GIVING TEETH TO THE WATCHDOG: OPTIMIZING OPEN RECORDS APPEALS PROCESSES TO FACILITATE THE MEDIA'S USE OF FOIA LAWS

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INTRODUCTION

In 2008, the Freedom of Information Act (FOIA) took center stage in Michigan as open records requests unveiled the shocking corruption of Detroit Mayor Kwame Kilpatrick and members of his administration. Reporters from the Detroit Free Press uncovered the mayor’s scheme to use $8.4 million of public money to cover up incriminating text messages. Those messages revealed Kilpatrick’s affair with his chief aide, their conspiracy to fire a deputy police chief investigating Kilpatrick’s behavior, and their perjury about both in a previous trial. However, the full details of those misdeeds, including the secret multi-million dollar settlement agreement and many steamy text messages, did not become public without a fight. The city’s refusal to fulfill FOIA requests for those documents by the Free Press turned into a lawsuit that ended up taking months and costing the newspaper more than $666,000 in legal fees, $450,000 of which was reimbursed from the struggling city’s coffers in an attorney’s fee award after the paper prevailed. Kilpatrick resigned his post in disgrace after being charged with ten

2. Id.
3. Id.
felonies and accepting a plea deal involving jail time and a million dollar fine.  

The Kilpatrick story amply demonstrates the importance of open records laws for government transparency and accountability. Yet protracted and expensive litigation is the only way to appeal an open records request denial in Michigan and many other states. Such litigation is often impractical or impossible—especially for smaller newspapers that do not have the kind of resources or the level of public interest in their investigation the Detroit Free Press had for the Kilpatrick lawsuit.

Journalists serve an imperative role in providing information to the public and acting as government “watchdogs.” Gaining access to government records via open records acts is crucial for a watchdog’s success. Yet, the overburdened state of the courts and current media budget woes threaten journalists’ ability to adequately fulfill those duties, as less funding for access litigation is available and information sought by FOIA requests becomes stale before lawsuits are resolved. In this environment, it is be-


12. New Knight FOI Fund: Media Companies Involved in Fewer FOI Legal Actions, NAT' L FREEDOM INFO. COALITION (Jan. 4, 2010), http://www.nfoic.org/new-knight-foi-fund. A summer 2009 study found that 60% of National Freedom of Information Coalition groups (those from twenty-three states) said litigation has “fallen dramatically,” and eight additional states said litigation had fallen slightly due to unavailability of funds. Id. Eighty-five percent predicted litigation would fall more dramatically in the next three years due to cost cutting. Id. Anecdotal responses reveal that news media cannot even take on lawsuits for flagrant abuses that will result in attorney’s fees awards because they cannot front the costs, and some
coming more apparent that current statutory appeals provisions in many states are inadequate to ensure that open records statutes serve their intended purpose.\textsuperscript{13} It is clear now that administrative alternatives would be superior to resolve FOIA disputes.\textsuperscript{14}

Though every state, the federal government, and the District of Columbia have some form of an open records act, the provisions of each concerning appeals vary widely.\textsuperscript{15} Citizens and journalists in some states enjoy more meaningful access to information about their government than others because they have the option to appeal to an independent commission that will work to resolve their dispute in a timely way before litigation becomes necessary.\textsuperscript{16} Provisions may allow for involvement by an ombudsman, administrative office, or attorney general to mediate disputes, issue opinions, or conduct hearings on the propriety of divulging information.\textsuperscript{17}

Legislatures must strengthen state open records laws by establishing or improving procedural processes for appeals. This is necessary to provide some check on government bodies short of litigation and ensure that the information essential for a thriving democracy is freely available to the public.\textsuperscript{18} Prelitigation appeals processes are imperative to facilitate quick, high-quality, and inexpensive resolutions of FOIA disputes, and thereby advance democratic participation and government accountability.\textsuperscript{19} Part I examines

\begin{itemize}
  \item are even wary to engage the services of a lawyer to write a letter to the offending public body. \textit{Id.}
  \item \textit{Id.} “[W]ithout the press serving as the enforcement arm for the sunshine laws, more government officials will deny access with impunity, especially because government seldom enforces the access laws against public officials who violate them.” \textit{Id.}
  \item Mark H. Grunewald, \textit{Freedom of Information Act Dispute Resolution}, 40 ADMIN. L. REV. 1, 36 (1988). While courts are often seen as the ultimate independent, objective body to resolve disputes, every other consideration points to the supremacy of an administrative agency primarily resolving FOIA disputes. \textit{Id.} Administrative bodies have more specialized, expert decision making, would promote greater consistency in interpretation, and would free access cases from the crowded judicial dockets. \textit{Id.} Further, notice-pleading procedures are inapt for FOIA cases, administrative procedures can be more flexible to fit the needs of access disputes, and judicial review would still be available to preserve the law-interpreting role of the courts. \textit{Id.}
  \item See Beckett, \textit{supra} note 8, at 16 (discussing all of the different approaches to open records appeals taken in U.S. jurisdictions). While many state statutes are called “Freedom of Information” Acts, “open records acts” is a more generic term that encompasses every jurisdiction’s laws in this area. Because FOIA is the more commonly used term, the two labels will be used interchangeably in this Comment.
  \item \textit{Id.}
  \item \textit{Id.}
  \item See \textit{infra} Part III (analyzing the state and federal approaches that best serve the purposes of open records acts and setting out ideal statutory provisions).
  \item These reforms are so necessary because the fight for openness in government is an ongoing battle, one that “cannot be fought once and permanently won.” RonNell Andersen Jones, \textit{Litigation, Legislation, and Democracy in a Post-Newspaper America}, 68 WASH.
the purposes behind open records statutes and the current inadequacies of most statutory provisions to meet those goals, as exposed by the current media budget crisis. Part II discusses the various approaches different jurisdictions take to providing intermediary appeals processes, mediation, or third-party enforcement after open records requests are denied. Part III evaluates the efficacy and effects of the various state approaches and proposes a legislative solution that best serves the public interest in light of the purposes of open records statutes. Part IV expounds on the consequences and benefits of creating an administrative appeals process for requesters and government.

I. THE PUBLIC'S RIGHT TO KNOW?: THE PURPOSES OF OPEN RECORDS ACTS AND HOW PROCEDURAL INADEQUACIES THWART THOSE FUNCTIONS

The importance of public access to information about government actions and officials in American democracy can hardly be overstated. From the founding of the country, the importance of government transparency and accountability has been apparent, and it continues to be critical to representative government. Justice William O. Douglas even wrote that "[s]ecrecy in government is fundamentally anti-democratic." Yet, many state laws currently fail to provide effective access to information. Record holders who violate the law are seldom held accountable for their actions, often because appeals processes are simply too slow, expensive, or flawed to require or encourage compliance with the spirit of government transparency.

& LEE L. REV. 557, 561 (2011). “[T]here is a serious risk of retrenchment once newspapers are no longer able to fight the fight.” Id.

20. See SHANNON E. MARTIN, FREEDOM OF INFORMATION: THE NEWS THE MEDIA USE (2008). The very first congress of the United States placed a high priority on the people’s need to know what the government was doing, and thus passed a bill in 1789 requiring every bill, order, resolution, congressional vote, and presidential objection be printed in at least three newspapers. Id. at 59-60.


22. For example, two media clients sought records from a police department and a school district concerning public employees who were disciplined, but officials would not release the emails, citing a court decision that email messages not concerning public employment (in that case, a romantic relationship) were not subject to open records laws. MEDIA LAW RES. CTR., NFOIC OPEN GOVERNMENT SURVEY 10 (2009), available at http://www.nfoic.org/sites/default/files/MLRC-NFOIC-Open-Govt-Survey.pdf [hereinafter NFOIC SURVEY]. The media in both cases did not pursue litigation to challenge the denials. Id.
A. Purposes of Open Records Laws

Information is said to be the lifeblood of democracy. Freedom of information (FOI) or open records laws give the public access to government information that is said to be indispensable to the social contract underlying America’s representative democracy. Early in U.S. history, Founding Father James Madison stated, “A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. . . . [A] people who mean to be their own Governors, must arm themselves with the power knowledge gives.” President Lyndon Johnson would echo Madison’s sentiments nearly two centuries later when he signed the federal FOIA into law in 1966:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest. . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people’s right to know is cherished and guarded.

Transparency in government was originally valued due to the memory of the English government’s abuses. However, the need for sunshine in political affairs did not again capture national attention until abuses of government power cropped up in the 1960s and 1970s, blindsiding the public when they were finally revealed. Secrecy hedged in terms of national security concerns in the Cold War began the abuses and set the stage for the
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single most important event in FOI history: the Watergate scandal.\textsuperscript{29} The presidential cover-up that became the infamous Watergate scandal created the mass awareness necessary to inspire the creation and strengthening of open records laws in states around the country\textsuperscript{30} and led to sweeping amendments to the federal FOIA.\textsuperscript{31} Now, every state and the national government has a form of "sunshine" laws designed to shed light on the workings of government, preventing abuses of power and providing the information necessary for an informed electorate.\textsuperscript{32}

1. Citizens' Rights Under Open Records Laws

Federal and state open records laws generally give people the right to inspect or obtain copies of government documents held by executive and

\textsuperscript{29} Id. at 30; The Watergate Scandal, PBS, http://www.pbs.org/johngardner/chapters/6c.html (last visited Nov. 4, 2012). In 1972, men were caught breaking into the Democratic National Headquarters to "bug" phones, and subsequent proceedings indicated that President Richard Nixon and other top White House executives may have been involved. The Watergate Scandal, supra. When it was revealed that secret recordings of presidential conversations were made, the tapes were subpoenaed. \textit{Id.} Nixon refused to disclose the tapes, claiming that it would endanger national security interests, and secretly arranged for the prosecutor who subpoenaed them to be fired. \textit{See} \textit{id.} When the tapes and other documents were finally disclosed, they revealed a multitude of illegal actions, abuses of power, and attempts to cover up those measures, which led to Nixon's resignation as his impeachment loomed. \textit{Id.}

\textsuperscript{30} PEARLMAN, supra note 10, at 30. Former executive director of the Connecticut Freedom of Information Commission Mitchell Pearlman remarked that "[o]ne of the key lessons of Watergate is that a healthy dose of skepticism by the electorate is critical to the survival of our form of government." \textit{Id.} at 48.

\textsuperscript{31} Robert J. Freeman, \textit{FOIL After Thirty Years: Time for More Sunshine}, ALTAMONT ENTERPRISE, Mar. 10, 2005, at 10, available at http://historicnewspapers.guilpl.org/altamont-enterprise-2005-january-june/altamont-enterprise-2005-january-june%20-%2000365.pdf. Although the legislation for these reforms was vetoed by President Ford, his veto was overridden by Congress. \textit{Id.} "The override indicates just how serious Congress and the public were about guaranteeing the public's right to know what the government is doing." \textit{Id.}

\textsuperscript{32} The purposes of freedom of information laws are eloquently expressed in the preamble to the Connecticut Freedom of Information Act.

The legislature finds and declares that secrecy in government is inherently inconsistent with a true democracy, that the people have a right to be fully informed of the action taken by public agencies in order that they may retain control over the instruments they have created; that the people do not yield their sovereignty to the agencies which serve them; that the people in delegating authority do not give their public servants the right to decide what is good for them to know and that it is the intent of the law that actions taken by public agencies be taken openly and their deliberations be conducted openly and that the record of all public agencies be open to the public except in those instances where a superior public interest requires confidentiality. PEARLMAN, supra note 10, at 30-31.
administrative bodies, and sometimes the legislative branch. Upon a citizen’s request, government bodies have a certain number of days to disclose the record or information and may charge the requester for reasonable copying or labor costs to produce the record. Most statutes have a presumption of openness, so information must be disclosed unless it falls within the narrow confines of enumerated exceptions. If a government body withholds information, state provisions may provide for mediation, administrative agency oversight, attorney general involvement, or some other dispute resolution measure. However, many states effectively leave citizens on their own to pursue review of the governmental body’s actions through private lawsuits.

For example, when journalists at the University of Southern Maine’s student newspaper wanted to see records detailing why the school’s provost resigned in 2010, the newspaper’s editor submitted a formal request on June 14, which said he was willing to pay up to $10 in costs. The university had five business days to respond with the reasons for its denial or a copy of the record. The university’s Office of Public Affairs responded on June 17,

33. Id. at 10. The judiciary is usually exempt, except for administrative records, since many court documents are often publically available due to constitutional or other statutory provisions. Id.

34. While most states require records requests to be fulfilled within three to fifteen days, some require a response in as little as twenty-four hours. For links to each state’s requirements, see Open Government Guide, REPORTERS COMM. FOR FREEDOM PRESS, http://www.rcfp.org/open-government-guide (last visited Nov. 4, 2012). Arkansas, for example, requires requests to be fulfilled immediately unless they are in storage or the request is voluminous. Ark. Code Ann. § 25-19-105 (2012). Other statutes say requests must be fulfilled “within a reasonable time” or “promptly.” PEARLMAN, supra note 10, at 13.

35. PEARLMAN, supra note 10, at 14. States may charge fees for copies and/or personnel time taken to find the record and reproduce it, depending on the statute. Id. Some states charge only their actual costs, others charge a fixed fee, and others use the fees to generate income. Id. Most states have provisions charging more for documents that will be used for commercial purposes. See, e.g., Ariz. Rev. Stat. Ann. § 39-121.03(A) (2012). Many states allow for fee waivers upon a showing that the request’s disclosure would be in the public interest. See, e.g., Alaska Stat. § 40.25.110(d) (2011).

36. PEARLMAN, supra note 10, at 12. Some exceptions are mandatory, thus, the governmental body must keep the record confidential. Id. at 15. Some exceptions are permissive, and the body can disclose the record unless there is a good reason not to. Id. Florida, for example, has more than 600 exceptions, Fla. Stat. § 119.01-199.19 (2012), while Nevada has 300, Nev. Rev. Stat. §§ 239.001-.070 (2011). Others have very few, like Connecticut’s fifteen exemptions; some include personnel files, medical files, some law enforcement files, juvenile offender information, some witness and victim identification records, documents pertaining to pending litigation, and real estate documents. Conn. Gen. Stat. § 1-210 (Supp. 2012).


38. Id. at 16; see infra Appendix.


40. Id.
providing the Memorandum of Understanding and General Release that communicated the provost’s intent to resign.\textsuperscript{41} The journalists then posted the full correspondence on the newspaper’s blog to educate others about their rights under open records laws.\textsuperscript{42}

2. Media’s Role in Freedom of Information

Although open records statutes allow nearly anyone to ask for government information,\textsuperscript{43} the media has assumed the role of “surrogate” of the public to disseminate information and hold government officials accountable, often using FOIA statutes.\textsuperscript{44} Because most people do not have the time, ability, or motivation to act as government watchdogs,\textsuperscript{45} the task has fallen to the media, which act as a sort of independent auditor of the government on behalf of the people.\textsuperscript{46} Detroit Free Press reporter M.L. Elrick, who exposed the Kilpatrick scandal, said, “Politicians and public officials are real [sic] good about telling you all the wonderful things that they do, and my job is to find out all the things that they don’t want you to know and then to

\textsuperscript{41} Letter from Bob Caswell, Exec. Dir. of Pub. Affairs, Univ. of S. Me., to Daniel S. MacLeod, Exec. Editor, Univ. of S. Me. Free Press (June 17, 2010), available at http://usmfreepress.tumblr.com/day/2010/09/06.

\textsuperscript{42} Anatomy of a FOIA, supra note 39.

\textsuperscript{43} PEARLMAN, supra note 10, at 11. Depending on the statute, access may be available to “all persons,” citizens only, or citizens and non-citizens who live in states that allow access to the records or information requested. \textit{id}.

\textsuperscript{44} \textit{id}. at 44-45. As reporters fought for open meetings laws, one commenter noted that “[w]hile newspapermen were . . . personally frustrated by being denied access to public proceedings and records, their primary reason for combating secrecy was said to be the recognition of their duty to stand for the public, keeping public officials in the public eye.” William R. Wright II, Comment, \textit{Open Meetings Laws: An Analysis and a Proposal}, 45 Miss. L.J. 1151, 1158 (1974). News media “have routinely acted as proxy for the larger public, putting the legislative tools to use after fighting for their enactment.” Jones, \textit{supra} note 19, at 591.

\textsuperscript{45} \textit{id}. at 44-45. As reporters fought for open meetings laws, one commenter noted that “[w]hile newspapermen were . . . personally frustrated by being denied access to public proceedings and records, their primary reason for combating secrecy was said to be the recognition of their duty to stand for the public, keeping public officials in the public eye.” William R. Wright II, Comment, \textit{Open Meetings Laws: An Analysis and a Proposal}, 45 Miss. L.J. 1151, 1158 (1974). News media “have routinely acted as proxy for the larger public, putting the legislative tools to use after fighting for their enactment.” Jones, \textit{supra} note 19, at 591.

\textsuperscript{46} \textit{id}. Linda Petersen, the president of the Utah Foundation for Open Government, Freedom of Information Committee chairwoman, and Utah Headliners chapter Freedom of Information officer, wrote to journalists,

\begin{quote}
You’re also a watchdog. It’s part of your job to help keep America’s public officials honest and pure, one senator, city council member or county commissioner at a time.
\end{quote}

\begin{quote}
We need to be the ultimate whistle-blowers, sounding that whistle loud and clear over and over again, so that elected officials remember the power of the press and the power of the people we and they serve. We need to write and air stories that spotlight government corruption and back-room dealings.
\end{quote}

make sure you know about them. . . . It’s about accountability.” 47 This role
for the media is so imperative for democracy that Thomas Jefferson re­
marked, “Were it left to me to decide whether we should have a government
without newspapers or newspapers without a government, I should not hesi­
tate a moment to prefer the latter.” 48

Citizens depend on news media to provide information about their
government, 49 and media often depend on open records acts to get that in­
formation. 50 One study showed that nearly 97% of journalists believe that
open records laws are important for doing their jobs. 51 The media-
government relationship can be seen as a two-way street: government pro­
vides information to media to reach the people, and media provide a check
on government power. 52 Both functions enhance public confidence in the
government and encourage citizen participation. 53 Further, the prevention of
secrecy in government should be an important goal; even leaders in Mexico
“clearly recognize that secrecy conceals mistakes and that a strong [Free­
dom of Information] law deters bad behavior and enhance [sic] the integrity
of government.” 54

47. M.L. Elrick, Shining a Light in Dark Places, MICH. ST. U. SPARTAN SAGAS,
48. PEARLMAN, supra note 10, at 50.
49. Although many think open records laws are solely useful to “find out what their
government ‘is up to’” and thus prevent illegal activity, government transparency is about
making public all information about government activity available. Colleen M. Murphy,
Freedom of Information Act Approaches Middle Age, CT NEWS JUNKIE (Oct. 31, 2010,
A transparent government reveals how well it: handles disputes (for instance, dis­
putes between citizens; disputes between law enforcement and citizens; and dis­
putes between other government agencies and citizens); how it protects the envi­
ronment; and how it interacts with certain segments of society, such as the sick, the
poor, the disabled and the uninsured, to name a few.

Id.

50. See generally MARTIN, supra note 20 (detailing the history of FOIA and the
resulting discoveries of valuable information in the last fifty years). Professor RonNell An­
dersen Jones said that “in literally every state in the union, the major force behind the adop­
tion of open-meetings acts and open-records laws, and the entities that overwhelmingly in­
volve them for public-serving purposes after their adoption, are newspaper companies.”
Jones, supra note 19, at 571 (discussing how newspapers were instrumental in pushing for
open records laws that benefit everyone, and now newspaper budget woes have threatened
the traditional role of newspapers and traditional media as legal instigators and enforcers).
52. PEARLMAN, supra note 10, at 44-46.
53. Id. at 44-45; Davenport & Kwoka, supra note 26.
54. Freeman, supra note 31. Likewise, Cynthia Counts, a First Amendment attorney
in Atlanta, said, “[T]here’s no greater threat to democracy than when the government is
acting in secret without any accountability to the public.” Greg Bluestein, Georgia Not Pros­
ecuting Sunshine Law Cases, ATHENS BANNER-HERALD (Mar. 13, 2011),
News media have fought to uncover a plethora of important information about local, state, and national government through open records laws. In Utah, the Associated Press used open records laws to uncover details of a scheme to use public funds to indirectly bribe International Olympic Committee officials in an attempt to get the 2002 Olympics bid for Salt Lake City. In a California case, nearly 2,000 pages of information concerning the nation’s largest retirement pension fund were obtained using the Public Records Act after the fund lost $100 million on a failed real estate investment and caused the eviction of hundreds of tenants.

While big scandals like these and the Kwame Kilpatrick situation are obvious demonstrations of the power of open records statutes, an enormous number of smaller FOIA requests impact people’s lives every day, providing important information, revealing government ineptitude or misconduct, or toppling corrupt local officials. When a village administrator was abruptly fired after a closed meeting, the Racine, Wisconsin Journal Times

55. For a plethora of examples of important stories uncovered by journalists using open records laws, see MARTIN, supra note 20.


58. See supra Introduction (discussing the details of the Kwame Kilpatrick FOIA dispute).

pursued more information through its open records law to find out why. After two months of litigation, the case was settled, and the newspaper found that the administrator engaged in salacious abuse and sexual harassment of his female employees, and that the Village Board had ignored complaints about his conduct for more than a year. Although this discovery may not have been of the same magnitude as the toppling of Mayor Kwame Kilpatrick and his administration, it was extremely important to the female employees and citizens of the small village of Mount Pleasant, Wisconsin. A ruling by the Connecticut administrative appeals commission that the mug shot of actor Elmore "Rip" Torn was a public document might have seemed like an inconsequential victory, but that precedent will impact many criminal investigations in the future. Every mug shot published in a newspaper has the potential to bring forward more information about a crime or previous victims, helping in the overall fight against crime.

However, as media budgets—and consequently access lawsuits—wane, more and more of this kind of information will remain shrouded in secrecy, hidden from the view of those entitled to know it. Everything

62. See supra Introduction (discussing the details of the Kwame Kilpatrick FOIA dispute).
64. One newspaper organization reported that a "triple whammy of declining circulation, advertising and classified revenue" eroded profits industry-wide during the period of 2004 to 2008, with some newspapers reporting "double-digit and even triple-digit declines in operating profit." Adolfo Mendez, Updated: U.S. Dailies See Declines in Revenue, Profits over 5-year Span, INLAND PRESS ASS'N (Apr. 1, 2010), http://www.inlandpress.org/articles/2011/08/08/knowledge/management_human_resources/doc4a53ce729fc97677262186.txt. Newspapers devote $1.6 billion less to news than they did in 2007. Jones, supra note 19, at 564. The industry has lost more than 50,000 jobs since mid-2008, and employs about 20% fewer people than it did a decade ago. Id. Major newspapers around the country have gone out of business or filed for bankruptcy. Id. at 563.
65. As one commentator noted, "[t]here is widespread agreement that society cannot ignore the economic condition of the Fourth Estate because democracy cannot function without the institutional press." Joseph A. Tomain, First Amendment, Fourth Estate, and Hot News: Misappropriation is Not a Solution to the Journalism Crisis, 2012 MICH. ST. L. REV. 769, 770 (2012).
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from stories like a university fudging football attendance numbers\textsuperscript{66} to the FBI's failure to give local police information about an impending crime, which resulted in three deaths,\textsuperscript{67} would go unreported, and government officials would be unaccountable for their actions. Without changes in the FOIA appeals process, the flow of information to the public will slow to a trickle of facts that public officials feel comfortable revealing, rendering FOI laws superfluous.\textsuperscript{68} To enable the "watchdogs" to uncover government information for the public, states must create new appeals processes to streamline the FOI request appeals procedure.

B. The Muzzle on the Watchdog: Inadequacies in Current Laws that Frustrate the Ideals of Open Records Laws and Effective Media Reporting

Despite the lofty goals of open records acts, current FOIA provisions fall short of providing an unfettered flow of important information to the public.\textsuperscript{69} With respect to citizens' legal right of access to information, the 2009 Global Integrity Scorecard Report gave the United States a score of 100; yet, for the effectiveness of that right of access, the United States only


69. Some, like Pearlman, "believe that unless the current dynamic changes, democracy (read freedom) as we know and understand it will cease to exist in the United States and elsewhere within the next 50 years." PEARLMAN, supra note 10, at 4.

System-wide, the government appears to use FOIA as "an excuse to delay or otherwise impede the free flow of what should be readily available public information." On a case-by-case basis, requesters experience delays, inconsistent responses, and at times, no response at all. These difficulties suggest that, whether for political or bureaucratic reasons, the culture within the District government places a low priority on responsive public access.

earned a score of 63.\textsuperscript{70} The lowest scoring factors considered were reasonable response time, appeals time, cost of appeals, and quality of government responses to FOIA requests.\textsuperscript{71} A 2002 study by the Better Government Association studied the open records laws of all fifty states, and none earned a grade higher than a "B-" when compared to an effective open records statute.\textsuperscript{72} Eleven states earned "F" ratings.\textsuperscript{73} Significantly, more than 90% of journalists involved in the study believe that government officials abuse their discretion when responding to open records requests, and the same percentage are not confident that legitimate requests will be honored.\textsuperscript{74}

It is no secret that many government officials "feel little constraint in closing governmental records . . . to public scrutiny and in passing laws that weaken the public's right to know."\textsuperscript{75} It is also well known that the proper presumption of disclosure absent a narrowly tailored exemption has all too often been distorted into public bodies withholding records whenever they can stretch an exemption to fit.\textsuperscript{76} A 2011 study by the Media Law Resource Center and the National Freedom of Information Coalition (NFOIC) revealed that more than 45% of attorneys polled thought FOIA violations had increased in the last two to five years, either slightly or substantially.\textsuperscript{77} Only about 5% thought violations decreased.\textsuperscript{78} It seems that the United States is no longer a country where the peoples' right to know is "cherished" and "guarded," as President Johnson optimistically opined.\textsuperscript{79}

\textsuperscript{71} Id.
\textsuperscript{72} Davis, supra note 10, at 14.
\textsuperscript{73} Id.
\textsuperscript{74} Id. An attorney who represents media reported that local government in his area give the most resistance to producing information, especially the Sheriff's Office, usually by simply ignoring the request or attempting to assess outrageous charges for it. NFOIC SURVEY, supra note 22, at 9.
\textsuperscript{75} PEARLMAN, supra note 10, at 49.
\textsuperscript{76} See NFOIC SURVEY, supra note 22 (presenting survey responses from media lawyers concerning their experiences getting information from public bodies). One attorney surveyed remarked that "[t]oo many government officials do not believe that openness is the presumption, not the exception." Id. at 7.
\textsuperscript{78} Id.
Though a myriad of problems plague these open records acts, mostly centered on how to properly apply exemptions, an effective dispute resolution system would go a long way toward providing effective public access to government information.\(^{80}\) A body tasked with administrative dispute resolution would provide an affordable, efficient, and accurate way to solve open records problems.\(^{81}\) The default dispute resolution process—private litigation after a request is denied—is simply inadequate to fulfill the purposes of open records acts.\(^{82}\) Litigation is particularly ill-suited to providing a remedy where the public body tries to overcharge for a document or stalls its release in violation of the statutory time limits until the information is no longer newsworthy.\(^{83}\) Although there is clearly a place for judicial decision-making in the FOIA context, it should be reserved for difficult questions of law and should be a last resort in settling disputes. Private litigation raises serious concerns about cost, delay, and quality of decision-making if it is used as a step in the resolution of every denied request, as most media outlets can no longer afford the wait or the price tag.\(^{84}\)

The current budget woes of the media are revealing the inadequacies of public access enforcement through the court system as the media’s ability to conduct access litigation declines dramatically.\(^{85}\) In their heyday, newspapers so constantly pursued lawsuits against government violations of open records laws that “the mere threat of litigation served to keep public officials in line and created openness for all of the citizenry.”\(^{86}\) Now, as budgets and staff dwindle, traditional media must place strict limits on the use of

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80. See Davenport & Kwoka, supra note 26, at 360-61 (suggesting improvements to Washington D.C.’s FOIA appeals process).
81. Id. at 360.
82. See generally Grunewald, supra note 14 (discussing the shortcomings of judicial resolution processes).
84. Davenport & Kwoka, supra note 26, at 370.
85. Newman, supra note 79. One media lawyer remarked:
86. Jones, supra note 19, at 593. In their heyday, newspapers also saw huge profits and had the financial resources to pursue a great deal of litigation. Id. at 617-18.
legal counsel to just keep the printing presses running. This lack of legal resources has "stifled the ability of news organizations to finance access litigation;" a 2011 study that found 60% of media lawyers have seen access litigation decrease in the last five years. One journalist pursuing a lengthy and expensive lawsuit to obtain public documents for a large media company pointed out that fighting for access is especially difficult for small newspapers. He commented, "I know if I was not part of a company like Hearst, if this newsroom had to go it on our own, we would have been making a choice about whether to wage a legal battle over principle or lay off staff." Lack of media resources was cited as the principal reason for the decline in litigation by 84% of media lawyers and 92% of NFOIC members.

When litigation becomes financially impossible, the problems with open records acts solely enforced by the judiciary and the lack of alternative ways to fight for access become glaringly apparent. As the press are increasingly unable to serve as the "enforcement arm for open-government laws, government officials' closure decisions may well go unchallenged, and the accountability and openness guaranteed by the legislation may well

87. Now, "where once the news business stood ready to defend openness, it now faces such relentless corporate cost-cutting pressure that litigation often is out of the question." New Knight FOI Fund, supra note 12. One attorney remarked, "Even large newspapers are passing on bringing valid enforcement actions while having to cut news staff." NFOIC SURVEY, supra note 22, at 10. Another commented that when local citizens try to sue county government, the two local newspapers support them but cannot afford to participate in the suits due to budget constraints. Id. at 11.

88. Newman, supra note 79; Press Release, Nat'l Freedom Info. Coalition, supra note 68; NFOIC SURVEY, supra note 22. First Amendment attorneys' responses as to the reasons why access litigation has changed dramatically in the last two to five years overwhelmingly point to media budget woes. NFOIC SURVEY, supra note 22, at 6-8. One responder said the primary reason for the decrease in open government intervention was "[d]ramatically slashed budgets at media companies—both for the type of reporting that requires extensive use of the public records law and for spending money on lawyers to challenge denials of access to public records." Id. at 6. Another said, "These matters fall within media client's discretionary budgets, which just are not what they use to be. That bottom line is hampering the media's ability to be aggressive on the access front." Id. at 7. Others cited simply, "[t]ack of funds to pursue discretionary litigation," "[m]edia and newspapers have no money for this," "[m]edia budgetary restrictions," and "[t]he expense associated with taking an open records/open meetings appeal through [the] system." Id. at 6.


90. Id.


92. Some suggest that even if newspapers' budget woes were solved, they would not seek the large profit margin necessary to be able to finance litigation; many papers are simply content to meet operating expenses. Jones, supra note 19, at 617-24. Further, litigation may never be a possibility in what is emerging as the new media model: a large number of small, disaggregated, niche entities that lack the resources to engage in litigation. Id.
prove illusory," thus threatening the very democracy of the country.\textsuperscript{93} A pre-litigation appeals process is necessary to combat these problems and ensure the media can continue their imperative enforcement function.

1. Cost of Litigation

Private litigation to resolve open records disputes is extremely costly, for both the requester and the state. The costs to requesters are evident: attorney’s fees, filing fees, court costs, and schedule disruption.\textsuperscript{94} The average private open records lawsuit in 2003 cost between $7,000 and $15,000.\textsuperscript{95} Some cases may cost thousands or even hundreds of thousands of dollars in attorney’s fees alone—the \textit{Detroit Free Press} spent about $666,000 pursuing the documents involved in the Kwame Kilpatrick scandal.\textsuperscript{96} Every lawsuit that is filed also requires substantial government resources to defend, as the government body has the burden to prove its refusal to disclose was proper.\textsuperscript{97} In 2010, federal government agencies spent more than $21 million on FOIA defense lawsuits.\textsuperscript{98} Even more, every suit uses valuable judicial resources in a system that is often already overburdened.\textsuperscript{99}

\textsuperscript{93.} Id. at 598. Kenneth F. Bunting, the executive director of the National Freedom of Information Coalition said, “[If news organizations are trending toward being less gung-ho in an area once regarded as a matter of responsibility and stewardship, there is the frightening potential that journalism could suffer, as could the health of our democracy.” Press Release, Nat’l Freedom Info. Coalition, supra note 68.

\textsuperscript{94.} A 2009 survey found that 34.9% of attorneys thought the resources devoted to seeking legal compliance with open government requirements had decreased substantially in the prior two to five years, while an additional 18.1% said those resources had decreased slightly. NFOIC SURVEY, supra note 22, at 4.

\textsuperscript{95.} Katrina Hull, \textit{Violating Government-Access Laws Rarely Results in Punishment for the Offenders}, NEWS MEDIA & L., Summer 2003, at 22, 22.

\textsuperscript{96.} \textit{City of Detroit Must Reimburse Detroit Free Press for Legal Fees}, supra note 5; see supra Introduction (discussing the Kwame Kilpatrick FOIA dispute and its large attorney’s fees award). Another case resulted in Missouri paying the \textit{Kansas City Star} more than $77,000 in legal costs as a result of the newspaper’s success in a 2003 court battle over a FOIA request. Maneke & Barton, supra note 25, at 79. Attorney’s fees of $90,000 were awarded in another case that resulted in the disclosure of applications of candidates for the position of city manager. NFOIC SURVEY, supra note 22, at 10.

\textsuperscript{97.} See, e.g., \textit{MICH. COMP. LAWS} § 15.240 (2009) (“The court shall determine the matter de novo and the burden is on the public body to sustain its denial.”); \textit{IOWA CODE} § 22.10 (2011) (“Once a party seeking judicial enforcement of this chapter demonstrates to the court that the defendant is subject to the requirements of this chapter, that the records in question are government records, and that the defendant refused to make those government records available for examination and copying by the plaintiff, the burden of going forward shall be on the defendant to demonstrate compliance with the requirements of this chapter.”).

\textsuperscript{98.} FOIA.GOV, http://www.foia.gov/data.html (last visited Nov. 4, 2012) (follow “Data” tab and select “Administration” and “FOIA Costs;” then select each agency).

\textsuperscript{99.} For example, Topeka, Kansas’s judicial system was so overburdened that it decriminalized domestic abuse because it did not have the resources to prosecute offenders. A.G. Sulzberger, \textit{Facing Cuts, a City Repeals Its Domestic Violence Law}, N.Y. TIMES, Oct.
In an effort to facilitate litigation for those who could not otherwise afford it, most jurisdictions provide for attorney's fees to be paid from the city's coffers to the requester if they prevail or "substantially prevail" in the lawsuit. This translates into large sums of taxpayer money going to private law firms or citizens instead of other valuable initiatives. For example, Detroit had to pay $450,000 in attorney's fees to the Detroit Free Press after the Kilpatrick litigation concluded.

Even the provisions that allow for attorney's fees to be paid may be inadequate to allow the media to pursue litigation because they still require the requester to front the expenses of a lawsuit and not all expenses are reimbursed. Further, attorney's fees awards are often discretionary, and the uncertainty of whether a prevailing requester will be given attorney's fees discourages the pursuit of an appeal for many people and media. Proceeding pro se is equally undesirable for most, especially in a federal forum.

Some grant funds have been established to support open records work by the media. The editor of a weekly newspaper who received one of


101. Litigation, supra note 5.

102. See Newman, supra note 79 (discussing a case where government officers stated they were surprised that newspapers had the resources to sue the state). For example, the Detroit Free Press spent about $216,000 more on the Kwame Kilpatrick litigation than it was awarded in attorney's fees, because not all expenses are included in such an award. See supra note 5 and accompanying text. This Comment does not argue that there is a lack of meaningful access to the judicial system. Rather, the cost of litigation in the current system clearly does not facilitate citizen access to government information and the purposes behind open records laws are thereby harmed. It is the lack of quick and easy access to documents, not the lack of access to the judicial system, that presents a problem.

103. Grunewald, supra note 14, at 23; Vaughn, supra note 9, at 189. Florida is one of only a few states where the award of attorney's fees is automatic. Hull, supra note 95, at 22.

104. Grunewald, supra note 14, at 23, 29 ("[F]rom the viewpoint of the unsophisticated requester the specter of federal court litigation to resolve a relatively modest request for access seems unduly imposing.").

105. See, e.g., New Knight FOI Fund, supra note 12 (describing the $2 million, three-year grant to the NFOIC to fund open records litigation created by the Knight Foundation); Sigma Delta Chi Foundation Grants, SOC'Y PROF. JOURNALISTS, http://www.spj.org/sdxgrants.asp (last visited Nov. 4, 2012). Also, the Freedom of Information Clearinghouse is funded by a grant from the Center for Study of Responsive Law and assists those seeking to access information from the government. Freedom of Information Clearinghouse, PUB. CITIZEN, http://www.citizen.org/litigation/free_info/ (last visited Nov. 4, 2012).
these grants, enabling him to sue a state college that was blatantly ignoring the dictates of the law, remarked,

This was a very important grant in that it helps small businesses like mine go after a huge higher education department backed by a team of lawyers and taxpayer money to fund their fight . . . . It’s great that a group like the [National Freedom of Information] Coalition has stepped up to help force a public agency share the public’s information.106

However, these types of funds cannot pay for every newspaper to bring a lawsuit for every open records dispute it encounters, and in some cases the grants do not cover the entire cost of a lawsuit.107 Likewise, pro bono or law student clinic initiatives are helpful but inadequate solutions to the entire problem.108 Thus, it is imperative that a cheaper alternative to litigation, such as an administrative appeals process, is available; otherwise, a substantial amount of public information will remain shrouded in secrecy. An appeals process would put journalists and public bodies on equal footing, preventing the “David and Goliath” situation that discourages many requesters dealing with uncooperative public bodies.

2. Processing Time

“Information is often only as useful as it is timely,” especially in the current fast-paced world of twenty-four-hour a day journalism.109 The espoused goals of the federal FOIA are the “‘efficient, prompt, and full disclosure of information,’” and courts recognize the importance of preventing

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107. The Knight FOI Fund, for example, does not cover attorney’s fees (only court costs, filing fees, consultation costs, and depositions costs), and has given out just nineteen grants around the country since its inception in early 2010. Knight FOI Fund, NAT’L FREEDOM INFO. COALITION, http://www.nfoic.org/knight-foi-fund (last visited Nov. 4, 2012). Although grants and coalitions are important, they are not enough to ensure ready access to government documents around the country.

108. Jones, supra note 19, at 628-29. Students or pro bono attorneys may help with an individual battle, but cannot coordinate the war; single cases may be resolved, but these volunteers lack the ability to coordinate litigation movements and take on significant, long suffering cases. Id. Further, as the number of media lawyers wanes, those able to train volunteers will become scarce. Id.

109. Davenport & Kwoka, supra note 26, at 386. One law professor explained the “good news”—that “FOIA remains a viable tool to pry loose . . . data if—but only if—there is no urgent need for the records and one has access to a legal team that can sustain the effort over a long haul.” David C. Vladeck, Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws, 86 TEX. L. REV. 1787, 1815 (2008).
undue delay.\textsuperscript{110} Yet, requesters face long delays on two fronts—both in getting a response to their requests and in going through litigation.\textsuperscript{111} Consequently, the time that it takes to resolve a FOIA request dispute often renders the request useless, because the relevant government official is long gone, the election has occurred, or the program was long since implemented or scrapped, and the information is no longer relevant or newsworthy.\textsuperscript{112}

Requesters often wait an extremely long time just for a response from public bodies, which may be because the body is swamped with requests or intentionally delaying. In 2010, the federal State Department had a median response time of 228 days for complex requests, and some requests had been pending for more than 1,500 days—more than four years.\textsuperscript{113} An open government advocate characterized the Department’s actions as “playing a waiting game in hopes that requesters ‘just go away’” and pointed out that “[n]o reporter works on a four-year time-cycle.”\textsuperscript{114} Similarly, after the Detroit Free Press sent a FOIA request for Kilpatrick’s records relating to the initial lawsuit settlement, Kilpatrick thwarted the impending disclosure by rejecting the previous settlement, keeping the information therein secret under a Michigan exemption for settlements that are not finalized.\textsuperscript{115}

\begin{itemize}
\item \textsuperscript{110} Senate of Puerto Rico ex rel. Judiciary Comm. v. U.S. Dep’t of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting Jordan v. U.S. Dep’t of Justice, 591 F.2d 753, 755 (D.C. Cir. 1978)).
\item \textsuperscript{111} Vaughn, supra note 9, at 188-89. This problem is compounded in the federal circuit, where the number of requests and inadequate resources to process them ensure substantial backlogs, and courts stay judicial action when an agency is processing its backlog. \textit{Id.}
\item \textsuperscript{112} Grunewald, supra note 14, at 20. Public bodies often take so long to respond to requests that the information is no longer relevant, and litigation simply adds more time to the process. \textit{Id.} One author said, “[T]he FOIA office at the [Securities and Exchange Commission] seems to have perfected the art of obfuscation and premeditated delay, apparently with the hope that I will grow frustrated by bureaucratic hurdles or because, by delaying, a publication deadline can pass.” William D. Cohan, Stonewalled by the S.E.C., \textit{N.Y. Times} (May 13, 2010, 9:28 PM), http://opinionator.blogs.nytimes.com/2010/05/13/stonewalled-by-the-s-e-c. A 2007 study found that the oldest pending federal FOIA request was more than twenty years old, and sixteen requesters had been waiting for more than fifteen years for results. Shane Scott, \textit{Survey Finds Action on Information Requests Can Take Years}, \textit{N.Y. Times}, July 2, 2007, at A15, available at http://www.nytimes.com/2007/07/02/washington/02secrets.html.
\item \textsuperscript{113} Josh Israel, \textit{State Department FOIA Requests Unanswered Four Long Years Later}, CENTER FOR PUB. INTEGRITY (July 6, 2011, 2:00 AM), http://www.publicintegrity.org/2011/07/06/5123/state-department-foia-requests-unanswered-four-long-years-later. The Department even sent letters to one reporter asking him to withdraw his FOIA requests to clean up its backlogs. \textit{Id.}
\item \textsuperscript{114} \textit{Id.} (quoting Bill Allison, Sunlight Found.).
\item \textsuperscript{115} Zappala, supra note 1, at 29. In the wake of the Kilpatrick scandal, Michigan courts made it explicitly clear that \textit{all} details of settlement agreements made with public funds are available as public records for citizens to inspect. David Ashenfelter & Joe Swickard, \textit{Ruling Called Victory for Public, Council}, \textit{PULITZER PRIZES} (Feb. 28, 2008),
\end{itemize}
Giving Teeth to the Watchdog

When requesters finally get a response, appealing the decision through litigation takes even longer. From 1979 to 1985, the median processing time for federal FOIA lawsuits from filing to disposition was seven to ten months in the district courts, and six to eight months in the D.C. Circuit Court of Appeals, although many cases took much longer.\textsuperscript{116} Even during litigation, government officials may work to stall the disclosure of records; Kilpatrick, for example, stalled the \textit{Detroit Free Press} case for weeks by refusing to testify, and when he did, he invoked his Fifth Amendment privileges eighty-two times.\textsuperscript{117} His lawyers also tried to demand that the \textit{Free Press} reveal the confidential source that tipped them off to the existence of the text messages in the first place, further complicating the lawsuit.\textsuperscript{118}

Indeed, the time it takes to get documents under FOIA laws also deters journalists from even pursuing many requests. Statistics suggest that reporters no longer turn to FOIA requests because they take too long, and those who do only use requests for investigative pieces that do not need to be done on a deadline.\textsuperscript{119} Reporters forego any attempt to get immediate news-worthy information for deadline stories, despite the short turnaround required by statutes.\textsuperscript{120}

The federal and Washington D.C. FOIA statutes attempt to address the processing time problem by shortening the time each party has to respond to pleadings.\textsuperscript{121} Another strategy for speeding up appeals is the use of expediency provisions, though they are rarely successfully invoked.\textsuperscript{122} Expediency provisions give open records cases priority on court dockets to facilitate

\textsuperscript{116}. Grunewald, supra note 14, at 8. Vladeck chronicles the story of the National Resource Defense Counsel’s (NRDC) attempt to obtain information about the safety of perchlorate for pregnant women and infants and any efforts the government was taking to remedy contamination. Vladeck, supra note 109, at 1798-817. After waiting over a year for the EPA to process the request, the NRDC filed suit. \textit{Id.} at 1802. Five years after their request, which included four years of litigation, three rounds of summary judgment briefing, extensive discovery, and hours reviewing documents, the case was still pending. \textit{Id.} at 1816.

\textsuperscript{117}. Zappala, supra note 1, at 30.

\textsuperscript{118}. \textit{Id.}

\textsuperscript{119}. Davenport & Kwoka, supra note 26, at 387. “To follow substantial agency processing delay with months and sometimes years of costly and delay-laden federal court litigation hardly seems the most desirable method for disposing of a media request for timely information on an issue of vital interest to the public.” Grunewald, supra note 14, at 29.

\textsuperscript{120}. Grunewald, supra note 14, at 29; see supra note 34 and accompanying text.

\textsuperscript{121}. Davenport & Kwoka, supra note 26, at 395. The federal government has shortened the time the government has to file an answer from 60 days to 30 days, while Washington D.C. shortened the response time from 60 days to 20 days. \textit{Id.}

\textsuperscript{122}. \textit{See infra} Appendix.
timely disclosures if appropriate in the case. However, most expediency provisions require the requester to show a "compelling need" or "good cause" for getting a resolution quickly. For media requesters seeking information from the federal government, a "compelling need" is present if the person is "primarily engaged in disseminating information and shows that there is urgency to inform the public concerning actual or alleged federal government activity." Although the existence of an expediency clause is a step in the right direction, very few requesters are able to show a compelling need or good cause under current court precedent. For example, requests for information about the death of Princess Diana, President Clinton's scandal involving his relationship with Monica Lewinsky, and post-September 11, 2001 questioning of Middle Eastern men were denied expedited processing. Further, in a true system of government transparency, requesters should be able to periodically examine records without knowing what they will find. Just as government inspectors may drop in unannounced or without knowledge of wrongdoing to ensure compliance with their regulations, the media should be able to "drop in" to the government's records to ensure nothing is being hidden from the people, without

123. Davenport & Kwoka, supra note 26, at 392. However, some jurisdictions have found that the judicial backlog reduces the effectiveness of these provisions as criminal cases and others take precedence. Vaughn, supra note 9, at 199.


125. Id. (first alteration in original) (quoting 5 U.S.C. § 552(a)(6)(E)(v)(II) (2006)). The D.C. Circuit established a three-part test for the "urgency to inform the public" provision. Id. (quoting Al-Fayed v. CIA, 254 F.3d 300, 306 (D.C. Cir. 2001)). The test asks "whether a request concerns a matter of current exigency to the American public, whether delaying a response would compromise a significant recognized interest, and whether the request concerns federal government activity." Id. (citing Al-Fayed, 254 F.3d at 306). Decisions made outside of this test appear to have a higher likelihood of success. Id. at 392-93.

126. Al-Fayed, 254 F.3d at 302.


129. Davenport & Kwoka, supra note 26, at 392-93.

130. For example, California farmers may be subject to announced or unannounced visits from government inspectors to determine if they are complying with food safety practices. California Food Safety Program Stresses Value of Government Oversight, BUS. WIRE (Jan. 12, 2012, 6:48 PM), http://www.businesswire.com/news/home/20120112006485/en/California-Food-Safety-Program-Stresses-Government-Oversight. Similarly, Occupational Safety and Health Act (OSHA) inspectors are authorized to enter work places, inspect conditions, question employees and employers, and inspect employer records concerning injuries and deaths, to determine if there are any problems with worker safety. JOSPEH W. LITTLE, THOMAS A. EATON & GARY R. SMITH, WORKERS' COMPENSATION: CASES AND MATERIALS 45 (6th ed. 2010). These inspectors do not need probable cause to get a warrant to search a workplace; only an administrative plan with specific neutral criteria is needed. Id.
advance knowledge of wrongdoing.\textsuperscript{131} Requiring a showing of compelling need defeats a large part of the media's "watchdog" role and thwarts the goals of government transparency.

These types of provisions are rare, so in most jurisdictions judicial review is too slow to serve the purposes of FOIA acts.\textsuperscript{132} Even with expediency provisions and shortened response times, journalists on a deadline will still often find information stale by the time a court rules on the propriety of its disclosure. Thus, it is necessary for many states to implement administrative appeals processes to speed up the resolution of open records disputes.

3. Quality of Decision Making

A third concern with using the judiciary as the sole source of oversight for agencies is the quality of decision making.\textsuperscript{133} Courts infrequently hear open records dispute cases and might lack the subject-matter expertise to develop consistent case law in accordance with the principles behind the open records statutes.\textsuperscript{134} Courts may also rely too much on the agency's characterization of the records at issue, depriving requesters of a neutral, truly de novo review of their request's denial.\textsuperscript{135} Given the subjectivity of agencies to political pressures\textsuperscript{136} and the usual culture of preventing disclosure whenever possible,\textsuperscript{137} there is reason to be concerned with a court de-

\textsuperscript{131} The media should not have to rely on whistleblowers, and thus have to deal with the problems that come with using such questionably reliable anonymous sources, to get information about the inner workings of government.

\textsuperscript{132} "[B]ecause there is no practicable way to compensate a requester for delay in obtaining disclosure, prompt resolution of the dispute is even more important. . . . [B]ecause the agency position of nondisclosure prevails unless and until it is reversed, the burden of delay falls exclusively on the requester." Grunewald, supra note 14, at 33.

\textsuperscript{133} Davenport \& Kwoka, supra note 26, at 370.

\textsuperscript{134} \textit{Id}. Indeed, the prominent view is that "federal courts are overburdened with controversies that do not merit the attention of an Article III body and that would be handled more appropriately by specialized, non-Article III tribunals." Grunewald, supra note 14, at 35.

\textsuperscript{135} Davenport \& Kwoka, supra note 26, at 370.

\textsuperscript{136} \textit{Id}. at 369.

\textsuperscript{137} \textit{Id}. at 377-78; Daxton R. "Chip" Stewart, \textit{Let the Sunshine In, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws}, 15 COMM. L. \& POL'Y 265, 300 (2010). Mitchell Pearlman, former director of the Connecticut Freedom of Information Commission, described the difficulties with the current information culture:

\begin{quote}
Everywhere I go, government information is power. People who control information, even at the level of a clerk, are reluctant to share it because it diminishes their power. Even if their position is innocuous, requesters will be given a hard time. In most jurisdictions, if you go in there and ask and they say, "No, you can't have it," people say thank you and goodbye. It's the path of least resistance. I think there's a culture of secrecy in any bureaucracy, not just in government but every-
\end{quote}
ferring to an agency's determination of what is in the public interest to disclose. Thus, an independent administrative appeals committee with expertise in FOIA laws, which is be designed to be independent and not defer to agency decisions, would be superior for fair dispute resolution.\textsuperscript{138}

4. Inadequate Sanctions and Enforcement

A last concern that arises when private litigation is used to enforce open records acts is the lack of deterrence or consequences for misconduct by government officials.\textsuperscript{139} Financially, the penalty for violating FOIA statutes is often an award of attorney's fees, which usually comes from the city's pocket and does not affect the individual official who denied the request.\textsuperscript{140} Some courts do not award attorney's fees or sanctions at all if the agency releases the requested document before the court issues its final order, allowing significant delay with no consequences.\textsuperscript{141} When punitive damages or fines are available, they are often a pittance and rarely imposed; the Washington D.C. FOIA, for example, provides for a fine of no more than $100 for arbitrary and capricious violations of the law, and no such fine has ever been imposed.\textsuperscript{142} The median maximum penalty among the thirty-five jurisdictions that allow for civil or criminal penalties is just $1,000, and such an award often requires the plaintiff to show some sort of knowing or willful violation of the law, a difficult standard to meet.\textsuperscript{143} Although the twenty states\textsuperscript{144} that impose possible criminal penalties on public
employees seem to give more incentive for government officials to comply with open records laws, those sanctions are also rarely enforced. Likewise, eight jurisdictions allow for official disciplinary actions against individual actors who violate open records acts. These potential deterrents range from suspension to impeachment, but are also rarely imposed.

The simple knowledge that litigation is rare and the media can rarely afford it detracts from the efficacy of sanctions and officials’ willingness to comply with the law. Administrators at Northern New Mexico College, for example, brazenly ignored open records requests from a weekly newspaper for more than six months; the paper sought financial information on the college’s capital projects and recruiting of a new president. The complaint alleged that the college said it was “too busy to bother with responding,” and never acknowledged the requests, asked for an extension, or explained any grounds for refusing to disclose the information. Such blatant disregard for the dictates of FOIA laws could be prevented if government officials knew citizens had an effective way to bring the government body’s actions to light and impose sanctions.

In the absence of effective sanctions, government officials are more likely to sit on politically sensitive information that they would rather not disclose. If the record request is denied and the requester is diligent and can afford it, he or she may pursue private litigation. However, the prohibitive cost and long resolution time mean that many abuses go unpunished.

Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming. Id. at 290 n.185.

145. Id. at 290-95. “While jail sentences may in theory be a strong deterrent against misconduct by public officials, sentences are so rarely imposed, and the lengths of punishment are so short, that the threat of jail time does not serve as an effective way to encourage compliance with the law.” Id. at 295. Likewise, “criminal fines . . . are rarely, if ever, enforced.” Id. at 293.

146. These jurisdictions include Florida, Iowa, Maryland, Minnesota, Missouri, Nebraska, Vermont, and the federal government. Id. at 288 n.165.

147. Id. at 288. “[O]penness advocates in only one state can recall the law [allowing a public official to be removed from office] ever being used successfully, and then only once.” Hull, supra note 95, at 23.

148. One attorney who handles media law issues said, “[I]n our tough economic times, public bodies know that there is a good chance the matter will just be dropped.” NFOIC SURVEY, supra note 22, at 11. Another attorney said open records act requests are often denied or ignored “unless there is a credible threat of a lawsuit.” Id. He recounted the story of a paper seeking access to the credit card statements of a college’s board of trustees; the board did not disclose the records until the newspaper prepared to file a lawsuit. Id.


150. Id.

151. See supra notes 68, 148 and accompanying text (giving examples of public bodies resisting disclosure).
because most disputes never go to court.\textsuperscript{152} Alternatives to litigation will rejuvenate open records systems and public access to records by solving this lack of enforcement problem.

Overall, when private litigation is the only oversight of government bodies' decisions to disclose or withhold information, the purposes of FOI statutes are not served. High costs, long delays, judges unfamiliar with open records statutes, and inadequate sanctions combine to cripple the implementation of these important laws, harming democratic participation and government accountability along the way. Accordingly, litigation cannot be the only way to appeal a record denial if democracy is going to thrive in the United States; states must implement or strengthen administrative appeals processes.

II. FEDERAL AND STATE APPROACHES TO OPEN RECORDS APPEALS

Although many states effectively leave requesters on their own to pursue open records appeals through the judiciary, some states and the federal government have taken steps to reduce the burden on requesters and the state's resources and more effectively resolve disputes.\textsuperscript{153} States may provide resources to educate the public and government officials about their rights and duties under open records laws.\textsuperscript{154} Measures like creating an ombudsman\textsuperscript{155} or administrative appeals process, or authorizing a state attorney general to get involved with appeals have been implemented to the benefit of requesters and government bodies alike.\textsuperscript{156}

A. Involvement in Litigation

In every state and the federal government, citizens have a chance at some point to use litigation to resolve their open records disputes.\textsuperscript{157} Thirteen states currently have provisions in their open records acts allowing for the state to somehow get involved when a citizen desires to appeal an agen-

\begin{footnotesize}
\begin{enumerate}
\item[152.] See supra Subsections I.B.1-2 (discussing the problems litigation creates when it is the only way to resolve every open records dispute).
\item[153.] See generally Beckett, supra note 8 (comparing the measures taken by each state to resolve open records disputes).
\item[154.] See generally id.
\item[155.] An ombudsman is "an independent and non-partisan officer of the legislature . . . who supervises the administration," dealing with complaints from the public against administrative agencies. Grunewald, supra note 14, at 54 (quoting DONALD C. ROWAT, THE OMBUDSMAN: CITIZEN'S DEFENDER xxiv (1965)). An ombudsman usually has the authority to "investigate, criticize and publicize, but not to reverse, administrative action." Id. (quoting Rowat, supra, at xxiv).
\item[156.] Beckett, supra note 8.
\item[157.] Id. at 19.
\end{enumerate}
\end{footnotesize}
cy’s denial of access to records through such litigation. Most of those states authorize the attorney general or local prosecutor to enforce open records acts by prosecuting violations on behalf of the requester, either standing in the requester’s shoes or seeking to impose criminal penalties. However, the authorization for attorneys general to get involved is discretionary, and in most states prosecution is rare. The political nature of the district attorney or attorney general often further complicates their active involvement in open records cases.

Some attorneys general have the specific task of defending a government agency in any challenge to its failure to disclose records. Delaware’s attorney general, uniquely, may conduct an investigation to determine whether a violation has occurred, and then may represent the state agency or the individual depending on the investigation’s findings. Finally, five jurisdictions have provisions that give requesters a better chance at timely resolution of their access litigation. Mississippi, North Carolina, and Nebraska have expediency clauses, which allow FOIA cases to take precedence over others on the docket, while Tennessee and the federal government have shortened pleading response times to speed up the process.

B. Education and Guidance About Application of Law

More than half of the states task some government official with providing guidance and education for requesters trying to use open records acts, state agencies trying to comply with them, or both. Many attorneys

158. See infra Appendix (Alabama, Arkansas, Delaware, Georgia, Iowa, Kansas, Maine, Massachusetts, Missouri, New Mexico, Rhode Island, Texas, and Wisconsin).
159. One such provision is used in New Mexico. N.M. STAT. ANN. § 14-2-12 (2011) (noting that a citizen may ask the attorney general to take their case, and he or she will stand in their place for purposes of the appeal).
160. In Georgia, for example, the state did not criminally prosecute any open meetings or open records complaints from 1998 until at least 2011. Bluestein, supra note 54; see also Open Government Guide, supra note 34 (choose 50 state comparison of “Attorney General’s Role”) (detailing the various state approaches, with many lawyers commenting on the infrequency of attorney general prosecution).
161. Hull, supra note 95, at 23. Bob Johnson, then-executive director of the New Mexico Foundation for Open Government, said, “A district attorney has never done an effective job of enforcement because they are local politicians.” Id.
162. This is the case in New York, Oregon, and Tennessee. See infra Appendix.
163. DEL. CODE ANN. tit. 29, § 10005(b), (e) (2012). The Delaware attorney general “shall not” represent the agency if it is guilty of “malfeasance.” Beckett, supra note 8, at 19.
164. See infra Appendix (D.C., Mississippi, North Carolina, Nebraska, and Tennessee); 5 USC § 552(a)(4)(C) (2013).
general can issue advisory opinions regarding how a statute should be interpreted upon request.\textsuperscript{166} Other states provide the opportunity for citizens or state agencies to seek informal advice through an attorney general or administrative agency.\textsuperscript{167} Further, many attorneys general or administrative agencies conduct training sessions for state agents, publish guides on open records laws, and present educational seminars to ensure that open records laws are well understood by requesters and officials alike.\textsuperscript{168} However, in some states, advice and guidance may only be available to state agencies.\textsuperscript{169}

C. Mediation Programs

Several states have enacted mediation programs within the attorney general’s office or an independent administrative body responsible for open records dispute resolution.\textsuperscript{170} All mediation processes currently in use are informal and voluntary.\textsuperscript{171} The federal government, for example, provides mediation services for disputes over its FOIA through the Office of Government Information Services (OGIS), created in 2007 by the Openness Promotes Effectiveness in our National (OPEN) Government Act.\textsuperscript{172} The OGIS can provide formal mediation, facilitation, or informal ombudsman services, depending on the needs of the requester and agency.\textsuperscript{173}

\textsuperscript{166} See infra Appendix (Alabama, Arkansas, Colorado, Florida, Maryland, Minnesota, Missouri, Montana, New Jersey, North Carolina, Pennsylvania, South Carolina, and West Virginia).

\textsuperscript{167} See infra Appendix (Hawaii, Indiana, Massachusetts, New Hampshire, New Jersey, Utah, Virginia, Wisconsin, and Wyoming). For example, New Jersey offers an extensive phone and web help line to give assistance on exercising or applying its open records law. Got an OPRA Question?, Gov'T RECORDS COUNCIL, http://www.state.nj.us/grc/public/question/ (last visited Jan. 12, 2013). The help line and website assistance are statutorily required. NJ STAT. ANN. § 5:105-1.5 (West 2013). Massachusetts’ Division of Public Records is also staffed with attorneys who will respond to inquiries from the public. WILLIAM F. GALVIN, A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW 5 (May 2012).

\textsuperscript{168} See infra Appendix (Connecticut, Hawaii, Florida, Idaho, Indiana, New Jersey, New Mexico, Pennsylvania, South Carolina, and West Virginia).

\textsuperscript{169} Attorneys general in Montana, New Hampshire, North Carolina, Utah, West Virginia, and Wyoming, for example, will only respond to inquiries from state agencies. See infra Appendix.

\textsuperscript{170} See infra Appendix (Connecticut, Florida, Georgia, Illinois, Mississippi, New Jersey, and Pennsylvania). Connecticut, for example, assigns an ombudsman to every appeal that comes to its Freedom of Information Commission for resolution, and the ombudsman acts as a mediator and liaison between the parties to try to reach a resolution of the issue even before an administrative hearing can occur. See infra Appendix (Connecticut).

\textsuperscript{171} See infra Appendix (Connecticut, Georgia, Florida, Illinois, Mississippi, New Jersey, and Pennsylvania).


\textsuperscript{173} Id.
D. Appeals Processes Prior to Litigation

Significantly, some states and the federal government have created ways for disputes to be heard and resolved by a third party before litigation is necessary.\(^{174}\) Nearly half of states, the District of Columbia, and the federal government have created appeals processes for requesters to attempt to settle their disputes so that costly and slow litigation is not the only option.\(^{175}\) These measures vary widely in their investigatory and enforcement powers, political independence, and the deference a reviewing court will grant prior findings.\(^{176}\) Yet, they all represent steps toward the accomplishment of effective access to government information.

Often these agencies will employ a small administrative staff to answer inquiries and organize dispute resolutions, while a group or commission of expert members will hold periodic hearings or meetings to decide specific disputes. One factor significant for administrative appeals bodies is the identity of its membership. The background of each member and his or her appointment process can play a large role in whether the committee is able to make politically independent decisions that fairly balance the concerns at issue in any open records dispute.\(^{177}\) The State Records Committee in Utah, for example, ensures that it will be politically independent and take into consideration every side of the issue by incorporating seven diverse individuals, including members of the government, lay public, and media.\(^{178}\) Connecticut’s Freedom of Information Commission maintains political in-

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176. For example, where a committee has a lot of expertise, like the Connecticut Freedom of Information Commission, the courts have often given greater weight to its decisions when engaging in judicial interpretation of the statute. Vaughn, supra note 9, at 203.

177. See infra Subsection III.B.1.

178. UTAH CODE ANN. § 63G-2-501(1) (West, Westlaw through 2012 Sess.). These members include:

(a) an individual in the private sector whose profession requires him to create or manage records that if created by a governmental entity would be private or controlled; (b) the state auditor or the auditor’s designee; (c) the director of the Division of State History or the director’s designee; (d) the governor or the governor’s designee; (e) one citizen member; (f) one elected official representing political subdivisions; and (g) one individual representing the news media.

Id. Similarly, Virginia’s Freedom of Information Advisory committee is comprised of twelve members plucked from the state executive and legislative government, local government, the media, and the citizenry. Cheh, supra note 138, at 352.
dependence by prohibiting more than three of its five members from being from the same party. 179

1. Agencies with Binding Authority

In some states, administrative agencies or attorneys general have been equipped to investigate and resolve disputes, and their findings result in binding decisions. 180 One such agency is Connecticut’s Freedom of Information Commission, which was one of the first administrative open records agencies and has long been heralded as an exemplary way to handle those disputes. 181 Upon notification from a requester, the Commission can review the request, subpoena witnesses, examine relevant documents, and hold hearings where the parties can present additional evidence and examine witnesses. 182 The member of the Commission who hears a dispute issues an opinion that is binding, but it is subject to review by the full Commission and then limited review in state court. 183 The Commission can impose penalties upon public bodies that fail to comply with its orders. 184 While the Kentucky attorney general provides a similar hearing process, it does not have

179. CONN. GEN. STAT. § 1-205 (Supp. 2012). The five members are also appointed by the governor with the approval of the legislature. Id.; Vaughn, supra note 9, at 185, 193 n.44.

180. See infra Appendix (Connecticut, Illinois, Massachusetts, Pennsylvania, South Dakota, Utah, Kentucky, and Nebraska); Beckett, supra note 8, at 16.

181. Beckett, supra note 8, at 16; CONN. GEN. STAT. § 1-205 (Supp. 2012). In 2010, the Commission had five members, twenty-two staff, and an operating budget of nearly $2.1 million. Cheh, supra note 138, at 351. The Commission has been consolidated with the newly-created Office of Governmental Accountability. OFF. GOV’T ACCOUNTABILITY: FREEDOM INFO. COMMISSION, http://www.ct.gov/foi/site/default.asp?ogaNav=1 (last visited Nov. 4, 2012). The impact of this change on one of the strongest open records administrative agencies in the country presents an important point for later study.


184. Id.; Beckett, supra note 8, at 16-17. Likewise, Illinois has a Public Access Counselor who can subpoena witnesses as part of the investigation and issue either an advisory or binding opinion to resolve disputes. 5 ILL. COMP. STAT. ANN. 140/9.5 (West Supp. 2012). However, even though its decision is binding, the Public Access Counselor does not have authority to impose sanctions, and the attorney general must take legal action to enforce the Counselor’s opinion through court proceedings. Id. Massachusetts’ Supervisor of Records and Utah’s State Records Committee also perform similar roles in access disputes. UTAH CODE ANN. § 63G-2-403(11)-(12) (West, Westlaw through 2012 Sess.); MASS. GEN. LAWS ANN. ch. 66, § 10(b) (West 2011); see also WILLIAM FRANCIS GALVIN, A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAWS 29, 38-39 (2012), available at http://www.sec.state.ma.us/pre/prepdf/guide.pdf.
enforcement powers. However, requesters who bring a lawsuit to force compliance must only show that the attorney general found in their favor to win a favorable judgment. Citizens in some other states can appeal to a general office tasked with resolving complaints about all administrative decisions. Such offices have less specialized knowledge about FOIA but can at least intervene when a government body is acting arbitrarily in clear violation of the law.

2. Agencies Without Binding Authority

Some states provide for a review process to investigate disputes that will result in an advisory opinion. Enforcement must come from a judge, who may give some deference to the agency’s findings. Indiana’s Public Access Counselor, for example, plays a significant role in resolving access disputes and has enjoyed the cooperation of most government bodies despite its lack of authority to require adherence. While requesters do not have to avail themselves of the Public Access Counselor’s services before pursuing litigation, choosing not to do so precludes an award of attorney’s fees in any subsequent litigation. The federal government’s OGIS also provides oversight of compliance with FOIA and can conduct audits on agencies. For those disputing an agency denial of a FOIA request, the

185. Kentucky and Nebraska provide hearing processes through the Office of the Attorney General, which result in binding opinions. KY. REV. STAT. ANN. § 61.880 (West 2011); NEB. REV. STAT. § 84-712.03 (2011); Beckett, supra note 8, at 19. In Kentucky, orders from the attorney general have the force of law unless they are appealed to the judiciary within 30 days. KY. REV. STAT. ANN. § 61.880 (West 2011).

186. KY. REV. STAT. ANN. § 61.880 (West 2011); Beckett, supra note 8, at 19.


188. See infra Appendix (Florida, Indiana, Minnesota, Mississippi, Arizona, and Virginia).


190. IND. CODE § 5-14-4-10 (2012).

191. Id. Other successful examples of this model include Florida’s Office of Open Government, which was uniquely created by the Governor’s executive order rather than statute, and New York’s State Committee on Open Government. See N.Y. PUB. OFF. LAW § 84-90 (McKinney 2008); Exec. Order No. 11-03 (2011), available at http://www.flygov.com/wp-content/uploads/2011/01/scott.co._three_.pdf. Florida’s Office of Open Government has no authority over legislature-created or judicial bodies, and thus only polices the governor’s office and other executively-created bodies. Exec. Order No. 11-03, supra.

192. Vladeck, supra note 109, at 1820.
Office provides mediation services and has the ability to issue advisory opinions concerning individual conflicts if mediation fails.193

E. Pending Legislation

Washington D.C. created an Open Government Office in 2010 that deals only with enforcement of its open meetings statute.194 A bill introduced on March 15, 2011 would expand the body’s powers to encompass enforcement of the Freedom of Information Act as well.195 The bill would task the Open Government Office with issuing advisory opinions, providing educational programs and training, and conducting informal mediation services.196 Further, the bill would give the Office the power to subpoena witnesses, access documents, and issue orders compelling public bodies acting in violation of the law to disclose the record.197 If the public body refused to comply, the Office could bring a lawsuit against it for declaratory or injunctive relief.198

Washington State is also considering a group of bills to reform its Public Records Act.199 The attorney general, who now operates an ombudsman office that deals with requester complaints but cannot issue binding decisions, has proposed a bill that would establish an Office of Open Records within the State’s Office of Administrative Hearings to resolve disputes before litigation.200 Another bill proposes a voluntary conference procedure between the requester and the agency before litigation begins.201

197. Id. at 4-5, 10.
198. Id. at 10-11.
The general trend in FOIA reform is becoming the creation of prelitigation dispute resolution methods.

F. Michigan’s Freedom of Information Act

While the costly FOIA lawsuit dealing with Kwame Kilpatrick’s incriminating text messages may be the most high-profile FOIA issue Michigan has seen recently, it is by no means the only example of the problems the media often have with using Michigan’s FOIA. Journalists in Michigan face an uphill battle in using FOIA requests, partially because of the lack of enforcement and appeals processes. While requesters may appeal a denial to the head of the public body from which they are seeking information, after that the only option is litigation. The attorney general does not assist citizens or prosecute violations on their behalf, and there is no administrative body to hear appeals or even give informal advice. Requesters are left on their own to pursue litigation. FOIA litigation is rare, and often public officials responsible for answering FOIA requests either do not know enough about the law to comply with it, or knowingly violate the law, understanding they will not likely be held responsible for their actions.

Anecdotal reports suggest that some public officials in Michigan routinely deny valid FOIA requests, ignore them altogether, or attempt to prevent disclosure by charging exorbitant fees. The Michigan State Police

Failure to use the conference procedure would foreclose the availability of sanction for violations. See id. 202. MICH. COMP. LAWS § 15.240 (2009). Appeals to the head of an agency are often fruitless; for example, after the FOIA request of Michigan State University student journalists seeking information about an assault on campus was denied, they appealed to the University and cursorily received the same result. Stuart J. Dunnings, III & Lena Golovnin, When John Q. Citizen’s Private Information Became Public: State News v. Michigan State University—One Case’s Effect on Michigan’s FOIA Law, 24 T.M. COOLEY L. REV. 263, 266-67 (2007).


204. § 15.240.

205. See Kelsie Thompson & Samantha Radecki, The Price of Freedom, ST. NEWS (Feb. 14, 2012, 9:28 AM), http://www.statenews.com/index.php/article/2012/02/the_price_of_freedom. Public bodies in Michigan often think that requests have “little chance of being legally challenged” due to the expense and time required to pursue a lawsuit. Id. Journalism professor and president of the State News Board of Directors Jane Briggs-Bunting said, “They assume that no one is going to push to get it . . . They’re not deliberately trying to violate the law, but they’re skating awfully close to it.” Id.

206. For example, one woman experienced months of delays, vague responses that ignored some of her requests, and an adversarial tone when asking for information about how her local school district spent public funds. Dawn Schaller, Dr. Rock Spent $1,700 of CCS District Money on Attorneys to Keep from Giving Me Documents I Requested Through FOIA, ACROSSTHEBOARD—CLARKSTON (Jan. 17, 2012), http://acrosstheboard-clarkston.blogspot.com/2012/01/dr-rock-spent-1700-of-ccs-district.html. She ended up pay-
attempted to charge $6.8 million to fulfill a FOIA request in 2009 concerning the state’s use of a $129 million federal Homeland Security grant.207 Other requesters waited more than three years for a response on a FOIA request concerning the police’s use of a device that can extract information from a cell phone without the owner’s knowledge, and then were told a response to the FOIA would cost more than $500,000.208

Further, student journalists at Michigan State University’s State News spent $100,000 and three years fighting the university’s denial of their FOIA request for details about the police’s response to an assault that occurred in a campus dorm room.209 After litigating the case up to the Michigan Supreme Court, the story had become stale; the incident occurred in February 2006 and the report was finally released in May 2009.210 Even more, the sixteen pages that were eventually released had so much information blacked out that the State News gained little information from the eventual disclosure.211

Compounding the problems with uncooperative officials are severe budget and staff cuts at many newspapers around the state. In November 2011, the owner of most of the major newspapers in Michigan laid off 550 employees around the state,212 and most of those papers have cut back home
delivery to a few days a week.\textsuperscript{213} After laying off nearly 45\% of its workforce,\textsuperscript{214} one can surmise that the state’s struggling newspapers simply cannot go after every public official who abuses FOIA. These budget struggles, combined with public bodies that may charge high fees to discourage disclosure, force reporters to “choose their battles” very wisely.\textsuperscript{215}

If Michigan had an administrative appeals process, Kilpatrick’s FOIA lawsuit may not have tied up the courts for months, the State News would not have had to spend $100,000 in the court system, and many more important stories could have been told when they were newsworthy.\textsuperscript{216} Even more, implementation of such a process could change the culture of animus nondisclosure, as FOIA officers would be accountable to someone, and struggling newspapers would not have to choose between aggressively pursuing the news and laying off more workers. Clearly, legislators in Michigan and other states with similar FOIA laws must take action to ensure that citizens have effective access to government documents and public officials feel compelled to follow the law. Government transparency and accountability, so imperative to American democracy, are ill-preserved by the current appeals and enforcement provisions of FOIA statutes in Michigan and many other states.\textsuperscript{217} Access to information about the government must not be limited to those who can afford the time and cost of litigation.\textsuperscript{218}


214. Jones, \textit{supra} note 212.

215. Thompson & Radecki, \textit{supra} note 205. One reporter said he has to be very selective about when to use FOIA because of the excessive fees charged by most public bodies to fulfill FOIA requests. \textit{Id}. He said, “It seems a lot more expensive than it used to be—money is so much tighter in the (news) industry. . . . We’ve FOIAed stuff, and it was several hundred dollars, so we dropped it.” \textit{Id}.

216. This concept is widely recognized in jurisdictions without pre-litigation dispute resolution processes; one author said, “If a public access counselor was available in Missouri to intervene, an opinion could have been issued within weeks to resolve the dispute” in a 2003 case by the Kansas City Star which took five years to resolve in court and cost the city more than $77,000 in an attorney’s fee award. Maneke & Barton, \textit{supra} note 25, at 79.

217. See \textit{supra} Part I.

218. Reliance on courts to resolve open records disputes “limits the practical availability of neutral intervention to those parties who can afford the cost and delay inherent in that process,” and also forces many parties “to use a mechanism more complex and formal than may be necessary to resolve their particular claim.” Grunewald, \textit{supra} note 14, at 56.
III. WHAT IS EFFECTIVE? AN ANALYSIS OF THE STATE AND FEDERAL APPROACHES THAT BEST SERVE THE PURPOSES OF OPEN RECORDS ACTS

Clearly, where the only option to appeal a denied request is litigation, there is rarely effective enforcement of open records laws.219 Although statutory provisions that allow for state intervention in litigation may address some concerns with effective access to government documents, none adequately address all of the concerns with open records appeals.220 Likewise, education, training, and general guidance on how to apply open records laws are imperative to their effective application, but alone, such measures do not do enough to ensure that requesters have effective access to government records without undue cost, delay, and effort.221

Instead, provisions that allow for some course of action for requesters to appeal a FOIA request denial before litigation are necessary if the purposes of open records acts, and the underlying values of government transparency, accountability, and democratic participation, are going to be upheld.222 States’ experiences with mediation, administrative hearings, and the ability to issue binding or advisory opinions on specific disputes all present important considerations in the search for the ideal FOIA enforcement scheme. After thirty years of working with FOI laws, the Executive Director of New York’s Committee on Open Government, Robert Freeman, said simply, “[W]e must provide realistic means of enforcing our laws so that average people can assert their rights in a meaningful way.”223

219. See supra Section I.B (discussing the inadequacies of litigation as the sole open records dispute resolution process); Christensen, supra note 83, at 1075-76. Christensen expounds on the inadequate enforcement of Georgia’s open meetings and open records laws, explaining that litigation is especially unacceptable to remedy “small” issues, like overcharging for copying fees. See Christensen, supra note 83, at 1091. Christensen proposes creating a commission to hear and adjudicate issues, so that the law would have effective enforcement power. Id.

220. See supra Section II.A (discussing the federal and state approaches to involvement in open records act litigation). While measures that lower costs to requesters or allow open records cases to take precedence on the docket are clearly helpful, they are not enough to ensure meaningful access to public documents. See supra Section II.A.

221. See supra Section II.B (discussing educational and advice programs for open records requesters and custodians).

222. “[T]he inherent imbalance in knowledge between the agency and the requester of the facts relevant to the resolution of the dispute generates distrust that often can be overcome only by placing the matter in the hands of a neutral decisionmaker.” Grunewald, supra note 14, at 31. “[B]ecause the denial of access represents a sheer assertion of governmental authority and because there may be no alternative source for the information sought, the typical requester stands in a relatively weak position to effect any change in the agency posture short of litigation.” Id. at 31-32.

223. Freeman, supra note 31, at 10. “How do we enforce our [Freedom of Information] laws and challenge foot-dragging and claims of secrecy? In the United States, we go to court.” Id. The problem, though, is that “it takes time and money to initiate a judicial pro-
A. Let's Compare Notes: What Works?

Because every state has a slightly different open records statute, an examination of each procedure can identify what works and what does not work in the search for effective open records procedures. Thus, it is illuminating to examine states that have had great success, great failure, or have dramatically shifted their open records policies and procedures to a more successful model. The states that have set the bar for having exemplary open records processes all have one thing in common—an independent body that can help resolve disputes before litigation is necessary. States with weak open records laws almost uniformly leave requesters on their own to enforce the law themselves through private lawsuits or have ineffective intermediate appeals systems.

When Illinois set out to strengthen its FOIA law in 2009, it did so by focusing on making its Public Access Counselor more effective. The state found that the biggest flaw in its FOIA was the lack of effective enforcement provisions. The existing Public Access Counselor could conduct mediation and issue advisory letters encouraging the public bodies to comply. However, these measures were inadequate to promote compliance with the law, and litigation presented such an uphill battle that requesters often gave up. To remedy these problems, the state enabled its Public Access Counselor to mediate disputes, issue nonbinding opinions, or issue binding opinions after investigating a dispute. The state went from "set[ting] the bar for the rest of the country in the areas of scandal and public corruption," due in part to highly ineffective open records laws that thwarted detection, to having one of the strongest open records laws in the preceding, and most people are unwilling or unable to do so." Id. Freeman explains that the United States is falling behind other countries in freedom of information because there is no effective enforcement mechanism for average citizens. See id.

224. PEARLMAN, supra note 10, at 40. Any time an administrative body issues an opinion that documents should be released, it becomes more difficult for the agency to deny the requester the access they seek "since the Committee possesses special expertise, and because if the request comes from the news media, significant publicity of the opinion may follow." Vaughn, supra note 9, at 202.

225. Consider Connecticut, New York, and Florida, all of which have been identified as states with strong open records laws and have independent bodies that play a role in dispute resolution. See Murphy, supra note 49; Davenport & Kwoka, supra note 26, at 371-72; Amy L. Edwards, Florida Laws Open Book on Casey Anthony’s Life, ORLANDO SENTINEL (Mar. 15, 2009), http://articles.orlandosentinel.com/2009-03-15/news/sunshine15_1_anthony-case-media-contacts-jail.


227. Id. at 68.

228. Id.

229. Id. at 68-69.

230. Id. at 73.
country.\textsuperscript{231} Other jurisdictions have had equal success with administrative hearings procedures that similarly result in binding opinions or have the flexibility to tackle each dispute in the most appropriate manner.\textsuperscript{232} Connecticut's Freedom of Information Commission, for example, has long been regarded as an example of the strongest open records appeals processes in the country because it has the authority to issue binding decisions and punish the public bodies that refuse to comply with its orders.\textsuperscript{233}

In contrast, FOIA appeals processes that are left to attorneys general are almost uniformly ineffective, because attorneys general have insufficient time, interest, or resources to prosecute open records requests.\textsuperscript{234} If used often, attorney general prosecution of violations would relieve the burden on requesters and show government bodies they will be held accountable for their actions. However, experience has shown that this is not a practical reality; Georgia's attorney general, for example, did not prosecute any violations for at least thirteen years.\textsuperscript{235}

Further, the attorney general's office is a "political arm of the government," and thus is subject to conflicts of interest and political manipulation that hinder open records law utilization.\textsuperscript{236} Actual or perceived conflicts of interest arise when the attorney general's office, which is often tasked with advising government bodies, finds itself in an adversarial relationship with that body by choosing to represent a requester.\textsuperscript{237} Attorneys general may also sway with the politics of the governor or president, or have their

\begin{itemize}
  \item \textsuperscript{231} \textit{Id.} at 63-65.
  \item \textsuperscript{232} See Beckett, \textit{supra} note 8, at 16.
  \item \textsuperscript{233} See \textit{id.}; Cheh, \textit{supra} note 138, at 351.
  \item \textsuperscript{234} See Bluestein, \textit{supra} note 54.
  \item \textsuperscript{235} \textit{Id.} Stefan Ritter, a senior assistant attorney general, said the attorney general's office had considered prosecuting a few cases to make an example out of the offenders, but he didn't know if it had the resources to do so. \textit{Id.}
  \item \textsuperscript{236} Mitchell W. Pearlman, \textit{FOI Enforcement Regimes}, RIGHT2INFO.ORG, http://right2info.org/resources/publications/FOI%20Enforcement%20Models.docx/view (last visited Nov. 4, 2012). Because of this political nature of the attorney general, any enforcement model within that office tends to lack citizen trust and confidence, and thus is not well regarded by the people. \textit{Id.}; see also Grunewald, \textit{supra} note 14, at 62.
  \item \textsuperscript{237} See MITCHELL W. PEARLMAN, N.J. FOUND. FOR OPEN GOV'T, AN ANALYSIS OF NEW JERSEY'S OPEN PUBLIC RECORDS ACT AND GOVERNMENT RECORDS COUNCIL 24 (2006), \textit{available} at http://www.divshare.com/download/2114352-ff6. New Jersey solved many conflict of interest problems by giving the Government Records Council its own independent counsel, so it does not get legal advice from the attorney general any longer. \textit{Id.}
\end{itemize}
own reasons to resist disclosure of government files, crippling the purposes of open records acts and destroying any uniformity of application.\textsuperscript{238} Similarly, where appeals go through executive branch officials, there is an unacceptable risk that the official’s interest in preventing the disclosure of politically sensitive information will rise above the public interest.\textsuperscript{239} Such a system is in place in Washington D.C., where the mayor’s office is one step on the appeals route.\textsuperscript{240}

It is apparent, then, that an independent commission that can assist requesters in resolving disputes is the most effective system to ensure that open records laws serve their purpose.\textsuperscript{241} If such a system had been in place in Michigan when the \textit{Detroit Free Press} was seeking Kilpatrick’s seamy text messages, it might not have taken hundreds of thousands of dollars and many months to determine that text messages sent on public devices are public records.\textsuperscript{242} The ideal makeup and powers of such a commission,

\begin{footnotesize}
238. See Vladeck, supra note 109, at 1790. For example, under Attorney General Janet Reno, a memorandum was issued that the Justice Department would not defend an agency that withheld a record “unless there was an identifiable governmental interest in withholding the record.” \textit{Id.} When President George W. Bush took office, his attorney general, John Ashcroft, turned the tables, pledging to defend any agency efforts to withhold information based on a plausible reason and telling agency heads to only disclose records “‘after full and deliberate consideration of the . . . interests that could be implicated by disclosure.’” \textit{Id.} (quoting Memorandum from John Ashcroft, Attorney Gen. of the U.S., to Heads of All Fed. Dep’ts & Agencies (Oct. 12, 2001), available at http://www.justice.gov/archive/oip/011012.htm). Agencies then began withholding more information than ever before. \textit{Id.} The pendulum swung back when President Barak Obama issued a memorandum making clear that “‘[i]n the face of doubt, openness prevails.’” Cheh, supra note 138, at 335 (quoting Memorandum from Barack Obama, President of the U.S., to Heads of Exec. Dep’ts & Agencies (Jan. 21, 2009), available at http://www.whitehouse.gov/the-press-office/freedom-information-act). President Obama’s attorney general, Eric Holder, then said he would not defend a denial of a FOIA request unless it fit within the statutory exceptions and would harm a government interest, or disclosure was illegal. \textit{Id.} at 335-36.

239. Cheh, supra note 138, at 349.

240. See \textit{id.} at 343.

241. A similar conclusion was reached in the realm of workers’ compensation when legislatures realized that the great expense of litigation and the long time it took to complete a tort case proving negligence was not ideal for workers or employers, as employees went years without adequate medical care waiting for their award or could not afford the lawsuit, and employers spent considerable resources defending cases and paying large judgments. Bruce Ridley, \textit{Workers’ Compensation for the General Practitioner, GP SOLO L. TRENDS & NEWS} (Feb. 2006), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/workerscomp.html. Administrative appeals tribunals solved these problems in large part. See generally \textit{LITTLE, EATON & SMITH, supra note 130} (discussing more in-depth the history and policy reasons behind Workers’ Compensation laws).

242. See \textit{supra} Introduction (discussing the impact of the Kwame Kilpatrick FOIA lawsuit).
\end{footnotesize}
which Michigan and other states should implement, can be identified by examining what has worked in various other states' experiences.

B. Ideal Appeals Processes for Media to Ensure Government Transparency and Accountability

Not all administrative appeals processes are created equal. As Illinois' 2009 changes to its Public Access Counselor demonstrate, an intermediary appeals process may be inadequate or exemplary, depending on its duties, powers, and identity. 243 Various states' experiences have shown that an administrative appeals process works best if it is administered by a group of people who represent a variety of viewpoints, the body is politically independent, and there are turnaround deadlines, enforcement powers, and flexibility. 244

1. Commission Members

A common thread running through states with successful open records appeals processes, as well as proposals for reform, is choosing committee members with a variety of viewpoints. 245 Any open records law requires a balance between free disclosure of most information and holding back information that truly needs to be kept secret; making sure that a variety of viewpoints are heard is key to striking the correct balance. 246 For example, Utah's State Records Committee incorporates both public and private actors from a variety of backgrounds; its members include representatives from local government and state history, a member of the media, the governor's designee, a private records manager, the state auditor's designee, and a citizen member. 247 New York's eleven-member Committee on Open Govern-

243. See supra Section III.A (discussing the benefits and drawbacks of various types of dispute resolution bodies).
244. See Grunewald, supra note 14, at 37 (setting out certain principles any agency should observe, including independence, discretion to process cases of different classes on different procedural tracks, accessibility, informal dispute resolution, and more).
245. See supra notes 177-179 and accompanying text.
ment incorporates seven members of the public, including two from the news media.\textsuperscript{248} In addition to making certain every viewpoint is heard, committees like these inspire more confidence in the outcome of disputes.\textsuperscript{249} Principally, citizens are much more likely to think that their dispute is being objectively decided.\textsuperscript{250} Also, in cases where information ultimately should not be disclosed, a demonstration that one's peers concur with government officials may influence a citizen to end the process after a committee issues its opinion, conserving judicial resources.\textsuperscript{251} Accordingly, an ideal administrative appeals committee would include members of the public, media, and government.

Also significant is who chooses the members of the committee and the members' resulting political dependence.\textsuperscript{252} Political independence prevents a myriad of problems\textsuperscript{253} that can be solved by instituting civil service protections for committee members and limiting how many members of the committee are chosen by the same person, especially if that person is subject to political pressure.\textsuperscript{254} For example, in many states the governor appoints all members of the open records committee.\textsuperscript{255} “This method can significantly limit the council’s independence, as well as impact the public’s perception of the council; it may be seen as simply another arm of the current government whenever it rules in favor of the administration.”\textsuperscript{256} Efforts at reform suggest allowing the governor to choose two members and then involving politically opposite leaders of each house of the legislature and public

\textsuperscript{248} Cheh, supra note 138, at 351-52. Likewise, Connecticut’s five-member Freedom of Information Commission can have no more than three members from the same political party. CONN. GEN. STAT. § 1-205 (Supp. 2012); see also N.J. STAT. ANN. § 47:1A-7 (West 2011).

\textsuperscript{249} See Christensen, supra note 83, at 1094. Christensen proposes that Georgia, in order to strengthen its open records law, should allow citizens to “make their plea before a committee appointed by the Governor and composed of fellow citizens as well as other governmental officials.” Id.

\textsuperscript{250} Id.

\textsuperscript{251} Id.

\textsuperscript{252} See Vaughn, supra note 9, at 198-99, 207-08, for discussions of the independence of Connecticut’s and New York’s open records appeals bodies.

\textsuperscript{253} See Section III.A (discussing the importance of an appeals body with political independence).

\textsuperscript{254} See PEARLMAN, supra note 237, at 30-31 (proposing that members of New Jersey’s Government Records Council be given state civil service protections to support the council’s independence). Indiana’s ombudswoman has such protection, and can only be removed from her office for cause during her four-year term; thus, she can act in the way she thinks is right, rather than acting as the governor’s puppet to avoid losing her job. Maneke & Barton, supra note 25, at 75.

\textsuperscript{255} The governor of New Jersey, for example, directly or indirectly controls the appointment of every member of the Government Records Council. PEARLMAN, supra note 237, at 10.

\textsuperscript{256} Id. at 10, 30. This is especially true when the counsel is determining a dispute over records that could be embarrassing to the governor’s office. Id. at 30.
groups to choose additional members. An ideal open records committee would include members appointed by government officials from various political parties, with possible input from members of the public.

A last consideration is the source of a committee’s funding; a public body loses all independence if it may be financially crippled by offending a political actor. Open records commissions must follow in the footsteps of Connecticut’s original model, which submits any appropriation requests directly to the legislature, with no intervention from the governor. This funding method allowed the Freedom of Information Commission to avoid budget cuts proposed by Governor John G. Rowland in 2003, cuts which many thought were retribution for adverse rulings from the Commission and designed to decrease its power. The legislature did not adopt the gover-

257. Specifically, Pearlman proposes allowing the Governor to nominate two of the five members, and “the highest ranking leader of each House of the Legislature who is not a member of the same political party as that of the Governor” will each nominate a member. Id. at 30-31. One additional member will be chosen by the Governor “from a list of nominees proposed by a not-for-profit organization, agreeable to both major parties in the Legislature, having as its principal purpose transparency and accountability in government.” Id. at 31. Although Connecticut’s Freedom of Information Commission members have historically been appointed solely by the governor, the statute requires that after July 1, 2011, “four members of the commission shall be appointed as follows: One by the president pro tempore of the Senate, one by the minority leader of the Senate, one by the speaker of the House of Representatives and one by the minority leader of the House of Representatives.” CONN. GEN. STAT. § 1-205(a) (Supp. 2012). This presents an avenue for further study to determine the impact of this selection structure on the body’s independence.

258. For example, the committee proposed for Missouri by Jean Maneke and Jill Barton includes one member chosen by each the Missouri Senate, the Missouri House of Representatives, the Missouri Broadcasters’ Association, and the Missouri Press Association, as well as two citizens appointed by the Governor of Missouri. Maneke & Barton, supra note 25, at 79.


260. CONN. GEN. STAT. § 1-205(a) (Supp. 2012). Effective July 1, 2011, Connecticut merged five watchdog entities to save money and repealed § 1-205(a), putting the Commission’s budget in the hands of the Governor; however, the Governor is not allowed to reduce the Commission’s budget, which prevents retributive budget cuts for adverse decisions. 2011 Conn. Legis. Serv. P.A. 11-48 (H.B. 6651) (West), available at http://www.cga.ct.gov/2011/act/pa/2011PA-00048-R00HB-06651-PA.htm; see also Maneke & Barton, supra note 25, at 79 (proposing that the budget for a public records council come from the state’s technology trust fund account, or other general appropriations from the legislature).

nor’s proposal, ensuring the Commission’s continued existence and independence.262

The virulent opposition to Connecticut’s recent changes to its Freedom of Information Commission demonstrates just how important political independence is to an open records commission.263 Effective July 1, 2011, the state consolidated a group of public agencies and created the conglomerate Office of Governmental Accountability, whose head is a gubernatorial appointee serving at the pleasure of the governor.264 In her plea to avoid this change, the executive director of the Commission explained that the loss of independence would “critically impair the ability of the agency . . . to do their jobs impartially, objectively and in the public interest.”265 She also cited the fear that the public would wonder how the new Office could fairly and independently rule on a multitude of issues without the perception of independence.266 It is thus obvious that an effective open records commission must be as politically independent as possible.

2. Duties, Powers, and Policies

An examination of various duties, powers, and policies adopted by state open records committees reveals the ideal provisions a statute must include to effectuate meaningful access for citizens and the media. First, it is clear that the body must be able to resolve disputes or conduct hearings in a timely fashion, and those time limits should be expressly set out in the statute.267 A workable system involves a quick initial response to take care of easily corrected mistakes or misconceptions, then setting a somewhat
more generous time limit for an extensive hearing, with the option of expediting a request upon a showing of good cause. 268

However, the commission should be liberal with its findings of good cause to ensure such a provision functions as it should. 269 This would be especially valuable for media requesters, because journalists often seek information on a deadline that would not be valuable if it was uncovered years later. 270 If the media is going to stand as the public’s surrogate and ensure government transparency and accountability, it must be able to quickly obtain resolutions of disputes by discouraging politicians from delaying their disclosures in the hopes that a publishing deadline will pass. 271 An ideal statute would assign an ombudsman or mediator to a complaint within the week it is filed, 272 require a hearing to be conducted within forty-five days, 273 and contain an expediency provision allowing for a hearing within twenty-one days for media requesters and others who show good cause. 274

268. This system is used in Utah and Connecticut; in Utah, the State Records Committee must respond to a complaint within five days. Utah Code Ann. § 63G-2-403(4)(a) (West, Westlaw through 2012 Sess.). The formal hearing must be conducted within fifty-two calendar days of receipt of the complaint, but it can be expedited by a showing of “good cause”—a term that is not defined by the statute. Id. § 63G-2-403(4)(a)(i). In Connecticut, the Freedom of Information Commission assigns an ombudsman to attempt to mediate the dispute within a short time, and every complaint must be resolved within a year. Conn. Gen. Stat. § 1-206(b)(1) (Supp. 2012). However, the commission is authorized to conduct expedited appeals, where the hearing is conducted within thirty days after receipt of a notice of appeal and decided no later than sixty days after the hearing. Id.

269. An expediency provision for administrative hearings should not be applied as court expediency provisions often are, where very few cases meet the high standard for jumping to the beginning of the docket. See supra notes 123–27 and accompanying text (discussing the high standard for taking advantage of most expediency clauses).

270. See supra Subsection I.B.2 (discussing the delay requesters face when waiting for requests to be answered and going through litigation).

271. See Cohan, supra note 112, for an example of a federal government body delaying disclosure in the hopes that a deadline would pass. A lawyer who specializes in media law issues commented, “[L]ocal officials seem to be using delaying tactics more frequently to avoid releasing documents until after the news value of a story has subsided.” NFOIC Survey, supra note 22, at 11.

272. This is the method used successfully by Connecticut’s Freedom of Information Commission; “well in excess of 50% of the complaints filed each year are settled without a hearing” thanks to these ombudsmen. Pearlman, supra note 237, at 23.

273. This is similar to the time frame used by Utah’s State Records Committee, which schedules hearings at its next regular periodic meeting fourteen to fifty-two days after an appeal is filed, unless there is a reason to expedite the request. Utah Code Ann. § 63G-2-403(4)(a) (West, Westlaw through 2012 Sess.).

274. The procedural time frames and paths can be further customized to the type of request at issue to manage a productive docket; cases that serve an important public function, like historical research, could be given priority over cases involving personal or commercial interests. Grunewald, supra note 14, at 42.
A debate is metaphorically raging between states that give their administrative bodies enforcement powers and those that do not. New York, Indiana, and Virginia, for example, operate under the assumption that a public body that merely issues advisory opinions is ideal, while Connecticut, Pennsylvania, and Illinois, among others, hold out that it is necessary for a body issuing opinions on specific disputes to be able to enforce its decisions. While either option may work for a state, a body with no enforcement power is more precarious and depends heavily on the person or group in charge since it relies on persuasion to resolve disputes. That person or group must be independent, have great integrity, and be perceived as both; if that perception is absent, recommendations are easily dismissed or ignored, leaving requesters with no real remedy.

However, given the highly contentious nature of most FOIA disputes, agencies with binding authority seem better suited to the task. More than 90% of those surveyed in Indiana, where the Coalition for Open Government does not have enforcement power, said the Coalition should have the power to impose fines or institute enforcement actions on uncooperative public bodies. Further, Illinois gave its Public Access Counselor the choice to issue binding opinions after determining that the advisory opinions and mediation used by the Counselor were ineffective. Now, the Counselor can issue binding opinions and even bring a suit to enforce its opinions in the event that the public body still refuses to comply.

275. The choice between using a binding or non-binding procedure is the "most basic issue in structuring a dispute resolution system for access cases." Id. at 34.
276. See Pearlman, supra note 236, at 16-25 (discussing the approaches taken by these states). Some fear that an appeals body without enforcement powers would end up being superfluous, so litigation would remain the only real remedy for requesters. See supra Part I (discussing the problems when litigation is the only remedy for media and average citizens).
277. See PEARLMAN, supra note 237, at 18. In New York, "the Committee's lack of enforcement powers appears to have reduced agency compliance with model regulations, and the ultimate role of the courts in interpreting the Act allows for considerable variation in interpretation." Vaughn, supra note 9, at 209.
278. PEARLMAN, supra note 237, at 18.
279. Grunewald, supra note 14, at 34. Grunewald endorses at least the availability of a binding procedure due to the contentious nature of open records requests that have to produce binary results. Id. Likewise, Abby Rogers advocated for giving the Virginia Freedom of Information Advisory Council the power to force compliance after a hearing, rather than require enforcement to come from a court after a lawsuit, to improve the law. Mike Signer, The Fight for Sunlight, THE NEW DOMINION PROJECT (March 16, 2011), http://newdominionproject.com/2011/03/16/the-fight-for-sunlight/.
281. See Klaper, supra note 226, at 68, 73-74.
282. Id. at 75.
the ideal statutory provision to ensure that citizens have a meaningful FOIA appeals option would give the administrative appeals board at least the option of binding enforcement powers.

Because a variety of dispute resolution methods may work, and some require less time and fewer resources than others, the ideal statutory appeals scheme would give the appeals body the flexibility to choose to engage in both formal and informal dispute resolution methods. It is important to start with more informal measures, since these take less time, are less expensive, and may easily solve the problem. In many cases, ignorance of the law is the only problem, and public bodies quickly comply or requesters quickly withdraw their requests after the law is explained to them. Likewise, mediation and ombudsman services can resolve disputes and encourage compromise without the requirement of a full administrative hearing. A review of 2,200 open records disputes in Georgia revealed that most of them were resolved when an attorney simply explained the law.

As valuable as informal advice and mediation are, however, not all disputes will be solved that way, and administrative hearings that result in binding opinions must be an ultimate option to prevent public officials from disregarding a committee's orders. Binding opinions provide meaningful

283. The body should be able to evaluate a case and choose to conduct mediation, issue an advisory opinion, or conduct a hearing that will result in a binding opinion. Illinois' revamped Public Access Counselor has these options for resolving disputes, 5 ILL. COMP. STAT. ANN. 140/9.5 (West Supp. 2012), as does New Jersey's Government Records Council, N.J. STAT. ANN. § 47: lA-6, -7 (West Supp. 2012). For an exemplary list of duties and powers given to an appeals body, see PEARLMAN, supra note 237, at 10-11, explaining what New Jersey's Counsel can do.

284. However, the body should have the option to choose to skip these more informal steps. See Grunewald, supra note 14, at 34.

The slim prospect that a dispute ... will yield meaningful compromise through purely facilitative techniques makes the imposition of a mandatory layer of non-binding process too costly as a matter of both time and resources. This conclusion dictates the rejection of either mediation, fact-finding, or ombudsman intervention as a prerequisite to more formal FOIA dispute processing and focuses attention on the choice of a binding procedure. It leaves these processes available, however, for non-mandatory use.

Id.

285. See Justin Cox, Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA, 13 N.Y. CITY L. REV. 387, 414-15 (2010). Ignorance of the law is more of a problem at the state and local level, where some agencies get requests so infrequently that no one is trained on the law. Id. at 414.

286. PEARLMAN, supra note 237, at 23. Connecticut's Freedom of Information Commission has resolved 65% of its disputes in the last three years before an administrative hearing was necessary by assigning an ombudsman to mediate and facilitate communication between the parties. Statement to the GAE Committee, supra note 261, at 2.

287. Bluestein, supra note 54.

288. For mediation to work properly, an agency that provides for mediation and then the option to do a binding hearing if mediation does not work out should place a wall be-
Giving Teeth to the Watchdog

resolution for requesters facing obstinate officials or tough legal questions who cannot afford the expense or time of a lawsuit. Even more, simply the potential for an adverse ruling encourages compliance in everyday requests that never have to reach the committee.289

Requesters should also have flexibility in the path they choose to resolve their disputes.290 By allowing requesters to appeal to a committee, but not requiring them to do so before filing a lawsuit, states can ensure meaningful access to government documents and cut down on concerns about administrative delay and skyrocketing costs.291 Some have expressed concern that administrative appeals bodies like Connecticut’s Freedom of Information Commission would not work in larger states,292 yet such a system has been successful in larger states where an intermediate appeal is an op-

tween the two, prohibiting anything said or done in the mediation process from being admissible in a subsequent formal proceeding; this will encourage open discussion and compromise in the mediation. Grunewald, supra note 14, at 45. This principle is an important consideration in the emerging process of Med-Arb, where one facilitator functions as a mediator until it is clear no resolution can be reached, and then transforms into an arbitrator and issues a binding decision. Martin Weisman, Professor, Univ. of Detroit Mercy Sch. of Law, Address at Michigan State University College of Law (Jan. 24, 2012).

289. PEARLMAN, supra note 237, at 25. Pearlman commented:
[T]he creation of an FOI enforcement agency with “teeth” pays for its existence by just being in existence. There is no way to quantify this assertion, but it seems highly likely that public officials and bureaucrats deny fewer FOI requests because of the fear that an FOI complaint will be filed and they will be embarrassed by an unfavorable ruling.

Id.

290. Importantly, requesters should be informed of their options for appeal when they are given a final denial by a government body. See Grunewald, supra note 14, at 64 (suggesting a similar approach).

291. This type of approach was suggested for the federal FOIA. Vaughn, supra note 9, at 211. Vaughn suggests that a requester would not have to use the adjudicatory agency before litigation, but could proceed to the courts if the agency did not decide the appeal within a certain amount of time or if they were unsatisfied with the decision. Id. The benefits of this approach are numerous; the agency would only attract cases if it was seen as a fair and efficient forum, so it would have an incentive to expedite appeals and create requester-friendly procedures, it would have an incentive to interpret the open records act fairly, and these fair and well-reasoned opinions would reduce the number of disputes. Id. at 210-11. Further, if requesters could choose to pursue their appeal to the district or trial court or have an administrative body function as the fact finder with the option to appeal to the court of appeals in that jurisdiction, all cases would be reviewed by the same forum. See Grunewald, supra note 14, at 43.

292. Maneke & Barton, supra note 25, at 75. Critics worry that if a commission patterned after Connecticut’s Freedom of Information Commission were established in a larger state, the bureaucracy would delay the public’s access and become too costly. Id. Yet, the overall time it takes to gain access and the ultimate cost of resolving disputes would be advanced, not hindered, by the adoption of the ideal commission described in this Comment. See infra note 303 and accompanying text.
tion, but not a requirement. Overall, every open records dispute is different, and allowing both the appeals board and the requester the flexibility to choose the right option for them is necessary for successful application of open records laws.

Thus, in order for members of the media and ordinary citizens to have meaningful access to government documents under FOIA laws, states must establish an administrative appeals system using the best ideas from other states' experiences. The body should be made up of members with a variety of viewpoints—including members of the media, government, and private citizenry—who are chosen by more than one person and represent more than one political ideology. Funding must not be subject to political manipulation. The statute should give the body the power to issue binding decisions, but allow it the flexibility to informally resolve disputes if possible. Finally, requesters should not be required to pursue an administrative appeal before choosing litigation.

IV. BENEFITS AND COSTS OF IMPLEMENTING AN IDEAL OPEN RECORDS APPEALS PROCESS

Implementing an administrative appeals process will bring a myriad of benefits to both requesters trying to use the law, including members of the media, and the government bodies subject to it. Most importantly, it will facilitate the fast and accurate release of information about the inner workings of the government, which will strengthen American democracy. Media requesters will be able not only to fulfill their "watchdog" role but also simply provide more information to readers, making the public more knowledgeable and interested in the government’s actions on their behalf.

293. See Klaper, supra note 226, at 73-74 (discussing this approach in Illinois); 5 ILL. COMP. STAT. ANN. 140/11 (West 2011). Minnesota is another state where requesters can choose to pursue administrative remedies or file a lawsuit directly. MINN. STAT. ANN. § 13.08 (West 2011).

294. See supra note 54 and accompanying text (discussing the importance of effective open records laws, and thus transparency, for democracy).

295. As traditional mainstream media face budget struggles and some predict their ultimate demise, much has been written on how the loss of these institutions will impact the flow of information to the people and undermine the strength of American democracy. See generally Jones, supra note 19. Aiding news media by giving them an easy way to find information about the government will help prevent these problems and support democracy.

296. In addition to benefits in the resolution of open records disputes, the implementation of administrative systems can have a myriad of other benefits. For example, administrative systems of workers' compensation are praised for providing a mechanism to oversee compliance, a forum for reporting injuries or violations of the law, and the ability to study the overall performance of the law and issue reports and recommendations to the legislature.
A. Letting the Sunshine In: Changing the Climate of Open Records Requests

Administrative appeals are unmistakably faster and cheaper for requesters. An intermediary appeal can be more informal than court, thus expediting the process and saving everyone money and time. Since administrative hearings are more informal than litigation, there is no need for requesters to pay for attorneys. For example, Connecticut’s Freedom of Information Commission employs a staff attorney to make sure the record is fair and complete for appeal, but most parties appear without counsel and are not disadvantaged. Resolving a dispute without litigation can thus save thousands of dollars in filing and attorney’s fees. A cheap and quick dispute resolution system is of particular benefit to the media, as the time and expense of litigation often hinders journalists’ ability to keep the public informed and hold government leaders accountable.

Connecticut’s experience has shown that even when cases are highly contested and despite administrative delays, the vast majority of cases can be decided rapidly. Further, flexibility to offer mediation and advisory opinions will speed up the process considerably and reduce the burden on the administrative body. Because of the reduced burden on requesters, more citizens and members of the media will be encouraged to assert their

See LITTLE, EATON & SMITH, supra note 130, at 70. An open records appeals body could provide similar oversight and evaluation.

297. Grunewald, supra note 14, at 33 ("[G]iven the overall policy of the Act and the difficulty of attributing any specific monetary value to a FOIA dispute, it appears fundamental regardless of who the requester is that the dispute be resolved in the most cost-effective manner possible. Moreover, given that the government incurs significant costs in all FOIA litigation, a cost-effective process for resolving access disputes provides general public benefit as well.") (footnote omitted).

298. PEARLMAN, supra note 237, at 25.

299. See Vaughn, supra note 9, at 194-95 (discussing Connecticut’s appeals process and highlighting that requesters do not need a lawyer because of the informal nature of the hearings process).

300. See id.; PEARLMAN, supra note 237, at 23.

301. In contrast, where there is no administrative appeal process and litigation is necessary, the requester can spend huge sums of money. See supra note 96 and accompanying text (giving examples of large attorney’s fees awards).

302. See supra Section 1.B (discussing the inadequacies of litigation for resolving FOIA disputes in a timely and cost-effective manner).

303. Cheh, supra note 138, at 351. The one-year limit is certainly an improvement over cases that take five years or significantly more, like the NRDC suit. See supra note 116.

304. See Cheh, supra note 138, at 354 (discussing how her proposed Open Government Office would make requests more timely and help requesters shape better requests).
rights under open records laws and seek information from those in government, which will bolster democracy. 305

As more requests are made and issues are resolved, the accuracy and consistency with which information is released will increase. Having most disputes resolved by the same body, one that has considerable expertise on one specific body of law, will provide more guidance to requesters and public bodies, and ensure that decisions are correctly made. 306 It will also result in more consistent development of the law and more predictable outcomes. 307 While the accountability provided by an intermediate appeal can easily prevent bad faith refusals, 308 the process can also solve complex interpretation questions without forcing requesters and government officials to have such an adversarial relationship. Instead of fighting and suing over competing interpretations, an impartial referee can examine the law and determine the correct outcome, hopefully preventing the caustic exchanges that often characterize records request disputes. 309

Even more, the power-imbalanced character of open records requests can be tempered when an administrative appeals process is implemented. 310

305. "[T]he very perception by the public and the media that public records are increasingly off limits has a chilling effect on efforts to obtain records." Id. at 346. In contrast, in Connecticut where there is a strong appeals board, "[t]he attitude of the [Freedom of Information] Commission, its adjudicatory powers, and its informal procedures encourage [the] use of the statute by individuals." Vaughn, supra note 9, at 195. Vaughn suggests the creation of an appeals process for the federal FOIA, saying that "[t]he availability of a more expeditious and less costly enforcement alternative might . . . encourag[e] greater use by individuals." Id. at 211.

306. See PEARLMAN, supra note 237, at 25. This phenomenon has played out in the realm of workers' compensation, where claims adjudicated by administrative tribunals find a more expert forum; expert fact finders have more training and experience than a jury or general judge would. LITTLE, EATON & SMITH, supra note 130, at 70.

307. PEARLMAN, supra note 237, at 25. The federal government's FOIA struggled with a similar issue early on, when lawsuits to enforce the act could be brought in any U.S. District Court. See Vaughn, supra note 9, at 187-88. To resolve the problems with varying judicial interpretations, the 1974 amendments to the Act made the District of Columbia Circuit the appropriate venue for all lawsuits under the federal FOIA. Id.

308. See Cheh, supra note 138, at 344. Cheh explained that government agents have tried to delay or deny requests in "ingenious" ways, citing that the request was lost, it violated privacy, there were no relevant documents, or even the agency used all its paper and "the General Counsel's effort to personally purchase the necessary paper proved futile." Id. An administrative body could easily provide a check on these kinds of underhanded tactics.

309. See, e.g., Public Servant Joslin Gets All Foamy, MICH. FOIA PROJECT, http://michiganfoia.com/more.html (last visited Nov. 4, 2012), and other entries at that site chronicling the dispute.

310. In the current climate, "[c]onfronted with delay in agency response, the costs of seeking judicial review, and the courts' treatment of agency delay, requesters are left to bargain with agencies over release of the requested information." Vaughn, supra note 9, at 189. Federal judges have noticed and "commented on agency bad faith or impropriety, agency delay, delay by the government in the litigation of the case, and agency unwillingness to accept the principles of the Act." Id. at 190.
No longer will citizens with few resources and little time be forced to wait for the decision of a huge government entity with its own legion of lawyers; the “David and Goliath” scenarios will be tempered by the assistance of the administrative body. 311 The availability of a real remedy for requesters, and thus punishment for bad faith denials of records requests, will further change the FOIA climate; government officials will no longer be able to rely on the knowledge that litigation is so rare that there is little chance they will be held accountable for their actions. 312 Last, it is evident that an intermediate appeals process for denied FOIA requests is both necessary and highly desired by citizens, because citizens use established open records commissions extensively. 313 New York’s Committee, for example, has given nearly 20,000 written advisory opinions, plus thousands more over the phone during its existence. 314

If a legislature created the ideal open records committee, FOIA laws would be able to serve their intended purpose. Appeals would be cheaper, faster, and easier, encouraging and allowing the media and private citizens to exercise their rights. The outcomes of those appeals would also create a consistent body of law in line with the legislature’s intent, while changing the adversarial and secretive culture of many government bodies.

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311. One lawyer, in a 2009 study, recounted the story of a private citizen whose sunshine law case had to be dismissed when the client ran out of funds; the government body had outspent the citizen by tenfold, exhausting his ability to pay. NFOIC SURVEY, supra note 22, at 9. Another lawyer complained about “a ‘superior’ body throwing its weight around.” Id. at 11.

312. See Cheh, supra note 138, at 349. In Washington D.C., for example, there is “almost no legal incentive[,] to comply beyond the remote[,] risk of punishment should a court find that a FOIA officer acted in an ‘arbitrary and capricious’ manner. This poses no trouble though, as no one has ever been found to have met this standard.” Id.; see also supra note 289 and accompanying text; supra Subsection I.B.4 (discussing the inadequate sanctions and enforcement mechanisms in most states).

313. Connecticut’s Freedom of Information Commission answers approximately 10,000 telephone and written inquiries from both citizens and public officials each year. PEARLMAN, supra note 237, at 22. It also resolves about 600-700 formal complaints each year. Id. In the first eleven months of its existence, the Pennsylvania Office of Open Records responded to nearly 5,000 emails, telephone calls, and letters, put on more than 300 trainings, and reviewed 1,000 cases. Cheh, supra note 138, at 353.

314. Maneke & Barton, supra note 25, at 76. In 2011, the Committee answered 3,544 telephone inquiries; of those, 37% were from the public, 33% were from local government, 18% came from the media, 10% were from state government officials, and 2% were from the state legislature. COMM. ON OPEN GOV’T, N.Y. DEP’T OF STATE, REPORT TO THE GOVERNOR & THE STATE LEGISLATURE: “PUSH” V. “PULL”: REINVENTING FOIL 22 (2011), available at http://www.dos.ny.gov/coog/pdfs/AnnualReport.pdf. The Committee also issued 405 advisory opinions, including 77% to the public, 17% to local government, 3% to the media, 2% to state government, and 1% to state legislature. Id.
B. Budgets and Burdens: Why Implementing an Administrative Appeals Process Is Affordable

The biggest concern whenever a new administrative body is proposed is where the money to fund it is going to come from.\textsuperscript{315} However, in the case of an open records committee, it is simply a matter of shifting the state's resources around—the ideal proposed committee need not be significantly taxing on the state's budget.\textsuperscript{316} Most significantly, an open records committee will reduce the burden on the judiciary, which is more expensive to run than an administrative agency.\textsuperscript{317} Of the 600 to 700 complaints heard by Connecticut's Freedom of Information Commission—many of which would surely have gone through the court system but for the Commission's existence—a mere ten to twenty cases a year are appealed to the courts.\textsuperscript{318} The federal OGIS resolved 79 of the 110 complaints it received from 2009 to 2010 through mediation, an even less expensive option, keeping them out of the courts.\textsuperscript{319}

While difficult to quantify, every case that does not see the inside of a courtroom saves the state or federal government a significant amount of money, from paying the judges to the clerks to the security guards.\textsuperscript{320} In the end, the government saves money overall, and the judiciary is free to focus its efforts and resources on other things.\textsuperscript{321} Moreover, the informal advisory duties of an open records committee also lower the burden on government

\textsuperscript{315} An administration's willingness to spend money on open government initiatives is very telling about the value it actually places on transparency. Although President Obama's administration pledged its support for openness in word, see supra note 238, it has not backed that pledge with financial support. Alex Howard, \textit{Congress Weighs Deep Cuts to Funding for Federal Open Government Data Platforms}, GOVFRESH.COM (Apr. 1, 2011), http://gov20.govfresh.com/congress-weighs-deep-cuts-to-funding-for-federal-open-government-data-platforms.

\textsuperscript{316} New York's experience shows that the use of an advisory agency reduces the cost of administration of open records acts: "[r]esolution of disputes without litigation reduces costs, and the influence of the advisory agency on administrative practice may likewise lead to substantial savings." Vaughn, supra note 9, at 213 (footnote omitted).


\textsuperscript{318} Pearlman, supra note 237, at 23.

\textsuperscript{319} Cheh, supra note 138, at 354.

\textsuperscript{320} Many states are facing severe budget crises due to the high cost of running their judicial systems. Editorial, \textit{Threadbare American Justice: Severe Budget Cuts Are Gutting the Effectiveness of the State Court Systems}, N.Y. TIMES, Aug. 18, 2011, at A20, available at http://www.nytimes.com/2011/08/18/opinion/threadbare-american-justice.html. If a cheaper system could cut down on the number of court cases filed—48 million went through the courts in 2008—it would relieve some of the burden states are facing and allow courts to more justly resolve other disputes. See id.

\textsuperscript{321} See id.
bodies subject to the act; officials can get advice from the committee or its staff rather than burdening their own staff with the research.\textsuperscript{322} Requesters can also make sure their requests are correctly done and suitably tailored using the informal advice of the committee’s staff, thus reducing the burden on the agency in finding and copying the requested documents.\textsuperscript{323} When mediation is used, not only do citizens get an answer quickly, but agencies are also able to “close the books” on open records complaints quickly and inexpensively.\textsuperscript{324}

Implementing an open records appeals process would not require a massive increase in spending, as lawmakers may fear.\textsuperscript{325} An administrative agency need not have many regional offices, since most disputes can be resolved largely through telephone or Internet communications and submissions.\textsuperscript{326} Importantly, a very small staff can make a huge difference to the state of open records compliance; a staff of just three in New York responded to 4,858 questions, prepared 572 advisory opinions, and maintained a website that received 2.7 million hits in 2007.\textsuperscript{327}

Members of the committee who would decide disputes need not be paid for full time service either.\textsuperscript{328} Utah, for example, pays its seven State Records Committee members only a nominal amount per diem and expenses, as they meet only periodically to conduct hearings.\textsuperscript{329} Compared to the cost of defending litigation, or even one large award of attorney’s fees in a losing case, the expense of a few employees is miniscule and the body may

\begin{itemize}
\item \textsuperscript{322} See Cheh, supra note 138, at 355.
\item \textsuperscript{323} Id. Requesters seeking information that is not covered by the open records act in their state may also refrain from ever filing a request, thus cutting down both the administrative burden and the need for dispute resolution. Id.
\item \textsuperscript{324} Statement to the GAE Committee, supra note 261, at 2.
\item \textsuperscript{325} New Jersey’s Government Records Council had a budget of $771,000 in 2006-2007. Pearlman, supra note 237, at 12. New York’s Committee on Open Government had a budget of approximately $350,000. Id. at 16.
\item \textsuperscript{326} See Grunewald, supra note 14, at 41 (explaining venue considerations for a proposed open records agency).
\item \textsuperscript{327} Cheh, supra note 138, at 352. Likewise, a staff of two in Virginia responded to 1,691 inquires in 2009. Id. at 352-53.
\item \textsuperscript{328} The part-time nature of an open records committee would even benefit it in the area of political independence by reducing the chance that a position on the Committee could become a “patronage appointment.” Vaughn, supra note 9, at 207.
\end{itemize}
even pay for itself in savings elsewhere.\footnote{330} It seems that states cannot afford not to implement at least a small open government committee.

Lawmakers must also consider how small a portion of their state budgets would be needed to provide this important service that would yield invaluable results.\footnote{331} In 2009, Washington D.C.'s budget was more than $10 billion, and the approximate total cost of FOIA was $2.4 million.\footnote{332} Even if the imposition of an appeals body more than doubled the amount the District spent on FOIA, that amount would still represent only 0.05% of its budget. A proposed revamping of New Jersey's Government Records Council (GRC) calls for a budget of $3 million a year—only 0.008% of the state's annual budget.\footnote{333} As is, the GRC's budget was a mere $771,000 in 2007.\footnote{334} Even Connecticut, which has one of the most extensive and powerful open records committees in the country, only spent about $2 million to operate its appeals body in 2010, also a small fraction of the state's budget.\footnote{335} This is but “an extremely small price to pay to greatly enhance the public's trust and confidence in open and accountable government.”\footnote{336}

Given the myriad of benefits that would be provided by open government commissions and the reasonable price tag of implementing such a body, states have no reason not to amend their open records laws to create intermediate FOIA appeals processes. Creating an appeals body would not only relieve part of the burden on public bodies and the judiciary, but would lead to more accurate decisions, more citizen confidence in government, and a better democracy—all for a tiny fraction of most states’ annual budgets.

\footnote{330. Though dual adjudication of some disputes would occur, wasting time and resources, “the costs would probably be offset by savings in the rapid and less expensive adjudication of a large number of requesters' actions by the adjudicatory agency.” Vaughn, supra note 9, at 211.}

\footnote{331. One commenter who advocated for the federal FOIA to adopt a committee like New York's Committee on Open Government said that creating such a body “would entail only limited costs and would promise considerable benefits and savings in the administration of the Act and in the development of law under the Act.” Id. at 214. “Creation of an agency . . . would prudently begin the development of the administrative alternatives necessary to preserve the concept of freedom of information.” Id.}

\footnote{332. Cheh, supra note 138, at 357.}

\footnote{333. PEARLMAN, supra note 237, at 34.}

\footnote{334. Id. at 12.}

\footnote{335. Cheh, supra note 138, at 351.}

\footnote{336. PEARLMAN, supra note 237, at 34. The Commission's executive director, Colleen Murphy, in a plea for the legislature to forego merging it with many other government agencies to reduce the budget, said, “The [Commission] has played a role in shining light on government and enhancing democracy well beyond the borders of our small state. In these tough economic times, I don't know what price you put on gems like this.” Statement to the GAE Committee, supra note 261, at 1.}
CONCLUSION

By amending statutory open records acts to put intermediary appeals processes in place, legislatures have an opportunity to make sure open records acts serve their intended purpose and the media is able to hold government officials accountable and inform the people about the actions of their government.\(^{337}\) Without any legislative action, open records acts in many states will continue to be abused by government officials,\(^{338}\) requesters will shy away from enforcing their rights because of the high expense and long wait of litigation,\(^{339}\) and states will be forced to bear the drain on judicial resources that comes from litigation concerning which documents are really open to the public.\(^{340}\) For all of the “Kwame Kilpatricks” in the world, something must be done.

Although some states have provided important educational and intermediary appeals steps for dealing with open records disputes,\(^{341}\) many states must do more to ensure that citizens have access to the information they need for democracy to function effectively.\(^{342}\) States must create or strengthen administrative agencies, giving them flexibility with enforcement power, independence from political manipulation, and expert staff with varied backgrounds.\(^{343}\) These administrative open records appeals processes will not only ensure that requesters can access government information in a timely and cost effective manner, but will also relieve the strain on judicial resources and public bodies without significantly increasing the financial burden on the state.\(^{344}\) Only when effective administrative appeals processes are implemented will media watchdogs have the teeth to effectively safeguard American democracy.

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337. See Newman, supra note 79 (outlining the current difficulties media face when trying to perform their “watchdog” roles).

338. See Davis, supra note 10, at 14 (discussing a study of open records laws, wherein no state earned higher than a “B-” and many states failed when compared to an effective open records law).

339. See Grunewald, supra note 14, at 22-23 (discussing how litigation as the only dispute resolution option discourages the exercise of FOIA laws).

340. See Pearlman, supra note 10, at 16 (asserting that the “judicial model” approach to FOIA dispute resolution requires “significant judicial resources” and noting that most international systems do not follow this model initially because of that expense).

341. See Beckett, supra note 8 (explaining the current approaches taken by each state).

342. See supra Part I (discussing the inadequacies of current systems that leave litigation as the only option).

343. See supra Section III.B (discussing the ideal duties, powers, and policies of an administrative appeals body).

344. See supra Part IV (discussing the benefits of an effective administrative appeals body that can be utilized before litigation).
# APPENDIX

<table>
<thead>
<tr>
<th>ALABAMA</th>
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<tbody>
<tr>
<td><strong>Litigation Involvement</strong></td>
<td>Attorney general may prosecute violations of the Public Records Law; tampering with governmental records is sanctioned with criminal penalties. ALA. CODE § 13A-10-12 (1975).</td>
</tr>
<tr>
<td><strong>Administrative, Ombudsman, or Committee Appeals Process</strong></td>
<td>State Records Commission surveys records, issues guidance as to the preservation or destruction of records. ALA. CODE §§ 41-13-21, -24 (1975).</td>
</tr>
<tr>
<td><strong>Mediation Services</strong></td>
<td>Attorney general may issue advisory opinions on specific issues regarding interpretation. ALA. CODE § 36-15-1 (1975).</td>
</tr>
<tr>
<td><strong>Education, Research, or General Opinions</strong></td>
<td>None</td>
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<tr>
<td><strong>Litigation Involvement</strong></td>
<td>None</td>
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<tr>
<td><strong>Administrative, Ombudsman, or Committee Appeals Process</strong></td>
<td>General state ombudsman may be helpful to review agency action, but has no expertise in records disputes like a specialized ombudsman would.(^1) ALASKA STAT. § 24.55.100 (2011).</td>
</tr>
<tr>
<td><strong>Mediation Services</strong></td>
<td>None</td>
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<tr>
<td><strong>Education, Research, or General Opinions</strong></td>
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<th>ARIZONA</th>
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<tr>
<td><strong>Litigation Involvement</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Administrative, Ombudsman, or Committee Appeals Process</strong></td>
<td>General Office of the Ombudsman-Citizens Aide handles complaints against agencies, makes recommendations to governor, legislature, or prosecutor. ARIZ. REV. STAT. ANN. § 41-1376 (2007). Accordingly, it has no expertise in records disputes like specialized appeals bodies generally do.</td>
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<tr>
<th>Mediation Services</th>
<th>None</th>
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<tr>
<td>Education, Research, or General Opinions</td>
<td>None</td>
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**ARKANSAS**

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<thead>
<tr>
<th>Litigation Involvement</th>
<th>Attorney general can take cases on behalf of citizens who are denied records.</th>
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<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Attorney general must give opinion on disputes when called for by requestor or records holder, on subject of request within three working days. ARK. CODE ANN. § 25-19-105(c)(3)(B)(i) (LexisNexis, LEXIS through 2012 Fiscal Sess. and updates.).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general issues many opinions regarding interpretation of FOIA. Though they are not binding on the courts, the courts often cite to those opinions.</td>
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**CALIFORNIA**

<table>
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<tr>
<th>Litigation Involvement</th>
<th>None</th>
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<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None by state—review may be available by local or municipal government.</td>
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<tr>
<td>Mediation Services</td>
<td>None</td>
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<table>
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<tr>
<th>Education, Research, or General Opinions</th>
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<td><strong>COLORADO</strong></td>
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<tr>
<td>Litigation Involvement</td>
<td>None</td>
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<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
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<tr>
<td>Mediation Services</td>
<td>None</td>
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</tbody>
</table>
| Education, Research, or General Opinions | Rare guidance for requestors through attorney general opinions.  

| **CONNECTICUT**                           |      |
| Litigation Involvement                   | None |
| Administrative, Ombudsman, or Committee Appeals Process | The Freedom of Information Commission is a board of five appointed members. CONN. GEN. STAT. § 1-205 (2011). It has broad investigatory powers and will conduct hearings that result in binding decisions. It can also impose penalties. *Id.* |
| Mediation Services                       | An ombudsman is assigned to each appeal to be a "liaison between the parties" and try to get to a settlement prior to a hearing by the FOIC.  
| Education, Research, or General Opinions | The Freedom of Information Commission educates the public and conducts training for agency officials. The FOIC can issue advisory opinions but rarely does.  

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### DELAWARE

<table>
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<tr>
<th><strong>Litigation Involvement</strong></th>
<th>Attorney general may represent the state agency or the individual in litigation, depending on his earlier findings on the issue. Del. Code Ann. tit. 29, § 10005(e) (2003).</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Administrative, Ombudsman, or Committee Appeals Process</strong></td>
<td>Citizens can petition the attorney general or chief deputy attorney general to determine if a violation has occurred. Del. Code Ann. tit. 29, § 10005(e) (2003). Attorney general will issue a written opinion, but court action is needed to enforce it. Id.</td>
</tr>
<tr>
<td><strong>Mediation Services</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Education, Research, or General Opinions</strong></td>
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### DISTRICT OF COLOMBIA

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<tr>
<th><strong>Litigation Involvement</strong></th>
<th>None</th>
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<tbody>
<tr>
<td><strong>Administrative, Ombudsman, or Committee Appeals Process</strong></td>
<td>Requestors may petition the mayor to review a denial of access, but mayor lacks ability to compel disclosure. D.C. Code § 2-537 (LexisNexis 2012).</td>
</tr>
<tr>
<td><strong>Mediation Services</strong></td>
<td>None</td>
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<tr>
<td><strong>Education, Research, or General Opinions</strong></td>
<td>None</td>
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### FLORIDA

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<th><strong>Litigation Involvement</strong></th>
<th>None</th>
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<tbody>
<tr>
<td><strong>Administrative, Ombudsman, or Committee Appeals Process</strong></td>
<td>Office of Open Government may assist requestors, but only has authority over the governor’s office, not legislature-created entities.¹⁰</td>
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<thead>
<tr>
<th>Education, Research, or General Opinions</th>
<th>Attorney general may advise legislature, conduct training seminars, and issue advisory opinions. FLA. STAT. § 16.60(2)(b)-(c) (West 2008).</th>
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<tbody>
<tr>
<td><strong>GEORGIA</strong></td>
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<tr>
<td>Litigation Involvement</td>
<td>Attorney general may bring cases in his/her discretion. GA. CODE ANN. § 50-18-73 (West 2012).</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
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<tr>
<td>Mediation Services</td>
<td>“Informal mediation program” exists through the Office of the Attorney General.11</td>
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<tr>
<td>Education, Research, or General Opinions</td>
<td>None</td>
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<td><strong>HAWAII</strong></td>
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<tr>
<td>Litigation Involvement</td>
<td>None</td>
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<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Office of Information Practice (OIP), a division of the lieutenant governor’s office, can issue informal or formal opinions, which are enforceable by the courts. HAW. REV. STAT. §§ 92F-41 to -42 (1996).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Office of Information Practice provides advice, education, and training to state agencies and citizens. HAW. REV. STAT. § 92F-42 (1996).</td>
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<td><strong>IDAHO</strong></td>
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<td>Litigation Involvement</td>
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<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
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<tr>
<td>Mediation Services</td>
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12 |  

**ILLINOIS**  

| Litigation Involvement | None  

Public Access Counselor, part of attorney general’s office, has broad investigatory powers. The attorney general may issue binding and advisory opinions. See 5 ILL. COMP. STAT. ANN. 140/9.5(f), (h) (West Supp. 2012). Denials must be reported to the Public Access Counselor by the body that is denying access. *Id.*  

| Mediation Services | Attorney general may choose to mediate FOIA disputes rather than issue a binding opinion. 5 ILL. COMP. STAT. 140/9.5(f) (West Supp. 2012).  

| Education, Research, or General Opinions | None  

**INDIANA**  

| Litigation Involvement | None  

Public Access Counselor (an attorney) can issue advisory opinions to interpret the law upon request. IND. CODE ANN. § 5-14-4-10 (LexisNexis 2006). Failure to consult the Public Access Counselor before litigation precludes an award of attorney’s fees. IND. CODE ANN. § 5-14-3-9(i).  

| Mediation Services | None  

| Education, Research, or General Opinions | Public Access Counselor conducts research, prepares educational materials, and gives advice to requestors and agencies.  
13 |  

**IOWA**  

| Litigation Involvement | Attorney general may enforce law through litigation. IOWA CODE § 22.10 (2011).  

Administrative, Ombudsman, or Committee Appeals Process | Office of the Citizen’s Aide/Ombudsman has broad authority to investigate citizens’ complaints regarding any agency action, including Open Records Law denials, but no open records expertise. *Iowa Code* § 2C.9 (Supp. 2011).

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<th>Mediation Services</th>
<th>None</th>
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<tr>
<td>Education, Research, or General Opinions</td>
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**KANSAS**

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<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Attorney general and county/district attorneys will take complaints and have the power to subpoena witness and investigate the case.¹⁴ <em>Kan. Stat. Ann.</em> § 45-228 (2012).</td>
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<tr>
<td>Mediation Services</td>
<td>None</td>
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<tr>
<td>Education, Research, or General Opinions</td>
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**KENTUCKY**

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<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Attorney general will review denials upon request by citizens and issue a finding. <em>Ky. Rev. Stat. Ann.</em> § 61.880(2)(a) (West, Westlaw through 2012 legislation). That outcome may be appealed within thirty days to the circuit court, but is binding with the force of law if not appealed. <em>Id.</em> § 61.880(5).</td>
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<td>Mediation Services</td>
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<tr>
<td>Education, Research, or General Opinions</td>
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<th>State</th>
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<th>Mediation Services</th>
<th>Education, Research, or General Opinions</th>
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<td>LOUISIANA</td>
<td>None</td>
<td>None</td>
<td>None</td>
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<tr>
<td>MAINE</td>
<td>Attorney general or district attorney may enforce the act, but prosecutions are very rare.</td>
<td>None</td>
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<tr>
<td>MARYLAND</td>
<td>None</td>
<td>Some bodies are subject to a general administrative review by the Office of Administrative Hearings, but no specialized open records division. See MD. CODE ANN., STATE GOV'T §§ 10-201, -622 (LexisNexis, LEXIS through 2012 legislation).</td>
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<th>Mediation Services</th>
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<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general frequently publishes opinions and issues guidelines to state agencies.\textsuperscript{16} Maryland’s Records Management Division reviews records produced and makes periodic reports on compliance.\textsuperscript{17}</td>
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**MASSACHUSETTS**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>Supervisor of Public Records may tell attorney general about violations, but attorney general has no obligation to bring suit for citizens. MASS. GEN. LAWS ANN. ch. 66, § 10(b) (West 2011).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Supervisor of Public Records, an administrative official in the Division of Public Records, can choose to investigate a denied request and conduct a hearing, and decision is binding on the agency. MASS. GEN. LAWS ANN. ch. 66, § 1 (West 2011). However, it has no enforcement power and cases must go to court if the agency fails to comply. Id. § 10</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Division of Public Records is staffed with attorneys who will respond to inquiries from the public.\textsuperscript{18}</td>
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**MICHIGAN**

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<tr>
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<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
</tbody>
</table>


\textsuperscript{18} Public Records Division, SEC. OF THE COMMONWEALTH OF MASS., http://www.sec.state.ma.us/pre/ (last visited Nov. 8, 2012); WILLIAM F. GALVIN, A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW 5 (May 2012).
<table>
<thead>
<tr>
<th>Education, Research, or General Opinions</th>
<th>None</th>
</tr>
</thead>
</table>

**MINNESOTA**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Requestor may ask Commission of Administration to issue an opinion, but it is not binding on the agency. <em>Minn. Stat.</em> §§ 13.072(1)-(2) (2011). Such an opinion is given deference in a court proceeding. <em>Id.</em> § 13.072(2). Requestor may also seek a hearing with the Office of Administrative Hearings. <em>Id.</em> § 13.085.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Mediation Services</th>
<th>None</th>
</tr>
</thead>
</table>

**MISSISSIPPI**

|-------------------------|-------------------------------------------------|

| Education, Research, or General Opinions | None |

**MISSOURI**

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general may issue opinions about the scope of the law to government bodies. MO. REV. STAT. § 610.027(6) (2011).</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>MONTANA</strong></td>
<td></td>
</tr>
<tr>
<td>Litigation Involvement</td>
<td>None</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general may issue advisory opinions to answer officials’ questions, but citizens cannot ask for an opinion.¹⁹</td>
</tr>
<tr>
<td><strong>NEBRASKA</strong></td>
<td></td>
</tr>
<tr>
<td>Litigation Involvement</td>
<td>Open records cases take precedence over most other cases due to an expediency provision. NEB. REV. STAT. § 84-712.03 (2011).</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Attorney general can issue binding decisions in an open records dispute after reviewing requested documents and evidence. NEB. REV. STAT. ANN. § 84-712.03 (West, Westlaw through 2012 Legis. Sess.). Enforcement must be through the courts, but plaintiff must only show that the attorney general ruled in their favor and may demand the attorney general take the case for them. <em>Id.</em></td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>None</td>
</tr>
<tr>
<td><strong>NEVADA</strong></td>
<td></td>
</tr>
<tr>
<td>Litigation Involvement</td>
<td>None</td>
</tr>
</tbody>
</table>

### New Hampshire

<table>
<thead>
<tr>
<th>Event Type</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>None</td>
</tr>
</tbody>
</table>

**NEW HAMPSHIRE**

<table>
<thead>
<tr>
<th>Event Type</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation Involvement</td>
<td>None</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
</tbody>
</table>
| Education, Research, or General Opinions | Attorney general advises government bodies and provides information to members of the public about its Right-to-Know Law.  

### New Jersey

<table>
<thead>
<tr>
<th>Event Type</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Government Records Council will take complaints from requestors, investigate, and issue binding orders. N.J. STAT. ANN. § 47:1A-6, 7 (West 2003).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>Government Records Council has an informal mediation program to facilitate resolution. N.J. STAT. ANN. § 47:1A-7 (West 2003).</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Government Records Council operates phone and web help lines, provides training on the law, and issues advisory opinions. N.J. STAT. ANN. § 47:1A-7 (West 2003).</td>
</tr>
</tbody>
</table>

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**NEW MEXICO**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>Attorney general or district attorney may bring an action to enforce the Inspection of Public Records Act, but rarely does so. N.M. STAT. ANN. § 14-2-12 (West, Westlaw through 2012 Legis. Sess.).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general publishes compliance guide and participates in seminars.(^{21})</td>
</tr>
</tbody>
</table>

**NEW YORK**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>Attorney general will defend the agency in litigation.(^{22})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Requestors can obtain an opinion letter about the propriety of disclosing a particular record from the New York State Committee on Open Government. N.Y. PUB. OFF. LAW § 89(1)(b) (McKinney 2008). Cases can then be brought to court in what is called an Article 78 proceeding, and court may consider the Committee’s opinion.(^{23}) Id. § 89(5)(d).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>New York State Committee on Open Government provides education and training, suggestions to legislature, and written advisory opinions.(^{24})</td>
</tr>
</tbody>
</table>

**NORTH CAROLINA**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>Litigation concerning open records takes priority on the court’s docket due to an expediency provision. N.C. GEN. STAT. § 132-9(a) (2011).</th>
</tr>
</thead>
</table>

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### Administrative, Ombudsman, or Committee Appeals Process

<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>Attorney general can conduct review of denial if request is received within thirty days after denial. N.D. CENT. CODE ANN. § 44-04-21.1(1) (West, Westlaw through 2011 Sess.). Attorney general will issue an opinion on the alleged violation. <em>Id.</em> Failure to comply with attorney general’s opinion in seven days results in an award of costs if a civil suit is pursued, and non-complying body will not be represented by attorney general in civil suit. <em>Id.</em> § 44-04-21.1(2).</td>
</tr>
<tr>
<td>Ohio</td>
<td>None</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>None</td>
</tr>
</tbody>
</table>

### Mediation Services

<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>None</td>
</tr>
<tr>
<td>Ohio</td>
<td>None</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>None</td>
</tr>
</tbody>
</table>

### Education, Research, or General Opinions

<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>Attorney general may issue advisory opinions regarding the law in response to questions raised by public agencies or officials. N.C. GEN. STAT. § 132-9(c) (2011).</td>
</tr>
<tr>
<td>Ohio</td>
<td>None</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>None</td>
</tr>
</tbody>
</table>

### Litigation Involvement

<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>None</td>
</tr>
<tr>
<td>Ohio</td>
<td>None</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>None</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general issues advisory opinions to covered agencies concerning application of the act.(^{25})</td>
</tr>
</tbody>
</table>

**OREGON**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>Attorney general will represent a state body if it determines the record should not be disclosed. OR. REV. STAT. § 192.450(3) (2011).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>Attorney general or county district attorney will review complaints and issue binding orders that must be followed within seven days unless a court appeal is filed. OR. REV. STAT. §§ 192.450(2), 192.460 (2011).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>None</td>
</tr>
</tbody>
</table>

**PENNSYLVANIA**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>The Office of Open Records, part of the Department of Community and Economic Development,(^{26}) issues binding orders and opinions after reviewing denials and conducting a hearing. 65 PA. CONS. STAT. ANN. § 67.1101(a)-(b) (West 2010).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>The Office of Open Records operates an informal mediation program. 65 PA. CONS. STAT. ANN. § 67.1310(a) (West 2010).</td>
</tr>
</tbody>
</table>

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Giving Teeth to the Watchdog

<table>
<thead>
<tr>
<th>State</th>
<th>Education, Research, or General Opinions</th>
<th>Litigation Involvement</th>
<th>Administrative, Ombudsman, or Committee Appeals Process</th>
<th>Mediation Services</th>
<th>Education, Research, or General Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island</td>
<td>The Office of Open Records provides advisory opinions to agencies and requestors, annual training for public officials and agencies, runs a website with information about the Act, and reports findings to governor and the General Assembly. 65 PA. CONS. STAT. ANN. § 67.1310 (West 2010).</td>
<td>Attorney general will investigate a requestor’s complaint and then may institute action to enforce the Act on behalf of a citizen in court. R.I. GEN. LAWS § 38-2-8 (2011).</td>
<td>None, other than attorney general’s investigation.</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>South Carolina</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>Attorney general’s office issues opinions and publishes guides for public officials detailing how to comply with the law.27</td>
</tr>
<tr>
<td>South Dakota</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td></td>
</tr>
</tbody>
</table>

| Administrative, Ombudsman, or Committee Appeals Process | State Office of Hearing Examiners will hear cases and has extensive investigatory powers. See S.D. CODIFIED LAWS § 1-27-40 (2011). It can hold hearings if necessary and will issue binding opinions. \textit{Id.} §§ 1-27-40, -40.1 (2011). The agency must comply within thirty days or appeal the decision to the appellate court. \textit{Id.} § 1-27-40.1 (2011). The Office is a general appeals board for all agencies.\textit{Id.} § 1-26d-1 to -12(2011). |
| Mediation Services | None |
| Education, Research, or General Opinions | None |

**TENNESSEE**

| Litigation Involvement | Attorney general will get involved where constitutionality of the statute is challenged or to defend a state agency.\textsuperscript{29} Response times are shortened to expedite review. TENN. CODE ANN. § 10-7-505(b) (LexisNexis, LEXIS through 2012 Sess.). |
| Administrative, Ombudsman, or Committee Appeals Process | None |
| Mediation Services | None |
| Education, Research, or General Opinions | None |

**TEXAS**

| Litigation Involvement | Attorney general may represent requestor if the government body refuses to comply with attorney general's findings. TEX. GOV'T CODE ANN. § 552.321(a) (West, Westlaw through 2011 Sess.). |


Giving Teeth to the Watchdog

<table>
<thead>
<tr>
<th>Administrative, Ombudsman, or Committee Appeals Process</th>
<th>A government body must request that attorney general issue an opinion if that issue has not been ruled on before. TEX. GOV'T CODE ANN. § 552.301(a) (West, Westlaw through 2011 Sess.).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Open Records Steering Committee studies the implementation of the act and makes recommendations to the legislature. TEX. GOV'T CODE ANN. § 552.009(d) (West, Westlaw through 2011 Sess.).</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>UTAH</strong></td>
<td></td>
</tr>
<tr>
<td>Litigation Involvement</td>
<td>None</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>State Records Committee, a board of seven appointed individuals from varied backgrounds, conducts hearings and issues binding decisions in each case. UTAH CODE ANN. §§ 63G-2-501, -502 (LexisNexis 2012). The Committee can fine an agency up to $500 for each day of noncompliance following an order. Id. § 63G-2-403(14)(d)(i)(A). Cases can be appealed to the district court. Id. § 63G-2-502(6).</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general will advise the state agencies and the State Records Committee. UTAH CODE ANN. § 63G-2-502 (LexisNexis 2012).</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>VERMONT</strong></td>
<td></td>
</tr>
<tr>
<td>Litigation Involvement</td>
<td>None</td>
</tr>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
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<tr>
<td>Education, Research, or General Opinions</td>
<td>None</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>VIRGINIA</strong></td>
<td></td>
</tr>
<tr>
<td>Litigation Involvement</td>
<td>None</td>
</tr>
</tbody>
</table>
| Administrative, Ombudsman, or Committee Appeals Process | Twelve-member Virginia Freedom of Information Advisory Council issues advisory opinions, but not if the parties are engaged in litigation.  

30. 

| Litigation Involvement | None  

| Mediation Services | None  

| Education, Research, or General Opinions | Advisory Council conducts training and answers questions formally and informally.  

31. 

**WASHINGTON**  

| Administrative, Ombudsman, or Committee Appeals Process | The attorney general’s office will review a case and provide a written opinion that is persuasive, but not binding. WASH. REV. CODE § 42.56.530 (2010). Legislation to create an Office of Open Records has been proposed.  

32. 

| Mediation Services | None  

| Education, Research, or General Opinions | None  

**WEST VIRGINIA**  

| Litigation Involvement | None  

| Administrative, Ombudsman, or Committee Appeals Process | State agencies can ask the attorney general to render an official opinion regarding a specific issue. W. VA. CODE § 5-3-1 (2011).  

31. 

Giving Teeth to the Watchdog

<table>
<thead>
<tr>
<th>Education, Research, or General Opinions</th>
<th>Attorney general has a duty to prepare summaries of case law and interpretations to inform public officials subject to the law. W. Va. Code § 5-3-1 (2011).</th>
</tr>
</thead>
</table>

**Wisconsin**

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Any person can request informal advice from the attorney general as to whether the act applies. Wisc. Stat. § 19.39 (2010).</td>
</tr>
</tbody>
</table>

**Wyoming**

<table>
<thead>
<tr>
<th>Litigation Involvement</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administrative, Ombudsman, or Committee Appeals Process</td>
<td>None</td>
</tr>
<tr>
<td>Mediation Services</td>
<td>None</td>
</tr>
<tr>
<td>Education, Research, or General Opinions</td>
<td>Attorney general may advise state agencies.(^{33})</td>
</tr>
</tbody>
</table>

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