

ACCESS TO ELECTRONIC PUBLIC RECORDS:

A 50 STATE STUDY

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ABSTRACT

This research explores the accessibility of state public records in electronic format by examining certain specific factors that can define "accessibility." This study includes a 50-state (plus D.C.) survey to assess how states responded to a request for commonly-sought records in an electronic format, comparing the quality of responses. Specifically, this research looked at whether states prioritized access to records in electronic format by proactively making electronic records available, and how states responded to requests for records in an electronic format, in terms of agency response time, compliance with state law, fees charged, and the format, quality and comprehensiveness of responsive records. This study also examines how easily navigable the transparency portals and online records request options were.

A preview of the findings are as follows: States with an online records request submission option had a slightly faster response rate overall than states that required citizens to submit requests by mail. The mode of response skewed heavily toward electronic communication, with less than 20 percent of states responding by either mail or phone.

Ten states failed to adequately respond to the records request and failed to grant or deny the request in whole or in part. Seven states required payment of a fee before the request could be processed, and the fees ranged drastically, from \$17 in Missouri to potentially \$195,000.00 in South Dakota. About half of all states provided the data in the format requested and nearly all states proactively provided at least some salary data online. However, the comprehensiveness of the data received was lacking.

INTRODUCTION

Government agencies in the United States answer more than four million Freedom of Information Act requests per year. In 1966 when the U.S. law was first enacted, it was the third of its kind in history after Sweden and Finland, but today, more than 60 countries have freedom of information laws on the books.¹ While the U.S. laid the groundwork for some of the first transparency laws in the world, the right of access to public information in this country is at best imperfect and at times ineffectual. Open government advocates have made much progress, and yet continue to work toward an ideal free-flow of information first imagined in the 15th century.

The greatest hurdle to public records access in the 21st century is arguably whether citizens can access the information they seek in an electronic format - the only format that, in this age, renders the data truly meaningful. Unlike hard copy records, electronic data can be parsed for content-analyses, machine-readable and easily configured into charts and graphs. Accessing records in electronic format can save journalists and everyday citizens hours of time and energy inputting millions of lines of data into a spreadsheet, and can be the determining factor in whether a meaningful analysis of the records is ever made public.

This paper explores the accessibility of state public records in electronic format by examining certain specific factors that can define "accessibility." The research includes a 50-state (plus D.C.) survey to assess how states responded to a request for commonly-sought records in an electronic format, comparing the quality of responses as

¹ Thomas Blanton, ed. *Freedom of Information at 40: LBJ Refused Ceremony, Undercut Bill with Signing Statement*, National Security Archive Electronic Briefing Book No. 194 (July 4, 2006), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194/index.htm>.

determined by certain criteria. Specifically, the study looks at whether states prioritized access to records in electronic format by proactively making electronic records available, and how states responded to requests for records in an electronic format, in terms of agency response time, compliance with state law, fees charged, and the format, quality and comprehensiveness of responsive records. The research also examines how easily navigable the transparency portals and online records request options were.

A preview of the findings are as follows:

States with an online records request submission option had a slightly faster response rate overall than states that required citizens to submit requests by mail. The mode of response skewed heavily toward electronic communication, with about three-fourths of states responding initially to the records request by email, instead of or in addition to a mailed response. Less than 20 percent of states responded by either mail or phone.

A rather high number - ten states, or roughly 20 percent - failed to adequately respond to the records request and failed to grant or deny the request in whole or in part. Including the states that did not respond at all, 11 states failed to respond within the required statutory time-limit, and three states responded but did not provide records within the required time.

Seven states required payment of a fee before the request could be processed, and the fees ranged drastically, from \$17 in Missouri to potentially \$195,000.00 in South Dakota.

The medium of the responsive records provided varied quite a bit. In total, 24 states provided the data in the format requested - a parsable electronic file (Excel).

Nearly all states proactively provided at least some salary data online. Nineteen states, or 37 percent, included links to already-posted online records in their response to the request, and one state - Texas - provided online access to records not previously available to the public. Sixteen states provided records by email or CD-ROM, rather than linking to the state's transparency portal.

The comprehensiveness of the data received was lacking. Despite the request for the salary records of all current state employees, few states actually provided records for all the state's employees, including every agency and department and every level of pay, for employees who are not exempt by law.

LITERATURE REVIEW

A Brief History of Freedom of Information Theory and Laws

English philosopher John Stuart Mill is often considered one of the greatest supporters of freedom of the press and intellectual freedom in society, ideas he expressed in his many writings throughout the 19th century - most prominently, the 1859 essay *On Liberty*.

He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side, if he does not so much as know what they are, he has no ground for preferring either opinion... Nor is it enough that he should hear the opinions of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. He must be able to hear them from persons who actually believe them...he must know them in their most plausible and persuasive form.²

The doctrine Mill presented built upon John Milton's 1644 *Areopagitica*, a tract regarded as one of "history's most influential and impassioned" defenses of the right to freedom of speech and expression, in which the English poet and polemical author opposed licensing and censorship.³

Mill's work was also influenced by Jeremy Bentham, an English utilitarian philosopher and social reformer who advocated for transparency over privacy, and by his own father, James Mill, who collaborated with Bentham on numerous projects and served as his secretary. For Jeremy Bentham and James Mill alike, "the freedom to discuss ideas in public and to criticise government institutions was an essential element in the struggle

² John Stuart Mill, *On Liberty*, 1859, available at <http://www.gutenberg.org/files/34901/34901-h/34901-h.htm>.

³ John Milton, *Areopagitica: A Speech of Mr. John Milton For the Liberty of UNLICENC'D PRINTING, To the PARLAMENT of ENGLAND* (1644); John Milton, *Paradise Lost: A Poem in Ten Books* (1667), http://www.dartmouth.edu/~milton/reading_room/areopagitica/text.shtml.

against corruption among the ruling classes, a topic at the heart of the agenda of the group of radical thinkers which centred around Bentham."⁴ The elder Mill and Bentham worked to fight British libel law, which considered the publication of material that might bring the government into "disesteem," a crime.

James Mill stated: "Now, to point out any fault in the government undoubtedly tends to bring, so far, the government into disesteem. Therefore, to point out any fault in government, is a liberty not allowed to the press by the law of England."⁵

While the First Amendment press freedom afforded journalists in the United States following the American Revolution meant U.S. reporters did not have to navigate the same thorny libel laws British writers faced, the U.S. Constitution did not directly address transparency issues, or whether journalists had a right to access the records necessary to adequately report on government matters.

The "transparency hero" who first championed freedom of information legislation in the U.S. was a Democratic congressman from Sacramento, California, John Moss, who fought for more than a decade to pass a law curtailing excessive government secrecy.⁶ Beginning in 1955, Moss held hearings on his proposed openness reforms, but faced an uphill battle finding a Republican co-sponsor for any transparency legislation during the Eisenhower presidency. During the Kennedy and Johnson presidencies, Moss' efforts gained more support. Then-congressman Donald Rumsfeld agreed to co-sponsor the Freedom of Information Act in 1966 and once the legislation gained favor with

⁴ K.C. O'Rourke, *John Stuart Mill And Freedom Of Expression: The Genesis Of A Theory*, Routledge Studies In Social And Political Thought (2001), <http://www.openisbn.com/preview/0415253047/>.

⁵ *Id.*

⁶ Blanton, *supra*.

reporters, then-White House aide Bill Moyers - once an opponent of FOIA - also became an advocate.

After near across-the-board opposition from federal agencies - with 27 agencies testifying against the bill in initial hearings - Congress carved out specific exceptions to the law, allaying much of the agencies' concerns about being forced to disclose certain executive agency internal working papers, military secrets, personnel files, confidential advice, executive privilege, and investigative files. The bill passed the House on June 20, 1966 and was signed into law - albeit begrudgingly - on July 4, 1966 by President Lyndon Baines Johnson, who refused a signing ceremony for the new law.⁷

Moyers said in 2005:

I knew that LBJ had to be dragged kicking and screaming to the signing...He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets and opening government files; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House. And he might have followed through if Moss and [Russell] Wiggins and other editors hadn't barraged him with pleas and petitions. He relented and signed 'the damned thing,' as he called it (I'm paraphrasing what he actually said in case C-Span is here).⁸

As monumental as the enactment of FOIA was, the law has left a lot to be answered, with countless court cases interpreting its proper application and exceptions in the years since. State freedom of information laws also often leave much room for argument over which types of government records and proceedings are considered public.

In one landmark case, *Richmond Newspapers v. Virginia*, the 1979 case that established the First Amendment right of access to court proceedings, the Chief Justice

⁷ *Id.*

⁸ *Id.*

Warren Burger noted, “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

While the Court's holding centered on the right of access to court proceedings, the decision had broader implications regarding whether the First Amendment "encompassed not only the right to speak but also the freedom to listen and to receive information and ideas."⁹

The FOIA does not apply to state governments, but every state has enacted similar legislation, though the laws do at times vary greatly from state to state. Still, the rationale behind the state public information laws mirror that of the FOIA. For instance, when the Washington state legislature enacted “sunshine” public records and open-meetings laws more than thirty years ago, it stated, “[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”¹⁰

Still, despite the commitment to transparency espoused by government officials, requesters frequently face an uphill battle, and reports of agencies responding to requests with great hostility are not uncommon. For instance, a 2004 statewide audit in Florida, conducted by a group of 30 Florida newspapers, determined that public officials "lied to, harassed and even threatened volunteers" who sought access to public records, with some counties wrongly telling requesters that the documents they wanted didn't exist.¹¹

⁹ *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980); The Oyez Project at IIT Chicago-Kent College of Law (October, 2014), http://www.oyez.org/cases/1970-1979/1979/1979_79_243.

¹⁰ Revised Code of Washington (RCW) § 42.56.030 (Formerly RCW 42.17.251), <http://app.leg.wa.gov/RCW/default.aspx?cite=42.56.030>.

¹¹ Chris Davis and Matthew Doig, *Public Records Audit: Some Records Requests Met With Suspicion and Threats*, St. Augustine Record, February 07, 2004, at http://staugustine.com/stories/020704/new_2111766.shtml.

Likewise, the federal government - oft criticized for its delay tactics, loosely-applied exceptions, and overzealous redaction - has made purported efforts to increase FOIA responsiveness and compliance in recent years, but transparency audits have found a discrepancy between promises made and actual, practical access to records.

“My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government,” President Barack Obama stated in an open government memorandum issued his first day in office.¹² Still, many transparency advocates remain critical of the administration's efforts, citing a lack of effective progress and a failure to live up to promised transparency benchmarks, including those involving increasing access to electronic records.

Scholars and philosophers, founding fathers and judges laid the foundation for a free press and, with it, the right to access and report information about government matters. Still, open government advocates continue to struggle at times to gain access - in any format - to records that ought to be public in the U.S., let alone to records in a meaningful electronic format.

Current Research

Several organizations have conducted 50-state transparency surveys in recent years, typically analyzing and grading each state's transparency website or portal. Sometimes these surveys focus on the availability of a particular frequently-requested record, like department budgets.

¹² President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government*, 74 Fed. Reg.15 (Jan. 21, 2009), http://www.whitehouse.gov/the_press_office/Transparency_and_Open_Government/.

The Knight Community News Network "looked at the Web sites of the 50 states and Washington, D.C., including state, governor and attorney general home pages and related content, and evaluated them on the basis of the visibility and quality of their online resources for citizens seeking information on rights of access to government records and meetings.¹³"

KCNN awarded a "thumbs up" rating to states that made good use of their online resources to inform the public about rights of access to public meetings and records, a "check mark" rating to states with easily-located basic information about public access, a "help wanted" rating to states that either need more comprehensive information or to make the available information more visible, and a "thumbs down" rating for the states with little to no information about access either to public records or public meetings. KCNN's research results are made available through an online, interactive map format. This format has the advantage of allowing the state ratings to be regularly updated, as states make improvements.

The Sunshine Review, a national nonprofit organization advocating government transparency, conducts yearly assessments examining transparency in state and local government. "The Sunny Awards recognize governments that make transparency a priority. The winners of the Sunny Awards are cities, counties and school districts that proactively share the public information that empowers citizens and keeps government accountable to the people."¹⁴ For the more recent Sunny Awards, the Sunshine Review analyzed "more than 1,000 qualifying government websites and graded each on a 10-

¹³ The Knight Community News Network, American University's School of Communication, *The Citizen's Guide to Open Government*, Washington, D.C. (Oct., 2014), http://www.kcnn.org/open_government/door_1/.

¹⁴ 2013 Sunny Awards, the Lucy Burns Institute, *Ballotpedia* (2013). http://ballotpedia.org/2013_Sunny_Awards

point transparency checklist," examining whether "items such as budgets, meetings, lobbying, financial audits, contracts, academic performance, public records and taxes" were proactively made available to the public.

Most recently, the U.S. Public Interest Research Group Education Fund released its fifth annual report, "Following the Money 2014: How the 50 States Rate in Providing Online Access to Government Spending Data."¹⁵ The researchers examined the content and ease-of-use of each state's transparency website and assigned each state a grade of "A" to "F." The organization raises its grading standards each year, requiring continued improvement from states in order to remain a top transparency leader.¹⁶

The Better Government Association and the National Freedom of Information Coalition conducted a nationwide survey assessing the strength of each state's open record act, based on certain criteria, including the time-limit agencies have to respond to a records request, whether attorney's fees and costs are awarded to the winning party if the dispute goes to court, whether there are penalties or sanctions for failing to comply with transparency laws, the process a citizen must go through to appeal an agency's decision, and whether an option to expedite the process exists.¹⁷

While very useful in determining the status of states' progress in transparency, none of these surveys assessed agency responses to actual records requests. This research

¹⁵ United States Public Interest Research Group, *New Report Ranks Transparency of Government Spending in the 50 States* (April 8, 2014) [Press Release], <http://www.uspirg.org/news/usp/new-report-ranks-transparency-government-spending-50-states>.

¹⁶ In 2013, the leading states with the most comprehensive transparency websites are Indiana, Florida, Oregon, Florida, Texas, Massachusetts, Iowa, Vermont, and Wisconsin. United States Public Interest Research Group, *Report: Transparent & Accountable Budgets* (April 8, 2014) <http://uspirg.org/reports/usp/following-money-2014>.

¹⁷ Charles N. Davis and Jay E. Stewart, National Freedom of Information Coalition and Better Government Association, *Results and Criteria of BGA/NFOIC Survey* (2008), <http://www.nfoic.org/sites/default/files/results1.pdf>

did not uncover a study analyzing a 50-state public records request, though there have been numerous federal, statewide and local government audits.

The National Freedom of Information Coalition tracks freedom of information audits at all levels of government and reports the findings on its open government coalition website.¹⁸ The numerous open government audits span from the first recorded FOI audit conducted in 1992 by the Oakland Tribune and the First Amendment Project to gauge the compliance of 30 Bay Area agencies with the California Public Records Act, to the 2013 audit of 27 public bodies in Washington D.C., conducted by the D.C. Open Government Coalition.¹⁹

One audit tracked by the NFOIC was conducted by U.S. Senator Claire McCaskill's office when she was Missouri State Auditor in 2001.²⁰ This audit examined how well Missouri's state agencies, boards and commissions complied with public records requests under Sunshine Law provisions. A total of 194 state agencies, boards and commissions were selected for review, looking at the timeliness of processing a request, the reasonableness of denying a request and the fees charged for such requests. Audits like this one are useful in identifying factors that help define "accessibility" in practice.

The current research available grades states' transparency portals or the quality of state's freedom of information laws, or assesses states' or local governments' accessibility based on open records audits, but no available research to date appears to have taken a data-driven approach to a nationwide audit of access to *electronic* records.

¹⁸ National Freedom of Information Coalition, *FOI Audits* (2014), <http://www.nfoic.org/foi-audits>.

¹⁹ National Freedom of Information Coalition, *D.C. Government Agencies: Kinda Open, Kinda Not* (March 15, 2013), <http://www.nfoic.org/dc-government-agencies-kinda-open-kinda-not>.

²⁰ Office of the State Auditor of Missouri Claire McCaskill, *Compliance With Sunshine Law Requirements: State Agencies, Boards and Commissions*, Report No. 2001-33 (April 17, 2001).

Access to Records in Electronic Format

As far back as 1996, Congress recognized the importance of making records publicly available in an electronic format, amending the federal Freedom of Information Act to specifically encompass electronic formats - like emails, spreadsheets, and other electronic versions of records - in the law's definition of what constitutes a public record.

Dubbed "EFOIA," the new amendment required federal agencies to provide the electronic form of a record, if requested, so long as that format is "readily reproducible" and its production would not "significantly interfere with the operation of the agency's automated information system." The amendment did not deal with the content of records, only the format. In other words, if a hard copy of a record is exempt from disclosure under the law, that exemption would likely also apply to the electronic format.²¹

A State-by-State Hodgepodge

In interpreting state freedom of information laws, courts have come down on both sides of the debate over whether the government can charge high fees for electronic records- and whether they even have to provide records in electronic format in the first place - creating a hodgepodge of conflicting court cases, agency rulings and statutory interpretations amongst and at times within states.

A New Jersey court, for example, ruled that municipalities do not have to provide public records to requesters in a computer-readable format if they are not already stored in such a format.²²

²¹ The Reporters Committee for Freedom of the Press, *Access to Electronic Records*, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/access-electronic-records#sthash.4rbuE0py.dpuf>.

²² Steven Lemongello, *Somerville Paper Sues Town Over \$1,100 Surcharge for Public Records*, *PressofAtlanticCity.com*, Oct. 7, 2009, at http://m.pressofatlanticcity.com/mobile/article_725715d8-b387-11de-99cd-001cc4c03286.html. *See also*:

In this case, a New Jersey newspaper lost its open records suit for free access to borough (county) payroll records from 2008 and 2009 in a searchable digital database format. The newspaper wanted the records in spreadsheet format in order to compare them with other municipalities, but the borough wanted to charge a \$1,100 fee. The state's open records law requires the borough to provide the records in the medium in which they are maintained, but Judge Yolanda Ciccone said the newspaper had not "established to a certainty" that the borough possessed the records in the format requested.

"We find the burden of charging the taxpayer of New Jersey to produce records that already exist in a common and usable format, merely for the convenience of the requestor, to be . . . unreasonable," Ciccone wrote in her decision.

Other courts have been more sympathetic to the requester. In Oklahoma, for example, courts in at least four counties have ruled against county assessors who wanted to charge requesters thousands of dollars in copying fees to reproduce records electronically.²³ The practice of charging exorbitant fees for records in an electronic format flies in the face of the state's open records law, which allows only charges for the reasonable and direct cost of copying or reproducing records.

To address the problem, the state's assessors association held a study group to establish a standard fee schedule for reproducing records in an electronic format. While

<http://www.mycentraljersey.com/article/20091130/NEWS/91130074/-1/newsfront/Judge-reserves-decision-on-Courier-News-lawsuit-brought-against-Raritan-Borough>

²³ Ann Kelley, *Grady County Assessor Loses Open Records Suit*, *The Oklahoman*, Nov. 10, 2009 at http://www.newsok.com/grady-county-assessor-loses-open-records-suit/article/3416133?custom_click=headlines_widget#ixzz0bwpagCWQ.

many assessors have adopted the new standard, the fee schedule is not mandatory and some continue to overcharge.²⁴

While some local governments are willing to provide data in an electronic format, that record is frequently pre-processed and fails to contain all of, or even the most up-to-date, information. One New Jersey requester, for example, was denied access when she asked to see the payroll distribution check register instead of the most recent salary resolution. Though the salary resolution may be in an electronic format, it does not track employee overtime and only lists employees' hourly wages but not how many hours they worked during a pay period. "I don't want to know what people's base annual salaries [are]," the requester told a local newspaper. "I want to know what people actually got paid."²⁵

Medium Neutrality

Of those states that prioritize access to electronic records, many have modeled their freedom of information laws after the federal guidelines. In 2006, Arkansas developed a model for upgrading public access to records in Arkansas by making them available in electronic format.²⁶ The Arkansas plan is modeled after the federal FOIA, which generally rejects medium distinctions and instead sets electronic records on the same footing as, or sometimes better footing, than paper records. This policy, called "medium neutrality," is codified under the Arkansas FOIA as requiring government to produce records "in any medium in which the record is readily available."

²⁴ *Id.*

²⁵ Dan Goldberg, *Mount Arlington Sued for Payroll Records*, The Star-Ledger, Dec. 10, 2009 at http://www.nj.com/news/local/index.ssf/2009/12/mount_arlington_sued_for_payro.html.

²⁶ Richard J. Peltz, *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555 (2006).

Freedom of information analysts have debated how "medium neutrality" affects fees charged for records, with some experts arguing that the increased call for electronic records has caused government officials to move away from charging actual costs and toward money-making schemes. Agencies maintain that the expense of electronic recordkeeping should allow for charging higher fees, since electronic equipment is more expensive than paper and filing cabinets, and "more skilled personnel--also more expensive, are required to operate the technology."²⁷ Additionally, some public access advocates have posited that government agencies want to charge higher than actual costs for electronic records as a money-making scheme, because they know the demand is high, and that people will pay more for a format they can actually utilize.

Many freedom of information advocates argue that government should not be allowed to hand over records in a format that the average requester cannot use—for example, a format that can only be decoded by proprietary institutional software. For this reason, the new Arkansas FOIA now requires that "[a]ny computer hardware or software acquired by an entity subject to [the FOIA] after July 1, 2001, . . . shall not impede public access to records in electronic form."

Format vs. Medium

Another point worth mentioning is the distinction between format and medium. The discussion frequently focuses exclusively on medium- whether records can be produced electronically, or only in hard copy. But there are numerous types of electronic

²⁷ *Id.*

records, and requesters may seek different formats based on how they intend to use or manipulate the data.²⁸

Unfortunately, many public record laws fail to address electronic records at all, let alone encourage the record-holder to attempt to accommodate requests for records in certain formats, rather than others. In fact, many states include provisions indicating “nothing in this section shall be construed to require a public agency to respond to requests by creating or compiling a record that does not exist,” or a similar statement. In these states, simply reformatting a record from a PDF, or Portable Document Format, to an excel spreadsheet, for example, could be construed as creating an entirely new record, something agencies are not required to do in order to fulfill a records request.

On the other hand, many states allow requesters to ask for documents to be provided in the format in which they are stored, or the so-called native format. For example, if an agency maintains information in an Excel file, then the agency must provide an Excel file to a requester who prefers that format. Some states are wary of the potential for requesters to manipulate or even alter the records provided, and thus insist on providing electronic records only in formats that cannot be easily changed - such as PDFs. But depending on the specific laws of the state, an agency may not be allowed to convert a file to a PDF from an existing Excel file simply to preclude a requester from manipulating the data, especially if the requester is seeking an Excel file.

If, however, the state maintains its records in some sort of alternate software program that everyday requesters are not likely to be familiar with or have access to, this creates a kind of legal "gray area," since the law does not require the custodian to transfer

²⁸ Frayda Bluestein, *Form, Format, and Medium: How Must Electronic Records Be Provided?* Coates' Canons: NC Local Government Law, The School of Government at UNC Chapel Hill (March 7th, 2012), <http://canons.sog.unc.edu/?p=6437>.

the data to a different format, even if the original format is confusing, unreadable, or unwieldy for a requester. Thus, if the only electronic form of a record is one that requesters cannot use, any requirement that states comply with requests for electronic documents is effectively rendered meaningless.

Prohibitive Electronic Formats

Even agencies that are ready and willing to provide access to records in an electronic format are sometimes unable to fulfill the request in a way that will be meaningful for the requester's purpose. Some electronic formats cannot overcome the limitations inherent in hard copy records, or create more problems than they solve.

Many government agencies will respond to a request for a record in an electronic format by providing a PDF, but for requesters seeking large amounts of numerical data or investigative reporters who wish to run content analyses - a PDF can render the record practically useless. According to the Sunlight Foundation, a nonprofit organization that advocates for government transparency, difficulties extracting data from PDFs, can hinder users' efforts to effectively analyze and interpret the information.²⁹

Adobe, which makes software for reading and creating PDF documents, explains that the data is in fact parsable, but admits that most users do not know how to use the function that can extract the data. Even so, open government advocates argue that most reporters - and certainly members of the general public - lack the computer programming background or coding fluency necessary to process and organize the necessary data, and the burden of providing useful data should be on the government, rather than on the requester to extract the data.

²⁹ Joab Jackson, *Is PDF Hurting Transparency?* Government Computer News, Nov. 04, 2009 at http://gcn.com/Articles/2009/11/03/Sunlight-Adobe-Tussle.aspx?s=gcdaily_051109&Page=1.

Additionally, because the format is not “machine readable,”³⁰ the widespread government use of PDFs may actually impede government transparency, despite the fact that more access to records in electronic or computerized format typically facilitates openness.

“Government releasing data in PDF tends to be catastrophic for Open Government advocates, journalists and our readers because of the amount of overhead it takes to get data out of it,” wrote blogger Clay Johnson in the Sunlight Foundation blog, “Adobe is Bad for Open Government.”³¹

The blog gives examples of government documents rendered useless for data aggregation purposes because of their PDF format. Specifically, requesters have had trouble with House of Representatives bills, the Internal Revenue Service's Political Action Committee filings, and Congressional earmark requests from members of Congress. Legislative bills, for example, require users to build a special parser for each individual bill in order to represent it programmatically, wrote Johnson.

The Sunlight Foundation also takes issue with the Adobe Flash program. “Government has spent lots of time and money developing flash tools to allow citizens to view charts and graphs online, and while we're happy the government is interested in allowing citizens to do this, Government's *primary* method of disclosure should not be these visualizations, but rather publishing the APIs and datasets that allow citizens to make their own.”³²

³⁰ Clay Johnson, Adobe is Bad for Open Government, Sunlight Labs, Oct. 28, 2009 at <http://sunlightlabs.com/blog/2009/adobe-bad-open-government/>.

³¹ *Id.*

³² To address these difficulties, Adobe held a one-day conference Nov. 5, 2009 on open government for agencies that utilize PDF and Flash. *Id.*

Another example of an electronic record with a user-unfriendly, prohibitive format is the more-than 3,000 page document posted online that contains a quarterly report of all receipts and expenditures for U.S. House members and committees. In November, 2009, the House began posting lawmakers' office expense reports online for the first time, in response to Speaker Nancy Pelosi's call for increased access to the data showing how legislators spend taxpayer funds. But transparency advocates complain that the document is not user-friendly.

“Little effort has apparently been made to create a document that's easily searchable for reporters, watchdog groups, or interested on members of the public. Indeed, the move, though a step in the right direction, appears to represent close to the bare minimum that could have been done.”³³

Congressional watchdogs seem to agree, noting that the online reports have much less detail than hard copy records on what the money was used to buy.³⁴

Transparency Portals: A Good Start but not a Silver Bullet

As more states begin to recognize the importance of access to records in an electronic format, many agencies have created transparency portals for citizens to easily find frequently-sought data.

The push toward transparency portals took off following a September 2009 report in which the National Association of State Chief Information Officers (NASCIO) challenged states and local governments to follow the federal government's lead in

³³ Zachary Roth, *In Monster Doc, House Spending Published Online*, TPM Muckraker, Nov. 30, 2009 at http://tpmmuckraker.talkingpointsmemo.com/2009/11/in_monster_doc_house_spending_published_online.php#more.

³⁴ T. W. Farnam, *More is Less as House Expense Records Go Online*, The Wall Street Journal, Nov. 30, 2009 at <http://blogs.wsj.com/washwire/2009/11/30/more-is-less-as-house-expense-records-go-online/>.

becoming more transparent by publishing a one-stop portal for all publicly-accessible data, much like the White House's data catalog, Data.Gov.³⁵

Though some state agencies have already made much of their data public electronically, NASCIO maintains that a single state data portal would dramatically increase transparency and accessibility for citizens.

"The full universe of outcomes is not fully understood, but it is certainly anticipated that the availability of government datasets will lead to more citizen engagement, the potential to spawn new economic opportunities, efficiencies in the creation and use of data, and greater accountability on the part of government," NASCIO contends in its report entitled "A Call to Action for State Government – Guidance for Opening the Doors to State Data."³⁶

While most states have some sort of transparency portal, local governments have been slower to follow suit, with some notable exceptions. Former New York City Mayor Michael Bloomberg announced in June, 2009 the start of "311 Online"— "a one-stop, searchable Web portal on NYC.gov for thousands of New York City services."³⁷ Shortly thereafter, the city unveiled its Data Mine portal, a catalog that supplies many sets of machine-readable public data produced by City agencies and other City organizations,

³⁵ Joab Jackson, *States Urged to Create Data Catalogs: NASCIO Calls For State Versions of the Federal Data.Gov Portal*, Government Computer News, Oct. 7, 2009 at http://gcn.com/articles/2009/10/07/states-urged-to-create-data-catalogs.aspx?s=gcnDaily_081009.

³⁶ *Id.*, citing *A Call to Action for State Government – Guidance for Opening the Doors to State Data*, NASCIO, (Sept. 2009), <http://www.nascio.org/publications/documents/NASCIO-DataTransparency.pdf>.

³⁷ Sewell Chan and Patrick McGeehan, *City Invites Software Developers to Crunch Big Data Sets*, The New York Times, June 29, 2009 at <http://cityroom.blogs.nytimes.com/2009/06/29/city-invites-software-developers-to-crunch-big-data-sets/>.

including “directories of sidewalk cafes, property values, horseback riding trails and historic houses.”³⁸

Likewise, San Francisco introduced DataSF, an online clearinghouse of raw government data available for public download that includes “seismic hazard zones, street sweeping schedules and campaign finance filings.”³⁹

While big cities like San Francisco and New York are making raw government data available to the public, the trend is not necessarily spreading as quickly to other municipalities.⁴⁰ The discrepancy might turn on whether public officials are calling for increased access to data, at both the state and local government levels.

Fees for Fulfilling Requests for Electronic Records

Some of the debate surrounding access to records in an electronic format focuses specifically on court records, which are maintained through the database PACER, or Public Access to Court Electronic Records, the federal Judiciary's electronic service that provides case and docket information from federal appellate, district and bankruptcy courts. While court records are certainly unique from other types of public records, like public employee salaries, many of the issues related to accessing the records in electronic format are similar - particularly prohibitive fees associated with obtaining the records.

Users of PACER are charged fees, and some public access advocates argue that those fees exceed the federal guidelines for assessing fees for access to public records in an electronic format. The law states that the "Judicial Conference may, only to the extent

³⁸ Claire Cain Miller, *Local Governments Offer Data to Software Tinkerers*, The New York Times, Dec. 6, 2009 at http://www.nytimes.com/2009/12/07/technology/internet/07cities.html?_r=1.

³⁹ *Id.*

⁴⁰ Matt Stiles, *On the Records: A Data Challenge for Texas*, The Texas Tribune, Dec. 7, 2009 at <http://www.texastribune.org/blogs/post/2009/dec/07/records-texas-data-challenge/#ixzz0bxtnf3cm>.

necessary, prescribe reasonable fees... to reimburse expenses incurred in providing these services."⁴¹

Some access experts have argued that the current fees "are unquestionably greater than the cost of providing the services,"⁴² and that even though the actual costs of storing and delivering data electronically has decreased in recent years, the user costs associated with PACER have risen 42 percent.⁴³ In response, some open government advocates have made headway in making PACER documents freely available on alternative websites, and one activist was investigated by the FBI for "liberating the paywalled court records."⁴⁴

PACER is considered "subjectively expensive," a label that also applies to fees charged by states for many types of commonly requested electronic records. While the court records system charges only 10 cents per page, the costs add up quickly for researchers or investigative reporters, since the charge applies not just to pages downloaded, but to all pages accessed in a search - even though a "search" does not cost the service anything.

Likewise, when states charge even "reasonable" fees to produce records in an electronic format, those fees can still be prohibitive for an average requester, and may or may not correspond to actual costs incurred. Many investigative reporters, for example, need to access records from multiple agencies or states, and numerous fees add up. One

⁴¹ 28 U.S.C. 1913 (note), http://www.openpacer.org/hogan/28_USC_1913_excerpt.pdf.

⁴² Steve Schultze, *Making Excuses for Fees on Electronic Public Records*, Princeton University Center for Information Technology Policy (February 7, 2013), <https://freedom-to-tinker.com/blog/sjs/making-excuses-for-fees-on-electronic-public-records/>.

⁴³ *Id.*

⁴⁴ Ryan Singel, *FBI Investigated Coder for Liberating Paywalled Court Records*, *Wired*, Oct. 5, 2009 at <http://www.wired.com/2009/10/swartz-fbi/>.

way to minimize unnecessary fees if for states to maintain commonly requested records in electronic format, so as not to require man-hours to produce such records.

As governments increasingly rely on technology to conduct public business, the fees quoted to requesters typically claim to compensate the state for the staff-time used in electronically identifying the records requested. But open government advocates argue that this type of valuation results in exorbitant fees that major watchdog and media groups are unable to pay, let alone the average member of the general public.

For instance, in 2013, the Center for Public Integrity made a public records request to Florida's 17th Judicial Circuit for records related to "the procedures and policies surrounding foreclosure cases."⁴⁵ The court quoted the watchdog group fees in excess of \$132,000, arriving at that figure by estimating that government employees who make roughly \$45 per hour would spend 2,500 work hours searching through 149,000 emails.⁴⁶ In a different request related to the same topic, the court stated it would require a \$66,000 deposit from the organization before even searching for any responsive records. One editorial in a local Florida newspaper reasons:

If the fees on public records being charged by Florida government are so excessive that even an open government foundation like the CPI refuses to pay them, it is clear there is a problem. If the cost of obtaining and sorting through public records is really as high as Florida government officials claim, then Florida must find more funds in the state budget to cover those costs. Better yet, the state should develop or utilize more advanced technology to lower costs by processing public records more efficiently. All Floridians deserve the right to access state records at a truly reasonable cost. After all, what is the point of having "public" records if they aren't readily available to the public?⁴⁷

⁴⁵ *Florida Public Records Fees Must Be Kept in Check*, The Independent Florida Alligator, Oct.13, 2014 at http://www.alligator.org/opinion/editorials/article_ec6e8bc4-528a-11e4-ac28-276adf97d1e3.html.

⁴⁶ *Id.*

⁴⁷ *Id.*

One effective way to address and combat prohibitive "research and retrieval" fees is for states to take legislative measures to cap fees for requests at what the state deems a reasonable amount. For instance, Colorado's governor, John Hickenlooper, recently signed into law a bill capping the research and retrieval fees that municipal, county and state governments may charge at \$30 an hour, with the first hour being free.⁴⁸

Still, some government watchdogs argue the new law does not go far enough. Officials in Boulder had previously been accused of "making very high monetary estimates for research and retrieval and then charging exactly the estimated price without providing any proof of who spent how much time doing what." Without more specific legal guidelines requiring recordkeeping agencies to document the number of hours spent retrieving records, the law capping fees could still be "rendered impotent."⁴⁹

Proactive Disclosure of Electronic Records

A broader way to circumvent some of the issues associated with fees for electronic records is for states to proactively post electronic records online, for free, following the lead of many federal agencies. As highlighted in the US Department of Justice Guide to the Freedom of Information Act:

Proactive disclosures – where agencies make their records publicly available without waiting for specific requests from the public – are an integral part of the Freedom of Information Act. All federal agencies are required to affirmatively and continuously disclose records proactively by subsection (a)(2) of the FOIA. Although this “proactive disclosure provision” has always served a vital role in achieving an “informed citizenry” – the central purpose of the FOIA – now, proactive disclosures are in the spotlight like never before [citations in original].⁵⁰

⁴⁸ Joel Dyer, *New Law Lowers Fees for Public Records*, Boulder Weekly, May 8, 2014 at <http://www.boulderweekly.com/article-12818-new-law-lowers-fees-for-public-records.html>.

⁴⁹ *Id.*

⁵⁰ The Department of Justice Guide to the Freedom of Information Act, *Proactive Disclosures* (2009 ed.), http://www.justice.gov/oip/foia_guide09.htm; http://www.justice.gov/oip/foia_guide09/proactive-disclosures.pdf.

On his first full-day in office, President Barack Obama explained the rationale for adopting a presumption in favor of disclosure in his January 2009 FOIA Memorandum to all federal agency and department heads "emphasizing that the FOIA reflects a 'profound national commitment to ensuring an open Government'"⁵¹:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.⁵²

The Obama administration followed up the memorandum by launching the Data.gov website in May, 2009, with the purpose of increasing "public access to high value, machine readable datasets generated by the Executive Branch of the Federal Government." The website provided the public with "access to more government information online than ever before," including economic, health care, environmental, and other data available in different types of electronic formats.⁵³

Next, the White House Office of Management and Budget issued its Open Government Directive outlined in the FOIA memorandum, directing agencies to take

⁵¹ Alysia Davies and Dara Lithwick, *Government 2.0 and Access to Information: 2. Recent Developments in Proactive Disclosure and Open Data in the United States and Other Countries*, Library of Parliament of Canada Background Paper No. 2010-15-E (April 15, 2010), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-15-e.pdf>.

⁵² President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies: Freedom of Information Act*, 74 Fed. Reg. 15 (Jan. 21, 2009), <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1773.pdf>.

⁵³ Davies and Lithwick, *Supra*.

specific steps to increase transparency and proactive disclosure. The directive set forth specific tasks and deadlines for publishing information, creating a culture of openness, improving data quality, and updating policies to allow for greater openness.⁵⁴

The administration's move in the direction of increased transparency was initially lauded as "a transformation of incalculable significance"⁵⁵ for the federal government, though many watchdog groups and open government advocates have since reported disappointing compliance with the directive's transparency goals and deadlines for agencies and department to overhaul their FOIA processes and proactive disclosures.⁵⁶

Even so, the federal government's espoused commitment to proactive disclosure and the development of a centralized transparency portal for federal data has been a step in the right direction. Many states are following suit, having moved towards proactively providing frequently requested information, like salary records or expense reports, online through government transparency portals. In fact, according to the U.S. Public Interest Research Group's latest transparency report, "last year was the first time that all 50 states operated websites to make information on state spending accessible to the public."⁵⁷ These web portals continue to improve, with several states launching new websites or making substantive upgrades to their existing websites, and others innovating new features for online transparency, U.S. PIRG reports.

⁵⁴ *Id.*

⁵⁵ *Obama Gives New Life to the FOIA*, Los Angeles Times, Jan. 23, 2009 at <http://www.latimes.com/opinion/editorials/la-ed-foia23-2009jan23-story.html>.

⁵⁶ Trevor Timm, *Under Obama, the Freedom of Information Act is Still in Shackles*, Electronic Frontier Foundation, (Jan. 26, 2012), <https://www.eff.org/deeplinks/2012/01/under-obama-administration-freedom-information-act-still-shackles>.

⁵⁷ Report: Transparent and Accountable Budgets, *How the 50 States Rate in Providing Online Access to Government Spending Data*, United States Public Interest Research Group (2014), <http://uspirg.org/reports/usp/following-money-2014>.

But, the comprehensiveness and user-friendliness of these transparency portals vary greatly, from those that provide an advanced search function and allow users to download the data in multiple different formats in order to best meet their needs, to complicated, limiting systems requiring users to input numerous potentially unknown fields - an employee's full name and agency, for instance - before information is displayed. While some states have made more progress than others, every state has room for improvement in one area or another.

Proactive Disclosure and Privacy Concerns

While governments are often accused of stonewalling requesters or not valuing the right of public access, at least some of these difficulties stem from agencies' genuine concerns about citizen privacy rights. When agencies began making initial progress toward more widely available electronic-records access nationwide, there was significant resistance from government entities that feared interpreting the law incorrectly or exposing citizens to potential identity theft.⁵⁸

This concern proved a particular obstacle in making court records available online. However, the records can be published without key identifiers, such as home addresses, birthdates and Social Security numbers, even though this information is available in hardcopy format. While redacting the private information may be time-consuming or even costly upfront, there are a great many benefits to completing the task once and being done with it - especially in regards to frequently requested records.

⁵⁸ Andrew Schotz, *2005 FOI Update: Electronic Access*, The First Amendment Center Report, (March 10, 2005), <http://www.firstamendmentcenter.org/analysis.aspx?id=14959>.

The Advantages for Governments Using Electronic Records

Switching to an electronic records system certainly comes with upfront and maintenance costs, but the benefits to both government entities and the public outweigh the initial drawbacks. While developing an electronic recordkeeping system comes with the cost of converting hard copies to digital records - like paying for additional server space to house the electronic records, developing an interactive portal that is easily accessible to the public, and paying for staff to be trained on the new system - the government will ultimately save money by moving away from a paper-dependent system.

As it stands, governments spend staggering amounts of money on hard-copy records systems, from printing costs and ink and paper purchases to paying for a physical storage location. According to the Sunlight Foundation, Ohio, spent some \$43,000 in one year on printing costs before moving towards a digitized records system, and a Florida records clerk reportedly claimed that the available record storage space was so overflowing, public records needed to be stored under a staircase.⁵⁹

Furthermore, streamlining and consolidating records through an electronic system allows for faster, more efficient, and more thorough searches, and easier records production. This saves staff time, and ultimately money, since it takes clerks much longer to run between rooms - or buildings, or across the state - and palm-through paper documents as opposed to conducting a simple computer search. While the initial cost of converting records into a digital format may be costly and complex, the long-term benefit is clear.

⁵⁹ Alisha Green, *Can Electronic Records Save Money, Increase Efficiency, and Benefit Everyone?* The Sunlight Foundation (Aug. 9, 2013), <http://sunlightfoundation.com/blog/2013/08/09/can-electronic-records-save-money-increase-efficiency-and-benefit-everyone/>.

In addition to the monetary benefits of moving to a digitized records system, governments should take into account the intangible benefits to the public right of access to information. For example, one study found that "court records contain information about abuse problems at foster homes, but no one person has the time or ability to search each and every written record stuffed in every file cabinet scattered about all the courthouses in the nation to ascertain which homes are safe and which might potentially present a danger to a child's safety. But if all such records were electronically available, any person could quickly and thoroughly search names, addresses and other relevant details to determine whether foster parents have a record of abusive behavior."⁶⁰

A digital records system can also significantly reduce costs for a requester, which in turn increases access. With a paper filing system, states typically assign fees to a requester to cover the costs associated with staff time required to locate, produce, and/or copy the requested records. Fees generally incorporate the costs of that staff time, along with any printing costs, paper and ink, and possibly any mailing costs.

Depending on the type and extent of the request, these types of fees can quickly add up. According to the Sunlight Foundation and the Reporters Committee for Freedom of the Press, one Tennessee journalist was quoted \$35,000 in "labor and printing costs" to produce records related to an investigation into a deaths or near deaths of children who had contact with the state's child welfare agency.⁶¹ For most investigative reporters, watchdogs, and average public citizens - those public records laws aim to serve - these "price tags" attached to obtaining records makes public access unobtainable.

⁶⁰ *Electronic Access to Court Records*, The Reporters Committee for Freedom of the Press, Special Report (Spring 2007), <http://www.rcfp.org/rcfp/orders/docs/EACR.pdf>.

⁶¹ Jeff Zalesin, *Agency Asks Tennessee Newspaper to Pay \$35,000 for Records on Deaths and Near Deaths*, Reporters Committee for Freedom of the Press (June 11, 2013), <http://www.rcfp.org/browse-media-law-resources/news/agency-asks-tennessee-newspaper-pay-35000-records-deaths-and-near-de>.

In fact, that is why some experts argue that when data are not available online or even in electronic format, they can only be considered nominally publicly available.⁶² In other words, the data posted online must be available in an easily accessible, flexible, or searchable format in order to meet the burden of public access.

The Role of Third-Parties in Access to Government Data

One freedom of information advocate maintains that “the online masses could be leveraged to help ensure the transparency and accountability that is the reason for making information public in the first place.”⁶³ In fact, numerous independent third parties have improvised to make public information available online in flexible formats, even where government has not done so. For example, many newspapers have made the requests for data, compiled state salary records and posted those records online in a searchable data format, even where the record holding agency has not proactively made those records available to the public.

When private parties fill the breach in government openness - by posting electronic records proactively - government agencies should be encouraged to follow suit, and live up to the example set by the newspaper. However, the reverse may be true at times, with agencies relying on the hard work of the private party and neglecting to make the data available through the proper channels. The fact that a media organization has done the work the government is responsible for does not alleviate the need for the government agency to live up to its purported policies of openness. After all, public requesters will naturally first seek out the records from the record-holder.

⁶² Jerry Brito, *Hack, Mash, and Peer: Crowdsourcing Government Transparency*, Colum. Sci. & Tech. L. Rev., Vol. IX, (May 2008).

⁶³ *Id.*

Some experts argue that government information should be made available online specifically because it would make it simpler for third-parties to aggregate government data. Since government agencies do not always provide comprehensive data, or information in a readily usable format, third-party aggregation is essential for journalists to interpret data effectively. For instance, third-party data aggregation can be published on private websites which can present government information in innovative and useful ways, such as interactive maps that shows the locations of funding recipients.

These innovative remixes of government data available in structured format are dubbed “mashups,” and can serve as watchdog tools used by journalists, bloggers, and citizens to better scrutinize government.⁶⁴ Because these types of applications make data more valuable, the government has a duty to make the information available in a structured electronic format, even though the government itself need not develop such innovative formats or applications, according to some public access experts.

Ultimately, digitized electronic records improve public access and are advantageous to governments as well as requesters, both from a cost-effective perspective and from a transparency standpoint.

⁶⁴ Jerry Brito, *Opening Government: Mashups*, Mercatus on Policy, No. 27, (Sept. 9, 2008).

METHODS

Focus of Study - Research Question

This study includes a 50-state survey to assess how states responded to a commonly-sought request for records in an electronic format, comparing the quality of responses as determined by certain criteria.

In other words, this study began with a rather broad research question:

How accessible are state public records in electronic format?

and then narrowed the focus of the research by looking at specific factors that might quantify "accessibility."

The criteria identified as defining "accessibility of electronic records" for the purpose of this research included: 1) whether the option to make a records request is available online/electronically, 2) the length of time it took to receive an agency response, including both the time to receive the initial response and the time to actually receive responsive records; and whether those response times complied with state laws, 3) the amount of fees, if any, charged to produce the records, 4) the quality and comprehensiveness of responsive records, including the adequacy of proactively disclosed records available through a transparency portal, and 5) whether the responsive records were provided in the requested electronic medium. The study also looked at how easily navigable the transparency portals and online records request options were, as measured by the number of "clicks" it took to locate the information sought, though these results are not included in the total assessment for each state, since navigating an online portal is a very subjective task.

Measurement and Data

The study employs methodology similar to that of the audit conducted by U.S. Senator Claire McCaskill's office when she was Missouri State Auditor in 2001.⁶⁵ As mentioned earlier, this audit examined how well Missouri's state agencies, boards and commissions complied with public records requests under Sunshine Law provisions. In this Missouri audit, a total of 194 state agencies, boards and commissions were selected for review, looking at the timeliness of processing a request, the reasonableness of denying a request and the fees charged for such requests. A letter requesting a copy of the minutes of the last meeting held in calendar year 1999 was sent to each board and commission, and a letter requesting purchase orders for the month of June 2000 was sent to each state agency.

In determining the criteria for analyzing the accessibility of the records in electronic format, this research looked at the factors similar surveys observed. Specifically, the Better Government Association and the National Freedom of Information Coalition study assessing the strength of each state's open record act, the Sunshine Review's 10-point transparency checklist,⁶⁶ and the U.S. Public Interest Research Group Education Fund's standards for grading leading transparency websites,⁶⁷ and the McCaskill audit each helped to establish which criteria best define "accessibility" with respect to electronic records.⁶⁸

⁶⁵ McCaskill, Report No. 2001-33, *supra*.

⁶⁶ 2013 Sunny Awards, *supra*.

⁶⁷ USPIRG, *supra* at <http://www.uspirg.org/news/usp/new-report-ranks-transparency-government-spending-50-states>.

⁶⁸ Davis and Stewart, *supra*.

Selecting a Record

Salary records were selected because they are frequently requested records and should be readily available in electronic format. Since the research sought to compare fees and timeliness of responses among states, choosing a uniform type of record that can be compared from state to state is especially important.

Locating the Right Agency

Determining which agency is the appropriate holder of the records sought was one of the greatest unanticipated challenges of this research. The agencies maintaining the salary records for state employees varied quite a bit among states. While state controllers, auditors, personnel and human resources offices, central management and state budget offices all play a role in handling state employee wages, typically only one of these agencies had access to comprehensive records for all state employees.

The research began by visiting the agency websites to determine which site, if any, posted salary information online. If so, the request was sent to the agency. If no salary information was posted online, the request was sent to the agency that dealt with employee benefits. Even though many states only proactively posted salary schedules or pay scales without names, most of the time these agencies proved to be the appropriate record holders. However, there were several instances in which the agency reached out to make it clear it was not the holder of the salary records sought. In these cases, some responses directed the requester to the correct agency and some denied the request and gave no forwarding information to further pursue the request. In instances where the original agency provided no forwarding information, the next most likely record-holding

agency was contacted by email to confirm whether the request for salary records would be appropriately directed to the agency.

State Transparency Portals: Room for Improvement

States do have public information portals centralizing frequently requested records, or sections summarizing public information law and how to go about making a public records request, but these sites are frequently not accessible from individual government agency websites, or are directly accessible only from some agency sites but not others. One recommendation would be for states to have a tab or link to the open government site from each of the department websites, as in Ohio and Missouri.⁶⁹

Likewise, none of the state transparency portals appear to link the specific public information displayed back to the record-holding agency responsible for the data. For instance, during the research there were several times where incomplete salary records were available through a transparency portal but it was not possible to determine which agency had provided those records. For requesters who wish to contact an agency to obtain more complete or more recent records than those posted on the state's transparency portal, it would be helpful to link to, or at least cite, the agency responsible for maintaining those records.

A few states provided commonly requested material, like salary data, in multiple locations for improved accessibility. Oklahoma, for example, provides state employee data in both its annual compensation report available through the Human Capital Management Division website, and in a more detailed format - including employee

⁶⁹ Ohio Attorney General Mike DeWine, *Sunshine Laws*, (Oct. 2014), <http://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws>.

names - on its state open government data portal. Rhode Island's consistency across all sites appeared markedly superior to other states.

While most states did provide at least some state employee salary information online, the types and breadth of information provided varied greatly. Still other states provided extensive information - even names of individual employees and their corresponding salaries - but required visitors to search for the data in a prohibitive manner - by inputting a specific employee's name, for example.

Online Records Request Option

In many ways, it seems quite unfair to evaluate a state that shows its commitment to transparency by offering an in-depth public information section on its website (or, in the case of Ohio and Virginia,⁷⁰ for instance, even setting aside a public information unit or freedom of information advisory council that aides requesters in making their inquiries and offers free mediation services) on the same level or even below that of a state that offers none of the above, and yet simplifies the process for requestors by providing the option of making the actual request online. Yet, in terms of transparency, the ability to make a timely, simple and free request can be worth much more than a beautiful, elaborate website or portal full of information a requester is not seeking.

Even some of the states with the best open government ratings from public access groups - based on how much information is proactively made public, and how much of a priority states have made information about public records laws and citizens' rights to access data - do not necessarily make the most basic information about how to go about filing a records request available or easy to find.

⁷⁰ Virginia Freedom of Information Advisory Council (Oct. 30, 2014), <http://foiacouncil.dls.virginia.gov/>.

Tennessee has a remarkable open government and transparency portal, as well as a designated open records counsel with its own website offering requesters assistance with filing a request and mediation efforts in working with agencies that have denied requests or are not responding to inquiries.⁷¹ The counsel reviews open records decisions and issues opinions on how to follow the laws. Both the transparency portal and the open records counsel website provide electronic contact options, either a form that can be submitted online or an email address at which to reach open government counsel staff.

However, even in light of all the effort the state has taken to make government documents accessible to the public, neither website provides adequate directions about how to make a request and where to send that request. The open government counsel provides a useful form with clear instructions for making a request, but still does not clarify whether the counsel itself fields requests or whether those requests must first be made through the individual agency.

Virginia's Freedom of Information Advisory Council is equally unclear about whether its advisors accept records requests, or where those requests should be directed. The state's Department of Accounts accepts freedom of information requests via email and provides detailed information regarding how to submit such a request. The Department of Human Resource Management, which maintains state employee salary records, offers similar guidance, but this researcher found the information almost impossible to access from within the site.

While the guidelines for how to make a public records request through this particular department can be located by using a search engine, not having the information

⁷¹ Tenn. Code Ann. § 8-4-602, 603.
<http://www.comptroller.tn.gov/openrecords/pdf/20140210TennesseeOfficeOfOpenRecordsCounsel.pdf>
(2013).

easily accessible from within the website defeats the purpose. Presumably, the instructions for filing a request are, in fact, technically accessible from the main page of the department website, but buried under numerous different tabs and subheadings that may not "jump out" at requesters as being the right place to look. Particularly for out-of-state requesters (though Virginia, with its bizarrely paradoxical FOIA limitations⁷² upheld by the U.S. Supreme Court in 2013 certainly is not seeking to encourage out-of-state requests) or other lay persons not familiar with a state's unique acronyms and terminology, burying open government guidelines deep within a website's structure makes accessing critical information quite difficult.

Others states had large discrepancies in how records requests are dealt with, depending on the agency holding the records. For example, in Oklahoma, the Department of Labor offers a helpful form for public records request submission and directions for where to send the form by mail. The Oklahoma Department of Public Safety offers requesters a completely different form available for submission by mail. But neither the main open government portal nor the Human Capital Management Division, which maintains salary records, offers a similar form or instructions about how to file a request for documents, and no department, to this researcher's knowledge, offered online form submission.

Analyzing Fees Charged

Much like the McCaskill's audit, this study planned to analyze the fees charged for producing the records. In the Missouri audit, requesters assessed whether a fee charged for duplication of a public record was fair, reasonable and did not exceed the

⁷² *McBurney v. Young*, 569 U.S. ____ (2013) (case No. 12-17); *see also*: Virginia Freedom of Information Act Council, *Responding To Requests From Out-Of-State*, <http://foiacouncil.dls.virginia.gov/out%20of%20state%20requests.pdf>.

actual cost of production. To do this, McCaskill's office had to determine a market rate. The office chose to compare the fees charged by agencies to that of commercial vendors, public libraries, and college and universities. Based on this survey, the office decided that any fee over \$0.10 per page would be considered on its face unreasonable.

Obviously, there has been a change in market rate for records production since 2001. However, the market rate does not appear to have risen substantially. For non-commercial requesters, the federal FOIA schedule currently allows federal agencies to charge a fee of \$.20 per page.⁷³ States have taken similar approaches, limiting fees to reasonable or actual costs. An arbitrator for a 2010 Florida case determined that \$.50 per page for copies was "unreasonable," unless the defendant condominium association could demonstrate payment of a market rate to a vendor, such as a copy service, or a specific accounting tied to the cost of the copies.⁷⁴

While many states have addressed reasonable fees for producing hard-copy records, fewer have specifically addressed how fees for electronic records should be assessed. For states that have addressed fees for electronic records, most seek to apply the same "reasonable cost of production" requirement that governs records requests for records in hard-copy formats. However, whether the cost of production can reasonably encompass the staff-time it takes to search for and compile the data requested has been much debated.

⁷³ IRS Disclosure Offices, *Freedom of Information Act (FOIA) Guidelines*, http://www.irs.gov/pub/irs-utl/irs_foia_guide.pdf#fees.

⁷⁴ Gary Poliakoff, *50¢ a Reasonable Fee for Copies?* Sun Sentinel, Aug. 8th, 2012; *see also: Maldondo v. MNTY Condominium Association, Inc.*, Fl. Arb. Case no. 209-05-1376, decided Feb. 5, 2010.

Disclosing the Requester's Purpose

In a 2001 statewide audit in Washington, media researchers from 25 news organizations encountered dozens of local public agencies which violated state law by withholding documents that the statutory law required them to release.⁷⁵ The audit requested lists of registered sex offenders, reports on crimes, home values, school superintendent contracts and restaurant inspections from agencies in all 39 Washington counties. As with the Missouri state audit, the reporters and other staffers in the Washington study posed as ordinary citizens when making their requests.

In a similar 2003 public records audit conducted by the Ohio Newspaper Association, Ohio journalists from more than 43 newspapers requested public officials salary records from municipal offices, school districts and police departments.⁷⁶ The researchers did not identify themselves as media members unless asked. The study found that the officers complied with Ohio law in only 30% of the record requests.

For the purpose of this study, the requester was not identified as a journalist. Right-to-know laws are aimed at making government information accessible to the public, not just the media, and the researcher sought to avoid influencing the way in which records custodians responded to the requests. Many states prohibit records custodian from requiring a requester to disclose the purpose of their request - with certain exceptions, such as requiring a requester to promise not to use the records (like state employee addresses) to send unsolicited marketing materials. Kansas, for example,

⁷⁵ Paula Lavigne Sullivan, *Washington, Your Right to Know: Audit Finds That Compliance With Open Records Law is a Sometime Thing*, The Tacoma News Tribune, (2001).

⁷⁶ Reporters Committee for Freedom of the Press, *Open Records Audit Shows 50 percent Compliance*, June 10, 2004; *see also*: Tom Gaumer, *Ohio Public Records Audit*, Computer Assisted Reporting Conference, (Newark, NJ 2006).

requires requesters to sign an affidavit promising not to misuse employee records for direct sales efforts before records will be released.

Only a few states inquired as to what the purpose of the request was, what organization prompted the request, or how the requested records might be used. Of the few states that inquired about the purpose of the request, only Kansas requested the information as a matter of policy. Other states simply asked over the phone, "Who are you with?" or "Is this a project for school?" or even "What do you need ALL the records for?"⁷⁷ In these instances, these questions seemed simply to be the spontaneous inquiries of the records custodians, who may or may not - but should have - known the law. Even so, ignorance of the official policy is no excuse because the impact on the public is the same for both states that do not protect requesters from needing to provide a reason for their request, and those that do provide that statutory protection but then fail to educate their records custodians on the policies. In both cases, requesters may be deterred or discouraged unfairly.

Making the Requests

The requests were mailed on October 11, 2013. Due to the Columbus Day holiday on October 14th, the requests were estimated to be received in office by October 15th. Indeed, responses began appearing on October 15th, and many responses specifically noted that the mailed requests had arrived on that date. Certainly, the amount of time the postal service took to deliver the requests depends on how far away from the location (Missouri) the receiving state is located, as well as weather conditions and any other unforeseen circumstances or postal delays. None of these delays can be attributed to the

⁷⁷The researcher responded to these questions by simply identifying a member of the public doing independent research.

responsive states, and any assessment of how quickly a state responded to the request clearly should take into account how soon the request arrived in the agency's office. Still, for consistency, the study began counting the number of days for response starting on October 15th. Clearly, it should be noted that the requests likely arrived in Illinois before Hawaii or Alaska, for example.

For states that offered an online record request submission, both a mailed hard copy request and an online submission option were submitted. Because it is sometimes impossible to know whether a state is responding to an online request or a hard copy request - when both types of requests are made - online submissions were made on the date that mailed requests would most likely arrive, October 15th. In choosing the method of making two types of requests for states that offered this option, the research attempted to strike a balance between consistency in the study across all states (making mailed requests postmarked on the same date) and analyzing states' responses in light of the actual options provided to requesters. When studying how quickly states respond to requests, it makes sense to utilize the option of instantaneous submission of the request, where available, and to compare response rate to states that do and do not provide email or online submission.

Limitations

The results of this research are not necessarily representative of all government agencies within a state, and the responses received from one particular records custodian may not be representative of the state's or even the agency's policies or practices.

The structure of states' official websites, their transparency portals, and the interconnectedness of individual state department or division websites to other state sites

impacted the analyses. Ease of locating both the actual salary data as well as information on whether it was possible to file a public records request online depended on several factors. As discussed earlier, many states contained transparency data and guidance for requesters online through their main state government homepage, but whether that information was easily accessible from human resources division pages, for example, varied greatly amongst states.

Locating information on two sets of data - salary information and online records request submission availability - ranged immensely, from as little as 30 seconds (Wisconsin) to more than an hour (West Virginia). The states in which locating information proved the most perplexing and time-consuming were those that maintained extensive transparency portals that, nevertheless, did not contain the data or FOI guidelines sought. It takes much more time to establish that data is not provided, or at least, cannot be located despite due diligence.

This study tracked the number of "clicks" needed to access data and any potential online submission forms. To control for researcher error, (clicking around endlessly beneath numerous different tabs and subheadings) however, the clicks were measured backwards from the point at which the information was located to the home site, whether it be the transparency portal, the state government homepage, or the appropriate division homepage. Some states provided access to the same information from multiple different sites, and in those instances, the smallest number of clicks was recorded.

In hindsight, while this method accounted for some potential researcher error or bias in locating the data, it failed to measure differences in accessibility stemming from availability of the information across all platforms. Providing access to data and requester

guidelines and submission forms from each individual department website is preferable, in that it increases accessibility by making the process easier on the requester, and unifying the way requests are received and data is presented amongst all state agencies. Future research should specifically track whether data and records request submissions are offered directly from the website of the individual state agency holding the records.

Because this study looked at data made available to requesters, starting by examining what is or is not available on the website of the record-holding agency and not the transparency portal or the main government homepage, the results differ from ratings provided by many open government coalitions that analyze and grade state transparency. This is an important distinction. A layperson or member of the public unfamiliar with freedom of information laws may very well begin their search for data or for guidelines about how to file a request on a state's main government homepage. However, many persons who are familiar enough with FOI laws to know that they exist - the media, in particular - are savvy enough to realize that requests must typically be made to the agency holding the record sought. Further research on whether states' individual division websites (as opposed to the state transparency portal) are living up to the transparency standards a state aspires to is needed and could provide valuable insight into the actual level of accessibility in practice.

Above all, one of the greatest limitations to this study was the potential for human error on the part of the researcher. Because only one researcher analyzed these websites, portals, data fields, and responses, the results ultimately depend on the accuracy of that research. In other words, just because the researcher did not find a data point does not mean it was not present - it simply means that one researcher did not or could not locate it

at the time. Still, this does not negate the importance of the research. Even though the results reflect the experience of just one requester, if a link or record or request option was, in fact, available online and yet the researcher was unable to locate it, it means other requesters could also have trouble finding the necessary information. If transparency is a priority, then states should make the information provided as accessible as possible.

Records - and the directions for accessing them - should be featured prominently on state transparency portals or websites, and each individual record-holding government agency should provide easy access to the portal from their home website.

Finally, this research looked at accessibility of electronic records in general, but not as compared with accessibility of the same records in non-electronic formats. While there are still hurdles to overcome in accessing records in electronic format, researchers may in the future encounter more obstacles in obtaining paper copies of certain records, especially at the state-level, with some states progressing technologically at a rapid pace, and others lagging behind. Future research could focus on comparing the ease of accessibility of records in contrasting formats.

RESULTS & FINDINGS

Alabama

The state of Alabama responded to the records request within 24 hours of receipt, even though it is not required to fulfill requests made by out-of-state requesters. The emailed response contained a link to the Open Alabama website, which contains a "checkbook" section that allows the public to search salary information by department or category and can be exported to an Excel file. However, the Excel file does not contain agency categories - those are only displayed through the search function, but not once the data is downloaded. No fees were requested.

The search function on the transparency portal website proved to be a little confusing. When searching by "payee," the portal requires the requester to input an employee's name in order to locate that employee's salary records.⁷⁸ For a researcher or reporter who wants to view the data in one comprehensive spreadsheet, an individual employee lookup renders the information practically useless, lest a researcher obtain a list of state employees and spend the time to search tens of thousands of names and input the data himself. However, after inquiring whether the information was only available by individual lookup, the record-holder provided a hyperlink not previously noticed that allowed for displaying all payees for a category. The link was separate from the "search by payee" option, and was only available on the main page, but not on the page with the individual lookup.

⁷⁸ Alabama Department of Finance Comptroller's Office, *Checkbook*, http://open.alabama.gov/spending_checkbook.aspx.

Prior to receiving the state's response to the request, the researcher was unable to locate the Open Alabama website directly from the Alabama State Personnel Department website.

Alaska

Alaska took six business days to respond initially to the records request. The state of Alaska responded to the request by email with an attached PDF of all Executive branch salaries. No fees were requested. The records custodian advised that the state only releases the information in PDF. There is no central management of state employee salary records, as each branch maintains its own records. The custodian provided email contacts for the legislative and judicial branches in order to make requests of those branches. No salary data is proactively disclosed online.

The state's final response arrived by email seven days after their initial acknowledgment, or 13 business days after initial presumed receipt. The statutory guidelines allow for 10 business days, so Alaska missed its deadline by 3 business days. The emailed final response included an attached PDF containing salary records current as of September, 2013. The file did not appear to include data on legislators, or university employees.

Alaska's online transparency portal contains a PDF with limited executive agency salaries and travel schedules. It is similar, but not identical, to the PDF attachment received.

Arizona

Arizona responded within 24 hours of receiving the request with an emailed acknowledgement of receipt, but did not furnish any records. The record custodian asked

if the requester was a former employee and indicated an employee name, date of birth or social security number would be needed in order to locate records. The researcher clarified that the request sought records for all state employees, but never heard back. Salary data does not appear to be proactively posted online.

Arkansas

The state of Arkansas responded within 6 business days after presumed receipt of the request, by phone call - one of only five states to respond by first by phone. Arkansas allows three working days for a response-time, so this state missed its deadline by three days. After the conversation with the records custodian, she followed up by email with a link to the state's transparency portal. The portal contains only salaries for those employees making more than roughly \$37,000 a year and the data is not available for download.⁷⁹ A requester can ask for access to the lower salaries and hourly wages - and may be charged a fee - but the state does not have to honor requests from out of state requesters. Alabama, Arkansas, Delaware, Georgia, New Hampshire, New Jersey, Tennessee and Virginia are the only states that do not require states to fulfill out of state requests.⁸⁰

California

California was the first state to respond to the records request. The records custodian responded by phone call early in the day on October 15th - the first day requests arrived in office. The custodian asked for the requester's social security number to process the request. She was confused, believing the requester must be a former state

⁷⁹ Arkansas Online, *Right 2 Know, State Salaries* (April 2015), <http://www.arkansasonline.com/right2know/statesalaries/>.

⁸⁰ Shawn Musgrave, *Virginia, Tennessee Restricting Records Access to Citizens: MuckRock Users Facing Unnecessary Hurdles Despite Discretion for Out-of-State Requests*, MuckRock, (July 22, 2013), <https://www.muckrock.com/news/archives/2013/jul/22/virginia-tennessee-restricting-records-access-citi/>.

employee seeking their own personnel records. Both California and Arizona interpreted the request in this manner, which was surprising given the wording of the request:

"Pursuant to the state open records law, I request access to and copies of all current state personnel salary records, including *all state employee* names, titles, and current salaries or wages."

The records custodian from the California Department of Human Resources Personnel Management Division directed the request be emailed to the State Controller's Office. An immediate email acknowledgement of the request from the controller's office arrived, stating that the request was being processed. However, the researcher never received responsive records or any other correspondence.

Colorado

An emailed response from the state of Colorado to the records request arrived seven working days after presumed receipt, which was four days more than the three business days allowed by law. The email message contained an attached PDF spreadsheet with state employee payroll data. The records custodian indicated that the data did not include all salary information for higher education institutions and that the requester would need to contact those institutions directly. The fact that a PDF was received after specifically requesting a different format was not addressed. No fees were requested.

Connecticut

Connecticut responded by email five working days after presumed receipt of the records request - one day beyond the statutory time-limit of four working days - with a link to the Connecticut Transparency website containing salary records for state

employees.⁸¹ The portal does not appear to provide an option to download the data, and does not contain salary information for state legislators. No fees were requested.

A week (seven days or 5 working days) after receiving the email response from the records custodian, a response via U.S. mail also arrived. The hard copy response acknowledged receipt of the request and stated that a representative would be in touch when the information became available. This seemed odd, since the acknowledgement letter was postmarked two days after the emailed response from the records custodian had already been received and acknowledged.

However, there is something to be said for responding by both email and U.S. mail, simply to cover all bases. For example, this is why the requests were sent by mail and, when available, also by email or electronic submission. But, the lag between Connecticut's emailed response and its mailed response - and the inconsistency with the first communication providing responsive data and the second communication providing only an acknowledgment - demonstrates the importance of establishing a unified policy in regard to electronic records production.

Delaware

The state of Delaware responded to the records request by email within three days of presumed receipt, with notification that a CD containing the data requested would be sent via U.S. mail, free of charge. The CD with an Excel file arrived within seven days. The law allows for a response-time of 10 days. Delaware is not required to provide records to an out-of-state requester, but the request was nevertheless honored.

⁸¹ Transparency Connecticut, *Employee Compensation*. <http://transparency.ct.gov/html/searchPayroll.asp>

District of Columbia

D.C. responded to the records request via email five working days after presumed receipt, with a link to the district's online transparency portal containing the requested records. The law allows for a response time of 15 working days. The Public Body Employee Information available online was only in a PDF and was not available for download or exporting to Excel. Public university salaries were not included. D.C. has no state legislators, but salary information on district council members was included in the file. No fees were requested.

Florida

The state of Florida responded by email to the open records request within 24 hours of presumed receipt with an acknowledgment of the request, and replied within 48 hours to fulfill the request. The custodian provided a link to the online transparency portal where salary data is provided and can be downloaded in an Excel format. The portal provides different links to display salaries for different categories. University data and the State Board of Administration salaries are separate from the payroll information provided by the Department of Management Services, but all are available for download. No fees were requested.

Georgia

No response. The law allows for three working days in order to respond. Georgia is not required to provide records to out-of-state requesters, and no acknowledgement was received.

Hawaii

No response. The law allows a response-time of ten working days.

Idaho

Idaho responded to the records request within 24 hours of presumed receipt with a phone call and then an email follow-up containing the link to the transparency portal and downloadable salary information available in an Excel file. The records custodian was one of the most helpful, knowledgeable and responsive gatekeepers encountered during this study. Some records custodians expressed irritation at having to respond to a freedom of information request and gave the impression that they wanted to direct the requester to their state's transparency portal "just to get rid of" the inconvenience, but the Idaho records custodian expressed willingness to go above and beyond in order to fulfill the request. No fees were requested.

Illinois

A response from Illinois arrived within five working days of the records request presumably arriving in their office - meeting the statutory guideline allowing for five working days to respond. The response was in the form of an email, with an attached letter in PDF. The Illinois Department of Central Management Services denied the records request, deeming it "unduly burdensome." The denial letter did include information about the right to file an appeal of the denial. While other states' responses constituted effective denials by failing to acknowledge the request, quoting exorbitant fees, or failing to provide responsive records, Illinois was the only state to flat-out deny the request, aside from Virginia, which is not required to provide records to out-of-state requesters.

The letter invited the requester to narrow the scope of the request to cover only those employees falling under the state's "Personnel Code." The researcher responded by

email seeking clarification as to which employees are covered by the personnel code and asking whether the agency could deny the request in part but provide any applicable records. The records custodian responded with a link to the online transparency portal, but stated that his agency does not maintain the portal. The researcher then responded asking which agency holds the records published in the portal.

Thirteen days after this inquiry, an email response was received indicating that the records custodian misspoke and that his agency, the Department of Central Management Services, does in fact maintain the transparency portal, but does so by disseminating information from records of the Illinois Comptroller. No response to the inquiry into which employees are covered under the personnel code referenced in the denial letter was received.

Indiana

Indiana was one of the first states to respond to the records request - likely within just a few hours of receiving it. The records custodian responded by email and included an Excel file attachment containing the salary data sought. The file contained all salary categories except the State Police Department and Gaming Commission, to which requesters need to directly contact in order to obtain public records access to data held by those agencies. The file also excluded information on all undercover agents. No fees were assessed.

Iowa

Iowa also responded to the records request almost immediately upon receiving it. The records custodian made contact by email and included a link to the state's

transparency portal, which contained downloadable Excel files containing the salary information sought. No fees were requested.

Kansas

The state of Kansas responded to the records request within 48 hours of presumed receipt. The response consisted of an initial acknowledgement of the request and included several points for which the records custodian requested clarification. Kansas' initial response was one of the most thorough received. The records custodian inquired as to whether the request sought the salary information for board members, national guardsmen and legislators, since these categories had some limitations. Pursuant to state law, Kansas excludes students, as well as employees that are members of a home – generally, individuals that live in state institutions that are also state employees - from having their salary information disclosed under freedom of information laws.

Kansas also excludes the names of employees in confidential positions, such as individuals who work in law enforcement in undercover positions. Most states exempt such confidential positions from disclosure, but only a handful of states went to the trouble to point this out or mention how this exemption might affect the records request. Kansas will provide the job title and salary of an undercover position, but the name field will say “confidential.” Other states simply exclude all the information about a position from salary records that are disclosed.

The records custodian from Kansas also made a point of noting that each state university maintains its own human resource system and payroll records and thus, the Kansas Department of Administration is unable to provide their data. Each university must be contacted individually in order to request data on for employees. The records

custodian made a point of identifying each of the state's 7 public universities by name, so that it would be clear which institutions to contact.

The records custodian also asked how the requester preferred the data to be displayed, and made suggestions as to what might be easiest to interpret:

I would recommend that we provide both the rate of pay and the pay frequency. For example, we have employees that are paid hourly and employees that are paid bi-weekly. We also have board members and legislators and other employees that may be paid at a daily rate. For those paid hourly we can only provide an estimate of their annual rate of pay since we will not know how much overtime or leave without pay they may or may not have had. For those paid bi-weekly you can simply multiply their rate of pay by 26 to calculate annual rate of pay. For daily rate employees it is impossible to determine annual rate of pay since we may not know how many days they may have worked.⁸²

The downside to Kansas' individualized response to the records request is that the data cannot be obtained for free. For requests that exceed one hour of staff time or more than 25-page amount, the following rates apply: Copies, 25¢ per page; Mailing, 50¢ for first 5 pages, 25¢ for additional 5 page increments; FAX, 65¢ per 10-page fax. In regards to staff time, a fee is charged at the rate of pay for each person(s) whose time is used in order to assist and/or respond to a specific request. This may include the time spent to access records maintained on computer facilities, review records to determine whether closure exceptions apply and/or to redact open from closed information. Attorney time is charged at \$60 per hour. Clerical time are charged at \$18 per hour. Information Technology (IT) services are charged at \$38 per hour.

After clarifying her questions about the request, the records custodian stated she would work with persons responsible for running the query to determine what fees, if

⁸² J. Cavalieri (personal communications, Oct. 17, 2013).

any, would be charged for the request. The records custodian was contacted on Friday, and the estimate for the records fees arrived the following Monday.

Because the request sought only electronic records, none of the copying/printing charges applied, but the records custodian estimated that the request will take approximately 4 hours of staff time. Billed at the hourly rate of the person doing the work, the total fee to fulfill the request was \$144.52. She also estimated that the request could be fulfilled within a week - or sooner - of receiving payment. The researcher declined to pay the fee and politely withdrew the request, stating that the fees were larger than anticipated.

In addition to the fees charged in order to fulfill the request, the state of Kansas requires requesters to complete a detailed form and signed certification attesting that the requester will not use the records obtained or provide those records to others in order to contact persons identified in the records for commercial purposes or selling goods or services. The form was included as an attachment in the initial email response received from the records custodian. She asked for return of the form immediately, but later agreed to provide a fee estimate without the signed forms. The signed form is required before records will be produced.

Once the request was withdrawn due to the fees, the records custodian noted that the state plans to make changes to its transparency portal to make information more accessible to the public. She acknowledged that the data as provided online is difficult to obtain, since it requires an individual search for each employee:

I think eventually we plan to change the way we display data on our KanView website so that users can download the data they want – currently you can pretty much only look up individuals or agencies if you know what you are looking for

and you can't download: <http://www.kansas.gov/KanView/> - if that had been completed by now you would have access to this data at no charge.⁸³

Kentucky

The state of Kentucky responded to the records request within 48 hours of presumed receipt. The emailed response contained an attached Excel file containing the requested salary data. The document did not appear to contain university or legislator salaries. No fees were requested.

Kentucky was one of the only states to expressly state that the request had been "granted." Most states either provided data with no reference to whether the request was fully granted or denied in part, or denied the request in whole or in part, typically citing the applicable statutory provisions.

Louisiana

The request mailed to Louisiana was returned undeliverable due to incorrect address. However, the address used was the correct one listed on the department website. Once contacted, the department allowed the request to be submitted by email. An email response arrived 6 days after the online request. The records custodian expressed that the Department of Administration did not have records to salaries of all state employees, only those in executive branch agencies.

To provide the records solely for the executive branch agencies, the records custodian estimated that the request would take 1 hour of staff time to fulfill, which would cost \$30. The requester replied to the records custodian's email, asking whether another agency maintains a more comprehensive record of all branches' employee

⁸³ *Id.*

salaries, or whether all of those agencies need to be contacted individually in order to obtain all the records sought.

The records custodian responded by email within three working days- meeting its state law allowing three business days for response-time - that no agency maintains a comprehensive record and that each branch and certain higher education systems and their member institutions maintain their own employee payroll records. He contact names and information for the other branches, including contacts for the House of Representatives, the state Senate, the Judicial Branch, the University of Louisiana, the Louisiana State University System, the Southern University System, Louisiana Community and Technical College System, and each separate member institution within all of the universities and colleges systems.

The following week after receiving the emailed response containing the quote of \$30 for fulfilling the request, the records custodian followed-up to determine whether the fee would be paid. The request was then withdrawn.

Louisiana does maintain a state transparency portal. The website contains information about agency expenditures, available for download in an Excel file. However, the salary information for the agencies are presented in one lump sum and contain no employee names.

Maine

No response. The law allows for 5 working days to respond.

Maryland

The state of Maryland responded by email to the records request, 15 days after presumed receipt. Though this exceeded the response-time for most states, Maryland's

law allows 30 days for agencies to respond. The response included an email attachment in an Excel format. The responsive document included mainly Executive branch employees, as well as Judiciary employees.

The records custodian indicated in the response that employees of the Legislative branch of the State of Maryland, the Maryland Department of Transportation, and the State's public universities are part of independent personnel systems that are not included in the database provided. Information about those entities can be obtained by contacting those agencies' human resources offices.

The records did not include separate fields for agency or employee titles. Rather, the employee's "class" was included, which sometimes indicated the agency ("hourly judiciary employee") or title ("accountant"), but this format could prove problematic for certain types of analyses.

Massachusetts

No response. The statute allows 10 calendar days for response.

Michigan

Michigan's response arrived within three days of the state's presumed receipt of the request, meeting its state deadline of five working days. The emailed response did not contain any data, and quoted the fee for fulfilling the request at \$83.50, with half of the fee due upfront as a good faith deposit. The \$83.50 fee assessed included charges for an estimated 1 hour of work by a "departmental analyst" to extract and review the data, at a rate of \$54.19 per hour, plus an estimated 1/4 an hour (15 minutes) at a rate of \$117.18 per hour, or \$29.30 for the estimated time, for a "FOIA coordinator" to review and redact information exempt from disclosure under the FOIA. It is unclear as to why the fee is

\$83.50, since $\$29.30 + \54.19 is actually $\$83.49$. The response stated that upon receipt of payment, copies of the nonexempt records would be mailed to me. It is also unclear whether the records mailed would be in electronic format or not. Due to the fee required, the request was withdrawn.

Minnesota

Minnesota responded to the request within 24 hours of presumed receipt of the records request. The emailed response contained a link to the state's transparency portal, which discloses state employee salary records and offers the option to download the data in an Excel file.

Mississippi

Mississippi's response to the open records request arrived by U.S. mail, eight working days after the state presumably received the request. The response was postmarked for working days after receipt. Mississippi's law allows agencies to take 7 working days to respond to a request. Thus, this state was one of a handful that met its statutory guideline by its postmark date, but not by the date of receipt of the records. The agency quoted \$64.89 for employee time in order to fulfill the request and indicated that the records could be sent electronically, as requested, though the records would not contain salary information for legislators or state teachers, or employees of public universities, community colleges, or the governor's office.

Missouri

Missouri's response to the records request arrived by U.S. mail five working days after presumed receipt. It was postmarked three working days after presumed receipt. Missouri's law gives agencies three working days in order to respond to a records request

so, like Mississippi, Missouri met its deadline by postmark but not receipt date. The responsive letter acknowledged the request and quoted a fee of \$17 in order to fulfill the request for records, which would be mailed as a CD containing an Excel file after fees are paid.

Montana

Montana's response to the records request was received six calendar days or four working days after presumed receipt. Montana does not specify a statutory guideline for response-time. The emailed response contained a link to the state's transparency portal, which displays salary records and provides the option to download the data in an Excel file. The data did not appear to include records for public university employees.

Nebraska

Nebraska's response to the records request arrived by U.S. mail five working days after presumed receipt. It was postmarked three working days after presumed receipt and contained a CD with the responsive records in a PDF. Nebraska law allows for a response-time of four working days, so the agency met its deadline by postmark but not date of receipt. The accompanying letter expressed that the state's policy is to only release electronic records in PDF. The database did not appear to contain records for any university employees or legislators.

Nevada

The state of Nevada's response was one of the last received. The records custodian made contact by phone 24 calendar days after presumed receipt of the request, and after an initial conversation, she also followed up with an email message. Nevada's law requires a response within 5 calendar days, so Nevada missed its deadline by 19

days, the longest response-time of those states that responded at all. The email contained an Excel file attachment with responsive salary records but did not include the Legislative Counsel Bureau and the Nevada System of Higher Education, since the Division of Human Resources does not have custody of these records. Requests for these records must be made directly to those agencies. The database included more fields of data than any other state and the records custodian detailed those data fields in her email to me.

New Hampshire

New Hampshire's response to the records request arrived by U.S. mail, eight working days after presumed receipt. It was postmarked four working days after receipt. The law allows for a response-time of five working days. The letter contained a link to the state's online transparency portal, free of charge. New Hampshire was the only state to respond by U.S. mail in order to provide information about records posted online. Other mailed responses either provided the records by CD, denied the request, or requested fees to produce the records.

New Hampshire's response stated that if the online records available at the transparency portal were insufficient to satisfy the request, then the state would charge \$0.20 per page to produce the responsive records, even if those records would be in electronic format. It is unclear as to why the state charges by the number of "electronic pages," since they do not generate printing, paper, or copying costs. The response did not mention a charge for staff time. New Hampshire is one of the states that is not required to fulfill out of state requests.⁸⁴

⁸⁴ Musgrave, *supra*.

New Jersey

The state of New Jersey responded to the records request by email, four working days after presumed receipt, meeting its statutory deadline of seven working days, even though New Jersey is also not required fulfill out of state requests.⁸⁵ The response contained a link to the state's online transparency portal, which contains employee salary records the agency deemed responsive to the request. The portal allows requesters to download the data in an Excel file. It did not appear to contain salary data on the employees at public universities.

New Mexico

New Mexico responded by email to the records request within 48 hours of presumed receipt. The email message contained an attached PDF with the salary records - although it did not appear to contain university data. The response did not address the fact that the document format was PDF, even though a parsable format was specifically requested.

New York

Within 24 hours of presumed receipt of the public records request, New York responded by email with an acknowledgement of the request, but not with any responsive records. The response stated that if any documents were found to be responsive to the request, the agency would make those records available by November 15, 2013 - thirty days after receipt of the request.

⁸⁵ *Id.*

North Carolina

No response. North Carolina requires state agencies to respond to requests within a "reasonable time."⁸⁶

North Dakota

North Dakota's response to the public records request was received by email, six working days after presumed receipt. The state's law allows for a reasonable response time of "a few days." The response contained an email attachment with an Excel database of salary records. The data provided did not include any university salaries or ND Mill & Elevator employee salaries, instead only provided salaries for employees of executive agencies, the judicial system, and legislative employees. North Dakota was one of only a few states that actively identified in its response data that the records did *not* include.

Ohio

Ohio responded to the records request by email, within 48 hours of presumed receipt. The email message contained an Excel file attachment with employee salary records. The data did not appear to include salaries for university employees.

Oklahoma

Oklahoma responded to the public records request by email within 24 hours of presumed receipt. The email message contained a link to the state's online transparency portal, which provides public employee salary data and an option to download the data in an Excel file. The data contained information on most categories, but did not provide employee titles - only agency information. The researcher experienced some technical

⁸⁶ 'Never' probably does not meet the any interpretation of the term "reasonable time."

difficulties in using the portal - the individual reports posted would not open - but the option to export and download the data worked well.

Oregon

The state of Oregon responded within three days of presumed receipt to the public records request, likely meeting its state's requirement that response-time be "reasonable." An email message arrived with an attached Excel file containing the state executive branch employee salary data, although no university employees' or legislators' salaries were included. The records custodian did not address the fact that only executive branch salaries were provided.

Oregon's record-holding agency was one of only a few that provided an online submission form for public record requests. However, the form required the requester to submit his or her organization or business name before the request could be processed. The law in Oregon has been interpreted as allowing agencies to consider the identity, status or purpose of the person seeking disclosure of a particular record when it may be relevant when a statutory exemption to disclosure requires a determination of the public interest in disclosure.⁸⁷

Pennsylvania

Pennsylvania responded to the public records request by email within three working days of presumed receipt. The state allows for a response-time of five working days. The email message contained a link to the state's online transparency portal, which

⁸⁷ Reporters Committee for Freedom of the Press, *Open Government Guide for Oregon, Status of Requester*. <http://www.rcfp.org/oregon-open-government-guide/i-statute-basic-application/who-can-request-records/1-status-requestor#sthash.AeGn46Rb.dpuf>; *see also: McEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961); Attorney General Manual, § I(A). As noted in *Gray v. Salem-Keizer School District*, 139 Or. App. 556, 912 P.2d 938 (1996).

allows users to download information on state employee salaries in an Excel format. The information available does not appear to include data on state university employees.

The response from Pennsylvania's custodian of records stated that the request was granted in part and denied in part. The disclosable records were available through the portal. The records or data that were denied are first and middle names of certain employees, and full records regarding certain employees. These records were denied because they are exempt from disclosure under the right-to-know-law and do not appear on the transparency portal, PennWATCH.

The message also included a link to the section of the transparency website detailing the types of exemptions and the reasons why certain data are not disclosed under the law. The message acknowledged the right to appeal the denial of records, and included contact information and how to file an appeal.

While the request asked for documents in electronic format, the message indicated that if paper records are preferred, as opposed to electronic documents, a duplication cost of \$.25 per page, plus postage would be charged. For this reason, it seems the state's policy is to typically provide these types of records electronically, free of charge, unless otherwise requested. This stands out in contrast to those states that provided the records online, and yet still quoted a fee for providing the records in another electronic format.

Rhode Island

The state of Rhode Island's records custodian responded to the records request within 24 hours of presumed receipt. The emailed response included a link to the state's online transparency portal containing salary information through 2012. The records custodian indicated the portal contained only information for executive agencies, but

should be updated to include all agencies before the end of 2013. Records for most, but not all agencies, could be found on the portal. The site included data on some, but not all, of the state's public universities, for example, though it did not appear to include legislator data.

While the transparency portal data is free of charge, it only contains updated information through 2012. To obtain more current data, the state requires a fee of \$15 per hour of staff time to assemble the records, with the first hour being free. The records custodian also stressed that the state prefers requesters obtain salary data from the portal - single source agreed upon by the parties involved - to assure that any provided salary information is consistent across all agencies.

South Carolina

South Carolina's response to the records request arrived by U.S. mail, ten days after presumed receipt of the request. The mailed response was postmarked six days after presumed receipt. The response quoted a fee of \$466 for an estimated 8 hours of staff time to fulfill the request, with first hour of staff time being free.

South Dakota

An emailed response to the records request arrived from South Dakota within 24 hours of presumed receipt. The response contained a link to the state's online payroll information. South Dakota does maintain some salary information in an online portal, but the payroll and wages are only searchable by job code/title, or by name - but only if the employee's name is known. The website does not make the data available for download.

Many states attempted to satisfy the request by directing the requester to the state's online transparency portal. However, even though South Dakota maintains a data

portal, because it requires a requester to know an employee's name before obtaining their salary record, the information sought was essentially inaccessible. While the portal provided general wages for certain salary classifications, and also the salaries a handful of the highest executive positions, no names were given. For this reason, the link to the data online was not considered to be responsive to the request for salary records of all state employees.

The records custodian acknowledged that this information available through the portal was not in the format requested (a parsable file). According to the records custodian, in order to properly fulfill the request, the state would need to "generate a lengthy report" at an apparently astronomical cost:

When I inquired with our compensation staff about the regularly charged fee for such a service I was told it is normally \$15.00 for one employee. The State has over 13,000 employees. I do not know if the State would charge \$195,000.00 to generate the desired report. However, due to the massive size of the report that you requested and due to the time that would be required to format such large amounts of data to your particular need, I believe it would be a significant sum.⁸⁸

The records custodian further explained that the state of South Dakota does not maintain an Excel file of existing employees "because it would have limited functionality for our purposes," since state employee wages and hours are tracked by various software programs. The process of pulling the data for each employee and putting it into a single file would be costly, since the state has no automated software to do that, so it would be need to be done manually.

Tennessee

Tennessee responded to the public records request within 24 hours of presumed receipt, by email, even though the state is not required to fulfill out-of-state requests. The

⁸⁸ N. Mellema (personal communication, Oct. 15, 2013).

email message included a link to the state's online transparency portal. The website does not appear to offer the option of downloading the data in any format. It does not appear to contain data for public university employees, and does not include information about protected law enforcement personnel.

Initially, the request was directed to the state's office of Open Records Counsel, which is a division of the state comptroller's office. One open records attorney contacted the researcher by email to direct the request to the Department of Finance and Administration. She helpfully provided the email address of the records custodian there, and the subsequent email request was responded to first thing the following morning.

Texas

Texas responded to the open records request within three days of presumed receipt of the initial request. The state law calls for a "reasonable" response-time, (likely 10 working days, case law has determined). The first contact was the State Auditor's Office, but their records custodian responded that while it does maintain a database of state workforce information that includes some general salary information, that file does not include the names, titles, and salaries of each employee. The message stated that the state's Office of the Comptroller of Public Accounts maintains current salary data for all state employees and included the email contact information to which the request should be directed. A telephone response was received within minutes of making the follow-up request.

The records custodian from the Comptroller's office responded by phone. He stated that his department would prepare a responsive document to the request and would post the information to their secure FTP server where the zipped and encrypted files can

be downloaded and accessed using the case-sensitive password that would be provided. The files requested were provided free of charge. An email message arrived eight working days after the phone conversation with the records custodian, containing the password and indicating the records had been uploaded.

The emailed final response stated that the responsive records would be available at the password-protected link for only a period of seven days. The researcher downloaded the documents provided, which were in three separate Excel files. Because the link to the files expired, Texas is the only state that required actual downloading of (rather large) documents. Other states that allowed files to be downloaded maintained those files on their state transparency portal, and those documents could be accessed again and again, at any time. However, Texas' data was current through October, 2013 - the month of the request. Many other states with records proactively posted online only provided records through 2012, for example.

Utah

An emailed response from Utah in response to the public records request arrived within three working days of presumed receipt of the request, meeting its statutory deadline of 10 working days. The email message contained an Excel spreadsheet attachment. It provided names, titles, and salaries of state employees, but did not list the state agencies for which employees worked. Thus, it was more difficult to determine which agencies were accounted for in the document. It did not appear to include data on state university employees or state legislators, for example.

Vermont

Vermont responded to the public records request by email within 24 hours of presumed receipt. The final email response contained an attachment with an Excel spreadsheet. All data fields examined were present in the file, including legislators, the corrections department, and state university employees. The records custodian indicated that the data was current through August, 2013. This information was provided free of charge. If data current as of October, 2013 had been required, additional fees may have been charged to produce a record at a rate of \$. 57 per minute after the first 2 hours, which is free of charge. The records custodian estimated up to 3.5 hours to complete this record. So the total charge would be up to \$51.30, for 90 minutes. The researcher declined to pay additional fees and accepted the August document free of charge.

Virginia

Virginia responded to the records request within 24 hours of presumed receipt with an emailed acknowledgement of the request. The custodian of records was out of town, and she responded to the request six days after receipt with a denial of the request, citing Virginia's law, which provides public records access only to citizens of the state.⁸⁹ The researcher responded to the email with an excerpt prepared by the state's FOIA council that provided guidance to agencies in handling out-of-state requests:

We generally recommend treating out-of-state requesters as you would in-state requesters. Even though you are not legally required to do so, we recommend it for two reasons: (1) it provides for internal consistency in responding to requests, and (2) if you deny a request because the requester is not from Virginia all the requester has to do is get a Virginia citizen to make the same request on his or her behalf. However, we do recognize that responding to out-of-state requests can be difficult in terms of collecting payment and in the amount of time involved, particularly because many -of-state requests involve a large volume of records and/or

⁸⁹ Code of Virginia § 2.2-3704.A.

search time. Because the procedural rules of FOIA are not mandatory when dealing with out-of-state requests, you may collect payment in advance.⁹⁰

The researcher then requested an estimate of the fees associated with the fulfillment of the records request. The records custodian responded by stating that the U.S. Supreme Court recently upheld Virginia's limitation on granting rights to out-of-state requesters in the case of *McBurney v. Young*. However, the guidelines provided by the state's FOIA council specifically referenced the recent case and nevertheless recommended Virginia agencies comply with out-of-state requests.

The records custodian stated that she would take the request for an estimate under consideration, but that state agencies are not bound by the Virginia FOIA time frame for responding to out-of-state requesters as they are for Virginia citizens making such a request. No response from the agency in regards to the request for a cost estimate ever arrived.

Washington

The state of Washington responded by email to the public records request within hours of presumed receipt. The email message contained a link to the state's online transparency portal, which allows users to download information in an Excel format. All data fields examined were present in the file, including legislators, the corrections department, and state university employees. The records custodian provided clear directions for how to access the reports containing the requested data, including which links to click and tabs to select. The data appeared to be current only through 2012, however.

⁹⁰ A. Dintereman (personal communication, Oct. 16, 2013).

West Virginia

West Virginia's response to the records request arrived by U.S. mail, six working days after presumed receipt of the request. The response was postmarked within three days after receipt, and the law requires a response within 5 working days. The request for records was denied, stating that the agency contacted, the state Division of Personnel, was not the custodian of the records. The response did not provide any information as to where the request should be forwarded or which agency actually maintains the records sought.

Next, the West Virginia State Auditor's office was contacted to determine whether this office was the holder of the records on state employee salaries. An email confirmation was received within 24 hours of the inquiry that the Auditor's office was the correct agency to which to make the request. A new records request was submitted to the Auditor's office, via the records custodian. Even though the records custodian communicated by email, the response to the request arrived via U.S. mail, postmarked three working days after the emailed request but received within six working days. The hard-copy response included the website for the state's transparency portal. The portal, however, is hosted by a third-party vendor and requires registration in order to view the data available. The researcher declined to register for the website.

Wisconsin

An emailed response was received from Wisconsin's Office of State Employment Relations, three working days after presumed receipt of the records request. The record custodian indicated the agency was not the holder of the records sought and that the request should be forwarded to the state Department of Administration. The request was

submitted to the correct agency, and an immediate acknowledgement noting that the request was being processed arrived. The responsive CD arrived in the mail within 5 working days, likely meeting the state's requirement that a response must be received "promptly."

Wyoming

No response. The law requires a response within a "reasonable" time.

**DATA ANALYSIS & DISCUSSION:
A categorical comparison of states' responses**

Does online submission availability have an impact on response-time? Did states with online submission forms respond soonest?

Seventeen states, or one-third of the states, provided requesters with the option to submit requests online, either through a submission form on the website, or even by providing the email address of the identified records-keeper.⁹¹

Most of these states did respond to the request fairly quickly, though many of the states that received the request only by mail also responded immediately upon receipt of the request. One state that received the request through online submission, Maine, did not respond to the request at all. Because requests were submitted to all states by mail, in addition to online submission when it was available, Maine's failure to respond cannot be attributed to potential problems with electronic submission.

In addition, because the variable - online submission form - is very limited (only 17 states), it is difficult to determine the extent to which the online availability affects response-time, though there does appear to be a relationship. The relationship between online submission availability and response-time is displayed in Table 1.

[Please See Table 1 About Here]

Online Request Option and Response Time

⁹¹ For the purpose of this discussion, the percentages are based on 51 states/territories (50 states + Washington D.C.)

Ease of Navigating Online Submission Option

Of the 17 states that expressly provided requesters with the option of submitting a records request online or by email, 9 submission options were accessed within 1 navigation "click" of the mouse, 6 within 2 clicks, 1 required 3 clicks, and for 1 state, the number of clicks required was undetermined, since the submission request could be located through a search engine, but not (apparent to this researcher) from the agency website or transparency portal.

[Please See Table 2 About Here]

Ease of Online Request by Clicks

Mode of Response

Thirty-four states, or 66 percent, responded initially to the records request by email. The proportion increases even further - to 75 percent - when states that did not respond to the requests at all were excluded. Three of these states followed the email correspondence up with a response by U.S. mail: Connecticut, Delaware, and Wisconsin. The latter two states mailed CD-ROMS containing the responsive documents.

Five states - roughly 10 percent - responded initially by phone, with the percentage rising to 11 percent when excluding states with no response.⁹² All five of these states - Arkansas, California, Idaho, Nevada and Texas - followed-up the phone conversation with an email documenting the discussion.

Likewise, six states - Mississippi, Missouri, Nebraska, New Hampshire, South Carolina, and West Virginia - responded to the request initially by U.S. mail. The figure represents 12 percent of all the states, or 13 percent of those that responded. Nebraska's

⁹² In 2009, a preliminary version of this study made requests to half of the states, and 15 of 25 states initially made contact by phone or mail, rather than by email.

response came by U.S. mail, and did not include further correspondence or an email follow-up. This proved the only state to mail a CD-ROM as a responsive document without first speaking with the requester by phone or email. In addition to Delaware and Wisconsin, Nebraska makes three states to provide documents by CD-ROM format. Missouri's mailed response sought a fee, but stated that records would be provided by CD-ROM sent through the U.S. mail.

[Please See Table 3 About Here]

Mode of Response

Did mode of response correlate with timeliness of response?

Whether an agency responded initially by email or by phone did not appear to affect whether the request was fulfilled within the statutory timeline. For states that responded solely by mail, however, there did appear to be a relationship. Of the six states that responded by mail alone, five of them postmarked the package or letter within the statutorily-imposed deadline, but the mail was not received until after the time-limit had passed. (None of the state statues differentiated between responses postmarked versus responses received within the deadline.)

The sixth state, South Carolina, does not have a statute imposing a time-line on agency response. Its mailed response was received within 8 working days - a time that, while reasonable in some states, would exceed the deadline in most others. Of course, it makes sense that states utilizing "snail mail" might miss their deadline more often than those who responded by email or phone. Still, the two states that took the longest time to respond - Maryland, within 15 days, and Nevada, within 24 days - responded by email and phone.

[Please See Table 4 About Here]

Mode of Response and Statutory Deadline

No Response or Inadequate Response

Six states, or nearly 12 percent, did not respond to the records request at all, as of the date of this paper, including Georgia, Hawaii, Maine, Massachusetts, North Carolina, and Wyoming. Four states, or nearly 8 percent, responded to the request with an acknowledgment of receipt but then, as of the date of this paper, did not provide any responsive documents. These states that failed to provide any final response included Arizona, California, New York, and Virginia. In sum, ten states, or roughly 20 percent, failed to adequately respond to the records request and failed to grant or deny the request in whole or in part. Georgia and Virginia are not required by law to fulfill out-of-state requests, but they could have chosen to respond anyways - as Alabama, Arkansas, Delaware, New Hampshire, New Jersey, Tennessee did - but declined to do so.

Adequacy of Response by State

Fees

Seven states required payment of a fee before the request could be processed - Kansas, Louisiana, Michigan, Mississippi, Missouri, South Carolina and South Dakota. In other words, 14 percent of all the states, or 15 percent of those states that responded, required a fee to process the request. Three states - New Hampshire, Rhode Island and Vermont - provided some data, but quoted a fee for producing more current or more thorough records. Rhode Island, for example, had (as of Oct. 2013) data posted online current through 2012. Fulfilling the request with data from 2013 however, costs a fee, since the state had not yet compiled the data for that year. Vermont also quoted a fee to

produce data more current than the records readily available. However, Vermont's available data was current through August, 2013.

Though only a few states made a point of identifying how current their records were and providing an option to pay for more current records, this raises the question of how up-to-date other states' records are. The majority of states fulfilled the request by directing the requester to proactively-posted online records already available to the public. But, in many instances, a requester has no way of knowing how current those records are. Information may be searchable by year, for example, but not month. Or, a comprehensive record may be generated once a year or every six months. Most states, however, did not provide an option to request the newest version of the records.

Range of Fees

Most surprising was the range of fees quoted for fulfillment of the records request. While only seven states required a fee in order to process the request, the fees ranged from \$17 in Missouri to potentially \$195,000.00 in South Dakota. Excluding the outliers, the fee quotes ranged from \$30 in Louisiana to \$466 in South Carolina.

Many of the fees were based on estimates of staff time required to produce the request. These estimates also varied quite a bit amongst states that charged fees. The estimates ranged from 1 hour in Louisiana to 8 hours in South Carolina. Predictably, the states with the larger estimated staff times ultimately quote larger total fees.

South Dakota charges per employee record, not per hour of staff time, and with 13,000 state employees, the fees add up quickly, resulting in an astronomical charge. Missouri charged a flat fee of \$17 with no mention of how the costs were assessed. New

Hampshire charges \$0.20 per page - even electronic "pages" - with no estimate of how many pages would be included in the response.

Notably, all of the states that charged fees each posted at least some state employee salary records online, free of charge.

[Please See Table 5 About Here]

Range of Fees

Format of Records Provided

Nearly all states - 49 of 51 states and D.C. - provided at least some salary data online. For two states - Alaska and Alabama - locating any salary information was difficult until the records custodian provided a direct link to the data. In only two states - Arizona and Nebraska - no salary records appeared to be posted online proactively, either by the agency or in a transparency portal. Because Nebraska provided a CD with the responsive records, and Arizona acknowledged the request but never provided any responsive records, these responses did not clarify whether the information was in fact posted online. Nineteen states, or 37 percent, included links to already-posted online records in their response to the request, and one state - Texas - provided online access to records not previously available to the public.

Of the 19 states that provided links to online data or transparency portals, 12 states' sites displayed the information in downloadable Excel files, one state supplied a downloadable PDF, and five states displayed the information in a non-downloadable html format. West Virginia is included as one of the states that provided a link to its transparency portal, but the site requires registration, and therefore, it was not possible to determine the format in which data was displayed.

Texas was the only state to tailor the records provided specifically to the individual request, in an online format. The state provided a link to an online password-protected Excel file available for download. The record was prepared only in response to the request, and was not made available to the general public.

Sixteen states provided records by email or CD-ROM, rather than linking to the state's transparency portal.

Of the 12 states that responded with an email attachment, nine states sent excel files, and three provided PDFs, despite the request that the data be parsable.

Of the four CDs received by U.S. mail, two provided data in an Excel file and one state, Nebraska, provided a PDF, since it's policy is only to provide data in a format that cannot be altered.

Two states that required payment of fees before producing the records indicated how the data would be provided once fees were paid. Kansas expressed its capability to send the records as an email attachment in an Excel file. Similarly, Mississippi confirmed records would be "sent electronically" after payment of the quoted fees.

In total, 24 states provided the data in the format requested - a parsable electronic file (Excel).

[Please See Table 6 About Here]

Format of Records

Ease of Navigating Transparency Portals

Navigating agency websites and online transparency portals is certainly a subjective task. Still, the study tracked how easily locatable the data sought was by making note of the number of mouse clicks it took before arriving at the posted records.

Of the 47 states that proactively provided access to records online, the researcher was able to reach the data within 1 click for 14 states, within 2 clicks for 16 states, within 3 clicks for 11 states, and 6 states required 4 or more clicks before accessing the information.

[Please See Table 7 About Here]

Ease of Portal Navigability by Clicks

Comprehensiveness of Records Provided

Despite the request for the salary records of all current state employees, few states actually provided records for *all* the state's employees, including every agency and department and every level of pay, for employees who are not exempt by law. In fact, without a list of every state employee, it is virtually impossible to determine whether every employee's salary is represented in a record.

Most states supplied at least the state's executive employee's records. In order to analyze how thorough or comprehensive the responsive records were, the research looked at three categories of salary records that may or may not be included in a state's response: state legislators, the department of corrections employees, and employees of state universities. These categories are by no means exhaustive, and do not represent a full picture of the records made available. Further research in this area would be beneficial, especially determining which states provided hourly wages, and which states supplied the salaries of undercover officers or classified employees without identifying the individual employee. Still, examining a broad range of representative categories provides insight into how thorough agencies are in responding to comprehensive records requests.

Ten states of the 34 that provided responsive documents, or 29 percent, provided records for only one of the three representative categories examined. Twelve states, or 35 percent, provided salary records for two of the three categories. Eleven states, or 32 percent, included salaries for employees in all three categories examined. Only one state, Illinois, did not provide salary data for any of the categories analyzed.

[Please See Table 8 About Here]

Comprehensiveness by Category

Notably, a few states categories were more difficult to quantify. For example, Arkansas' data encompasses only those state employees making above \$37,000 while Indiana's data excludes the employees of the State Police Department and Gaming Commission - agencies that need to be directly contacted for records requests. Alabama's record does not contain agency names, thus precluding this analysis. New Hampshire provided data for all three categories, although the salary information for public colleges included only community colleges, but not universities.

No state that provided responsive records excluded its department of corrections employees' salary data from the records, though in some cases, only the higher level salaries were provided. Public university employee data was excluded more than twice as much as legislators' salaries. Thirty-one percent of the responsive agencies that excluded at least one category failed to include legislators' salaries while 69 percent excluded public university salaries.

Several states proactively disclosed that certain agencies' or employees' records were not included in the responsive documents, while others made no mention but withheld data on certain agencies or employees all the same. For example, North Dakota

disclosed that the state's ND Mill & Elevator's employees' data were not included in its response, though the records custodian gave no explanation. Other states explained the process for providing records on undercover employees, with some excluding the data and others providing salaries for certain classified positions with no name or title attached. Illinois' response, however, made no mention of missing salaries, even though its portal contained no data for the agency categories examined in this study.

Twenty states provided a link to online records, (including Texas' non-public online data) and fourteen of those states - 70 percent - provided a link that differed from the data located independently.⁹³ On one hand, this means that records in these states are available in multiple locations. However, because the data located independently generally differed greatly from the records available through the link provided by the record custodian, the records did not equate. For example, many times, general pay grades and salary schedules were easily located, but not names of employees receiving wages - though this information was available at a different online location. Citizens who do not make an official records request may locate the more generalized records and incorrectly believe these are the only records available. In these instances, proactively providing very limited information online may actually work to hinder access to more detailed records, by deterring requesters.

Do states' response times comply with the time-limits legally imposed for agency response?

Most states have statutory, regulatory or court-set time-limits for agencies responses to open records requests, and agencies must work to comply with these time

⁹³ Texas' data was password-protected, so the direct link was not identical to the website location previously identified. However, the unique direct link was posted within the site located. For this reason, Texas was classified as one of the six states for which the location of the records was correctly pinpointed.

limits. Some states, like Alabama, do not delineate a prescribed time for an agency to respond to a records request,⁹⁴ while others, like Arizona, have a presumption of immediate access to records.⁹⁵ In other states, like Alaska, case law has determined that certain time-limits apply only to executive agencies.

In this study, a number of the states that did actually respond to the records request failed to do so within the allowed time-frame. In Nevada, for example, the law requires a response to a records request within five days, though the agency took 24 days to respond to the request - the longest response time of this study, aside from the states that did not respond at all.

The response-times allowed by law varied a great deal from state to state. Some states responded in what would easily have been considered a reasonable time-frame in one state, but missed their own state's limit by several days. For instance, Arkansas responded to the request within eight days, though their law requires a response within three days.

Some states have loosely defined time-limits, stating that responses must be received within a "reasonable" time. Other states have very specific time-frames, and even specify different time-limits based on different factors, such as complexity of the request.

In Colorado, for instance, a "reasonable time" is presumed to be three working days or less, though in extenuating circumstances, the time may be extended to no more than seven working days. However, even though the time-limit may be extended, the law

⁹⁴ Reporters Committee for Freedom of the Press, *Open Government Guide for Alabama: Statutory, Regulatory or Court-Set Time Limits for Agency Response*, <http://www.rcfp.org/alabama-open-government-guide/v-procedure-obtaining-records/b-how-long-wait/1-statutory-regulatory-o#sthash.gOGrvMFw.dpuf>.

⁹⁵ *Id.*

still requires that any finding "that extenuating circumstances exist shall be made in writing by the custodian and shall be provided to the person making the request within the three-day period."⁹⁶ Still, despite such specific guidelines, Colorado took nine days to respond to the request and never notified the requester during the three-day period that the request would take longer to process.

Other states allow different time-limits based on whether the request is granted or denied. Connecticut requires agencies to respond within three business days, but allows 10 days to process a denial. Connecticut's response granting access to the records arrived within 7 days, or 5 business days.

Forty out of 50 states responded within the legal time-frame, if there was one. However, three of those responses were not final or complete responses, meaning they acknowledged the request within the time-frame, but did not provide responsive records during that time-limit. Five more of those responses could only be counted as responding within the time-frame by using the postmark date, but not the received-by date.

That is because five states that provided responses by post had postmarked the responses within the statutory time-limit, but by the time responses arrived via the mail, the time-frame had passed by several days. None of the state laws examined specified whether the time-limit requirement could be met by the postmark date, or by the date received. So, for the purpose of this study, the responses were charted separately, both by the post-mark date (received in time) and by the receipt date (not received in time).

Five other states responded to the request, but not within the time-frame designated. Six states did not respond at all, despite the fact that all of those states specified a time-frame of between 3-10 days, or stated that a response must be made

⁹⁶ Colo. Rev. Stat. § 24-72-203(3); *see also: Id.*

within a "reasonable" period. (Though Georgia is not required to provide records to out-of-state requesters).

Finally, four states that responded to the request did not have a statutory time-limit, but their response times were "reasonable," if judged by time-limits specified in other states. As such, these states were categorized as having responded within the time-frame, with the longest receipt-time being 4 business days.

[Please See Table 9 About Here]

Statutory Time-Limits Met or Exceeded by Postmark Date (Received in Time)

Conclusions

The research findings indicate that while states have definitely made progress, especially in establishing transparency portals and proactively disclosing some frequently requested records, there remains much room for improvement, particularly in the areas of comprehensiveness of the data provided, adherence to statutory time-limits for response time, and reasonableness of fees requested. Moreover, the notably slower response rate for states that replied by postal mail highlights the increasing importance for electronic access to public records.

A Standardized Model Policy

One of the most interesting findings of this study was the extreme variations in electronic public records accessibility from state to state. In states where accessibility lacked, transparency suffered not just from astronomical - even absurd- fees, a slow response rate - or no response at all - incomplete, out-of-date or cursory records, confusingly complicated or maddeningly simplistic websites, or the inability of agencies to adhere to quite generous statutory timelines or to provide records in what should be a universal format. Rather, far too many states lagged in some, if not all, of these areas, and even states that excelled in some important accessibility factors typically fell below ideal standards in at least one other transparency area.

Establishing a model public records policy for state agencies across the country to follow could help record-holders streamline their process and know how to stay on top of requests as they arrive. While most states have improved their transparency ratings in

recent years by establishing public information portals, proactively posted records are only one factor in practical accessibility for the public.

Recommendations

Proactively making records available online is one important step that states without an adequate transparency portal can take to increase accessibility, but states with expansive transparency portals still have room for improvement. The inconsistencies and complete separation between individual state agencies' websites and a state's transparency portal remains one of the largest gaps among all states in providing proactive accessibility.

All agencies' websites need to be directly linked with the state's transparency portal, and have a freedom of information section allowing online records requests and displaying or linking to records available through the transparency portal. However expansive a portal may be, it is ineffectual if the data is not also available through the website of the agency commonly understood to be the record-holder. Sleek looking portals may earn top scores from transparency watchdogs, but if the average citizen has trouble navigating the site or deducing how and where to direct a records request, the site has not done its job.

Providing an online records request submission option is an additional safeguard for agencies looking to streamline their record request process, making it more efficient, more effective, and more economical. While an online or email request submission option does not negate the need to clearly identify record-holding agencies, it jumpstarts a process that is almost unfailingly-and unnecessarily-slow from beginning to end.

In addition, agencies need to work to establish and maintain commonly-requested records in electronic format and to make those records available online or, at the very least, have the record updated and available for distribution when requested. Requesters should not be charged exorbitant fees based on the number of estimated manpower hours required to create or compile records that, in this age, should already exist in electronic format.

The Role of the Custodian of Record

States should also continue to train custodians of records on responding to records requests promptly and within the statutory time-limit, and stress the importance of providing comprehensive records and following-up with a requester after the initial contact. Many states with excellent transparency portals and strong public records laws failed to respond adequately to the records request in this study, due to inaction or misunderstanding on the part of their records custodians.

A strong transparency website and proactively posted records do not take the place of well-trained public information officers within an agency. An agency can only anticipate the most basic records requests, and officers must be trained to handle more complex - and important - requests.

Likewise, agencies need to have a quality control system in place to catch records requests that fall through the cracks. In this study, six states failed to respond to the records request at all, and still others only acknowledged the request and never responded further. Both are unacceptable. Agencies can ensure this does not happen by having more than one employee involved in fielding records requests.

There are many different software available that can track incoming "client" inquiries, including assigning the request to an employee, scheduling follow-up tasks, allowing supervisors to track progress, marking tasks completed and making notes in the system about the request. A transparency portal with bells and whistles of all kinds cannot outweigh the effect of a negligent custodian of records. Agencies need to acknowledge how crucial these roles are, and hire accordingly. Required experience and salaries offered should reflect the position's importance within the agency.

Adequate Public Records Laws

Each state needs to adopt clearer statutory guidelines for handling public record responses, including specific timelines for agency responses - both acknowledgement of the request and either providing the records or issuing a denial of the request.

Very few laws address allowable fees, and this too needs clarification. While courts have established that reasonable fees may be charged for processing a request, it is hardly reasonable for states to expect taxpayers to reimburse the state for the time it takes an employee to do the job they are hired to do.

Poor Handling of Simple Requests Does not Bode Well for More Complex Requests

The salary information requested in this study was very simple. It should have been readily available in electronic format. The truth is, though, that the most important public records requests - the ones most crucial for the public to see- are not typically this basic. If records custodians balk at requests for salary information of public employees, how can they be expected to handle more sensitive, controversial, complex, or expansive requests?

Moving Forward

Most business is conducted electronically these days, and public business should be no exception. Agencies should put forth the time and money necessary to bring their recordkeeping into the 21st century, for the benefit of all, and should pursue the funding necessary to update their software and train and hire employees. Software should store records in a format that is easily convertible to Excel or another universal, parsable and machine-readable format. Platforms should be current and must not require requesters to use a limited search function to locate records one-by-one, for instance.

Agencies should adopt policies to efficiently store each new record electronically from the moment it is created and, at the same time, should develop a plan to bring pre-digital records up-to-date so that they may also be stored in accessible electronic formats. While great strides may not necessarily be made overnight, there is no excuse for agencies to continue creating and storing records in a manner that impedes transparency.

Future Research

Future research could expand upon this study by simultaneously requesting hard copy records and data in an electronic format, and comparing responses. Exploring both how states respond to requests for the same records in different mediums, as well as to similar records in different formats, would provide a more complete picture as to whether states' shortcomings in areas such as response-time or fees charged are related to the format of records requested or, alternatively, are simply failures of the agencies' freedom of information practices as a whole. Additionally, future researchers could request the same type of record from all states, but request hard copy records from half of the states and electronic records from the other half. Future researchers might also consider

requesting records that are more complex or more sensitive in nature than simple salary records.

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TABLES

Table 1. Online request option and response time

	Average Number of Days	Number of States	% of States
No Online Option	9.75	28	63.6
Online Option	7.0625	16	36.4
Total		44	100

Table 2. Ease of online request by clicks

	Average Clicks
Requests	1.6
Data	2.2
Total	3.8

Table 3. Mode of response

	Number of Respondents	Percentage of Respondents
Email	34	75.56
Phone	5	11.11
Mail	6	13.33
Total	44	100

Table 4. Mode of response and statutory deadline

	Made Deadline	Percentage Made Deadline	Missed Deadline	Percentage Missed Deadline
Email	31	77.5	3	60
Phone	3	7.5	2	40
Mail	6	15	0	0
Total	40	100	5	100

Table 5. Range of Fees

Charge Type	Average (U.S. Dollars)
Free	0
Flat Fee	40.9
Hourly Rate	35.9
Per-Page	0.2
Per-Employee	15.0

Table 6. Format of records

Format Type	Number	Percentage
cd	4	10.8
other	9	24.3
pdf	5	13.5
xls	19	51.4

Table 7. Ease of portal navigability by clicks

Number of Clicks	Number of States	Percentage of States
1	14	29.8
2	16	34
3	11	23.4
4	6	12.8
Total	47	100

Table 8. Comprehensiveness by category

Number of Categories	Number of States	Percentage of States
1	10	30.3
2	12	36.4
3	11	33.3
Total	33	100

Table 9. Statutory time-limits met or exceeded by postmark date (received in time)

	Number of States	Percentage of States
Yes	31	68.89
Yes, by postmark only	2	4.44
Yes, but did not finalize	7	15.56
No	5	11.11
Total	45	100