking no position on whether these records should be released by the department, we believe they are the appropriate agency for you to direct such requests," wrote Steve Owen, a spokesman for CCA.

Officials at the Idaho Department of Correction initially seemed confused by the AP's request.

First, the agency provided only the records it held, ignoring the remainder of the request. Eighteen days and multiple emails from the AP later — well past the 10-day deadline set by the Idaho Public Records law — the department issued a formal denial, saying it wasn't the holder of the records and so couldn't provide them.

"The Idaho Department of Correction is not the custodian of the records you seek," IDOC spokesman Jeff Ray wrote in an email. "The department is under no obligation to provide records for which it is not the custodian. This is a matter between The Associated Press and MTC and CCA."

Ray said the AP's requests had been forwarded to both companies.

The Department of Administration also only provided AP with department records and did not seek any records held by ENA.

Idaho Attorney General Lawrence Wasden says the government can't deny requests for public records simply because they are held by a third-party organization. The exemptions in the public records act would also apply, Wasden said, so documents that reveal trade secrets, personal health information, or other protected information may be withheld. Documents that aren't related to the government function are not public, he noted.

"Some of those documents may, in fact, not be public records," Wasden said, "but the records that are related to the public function are public."

Deciding which privately held records are public must be done on a case-by-case basis, Wasden said.

Betsy Russell, president of both the Idaho Press Club and Idahoans for Openness in Government, said the public records law is clear.

"Records about the public's business are public, and a state agency can't just contract out to a private entity to hide those records," Russell said. "Our public records law is turning 25 years old this year and in most cases, it's served us very well. But clearly there are some areas where we need to make sure that we have compliance."

Wayne Hoffman, the president of the Idaho Freedom Foundation, said government always benefits from robust inquiries from the public and other branches of government.

"There is always a benefit when the public and legislators are able to ask questions about what's under the hood: How's a program operating, what's going right, what's going wrong?" Hoffman said. "And when there's a veil of secrecy, bad things happen. From experience, we know that to be true."