

**CONSTRUCTIVELY MANAGING CONFLICT  
ABOUT OPEN GOVERNMENT:  
Use of Ombuds and Other Dispute Resolution Systems in State  
and Federal Sunshine Laws**

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**A dissertation presented to the Faculty of the Graduate School  
University of Missouri**

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**In Partial Fulfillment  
Of the Requirements for the degree**

**Doctor of Philosophy in Journalism**

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**by  
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**MAY 2009**

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The undersigned, appointed by the Dean of the Graduate School, have examined the dissertation entitled

CONSTRUCTIVELY MANAGING CONFLICT ABOUT OPEN GOVERNMENT:  
Use of Ombuds and Other Dispute Resolution Systems in  
State and Federal Sunshine Laws

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A candidate for the degree of Doctor of Philosophy

And hereby certify that in their opinion it is worthy of acceptance.

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For all of the journalists and citizens who strive to be watchdogs, for all of the freedom of information advocates who have long battled to open our government to our scrutiny, for all who believe that our democracy is best when it operates transparently – this is for you.

## ACKNOWLEDGEMENTS

Only one place has world-class programs in journalism and dispute resolution – the University of Missouri. I have had the good fortune to study in both programs, where I had access to unrivaled scholars and colleagues while pursuing a Master of Laws in Dispute Resolution and a Doctor of Philosophy in Journalism.

I owe a debt of gratitude to everyone who helped me along the way, especially those named below.

To George Kennedy, I must say thanks for taking a gamble and hiring me as a city editor at the *Columbia Missourian* back in 2000. Without that experience, I would not have pursued a master's in journalism, nor would I have sought a career in journalism education. Your passion for good journalism and your understanding of the importance of open government have been invaluable contributions to my research.

To Charles Davis, a tireless advocate for the freedom of information movement, you are an inspiration not only to me, but also to all of us who look to build on your works to make the government accountable to the public. To me, you're a role model as a scholar and as a professor, and it has been my great privilege to have had you as a committee chair for both my master's and doctorate. Thanks.

To Sandy Davidson, I am just one of so many students who have been influenced by your efforts as a teacher and as a scholar. My understanding of the First Amendment, the law of communication, and the role of journalism in democracy has been tremendously influenced by you, and I've been fortunate to have your support and guidance as a student in both my master's and doctoral programs.

To John Lande, who introduced me to new ways to research legal issues and provided invaluable methodological guidance for this dissertation, and who suggested that I take a Dispute Systems Design approach to study these issues, this project could not have been done without your experience and knowledge. I've been fortunate to have you as a mentor in the Dispute Resolution program.

To Richard Reuben, who introduced me to Conflict Theory, you have been a model of how to incorporate the study of conflict and the role of media in society. There are so few who have chosen to explore this essential and complex field, and your influence on my orientation in conflict and media is immeasurable. You are also the person I have to thank for suggesting that case studies would be the most valuable part of this research – you were right, and I can't imagine having done things any other way.

So many other faculty members at the University of Missouri have served as mentors and supporters that it is virtually impossible to name them all, but I'll try. In the Dispute Resolution program at the law school, I owe special thanks to Bob Bailey, Phil Harter and Jim Levin. At the journalism school, special thanks go out to Wayne Wanta, Stephanie Craft, Michael Grinfeld, Earnest Perry, and Steve Weinberg.

And I cannot forget to mention my family. This project would not have been possible without my wife, Kara, and our three daughters – Katie, Elise and Sabrina – who supported me and motivated me to see it to the end.

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CONSTRUCTIVELY MANAGING CONFLICT  
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ABSTRACT

People seeking access to public records and meetings under state and federal open government laws have the right to sue in court to enforce them. But several jurisdictions also have alternative systems to handle disputes arising under public access laws. This study applied principles of Conflict Theory and Dispute Systems Design to examine the systems in place in each jurisdiction.

First, formal dispute resolution systems in each jurisdiction were examined, and a typology of systems was developed that identified five models: Multiple Process, Administrative Facilitation, Administrative Adjudication, Advisory, and Litigation. Second, ten experts in the freedom of information field were interviewed to examine any informal dispute resolution systems that may be in place. While few informal systems were found, the sources affirmed the necessity for formal alternative dispute resolution systems. Finally, case studies were conducted of three ombuds programs to examine the effectiveness of these kinds of offices in handling open government disputes.

The study concluded that ombuds programs, if established following the tenets of Dispute Systems Design by using a stakeholder process and building trust for providing independent, impartial and credible oversight, have great potential for constructive conflict management.

## CHAPTER 1: RESEARCH PROPOSAL

Access to public records has historically been a constant source of conflict between journalists and the government. As Harold Cross explained in his 1953 treatise *The People's Right to Know*, "No activity of which so much good is justly expected as that of the newspaper press encounters so much legal complication at the raw material level: access to public records and proceedings, the newspaper's most vital raw material source."<sup>1</sup> More than half a century later, reporters still struggle for access. Jane Kirtley, the former executive director of the Reporters Committee for Freedom of the Press, has in recent years decried the Bush administration's "draconian" approach to access, which she said can "chill investigative journalism and further undermine the public's right to know."<sup>2</sup>

Federal and state freedom of information laws, which are in place to ensure that public's business is done in public, struggle to regulate this conflict in an effective manner. Audits and surveys conducted in nearly every jurisdiction have come to a similar conclusion: Government agencies routinely fail to follow laws mandating disclosure of certain records, frustrating the attempts of citizens and journalists who hope to scrutinize government behavior.<sup>3</sup> Hammitt recognized that this frustration has led to

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<sup>1</sup> Harold L. Cross, *The People's Right to Know*, 4 (Columbia University Press, 1953).

<sup>2</sup> Jane E. Kirtley, *Transparent and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 Comm. L. & Pol'y 479, 508 (2006).

<sup>3</sup> An audit in Hawaii found "a pattern of defensiveness and reluctance" when records were requested. Freedom of Information Hawaii, Freedom of Information Compliance Audit (2006), available on-line at [www.hawaiispj.org/foi/foiaudit.htm](http://www.hawaiispj.org/foi/foiaudit.htm); Less than half of the 66 metro Atlanta police departments complied with requests for statistics on serious crime. Richard Halicks, "Your Right to Know: Unlock Your Government," *The Atlanta Journal-Constitution*, March 13, 2005; In Colorado, an audit conducted by 23 newspapers found "obtaining records can be an intimidating and disheartening process." Jon Sarche, "Want a public record? Statewide survey finds wide variety in what officials are willing to hand over," *Associated Press*, Oct. 25, 2006; In New York, an audit conducted by 52 reporters showed that a majority

the push for methods that are more practical for citizens and small organizations than the reliance on litigation that is prevalent in access laws:

While the courts are respected for their independence, forcing requesters to go to court if they are dissatisfied has prolonged an already arduous process, often adding years to the final resolution. Both the cost and time of litigation has discouraged requesters from litigating.<sup>4</sup>

However, despite the presence of numerous informal or administrative programs in the states, litigation remains a hurdle in effective management of disputes over access, and research on freedom of information remains largely rooted in legal analysis and advocacy.

Decades of court decisions have refined freedom of information law in the United States, and legal scholars have advocated further refinement and reinterpretation of federal and state open records laws during that time. But these studies remain largely rooted in the adjudicative process, focusing more on the law itself than the underlying conflict that the law seeks to regulate. Conflict theory provides an alternative approach by focusing on the underlying conflict, allowing consideration of how conflict can be constructively managed. Viewing disputes over access to information as a matter of conflict between competing institutions with divergent interests allows the constant struggle over records between government and journalists could provide new direction in managing this conflict to serve the interests of democracy.

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of schools and government bodies cooperated with sunshine law requests, but only 37 percent of police departments gave out requested arrest information. Cara Matthews, "Compliance varies in quest for information," *The Journal News*, March 13, 2005.

<sup>4</sup> Harry Hammitt, *Mediation Without Litigation* 2, *The FOI Reports*, Vol. 2, No. 3 (National Freedom of Information Coalition, 2007).

Conflict is an inevitable and omnipresent aspect of human life, and it can have both beneficial and negative consequences.<sup>5</sup> Conflict theory suggests that more beneficial consequences come as a result of constructive conflict processes, which are embodied in the relationships between conflicting parties and the systems in place to manage disputes that arise between them.<sup>6</sup> This research proposal seeks to examine the systems in place to regulate conflict regarding access to public records and meetings, a primary concern of journalists. Through a combination of legal research and depth interviews, the systems in each of the 50 states, the District of Columbia and the federal government will be analyzed to develop a typology of freedom of information dispute systems. Dispute Systems Design, a concept rooted in conflict theory that calls for developing and analyzing systems that constructively manage disputes,<sup>7</sup> provides a lens through which these systems manage freedom of information disputes can be examined. To provide additional depth to this probe, case studies of at least four existing systems from different types identified in the typology will be conducted.

#### **a. Literature Review**

This study examines the intersection of three concepts: Conflict Theory, Dispute Systems Design, and Freedom of Information. These concepts are discussed in detail in this section to build a theoretical framework for this study and to guide the formation of research questions.

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<sup>5</sup> See Lewis Coser, *The Functions of Social Conflict* (The Free Press, 1956).

<sup>6</sup> Morton Deutsch, *Cooperation and Competition*, 24-28, in Morton Deutsch & Peter T. Coleman, eds., *The Handbook of Conflict Resolution* (Jossey-Bass, 2000).

<sup>7</sup> See Cathy A. Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, 1996).

## Conflict Theory

Conflict is the result of the “perceived divergence of interest” between parties, embodied by their “incompatible goals and standards.”<sup>8</sup> Because human beings will inevitably hold “conflicting notions of the good,” conflict is a natural and unavoidable part of human life.<sup>9</sup>

Conflict theory seeks to understand the conflict process from an interdisciplinary perspective, incorporating a broad body research from several social sciences, including anthropology, political science, sociology, psychology, history, economics, and game theory.<sup>10</sup> A model of the conflict process developed by Pruitt and Kim suggests that conflict progresses according to the strategies the parties employ and the tactics they use to achieve these strategies.<sup>11</sup> In this model, the four strategies a party can employ can be passive, in the case of conflict avoidance, or active, in the case of yielding to the other party, engaging in problem-solving, or contending by trying to impose a solution on the other party. If the parties choose to contend, they can employ tactics ranging from less contentious, such as making promises and persuasive argumentation,<sup>12</sup> to more contentious, such as threats and violence.<sup>13</sup> Use of heavier tactics to counter the tactics of the other can lead to escalation, an intensification of the conflict.<sup>14</sup> If the escalated conflict does not bring about a resolution, the escalation may become persistent, which

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<sup>8</sup> Dean G. Pruitt & Sung Hee Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, 8-9 (3d ed., McGraw-Hill Higher Education, 2004).

<sup>9</sup> Carrie Menkel-Meadow, *Dispute Processing and Conflict Resolution: Theory, Practice and Policy*, xii (Ashgate, 2003).

<sup>10</sup> *Id.* at xvi.

<sup>11</sup> Pruitt & Kim, *supra* note 8 at 5-7.

<sup>12</sup> *Id.* at 66, 68.

<sup>13</sup> *Id.* at 71, 79.

<sup>14</sup> *Id.* at 88, 89.



tends to cause the conflict to endure and become harder to de-escalate.<sup>15</sup> However, Pruitt and Kim note, “escalated conflict always ends.”<sup>16</sup> Once the parties determine that reaching their goals comes at an “unacceptable cost or risk,” the conflict will reach a state of “perceived stalemate.”<sup>17</sup> From this point, the stalemate may persist, or the parties may begin to enter into negotiation to de-escalate and resolve the conflict.<sup>18</sup>

In this framework, “conflict” is a neutral term. While the field of sociology long viewed conflict as a “disruptive phenomenon”<sup>19</sup> and from the perspective of “competitive struggle,”<sup>20</sup> and people generally describe conflict in negative terms,<sup>21</sup> conflict theory recognizes the positive side of conflict as well. Coser outlined a number of positive functions of social conflict, including “stabilizing and integrative functions” by permitting resolution of rival claims, allowing for adjustment of social norms to new conditions, building unity and cohesion within groups, and “help(ing) to structure the larger social environment” by drawing and maintaining boundaries between conflicting groups.<sup>22</sup> Conflict can thus lead to needed social change and clarification of differences between disputing parties.<sup>23</sup> At an interpersonal level, conflict can also help to reconcile people’s interests and can help people determine the boundaries of their relationships.<sup>24</sup> Nevertheless, conflict can certainly have negative consequences, including draining time

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<sup>15</sup> *Id.* at 151, 153.

<sup>16</sup> *Id.* at 171.

<sup>17</sup> *Id.* at 172-173.

<sup>18</sup> *Id.* at 177.

<sup>19</sup> Coser, *supra* note 5 at 26.

<sup>20</sup> Morton Deutsch, Introduction, 11 in Morton Deutsch & Peter T. Coleman, eds., *The Handbook of Conflict Resolution* (Jossey-Bass, 2000)

<sup>21</sup> Suzanne McCorkle & Janet L. Mills, *Rowboat in a Hurricane: Metaphors of Interpersonal Conflict Management*, 5 *Comm. Reports* 57 (1992).

<sup>22</sup> Coser, *supra* note 5 at 154-155.

<sup>23</sup> Richard E. Rubenstein, *Sources*, 55 in Sandra Cheldelin, Daniel Druckman, and Larissa Fast, eds., *Conflict: From Analysis to Intervention* (Continuum, 2003).

<sup>24</sup> Roxane S. Lulofs & Dudley D. Cahn, *Conflict: From Theory to Action*, 12 (Allyn and Bacon, 2000).

and energy resources, psychological and physical health problems, collective trauma, and in cases of heavy escalation, interpersonal violence and war.<sup>25</sup>

Social psychologist Morton Deutsch, one of the pioneers of empirical research of conflict, described this dual nature of conflict in terms of *constructive* and *destructive* processes.<sup>26</sup> In this conceptualization, destructive conflict is “characterized by a tendency to expand and escalate,”<sup>27</sup> while constructive conflict involves “lively, productive controversies” that can be “mutually rewarding.”<sup>28</sup>

Deutsch offers a simple way to distinguish the consequences of destructive and constructive conflicts. Conflict is more destructive “if its participants are dissatisfied with the outcomes and feel they have lost as a result of the conflict,” while it is constructive “if the participants are all satisfied with their outcomes and feel that they have gained as a result of the conflict.”<sup>29</sup>

Deutsch identified the interplay between *competitive* behavior and *cooperative* behavior as central in determining the processes and consequences of conflict,<sup>30</sup> linking the characteristics of these behaviors to destructive and constructive conflict processes. Thus, under Deutsch’s typology, a destructive process of conflict would include:

1. Poor communication between the parties
2. Coercive tactics
3. Suspicion of the other party

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<sup>25</sup> Pruitt & Kim, *supra* note 8 at 10; Lulofs & Cahn, *supra* note 24 at 11-12.

<sup>26</sup> Morton Deutsch, *An Experimental Study of the Effects of Cooperation and Competition upon Group Processes*, 2 *Human Relations* 199 (1949).

<sup>27</sup> Morton Deutsch, *The Resolution of Conflict: Constructive and Destructive Processes*, 351 (Yale University Press, 1973).

<sup>28</sup> *Id.* at 359.

<sup>29</sup> Morton Deutsch, *The Social-Psychological Study of Conflict: Rejoinder to a Critique*, 4 *Eur. J. Soc. Psych.* 441, 454 (1974).

<sup>30</sup> Morton Deutsch, *supra* note 6 at 22.

4. Perceptions of basic differences in values between the parties
5. Attempts to increase power differences between the parties, and
6. Challenges to the legitimacy of the other party

A constructive process of conflict, on the other hand, would include:

1. Good communication between the parties
2. Less coercive tactics
3. Mutual trust and confidence
4. A perception of similarity in beliefs and values
5. Information sharing between the parties, and
6. Full acceptance of the other party's legitimacy<sup>31</sup>

Deutsch incorporated the above typology into a theory of *conflict resolution* that "equates a constructive process of conflict resolution with an effective cooperative problem-solving process in which the conflict is the mutual problem to be resolved cooperatively."<sup>32</sup>

Under this theory, the kind of conflict resolution system in place is representative of the social relationship between the parties, establishing the context of the conflict that provides "meaning and creates expectations for behavior."<sup>33</sup> As such, a conflict resolution system that focuses on litigation and adjudication, rather than negotiation and problem-solving, would be evidence of a social relationship that is more competitive and less cooperative.

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<sup>31</sup> Morton Deutsch, *A Theoretical Perspective on Conflict and Conflict Resolution*, 48, in Dennis J.D. Sandole & Ingrid Sandole-Staroste, eds., *Conflict Management and Problem Solving* (New York University Press, 1987).

<sup>32</sup> Deutsch, *supra* note 6 at 30.

<sup>33</sup> Lulofs & Cahn, *supra* note 24 at 32.

Conflict management scholars instead encourage “process pluralism,” which calls for the use of methods besides conventional legal processes to resolve disputes.<sup>34</sup> Sander and Goldberg described it as “fitting the forum to the fuss.”<sup>35</sup> These processes, which include negotiation, facilitation, mediation, arbitration, and hybrids of those processes, are often referred to collectively as “alternative dispute resolution.”<sup>36</sup> Alternative dispute resolution processes often rely on problem-solving approaches and use of neutral third parties to facilitate negotiations between parties in conflict.

Conflict theory suggests use of a problem-solving approach is one way for parties to become “unstuck” when they have reached stalemate.<sup>37</sup> The Harvard Negotiation Project, which began in the 1970s, developed “principled negotiation” as a way for parties to approach disputes effectively.<sup>38</sup> Principled negotiation focuses on solving problems, reconciling interests and seeking solutions that increase mutual gain rather than focusing on people and the positions they take in bargaining.<sup>39</sup> When this kind of negotiation fails to resolve the dispute at hand, parties should rely on objective criteria and fair standards to reach an agreement.<sup>40</sup>

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<sup>34</sup> *Id.* at xiv.

<sup>35</sup> Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *Negot. J.* 49 (1994).

<sup>36</sup> Although conflict resolution and dispute resolution scholars usually cover similar ground in their research, they can be distinguished by the situation of the parties involved. Generally, “conflict” refers to the overarching social relationship between individuals or social groups with divergent interests, while “disputes” are more narrowly focused on the divergent interests at hand, often after they have been reduced to a legal case between individuals. Menkel-Meadow, *supra* note 9 at xvi.

<sup>37</sup> Pruitt & Kim, *supra* note 8 at 190.

<sup>38</sup> Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiation Agreements Without Giving In*, xviii (2d ed., Penguin Books, 1991).

<sup>39</sup> *Id.* at 10-11.

<sup>40</sup> *Id.* at 85.

## **Dispute Systems Design**

The lessons developed in conflict theory have been applied to help design systems to improve conflict management. This area, Dispute Systems Design, also provides guidance for examination of existing conflict management systems. In particular, the field looks at managing individual disputes as well as overall conflict, both of which are necessary to manage conflict effectively. Conceptually, “conflict” can thus be distinguished from “dispute” in terms of the scope of the area of concern; conflict is a process and disputes are a product of that conflict.<sup>41</sup> In this framework, conflict is the broad, overarching term covering issues of divergent interests or incompatible goals between any number of people or groups; disputes are the specific manifestations of these issues.

Dispute Systems Design is not a perfect conceptual fit for research about conflict between organizations; much of the research about conflict management system design has been limited to disputes in organizations, typically workplaces.<sup>42</sup> However, there is potential for some of the concepts in the literature to inform research on conflict management systems outside of the organizational context, and these could be broadened to cover relationships in the inter-organizational context.

Ury, Brett & Goldberg recognized the potential breadth of dispute resolution systems design, going beyond organizational import to be of interest to “scholars, researchers, and students concerned with understanding, developing and evaluating

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<sup>41</sup> Costantino & Merchant, *supra* note 7 at 5.

<sup>42</sup> See John P. Conbere, *Theory Building for Conflict Management System Design*, 19 Conflict Resolution Q. 215 (2001).

alternative dispute resolution systems.”<sup>43</sup> In *Getting Disputes Resolved*, these authors focused on three elements of effective dispute management: (1) reconciling parties’ interests, (2) determining who is right, and (3) determining who is more powerful.<sup>44</sup> The interrelationships between these areas of concern should be taken into account by dispute resolution system designers; the authors suggest that while systems should be interest-oriented, they must also adequately deal with rights and power to be effective.<sup>45</sup> The authors used these lessons to build a framework of six basic principles of dispute systems design:

1. Putting the focus on interests by creating processes that identify the core concerns of relevant interest groups;
2. Providing “loop-backs” in the process to encourage a return to interest-based methods as a dispute progresses through the system;
3. Providing low-cost alternatives to reach satisfactory resolutions;
4. Encouraging discussion about the nature of disputes and the best ways to resolve them early in the process;
5. Arranging procedures from low-cost to high-cost; and
6. Ensuring that adequate resources are committed to motivate and educate parties so that they can make the system work.<sup>46</sup>

Costantino & Merchant embraced these principles and incorporated lessons from organizational design to build on this framework in the organizational context.<sup>47</sup> These

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<sup>43</sup> William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, *Getting Disputes Resolved* xiv (Jossey-Bass, 1988).

<sup>44</sup> *Id.* at 5-8.

<sup>45</sup> *Id.* at 15-18.

<sup>46</sup> *Id.* at 42-64.

<sup>47</sup> See Costantino & Merchant, *supra* note 7.

authors suggested addressing in the first instance whether ADR systems are appropriate for the type of conflict at hand, and they encouraged programs that are simple to use, easy to access, and that are narrowly tailored to address particular problems.<sup>48</sup> Further, they encouraged emphasis on the design and review of dispute resolution systems, calling for stakeholder involvement in the design process,<sup>49</sup> training and education of stakeholders about dispute resolution,<sup>50</sup> and constantly evaluating whether the program is meeting its intended goals.<sup>51</sup>

The goal of Dispute Systems Design goes beyond effective management of the many disputes that arise. Costantino & Merchant recognized that good systems should do more than “tinker at the edges of conflict,” instead seeking to change the culture of conflict in an organization.<sup>52</sup> Slaikeu & Hasson provided the metaphor of “rewiring” people and organizations to change the way they think about conflict, training stakeholders to understand and approach conflict management in an effective manner.<sup>53</sup>

Conbere<sup>54</sup> and Bingham<sup>55</sup> have noted that research on conflict management systems design has received much attention from scholars, but that little social science research has been done to help build theory in this area. This proposed research would seek to build theory in Dispute Systems Design through its in-depth evaluation of particular systems in place to manage disputes that arise in open government matters.

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<sup>48</sup> *Id.* at 121.

<sup>49</sup> *Id.* at 49.

<sup>50</sup> *Id.* at 134-135.

<sup>51</sup> *Id.* at 168.

<sup>52</sup> *Id.* at 218.

<sup>53</sup> Karl A. Slaikeu & Ralph H. Hasson, *Controlling the Costs of Conflict*, 199 (Jossey-Bass, 1998).

<sup>54</sup> Conbere, *supra* note 42.

<sup>55</sup> Lisa B. Bingham, *The Next Step: Research on How Dispute System Design Affects Function*, 18 *Negot. J.* 375 (2002).

## Freedom of Information

Accurate information about the way the government conducts its business is essential to the functioning of democracy. While a free press is central to combating abuse of government power, the press needs access to accurate information to perform in its watchdog role.<sup>56</sup> As Walter Lippmann noted in *Public Opinion*, the press cannot scrutinize government completely on its own, but instead can “normally record only what has been recorded for it by the working of institutions.”<sup>57</sup>

The centrality of the public’s need for information about government, implicit in the freedom of expression guaranteed in the First Amendment, is commonly described as the “right to know.”<sup>58</sup> Emerson, in examining the legal foundations of the right, noted that the most important use of the right to know is ensuring the public’s ability to obtain information about the government:

The public, as sovereign, must have all information available in order to instruct its servants, the government. As a general proposition, if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible.<sup>59</sup>

However, despite the legal and philosophical underpinnings of the “right to know” in the United States, the press has historically had difficulty gaining access to government information.<sup>60</sup> To regulate the legal disputes over access, the federal government and every state have passed some form of freedom of information law, also commonly called

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<sup>56</sup> Timothy W. Gleason, *The Watchdog Concept: The Press and the Courts in Nineteenth Century America*, 24 (Iowa State University Press, 1990).

<sup>57</sup> Walter Lippmann, *Public Opinion*, 228 (1st ed., The Free Press, 1965).

<sup>58</sup> Thomas I. Emerson, *The Legal Foundations of the Right to Know*, 1976 Wash. U.L.Q. 1, 2 (1976).

<sup>59</sup> *Id.* at 14.

<sup>60</sup> Cross, *supra* note 1 at 4.



“sunshine laws.”<sup>61</sup> The purpose of these laws is often clearly stated in ways that mirror Emerson’s language on the right to know. For example, West Virginia’s Freedom of Information Act says:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people and not the master of them, it is the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.<sup>62</sup>

Yet despite the presence of freedom of information laws rooted in these democratic principles, conflict between journalists and government over access persists.<sup>63</sup> This can partially be explained by the emergence of the “right to privacy” in a series of decisions by the U.S. Supreme Court.<sup>64</sup> The “right to privacy” and the “right to know” often clash, leaving courts to balance “the democratic value of access to the information against the individual value of privacy.”<sup>65</sup>

While legal scholars often describe the relationship between public access and privacy interests as a “conflict,”<sup>66</sup> conflict theory is typically not used to describe the

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<sup>61</sup> Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 Wm. & Mary Bill Rts. J. 1, 2 (2003).

<sup>62</sup> W.V. Code § 29B-1-1 (Lexis-Nexis 2006).

<sup>63</sup> Kirtley, *supra* note 2 at 480-482.

<sup>64</sup> *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a “right to privacy” in the U.S. Constitution in overturning a state law outlawing contraceptive medication); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman’s right to privacy in deciding whether to terminate a pregnancy before the second trimester); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning a state sodomy law as an unlawful intrusion into private sexual matters of consenting adults); *See also* Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 1 CommLaw Conspectus 71, 74-80 (2003).

<sup>65</sup> Halstuk, *supra* note 64 at 82.

<sup>66</sup> “The tension between an individual’s right to privacy and the public’s right to obtain government-held information represents a conflict between competing but vital democratic values,” Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government’s Up To*, 11 Comm. L. & Pol’y 511, 514, 583 (2006). *See also* Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower*

relationship between journalists seeking access to public records and government policies against disclosure. Instead, freedom of information scholarship is almost exclusively done from a legal perspective, examining disputes that arise under freedom of information laws and how courts should interpret the law to adjudicate these disputes properly. For example, Halstuk and Davis examined how lower courts applied the U.S. Supreme Court's decision in *United States Department of Justice v. Reporter's Committee for Freedom of the Press*,<sup>67</sup> in which the high court narrowly interpreted the "central purpose" of the Freedom of Information Act to refuse a journalist's request for the FBI rap sheet of a businessman with ties to organized crime.<sup>68</sup> Halstuk and Chamberlin examined how the "right to privacy" has largely overtaken the "right to know" in the 40 years since the federal Freedom of Information Act was passed, concluding that the U.S. Supreme Court has "created an FOIA-related privacy framework that has reset the balance significantly in favor privacy over disclosure," contrary to the legislative intent and statements by Congress that call for a "strong presumption of government openness."<sup>69</sup> Other legal studies on freedom of information are more normative in nature, such as Nowadzky's examination of state sunshine laws to reveal common elements and to "provide a framework for statutory interpretation"<sup>70</sup> and Christensen's examination of four state laws to suggest improvements to enforcement mechanisms in Georgia's Open Records Act and Open Meetings Act.<sup>71</sup> Such normative

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*Court Treatment of the Reporters Committee "Central Purpose" Reformulation*, 53 Admin. L. Rev. 984, 1024 (2002), noting the "central conflict between transparency and governmental secrecy."

<sup>67</sup> *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

<sup>68</sup> Halstuk & Davis, *supra* note 66 at 987.

<sup>69</sup> Halstuk & Chamberlin, *supra* note 66 at 514.

<sup>70</sup> Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law. 65 (1996).

<sup>71</sup> Meri K. Christensen, *Opening the Doors to Access: A Proposal for Enforcement of Georgia's Open Meetings and Open Records Laws*, 15 Ga. St. U.L. Rev. 1075 (1999).

research is typical in freedom of information research, describing existing legal frameworks and proposing improvements to these systems.

The theme that emerges from these studies is that freedom of information is essential to the American system of democracy to ensure that the public can make informed decisions about government and to ensure that journalists, the proxy of the people, have access to government information to serve as a monitor of the government. This conceptualization, when combined with the above concept of conflict theory, serves as a basis for the following research, which will follow the typical normative approach of describing existing statutes and relevant cases through legal research and then use other qualitative methods to examine the interactions inherent in the systems to propose improvements to these systems informed by Conflict Theory and Dispute Systems Design.

#### **b. Research Questions**

Freedom of information is essential for transparent and effective governance in American democracy, and journalists must have access to public records in order to serve in their watchdog capacity. Conflict Theory proposes that conflict should be constructive rather than destructive to maximize parties' satisfaction and achievement of their goals. Dispute Systems Design proposes to manage conflict constructively through creation of interest-based systems that rely on problem-solving and actively involve stakeholders in the design process. Together, these concepts serve as a theoretical foundation for this paper, suggesting that the systems in place to manage conflict over access to records

should be constructive rather than destructive to ensure that citizens can effectively monitor the performance of their elected officials.

Thus, this study first proposes to examine the formal systems in place to resolve disputes arising under state freedom of information laws to determine whether they are more representative of a constructive process or a destructive process. Thus:

**RQ1: What types of systems do states employ in their freedom of information laws to resolve disputes that arise?**

The results of RQ1 should provide a framework for classifying the dispute systems into types. However, this typology will be based on the formal, statutory procedures for resolving disputes. Other more informal methods of dispute resolution, which may arise before stakeholders use formal statutory mechanisms to resolve, claims, should be examined to provide a better understanding of how disputes are managed. Thus:

**RQ2: What informal systems are in place to manage disputes that arise under freedom of information statutes?**

Using Dispute Systems Design as a guide, the formal and informal systems will be examined to see how they interact to manage disputes about access to government information, with particular focus on an area that emerges as the most significant from the study of RQ1 and RQ2. Thus:

**RQ3: How do existing freedom of information dispute systems manage conflict?**

### **c. Methodology**

This research will be conducted using triangulation of three methodologies. First, legal research will be done to examine and classify the dispute resolution systems in place in state sunshine laws. Second, depth interviews of freedom of information advocates and practitioners will be conducted to explore less formal mechanisms for managing disputes over access. These two steps would guide the selection of jurisdictions for case studies, which will allow examination of dispute resolution systems in a number of jurisdictions to inform the analysis and conclusion portions of the research.

### **Legal Research**

Legal research would be used to examine the freedom of information laws in the 50 states, the District of Columbia and the federal government. Legal research methodology in mass communication studies can have many purposes, including analyzing the political and social processes that shape the laws of mass communications and providing a better understanding of how the law operates on society.<sup>72</sup> The method uses qualitative analysis of primary sources, such as laws and court decisions interpreting those laws, and secondary sources, such as works of legal scholarship that synthesize legal history, theory, case law and the works of other legal scholars.<sup>73</sup> For the purposes of this study, legal research would be used to examine the dispute resolution systems in

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<sup>72</sup> Donald M. Gillmor and Everette E. Dennis, *Legal Research in Mass Communication*, 341-342, in Guido H. Stempel III and Bruce H. Westley, eds., *Research Methods in Mass Communications* (Prentice Hall, 1989).

<sup>73</sup> See Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual* (2d ed., Adams & Ambrose Publishing, 1986).

place in the freedom of information law in each jurisdiction through review of statutes, relevant caselaw and government policy.

### **Depth Interviews**

Depth interviews of FOI experts and advocates would be used to study RQ2, which calls for examination of the non-statutory, informal systems that are used to resolve disputes regarding access to government records and meetings. Depth interviewing allows for targeting of the most relevant respondents for a research project.<sup>74</sup> Further, this method is flexible and adaptable to each individual respondent, allowing for more detailed responses to inform exploration of research questions.<sup>75</sup>

For this study, unstructured interviews would be used to explore the various experiences and knowledge of respondents regarding less formal systems of dispute resolution that have emerged in sunshine law disputes. At least 10 respondents would be interviewed, and interviews would be conducted either by telephone or in person.

The results of the depth interviews would be combined with the legal research to generate a typology of sunshine law dispute resolution systems. This would build on the research of Hammitt, who classified state sunshine law dispute resolution systems as either “formal” and “informal.”<sup>76</sup> For example, if the research were to suggest a continuum ranging from systems that have more facilitative characteristics, such as the presence of mediation programs or other non-binding programs that emphasize negotiation and problem-solving, to systems that have less facilitative characteristics, such as relying on litigation and adjudication to resolve disputes, then the typology would

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<sup>74</sup> Arthur Asa Berger, *Media Research Techniques*, 2d ed., 55-56 (Sage Publications, 1998).

<sup>75</sup> Robert Sommer & Barbara Sommer, *A Practical Guide to Behavioral Research*, 114-115 (Oxford University Press, 2002).

<sup>76</sup> Hammitt, *supra* note 4 at 2.

provide clearer definitions of groups along that continuum. On the other hand, the typology may consist of more distinct groups that do not fit a continuum as well. Regardless, the result would be a typology that places each jurisdiction's freedom of information law dispute resolution system into a category based on its management of conflict, which could then be used to select jurisdictions to be further illustrated through case studies.

### **Case Studies**

Case studies will be used to explore RQ3 through examination at least three states that emerge as the most compelling from the legal research and depth interview portions of this study. Case studies are ideal for studying complex social dynamics, allowing multiple methods of data gathering to study an individual case as a “whole with its myriad of interrelationships.”<sup>77</sup> Rather than generalizability, case studies allow for research that allows units to be studied in depth, compared and contrasted, and used to build theory.<sup>78</sup> Case studies may lead to the generation of novel theories that can be empirically tested and that can generate “new, perhaps framebreaking, insights.”<sup>79</sup>

Eisenhardt identified eight steps in the process of theory building from case studies:

1. Getting started by defining research questions;
2. Selecting theoretically useful cases;
3. Outlining data gathering through multiple methods;

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<sup>77</sup> Sommer & Sommer, *supra* note 75 at 203.

<sup>78</sup> *Id.*

<sup>79</sup> Kathleen M. Eisenhardt, *Building Theories from Case Study Research*, 14 *Academy of Mgmt. Rev.* 532, 546-548 (1989)

4. Gathering data in the field;
5. Analyzing the data, both within the case and compared to other cases;
6. Shaping hypotheses from the analysis;
7. Enfolding the existing literature into the analysis; and
8. Reaching closure when enough cases have been studied to make additional research repetitive or unnecessary.<sup>80</sup>

This process calls for cases to be studied to develop adequately complex theory with solid empirical grounding.<sup>81</sup> In the proposed research, the unit of study will be states, with a focus on (1) the process that led to the development of dispute resolution systems in each state's sunshine law, (2) how these systems have evolved as they have been used, and (3) relevant conflict management issues that have arisen since the creation of the systems. The primary method of gathering data in the case studies will be interviews, supplemented by legal and historical research.

Rather than development of hypotheses, as Eisenhardt suggests, the case studies will be evaluated using tenets of conflict theory and Dispute Systems Design to see which elements of those concepts are embraced and which are not. The analysis would address how conflict theory and Dispute System Design could influence the improvement of existing systems and the design of future systems to manage conflict regarding access to public records and public meetings.

Thus, this research proposes to be both descriptive and prescriptive. The typology of dispute resolution systems will provide a broad view of conflict management in sunshine laws, while the case studies would provide a more in-depth examination of how

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<sup>80</sup> *Id.* at 533.

<sup>81</sup> *Id.* at 545.



these systems come into being, how they evolve, and how effective they are at meeting the needs of disputants. These studies would guide a conclusion that focuses on improving dispute resolution systems in sunshine laws, with a goal of vindicating the purposes underlying the people's right to know in American democracy. Additionally, the analysis would be examined to see if it can help to build theory in Dispute Systems Design.

## **CHAPTER 2: A TYPOLOGY OF SUNSHINE LAW DISPUTE RESOLUTION SYSTEMS**

One must examine the types of systems employed to resolve disputes that arise under Sunshine Laws in the United States to address the first research question in this study:

### **RQ1: What types of systems do states employ in their freedom of information laws to resolve disputes that arise?**

Using legal research methodology, the dispute resolution systems in freedom of information laws in each of the 50 states, the federal government, and the District of Columbia were examined to develop a typology of Sunshine Law dispute resolution systems.

Additionally, two “white papers” examining alternatives published detailing some of the options available to people seeking access were considered: a publication by the Marion Brechner Citizen Access Project in 2007 detailing the formal statutory mechanisms for dealing with enforcement and compliance of open government laws,<sup>82</sup> and a paper published by the National Freedom of Information Coalition in 2007 that classified state sunshine law dispute resolution systems and examined mediation as an option in particular.<sup>83</sup>

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<sup>82</sup> Courtney Anne Barclay, *State-by-State Report: Formal Statutory Mechanisms for FOI Complaints*, Marion Brechner Citizen Access Project FOI 911 Rapid Response Team (2007), [www.citizenaccess.org](http://www.citizenaccess.org).

<sup>83</sup> Hammitt, *supra* note 4.

### **a. Results**

Multiple models emerged from the examination of state freedom of information laws. While many states do not have an alternative to litigation in place, others provide a special role for attorneys general, administrative agencies, ombuds, or some combination of these to manage disputes that arise over access to public records.

It would have been simple enough to assign systems to categories based on the name of the individual or office in place to serve as an alternative to litigation. For example, states that have created ombuds could be placed in one category, while states that funnel disputes to the attorney general could be placed into another category, and states with administrative agencies could be placed into a third category. However, this kind of categorization would fail to handle the multiple layers of dispute processes available in some states. Further, Dispute Systems Design is more about how systems are intended to function, rather than how they are titled. The role of the attorney general in one state may be similar to the role of the ombuds in another; these systems may be more alike, and may approach conflict management from a similar perspective.

Thus, a typology emerged rooted in the dispute processing inherent in each state's freedom of information laws. Because Dispute Systems Design calls for multiple levels of processing, starting with options that cost less for parties and involve more interest-based problem solving, the states that do this were grouped together in the "Multiple Process" model. States that call on an individual or office to investigate and facilitate disputes, seeking to resolve disputes before they go to court, were placed in the "Administrative Facilitation" model. States that rely on individuals or offices to make determinations and rulings about openness, binding or otherwise, were grouped into the

“Administrative Adjudication” model. Similarly, states that opt for this kind of individual or office to perform a more advisory function were placed in the “Advisory” model. Finally, states that contemplate no formal system beyond adjudication in court were grouped together in the “Litigation” model.

An outline of these models and some examples of the states that comprise them are detailed below.

### **Model 1: Multiple Process**

The “Multiple Process” model stands out as the kind of system that most embraces the principles of Conflict Theory and Dispute Systems Design. While none of the jurisdictions embody all of these elements – cooperative rather than competitive approaches, efforts to “rewire” participants into most constructive conflict management, problem-solving orientation, multiple entry points ranging from low-cost to high-cost for disputing parties, “loopbacks” to low-cost alternatives, and a design process incorporating stakeholders – the jurisdictions in this model all appear to have systems in place that allow for a more ideal processing of disputes.

Two characteristics most separate these systems from others. First, following the tenets of Conflict Theory, the emphasis on a cooperative, constructive approach to problem-solving is evident in the jurisdictions’ creation of programs intended to foster discussion and negotiation without reliance on the heavy hand of adjudication, even though administrative adjudication is permitted as a final option before litigation. Second, multiple layers of dispute processing are available to people who feel that their request for access has been improperly handled. These jurisdictions typically call for

early facilitation and mediation by government offices specifically aimed to handle open government disputes, while still allowing such an office more investigatory or administrative powers to enforce or resolve disputes. These options are all available as an early alternative to litigation, though they are not necessarily required before litigation may begin. Additionally, the offices that oversee the disputes are typically called upon to oversee educational programs to help ensure public understanding of open government laws. These programs aim both to resolve disputes and to educate potential disputants at low cost, a broad approach to dispute management. This approach has the potential to transform conflict pursuant to the tenets of Dispute Systems Design.

The jurisdictions with systems that fit best into this model were Connecticut, Hawaii and New Jersey. Each is described in further detail below.

**CONNECTICUT:** The Connecticut Freedom of Information Commission, which is regarded as “one of the best and most proactive oversight bodies” in the country,<sup>84</sup> was created with the passage of the state’s Freedom of Information Act in 1975 and has managed disputes concerning records and meetings in the state in the more than three decades since. The office is made up of 26 full-time staff members and had a budget of about \$1.7 million in 2006-2007.<sup>85</sup>

The commission combines administrative powers with quasi-legal powers to investigate violations of the Freedom of Information Act, to enforce its provisions, and to mediate disputes in an informal manner to seek settlement before a full hearing is conducted. For example, the commission:

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<sup>84</sup> Freedom of Information Commission and Connecticut Foundation for Open Government, *A Survey of Compliance by Local Agencies with the Freedom of Information Act* 11 (1999).

<sup>85</sup> State of Connecticut Freedom of Information Commission, *Who Are We?*, [www.state.ct.us/foi/about.htm](http://www.state.ct.us/foi/about.htm).

- (1) Has the duty to “promptly review” alleged violations of the act;<sup>86</sup>
- (2) Must “issue an order” pertaining to said violations;<sup>87</sup>
- (3) Has the power to investigate alleged violations by holding hearings, administering oaths, subpoenaing and examining witnesses, and receiving testimony and evidence;<sup>88</sup>
- (4) Can apply to the superior court for the judicial district of Hartford to issue orders requiring compliance with subpoenas, which may be punished by contempt of court if not obeyed;<sup>89</sup>
- (5) May declare actions taken at a meeting in violation of the Freedom of Information Act null and void;<sup>90</sup>
- (6) May require the “production or copying of any public record” it believes is appropriately open under the Act,<sup>91</sup> and
- (7) May impose civil penalties of between \$20 and \$1,000 against officials and also against persons who frivolously appeals to the commission for the purpose of harassing the agency.<sup>92</sup>

The legal and equitable remedies with which the commission is empowered are comparable to those given to the courts in most other states. Hearings are conducted by members of the commission, called “hearings officers,” who have judge-like powers.<sup>93</sup> And while complainants are entitled to contested hearings on matters, the commission

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<sup>86</sup> Conn. Gen. Stat. § 1-205(d) (Lexis 2008).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Conn. Gen. Stat. § 1-206(b)(2).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Regulations of the Connecticut Freedom of Information Commission § 1-21j-8, [www.state.ct.us/foi/Regs/regsIndex.htm](http://www.state.ct.us/foi/Regs/regsIndex.htm).

appoints a staff member ombudsman who “will attempt to effect a settlement of each appeal” before it reaches a final hearing.<sup>94</sup>

Matters are not required to be resolved by the commission as quickly as is the case in other states that have short turnaround requirements for administrative review or review by the attorney general. On its face, the Freedom of Information Act only requires that appeals be resolved within one year of the filing of the appeal.<sup>95</sup> However, if the commission designates an appeal as “privileged,” the case should be resolved by the commission within 90 days – hearings are to be held within 30 days of receipt of the appeal, and commission decisions must be made within 60 days of the hearing.<sup>96</sup> But the commission must expedite matters in the face of a threat to hold a meeting in executive session; in such cases, the commission will hold a preliminary hearing within 72 hours of the filing of an appeal to the commission.<sup>97</sup> A finding of probable cause on behalf of the complainant at the preliminary hearing can result in the agency being prohibited from holding the meeting until after the appeal is finally decided.<sup>98</sup> These decisions must be made within five days of the preliminary hearing.<sup>99</sup> The Connecticut Supreme Court has ruled that these time limits are mandatory, not merely directory. If the commission does

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<sup>94</sup> Freedom of Information Commission, *A Citizen's Guide to the Freedom of Information Commission*, [www.state.ct.us/foi/1998CITIZENSGUIDE.htm](http://www.state.ct.us/foi/1998CITIZENSGUIDE.htm).

<sup>95</sup> Conn. Gen. Stat. § 1-206(b)(1). Before 1987, the statute used to require a hearing within 20 days of the filing of the appeal in any case, and a commission decision within 30 days of the hearing. See former Conn. Gen. Stat. § 1-2i (b), changed by P.A. 86-408 (1986), cited in *Zoning Board of Appeals v. Freedom of Information Commission*, 503 A.2d 1161 (Conn. 1986).

<sup>96</sup> Conn. Gen. Stat. § 1-206(b)(1).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

not hold a hearing and make a ruling in the proper amount of time, the ruling will be invalidated.<sup>100</sup>

Besides being the primary arbiter of freedom of information issues in Connecticut, the commission also serves as the entry point for any disputes over records or meetings. The state requires exhaustion of administrative remedies before a case can proceed to court,<sup>101</sup> and the Freedom of Information Act only authorizes suit upon appeal from an adverse ruling by the commission.<sup>102</sup> In such appeals, the commission has standing as a party to defend its decisions.<sup>103</sup>

The commission issues about 200 formal rulings per year, and issued 260 in 2007.<sup>104</sup>

**HAWAII:** Hawaii's Office of Information Practices is "intended to be an alternative means for the public to appeal an agency's denial of access to records."<sup>105</sup> The office has the power to review agency denials and to order agency compliance,<sup>106</sup> but also handles informal inquiries from the public and from government agencies through its "Attorney-of-the-Day" service.<sup>107</sup> The office also performs educational and training services to government bodies.<sup>108</sup>

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<sup>100</sup> "The time requirements were not designed as merely a convenience to complainants under the act. The speedy disposition of complaints is important both to the complainant and to the efficient functioning of the governmental agency involved. Because the time requirements embodied in (the act) advance this purpose, they go to the essence of the act and are, therefore, mandatory." *Zoning Board of Appeals v. Freedom of Information Commission*, 503 A.2d 1161 (Conn. 1986).

<sup>101</sup> Conn. Gen. Stat. § 4-183(a).

<sup>102</sup> Conn. Gen. Stat. § 1-206(d).

<sup>103</sup> *Id.*

<sup>104</sup> Numbers from the Connecticut Freedom of Information Commission, [www.state.ct.us/foi/final\\_decisions.htm#Final Decisions](http://www.state.ct.us/foi/final_decisions.htm#Final%20Decisions).

<sup>105</sup> Office of Information Practices, *Annual Report 2007*, 1, [www.state.hi.us/oip/reports.html](http://www.state.hi.us/oip/reports.html).

<sup>106</sup> H.R.S. § 92F-15(a) (Lexis 2007).

<sup>107</sup> Office of Information Practices, *supra* note 105 at 1.

<sup>108</sup> *Id.*



In fiscal year 2007, the Office of Information Practices received more than 1,100 inquiries from the public telephone inquiries, received 30 appeals from the public and opened 23 investigations into government bodies alleged to have violated either the Uniform Information Practices Act or the Sunshine Law.<sup>109</sup> In 2007, the office had eight staff members and operated on a budget of about \$400,000.<sup>110</sup>

This combination of informal responses to inquiries at little time or money cost to the public, formal powers to adjudicate and investigate, and duties to educate the public and government about open government laws make Hawaii a natural fit in the Multiple Processes model.

**NEW JERSEY:** New Jersey is a relative newcomer to the area of sunshine law-specific administrative bodies. As recently as 2002, New Jersey had a functional open meetings law but a substandard public records law considered in a 1999 audit “by media and public right-to-know advocates as...one of the worst access laws in the nation.”<sup>111</sup>

But in 2002, the New Jersey legislature passed the Open Public Records Act, which created the Government Records Council.<sup>112</sup> The five-member council includes one representative each from the Department of Community Affairs and the Department of Education and three members from the public, who are not paid but can be reimbursed for expenses.<sup>113</sup>

An aggrieved party does not have to seek redress from the Government Records Council before going to court.<sup>114</sup> But the council has broad powers to handle public

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 3.

<sup>111</sup> Paul D’Ambrosio, “A new right-to-know bill due,” *Asbury Park Press*, May 28, 1999.

<sup>112</sup> N.J. Stat. § 47:1A-7 (Lexis 2008).

<sup>113</sup> *Id.*

<sup>114</sup> N.J. Stat. § 47:1A-6.

records disputes, including the power to “receive, hear and adjudicate”<sup>115</sup> complaints filed concerning a denial of access to records and the power to order the production of documents and witnesses.<sup>116</sup> The council does not have the power to issue fines or other civil penalties under the act.

New Jersey’s mediation program gives parties an opportunity to quickly resolve disputes with the aid of a mediator and without going to court:

Mediation shall enable a person who has been denied access to a government record and the custodian who denied or failed to provide access thereto to attempt to mediate the dispute through a process whereby a neutral mediator, who shall be trained in mediation selected by the council, acts to encourage and facilitate the resolution of the dispute. Mediation shall be an informal, nonadversarial process having the objective of helping the parties reach a mutually acceptable, voluntary agreement. The mediator shall assist the parties in identifying issues, foster joint problem solving, and explore settlement alternatives.<sup>117</sup>

The program refers all cases that fail to be resolved in mediation back to the council for investigation, moving the case from less formal to more formal with the possibility of a loop-back for more facilitation.<sup>118</sup> The council can make a ruling based on the written complaint and response, or if it is unable to do so on that basis, it may hold a contested hearing on the matter.<sup>119</sup> There is no charge to the complainant for this service.<sup>120</sup>

The council also operates a toll-free helpline and a Web site to aid less formal inquiries about the Open Records Law.<sup>121</sup> The council now has a staff of eight, including four case managers, and one in-house attorney.<sup>122</sup>

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<sup>115</sup> N.J. Stat. § 47:1A-7(b).

<sup>116</sup> N.J. Stat. § 47:1A-7(c).

<sup>117</sup> N.J. Stat. § 47:1A-7(d).

<sup>118</sup> N.J. Stat. § 47:1A-7(e).

<sup>119</sup> *Id.*

<sup>120</sup> N.J. Stat. § 47:1A-7(f).

<sup>121</sup> State of New Jersey Government Records Council, *About GRC*, [www.state.nj.us/grc/about](http://www.state.nj.us/grc/about).

<sup>122</sup> State of New Jersey Government Records Council, *GRC Staff*, [www.state.nj.us/grc/about/staff](http://www.state.nj.us/grc/about/staff).

In spite of its improved administrative and enforcement provisions, the law has yet to prove it can be effective in compelling compliance. The *New Jersey Law Journal* reported in 2003 that its experiences indicated that “the system is rife with foot-dragging, bureaucratic browbeating, fee gouging and flat-out noncompliance.”<sup>123</sup>

## **Model 2: Administrative Facilitation**

Sixteen jurisdictions embrace seeking interest-based solutions through informal mediation or facilitation, dispute resolution methods that reflect several of the tenets prevalent in Conflict Theory and Dispute Systems Design. These jurisdictions typically have a person or agency in place to mediate disputes that arise at no cost to the public. There are fewer layers of processing available than programs in the Multiple Process model; instead, these programs serve a way to divert disputes from litigation through a less formal process created by a state’s law or policy. But through these informal dispute resolution processes, the jurisdictions embrace interest-based solutions at little or no cost to disputants, seeking to resolve disputes early and to lay the foundation for more cooperative problem-solving between government officials and those seeking access.

Several different methods of implementing these kinds of program were evident. Within this model, the analysis of jurisdictions showed two main paths of facilitating disputes over access between the public and government agencies, which are referred to here as the “Mediation” path and the “Ombuds” path. A third path, referred to here as “Other,” includes public access counselors and other programs that did not fit easily into either of the other two paths.

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<sup>123</sup> Jim Edwards, “Government Agencies Filter Rays of Open Public Records Act's Sunshine,” *New Jersey Law Journal*, March 17, 2003.

## Mediation Path

Perhaps no jurisdiction in the country has been as innovative with mediation as a tool for resolving disputes arising under the Sunshine Law than the Sunshine State. To provide an alternative to litigation, the Attorney General's Office created an informal open government mediation program in the early 1990s. That program was formally codified by the state legislature in 1995, and it has handled hundreds of cases since then.

The statute defines "mediation" as:

a process whereby a neutral third person, called the mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is a formal, nonadversarial process that has the objective of helping the disputing parties reach a mutually acceptable, voluntary agreement. In mediation, decisionmaking authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.<sup>124</sup>

The statute requires the Office of the Attorney General to employ at least one mediator, and that mediator must be a member in good standing with the Florida Bar.<sup>125</sup> The statutory language embraces many of the premises common to mediation: a neutral third party, voluntariness of agreement, identification of issues and problem-solving.

For example, cases referred to the program do not necessarily go before a mediator. Pat Gleason, who oversaw the program until 2005, said many cases are resolved through "a simple phone call" from the Attorney General's Office to a

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<sup>124</sup> Fla. Stat. Ann. § 16.60 (1) (Lexis 2008).

<sup>125</sup> Fla. Stat. Ann. § 16.60(3)(a).

government agency.<sup>126</sup> As such, many disputes are solved quickly, some in less than 24 hours from the time the program is consulted.<sup>127</sup>

Resolving disputes in a timely manner is one of the main goals of the Sunshine Law, which calls for “an immediate hearing, giving the case priority over other pending cases” when an action is filed.<sup>128</sup> Courts have interpreted this to mean that Sunshine Law cases do not necessarily receive top priority, but they must be given priority over more routine matters “to accommodate the legislative desire that an immediate hearing be held.”<sup>129</sup> The Office of the Attorney General cites a “three-week goal” in resolving disputes in the open government mediation program.<sup>130</sup>

In 2007, the mediation program handled more than 75 cases, part of the attorney general’s efforts to “prevent expensive and time-consuming litigation which is often not an option for a citizen who is merely trying to hold his or her government accountable and responsible for its actions.”<sup>131</sup> Participation in the program has dropped in recent years – the program typically handled more than 100 cases annually for years, and handled 125 in 2005 – some of which may be attributable to the former head of the program being moved into a new Office of Open Government created when Charlie Crist became governor in 2007, which will be discussed below.<sup>132</sup>

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<sup>126</sup> Pat Gleason, *Mediation Program Resolves Access Disputes*, The Brechner Report (March 2000), [www.brechner.org/reports/2000/03mar2000.pdf](http://www.brechner.org/reports/2000/03mar2000.pdf).

<sup>127</sup> Pat Gleason, *Mediation Program Provides Alternative to Litigation*, The Brechner Report (June 1999), [www.brechner.org/reports/1999/rpt9906.htm](http://www.brechner.org/reports/1999/rpt9906.htm).

<sup>128</sup> Fla. Stat. Ann. § 119.11(1).

<sup>129</sup> *Salvador v. Fennelly*, 593 So.2d 1091, 1094 (Fla. Dist. Ct. App. 1992).

<sup>130</sup> Office of Attorney General Charlie Crist, *2005 Year in Review*, 22-23 (May 2006), [myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/\\$file/2005YIR.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/$file/2005YIR.pdf).

<sup>131</sup> Bill McCollum, *Generally Speaking*, vol. 6, no. 11 (March 14, 2008), [www.myfloridalegal.com/NewsBrie.nsf/OnlineBrief/485F60D5D533B97B8525740C00621BE2](http://www.myfloridalegal.com/NewsBrie.nsf/OnlineBrief/485F60D5D533B97B8525740C00621BE2).

<sup>132</sup> Aaron Deslatte, “Records-access cases drop, McCollum says,” *Orlando Sentinel* (March 16, 2008), [www.orlandosentinel.com/news/local/state/orl-mediate1608mar16,0,5528203.story](http://www.orlandosentinel.com/news/local/state/orl-mediate1608mar16,0,5528203.story).

The open government mediation program is similar to the sunshine-law-specific administrative agencies in other jurisdictions, but it is unique in that it is administered by the attorney general. Further, the general counsel has said that the program has been operated without any additional funds or legislative appropriations.<sup>133</sup> While the program is only statutorily approved to handle public records disputes, it has been used to mediate open meetings issues as well.<sup>134</sup>

The mediation program is “supplemental to...the other powers of the attorney general,” rather than a substitution of those powers.<sup>135</sup> The attorney general has other more formal powers, such as investigating violations in a manner similar to the ombuds path below, and it may issue legal opinions to government agencies, similar to the advisory model below.<sup>136</sup> The opinions are advisory and non-binding, and litigation is an option for parties who do not reach an agreement following such intervention by the Attorney General.

The programs offered by the attorney general are complemented by the Office of Open Government, which was created by executive order in 2007 and resides in the governor’s office.<sup>137</sup> This office is in place to ensure compliance and to provide training across the state on the Sunshine Law, adding more depth to Florida’s commitment to managing conflict through facilitation and education.

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<sup>133</sup> This statement was made in 1999, almost five years into the program’s formal creation. See Gleason, *supra* note 127.

<sup>134</sup> *Id.*

<sup>135</sup> Fla. Stat. § 16.60(4).

<sup>136</sup> Fla. Stat. Ann. § 16.01(3).

<sup>137</sup> Office of the Governor of the State of Florida, *Executive Order No. 07-01* (Jan. 2, 2007), [www.flgov.com/pdfs/orders/07-01-outline.pdf](http://www.flgov.com/pdfs/orders/07-01-outline.pdf).

Without the same breadth of reach, other jurisdictions offer open government mediation programs as well. Georgia introduced its program in 1997,<sup>138</sup> and Pennsylvania established a mediation program in its newly-created Office of Open Records, signed into law in 2008. This office would issue advisory opinions, hear appeals of agency denials, and offer informal mediation, as well as provide training on open government matters to public officials.<sup>139</sup>

### **Ombuds path**

Six states have programs representative of ombuds,<sup>140</sup> or neutral parties that can investigate and aid in resolving disputes. Ombudspersons or offices can have varying powers and duties, but they typically are able to “fill multiple roles of counselor, investigator, mediator and advisor (at a minimum),” remaining flexible to use whatever resources and tactics disputants may need to reach resolution.<sup>141</sup> However, ombuds also typically have little power to enforce statutes or to impose solutions on disputing parties.<sup>142</sup>

The flexibility inherent in ombuds offices is reflected by the approaches of the states that follow this path in their sunshine laws.

Iowa’s Citizens’ Aide/Ombudsman is more of an investigator with some facilitation powers. The office is charged with investigating “any administrative action

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<sup>138</sup> Office of the Attorney General of Georgia, *Open Government Mediation Program*, [law.ga.gov/00/article/0,2086,87670814\\_87670967\\_87996538,00.html](http://law.ga.gov/00/article/0,2086,87670814_87670967_87996538,00.html) .

<sup>139</sup> 2008 PA ALS 3 § 1310 (Lexis 2008).

<sup>140</sup> The author prefers “ombuds” to the more common “ombudsman” in the interest of gender-neutral writing.

<sup>141</sup> Tyler R. Harrison and Calvin Morrill, *Ombuds Processes and Disputant Reconciliation*, 32 J. of Applied Communication Research 318, 319 (2004).

<sup>142</sup> *Id.*

of any agency,” either upon complaint or on its own.<sup>143</sup> It serves as an independent investigator with the power to issue subpoenas and to hear testimony,<sup>144</sup> but also as a facilitator that can “work with an agency to attempt to resolve a problem when an investigation shows that the agency has acted contrary to law.”<sup>145</sup> The office handled 282 inquiries about public meetings and records issues in 2006, up from 169 just three years before.<sup>146</sup>

Arizona’s public access ombuds law also calls for investigation, but also leans more toward facilitation of disputes. The state revised its public access laws in 2006, calling on the Office of Ombudsman-Citizens’ Aide to facilitate disputes between people seeking access and government agencies, investigate complaints and to provide training and education about public access laws.<sup>147</sup> The office, which hired two staff members including one attorney at a cost of \$185,000 to take on its public access duties,<sup>148</sup> views itself as a “neutral dispute resolver” that is supposed to “aid in the resolution of problems in a nonadversarial manner,” but with no authority to issue orders or adjudicate disputes.<sup>149</sup> In its first full year serving as ombuds of public access issues, the office received 368 inquiries, more than half of which were from the general public.<sup>150</sup>

Without explicitly referring to any role as an “ombuds,” Virginia law requires Virginia’s Freedom of Information Advisory Council to “encourage and facilitate

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<sup>143</sup> Iowa Code § 2C.9(1) (Lexis 2008).

<sup>144</sup> Iowa Code § 2C.9(5).

<sup>145</sup> Office of Citizens’ Aide/Ombudsman, *Services We Offer*, [www.legis.state.ia.us/Ombudsman/services](http://www.legis.state.ia.us/Ombudsman/services).

<sup>146</sup> Ombudsman’s Report 2006, 3 (June 2007), [www4.legis.state.ia.us/caodocs/Annual\\_Reports/2007/CAWPA000.PDF](http://www4.legis.state.ia.us/caodocs/Annual_Reports/2007/CAWPA000.PDF).

<sup>147</sup> A.R.S. § 41-1376.01 (Lexis 2008).

<sup>148</sup> Leah Duran, “New option in public records disputes,” *The Arizona Daily Star*, Feb. 2, 2007.

<sup>149</sup> Arizona Ombudsman – Citizens’ Aide, *What is an ombudsman?*, [www.azleg.gov/ombudsman/about.asp](http://www.azleg.gov/ombudsman/about.asp).

<sup>150</sup> Paul Davenport, “Business Good for Arizona’s Public Records Ombudsman,” *Associated Press*, March 15, 2008, [ktar.com/?nid=6&sid=764399](http://ktar.com/?nid=6&sid=764399).



compliance with the Freedom of Information Act.”<sup>151</sup> In doing so, the council, created in 2000, has taken on an ombuds-like role in managing disputes over access in Virginia. In its annual report in 2007, the council noted: “Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media.”<sup>152</sup> The council is required to issue advisory opinions at the request of the public or the government, and it is also charged with conducting educational seminars about access and “views its training mission as its most important duty.”<sup>153</sup> In 2007, the 12-member council and its staff of two attorneys handled 1,708 inquiries and wrote 13 formal opinions.<sup>154</sup> Unlike other ombuds offices, however, Virginia does not conduct formal investigations.

Other jurisdictions that fit the “ombuds path” are Alaska,<sup>155</sup> Tennessee,<sup>156</sup> and Washington.<sup>157</sup> In addition, Congress authorized the creation of the Office of Government Information Services, an ombuds program in the National Archives, in 2007,<sup>158</sup> though there has been conflict over the creation and location of the office.<sup>159</sup>

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<sup>151</sup> Va. Code Ann. § 30-178(A) (Lexis 2008).

<sup>152</sup> Report of the Virginia Freedom of Information Advisory Council to the Governor and General Assembly of Virginia, 2 (2007), [dls.state.va.us/groups/foiacouncil/2007ar.pdf](http://dls.state.va.us/groups/foiacouncil/2007ar.pdf).

<sup>153</sup> *Id.* at 6.

<sup>154</sup> *Id.*

<sup>155</sup> Alaska has no formal ombuds program in its open government laws, but a state ombuds office is available to handle citizen complaints about state agencies. *See* Alaska Stat. § 24.55.010 et seq. (Lexis 2008).

<sup>156</sup> Tennessee formally created the Office of Open Records Counsel in 2008. Tenn. Code Ann. § 8-4-601 (Lexis 2008). However, this was an extension of an ombuds program created by Gov. Phil Bredesen in 2007, consisting of two staff members in the state comptroller’s office. The office helps to resolve disputes between government agencies and people seeking access to meetings or records. It does not have enforcement powers. *See* Beth Rucker, “Office hoping for co-operation,” *Associated Press*, Jan. 1, 2008. The office started a toll-free hotline and informational Web site in 2008. Michael Cass, “State launches open records web site, toll-free number,” *The Tennessean*, March 24, 2008.

<sup>157</sup> Washington’s ombuds was created by the attorney general in 2005. [www.atg.wa.gov/OpenGovernment/Ombudsman.aspx#OG1](http://www.atg.wa.gov/OpenGovernment/Ombudsman.aspx#OG1).

<sup>158</sup> 5 U.S.C. § 552(h) (Lexis 2009).

<sup>159</sup> Congress called for the office to be operated by the National Archives and Records Administration; however, in a budget request, President George W. Bush shifted the office to the office of the attorney general, drawing the ire of legislators who feared that the move would threaten the independence of the

## Other

Several states also have dispute resolution systems that are facilitative in nature. For example, Kansas has a program operating at the agency level, requiring public information officers in each agency to “be able to assist the public agency and members of the general public to resolve disputes relating to the open records act.”<sup>160</sup> Maryland fits into the facilitation model in meetings only,<sup>161</sup> with a three-member Open Meetings Law Compliance Board that can receive and review complaints from the public about potential violations of the Open Meetings Act. The agency can hold informal conferences to handle disputes, and if no agreement is reached, it can issue a written advisory opinion that is not binding on the agency.<sup>162</sup> North Carolina also calls for facilitation in a limited scope with its Information Resource Management Commission, which can mediate issues regarding excessive fees charged for copying public records.<sup>163</sup>

However, larger administrative bodies with broader scope are also available to facilitate disputes, with more duties than open government mediation but without the same investigative duties as an ombuds. Indiana’s Public Access Counselor is representative of these bodies.

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office. See Elizabeth Williamson, “Is Ombudsman Already in Jeopardy?” *Washington Post*, A17, Feb. 6, 2008.

<sup>160</sup> K.S.A. § 45-226(b)(2) (Lexis 2006). Outside of this program, Kansas resembles the “Litigation” model, *infra*.

<sup>161</sup> For records, litigation is the only option. The attorney general may issue advisory opinions, an approach resembling the “Advisory” model, *infra*.

<sup>162</sup> Md. State Gov’t Code Ann. § 10-502 et seq. (Lexis 2008).

<sup>163</sup> N.C. Gen. Stat. § 132-6.2(b) (Lexis 2007). Besides this program, North Carolina calls for an informal advisory role for its attorney general, which would place the rest of the program more in the “advisory” model, *infra*.

The Indiana Public Access Counselor office was created in 1999. The counselor is an attorney appointed by the governor<sup>164</sup> and has numerous duties, including training the public and public agencies on open government laws,<sup>165</sup> handling informal inquiries about public access laws,<sup>166</sup> and writing advisory opinions at the request of a member of the public or a public body.<sup>167</sup> The office is staffed with the counselor and one administrative assistant.<sup>168</sup> Complaints may be submitted to and resolved by the counselor,<sup>169</sup> but a person does not have to file a complaint with the counselor before filing suit under the public records or open meetings laws.<sup>170</sup> However, people have one main form of encouragement to seek the aid of the Public Access Counselor before going to court. If a person makes no effort to resolve a dispute through the Public Access Counselor, he or she is barred from having attorney's fees paid by the public body.<sup>171</sup>

In fiscal year 2007, the office received 2,097 inquiries and complaints and reported resolving all but 53 of those. Inquiries can be made by telephone or e-mail. The office also issued 251 written advisory opinions and made 24 educational presentations regarding Indiana's open government laws.<sup>172</sup>

Illinois established a Public Access Counselor in 2004, housed in the Office of the Attorney General with similar duties to its Indiana counterpart. The attorney general's

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<sup>164</sup> Burns Ind. Code Ann. § 5-14-4-6 (Lexis 2008). The position was created in 1999, and the counselor serves four-year terms. *Id.*

<sup>165</sup> Burns Ind. Code Ann. § 5-14-4-10(1).

<sup>166</sup> Burns Ind. Code Ann. § 5-14-4-10(5).

<sup>167</sup> Burns Ind. Code Ann. § 5-14-4-10(6).

<sup>168</sup> Public Access Counselor, *Annual Report of the Public Access Counselor to the Indiana General Assembly* (2007), [www.in.gov/pac/pdfs/annual07.pdf](http://www.in.gov/pac/pdfs/annual07.pdf).

<sup>169</sup> Burns Ind. Code Ann. § 5-14-5-6.

<sup>170</sup> Burns Ind. Code Ann. § 5-14-5-4.

<sup>171</sup> Burns Ind. Code Ann. § 5-14-3-9.

<sup>172</sup> Public Access Counselor, *supra* note 168.

“Public Access Team” responds to citizen complaints, works with agencies to ensure compliance, and can mediate open government disputes.<sup>173</sup>

New York’s Committee on Open Government also has similar duties: handling public inquiries, serving as an informal mediator, and issuing written advisory opinions that are not binding on the government.<sup>174</sup> The committee has four employees and, in 2007, it answered more than 6,600 inquiries, wrote more than 800 advisory opinions, and gave 127 presentations to the public and to government officials on the state’s open government laws.<sup>175</sup>

## **Model 2: Administrative Adjudication**

The seven states that fit into the Administrative Adjudication model rely less on facilitation, instead serving as an arbiter of disputes in a quasi-judicial manner. This model offers a low-cost alternative to litigation and has potential to allow for more negotiation in a less charged environment, embracing some of the principles of Dispute Systems Design. But rather than seeking interest-based solutions, the states in the Administrative Adjudication model issue orders that can be binding on agencies. Because the model remains more competitive than cooperative in nature, Conflict Theory suggests that these jurisdictions may be sacrificing any chance of transforming the underlying conflict over access in the interest of speedy and cost-effective dispute resolution.

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<sup>173</sup> Office of the Attorney General, State of Illinois, *Public Access Counselor Annual Report, An overview of 2007*, 1 (March 2008). [www.illinoisattorneygeneral.gov/government/PublicAccessCounselorAnnualReport\\_0308.pdf](http://www.illinoisattorneygeneral.gov/government/PublicAccessCounselorAnnualReport_0308.pdf).

<sup>174</sup> NY CLS Pub O § 89 (Lexis 2008).

<sup>175</sup> Committee on Open Government, *Report to the Governor and State Legislature 2007*, [www.dos.state.ny.us/coog/2007report.htm](http://www.dos.state.ny.us/coog/2007report.htm).

Several of these states give this adjudicative role to the attorney general, while others have other public agencies in place to serve as the arbiter.

Texas and Oregon seek to quickly handle records disputes by requiring the input of their attorneys general before a situation proceeds to court.<sup>176</sup> The attorneys general take on administrative law powers, becoming almost necessary parts of the process of deciding whether a party should receive access to records.

Attorney general opinions must be sought in Texas by any government agency that seeks to deny access to a public record under one of the exemptions to the Public Information Act.<sup>177</sup> The agency does not have to seek an opinion if the attorney general or a court has addressed the specific issue at hand previously;<sup>178</sup> however, the attorney general cautions public bodies that this exception is “narrow in scope” and does not pertain to records that are “substantially similar” to those closed under previous decisions.<sup>179</sup> Further, the public body is barred from requesting an opinion on closing an issue when a previous opinion has already declared that a record is open, which precludes asking the attorney general to reconsider a previous ruling.<sup>180</sup>

A party may seek declaratory or injunctive relief without necessarily waiting for the attorney general to issue an adverse ruling.<sup>181</sup> However, this route is impractical, both

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<sup>176</sup> The Texas and Oregon duties given to the attorney general are for records disputes only. For their public meetings acts, Texas and Oregon do not specify any role for their attorneys general, thus leaving them to their more traditional roles as advisors and chief legal officers for the state without any other administrative duties or enforcement powers.

<sup>177</sup> Tex. Gov’t Code § 552.301(a) (Lexis 2008).

<sup>178</sup> *Id.*

<sup>179</sup> Office of the Attorney General, *Public Information Handbook*, 34 (2008), [www.oag.state.tx.us/AG\\_Publications/pdfs/publicinfo\\_hb2008.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf).

<sup>180</sup> Tex. Gov’t Code § 552.301(f).

<sup>181</sup> Tex. Gov’t Code § 552.3215(b) simply states: “An action for a declaratory judgment or injunctive relief may be brought in accordance with this section against a governmental body that violates this chapters,” without any mention of the role of the attorney general.

in terms of time and cost, considering the duties placed upon the government bodies to seek attorney general review for any denial.

The review process is relatively quick – the government body must ask for an attorney general opinion within 10 business days of receiving a request,<sup>182</sup> and the attorney general “shall promptly render a decision,” at the most within 45 working days of receiving the request for a decision.<sup>183</sup>

This process is being used more and more frequently in Texas. In 2007, the Office of the Attorney General issued more than 17,000 letter rulings, almost double the amount requested in 2003 and nearly six times the amount requested in 1999.<sup>184</sup>

The Oregon attorney general, who is not a mandatory party to the process as in Texas, nevertheless takes on a similar administrative role in records disputes. Rather than requiring agencies to seek attorney general advice, Oregon lets people seeking access ask for review when state agencies deny records.<sup>185</sup> But before the person can take any steps to enforce the Public Records Act, he or she must receive an attorney general order denying the petition for relief.<sup>186</sup> Similarly, if the attorney general orders disclosure of the record, the public body must either comply with the order or issue “a notice of its intention to institute proceedings for injunctive or declaratory relief” in

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<sup>182</sup> Tex. Gov’t Code § 552.301(b).

<sup>183</sup> Tex. Gov’t Code § 552.306(a). The office of the attorney general can seek to delay its ruling by 10 additional working days if proper notice and reason is given to the parties. *Id.*

<sup>184</sup> In 2007, the office issued 17,106 rulings; in 2003, office issued 9,049 rulings; in 1999, the office issued 3,829 rulings, according to the Office of the Attorney General’s Web site, [www.oag.state.tx.us/open/index\\_orl.php?ag=50abbott](http://www.oag.state.tx.us/open/index_orl.php?ag=50abbott).

<sup>185</sup> O.R.S. § 192.450(1) (Lexis 2008).

<sup>186</sup> O.R.S. § 192.450(2). It is not enough that a party seek attorney general review; a final order must be made before a person can institute proceedings in court. See *Morse Bros., Inc. v. Oregon Department of Economic Development*, 798 P.2d 719 (Ore. Ct. App. 1990).

court.<sup>187</sup> The Office of the Attorney General also works expeditiously; it must issue orders within seven days from the day it receives the petition for relief.<sup>188</sup>

Kentucky also gives its attorney general adjudicative powers. Citizens may appeal denials to the attorney general, and after considering the arguments of the requestor and the government body, the attorney general can make decisions that are binding on public bodies and that have the “force and effect of law,” requiring an appeal to court to overturn them.<sup>189</sup> Rhode Island<sup>190</sup> and Nebraska also call on the attorney general to enforce the law upon citizen complaints. In Nebraska, citizens can demand that the attorney general sue if a public body refuses to comply with the attorney general’s decisions.<sup>191</sup>

An example of a more formal administrative agency that serves an adjudicative role can be found in Utah. The State Records Committee has broad powers to handle disputes, including holding a hearing within 17 days of receiving the notice of appeal,<sup>192</sup> issuing subpoenas,<sup>193</sup> ordering disclosure of records<sup>194</sup> and ordering civil penalties of up to \$500 “for each day of continuing noncompliance.”<sup>195</sup> Government bodies must comply with orders of the committee.<sup>196</sup> The committee is made up of seven members, including a representative from the media and a citizen member.<sup>197</sup> The attorney general

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<sup>187</sup> *Id.*

<sup>188</sup> O.R.S. § 192.450(1).

<sup>189</sup> KRS § 61.880 (Lexis 2008).

<sup>190</sup> *See* Hammitt, *supra* note 4 at 16.

<sup>191</sup> R.R.S. Neb. § 84-712.03(2) (Lexis 2007).

<sup>192</sup> Utah Code Ann. § 63-2-403(4) (Lexis 2008).

<sup>193</sup> Utah Code Ann. § 63-2-403(10)(a).

<sup>194</sup> Utah Code Ann. § 63-2-403(11)(b).

<sup>195</sup> Utah Code Ann. § 63-2-403(14)(b)(i)(A).

<sup>196</sup> Utah Code Ann. § 63-2-403(14)(a).

<sup>197</sup> Utah Code Ann. § 63-2-501.

is not part of the committee, but provides counsel to it.<sup>198</sup> However, the committee is not often called upon to use these duties. In 2007, the committee issued just 16 decisions.<sup>199</sup>

Massachusetts has a less formal administrative body, but one that still operates in an adjudicative manner. The Supervisor of Public Records handles formal, written appeals of agency denials of access to records. The supervisor has broader powers to employ “any administrative means available to resolve summarily any appeal.”<sup>200</sup> Further, records custodians “shall promptly take such steps as may be necessary to put an order of the Supervisor into effect,” giving the supervisor some power to order agencies what to do.<sup>201</sup> However, opinions of the supervisor are non-binding.<sup>202</sup> Massachusetts does, however, have the potential for some facilitation. The Division of Public Records handles informal inquiries through an “Attorney of the Day,” a staff member who answers phone calls from the public or the government regarding the public records law. These calls, however, do not typically involve advisory opinions about the public records law.<sup>203</sup>

#### **Model 4: Advisory**

Unlike the public bodies described in the Administrative Adjudication model, it is more typical for attorneys general and administrative agencies to have a less formal, advisory role when disputes arise under the Sunshine Law. Eight jurisdictions follow this “Advisory” model, granting attorneys general or other public bodies the ability to issue

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<sup>198</sup> Utah Code Ann. § 63-2-502(8).

<sup>199</sup> State Records Committee Appeal Decision Summaries, 2007-2008, [www.archives.state.ut.us/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=374](http://www.archives.state.ut.us/main/index.php?module=Pagesetter&func=viewpub&tid=1&pid=374).

<sup>200</sup> ALM G.L. ch. 66 § 32.08-2-5 (Lexis 2008).

<sup>201</sup> ALM G.L. ch. 66 § 32.09.

<sup>202</sup> Hammitt, *supra* note 4 at 12.

<sup>203</sup> William Francis Galvin, *A Guide to the Massachusetts Public Records Law*, 11 (2009), [www.sec.state.ma.us/pre/prepdf/guide.pdf](http://www.sec.state.ma.us/pre/prepdf/guide.pdf).



informal opinions at the request of citizens or public officials, without any affirmative duties to facilitate disputes or to issue binding rulings. Without embracing all of the tenets of Dispute Systems Design, the advisory approach does allow parties a low-cost option that calls for a third party to intervene to try to resolve disputes before they reach court. The informal, non-binding nature of this intervention may allow for more negotiation in a more cooperative and constructive environment, as Conflict Theory recommends.

Five of these jurisdictions – Arkansas, Delaware, Montana, North Dakota and Wisconsin – allow citizens to seek advisory opinions from the attorney general concerning open government matters, typically after a request for access has been denied. In Washington, D.C., requests for review are instead made to the mayor.<sup>204</sup> Wisconsin has a typical provision, saying that “any person may request advice from the attorney general” regarding the public records law, and that the “attorney general may respond to such a request.”<sup>205</sup> In Arkansas, the attorney general is only authorized to issue advice to public bodies, but Hammitt noted that sometimes the attorney general will also issue informal opinions to the public as well.<sup>206</sup>

Two states follow the Advisory model through other public bodies. South Dakota’s Open Meetings Commission, created in 2004, is in place to handle complaints arising from potential violations of the state’s open meetings laws. Complaints are first directed to the attorney general, then forwarded to the commission.<sup>207</sup> The commission can issue written findings of fact and law, which are not necessarily binding on the

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<sup>204</sup> D.C. Code § 2-537 (Lexis 2008).

<sup>205</sup> Wis. Stat. § 19.39 (Lexis 2007).

<sup>206</sup> Hammitt, *supra* note 4 at 17.

<sup>207</sup> S.D. Codified Laws § 1-25-6 (Lexis 2008).

parties to the dispute.<sup>208</sup> The commission has no further enforcement or facilitation powers outlined in the statute. Minnesota's Commissioner of Administration also offers non-binding advisory opinions at the request of the public, with one minor difference than the above. Such requests cost \$200 if they are made in regards to the open meetings law, making this commission the only one that charges a fee for its advice on access issues.<sup>209</sup> The Minnesota attorney general may also issue advisory opinions, which take precedence over commission opinions but are still non-binding.<sup>210</sup>

Jurisdictions following the advisory model have made a commitment to some kind of informal review, providing another layer of processing of disputes before they go to litigation. Depending on the activities of the advisory body at hand, these programs may be representative of the recommendations of Dispute Systems Design. However, the statutes do not clearly require that the advisor behave in a cooperative or facilitative manner, and there is certainly potential that the advisory opinion would simply be another level of administrative adjudication before litigation commences. Much depends on the outlook and approach of the advisory body, details that cannot be gleaned from statutory language alone.

### **Model 5: Litigation**

Every jurisdiction offers litigation as an option for parties that are displeased with the way a public access issue has been handled. However, more than a third of the jurisdictions in this study – 18 out of 52 – had no reference to dispute resolution systems

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<sup>208</sup> S.D. Codified Laws § 1-25-7.

<sup>209</sup> Minn. Stat. § 13.072(b) (Lexis 2007).

<sup>210</sup> Minn. Stat. § 13.072(b)

available to the public outside of litigation mentioned in their open government laws.<sup>211</sup>

That does not mean that each of these states has no options besides litigation; rather, it represents that these states do not have formal mechanisms in the statutory schemes that lay out other forms of dispute resolution. States may have informal systems in place. For example, Missouri's attorney general has been called upon to help members of the public and the media to gain access to records despite no formal requirements of this in the state's public records law.<sup>212</sup>

Adjudication is not, in itself, an inadequate way to resolve conflict. Gulliver noted that adjudication is most appropriate when parties' interests are "totally incompatible" or if facts require an "authoritative third-party ruling."<sup>213</sup> However, adjudication systems may be "dysfunctional" when a more accommodative or complex solution is needed.<sup>214</sup>

Relying on the "rule of law" through a system that emphasizes litigation and adjudication is just one of many conflict management systems available to parties. However, this system certainly does not on its face embrace the interest-based, problem-solving orientations suggested by Conflict Theory and Dispute Systems Design. As Menkel-Meadow notes, the "law (is) often conflictual, indeterminate and politically contested or manipulable, or so focused on the need for regulation of the aggregate that it cannot always do 'justice' in particular cases."<sup>215</sup> Because this need for justice is so important in the context of open government disputes, and because litigation may have

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<sup>211</sup> These states were: Alabama, California, Colorado, Idaho, Louisiana, Maine, Michigan, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, South Carolina, Vermont, West Virginia, and Wyoming.

<sup>212</sup> Jean Maneke, "Enforcing the Sunshine Law," *Missouri Press News* (2003), [www.mopress.com/\\_lib/files/ManLawSUNenforce.pdf](http://www.mopress.com/_lib/files/ManLawSUNenforce.pdf).

<sup>213</sup> P.H. Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective*, 13-17 (Academic Press, 1979).

<sup>214</sup> *Id.*

<sup>215</sup> Menkel-Meadow, *supra* note 9 at xii.

more significant costs of time and money to parties, it appears to be less than ideal as a dispute resolution system.

### **b. Analysis**

Conflict Theory suggests that the kind of conflict resolution system in place is representative of the social relationship between parties, establishing the context and culture of the relationship between parties in conflict. As such, a conflict resolution system that focuses on litigation and adjudication, rather than negotiation and problem-solving, would evidence a social relationship that is more competitive and less cooperative. “Process pluralism” suggests fashioning alternative systems to complement or supplant conventional legal processes such as litigation.

Alternative dispute resolution processes are evident in the freedom of information dispute resolution systems typology developed in this study. Whether through mediation programs, adjudicative processes, ombuds, administrative bodies, informal advisory opinions, or some hybrid of these, the 52 jurisdictions have come up with dozens of approaches to managing conflict effectively. Some of these approaches touch on multiple models. For example, Maryland offers an Open Meetings Commission that is classified here as “Administrative Facilitation,” but this program is for meetings only; records requests are handled in a fashion more resembling the “Advisory” model. Additionally, states that rely on the attorney general or other public bodies to issue rulings that resemble the “Administrative Adjudication” model, also call for these offices to offer some informal advice and training. For example, the Texas attorney general

operates a toll-free helpline for informal public inquiries<sup>216</sup> and offers mandatory training to public officials on the open government law.<sup>217</sup>

Considering the principles of Dispute Systems Design and Conflict Theory, the first two models – Multiple Processes and Administrative Facilitation – seem to offer the most promise in dealing with long-term conflict over access while also managing the many disputes that arise along the way. Because of the successes of states such as Florida, with its Open Government Mediation Program, and Connecticut, with its Freedom of Information Commission, it is easy to hold out these two jurisdictions as models for all others. But these two programs are present in states with long-term commitments to freedom of information, and these kinds of programs may not be ideal or cost-effective for other jurisdictions.<sup>218</sup> One commentator suggests that a more cost-effective model for some states may be Indiana’s Public Access Counselor or Minnesota’s Commissioner of Administration,<sup>219</sup> which fall into the Administrative Facilitation and Advisory models, respectively.

However, empirical study of the effectiveness of these dispute systems is lacking. Scholars and the news media have praised the open government laws in Florida<sup>220</sup> and

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<sup>216</sup> Texas Attorney General, *Complaints & Enforcement*, [www.oag.state.tx.us/open/enforcement.shtml](http://www.oag.state.tx.us/open/enforcement.shtml).

<sup>217</sup> Texas Attorney General, *Open Government Training Information*, [www.oag.state.tx.us/open/og\\_training.shtml](http://www.oag.state.tx.us/open/og_training.shtml).

<sup>218</sup> The New York Committee on Open Government noted this in a 2007 report: “Connecticut is one-tenth the size of New York, and our population is more than five times as great. The staff of the Committee on Open Government in New York is four; Connecticut’s FOI Commission has twenty employees. The cost of implementing a similar program in New York, with an independent agency having the power to enforce the law, would be many millions of dollars.” New York Committee on Open Government, *Report to the Governor and State Legislature 2007*, [www.dos.state.ny.us/coog/2007report.htm](http://www.dos.state.ny.us/coog/2007report.htm).

<sup>219</sup> See Jean Maneke and Jill Barton, *Providing Public Assistance for the Sunshine Law*, 63 J. Mo. B. 74, 79 (2007).

<sup>220</sup> See Sandra F. Chance and Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent With Florida’s Position as a Leader in Open Government*, 35 Fla. St. L. Rev. 245 (2008); Harry Hammitt said Florida is considered by many to be the “sunniest” state for public access laws. Christopher Williams, “Maine right-to-know law needs overhaul, experts say,” *Associated Press*, Dec. 30, 2002.

Connecticut,<sup>221</sup> but no independent research has been done to confirm whether the systems in place are meeting the needs of disputants or whether they are effectively diverting cases from litigation or are otherwise meeting the needs of disputants.<sup>222</sup> This is not an issue restricted to research on dispute processing systems in open government; Conbere has noted the lack of empirical research and theory-building in Dispute Systems Design in general and has called for more research into the effectiveness of systems using these approaches.<sup>223</sup> Similarly, Bingham has commented, “(w)e do not have a body of consistently collected observations about dispute resolution and the systems with which it is compared.”<sup>224</sup>

Some studies have been conducted that examine the effectiveness of dispute resolution systems. For example, a case study of the Parades Commission in Northern Ireland, which was created in 1997 to mediate and adjudicate disputes over contentious parades conducted by Loyalists and Nationalists in the region, found that public attitudes about the commission were generally more negative than positive.<sup>225</sup> The authors cautioned against placing unrealistic expectations on a single institution,” particularly one facing the long-term cultural and political challenges of this conflict.<sup>226</sup> In a different context, interviews of participants in a workplace program found that mediation was considered as an ideal but unrealistic strategy for managing workplace conflict; instead,

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<sup>221</sup> “Connecticut doesn’t have the nation’s strongest Freedom of Information laws, but its FOI Commission is one of the most powerful.” Cara Rubinsky, “Connecticut FOI Commission marks 30 years,” *Associated Press*, March 12, 2005.

<sup>222</sup> The Florida Attorney General has said that the state’s Open Government Mediation Program offers benefits such as “the saving of tax dollars that may otherwise have been used to pay extensive legal fees and costs.”

<sup>223</sup> See Conbere, *supra* note 42.

<sup>224</sup> Bingham, *supra* note 55 at 375-376.

<sup>225</sup> Michael Hamilton & Dominic Bryan, *Deepening Democracy? Dispute Systems Design and the Mediation of Contested Parades in Northern Ireland*, 22 *Ohio St. J. on Disp. Resol.* 133 (2006).

<sup>226</sup> *Id.* at 183-184.

employees reported a preference for direct negotiation without a third party being involved.<sup>227</sup>

Empirical research into the design of dispute resolution systems in open government laws should be done to provide guidance to jurisdictions as they reconsider the ways these laws operate. This study hopes to help inform the creation of new dispute resolution systems or modification of existing dispute resolution systems in open government laws. But this study is only a beginning. Because it examined only formal systems and programs in statutes and government bodies, this study did not look at the informal dispute resolution systems that have emerged to manage relationships between government bodies and people seeking access. These emergent systems, particularly in jurisdictions with no formal alternatives besides litigation, should be explored in more depth to see what lessons can be learned. Further, the manner in which the dispute resolution systems have been created – the design process – could be examined to see how best to implement the needs of the varying stakeholders in legislation regarding open government. Additionally, the models developed by this study should each be evaluated to see how effective they are at meeting the needs of disputing parties.

Conflict Theory and Dispute Systems Design have valuable lessons that can be applied in many contexts. If applied to freedom of information laws, they can help build on a strong foundation of legal research and analysis to lead to a better framework. With an orientation of effective conflict management that emphasizes cooperation rather than competition, particularly allowing practical low-cost solutions throughout the dispute

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<sup>227</sup> Jessica Katz Jameson, *Employee Perceptions of the Availability and Use of Interest-Based, Rights-Based, and Power-Based Conflict Management Strategies*, 19 Conf. Resol. Q. 163, 185-186 (2001).

process, freedom of information laws may be able to live up to their lofty goal of ensuring transparent, democratic government.



### **CHAPTER 3:            INFORMAL DISPUTE RESOLUTION                                  SYSTEMS**

Conflicts arising under sunshine laws are inevitable, and every jurisdiction allows for citizens to challenge government denials of access in court. However, when a citizen seeking access to government records or meetings runs into a road block, litigation is not the only answer. In Chapter One, the systems in place to resolve disputes over access between people seeking access and government agencies were examined, and about two-thirds of the states were found have some kind of process available to parties as an alternative to litigation. However, this examination, like others before it, was limited to the formal systems created by statute or by official government policy, thus only providing one layer of depth to understanding about how disputes over access to records and meetings are handled.

There is another layer of depth to be probed. The formal systems reflect how legislators and policy-makers intend for disputes to be processed, but they do not necessarily reflect how parties actually engage in such disputes. There may be a far more organic process underlying human relationships, one that illustrates how people actually deal with one another when such disputes arise, that could provide a more complete picture of dispute processing in the sunshine law context. This is the essence of the second research question:

**RQ2: What informal systems are in place to manage disputes that arise under freedom of information statutes?**

To improve understanding of how conflict over access to government records is managed, this study searches for the existence of these kinds of informal, emergent

systems in state and federal sunshine laws. Further, this study explores the role these systems, or in many cases the lack of such systems, have played in the sometimes conflict-laden relationship between citizens (often journalists) and government when they disagree about how open government laws should be applied.

#### **a. Literature Review**

Despite the best efforts of lawmakers to regulate human behavior through legal systems, people often do not let the shape of the law overly impact the way they deal with one another. Macaulay noted this in 1963 in his examination of business relationships.<sup>228</sup> Macaulay suggested that most business transactions were governed by contract law, and that often these contracts were extremely detailed in ways to govern the expectations of the parties to the transaction. However, the interviews he conducted suggested that contract law did not overly concern businesspeople. Situations that should have called for detailed contracts often were decided by handshake and trust. Even when detailed contracts were in place, the parties did not behave in a manner that expected that either would conform to all of the details of the contract. In short, businesses and their lawyers expected that the law would shape and guide the parties to business transactions, but the reality of business transactions often operated outside of this more formal legal system.

Macaulay noted a similar phenomenon when he examined the behavior of attorneys who handled cases involving the Magnuson-Moss Warranty Act, a very detailed law intended to protect consumers from faulty products, automobiles in

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<sup>228</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963).

particular.<sup>229</sup> Once again, the details of the law did not necessarily guide the way that attorneys and clients behaved. Instead, Macaulay noted, there was recognition of a new model of lawyer behavior. Attorneys were behaving more as negotiators, facilitators and even managers of disputes, ensuring that the most serious cases could get attention from the most formal processes, namely litigation, while other cases could be managed in less formal ways. This study revealed that attorneys and clients may allow detailed laws to guide behavior sometimes, but often other concerns and motivations affect them to a greater extent.

In the context of divorce proceedings, Mnookin and Kornhauser noticed a similar phenomenon, describing it as “bargaining in the shadow of the law.”<sup>230</sup> The authors noted that divorcing couples were engaged in “private ordering” to “work out their own arrangements” regarding property, alimony, child support, and other issues.<sup>231</sup> These negotiations were informed by the doctrines of family law, which are “inescapably relevant”<sup>232</sup> to the bargaining process. The authors made the point that examination of these less formal processes, rarely studied by legal scholars, is necessary to understand how “divorce proceedings actually work.”<sup>233</sup> Scholars have applied this framework to the study of areas such as plea bargaining in criminal cases under the federal sentencing guidelines<sup>234</sup> and contract negotiations between publishers and freelance authors on copyright issues after a U.S. Supreme Court opinion favoring the authors.<sup>235</sup>

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<sup>229</sup> Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 *Law & Soc’y Rev.* 115 (1979).

<sup>230</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950 (1979).

<sup>231</sup> *Id.* at 951.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 *Cal. L. Rev.* 1472 (1993).

<sup>235</sup> Maureen A. O’Rourke, *Bargaining in the Shadow of Copyright Law After Tasini*, 53 *Case W. Res. L. Rev.* 605 (2003). The Supreme Court decision in question, *New York Times Co. v. Tasini*, 533 U.S. 483

These studies recognize that review of legal doctrines and systems is just one approach to studying how people behave when disputes arise. Attention to systems design is important, particularly in the context of conflict management and dispute resolution.<sup>236</sup> However, also important is attention to the customs and habits of parties who regularly interact with one another in a relationship defined by legal rules and obligations. The dispute resolution systems created by law can help to set boundaries and shape the process for when disputes arise, but study of these systems alone is not enough to give a complete picture of how disputants actually approach these situations. As Hamilton and Bryan noted, such research can focus on something beyond “legal institutions per se,” instead examining “how law can construct, or leave open the possibility of, dispute resolution mechanisms beyond itself.”<sup>237</sup>

In this study, these non-statutory, informal systems of dispute resolution are examined to complement previous research on more formal, statutory systems in place to manage disputes over access.

## **b. Methodology**

To show how these systems came into being and how they interact with more formal systems, depth interviews of open government officials and experts from ten jurisdictions were conducted.

Seeking a broad array of respondents that included several regions of the country and included a diversity of perspectives, an initial group of potential interviewees was

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(2001), affirmed the copyrights of freelance authors and ordered publishers to compensate freelance authors for republishing their works without consent.

<sup>236</sup> See Costantino & Merchant, *supra* note 7; See also Ury, Brett & Goldberg, *supra* note 43.

<sup>237</sup> Hamilton & Bryan, *supra* note 225 at 134-135.

identified in discussions with Charles Davis, the executive director of the National Freedom of Information Coalition. Some of the potential interviewees deferred to others who could provide a more expert opinion, and these sources were contacted instead. Some of the potential interviewees declined or were otherwise unavailable to be interviewed, so additional contacts were made to attendees of the coalition's annual summit in Philadelphia in May 2008.

For this study, unstructured interviews were used to explore the various experiences and knowledge of respondents. Interviews were conducted by telephone from August to November of 2008. Each interview lasted between 30 and 60 minutes. While the interviews themselves were unstructured, questions were typically asked about (1) the nature of the jurisdiction's current approach to managing disputes that arise, (2) how the current system came into being, (3) whether informal options for resolving disputes exist for parties outside of the formal system outlined in statutes, (4) how, if at all, these informal systems interact with or otherwise complement the formal systems, and (5) the tone of the relationship between government agencies and those who seek access to government records and meetings.<sup>238</sup>

The interviewees were:

- Mark Anfinson, attorney for the Minnesota Newspaper Association
- Lucy Dalglish, Executive Director, Reporter's Committee for Freedom of the Press
- Maria Everett, Executive Director, Virginia Freedom of Information Advisory Council

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<sup>238</sup> The complete list of possible questions and topics is in Appendix A.

- Frank Gibson, Executive Director of the Tennessee Coalition for Open Government
- Pat Gleason, Director of Cabinet Affairs and Special Counsel on Open Government (Florida)
- Bill Lueders, President of the Wisconsin Freedom of Information Council
- Hollie Manheimer, Executive Director, Georgia First Amendment Foundation
- Jean Maneke, counsel for the Missouri Press Association
- Mike Merriam, general counsel for the Kansas Press Association and the Kansas Association of Broadcasters
- Mitchell Pearlman, former Executive Director of the Connecticut Freedom of Information Commission

**c. Results**

Several themes emerged from the interviews. Interviewees reported the existence of some kinds of informal or emergent systems, although several respondents expressed disappointment or frustration with the lack of either a formal or informal system besides litigation to handle disputes over access to government records and meetings. Some respondents noted the drastic improvement in managing disputes over access in jurisdictions that had formalized alternatives to litigation through legislation. However, some interviewees also noted that these kinds of formalized systems had unintended consequences that changed the dynamic of dispute processing, sometimes for the worse. Regardless of the formal or informal systems in place in their jurisdictions, respondents

noted the importance of the personalities and orientations of people in the systems in making a system work effectively.

These findings are discussed in more detail in the sections below.

### **Finding 1: How Informal Systems Work**

The interviewees were all asked questions about their home jurisdiction in particular, but they were also asked about their experience or knowledge of other jurisdictions. In some jurisdictions, informal lines of negotiation were apparent. Perhaps most typical was identified by Jean Maneke, a private attorney who has served as counsel for the Missouri Press Association since 1991. Maneke bemoaned Missouri's sunshine law, noting that outside of litigation, there are few options when disputes arise.

"If you're a newspaper, you can write about it," Maneke said. "You can try to get your local prosecutor or the attorney general to file suit, but neither happens frequently. Or (citizens or newspapers) can file suit themselves. But that's the only option."<sup>239</sup>

Maneke's description of her experiences, though, revealed that she served as an informal negotiator who could help people seeking access to government records and meetings. In her nearly two decades as an advocate, during which time she has run a free hotline for citizens and journalists seeking advice about how to handle thorny access issues, she has become a familiar face to people who may have the power to coerce government agencies to release records that should be open under the sunshine law.

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<sup>239</sup> Author interview with Jean Maneke (Aug. 21, 2008). All quotes and paraphrases from Maneke hereafter are from this interview.

Maneke particularly referred to making calls to the Office of the Attorney General to intercede on behalf of members of the Missouri Press Association, suggesting that she may be able to get results that citizens or journalists could not.

“In part, some of this has to do with the credibility of the caller,” she said. “Sometimes, people call and call and call and become pests, and then they get a less than positive response. When I call, I have some credibility. Sometimes I can call on these same people’s behalf and say, ‘Listen, maybe there’s a real problem here that’s not being addressed.’”

Mike Merriam, a private attorney who has served as general counsel of the Kansas Press Association and the Kansas Association of Broadcasters for more than 30 years, described a similar level of credibility he has when he makes calls to government agencies. However, for Merriam, most of his advice to the news media comes through the hotline he operates.

“That’s just telephone advice for the callers,” Merriam said. “If we have to follow up with the demand letter or negotiate with the agency, that’s a fee-based service.”<sup>240</sup>

Instead, Merriam says he usually advises people seeking access to go to the attorney general’s office, which designates an assistant attorney general who specializes in open government issues to get involved in negotiations.

Advising people who have been denied access to government records and meetings to engage in self-help through better negotiation was a strategy raised by several respondents. Bill Lueders, a citizen member of the Wisconsin Freedom of

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<sup>240</sup> Author interview with Mike Merriam (Sept. 17, 2008). All quotes and paraphrases from Merriam hereafter are from this interview.



Information Council who has been involved with the group for nearly 20 years, said he would make a call to records custodians “on rare occasions,” but that more often he advises people to try other strategies.

“We basically tell people to be persistent, to be clear, to be willing to work with the custodian (of records),” Lueders said. “There may be some persuasion you can do. Oftentimes, I think reaching out to the public official and asking, ‘Hey, can you help me get this, let’s work together?’ , that kind of diplomacy is the best avenue of all.”<sup>241</sup>

Lucy Dalglish, the executive director of the Reporter’s Committee for Freedom of the Press, a resource for journalists across the country, similarly advises journalists through the organization’s hotline to “engage in self-help” through persuasion and strategic narrowing of requests.<sup>242</sup>

The organizations to which Maneke, Merriam, Lueders and Dalglish belong serve as resources for citizens and/or journalists as a first line of defense when efforts to get access to information fail. These organizations all offer hotlines to people with access questions, in which requesters can get basic questions about open government laws answered and can receive some kind of advice about how to proceed.<sup>243</sup> Sometimes, as Maneke and Lueders mentioned, a call to a person in government can be made at an informal level. Pat Gleason, the Florida governor’s special counsel on open government

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<sup>241</sup> Lueders noted that when this fails, he usually advises clients to seek more formal review through a request for an opinion from the attorney general. Author interview with Bill Lueders (Sept. 22, 2008). All quotes and paraphrases from Lueders hereafter are from this interview.

<sup>242</sup> Author interview with Lucy Dalglish (Sept. 23, 2008). All quotes and paraphrases from Dalglish hereafter are from this interview.

<sup>243</sup> Similar systems through organizations representing journalists or government groups were apparent in case studies conducted in Iowa, Virginia and Arizona, *infra*.

and former assistant attorney general specializing in open government issues, noted a similar role for Florida's First Amendment Foundation.<sup>244</sup>

Georgia offers an even broader role with its First Amendment Foundation. Hollie Manheimer, an attorney who began working for the foundation in 1998, helped to develop the state's open government mediation program, which is housed in the attorney general's office. She says that program, which has been formally established by the attorney general and is currently overseen by Deputy Attorney General Stefan Ritter, handles about 100 complaints from citizens each year and has binding authority to require agencies to at least explain their reasons for denying access.

However, Manheimer offers another, less formal level of protection for citizens seeking access. She estimates that the Georgia First Amendment Foundation handles about 700 calls each year seeking assistance, and not all of these requests can be reasonably handled by referral to the attorney general's more formal program. So she will write what she calls a "letter of inquiry" to agencies who have denied a citizen access to records.

"I will make calls. I will send letters on my letterhead, and my letterhead has the editors of several dailies on it," Manheimer said. "So a county commission chair would get a letter not just from the complainer, but from somebody else looking over their shoulder. My role is just to be an ally for the citizen."<sup>245</sup>

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<sup>244</sup> Author interview with Pat Gleason (Nov. 21, 2008). All quotes and paraphrases from Gleason hereafter are from this interview.

<sup>245</sup> Author interview with Hollie Manheimer (Sept. 25, 2008). All quotes and paraphrases from Manheimer hereafter are from this interview.

Between the formal mediation program offered by the attorney general and the less formal calls and letters from the First Amendment Foundation, citizens in Georgia have two levels of help available outside of litigation.

“I have always viewed the attorney general’s office as being in the arsenal of tools I can use for people to get records,” Manheimer said. “Along with the First Amendment Foundation, it’s just two more things that a frustrated citizen can use to get relief.”

Georgia’s open government mediation program was the second in the country, following neighboring Florida, which developed a mediation program informally in the early 1990s. Gleason noted that what began as an informal program in the attorney general’s office was successful enough that it became formalized by the state legislature in 1995.<sup>246</sup> Gleason was the program’s mediator from its inception until 2005, when she left to join the governor’s administration in the newly-created Office of Open Government. Gleason recalled that the mediation program began as a directive from former Attorney General Bob Butterworth, who she described as a strong advocate of open government who also wanted to avoid litigation costs because in Florida, parties who lost an open records dispute had to pay the attorney’s fees of the winning party.

“It’s a system of you lose, you pay,” Gleason said. “As a cost measure, it made sense to settle these cases before they go to court. Government agencies were paying a fortune in attorney’s fees.”

Gleason noted that the program was “very informal” at first and often involved her fielding calls from both citizens and government agencies to step into disputes over access.

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<sup>246</sup> See Fla. Stat. Ann. § 16.60 (1).

“It was kind of amazing to me how many government agencies wanted to use it,” Gleason said, recalling what would happen when some records custodians were unsure what to do about requests. “They would call me and say, ‘They want to know the mayor’s salary and I don’t know what to do.’ I’d say, ‘You can tell them that Pat Gleason said you have to give that out.’ They would be so relieved.”

The success of Florida’s mediation program in its early years is an example of what can happen when a good informal system exists to complement more formal systems, such as attorney general review by opinion or other administrative review. However, in other jurisdictions, respondents noted that it has taken the creation of more formal systems to facilitate the competing interests of citizens and government without resorting to litigation.

## **Finding 2: The Need for Formal Systems**

When informal systems such as those mentioned in the previous section do not manage open records disputes in an effective manner, creation of more formal systems may be necessary. Several interviewees noted how access has improved since their jurisdictions have implemented more formal processes through legislation and other government programs.

For example, Virginia created its Freedom of Information Advisory Council in 2000, a body that is charged with training of government employees, advising the legislature on open government matters, and “encourag(ing) and “facilitat(ing) compliance with the Freedom of Information Act.”<sup>247</sup> Maria Everett, the executive director of the Freedom of Information Council, said the council answers about 1,800

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<sup>247</sup> Va. Code Ann. § 30-178(A).

calls and e-mails each year, stepping in to mediate in about 15 percent of these disputes. However, before the creation of the council, options for disputing parties were slim.

“Either the government had the last word and nobody filed suit, or there was a lawsuit,” Everett said. “People were out there on their own.”

The council, Everett said, has created options for dispute resolution that were not there before. Where litigation was the primary path in the past when negotiations broke down, now the Freedom of Information Council can serve in a facilitation role. Everett said the most important thing she can provide as an ombuds is “being the facilitator, just giving people an opportunity to kind of learn about each other and develop relationships.”

The ombuds in Tennessee, known as the Office of Open Records Counsel and formally established by statute in July 2008, filled a similar void of options for parties in disputes under the sunshine law.

“There was nothing in place before,” said Frank Gibson, who has served as the executive director of the Tennessee Coalition for Open Government since 2003. “Citizens’ only recourse was to retain a lawyer to advise them as to what the law was and what they should do. They would call us, and we could refer to them a copy of a (relevant) attorney general’s opinion or tell them about a court case, but you still had the situation where it was the citizen on one side of the counter and a reluctant clerk on the other side of the counter arguing about what should be done. Citizens basically didn’t have any rights.”<sup>248</sup>

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<sup>248</sup> Author interview with Frank Gibson (Aug. 25, 2008). All quotes and paraphrases from Gibson hereafter are from this interview.

Tennessee, like many other states, had provided for expedited review in court cases, and it also included the possibility of a plaintiff asking for a show-cause hearing requiring the records custodian to appear and justify the reason for denying access.

“Over time, we discovered that because there was no requirement that the records custodian specify the basis for denial, even the show-cause wasn’t working well,” Gibson said. “Probably the most significant thing we have added was creating the Office of Open Records Counsel (in 2008).”

Gibson gave an example of how the Open Records Counsel, by being able to intervene as a neutral third party, can facilitate disputes that arise. He described a situation in which the son of a city police chief was stopped for drunk driving, but that rather than being arrested, the son was picked up by a deputy police chief and taken home. No charges were filed, but word of the situation leaked to a local newspaper, which requested the investigative report from the police department. The local prosecutor said that record was closed because it was an ongoing investigation, and the newspaper contacted Gibson.

“I sent them to the Open Records Counsel, and the day they called, they set up a mediation the very next day,” Gibson said. “(Open Records Counsel Anne Butterworth) met with the newspaper’s editor and the city attorney, and they participated by phone. The city attorney agreed to join the newspaper in a letter to the prosecutor to say the record should be released. They established that no record existed.”

Rather than weeks or months of litigation, the matter was resolved in two days. Further, the open records counsel had enough pull to set up a mediation session, while Gibson’s open records advocacy group did not. “If my organization had done that, we

would never have gotten the city attorney to the meeting. Somebody with some power over the local government is needed,” he said.

Connecticut’s Freedom of Information Commission, an administrative agency created by statute in 1975 to oversee open government disputes, is also evidence of the power of using a formal dispute resolution system to fill the void when litigation is the only option.

“I think a lot of cases (challenging denial of access to records) were not brought because there was no mechanism,” said Mitchell Pearlman, who served as the Connecticut Freedom of Information Commission’s director from its inception until 2005. “But that’s what the Connecticut experience really showed. When you have an agency where people don’t have to hire lawyers, don’t have to spend money, don’t have to take off half a day of work, then a lot more cases will be brought.”<sup>249</sup>

Pearlman said the most important impact of the commission was not in its individual actions over the years, but the fact that it formalized a process that made it harder for government agencies to refuse to release records.

“Government officials usually take the course of least resistance,” Pearlman said. “So even if the tendency is to be secretive, you can just give the damn thing out. (The creation of the Freedom of Information Commission) had a profound effect. There used to be literally millions of requests where they would say, ‘Screw you, take us to court,’ because they knew that wouldn’t happen. Instead, it’s the path of least resistance to give it out.”

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<sup>249</sup> Author interview with Mitchell Pearlman (Sept. 5, 2008). All quotes and paraphrases from Pearlman hereafter are from this interview.

He compared Connecticut's system with that of the federal government under the Freedom of Information Act, suggesting that it is easier for federal government agencies to deny access. "That's why the federal system doesn't work very well. The path of least resistance is to say, 'Just sue us,' because they know that won't happen," he said.

The federal government, which has passed an amendment to the Freedom of Information Act that would create an ombuds office in the National Archives,<sup>250</sup> seems to have taken steps to create a more formal dispute resolution system.

"We are hoping the new Office of Government Information Service will help people stuck in no-man's land," said Dalglish, who noted that the main issue in the federal government is requests that are ignored or "sat on" while requesters wait for a decision on whether access will be granted or denied by federal agencies.

The successes of formal non-litigation dispute resolution systems in Virginia, Tennessee and Connecticut, however, have not proven to be a magic solution. Numerous disputes still arise, and there are still obvious tensions between government records custodians and people seeking access.

Mark Anfinson, an attorney who represents the Minnesota Newspaper Association, described multiple effects of the Minnesota Data Practices Act, which authorizes the commissioner of the Department of Administration to author advisory opinions in sunshine law cases. He says the advisory opinion process has been "generally a good project" since its inception in 1994, handling more than 900 cases.<sup>251</sup>

"What you find is that in the very great majority of those cases, the advisory opinion has resolved the dispute, with little cost to the parties," Anfinson said. "It was

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<sup>250</sup> Williamson, *supra* note 159.

<sup>251</sup> Author interview with Mark Anfinson (Sept. 26, 2008). All quotes and paraphrases from Anfinson hereafter are from this interview.



worked particularly well for these very vexing access disputes, especially for citizens as opposed to media organizations. Citizens aren't going to litigate. They can't afford it."

However, Anfinson says he has also seen a "cultural shift" in the way open government disputes progress now. Because most disputes over access are now handled through the advisory opinion process, and because media companies no longer have "spare cash to fight these battles in court," Anfinson says few cases actually make it to court, maybe two or three per year. He also noted that government officials and their attorneys have figured out that the financial disincentives to sue, coupled with the advisory process becoming the primary way to manage disputes, have given an unintended advantage to government agencies.

"Government officials and their attorneys are specialists of municipal government work, and their attorneys have started to get much more sophisticated with these laws," Anfinson said. "They know the odds are incredibly remote that there will be a lawsuit, so they just hunker down and say, 'No, what are you going to do about it?'"

Anfinson said that 15 years ago, government attorneys were more likely to believe him when he threatened litigation in sunshine law cases. Further, he sensed that agencies were insecure about the complexities of the law and feared bad publicity from refusal to release records. Instead, Anfinson says that today, "it's made it a tougher deal in an era where we have fewer dollars to challenge them. I think it's a very bad little equation."

Similarly, Merriam said the creation of freedom of information officers charged with facilitating access to records in each government office in Kansas has backfired to some extent.

“In practice, I don’t think that works very well because public agencies in Kansas would rather deny requests than facilitate access,” Merriam said. “So these information officers tend to really just be the first line of defense for the agency rather than facilitating access.”

The underlying cultural issue Anfinson and Merriam describe, one of constant confrontation between government officials and citizens seeking access to records and meetings, may be one that cannot be solved by formal or informal dispute resolution systems. The culture of conflict in relationships between parties inescapably colors how sunshine law disputes proceed.

### **Finding 3: The Role of Relationships and Culture**

In his more than three decades of experience in open government, Pearlman has traveled the world, advising other countries on the benefits of the Freedom of Information Commission model he helped to build in Connecticut. However, he explained that there are other cultural factors that go beyond open government laws and policies respecting transparency.

“Everywhere I go, government information is power,” Pearlman said. “People who control information, even at the level of a clerk, are reluctant to share it because it diminishes their power. Even if their position is innocuous, requesters will be given a hard time. In most jurisdictions, if you go in there and ask and they say, ‘No, you can’t have it,’ people say thank you and goodbye. It’s the path of least resistance. I think there’s a culture of secrecy in any bureaucracy, not just in government but everywhere.

Freedom of information laws are intended to legislate against that culture, and it's very hard to legislate against the culture."<sup>252</sup>

Anfinson described one aspect of this culture as "institutional anxiety bordering on fear" on the part of the government, particularly among lower-level employees.

"It is so completely drummed into their consciousness that you're much more likely to get in trouble in this agency if you give out something you're not supposed to than if you do," Anfinson said, noting the potential ramifications of violating privacy rights in Minnesota. "What happens if you don't give out something to a reporter that they're supposed to get? Usually nothing. If it's in doubt, don't give it out until you consult counsel. And it's hard not to generate doubt with a law as complex as this law has become."

Everett noted that in Virginia, she has sensed that the relationship is often uneasy because the disputing parties – often journalists and government officials – do not understand how the other side operates.

"It comes from a point where they each don't know what the other really does, what their job is," Everett said. "The media always perceive that the government gives out a bunch of crap, and the government always perceives that the media is out to get you. That it's confrontational is not surprising."

In Wisconsin, Lueders described what happens when some citizens have similar misgivings about the trustworthiness of government.

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<sup>252</sup> Pearlman noted that changing the culture is particularly difficult in countries without the same history of respecting transparent government as the United States. "In China, that's our big issue – how do we change this culture? It will take a long time to get it done. Bulgaria actually passed a really good FOI law in comparison to most countries, but the bureaucracy there said, basically, 'F you, this is Bulgaria, if we want to give you information, we will, and if we don't, we won't.'"

“You have a certain number of people in the community who think that whoever is in charge of that town board is just evil, just crooked, and their only reason to ask for records is to prove that Town Chairman Brown is corrupt,” Lueders said. “They think the record will say, ‘I steal money every day and I eat my children and my dogs.’ And when that record doesn’t turn up, they’ll say there’s a cover-up. Even the best public official is hard-pressed to comply with the Open Records Act in these cases. But even if an asshole is requesting it, you still have to obey the law.”

Past hostile relationships make things difficult as well. Gibson noted a recent situation in Tennessee in which he advised people who were once involved in a lawsuit against the government agency in the past. “The litigation is over, but if they make records requests, they’re treated as if the litigation is still ongoing. They’re treated as the enemy,” he said.

Most interviewees noted that the relationship between government officials and people seeking access is hard to describe simply.

“It’s all over the map,” Merriam said of the situation in Kansas, saying that relationships varied from place to place, but that in general, relying on open government laws was not going to be a way for members of the news media to get the access to information they need. “What you need is to cultivate sources, deal with public officials and administrators and get information from them on a one-on-one basis. Forcing the issue through open meetings and records requests just doesn’t help that much.”

Forging these kinds of relationships are even more difficult at the federal level, where Dalglish describes the relationship with one word: distant.

“Think about it. On the federal level, most requests come in by e-mail, mail and fax,” Dalglisch said. “At the state level, you can come up to the counter to ask someone in person, and that person often will respond on the spot. In the federal system, often you’re going to a faceless bureaucrat. There’s no opportunity to develop a relationship. The feds don’t just give out information. They make you FOIA it.”

Just as there are cultural difficulties in these relationships, some respondents described the positive role culture can have in managing the expectations of parties in open government issues. While Lueders sees some places in Wisconsin as being “adversarial from the get-go” when it comes to the sunshine law, he described other communities that have “traditions of openness” that can be self-perpetuating.<sup>253</sup>

“Communities regard their function as being as open as possible, and that builds trust and good relations with citizenry,” Lueders said. “And people there are pleased with how accessible things are.”

The culture of openness was also cited by Gleason as one of the keys to Florida’s administration of its sunshine law. Most important, she said, is the commitment of government to openness from the top down.

“In my experience, the most critical factor in terms of expediting public access is the commitment of the person in charge of the agency or office where the records are kept or where meetings are held,” Gleason said. “When Governor (Charlie) Crist issued his first executive order as governor and said that the state of Florida was going to have an Office of Open Government and that the office was there to ensure the people’s right of access to records and meetings, it sent a huge message to our agencies that that role was important. They see that providing access isn’t just a statutory and constitutional

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<sup>253</sup> Lueders noted that the city of Madison, in particular, had this kind of tradition of openness.

right, as if that's not important enough, but that it's also a critical part of the mission of the agency.”

Gleason said that much of this relationship has to do with how people are treated by the people in government who control records access.

“Is there a welcome mat out there for you, or are you treated as a pain in the neck?”

#### **Finding 4: The Role of Individuals**

Each interviewee took time to explain how important the people in the process, whether in a formal or informal system, were to the effective management of sunshine law disputes.

As Gleason noted, the commitment of high-level government officials such as the governor can shape the way records and meetings access are managed. Further, the role of the chief law enforcement officer in the jurisdiction – the attorney general – often sets the tone for how the sunshine law will be interpreted and enforced. Dalglish noted that this was the case in the federal government, which often seemed to favor closure over access under former attorneys general John Ashcroft and Alberto Gonzales. “Who becomes attorney general is enormously important,” she said.

At the state level, the attorney general also plays a crucial role in the sunshine law culture. Lueders illustrated how changes in the Wisconsin Attorney General's Office shifted public policy on access. Former Attorney General Peg Lautenschlager had “a pretty good track record” of bringing actions against public officials and agencies for not

following the law, Lueders said. Her successor, J.B. Van Hollen, who was elected in 2006, does not have the same reputation.

“He has never brought an enforcement action against anyone,” Lueders said. “He does not want to use his office to prosecute public officials for violating these laws.”<sup>254</sup>

The attorney general’s office in Missouri also sets the tone for sunshine law enforcement, said Maneke, who expressed worries that a change at the top may lead to a different approach to the sunshine law.

“We’ve had an attorney general for 12 years who has had a good sunshine law attitude, and as a result, there has been support in his office for sunshine law issues,” Maneke said. “But our attorney general is out of office this year, and we’re going to have someone new in that office...It’s really just a personality situation.”

Anfinson said he and other attorneys for the news media monitor who is in the Information Policy Analysis Division (IPAD) of Minnesota’s Department of Administration, which is in charge of issuing advisory opinions on sunshine law matters.

“There’s always the risk at IPAD of some personnel change,” Anfinson said. “The governor appoints the administration, and something could go south on us if the governor is somebody who is very adverse to the media on access. We try to keep as much influence as possible on that office as to who they select. There’s always that fear, especially as (advisory opinions) become the only real viable option, that we could be back-doored in terms of personnel.”

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<sup>254</sup> Lueders gave the example of Van Hollen dropping an appeal of a prosecution Lautenschlager had started when she was attorney general. The Wisconsin Department of Justice sued two state legislators under the state’s open records law, claiming the legislators had shared “a draft of concealed weapon legislation with the National Rifle Association but refusing it to hand it over to her office.” Associated Press, “Wisconsin DOJ gives up on open records lawsuit,” July 19, 2007. Lueders said, “The change in power directly knocked the legs out of what she was doing.”

Several other interviewees noted the positive role individuals have played in shaping their jurisdiction's approach to dispute management. Pearlman, for example, cited the early work of the "top-notch people" on Connecticut's Freedom of Information Commission, such as its first chair, journalism professor Herb Rooker, as "setting the tone" for the commission.

For jurisdictions with ombuds, having an independent and neutral person in place can help lend the program legitimacy. Gibson noted that the nature of the role in Tennessee and the placement of the Office of Open Records Counsel in the state comptroller's office has been crucial in establishing Anne Butterworth as a neutral facilitator.

"The fact that you have someone who is trusted and respected by folks in local government, as the comptroller is, there's some credibility there if they advise somebody to do something, even if it's informal," Gibson said. "All of (Butterworth's) time is spent on this issue, so she has become well-educated. And she doesn't represent anybody in court, she's not a litigator, so she doesn't have that conflict of interest."

Similarly, Everett described how her experience in Virginia's Freedom of Information Advisory Council has helped her establish bonds of trust with government agencies. "My relationship with local government attorneys, all the county, city and town attorneys, I've cultivated that relationship so we can talk frankly about stuff. That helps us to work things out," she said.

This experience, Everett says, makes her more acceptable when she serves as a facilitator in sunshine law disputes.



“My approach is not as a legal scholar, but as someone who’s very practical,” Everett said. “How can we make this work for everybody, make it win-win? Not all situations are things where you can get win-win solutions, but FOIA is a situation that can be win-win. With FOIA, it can happen.”

**d. Analysis**

At the outset of this chapter, the goal was to examine the role of informal systems of dispute resolution – those systems that are not a matter of statute or legal process, but instead have emerged from disputing parties themselves – in the context of open government laws. From the ten interviews conducted, the primary informal system in place in most jurisdictions was apparent in freedom of information and journalism advocacy groups such as the Georgia First Amendment Foundation, the national Reporters Committee for Freedom of the Press, and the Missouri Press Association, which have established some less formal routes for citizens and journalists to use when they are in conflict with the government over access to records or meetings. Similar advocacy groups exist for government officials and employees as well.<sup>255</sup> The structure of these informal systems seems to encourage processing of disputes in the “shadow” of the sunshine law, as informal advisers inform citizens about what the law itself says and how best to persuade government officials that their requests are valid. What the various sunshine laws actually say, as interpreted by courts and attorneys general, unquestionably informs this process. However, because the lines of negotiation are informal, often using experienced people with some persuasive pull with government officials to send a letter

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<sup>255</sup> Such as the Iowa Association of School Boards, the Iowa League of Cities, the Virginia Sheriffs Association, the Arizona School Boards Association, *infra* Chapters 4-6.

or make a phone call, these systems operate outside the more formal structures created by legislatures to manage sunshine law disputes.

These more formal systems in the statutes themselves, however, play a crucial role in managing disputes beyond anything that the informal systems can offer. Systems such as the Connecticut Freedom of Information Commission, the Virginia Freedom of Information Advisory Council, and the Tennessee Office of Open Records Counsel offer early and usually low-cost alternatives to litigation, reshaping the way sunshine law disputes proceed in their respective jurisdictions.

While these formal systems have undoubtedly had a positive impact, as described by the respondents, they come at a cost as well. One of the unintended consequences is that by intentionally diverting most cases from the litigation process, citizens and journalists may have largely lost litigation as an option in these cases.<sup>256</sup> Government agencies, knowing that citizens who already had little incentive to bring lawsuits may be placated by the alternative dispute resolution systems offered through sunshine laws, can be emboldened to deny access without much fear of litigation. Unless the system created gives an independent body enforcement powers, such as Connecticut's Freedom of Information Commission, or is otherwise backed by a firm commitment to openness from the highest levels of powers, as is the case in Florida, then even the formal, statutory dispute resolution systems may be unable to manage access issues effectively.

Much of the challenge in effective conflict management stems from the culture and from the relationships between people seeking access and people in power,

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<sup>256</sup> Mark Galanter referred to this phenomenon as “the vanishing trial,” noting that one of the possible causes of the decline in civil trials at the federal and state level in recent decades is “the diversion argument – that the claims and contests are there but they are in different forums.” Mark Galanter, 1 J. of Empirical Legal Stud. 459, 517 (2004).

particularly between journalists and government. This relationship in particular is one that has been competitive, if not openly hostile, since colonial times. The relationship is especially tense in matters of access to government records and meetings, which deal with the balance of individual privacy and the public's right to know about what its government is doing.<sup>257</sup> In his seminal treatise on open government more than half a century ago, Cross explained that no activity of the press “encounters so much legal complication at the raw material level” as access to government records and meetings, which he saw as essential to the press serving its role in democratic governance.<sup>258</sup> Interviewees in this study saw similar difficulties in the relationship, describing it as tense, mistrustful, anxious and sometimes distant. Conflict theory suggests that rebuilding this relationship in a cooperative, rather than competitive, orientation could help to transform the conflict in a positive way. However, transforming a culture of conflict and rebuilding relationships is an extraordinarily complex task, one that Pearlman noted is particularly challenging in the light of the power issues involved in open government matters.

Improving the systems in place to manage disputes that arise under the sunshine law at both the formal and informal levels can be one step toward transforming this conflict. At the informal level, jurisdictions can work to build more lines of communication between citizen and journalism advocacy groups and the public officials in charge of overseeing and enforcing sunshine laws, such as attorneys general. Several respondents noted the importance of having a person in place in the attorney general's

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<sup>257</sup> “The tension between an individual's right to privacy and the public's right to obtain government-held information represents a conflict between competing but vital democratic values,” Halstuk & Chamberlin, *supra* note 66 at 583.

<sup>258</sup> Cross, *supra* note 1 at 4.

office who has experience in open government matters and who can respond to requests from the public to look into disputes. At the more formal level, jurisdictions can offer independent oversight of sunshine law disputes and advice to both citizens and government through any number of methods. In particular, respondents seemed to favor the ombuds model in place in jurisdictions such as Iowa, Arizona, Virginia and now Tennessee. As Dalglish noted, “In states that have ombudsmen, things move in general faster and more efficiently. Those states are providing valuable services to their citizens, and appreciate those and encourage people to use them. Those particular states are a little ahead of the game.”<sup>259</sup> However, Dalglish said she is pessimistic about the ombuds office that may be on the horizon in the federal FOIA system.

“I mean, the federal government has a million times more information,” Dalglish said. “To expect one person in one little office in the Archives to do what those ombudsmen do in the states with the amount of money they’re throwing around, I quite honestly don’t see how it’s going to work.”

Further research into the effectiveness of ombuds programs and other alternative dispute resolution systems in place to manage disputes arising under sunshine laws could help to develop ways to improve this conflict. However, transformation of the conflict would likely require much more than better systems design, beginning with an emphasis on the people who engage in disputes over access. By focusing on the role that high-level government officials can have in creating a culture of openness, Gleason suggested one path that could be fruitful in this area. Further, showing government employees and

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<sup>259</sup> This was not a consensus opinion among interviewees. Anfinson raised doubts about the effectiveness of ombuds offices, suggesting that such a process would be “too time consuming and cumbersome” in Minnesota, where he favored the advisory opinion process in place there now.

agencies that openness has value to them could help persuade them to buy into programs that are supposed to ensure government transparency.

“To me, the government operates so much more efficiently the more we know,” Gleason said. “The accountability that open government provides makes things run better. Instead of ways to keep information hidden from the public, we should be asking, ‘What are the things we can do to ensure that people get access more efficiently?’”

## CHAPTER 4: CASE STUDY – IOWA

Case studies were proposed to examine how systems were designed and implemented and how those systems manage conflict to examine the third research question in this study:

### **RQ3: How do existing freedom of information dispute systems manage conflict?**

The results of Chapters 2 and 3 indicated that ombuds programs have emerged in several jurisdictions to handle disputes about public access, including the recent creation of the Office of Open Records Counsel in Tennessee and the passage of a law that would create an ombuds office to manage disputes arising under the federal Freedom of Information Act. Because further in-depth examination of these kinds of offices would help to provide more understanding about how they operate and how best to establish and run ombuds offices in this context, three jurisdictions were selected that follow this model: Iowa, Virginia and Arizona.

The ombuds concept dates at least to the early 19th century, when Sweden created its first national ombudsman.<sup>260</sup> The Swedish word “ombudsman” means “agent” or “representative,” though what has emerged as the “classical ombudsman” concept in the United States is an independent government official who can investigate and make recommendations concerning government conduct.<sup>261</sup>

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<sup>260</sup> Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government – An Emerging Trend?*, 22 Admin. & Regulatory Law News 6 (1997).

<sup>261</sup> See Howard Gadlin, *Ombudsman: What's in a Name?*, 16 Negot. J. 37, 38 (2000); Dean M. Gottehrer & Michael Hostina, “Essential Characteristics of a Classical Ombudsman,” United States Ombudsman Association (1998), [www.usombudsman.org/documents/PDF/References/Essential.PDF](http://www.usombudsman.org/documents/PDF/References/Essential.PDF); “Standards for the Establishment and Operation of Ombuds Offices,” American Bar Association (2004), [meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf](http://meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf).

Though ombuds programs began to emerge in the United States in the 1960s,<sup>262</sup> they have been subject to little empirical study. Gadlin has noted that “the ombudsman role is arguably the least well understood part” of the alternative dispute resolution movement.<sup>263</sup> Ombuds programs of several different types have developed, both within government and in the private sector. A primary distinction has been drawn between a “classical ombudsman” and an “organizational ombudsman.” The classical ombudsman is a created by legislation and serves as an independent agent in government to review government action, while an organizational ombudsman have similar responsibilities but in the setting of an organization such as a university or a corporation.<sup>264</sup> Additionally, “quasi ombudsman” programs have also developed, such “executive ombudsman” offices that are housed in a government’s executive branch; “advocate ombudsman” offices that primarily represent citizens; and “ADR mediator” ombuds programs that typically work within organizations and corporations.<sup>265</sup>

The “classical ombudsman” concept, which has been adopted by the United States Ombudsman Association as the standard for government ombuds programs,<sup>266</sup> includes four essential characteristics:<sup>267</sup>

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<sup>262</sup> A report by the Ombudsman Committee of the American Bar Association’s Section of Administrative Law & Practice attributed the emergence of ombuds programs in the United States to the growth of administrative agencies as a result of the “post-World War II development of the welfare state,” which led to a “bureaucracy so great that the legal status of the individual needs extra protection.” American Bar Association Section of Administrative Law & Practice Ombudsman Committee, Appendix A (1998), [www.abanet.org/adminlaw/ombuds/appenda.html](http://www.abanet.org/adminlaw/ombuds/appenda.html). Gadlin said the development in the 1960s came in response to “social turmoil” and a “demand for mechanisms by which people could address maladministration by government, educational, and corporate bureaucracies.” Gadlin, *supra* note 261 at 37-38.

<sup>263</sup> Gadlin, *supra* note 261 at 37.

<sup>264</sup> *Id.* at 38-39.

<sup>265</sup> Larry B. Hill, *The Ombudsman Revisited: Thirty Years of Hawaiian Experience*, 62 Public Administration Rev. 24, 36-38 (2002). See also American Bar Association, “Standards for the Establishment and Operation of Ombuds Offices,” 1 (2004).

<sup>266</sup> United States Ombudsman Association, “Governmental Ombudsman Standards,” 1 (2003), [www.usombudsman.org/documents/PDF/References/USOA\\_STANDARDS.pdf](http://www.usombudsman.org/documents/PDF/References/USOA_STANDARDS.pdf).

1. Independence: the office “in structure, function and appearance, should be free from outside control or influence;”
2. Impartiality: the office should review complaints “in an objective and fair manner, free from bias, and treat all persons without favor or prejudice;”
3. Confidentiality: the office should have discretion to “keep confidential or release any information related to a complaint or investigation” as a way to encourage complainants to come forward and speak openly; and
4. A credible review process: the office should perform its duties “in a manner that engenders respect and confidence” so that its work will “have value and...be accepted by all parties to a complaint.”<sup>268</sup>

The American Bar Association’s model standards for ombuds offices embrace these concepts as well.<sup>269</sup>

Further, ombuds programs typically have no formal enforcement authority, instead relying on voluntary compliance with recommendations to be effective. As Gadlin put it, “(r)eason and persuasion are as much tools of the classical ombudsman as are criticism and embarrassment.”<sup>270</sup> However, a lack of enforcement authority does not mean that ombuds are without power. Gadlin notes that the power “to investigate and to render judgments of right and wrong provides enormous leverage,” even when the ombuds is making informal inquiries and investigations.<sup>271</sup> Further, by highlighting bad behavior and refusals to comply with recommendations, ombuds programs can draw the

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<sup>267</sup> These four characteristics are identical to the four developed by Gottehrer & Hostina, *supra* note 261.

<sup>268</sup> United States Ombudsman Association, *supra* note 266 at 1-2.

<sup>269</sup> American Bar Association, *supra* note 262 at 2.

<sup>270</sup> Gadlin, *supra* note 261 at 42.

<sup>271</sup> *Id.*



attention of enforcement authorities, which can bring sanctions from those with enforcement power.<sup>272</sup>

Case studies of three jurisdictions with public access ombuds programs – Iowa, Virginia, and Arizona – were conducted to explore RQ3. Though at least three other ombuds programs exist, they are less ideal for this research. Alaska’s ombuds has general powers that are not public-access specific.<sup>273</sup> Washington’s ombuds program is not authorized by statute and is operated in the attorney general’s office, placing it outside the “classic ombuds” model.<sup>274</sup> And Tennessee’s Office of Open Records Counsel was formally created in 2008, making it so new as to be difficult to study with an appropriate amount of depth.<sup>275</sup>

The case studies used in-depth interviews as a primary method of information gathering. The interviews were supplemented with government documents, legal research and news articles to examine (1) the historical context of the state’s open government laws and its approach to resolving disputes, (2) the design and creation of the ombuds office, (3) the implementation and early years of the office and issues that have arisen in establishing the office, and (4) issues that have arisen regarding the office’s conflict management.

For each state, at least seven sources were interviewed, with interviews typically taking between 30 minutes and one hour. A minimum of five hours of interviewing was conducted in each jurisdiction. In some instances, multiple telephone interviews of

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<sup>272</sup> Mary P. Rowe, *The Ombudsman’s Role in a Dispute Resolution System*, 7 *Negot. J.* 353, 357-358 (1991).

<sup>273</sup> See Alaska Stat. § 24.55.010 et seq.

<sup>274</sup> Washington’s ombuds was created by the attorney general in 2005, [www.atg.wa.gov/OpenGovernment/Ombudsman.aspx#OG1](http://www.atg.wa.gov/OpenGovernment/Ombudsman.aspx#OG1).

<sup>275</sup> Tennessee formally created the Office of Open Records Counsel in 2008. Tenn. Code Ann. § 8-4-601.

sources were conducted, while in some cases, follow-up questions were answered via e-mail.<sup>276</sup> The primary ombuds officer in charge of open government issues was interviewed in each jurisdiction, as were sources representing news media and government groups to get an understanding of how users of the office evaluate its strengths and weaknesses. The source interviews provide a level of depth that would be unattainable from reliance on legal research or government documents only, allowing commentary and examples to aid understanding of how these offices have had an impact on dispute resolution and conflict management involving open government issues.

**a. Historical Background – Iowa’s Freedom of Information Laws**

Iowa passed its open government laws in 1967, requiring that government records and meetings be accessible to the public.<sup>277</sup> The legislature’s stated intent of the open meetings portion of the law is “to assure...that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people.”<sup>278</sup>

The Iowa public records law responded to the limitations of access by the common law in the state to provide a broader definition of “public records”<sup>279</sup> in the interest of promoting government transparency. Today, the public records law requires that “(e)very person shall have the right to examine and copy a public record.”<sup>280</sup> The open meetings law demands that notice be given to the public of government meetings

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<sup>276</sup> Unless otherwise noted, direct quotes and paraphrases of quotes attributed to the sources are from these interviews.

<sup>277</sup> See Douglas L. Phillips, “Open Government Guide: Iowa, Reporters Committee for Freedom of the Press (2006), [www.rcfp.org/ogg/item.php?t=short&state=IA&level=F1](http://www.rcfp.org/ogg/item.php?t=short&state=IA&level=F1); Note, *Iowa’s Freedom of Information Act: Everything You’ve Always Wanted to Know About Public Records But Were Afraid to Ask*, 57 Iowa L. Rev. 1163 (1972)

<sup>278</sup> Iowa Code § 21.1

<sup>279</sup> See *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493, 501 (Iowa 1976).

<sup>280</sup> Iowa Code § 22.2(1)

and that “all actions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session” unless the law otherwise allows for closure.<sup>281</sup>

For more than 30 years, the only formal mechanism available to people who believed they had been wrongfully denied access to meetings or records under the laws was judicial enforcement. For meetings violations, any aggrieved party, including taxpayers, citizens, the attorney general and county attorneys,<sup>282</sup> can seek damages of not less than \$100 or more than \$500,<sup>283</sup> and “all costs and reasonable attorneys fees” incurred in enforcing the violation in court.<sup>284</sup> For records violations, parties could seek enforcement through injunction or a writ of mandamus,<sup>285</sup> and a knowing violation of the act could be prosecuted as a “simple misdemeanor.”<sup>286</sup> A complainant who successfully proved that a record custodian violated the provisions of the public records law is entitled the same amount of damages and reimbursement for costs and attorney fees as provided in the open meetings law.<sup>287</sup>

While judicial enforcement was (and still is) available as a remedy, it has not been a viable way to consistently handle disputes arising over access to public records and meetings. Kathleen Richardson, who worked in the newsroom at the *Des Moines Register* for 20 years before becoming the executive secretary of the Iowa Freedom of Information Council in 2001, outlined what options were available to people who believed they were improperly denied access to a record or meeting.

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<sup>281</sup> Iowa Code § 21.3

<sup>282</sup> Iowa Code § 21.6(1)

<sup>283</sup> Iowa Code § 21.6(3)(a)

<sup>284</sup> Iowa Code § 21.6(3)(b)

<sup>285</sup> Iowa Code § 22.5

<sup>286</sup> Iowa Code § 22.6

<sup>287</sup> Iowa Code § 22.10(3)

“Essentially, you call the Attorney General’s office, and the Attorney General’s office says that they don’t have time to do anything. They basically ignore you,” Richardson said. “And you might call my predecessor Herb Strentz, the executive director of the Iowa Freedom of Information Council, and he might give you advice about what the law says and how to approach the problem. But there really isn’t any other formal mechanism other than trying to get your newspaper to get an attorney to sue and enforce the law.”

Iowa’s Office of Citizens’ Aide/Ombudsman, which was created by the legislature in 1972,<sup>288</sup> has always had jurisdiction to investigate citizen complaints about access to public records and meetings, said Bill Angrick, who has served as Iowa’s ombudsman since 1980.

“We’re charged with investigating unfair and unreasonable practices, and we have looked at open records and open meetings issues for most of the time the office has been in existence,” Angrick said. While there weren’t a great many cases before 2001, Angrick recalled that they would pop up on occasion, and he specifically recalled a time that he issued a report about a county assessor who failed to make property record cards available in the early 1980s. “There were other cases like that going back to that period of time.”

Writing in 1999, Richardson said that the Citizens’ Aide /Ombudsman office’s “(h)andling of access issues is currently a scatter-shot approach,” with a process that “can

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<sup>288</sup> The Ombudsman Act was passed by the Iowa legislature in 1972, but the role of ombudsman was first created in 1970 in the governor’s office. Iowa Citizens’ Aide/Ombudsman, Ombudsman’s Report 2003, 4 (2004).

take several months” when it chooses to investigate.<sup>289</sup> Until the office added a position to focus on public records and open meetings issues, getting assistance from the ombudsman office in these sorts of cases was problematic, particularly for citizens, she said.

“I would get people who would call over to us, and you kind of have to differentiate between average citizens and journalists, because a citizen has less power, has no relationship with a records custodian, and doesn’t have the resources of a journalism organization for suing,” Richardson said. “Somebody would call me and say, ‘I’m having trouble in my community, the city council is violating the law by holding closed meetings,’ or ‘I’m trying to get a record and the city clerk won’t give it to me.’ I’d ask, ‘Have you called the Attorney General’s office?’ They’d say, ‘I have, and they said to call you (at the Iowa Freedom of Information Council).’ So I’d ask, ‘Have you called the ombudsman?’ And they’d say, ‘I have, and they said to call you.’”

“I’m certainly not a government official. I have no way to help people obtain their legal rights, and to citizens it was very frustrating for years. Even before I came on board here, that was a longstanding problem in Iowa. There was nobody for the average citizen to go to to help enforce the law.”

Such concerns about enforcement were coupled with concerns about compliance, and these began to receive more public attention at the turn of the century. In the spring of 2000, a dozen newspapers across the state conducted an audit, sending reporters to each of Iowa’s 99 counties. Journalists requested public documents such as police incident reports, sheriffs’ lists of persons with permits to carry concealed weapons,

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<sup>289</sup> Kathleen Richardson, “State Access Counselors: In search of responsive government,” 21, presented at the annual meeting of the Iowa Freedom of Information Council on Oct. 2, 1999.

expense reports by city managers, personal property tax bills, and building permits.<sup>290</sup>

Compliance was spotty at best, particularly in the area of law enforcement records; 58 percent of sheriff's departments denied requests about the concealed-carry permits, and 42 percent of police departments denied access to incident reports.<sup>291</sup>

Numerous sources cited this audit as the force that spurred the Iowa legislature to authorize the creation of a new position in the Office of Citizens' Aide/Ombudsman to handle public records and open meetings issues. Angrick noted that the audit came out toward the end of the legislative session, and it drew the attention of the Iowa General Assembly's legislative council, which appoints the ombudsman and approves hires and budgets for the office.

"That particular year, after that sunshine study was published in papers and on television in Iowa, I was appearing before the legislative council, and I got asked, 'What are you doing in this area?'" Angrick said. "I said, 'We are doing some things, but we could be doing more, especially if I had a staff assistant to focus on this, to do outreach and education and those kinds of things.' They asked how much would it cost, and I said it would be for an entry-level person. So they approved it, and I advertised, and later that year I hired Robert Anderson who was working at the University of Missouri Freedom of Information Center at the time."

The news media viewed the creation of the new position as a victory.

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<sup>290</sup> Associated Press, "Survey: Iowa residents often denied access to public records," Sept. 25, 2000, [www.freedomforum.org/templates/document.asp?documentID=3631](http://www.freedomforum.org/templates/document.asp?documentID=3631)

<sup>291</sup> *Id.*

“I think they were all really excited and happy,” Richardson said. “We had done some lobbying editorially to promote the whole idea of an access counselor,<sup>292</sup> and then the public records audit came out and this position was added to the Ombudsman’s office. We thought it was a triumph. For the first time in years, freedom of information advocates got something. It kind of showed the power of the press, binding together doing these audits and seeing something happen. We were all very optimistic.”

But, Richardson noted, it “didn’t turn out to be panacea we all thought.”

#### **b. Design and Formal Structure**

The legislative council approved the hiring of one additional full-time employee in the ombudsman’s office to be paid about \$36,500 per year, specifying that “the additional position would be assigned the special responsibilities of public records and open meetings issues in addition to regular casework.”<sup>293</sup> Anderson was appointed to this position in 2001, and the position became known as PROMP, an acronym for Public Records Open Meetings and Privacy.<sup>294</sup> Angrick said he saw the position as a way for the legislature to respond to the records audit in a way that would “put the issue behind them, and to see what would happen.”

Though the position was created specifically to handle open government matters, no legislation was amended to reflect this. Instead, the new assistant ombudsman

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<sup>292</sup> Richardson specifically mentioned that she and others were seeking a Public Access Counselor’s office, similar to the one in Indiana. *See* Burns Ind. Code Ann. § 5-14-4.

<sup>293</sup> *See* Minutes from Legislative Services Committee (Dec. 12, 2000), as cited by Angela Dalton via e-mail on Feb. 11, 2009.

<sup>294</sup> Robert Anderson, “Message from Iowa’s first public records ombudsman,” Ombudsman’s Report 2001, 2 (2002).

position would be subject to the same duties as established by the Iowa Citizens' Aide Act.<sup>295</sup>

The act creates the position of Citizens' Aide, a person to be appointed by the legislative council and confirmed by the house and senate by majority vote.<sup>296</sup> The Citizens' Aide, commonly referred to as the "Ombudsman" or the "Citizens' Aide/Ombudsman," serves four-year terms.<sup>297</sup> Under the act, the ombudsman is given the power to investigate "any administrative action of any agency" upon the complaint of a citizen or upon his or her own motion.<sup>298</sup> Appropriate subjects for investigation include actions "contrary to law or regulation"<sup>299</sup> or acts that are "unreasonable, unfair, oppressive or inconsistent with the general course of an agency's functioning, even though in accordance with law."<sup>300</sup> The goal of the office is to act in "the interests of resolving complaints and improving administrative processes and procedures."<sup>301</sup>

The law requires that the Citizens' Aide "shall conduct a suitable investigation" into actions complained about by citizens, though there are some exceptions.<sup>302</sup> For example, if complainants have "available another remedy or channel of which the complainant could reasonably be expected to use," the ombudsman could decline to investigate.<sup>303</sup> Additionally, if the ombudsman determines that "other complaints are worthy of attention," some requests for assistance may be denied.<sup>304</sup> When budget cuts

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<sup>295</sup> Iowa Code § 2c.23

<sup>296</sup> Iowa Code § 2c.3

<sup>297</sup> Iowa Code § 2c.5

<sup>298</sup> Iowa Code § 2c.9(1)

<sup>299</sup> Iowa Code § 2c.11(1)(a)

<sup>300</sup> Iowa Code § 2c.11(1)(b)

<sup>301</sup> Iowa Administrative Code 141-1.1(2c)

<sup>302</sup> Iowa Code § 2c.12(1)

<sup>303</sup> Iowa Code § 2c.12(1)(a)

<sup>304</sup> Iowa Code § 2c.11(1)(e)



affected state offices in 2002 and 2003, Angrick referenced these provisions in explaining how the office was trying to manage its caseload.

“The proper role for the ombudsman, especially in times of limited resources, is to inquire whether established processes and procedures do not work, when unreasonable, inconsistent or unfair patterns appear, or when immediate risks exist for safety, health, or basic human rights violation government action or inaction,” Angrick wrote, specifically noting a decline in handling complaints related to correctional institutions and an increased emphasis on public records, open meetings and privacy matters. “These are the kinds of complaints we are continuing to prioritize.”<sup>305</sup>

The office was created to be a resource for citizens, and Angrick believes that part of this involves helping to train citizens to engage in self-help in many of their complaints about government.

“When citizens come to rely upon others to do what they can reasonably be expected to do themselves, they may become dependent and individually ineffective,” Angrick said. “Additionally, they do not develop or hone their ability to articulate issues, persuade others, and achieve results. A citizenry with those skills is, in my opinion, an important ingredient of the civic culture of democracy.”<sup>306</sup>

In furtherance of this policy, the Office of Citizens’ Aide/Ombudsman has created guidelines entitled “What to do before calling the Ombudsman.” These guidelines have appeared in the office’s annual reports nearly every year since 1998, and they are listed on the office’s Web site.<sup>307</sup> These guidelines advise people to “simply take the time to

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<sup>305</sup> Bill Angrick, “A checklist for good government,” Ombudsman’s Report 2003, 1, 5 (2004).

<sup>306</sup> *Id.* at 1.

<sup>307</sup> See “What to do before calling the Ombudsman,” Ombudsman’s Report 1998, 4 (1999); [www.legis.state.ia.us/Ombudsman/complaints](http://www.legis.state.ia.us/Ombudsman/complaints)

talk and listen” if they have problems with state or local government agencies and to follow “some good common sense steps” when trying to resolve these issues. Six points are identified in these guidelines:

1. “Be prepared,” with questions ready and necessary information at hand before contacting the agency;
2. “Be pleasant” by “treating public employees as you like to be treated;”
3. “Keep records” including notes on the names of people contacted and any correspondence;
4. “Ask questions” about why the agency responded as it did;
5. “Talk to the right people,” such as a supervisor who has the power to handle complaints or policy matters; and
6. “Read what is sent to you (*including the fine print!*)” to be aware of deadlines for appeals and other procedural rules.<sup>308</sup>

Citizens are then advised to call the Ombudsman’s office a call if they “still cannot resolve the problem” after taking these steps.<sup>309</sup>

The Office of Citizens’ Aide/Ombudsman operates free of charge to citizens.<sup>310</sup>

The office had a budget of about \$1 million in Fiscal Year 2002, when the office had a staff including Angrick, Senior Deputy Ombudsman Ruth Cooperrider, and nine assistant ombudsmen.<sup>311</sup> By Fiscal Year 2008, the budget had grown to about an expected \$1.5

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Iowa Code § 2c.10

<sup>311</sup> Iowa Citizens’ Aide/Ombudsman, “Office of Citizens’ Aide/Ombudsman FY02 & FY03 Financial Information,” Ombudsman’s Report 2002, 2-3 (2003).

million; the staff had added a full-time legal counsel and two additional assistant ombudsmen by this time.<sup>312</sup>

The office has the power to “maintain secrecy” in all matters before it, and it may conduct private hearings as well.<sup>313</sup> Among its many investigative powers, the ombudsman has the power to subpoena witnesses.<sup>314</sup> The office is supposed to make recommendations to an agency if any action is needed based on its investigations,<sup>315</sup> and if disciplinary action is warranted, the ombudsman is required to “refer the matter to the appropriate authorities.”<sup>316</sup> However, as every source noted, this leaves the ombudsman without any formal enforcement powers. Some saw this as a significant drawback for the office. Within the Office of Citizens’ Aide/Ombudsman, however, the lack of enforcement power is seen as part of the proper role of an ombudsman.

“My model is a softer model,” Angrick said. “I’d rather prevent the problem than enforce it, because prosecuting cases is costly and doesn’t always work. My particular strategy is to build up a lot on the front end, meet with city clerks, county officials, state officials, and to get people thinking that this is not only the law but the right thing to do.”

Angrick said this “softer” approach allows the office to handle more cases and to resolve them in a timelier manner than adjudicative or other administrative enforcement.

“You wear your seat belt because you know it’s safer, but you also wear your seat belt because you don’t want to be fined,” Angrick said. “I want people out there to have good agendas and responding to records requests because that’s what they should be

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<sup>312</sup> Iowa Citizens’ Aide/Ombudsman, “Office of Citizens’ Aide/Ombudsman FY07 & FY08 Financial Information,” Ombudsman’s Report 2007, 18, 20 (2008).

<sup>313</sup> Iowa Code § 2c.8

<sup>314</sup> Iowa Code § 2c.9(4) and § 2c.9(5)

<sup>315</sup> Iowa Code § 2c.16

<sup>316</sup> Iowa Code § 2c.19

doing in a democracy. That's the bully pulpit, and I'm not sure enforcement has the same bully pulpit."

Additionally, Angrick does not believe that the ombudsman's office has diverted many disputes from litigation, even if litigation appears to have lessened in recent years.

"I don't know if I can say we have avoided many lawsuits, but in this day and age, don't think media can do too many lawsuits," Angrick said, noting that his office handles about 250 to 300 inquiries each year. "Sometimes if you make a public statement, the bully pulpit approach, that can be more effective. The University of Iowa had a search for a president that went bad, they didn't make a hire, and they had a very secret process. When they opened it up again, I wrote a letter to them and to the attorney general, saying, I think you should do everything you can to maximize this to make it open so that the public knows who they are earlier in the process. They had a much more open process second time around. I'm not sure prosecution or mediation would do that."

The Office of Citizens' Aide/Ombudsman is a nonpartisan legislative agency. Although it is part of the legislative branch and is directed by the Legislative Council, the office is able to maintain its independence to investigate any matter, according to several sources.

"It's exceedingly important to have independence in an ombudsman," Angrick said. "You need to have an independent ombudsman. It's one of the significant ingredients in building that office. You don't want to have an in-house ombudsman within the mayor's office because when the mayor doesn't want to be public, you're toothless."

### **c. Implementation and Developments**

When Anderson was hired in 2001, Angrick directed him to begin outreach efforts through training and education of government employees throughout the state. Anderson noted that he reached out to officials in law enforcement and local government to help them understand “that allowing access to public records is an important part of their public trust.”<sup>317</sup> After his first year on the job, Anderson noted that it was “difficult to say” whether the situation had improved in his first year on the job, noting the poor compliance rates in the audits conducted by newspapers the previous year. He mentioned collaborating with the Attorney General’s office in giving presentations to educate officials about public records and open meetings matters.

“I believe this working partnership with the attorney general’s office in educating and publicity is the best way to improve compliance with the public records and open meetings laws,” Anderson wrote in his first annual report in 2001.

Angrick noted that Anderson also worked cooperatively with the Iowa Freedom of Information Council in addressing open government matters.

“Robert immediately undertook his responsibilities with vigor and creativity,” Angrick wrote in his annual report in 2003. “We approached the task as one through which education and training would be just as important as investigation and criticism.”<sup>318</sup>

As Anderson was doing this work, he was diagnosed with bone cancer. It turned out that he was terminally ill, and he resigned from the office in June 2002 when the cancer made it impossible for him to work. He died in November of that year.

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<sup>317</sup> Anderson, *supra* note 294 at 2.

<sup>318</sup> Bill Angrick, “Message from the Ombudsman,” Ombudsman’s Report 2002, 2 (2003).

The PROMP work was then divided among other ombudsman staff “as part of our shared and general responsibilities,” Angrick reported in 2002.<sup>319</sup> In February 2003, Angrick hired Angela Dalton as an assistant ombudsman to fill one of the vacancies on the staff. Angrick asked Dalton, who had a background in law enforcement but no particular history dealing with public records and open meetings issues beyond that, if she would be interested in taking over the Public Records, Open Meetings and Privacy duties.

“Bill asked if I would take that position,” Dalton said. “I hadn’t been hired yet, so of course my answer was yes. It wasn’t four or five months before he asked me if I’d like to fill this position. I’d already taken an interest to it, it seemed like a natural fit, and I’ve been here ever since.”

Dalton said her background in law enforcement – she was an officer with state police and capitol police and a trooper with the state patrol – has “absolutely” influenced her as an assistant ombudsman.

“Sometimes I’ll tell people up front, I was in law enforcement for a number of years, I know what’s available,” Dalton said. “Other times, I won’t even mention it. The majority of the training I’ve done in open records and open meetings has been for law enforcement. I’ll go out to a conference of people in internal affairs, and there, my law enforcement experience is instrumental. I’ll instruct them how to go about writing a response to this office (the ombudsman).

“Generally, you can use the language of the industry. You can get through some of the issues a lot faster. You have an understanding and a working knowledge of things, so you don’t have to start from ground zero.”

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<sup>319</sup> *Id.*

Sources mentioned Dalton's background, attitude and professionalism as keys to her performance in the PROMP role.

"I think she's been great," Richardson said. "I like Angie. I think she's smart and well-intentioned. I remember talking with her when she first got the job. She's certainly grown in the job and grown in her expertise. I can't remember having any disputes with her or her interpretation of the law or anything."

Outreach and training remain as essential duties for the PROMP position. Dalton said some of the training she does includes an hour-long law enforcement academy, with 30 to 40 people in each class, and jail school trainings, which involve discussions about public records and other jail issues.

"I would say it's anywhere from five to 10, possibly 15 times a year where I'm going out and training people," Dalton said.<sup>320</sup>

Dalton has come to speak at functions of the League of Cities, said Terry Timmins, the general counsel for the league. He added that both the League of Cities and the Iowa State Association of Counties offered training on public records and open meetings laws as well.

Besides training, Dalton also began engaging in outreach activities early, staffing the office's outreach booth at the Iowa State Fair in 2003 to talk to citizens about their rights under the public records and open meetings laws.<sup>321</sup>

Dalton has also followed the ombudsman's office policy of encouraging self-help for citizens before getting the ombudsman involved.

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<sup>320</sup> Sources representing government interests mentioned that they offered training and educational materials for members as well. Mary Gannon, counsel for the Iowa Association of School Boards, said she conducts "at least three trainings a year on open records or public meetings, and they're always packed."

<sup>321</sup> Government Oversight Committee, 2004 Interim Committee Briefing (July 21-22, 2004), [www.legis.state.ia.us/GA/80GA/Interim/2004/brf/ove.htm](http://www.legis.state.ia.us/GA/80GA/Interim/2004/brf/ove.htm).

“The first thing we ask (when a citizen calls) is, ‘What have you done to try to resolve this yourself?’ We try to get them through that process,” Dalton said. “For instance, if it’s a law enforcement complaint, have you filed a request through internal affairs? If it’s a letter to the city council or mayor, we ask complainants generally to put things in writing. By law, they’re not required to put it in writing, but practically, it helps citizens resolve complaints on their own. When the government puts it in writing, their response has more thought, and oftentimes the right response comes back...If they’ve put it in writing and gotten a response from the agency and they’re still dissatisfied, or maybe there’s no response, then we make determination if we want to get involved at that point.”

Handling calls makes up a great portion of Dalton’s duties. One of the 11 assistant ombudsmen handles general intake each day, including Dalton. She said most complaints come in via telephone, though the office occasionally receives a question or complaint by e-mail or by a person stopping by the office in person. In recent years, the office has handled about 100 informal inquiries of this kind annually on public records and open meetings matters (see Table 1, *infra*).

She said that when she receives calls on public records or open meetings issues, these calls often involve “quite a bit of education” about the law. For example, she said she recently handled a call from a city council member who was having trouble getting records from the city’s clerk.

“(I)t seemed obvious that the clerk didn’t know about the law or felt like she was defending city property in some way,” Dalton said. “So I made a call to the clerk, and we had multiple discussions over the phone. She’d say, ‘Angie, does this make sense?’ So I



spent time over the phone talking to her about public records law. The clerk hadn't had any formal training, and the city didn't want to spend money to sending her to training. She would tell people, 'You don't get this stuff, it's confidential,' but without any basis for that."

Dalton said that in this instance, she was able to build a relationship with the clerk and identify other issues – particularly the difficult relationship between the clerk and the council member who made the initial call – that were getting in the way of the clerk's duties regarding records access.

"In that relationship, me and the complainant had many conversations, about what are they required to provide her and what she has to do," Dalton said. "Ultimately, she responded, 'I don't have much of a choice, do I?' I said, 'No, you have to get along with this person.'"

One of the major challenges the Office of Citizens' Aide/Ombudsman has faced since creation of the PROMP position is managing a growing caseload. Angrick noted that while Dalton performs the public records, open meetings and privacy role, she also has other responsibilities in the office.

"Right now, my office handles about 4,500 cases a year," Angrick said. "With 11 investigators, we don't have time for just one person to handle open records and open meetings. Everybody does some of them, and Angie does the most. For PROMP issues, I estimate we'll have 275 this year, which is fair but still a small percentage of what we get each year."

Dalton emphasized the importance of having all of the assistant ombudsman ready to handle open government matters, saying that cases that needed expedited

handling could be prioritized and given to somebody else. She also suggested that having a diverse caseload that went beyond PROMP matters was beneficial to her by allowing her to avoid burnout and to bring in a variety of experiences from other cases.

“If it were one person, they may be able to do just 300 complaints plus all of the (training out outreach) work,” Dalton said. “That may allow for quicker turnover on cases than they are currently. But usually, people are putting these on priority...I just don’t know if that outweighs benefits of having diverse caseload.”

In 2003, the electronic case management system at the office was updated to allow entry of contacts involving public records, open meetings and privacy issues.<sup>322</sup> These contacts, which involve both complaints about government action or inaction and requests for information about open government issues, have grown steadily since they were first recorded (see Table 1).

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**Table 1: Annual contacts at the Iowa Office of Citizens’ Aide/Ombudsman for Public Records, Open Meetings and Privacy matters.**

Year	Total Contacts	Complaints	Information Requests
2003	163	118	45
2004	179	111	68
2005	247	141	106
2006	266	167	99
2007	295	197	98
2008	289	181	108

Source: Iowa Office of Citizens’ Aide/Ombudsman<sup>323</sup>

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<sup>322</sup> Angrick, *supra* note 305 at 5.

<sup>323</sup> Iowa Citizens’ Aide/Ombudsman, “Public Records, Open Meetings, and Privacy Jurisdictional Complaints and Information Requests Received by the Ombudsman,” Ombudsman’s Report 2007, 2 (2008); 2008 numbers confirmed by Angela Dalton via e-mail on Feb. 11, 2009.

Keeping up with this growing number of cases may be slowing down the efforts of the ombudsman's office to handle public records and open meetings issues in a timely manner.

"I think citizens were frustrated with the speed, especially in the early years," Richardson said. "It was a resource issue as well. A citizen might be told, 'I already have three dozen cases on my desk, so it might be awhile before I can get you in.' It wasn't a quick turnaround."<sup>324</sup>

Dalton aims to resolve citizen complaints informally by a phone call or two, usually focusing on talking to an attorney who deals with the government agency in question. When she is able to do this, she said, "we're pretty effective at getting cases resolved relatively quickly." Sometimes, she said, she will conduct a preliminary review by examining relevant documents in the agency's possession to see if that will aid in resolving the dispute.

However, when the informal approach fails to resolve the dispute, cases can begin to take longer.

"If it rises to a different level, we generally put a notice in writing to the agency. We inform them that we're opening an investigation pursuant to the section that governs us, and that puts them on notice," Dalton said. "An investigation usually ends up taking more time."

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<sup>324</sup> Richardson, who has examined dispute resolution systems in other jurisdictions, specifically contrasted her experience in Iowa with the Indiana Public Access Counselor. "Legally, when somebody calls and registers a complaint, they have to do a written opinion like two or three weeks. It's a very quick turnaround. It's tough, but they manage to do it," she said.

She said formal investigations “can last a month, three months, sometimes they’ll last a year. Sometimes, if it’s a contentious issue, it can last more than a year if the agency is not as cooperative, chipping away at every single piece of it.”

Richardson said these kinds of delays are particularly challenging for journalists who hope that the ombudsman’s office can help them gain access to information.

“Over the years, I’ve been aware of relatively few cases where journalists went through the ombudsman’s office,” Richardson said. “They need information, they’re on deadline, they don’t have three to six months to get a piece of paper.”

Perception on use of the office by journalists is different within the office itself. Angrick told the Iowa General Assembly that “complaints are more frequently generated by the media than private citizens” in 2004,<sup>325</sup> and Dalton remembers several specific instances of dealing with journalists over the years, though these are typically more informational requests than complaints.<sup>326</sup>

“Oftentimes reporters don’t feel they can file a complaint or be a complainant without their boss or their editors telling them they can file a complaint,” Dalton said, describing that journalists sometimes expressed concerns that they had to be careful how they handled relationships with their sources. “An editor or supervisor will write a letter or file a formal complaint.”

When a journalist contacts her, Dalton said, sometimes what the office is best equipped to do is to help the journalist narrow requests to a manageable amount or to negotiate fees for copying.

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<sup>325</sup> Government Oversight Committee, *supra* note 309.

<sup>326</sup> However, Dalton noted that by 2007, “Most of our cases stemmed from citizen complaints. A few complaints came from journalists.” Angela Dalton, “What’s Happening on Public Records, Open Meetings, and Privacy,” Ombudsman’s Report 2007, 3 (2008).

“We brainstorm to figure out how to get what they’re really looking for,” Dalton said, giving the example of broad requests for e-mail messages of government officials. “For e-mails, you can do keyword searches. Look for anything to or from the mayor with these four terms. That definitely narrows down the search. It’s obvious at that point what’s being asked for. You get an IT worker doing the search, then they have it reviewed for confidentiality, and they’re reducing the cost.”

Dalton said she understands that not everybody will be satisfied with the approach the ombudsman’s office takes to handling requests for help with a public records or open meetings dispute. However, she sees the office as serving an important role in maintaining transparent governance.

“We’re not filing lawsuits, but we’re holding people accountable, just in a softer way than a lawsuit,” Dalton said. “We have over 5,000 cases a year as an agency, so if we can resolve them informally, we do. We can look at documents, go back to case files, and determine how we did things so we can be consistent, so we can help people.”

Angrick said that since the implementation of the Public Records, Open Meetings and Privacy position in 2001, the office has done a good job of managing the many complaints and informational requests that have come before it, particularly considering the scope and the powers of the office.

“Since then, a few poster child cases have developed, where groups of citizens have gone to court, but those are issues that my agency isn’t going to be able to deal with,” Angrick said. “They’ve drawn the line and they say, ‘We don’t like each other and want to deal with this legally.’”

Compliance with the open government laws also remains problematic. An open government audit conducted in 2005 by 15 Iowa newspapers found improvements in compliance by most agencies but also reported continued issues with groups such as school superintendents and sheriff's departments;<sup>327</sup> of the 99 counties in Iowa, 29 sheriff's departments did not comply with a request for a list of concealed-weapons permit holders. Several of these were "repeat offenders" who also didn't comply in the 2000 audit.<sup>328</sup>

Angrick noted similar compliance issues before a legislative study committee on freedom of information issues in 2007, in which he "stated that reports of noncompliance with both public records and open meetings laws have increased with 'frequency and audacity' despite increased training efforts" by both local government groups and the ombudsman's office.<sup>329</sup>

These issues underscore a recent development in legislation about public records and open meetings in Iowa: the possibility of creating an independent enforcement agency to handle these kinds of disputes.

#### **d. Issues**

Sources touched on several themes when considering some of the strengths and weaknesses of the Office of Citizens' Aide/Ombudsman in handling public records and open meetings cases. These include how the ombudsman's office affects legislation

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<sup>327</sup> Associated Press, "Open records check by Iowa newspapers finds some improvement, some backsliding," March 19, 2005.

<sup>328</sup> Janet Rorholm & Colleen Krantz, "Requests to police met with resistance," *Des Moines Register*, March 21, 2005, [www.nfoic.org/uploads/foi\\_audits/iowa-audit-march-2005.html](http://www.nfoic.org/uploads/foi_audits/iowa-audit-march-2005.html)

<sup>329</sup> Legislative Services Agency – Legal Services Division, "Freedom of Information, Open Meetings, and Public Records Study Committee," 4 (2007), [www.legis.state.ia.us/lsadocs/BriefOnMeetings/2008/BMRBH000.PDF](http://www.legis.state.ia.us/lsadocs/BriefOnMeetings/2008/BMRBH000.PDF).

concerning open government; perceptions of the office's partiality; how the office impacts the tone of conflict over access to government, particularly when it involves journalists; the role of the attorney general in addressing these kinds of disputes; and the issue of enforcement.

### **Legislative Duties**

Every source mentioned the role of the ombudsman's office in influencing legislation about public records, open meetings and privacy laws. Angrick noted that "proposing legislative change" is one of the major ways that the ombudsman can respond to "patterns of complaints or systemic causes of problems."<sup>330</sup>

One source who was generally critical of the ombudsman's office performance regarding public records and open meetings praised the office's efforts in affecting legislation.

"The one area where they have had some impact is in getting the law changed," said the source, an attorney dealing with local government matters.<sup>331</sup> "Regarding some issues such as how records request can be made, and what local governments can charge for records, they have been effective."

Dalton said that part of her daily responsibilities while the legislature is in session is to review the new daily bills to see if there are any that implicate open government or privacy matters.

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<sup>330</sup> Bill Angrick, "Anatomy of a Number," Ombudsman's Report 2004, 5 (2005).

<sup>331</sup> The source, who deals with the ombudsman's office regularly, asked to remain confidential to preserve this ongoing relationship. The researcher granted this request to allow the source to speak candidly in addressing the performance of the office.

“We’re probably the most opinionated folks out there because we’re dealing with it day to day,” Dalton said. “The kind of complaints we’re seeing, if we can see a trend or a tendency for people using new loophole, we can put the word out, and we can suggest language to close the loophole if multiple agencies are doing it.”

For example, Angrick raised the issue of “walking quorums,” which involves government bodies rotating members in and out of a deliberation room to ensure that there is not a majority present at any one time.<sup>332</sup> Angrick saw this happening in the Polk County Board of Supervisors and said that this practice is not technically prohibited by the Open Meetings law, but it certainly violates the spirit of the law, so he pushed for legislation to clarify the law in 2008.

“They were looking at some sort of joint project but they didn’t want to be scrutinized about it, so they would meet in various groups of two by two,” Angrick said. “They did that for awhile in secret. People knew they were doing it and couldn’t do anything about it. They were doing it to avoid deliberations in public, and I commented on that as being inappropriate.”

In 2005, the office addressed the issue of whether someone seeking copies must be present in person to pick up copies of the documents after a citizen who lived in the western part of the state was told he would have to appear in person to pick up documents from a school district in central Iowa. Mary Gannon, counsel for the Iowa Association of School Boards, said she had proposed a bill that would require prepayment before copies were made as well after some of her constituents mentioned that unpaid bills were becoming a problem.

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<sup>332</sup> Iowa Citizens’ Aide/Ombudsman , “If it walks like a duck...” Ombudsman’s Report 2006, 3 (2007).



“They said, ‘We’re not going to send it to you.’ The law says he has to get records at the office of the custodian, so he has to drive there,” Angrick said. “Now, that follows the law, but it’s unreasonable. We engaged in a discussion with the school district. I’m allowed to formally recommend to the legislature changes in the law, so I recommended I think in 2006 for the first time changes in that very antiquated provision that required people to come to the office of the custodian. I think you should be able to make a request by telephone, e-mail, fax, any way. The legislature agreed and passed that legislation.”<sup>333</sup>

However, the most significant legislative project the ombudsman’s office has taken up was participating in a legislative study committee that was looking to make several changes in the state’s freedom of information laws. Each of the sources mentioned the role of the ombudsman in this legislation, which would have changed several provisions and, most importantly, would have created “an administrative enforcement agency with some ‘real teeth,’” according to Dalton, who actively participated in the group.<sup>334</sup>

Angrick said the bill reflected the tension between the “softer option” of an “ombudsman who can make recommendations and investigate” or with an enforcement agency besides what was already in place in the attorney general’s office.

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<sup>333</sup> See Iowa Code § 22.3(1), which now says “the custodian shall not require the physical presence of a person requesting or receiving a copy of a public record.” See also Iowa Citizens’ Aide/Ombudsman , “Count on officials to do ‘the right thing’...or require it?” Ombudsman’s Report 2005, 2 (2006).

<sup>334</sup> The bill, Senate File 2411, passed the Senate but did not get to a vote in the House. Dalton, *supra* note 50 at 3. This matter is discussed in more detail in the “enforcement” section, *infra*.

Toward the end of 2008, Angrick sought support for creation of a permanent legislative advisory committee on public records, open meetings and privacy matters.<sup>335</sup> This committee would include the ombudsman “or the Ombudsman’s designee” as one of 17 members to advise the Iowa General Assembly on legislation regarding freedom of information and privacy.<sup>336</sup>

### **Impartiality**

While the title “Citizens’ Aide” appears to suggest that the ombudsman is supposed to be acting as an advocate for Iowa citizens, the law creating the position does not expressly demand that the Citizens’ Aide act on behalf of citizens. Instead, the power is discretionary; the Citizens’ Aide “may” do several things, such as investigate citizens’ complaints and make recommendations to an agency, but it may also decline to investigate at its own discretion.<sup>337</sup>

Both Angrick and Dalton, instead, describe the ombudsman’s office role as an independent one. Angrick has referred to the ombudsman’s role as “an objective, impartial, timely investigator of complaints,”<sup>338</sup> stressing the importance of being “smart and sensitive to both sides of the pendulum” to “make sure the cadre of policymakers and stakeholders come together.”

Similarly, Dalton has seen a role that goes beyond just citizen concerns to be an impartial agent for addressing government inquiries as well.<sup>339</sup>

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<sup>335</sup> William P. Angrick II, “Summary of Ombudsman Recommendations,” Identity Theft Prevention Study Committee, 4-7 (2008); see also Jason Clayworth, “Panel proposes expanded privacy in public records,” *Des Moines Register*, Jan. 3, 2009.

<sup>336</sup> Angrick, *supra* note 335 at 7.

<sup>337</sup> See Iowa Code § 2c.9; § 2c.12

<sup>338</sup> Angrick, *supra* note 330 at 1.

<sup>339</sup> Dalton, *supra* note 326 at 3.

“When I’m making a phone call, I tell them I’m not an advocate for that person, and I don’t always believe 100 percent what that person has told me until I see otherwise,” Dalton said. “I try to be conscientious about what I say and how that comes across so the government doesn’t see me as biased. If they see me as one-sided, it’s downhill from there.”

However, the perception of impartiality within the office is not reflected by the opinions of sources on the media and government sides who commented about it, each of whom said the agency seemed to advocate too strongly on behalf of citizens at the expense of government concerns.

“One criticism I have, and I’ve told this to Bill (Angrick) himself, is that the title of the office is Citizens’ Aide, and they take that title quite seriously it appears because they tend to side with citizens long before they talk to the public body with whom they have a beef,” said Gannon, who has been representing the school board association since before the creation of the PROMP position in the ombudsman’s office. “The office comes across as significantly biased.”

Another government source agreed that the office had an orientation favoring citizens.

“They’re very much...an advocate for rights of citizens, particularly when it comes to open meetings and open records,” Timmins said. “They don’t often take the side of cities, and we find ourselves at odds with them. That’s their job. Their job is to take on state and local agencies when they feel there’s been a violation of the law.”

Another source representing government bodies was even more dubious about the office’s stated impartiality.

“My biggest problem with the Ombudsman’s office is that they see their job as acting as a zealous advocate for aggrieved citizens,” the source said. “What I mean is, they see violations where there aren’t any, and attribute bad motives to people, and assume the worst about government officials in any situation where the facts are ambiguous.”

The tension between the ombudsman’s approach and local government is evident to Richardson, who has dealt with these matters on behalf of the news media and said the ombudsman and the government sometimes appear to act as adversaries.

“(People in the ombudsman’s office) see themselves as advocates for citizens of Iowa to make the government as open as possible, maybe to the point that some of the government associations are kind of rubbed the wrong way by that,” Richardson said. “They think they’re always going to take the side of citizens against government officials.”

Timmins added that because he had come to understand this as the role of the ombudsman’s office, he had come to expect it and didn’t see it as a negative thing.

“They try to be impartial, but their role is to represent citizens, and we don’t begrudge them that because that’s their role,” Timmins said. “I’ve had dealings with them, and they were good discussions. They’re very open to our comments, to our point of view.”

However, Timmins said, because of this, his clients were more likely to come to him and the League of Cities for help on public records and open meetings issues rather than the ombudsman.

Another government source agreed that the perceptions of partiality makes government officials more reluctant to “work with them or listen to any suggestions they have for improvement” and suggested that a more neutral approach might improve compliance with the ombudsman’s recommendations. The source said that the office’s hiring of a former investigative journalist for the *Des Moines Register* as an assistant also sends the wrong message to local government officials, who may feel that a journalist couldn’t help but to be biased toward news media interests in open government matters.

“The Ombudsman’s office assumes that every local government official is either stupid or corrupt,” the source said. “That rankles people.”

Dalton disagreed with this assessment, saying she understood the danger of being perceived as biased toward citizens. When the office gives off this sense, she said, it may be because her duty is to be an advocate of the public records and open meetings laws, which favor citizen access.

“We may feel passionate about the intent of open government law, that it is good and fair. But until you’ve seen the documents and seen both sides, you really can’t go to one side or the other,” Dalton said. “It’s usually not until the very end, if you have a substantiated complaint, do you take on advocate role. I usually don’t feel like an advocate, but (when violations are apparent) you can say, ‘This is what the law is and this is how you do it. You don’t get to choose.’”

Multiple sources who wanted to remain confidential said as a result of this perceived lack of impartiality, their clients simply don’t use the ombudsman’s office as a resource.

“My members, they’d never go there,” said one source. “I don’t know of anyone who’s ever gone there. If they’ve got problems, come to me first, and then they may go to the legislature...When they do complain, it’s to me or even to members of the legislature, and they’re complaining about the ombudsman being a little too overzealous.”

Another source representing government interests said that despite the fact that the ombudsman’s office holds itself out as a resource for government interests, it no longer has the trust of government officials or employees, hampering the effectiveness of the office.

“I think their credibility is shot,” the source said, suggesting that it may take a structural overhaul to create a more independent office that would be a consistent resource for government interests. “It would probably have to be a revamped agency. I don’t know if you’re going to have to change personnel, but you’re going to have to change the focus of the agency and the mission.”

Another alternative the source suggested was having an attorney in the PROMP position, which could help to build the office’s credibility because of the complexity of the legal issues that can be involved in public access laws.

“I think it would make sense to have an attorney in the position,” the source said.

### **Conflict Management**

While the ombudsman’s office works to resolve individual disputes involving access to government records and meetings, it does so in an environment where there are obvious tensions, particularly between journalists and government agencies. Sources

were asked about how the office approached these underlying tensions, but they struggled to provide examples of how relationships between disputing parties had changed, for better or worse.

Most sources pointed out that journalists did not use the office much, for any number of reasons. Richardson said she had the sense that a journalist who was unable to get access to a record would “use the power of the press to fight it on their own” rather than go through the ombudsman’s office. However, she noted that when the ombudsman’s office was able to make a phone call to a government agency to informally look into a journalist’s request, this form of mediation had been successful at times.

“I think they do that to a certain extent,” Richardson said. “I think they do try that sometimes. I think they have been able to call up government officials and explain what the law is, and they can solve some problems that way.”

Dalton says the approach isn’t exactly mediation, and made it clear that she was not a trained mediator.

“Conflict management and conflict resolution, I’m much more comfortable with those terms than mediation,” Dalton said. “Whether directing a person back to the agency and getting them to file a proper complaint in writing, often times that gets the ball rolling for people. We spend a lot of time trying to think of alternatives to formal investigations or lawsuits.”

Dalton said she had worked to build bridges between media and government, in particular by training government employees on the requirements of open government laws and by showing them how people higher up in government offices, “executive director types and the city council,” can better handle media requests.

“If they can be knowledgeable about these situations, the media can be your friends,” Dalton said. “If you can learn, generally, we don’t hear complaints (from the news media).”

Dalton said that Angrick had been particularly good at building relationships with news media to make sure their needs are being met by the office.<sup>340</sup> Angrick said the office can step in to ease tensions when they arise between journalists and government agencies.

“It removes some of hair on back of the neck when you tell a reporter, ‘No you can’t have that,’” Angrick said. “Especially a good investigative reporter is going to get really unhappy if he or she’s told no, and sometimes they don’t do it in the most polite way in the way they ask for more. If at some point in time they can come to the ombudsman, they can stand between agency and requester, and it’s not quite as resisting as if it was just two of them duking it out.”

Angrick noted that some of the most important cases about public records and open meetings come from journalists, and that even if the office does not always come to conclusions that satisfy journalists, it has been able to change some practices in government, particularly in law enforcement.

“I don’t know that we get everybody singing kumbaya together, but sometimes we stand between where the tension is,” Angrick said.

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<sup>340</sup> This also sometimes involves making sure that media requests are prioritized to accommodate journalists’ deadlines. “If you tell a reporter ‘no,’ you don’t know what’s going to end up on the front page of the newspaper the next day,” Dalton said.



## **Role of the Attorney General**

The Office of Citizens' Aide/Ombudsman has no power to enforce the public records and open meetings laws, relying instead on its ability to investigate, persuade, recommend and seek voluntary compliance to resolve disputes.

The primary agency charged with enforcement of the state's laws, the Office of the Attorney General, does have the power to prosecute violations under the freedom of information act. However, throughout its history, the office has been reluctant to do so.

"The attorney general of our state can have original jurisdiction to prosecute those violations, but he has not been interested in that," Angrick said. "There's a conflict of interest. The attorney general has an obligation to defend state agencies, and (previous attorneys general) really thought it was the county attorneys' responsibility to take care of the locality. It left a big vacuum. Besides one or two county attorneys over the years, they haven't gone after these cases, and those were just individual cases."

One source noted that the ombudsman's office can refer cases to the attorney general, but that has not happened much either.

"They can refer matters to the Attorney General's office for prosecution," the source who works with local government agencies said. "But in the last few years the Attorney General's office has been notoriously weak on pursuing these types of violators."

Timmins said this was much of the impetus for an enforcement agency in the legislature in 2008.

“It came up because there was a concern that the attorney general had not been active enough in pursuing these complaints, and that kind of stung the attorney general,” Timmins said.

Instead, Angrick said, the attorney general has taken on an informational and educational role involving public records and open meetings. In November 2001, the Office of the Attorney General began creating monthly reports called “Sunshine Advisories” as a resource for both government officials and citizens.<sup>341</sup>

“It’s not quite as persuasive or researched as an attorney general opinion, but it contains good practices about what the law is on meeting agendas and closed records and when you can go into closed session, all sorts of stuff,” Angrick said. “We’re sharing that information when we can.”

Toward the end of 2008, Attorney General Tom Miller announced a more public move to take on an enforcement role in freedom of information cases. After legislation to create an independent enforcement agencies failed earlier in the year, Angrick and Miller began discussions on how they could best coordinate their efforts.

“When that piece of legislation didn’t pass in spring 2008, the attorney general headed over here and said, ‘OK Angrick, why don’t you start passing some of these cases to us,’” Angrick said. “Sometime between Christmas and New Year’s, the attorney general wanted to do a press conference with me where we announced our cooperation. Even though we’ve been doing this for four or five months, we announced that an agreement had been reached. I’ve pledged with giving them more cases and more cases early in the process than before.”

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<sup>341</sup> See Iowa Department of Justice, Office of the Attorney General, “Index, ‘Sunshine Advisory’ Bulletins,” [www.state.ia.us/government/ag/sunshine\\_advisories](http://www.state.ia.us/government/ag/sunshine_advisories)

In a statement, Miller said he had appointed an assistant attorney general to handle complaints about public records and open meetings violations from both citizens and the ombudsman's office.

"I am going to beef up my office's efforts in this regard and serve notice that we will bring enforcement actions when they are appropriate," Miller said.<sup>342</sup>

However, Miller also said that cases should be resolved informally at the local level whenever possible.<sup>343</sup> Dalton agreed, saying that informal resolution will most likely be a better alternative than prosecution by the attorney general.

"I know they don't think prosecution is the way to resolve this stuff," Dalton said. "They recognize the value of voluntary resolution of these kinds of cases. You're better getting a resolution than filing criminal or civil charges on people. You're dealing with library boards, and they're all volunteers who just love books. I don't think it makes a lot of sense to file charges on these people. Usually, if they violate the law, it's because they don't know, there's a lack of knowledge, they haven't had the training."

Sources had mixed reactions about how the announced intentions to serve as an enforcer of the open government laws would work. Angrick said he is hopeful that the ombudsman's office could partner with the attorney general to improve enforcement, while Richardson and others expressed a wait-and-see attitude. Dalton said she expected things to get complicated.

"It will be interesting to see the first one where the agency and the attorney general's office disagree," Dalton said. "That's where (John McCormally, the assistant attorney general in charge of these cases) is going to get his feet wet. If the

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<sup>342</sup> Iowa Department of Justice, Office of the Attorney General, "Ensuring Open Government," (Dec. 30, 2008), [www.state.ia.us/government/ag/latest\\_news/releases/dec\\_2008/Ensuring\\_Open\\_Government.html](http://www.state.ia.us/government/ag/latest_news/releases/dec_2008/Ensuring_Open_Government.html)

<sup>343</sup> *Id.*

ombudsman's office says we disagree, and the agency isn't moving, which direction is the AG's office is going to take? Is it going to be an informal mediation or conflict resolution case, or is this one they take to prosecution?"

### **Enforcement Issues**

The sources interviewed for this study all cited enforcement as one of the most troublesome areas of Iowa's public records and open meetings laws.

"There are days when I wish I just could write a uniform citation for meetings violations," said Dalton, recalling her days in law enforcement. "Here's your date, show up in court, I'll meet you there. But it doesn't work that way."

Instead, the office works toward voluntary compliance with its recommendations.

"Usually the top recommendation is that in the future you will comply with the open meetings law," Dalton said. "Nobody ever says, 'No we're not going to accept your recommendation,' so that's the softer versus the hard enforcement."

This does not encourage compliance, said one source.

"Suppose your board screws up and illegally closes a meeting, what is the Ombudsman's office going to do?" said the source, an attorney working with local government agencies. "Write a nasty report about you that no one reads?"

The source went on to say that, from a practical perspective, having the office structured the way it is can be beneficial to clients because "nothing much will happen" if a citizen complains and the government agency does not agree with the ombudsman's recommendation.

Dalton noted that when the ombudsman's office has documentation of continuous violations, it can pass that off to the attorney general or county attorneys, who can then file for civil or criminal penalties. However, when those agencies decline to prosecute, as mentioned above, the only remaining recourse is litigation. Richardson offered the example of what has happened in Riverdale, Iowa, as an illustration. Citizens have brought at least three lawsuits against Riverdale city officials since 2004 involving records and meetings violations, and one citizen says it has cost him more than \$250,000 in legal costs to bring these cases.<sup>344</sup>

"They were the perfect poster children for the problems in enforcement, since they called everyone, from the governor's office on down, and nobody would help them," Richardson said.

She said that after citizens of Riverdale, a town of about 600 people, were denied access to public records about the city's volunteer fire department, they asked the city attorney for help but were denied. They then contacted the ombudsman's office, which called the mayor but was unable to resolve the dispute.<sup>345</sup> The local sheriff declined to investigate, and the county attorney refused to prosecute. The citizens made calls to the attorney general, to Governor Tom Vilsack, even to U.S. Senator Charles Grassley. Nothing worked for them until they filed a lawsuit, which they won in 2006 and were awarded their attorney's fees as part of the judgment.<sup>346</sup> In 2008, citizens were awarded

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<sup>344</sup> Tom Saul, "Iowa sunshine laws might get teeth," *Quad City Times*, March 18, 2008, [www.qctimes.com/articles/2008/03/18/news/local/doc47df4d45eb749184380673.txt?](http://www.qctimes.com/articles/2008/03/18/news/local/doc47df4d45eb749184380673.txt?)

<sup>345</sup> Dalton said the Riverdale citizens forgot about using the ombudsman as an option as the case progressed. "I think we could have avoided a lawsuit in that one. Yeah, I think we could have resolved that one," Dalton said. However, she said that there "probably" would have been another lawsuit regardless.

<sup>346</sup> From interview with Kathleen Richardson; *see also* Saul, *supra* note 344.

another court victory in an open meetings case, again receiving attorney's fees as part of the judgment.

In response to these kinds of situations, state Senator Mike Connelly sponsored legislation in the 2008 session that would create an independent board intended to enforce the public records and open meetings laws.<sup>347</sup> The recommendation came after a legislative study group had advised creation of an "Iowa Public Information Board" that could "receive, investigate, and prosecute complaints" in contested cases, as well as offering mediation.<sup>348</sup> The bill passed the Senate in April 2008.<sup>349</sup>

Multiple sources said that the bill was supported by media groups and local government groups. However, when disagreements arose over provisions on walking quorums, employment applications and draft legislation, support for the bill began to wane.

"We went into senate subcommittee meeting that was debating this, and the media types and school groups and county groups came in with an unholy alliance," Angrick said. "They suggested that both the draft legislation and walking quorums be dropped because they couldn't agree on it. I just kind of rolled my eyes. Here we've got the media saying they won't move, they wouldn't push for walking quorum and employment applications being opened if government agencies wouldn't push for making confidential draft legislation. The senator looking at the bill said, 'What the heck's going on here?' He was extremely unhappy that group couldn't work toward a compromise and started gutting the legislation."

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<sup>347</sup> Saul, *supra* note 344. Connelly was quoted as saying such a board "would go a long way toward stopping the kind of abuse we've seen in places like Riverdale."

<sup>348</sup> Freedom of Information, Open Meetings and Public Records Interim Study Committee, Final Report, 5-6 (July 2008).

<sup>349</sup> *Id.* at 9.

Other sources confirmed that there was a deal between media groups and local government groups on the Senate Bill, but that discord on a final version kept it from reaching a vote in the House.

“We actually had a deal with the newspaper association, and it got stalled because of some legislative politics that got in the way of what we thought was a good bill,” said a source who works with local government groups. “There were some things that we needed to be reformed, such as going into executive or closed sessions. There’s a list of things that the way they are working kind of hurts government’s ability to be more efficient. We had a compromise, but it pretty much fell apart because of the legislative process.”

Richardson said one member of the coalition that had originally agreed on the bill turned against the House version to sink it.

“There were concerns about the legislation, the main one being creating a new government body,” Richardson said, specifically citing concerns about the price tag of the Public Information Board, which was expected to cost about \$800,000 annually. “We tried to come to some sort of collaboration, but at the last minute, the League of Cities broke away and at the end really fought this. They thought that the access counselor’s office would be used by malcontents to harass government officials. I think that there was not the focus there should have been on how this agency could have helped public officials much more by being a good resource for them.”

Richardson said the Freedom of Information Council is considering whether to push for a Public Information Board again, and several news media outlets have

expressed continued support for an enforcement body.<sup>350</sup> Gannon said the Association of School Boards supported creation of an enforcement board last year and would continue to do so as long as the board would not be structured in a way that would still allow investigation and enforcement by other agencies.

“When it was established that the board would have enforcement powers but didn’t take away authority from the ombudsman or the attorney general, now we were going to have three bodies to respond to,” Gannon said. “You only need one, especially if it’s going to have enforcement power. You can’t have all three acting independently. A school board would have to defend itself three times, and that’s not a good use of tax dollars.”

Angrick said he has been in conversations to revive the enforcement agency with interested groups, though several sources mentioned that finding money to create a new office during difficult economic times will be hard.

“We’ve been revisiting the enforcement model, dialoguing with legislators, and the FOI folks and media definitely wanted an enforcement agency,” Angrick said. “But state budgets have gone belly up, they’re not going to find half a million or a million dollars to fund it. I told them, here’s what we can do in the ombudsman’s office with another position so we can spend more time on open meetings and open records.”

Whether the issue is revisited by the legislature or not, Angrick said the office will continue to do what it has been doing.

“I think we probably aren’t going to have the money for an enforcement agency,” Angrick said. “With the attorney general back in the business of enforcing these laws, I

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<sup>350</sup> See Editorial, “State must enforce public access laws,” (Dubuque) Telegraph Herald (Jan. 28, 2009), [www.thonline.com/article.cfm?o=1&id=231036](http://www.thonline.com/article.cfm?o=1&id=231036); Editorial, “State must create open government watchdog this year,” *Iowa City Press-Citizen*, Jan. 9, 2009.



don't know if this is going to change the impetus for the legislation or not. FOI and media types may be opposed, but basically, with Angie and the rest of my staff, we're going to continue to do this from ombudsman perspective."

**e. Analysis**

Since the legislature authorized the creation of the Public Records, Open Meetings and Privacy position in the Office of Citizens' Aide/Ombudsman in 2001, the office has undoubtedly taken a more direct role in handling disputes arising under Iowa's open government laws, both through proactive methods such as outreach, education and training and reactive methods such as answering inquiries, responding to citizen concerns, investigating potential violations and making both informal and formal recommendations to government agencies on how they should act when open government issues arise. However, the comments of several of the sources for this case study and ongoing efforts to create an independent enforcement agency make it clear that the role of the ombudsman's office, as it was designed, implemented and has developed over the past eight years, has been unable to address many of the needs of parties in open government matters.

One potential reason for this could be the design of the PROMP position, or more specifically, a lack of forethought by the legislative council in envisioning how the ombudsman's office would be able to handle the concerns of the parties most interested in public meetings, open records and privacy issues. It appears that the creation of this office, while supported at the time by groups such as the Iowa Freedom of Information Council, did not involve them or other stakeholders who would be most cognizant of the

primary issues faced by citizens, the news media and government agencies. This is partially explainable through the design of the Office of Citizens' Aide/Ombudsman itself. As established by Iowa law, the office essentially must embrace the "softer option" that Angrick has employed for more than a quarter of a century. The main tools the ombudsman's office has are voluntary compliance and the "bully pulpit" to encourage enforcement; the limitations of these tools weaken the office's ability to engage in effective dispute resolution. Parties who feel that more is needed to make government agencies comply with the law have been left with the same options as before: informal negotiation, appeals to the public through the press, and litigation.

Another design issue that emerged from this study was the lack of clarity about the role of the ombudsman's office in handling public records and open meetings matters. Is the agency an independent and impartial agency that investigates situations and encourages best practices and seeks resolution of disputes, or is it an advocate for citizens that can take an adversarial role against government agencies who do not comply with open government laws? The office holds itself out as an independent agency that can impartially review and seek to resolve disputes that arise. But the Iowa Citizens' Aide Act itself establishes the office as a resource for citizens, and the perception of government agencies is that it favors citizens' interests against those of local government. This may, of course, be a good thing for open government advocates; government agencies have other resources, such as legal counsel in local government or school board associations, to serve as their advocates. The law itself may drive this perception as well. If the law favors openness and the ombudsman is handling disputes arising under the law,

then the ombudsman may feel compelled to side with people seeking access when legitimate complaints arise.

However, the appearance of partiality that was evident to several sources seemed to work against the effectiveness of the ombudsman's office in open government matters. While Dalton said she approaches each case as neutrally as possible, sources representing government interests sensed a "guilty until proven innocent" mentality that made them hesitant to deal with the ombudsman's office. This was evident from the earliest days of the PROMP position, when a former award-winning journalist and open government advocate was appointed to oversee these matters. If the ombudsman is to rely on voluntary compliance, government officials and employees must feel that they are being treated fairly or else they will have little motivation to participate with these non-binding recommendations. While the ombudsman does not formally act as a mediator, it can intervene in ways similar to mediation. A mediator must be impartial to be effective in finding resolutions with which both parties to a dispute will voluntarily comply; similarly, an ombudsman acting as a mediator in an open government dispute needs to be perceived as impartial for the disputing parties to participate meaningfully to seek a voluntary resolution. This perceived lack of impartiality weakens the office's effectiveness in resolving disputes.

Another issue that may be compromising the effectiveness of the ombudsman's office approach to open government matters is spreading the PROMP duties among several assistant ombudsmen in the office. Much of this can be explained by the office's growing caseload and other matters that complicated the implementation of the PROMP position. As originally conceived, the PROMP position was a single person who had

expertise in open government matters and could work to conduct outreach and training, to answer inquiries about the state's freedom of information laws, and to help resolve disputes arising under these laws. While the person had other duties, the primary focus was open government issues. The implementation of this had an unforeseeable and unfortunate setback when Robert Anderson died after only one year in the position. Since then, public records and open meetings matters became more of an office-wide responsibility, handled by many until Angela Dalton took over the position in 2003. Sources widely praised Dalton for her attitude and effort in handling open government matters, both on the education and training side and on the dispute resolution side. However, these matters are not the only ones to which she must attend, nor is she the only one who handles them. Much of this seems to be a result of unavoidable budget cuts and an increasing caseload in the years following the creation of the PROMP position in 2001. Angrick noted that the office could not feasibly focus just one person on public records and open meetings matters; this fact may be complicating the office's ability to manage these kinds of inquiries and investigations.

Each of these structural matters – perceived partiality on the part of the office that may interfere with its ability to mediate effectively lack of a primary person charged with handling PROMP matters – are complicated further by the lack of realistic enforcement of the freedom information laws outside of litigation initiated by citizens or the news media. The ombudsman's office seems to have had little effect on diverting disputes from the courts, and the failure of the attorney general to police noncompliance by government agencies means that in many ways, little has changed about the way the most difficult and adversarial cases are processed in Iowa since 2001. Recent statements by the

attorney general's office to prosecute violations of the public records and open meetings laws have some promise, as does the attorney general's intent to cooperate with the ombudsman's office to seek enforcement against the law's most problematic or persistent violators. But sources were wary of these promises and expressed concerns that even this kind of enforcement would not be enough to deter future misconduct in significant ways.

Through its outreach and educational efforts, the ombudsman's office has had an impact on the culture of open government in Iowa since 2001. But it seems that the stakeholders who deal with these issues the most – citizens, news media and government agencies – each sense weaknesses in the office that lead them to prefer another structure for handling disputes. As much as open government advocates may want an enforcement agency, budget shortfalls in Iowa make funding of an independent Public Information Board unlikely in the near future. Without this board, citizen, media and government groups will have to continue to rely on the “softer approach” of the ombudsman's office, taking advantages of its strengths in dispute prevention – through training, answering informal inquiries, and reviewing legislation – a while working to overcome any weaknesses it has in effective dispute resolution.

## CHAPTER 5: CASE STUDY – VIRGINIA

### a. Historical Background – Virginia’s Freedom of Information Act

The Virginia Freedom of Information act was passed 1968 to make it a general rule that government records and meetings be open to the public, with the government having the burden to show exceptions to this general policy.<sup>351</sup> In 1976,<sup>352</sup> the legislature made its openness policy clear by passing a statement of purpose that includes the following language:

By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.<sup>353</sup>

The act also requires liberal construction of its terms to favor openness, narrow construction of exceptions, and a requirement that “all public bodies and their officers and employees shall make reasonable efforts to reach an agreement with a requester concerning the production of the records requested.”<sup>354</sup>

Before 2001, when disputes arose, the primary mechanism to resolve disputes was litigation. The Freedom of Information Act provides that any person “denied the rights and privileges conferred by this chapter” may seek judicial enforcement through injunction or mandamus.<sup>355</sup> A party substantially prevailing in a lawsuit against a public

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<sup>351</sup> House Document No. 106, “Report of the Joint Subcommittee Studying Virginia’s Freedom of Information Act,” 4 (2000).

<sup>352</sup> *Id.*

<sup>353</sup> Va. Code Ann. § 2.2-3700(B).

<sup>354</sup> *Id.*

<sup>355</sup> Va. Code Ann. § 2.2-3713(A).

body is entitled to “reasonable costs and attorneys’ fees,”<sup>356</sup> and the court may also order civil penalties of between \$250 and \$1,000 for a willful and knowing violation.<sup>357</sup>

The law offered “no implementation or enforcement authority,” and there was “no statutory provision mandating alternative dispute resolution” or other informal methods of resolving disputes outside of litigation.<sup>358</sup> Even in the courts, enforcement was difficult to achieve under the law during these years. Under the law, granting injunctive relief was discretionary rather than mandatory for judges, as were civil fines.<sup>359</sup> Advocates for journalists and citizens expressed frustration with having litigation as the only avenue for resolving disputes under the act.

“There was nothing there that provided for continuing day-to-day advocacy work for compliance with the state’s Freedom of Information Act,” said Frosty Landon, a longtime editor of *The Roanoke Times* and the former executive director of the Virginia Coalition for Open Government. “It was a constant source of frustration for media and citizen watchdogs. While the legislature gave all of the right lip service to open government, the practical application was that you had to go to court, and after a couple of years and \$50,000 in costs, the court may not give you a satisfactory result.”

After Landon retired from the Times in 1995, he spearheaded an effort to create the Virginia Coalition for Open Government, a group that brought journalists and citizens to lobby for reform of the state’s Freedom of Information laws.

“A bunch of us who were newspaper editors in the state, we were interested in FOI issues, so we got together and decided we needed to build a broader base of support

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<sup>356</sup> Va. Code Ann. § 2.2-3713(D).

<sup>357</sup> Va. Code Ann. § 2.2-3714.

<sup>358</sup> House Document No. 106, *supra* note 351 at 27-28.

<sup>359</sup> Eleanor Berry Knoth, *Note: The Virginia Freedom of Information Act: Inadequate Enforcement*, 25 Wm and Mary L. Rev. 487, 506-511 (1984).

and get it beyond the appearance of something to sell newspapers or raise ratings,” Landon said. “While the press association was a very effective lobbyist for open government, there was no voice there for individual citizens. We decided we ought to somehow develop a broader constituency and build a coalition that would go beyond traditional newspaper and broadcast folks. We immediately invited the state library association to join that effort.”

Landon said the coalition invited several other non-media groups to take part in the coalition. Today, the board of directors of the coalition includes 27 members, 15 of whom are supposed to “represent educators, librarians, media lawyers and others” as a way of including the public.<sup>360</sup>

The coalition lobbied for the formation of a new study group in the legislature to review several items in the state’s Freedom of Information Act, including the way disputes were handled. Six study groups had been appointed over the years since the act was passed in 1968, with the most recent one coming in 1990.<sup>361</sup>

“One of our early initiatives was to push for a legislative study, but this time we wanted to look at overhauling the state law and to see if there was some alternative for dispute resolution that would not be in the courts,” Landon said. “In Virginia, the office of the attorney general issued opinions only when requested by people in government, not citizens, and those rulings got kind of strange in election years. It was the same frustration there as going to courts for relief. We wanted to look for some way to push compliance with the act and at the same time not have to rely on litigation or change in the setup in the attorney general’s office.”

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<sup>360</sup> By-Laws of Virginia Coalition for Open Government, Inc., Art. III, Sec. 3 (2008), [www.opengovva.org/content/view/832/0](http://www.opengovva.org/content/view/832/0).

<sup>361</sup> House Document No. 106, *supra* note 351 at 8.



The lobbying effort was successful. During the 1998 session of the Virginia General Assembly, a resolution was approved to create “a joint subcommittee to study the Virginia Freedom of Information Act...to determine whether any revisions to the Act were necessary.”<sup>362</sup> The study group examined several issues in the law, mostly focusing on a redraft that would clarify several matters such as exemptions to the records and meetings provisions in existence.<sup>363</sup> The Virginia Press Association drove much of the revisions of the legislation, bringing in a proposed rewrite that was broader than many had expected, said Maria Everett, who staffed the meeting as the senior attorney for the Division of Legislative Services.

“It kind of hacked off a lot of people on the local government side, who said, wait a minute, you said this was about electronic records, and now it’s an overhaul of FOIA, we didn’t get a chance,” Everett said. “It was drafted with a particular vision (by the Press Association), and now you’re on the opposite side, the ones who have to implement it. They were behind the eight ball. They said it wasn’t an open process, so they were fighting from the beginning.”

Multiple sources credited the committee’s chairman, Clifton “Chip” Woodrum, a longtime member of the House of Delegates, who encouraged parties with competing interests to seek consensus through informal negotiations.

“Chip Woodrum said in the very first year, ‘Hey, look, you don’t have to wait until we have meetings to talk. There’s phones and e-mail. You can keep working on these issues. It’s informal, you don’t have to say it to us to keep working,’” Everett said.

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<sup>362</sup> *Id.* at 3.

<sup>363</sup> *Id.* at 26-27.

“You don’t have to wait for an organized format for resolution of issues. Without making a formal presentation to a joint subcommittee, you can continue to work at it.

“But they said we need somebody to facilitate, and at the time, the point of view toward people on the other side was, pardon my French, ‘You’re full of shit.’”

Everett said it was left to her and the non-partisan staff at Legislative Services to facilitate in this manner, and in this role, the group gradually moved toward consensus on many matters that needed revision. In the official report of the joint subcommittee to the governor and the General Assembly, the tone of the discussions was praised. “Due in a large part to the level of professionalism and recognition that there was an opportunity for shaping the new FOIA law, the parties kept at it and found there was room for compromise,” the report noted.<sup>364</sup>

During the study group’s first meeting on June 12, 1998, the Virginia Coalition for Open Government suggested that the committee “explore several approaches used by other states in ensuring compliance with public access laws, including the creation of (i) a quasi-independent FOIA office, (ii) a FOIA enforcement agency, (iii) an expanded FOIA role for the Attorney General or (iv) some hybrid of these approaches.”<sup>365</sup> During its next meeting, the committee heard comparisons of the approach of several states that used either “an assisting agency relative to enforcement or implementation of the laws” or “the use of alternative dispute resolution” to handle disputes arising under open government laws.<sup>366</sup> The agency considered the approach of nine jurisdictions, including Connecticut’s Freedom of Information Commission that includes an ombudsman

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<sup>364</sup> *Id.* at 3.

<sup>365</sup> *Id.* at 10.

<sup>366</sup> *Id.* at 11.

program, Florida's Open Government Mediation program, Maryland's Open Meeting Compliance Board, and New York's Advisory Committee on Open Government.<sup>367</sup>

Several sources agreed that the New York approach was the most popular for the committee, and Landon suggested that an ideal model would also incorporate aspects of Maryland's review panel on open meetings issues.

"There was where we started to see that Bob Freeman's 25-year-old Commission on Open Government in New York state would be the best model for Virginia to follow," Landon said. "It was a very small agency, it was operated at a low cost, and that has got to be the case in Virginia, even in good times."

However, by the end of the year, the joint subcommittee did not reach a conclusion on how to create or operate such an office. Thus, the committee "agreed to continue its study for an additional year" to focus on the possibility of creating "a state 'sunshine office' to resolve FOIA complaints, conduct training and education seminars, issue opinions on final orders, and offer voluntary mediation of disputes."<sup>368</sup> The push was aided by results from an audit of open records law compliance conducted by 14 Virginia newspapers in 1998 that showed that only 58 percent of officials in the state's 135 cities and counties complied with requests.<sup>369</sup>

"Right around then was right when the first of the press audits with state freedom of information laws began to take place, particularly in Indiana, where the governor appointed a Public Access Counselor," Landon said. "Newspapers in Virginia were

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<sup>367</sup> *Id.* at 11-13.

<sup>368</sup> *Id.* at 25.

<sup>369</sup> Pamela Stallsmith & John Denniston, "Want public information? In Virginia, good luck," *Richmond Times-Dispatch*, Nov. 1, 1998, [www.nfoic.org/uploads/foi\\_pdfs/vawantpubinfo.pdf](http://www.nfoic.org/uploads/foi_pdfs/vawantpubinfo.pdf)

conducting a similar audit. We were getting open government on the radar of the public.”

The House passed a resolution approving a second year for the joint subcommittee studying the Freedom of Information Act, and it began working on creating a new agency on June 2, 1999.<sup>370</sup>

#### **b. Design and Formal Structure**

The membership of the joint subcommittee remained the same as it was the previous year. Three members came from the House of Delegates, including Woodrum, who again served as the chairman of the group. Two state senators also served on the committee, as did newspaper editor John B. Edwards and attorney Roger C. Wiley, who represents counties and cities across the state. As it had the previous year, the committee welcomed several perspectives to the table to discuss their interests and proposals for revising the Virginia Freedom of Information Act.

“The ones we got to the table for (discussion about a ‘sunshine office’) were the traditional players – the press association, local government associations,” Landon said. “In building support for (the) office, it was kind of tricky in that in local government, everybody was very skeptical.”

Leo Rodgers, who was present as a member of the Local Government Attorneys of Virginia at the time and who now serves as county attorney for James City County, said his group had reservations about creating an office to oversee open government disputes.

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<sup>370</sup> House Document No. 106, *supra* note 351 at 27.

“Our initial reaction was that we don’t need them,” Rodgers said. “We already know the law, and we don’t need them to give opinions about it... There was a lot of fear about how this agency would work, that it would be an oversight agency that would act as an enforcement arm against localities rather than a helpful agency.”

Everett noted that representatives from government in attendance made sure their voices were heard, such as the Virginia Municipal League and the Virginia Association of Counties. From the law enforcement perspective, John W. Jones, the executive director of the Virginia Sheriffs Association, and Dana Schrad, the executive director of the Virginia Association of Chiefs of Police, both said they participated in the study group.

“What I recall specifically from the kitchen cabinet group we were – we literally met within the redistricting room of Legislative Services – myself, Ginger Stanley, Craig Merritt, Maria, Frosty, and other folks that sat down like that,” Schrad said. “People were protective of their interests, but it was always about what serves Virginians, what serves the public interest.”

Landon said the mix of interests worked out well for the committee.

“We had good, strong players, but they weren’t there looking for a fight,” Landon said. “They wanted to resolve conflict between the press and the government, particularly local government. They wanted some fixes. They wanted to stop seeing such bloody conflict, particularly between the press and the local government.”

After its first meeting, the committee reached consensus that a “sunshine office” should be “an independent agency that would not be subject to direct political pressure while it serves Virginia citizens and state and local public bodies.”<sup>371</sup>

The committee invited Bob Freeman, who had served as the executive director of New York’s State Committee on Open Government since 1976, to speak at its second meeting on July 8, 1999. Freeman told the committee about New York’s 11-member commission and his office, which handled about 8,000 inquiries per year, about one-third of which came from local government entities, at a cost of about \$170,000 per year.<sup>372</sup> He advised the committee that a “sunshine office” required three factors: “strong leadership, especially in the beginning; a commitment to the role as educator; and a reputation for impartiality.”<sup>373</sup>

The committee embraced this model and began working on a draft of legislation to create an office based on Freeman’s advice and experience. Some people at the table were skeptical about the concept; Schrad remembered thinking at one point, “Oh my gosh, were going to have a star chamber.”

Landon noted that local government attorneys in particular had concerns

“Their clients were saying, ‘Oh boy, we’re going to get second-guessed by Richmond, big brother is making our lives more difficult,’” Landon said. “We kept saying, ‘Look at the New York model.’ It’s primarily citizens that get helped, but there are also big numbers of people in government having that office to turn to, so they don’t stumble and get embarrassed. Most people in government don’t want to break the law. They don’t want to be on Page One above the fold. Here will be a place they can get

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<sup>371</sup> *Id.* at 33.

<sup>372</sup> *Id.* at 34.

<sup>373</sup> *Id.*

consistent, uniform interpretation without the court battles. At the same time, citizens who have this vehicle may quit being so adversarial when they get told, ‘No, you don’t have those rights under the law, you have these.’”

After a while, Everett noted, groups began to warm to the idea of creating a “sunshine office” based on the New York model.

“Everybody thought it was a good idea, especially the government,” Everett said. “(They said), ‘There’s a whole lot of us, diversity of personnel, and they may look at it and say we don’t give that out. We could call somebody instead.’”

The committee also emphasized the importance of the training and education mission of the proposed office. At the time, Landon pointed out that educational efforts in the past had been sporadic, writing that “FOI training should not be a one-time, once-a-decade occurrence. FOIA training sessions also were held statewide in 1989-90. After 1990, they stopped. In 1989-93, the Office of the Attorney General produced plain-English guidelines for FOIA compliance. In 1993, that updating stopped.”<sup>374</sup>

But some major issues remained. The committee had to address where best to house the agency.<sup>375</sup> Both the governor’s office and the attorney general’s office had expressed interest in the agency, an idea that concerned many sources.

“The attorney general’s office didn’t seem to be a good idea because of the conflict of interest,” Everett said, noting that the attorney general is charged with representing the commonwealth’s interests as a primary duty.<sup>376</sup> “And nothing fit in the

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<sup>374</sup> Forrest M. “Frosty” Landon, *Freedom of Information: Virginia Needs an Ombudsman*, 6 Virginia Issues & Answers (Dec. 1999), [www.via.vt.edu/fall99/ombudsman.html](http://www.via.vt.edu/fall99/ombudsman.html)

<sup>375</sup> Christina Nuckols, “Legislative committee considers designs for Va. ‘sunshine’ office,” *The Roanoke Times*, B4, June 3, 1999.

<sup>376</sup> According to the attorney general’s Mission Statement, “The Office of the Attorney General is the Commonwealth’s law firm. The office is charged with providing advice to state agencies and the Governor,” Office of the Attorney General, “Mission Statement” (2009),

executive branch. We wanted this to be sellable (to the legislature), so if it could be part of an existing structure, that would be ideal.”

Many on the committee favored placing the office elsewhere, looking in particular to the Division of Legislative Services, which had staffed the joint subcommittee and helped to guide and draft the bill that would be considered by the General Assembly. The office earned a reputation for fairness and impartiality that was considered essential for the Freedom of Information Advisory Council.

“We negotiated with the attorney general’s office, who wanted it in their purview,” said Ginger Stanley, who serves as the executive director of the Virginia Press Association. “We didn’t. We wanted to be as independent and bipartisan as possible, and we thought Legislative Services was the right home for it.”

The move would be a break from New York, which placed its agency in the executive branch.

“The thing that made Virginia unique was that we based the office in the legislative branch of government,” Landon said. “It may be the only one in the country to do that. Most areas are based in the attorney general’s office or the governor’s office. At the last minute, the AG tried to get it into his office, but because we had a bipartisan commission, Republicans were committed to keep it in the legislative branch. That was the benefit of doing a bipartisan study.”

Along with the location of the council, the joint subcommittee also had to agree on the he size, role and extent of the powers of this independent agency needed to be determined. The committee settled on a 12-member Freedom of Information Advisory

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[www.oag.state.va.us/OUR\\_OFFICE/Mission\\_Statement.html](http://www.oag.state.va.us/OUR_OFFICE/Mission_Statement.html). The attorney general is only authorized to issue advisory opinions at the request of state or local government officials, not members of the public. *See* Va. Code Ann. § 2.2-505.



Council made up of a mix of government officials, media representatives and citizens, that could issue non-binding advisory opinions on matters involving the Freedom of Information Act.<sup>377</sup> The council was also to be responsible for training government employees and creating educational materials about the law.<sup>378</sup>

The terms “ombudsman” and “mediator” were used frequently in these discussions to describe what function the agency would have in dispute resolution. Landon said the Coalition for Open Government preferred to think of the role as an “ombudsman.”<sup>379</sup>

“We called it that from day one,” Landon said. “We were just using it as a descriptive term. There’s no tradition for actual ombudsman in Virginia with a capital O.”

Wiley said he saw the role of the council a different way, particularly as Everett has performed as the council’s executive director.

“I would say ‘mediator’ is closer than ‘ombudsman,’” Wiley said. “She’s not really advocating for anything except for the act itself, but she is trying to make parties see both sides of the issue.”

The matter was left unclear, as neither term was used when the legislation authorizing creation of the office was passed, even though the committee often talked about the importance of having an office to mediate freedom of information disputes.<sup>380</sup> Stanley said the Press Association never took a position on the extent to which the office should act as an ombudsman or mediator.

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<sup>377</sup> House Document No. 106, *supra* note 351 at 37-38.

<sup>378</sup> *Id.* at 39.

<sup>379</sup> Landon, *supra* note 374.

<sup>380</sup> See Associated Press, “Panel proposes office to mediate FOI disputes,” Dec. 29, 1999.

“They really do not have an official role as a mediator or to come to do dispute resolution. That’s not in their mandate,” Stanley said. “So they can mentor and they do training, they will call a county attorney for a newspaper and just try to read them the law and explain how they’re not following it. They do help from the standpoint of trying to clarify for government what they’re doing right and what they’re doing wrong.”

While the terms ombudsman and mediation were left out of the legislation, the expectation was that the council could have an informal role in resolving disputes.

“We had hoped the agency would be a strong force for mediation,” Landon said. “It’s not in the statute everywhere. What’s in the statute is that the office must foster compliance with the FOI act. (Everett) is beating the drums for complying with the law that’s on the books.”

The joint subcommittee ultimately advised the creation of the Freedom of Information Advisory Council to be housed in the legislative branch, with a broad charge “to encourage and facilitate compliance with the Freedom of Information Act.”<sup>381</sup> Woodrum sponsored the legislation in the House, and when the bill was considered by the General Assembly in 2000, only minor changes were made. One was to put a sunset provision on the office that would require the office to be reauthorized at the end of two years, which Landon called a political move made to help build political support for “this strange new breed.” Everett said the sunset provision also helped to quell fears from the governor’s office.

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<sup>381</sup> Va. Code Ann. § 30-178(A)

“The governor at the time put a two-year sunset on the office, and that came from the executive branch’s fear that it would be hateful to them, and if it is hateful, it’s going to go away,” Everett said.<sup>382</sup>

The bill authorizing creation of the Virginia Freedom of Information Council was signed into law by Gov. Jim Gilmore on April 10, 2000.<sup>383</sup> Besides the mandate of fostering compliance, the council was to provide the following services:

- Furnishing “advisory opinions or guidelines” to any person “in an expeditious manner”
- “Conducting training seminars and educational programs” for public officials and employees
- Publish educational materials about the Freedom of Information Act<sup>384</sup>

The Division of Legislative Services was charged with providing assistance to the council in these matters.<sup>385</sup> After a brief interview process, Everett was hired to serve as the council’s executive director,<sup>386</sup> and Woodrum became the council’s first chairman.<sup>387</sup>

After nearly five years of planning and two years of legislative study, Virginia finally had an agency to oversee open government matters in the state. Reflecting on the process, Landon said the timing turned out to be perfect.

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<sup>382</sup> The office was reauthorized in 2002. “When we came back two years later, enough of the skepticism had been defused that Maria’s office was then reestablished on a permanent basis on a unanimous vote in the house and senate,” Landon said.

<sup>383</sup> Associated Press, “Bill creating Freedom of Information panel signed into law,” April 10, 2000.

<sup>384</sup> Va. Code Ann. § 30-179

<sup>385</sup> Va. Code Ann. § 30-180

<sup>386</sup> Everett said she wasn’t angling for the job. “They opened the hiring process. It was not like thou shalt be appointed, but they had the Press Association and local government representatives on the panel, and they wanted me to do it. I didn’t want this.”

<sup>387</sup> Bob Lewis, “Woodrum chosen new FOI council chairman; outreach will be first focus,” *Associated Press*, Aug. 15, 2000.

“We lucked out,” Landon said, noting that this was possibly the only time the legislature would have had money in the budget to spend on a small agency. “Recessions preceded and followed the study groups, but not at that time.”

### **c. Implementation & Developments**

The Virginia Freedom of Information council began work on July 21, 2000.<sup>388</sup> While the council had New York to look to as a model, it was entering uncharted waters with legislation that gave it only one specific mandate: encouraging and facilitating compliance with the Freedom of Information Act.

“The big challenge was just an unknown,” Landon said. “What is this animal?”

With guidance from Freeman’s experience, the council began to focus on the three key items he had mentioned: strong leadership, a reputation for independence, and a focus on the educational and training mission. Each of these was developed in the council’s early days.

With the selection of Maria Everett as executive director, council members had chosen somebody they were familiar with and who had a reputation for even-handedness and independence. The council gave Everett the authority to conduct the office’s day-to-day functions as one of its first acts.<sup>389</sup> Every source interviewed for this case study mentioned Everett’s hiring as the most significant factor in the council’s successful implementation and development.

“When the FOIA Council was created, Maria was such a good person to put into that position,” said Schrad, noting that choosing another person may have delayed the

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<sup>388</sup> House Document No. 30, “Report of the Virginia Freedom of Information Advisory Council, 1 (2001). The council launched its web site in August. *Id.* at 6

<sup>389</sup> *Id.* at 2.

council's effectiveness as a resource. "She made the council a practical resource for government folks, journalists other interests groups on how FOIA applies in Virginia."

Wiley cited Everett's forceful personality and reputation for impartiality – which he noted was the case with Freeman in New York as well – as key factors in the council's success. Landon mentioned these as well, specifically talking about how she had shown her impartiality while staffing the joint subcommittee.

"She had to be impartial," Landon said. "She had to satisfy Democrats and Republicans. That was the benefit of the New York model. It brings all players to table and keeps them honest. With Maria Everett, you can't get anything else. She had that role historically when she was drafting legislation. Even on bills she hated, she knew how to be an impartial supporter for what her charge was."

While her background was not specifically in open government matters, Everett said she had worked on several freedom of information bills in the years before the study group as part of her duties in drafting general laws. She learned more about open government laws during her two years working with the study group, and she said this also honed her appreciation for the importance of these laws in a democracy.

"I'm an access advocate as far as the law is, but I'm not a zealot who thinks that everything should be open under all circumstances," Everett said.

The council began with a budget of \$147,000, enough to pay half of Everett's salary<sup>390</sup> and another staff attorney position. To fill the other position, Everett hired Lisa Wallmeyer, attorney who had studied under Bill Chamberlin, a renowned freedom of information advocate and scholar at the University of Florida. Wallmeyer was hired as a

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<sup>390</sup> Everett remains an employee of the Legislative Services Division, drafting bills during the legislative session, with half of her salary drawn from the budget for this office.

contract employee during the legislative session to handle the office's duties writing advisory opinions.

“The idea was I would do this all, and then during session, we would hire somebody while I switched over to my other role to keep the pot from overboiling,” Everett said. “We hired Lisa on a contract basis to keep the pots under control on the FOIA side. She had some knowledge of FOI and stuff like that. Afterwards, the idea of just hiring a contract attorney for four months a year, you're not going to find somebody. Then we thought, there's enough business here to hire a full-time attorney.”

In its early years, the council was inundated with requests for advisory opinions. After 18 months of operation, Everett and Wallmeyer had written 79 advisory opinions (see Table 3).

“Initially, everybody wanted written opinions, which takes a lot more time and research,” Everett said. “But they wanted that piece of paper. That has changed. Nobody wants the piece of paper now, they just say, ‘The FOIA Council says this.’ We don't (write opinions) as much anymore.”

The council now writes about a dozen advisory opinions each year, with more time spent handling informal inquiries. Most inquiries come from government and citizens, a trend that Landon expected from the experience of Freeman's office in New York. In its first six months, Virginia's FOI Advisory Council fielded 141 inquiries, with 54 coming from local or state government, 54 coming from the public, and 33 from the news media. (see Table 2)

However, there were concerns early on both on the council and from other sources that the office would have trouble getting the government to use the agency.

“One of the big success stories with Maria’s office is that people in government have really come around on the issue of calling Richmond and getting an opinion,” Landon said. “You look at her annual reports now, and the biggest users of the office now are government people. The second biggest are citizens, and for several years they were the largest. Way down the list is media.”

Everett said she sensed skepticism from the government side, particularly from local government attorneys, early in her tenure as the council’s executive director. She remembered speaking on a panel at a conference of the Local Government Attorneys of Virginia in her first year.

“As a lawyer, you want to talk to other lawyers in a way that is provocative and stimulating, but they tore me a new one,” Everett said. “(They said), ‘We have staff and other lawyers, you’re in an ivory tower, what do you know?’”

Rodgers, one of the local government attorneys present, admitted that he was one of the ones who had peppered her with questions at the meeting.

“Maria was up there on the panel with two of our attorneys, and all the darts and arrows were thrown at her,” Rodgers said. “To the embarrassment of my group, we treated her a bit rough. But she stood up, she was tough, and she said, ‘OK, I kind of expected that.’”

In response to this experience, Everett penned an article in early 2001 aimed at people in local government entitled “Friend or Foe? The Virginia Freedom of Advisory Council.”<sup>391</sup> The article noted the council’s goal of providing an independent resource for handling open government matters for anybody, whether from government, media or

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<sup>391</sup>Maria J.K. Everett, *Friend or Foe? The Virginia Freedom of Advisory Council*, 6 *Journal of Local Government Law* 2 (June 4, 2001).

the public, but it particularly emphasized what the council offered to government employees and officials:

As a law of broad application, FOIA cannot address every factual situation; hence, the creation of the Council to help confront the day-to-day realities of its application. As we all know, there are many gray areas and the construction rules provided in FOIA do not always seem to help. At a minimum, the Council can be used as a sounding board for local governments in working through thorny FOIA issues. Sometimes individuals are too close to an issue that has fueled FOIA controversy and the Council's neutral perspective can help sort through the problem. The Council is a resource in addition to the Office of the Attorney General for answering difficult FOIA questions and has the advantage that *anyone* may ask for an advisory opinion and receive it in an expeditious manner.<sup>392</sup>

She encouraged the participation of local government representatives in the council's work, including input on legislation, and made a pitch for the practical value of the council to local government attorneys.

"To those in local government who are resistant to the idea of the Council, I submit that there are many more ways in which the Council may be used to assist you than to resist you," Everett wrote. "I strongly suggest you investigate the ways in which the Council can work for you and your clients before you decide it is of no value. Evaluate the guidance received. You may just find it helpful."<sup>393</sup>

Rodgers said that these outreach efforts were critical in getting local government attorneys to buy in to the program.

"We can trust Maria, and it had a lot to do with her coming to us," Rodgers said. "She came to us and said, 'I'm looking for help as I define the role of what a FOIA council should be, and she got input from us. She didn't take everything to heart, but she

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<sup>392</sup> *Id.*

<sup>393</sup> *Id.*



took enough to heart to make it into something that's an asset for Virginia and for localities.”

The council was also publicly supported by other groups to aid in its visibility and use, particularly by government and citizens. Wiley and Landon each made moves to publicize the council and to make it clear that it was a resource for everyone.

“We were working real hard to raise the visibility of the council and Maria’s office,” Landon said. “Anybody who called us, we told them to use Maria’s office. We got a grant from the national FOI council to create a snazzy four-color poster that was highlighting her office, with her Web site and e-mail address and phone number. She didn’t have a budget to put out materials like that. We sent one to every local government and state agency entity in the state. There was some small print that this poster made possible with the support of the national group. One of the big jobs was just to help Maria become better known and to carry out the intent of the legislature.”

Wiley said he worked on this by bringing her to speak to his colleagues in local government.

“I think the one thing we did when this was first created was to make sure Maria got out there, I got her on the program of the local government attorneys conference, and try to build the relationship from the ground up,” Wiley said. “I think that can help, but without her personality and kind of evenhanded approach, it wouldn’t have worked even doing that.”

Everett also reached out to law enforcement groups, asking Schrad to invite police chiefs to a training that was co-sponsored by the Virginia Association of Chiefs of Police.

“The subliminal buy-in is right there,” Schrad said. “They’ll see that a co-sponsor is the Virginia Association of Chiefs of Police and say, ‘Oh well, if the chiefs association is on here it must be OK.’ That partnership created a sense of buy-in and acceptance from the beginning.”

The approach appears to have worked. Government and citizens make up the bulk of the inquiries made to the council each year, with government usually making about half of the inquiries. (see Table 2)

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**Table 2 – Sources of Inquiries Made to the Virginia Freedom of Information Advisory Council**

	Public	Government	News Media	Other*	Total
2000	54	54	33	0	141
2001	365	295	179	0	840
2002	339	465	165	21	990
2003	313	472	198	18	1001
2004	397	616	145	32	1190
2005	627	756	209	60	1652
2006	611	845	232	53	1741
2007	628	854	167	46	1695
2008	649	828	208	0	1685

\* Other includes out-of-state contacts, which were included as a separate category in annual reports from 2002 to 2007

Source: Annual Reports of the Virginia Freedom of Information Advisory Council

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Over the years, the number of requests for advisory opinions declined as the volume of inquiries rose (see Table 3).

“We’re like, wow, we’re not writing many opinions, but our calls went from 800 to 1,600,” Everett said. “I take that as a good sign that there’s some credibility. And

also, since I'm real pragmatic, I'm trying to figure out solutions. FOIA can allow you to have win-win situations to give people what they want. You're not in the middle of it, so you can try this or do this. Practical solutions can be offered.”

**Table 3: Virginia Freedom of Information Advisory Council contacts, Year-by-Year**

Year	Inquiries	Advisory Opinions
2000	141	8
2001	840	71
2002	990	19
2003	1,001	24
2004	1,190	26
2005	1,652	16
2006	1,741	10
2007	1,695	13
2008	1,685	11

Source: Annual Reports of the Virginia Freedom of Information Advisory Council

Without the word “ombudsman” or “mediate” in the statute, Everett had nevertheless taken on aspects of both, often referring to her role as an ombudsman and highlighting the council’s ability “to help fashion creative solutions in an attempt to remedy a dispute.”<sup>394</sup>

“The success of the Council should be judged by the number of disputes that have been resolved, not by the number of opinions issued,” she wrote in December 2000.

Much of the council’s outreach efforts involved not just fielding inquiries, but also conducting training and education on open government matters, another area Freeman had highlighted as crucial for a “sunshine office” to be effective. From July

<sup>394</sup> *Id.* at 2.

2000 to November 2001, the first 15 months the office was open, Everett conducted about 40 presentations to numerous groups, such as the Richmond City Council, the Virginia Municipal League, the Virginia Association of Counties, the Virginia Press Association, at both the University of Virginia and Virginia Tech, and the Virginia Coalition for Open Government.<sup>395</sup> The office now conducts about 60 training sessions each year and plans to reach about 600 people through workshops across the state in 2009, though there are concerns about how much training can be done free of charge in the near future because of budget shortfalls.<sup>396</sup>

While most of the training has been aimed at government employees, it has also been conducted for news media. When the council was created, a newspaper representative on the joint subcommittee had commented that training was not just an issue for government. “Too many papers in the state have an abysmal record of training their people,” said John B. Edwards, editor of *The Smithfield Times* and one of the original members of the FOI Advisory Council.<sup>397</sup>

Everett sees the training mission as the most important duty of the council, in part because it allows her to build relationships and trust throughout the state on open government matters.

“We make the personal contacts face-to-face, and they can see how you talk and operate,” Everett said. “In outreach areas where people tend to be cynical about centralized state government, now they feel free to call.”

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<sup>395</sup> “Report of the Virginia Freedom of Information Advisory Council,” B1-B3 (2001).

<sup>396</sup> House Document No. 25, “Report of the Virginia Freedom of Information Advisory Council,” 6 (2008). The council conducted 65 training sessions in 2008 and 77 training sessions in 2007. *Id.* and House Document No. 42, “Report of the Virginia Freedom of Information Advisory Council,” 6 (2007).

<sup>397</sup> Associated Press, “Woodrum chosen as new council chairman; outreach to be first focus,” Aug. 15, 2000.

She emphasized the importance of traveling in person around the state.

“Frosty was on me for awhile, saying you don’t need to travel as much, just do a video,” Everett said. “No, that won’t work...It’s kind of like paving a road. We’re laying one brick after another, then you can see the outcome and how you got there. We’ve done around 70 training sessions a year.”

Every source praised Everett’s efforts in outreach and training, saying it has had a major impact on how people understand the requirements of the Freedom of Information Act.

“The thing that the council can legitimately claim, and it does have to be ongoing effort, is that officials are better educated about the law than they were, and Maria’s efforts are partially responsible for that,” Wiley said, citing open records audits that have shown improved compliance over the years.

Schrad and Jones both cited improved compliance numbers for law enforcement agencies as a result of the council’s emphasis on training and education, in what Schrad called “chautauqua-style” meetings across the state.

“We’ve participated in those, there’s a section on law enforcement and public safety, by providing a trainer who’s a retired Fairfax County public information officer, and we work in cooperation with the council,” Schrad said. “We have a great relationship with them.”

Everett said she has seen drastic changes in understanding of the law by government employees, also citing audits that showed much improved compliance.<sup>398</sup>

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<sup>398</sup> See Harry Minium, “Can you get public records if you ask? State localities denied about 1 in 5 bids for information that is legally open to all,” *Richmond Times-Dispatch*, A-1, Dec. 31, 2006.

“The government’s thinking and doing things correctly,” Everett said, referring to improvements in open records audits from the first one conducted in 1998 to another round done in 2006, which showed law enforcement agencies improving from 16 percent compliance to 50 percent compliance.<sup>399</sup> “It’s still not betting odds, but that’s pretty huge movement. The government is performing better. But because they’re understanding it better, then they realize that there are documents that are sensitive that should be covered, so there is more legislation for exemptions. You look at 123 exemptions to records, that seems like a lot, but maybe it’s not enough.”

Increased legislation involving the Freedom of Information Act has been one of the unintended consequences of the creation of the FOIA Advisory Council. The council has become what Landon calls a “permanent study commission on FOI issues,” a place where legislators can send any matters pertaining to the Freedom of Information Act for further consideration before drafting new bills.

Wiley said that while unintended, this development has turned out to be very important in the council’s mission.

“One of the things we hadn’t really anticipated was that this group would really serve as a permanent place for the general assembly to send FOIA legislation to be evaluated,” Wiley said. “We have a legislature that only meets at most 60 days a year, so they’re always dealing with bills in a hurry. The council has been a place where controversial FOIA bills could go and kind of receive more mature consideration. Then they could go back the next year with the council’s recommendation, and sometimes not

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<sup>399</sup> 50 percent supplied information, while 7 percent of agencies had inconclusive responses. Peter Bacque, “Requests for crime data often denied; In survey of 134 police, sheriff’s agencies in Va., 43 percent withheld logs,” *Richmond Times-Dispatch*, A-1, Jan. 1, 2007.

with its recommendation. It's a really useful thing I hadn't foreseen the council doing that much."

Much of the legislative work concerns dealing with new proposals for exceptions, which Everett points out is to be expected because of the act's general presumption of openness. "(T)he law already makes everything open – it's not like you can have a law that makes it even more open," she said.

Landon said that despite the focus on exemptions, it has made these exemptions subject to far more scrutiny than in the past.

"It used to be any legislator who introduced some pro-secrecy measure, it sailed right through, no questions asked," Landon said. "The Press Association would raise hell, but lots of luck blocking it. By having this vehicle, the study commission, we could have bills referred to take a year think about it and look for something all sides could live with."

Stanley said that the Press Association expected more legislation on exemptions as a result of the overhaul of the act in 1999 and 2000.

"We were warned from the beginning that the more exposure this FOIA council receives, the more folks will march down to Richmond to ask for exemptions, and that has come true," she said. "More and more and more state and local groups and public bodies are asking for their own exemption."

The council, Stanley said, provides a good place for these exemptions to be considered.

"I think they're very helpful in giving us time to work with folks who feel they need more protection," Stanley said. "We can try to make it more consistent. There are

instances when it doesn't always win out at the end of the day. If the council actually supports a bill, that bill is likely to pass, very likely to pass. Very few have failed."

A recent example of this is an exemption that would make it more difficult to access lists of people who have permits to carry concealed weapons. The request for the exemption came in response to the Roanoke Times, which published the list of permit holders on its web site in 2007, prompting some legislators to seek an exemption shielding those records from public scrutiny.<sup>400</sup> Stanley said the council considered nine bills on the issue in 2008.

"The council approved a bill that made the records releasable only at the courthouse but not in aggregate form," Stanley said. "Tempers are still flying pretty high from that. It's an example of the council getting involved and saving the day for us. We're thankful that the worst of the bills can get sent to the council and get killed. That helps us greatly. There's a clout there that they have that we don't have."

#### **d. Issues**

Apart from design and implementation issues, three themes emerged from source interviews concerning the Virginia Freedom of Information Council. These issues, discussed in more detail below, were the office's reputation for impartiality, the office's role as an alternative to litigation, and how the office handles overarching conflict matters.

#### **Impartiality**

Everett has cited the importance of impartiality in her role as executive director of the FOIA council, and every other source interview confirmed that she has served as an

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<sup>400</sup> Tyler Whitney, "Council recommends weapons legislation," *Richmond Times-Dispatch*, Jan. 14, 2009.



independent and impartial director that serves as the primary contact on open government matters.

From the government perspective, Wiley said that while some people in local government were worried about being second guessed and may not always have agreed with her decisions, they respect her ability to “talk to both sides and listen to what they have to say.” Law enforcement representatives responded similarly.

“She’s very balanced,” Jones said. “She does not represent one side or the other. The sheriff gets good shake, and so does the media, and therefore the public does.”

Schrad said Everett’s honesty plays a significant role in dealing with disputes.

“She’s very independent in her thinking, and she doesn’t look to protect anybody or any group in particular,” Schrad said. “The litmus test for her is, ‘Does it comply with the law?’ She does a very good job of researching issues rather than rushing to judgment. She’s very professional, very forthcoming, and very exacting in her assessment of situations. She knows our FOIA act inside and out, and I trust her and her understanding of FOIA policy.”

From the media perspective, Stanley said she “absolutely” thought Everett had been an impartial voice in freedom of information matters.

“She walks that line as well as anybody could do it, I really do think that, yes,” Stanley said. “She certainly has her own opinions, and she certainly isn’t scared to voice those one-on-one, but I think when it comes to being before the council, tries to be educational and that’s all.”

Everett has summarized the council role as an agency that “doesn’t have a dog in the fight” so it is able to be a fair resource for all who come to it for help.

“The Council serves an ombudsman role and not that of an access advocate,” Everett wrote in 2001. “Staff for the Council is housed at the Division of Legislative Services which, with its diverse legal staff, provides a collegial environment for discussing FOIA issues from a variety of subject area perspectives. Indeed, the membership of the Council reflects the varying interests in the FOIA arena, including representatives of state and local government and the media.”<sup>401</sup>

Landon added that the office now has credibility with all of the key players in freedom of information disputes.

“Maybe it’s just I’m a cockeyed optimist or I’m too far removed now that I’m retired,” said Landon, who now serves on the council. “Once every three or four years, you might hear somebody say, ‘That may be Maria Everett’s opinion, but it’s not ours.’ But it’s very few and far between, criticisms of that nature.”

Everett mentioned that her role is not about taking sides at all, and that if she is on any side, it’s “the side of non-bullshit.”

Sources voiced a few concerns about Everett’s relationship with government agencies, but they were not consistent and perhaps may be opinions influenced by their advocacy work. For example, Stanley noted that the relationship with Everett and local government was “very good” and sometimes perhaps “too buddy-buddy with them,” while Wiley said people in local government have times that they worry that Everett listens too much to citizens’ versions of the facts when they raise complaints.

“If you do that just based solely on what a citizen tells you without hearing the other side of the story, you might not get the right result,” Wiley said. “But I think Maria Everett has been pretty skilled at balancing that out. Local government people now think

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<sup>401</sup> Everett, *supra* note 391.

this system is OK... I haven't heard a great amount of discontent, and I probably would hear it if it was out there. That's probably due to her being fairly diplomatic and giving a good faith effort to get both sides of the story.”

While Everett has a great reputation for impartiality, the council, with its diversity of opinions and perspectives, is not perceived as quite the same way. For example, in a case in 2007 that Wiley argued on behalf of Culpeper County, tensions from the case spilled over from the council after the Supreme Court decided in favor of newspapers that had complained about the county's board of supervisors, which had gone into closed session for three and a half hours to discuss amending a contract for construction of a new high school with architects who had already been selected for the project.<sup>402</sup>

Stanley said the Press Association fought hard for the case, spending about \$150,000 in legal costs before eventually prevailing.

“We were very proud of the results,” Stanley said. “However, we were up against (Wiley), and he also sits on the FOI advisory council, and because of his relationship with the staff, he came to the next meeting of the council with a statement that was very detrimental to us and the Supreme Court's unanimous decision in our favor. We were livid, to say the least. I felt it was totally inappropriate, and I voiced concerns about inappropriate use of the office in that respect.”

The statement was not one regarding the official business of the council, and Wiley disagreed that it was out of place. He said, however, that if official business of the

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<sup>402</sup> The case turned on an exemption that allows government bodies to have closed sessions on awarding a public contract. The Virginia Supreme Court held that because the discussions by the Culpeper County Board of Supervisors had already awarded the contract, further discussions about “the application or enforcement of the scope or terms of a previously awarded public contract.” *White Dog Publishing, Inc. v. Culpeper County Board of Supervisors*, 272 Va. 377, 387 (2006).

council were implicated in a matter he was handling as an attorney, he would not participate in it.

“The one thing that I wouldn’t do is take a position on the council on something that one of our clients has asked for,” Wiley said, mentioning some upcoming legislation that may come before the council this year. “One of the counties we represent put a bill in that will likely be referred to the council, and I’ll have to recuse myself. Ordinarily, the things that come before the council to be voted on are not coming directly from one of our clients.”

Landon said that since becoming a member of the council in 2007, he tries to bring the same perspective he did when he was with the Coalition for Open Government, though with a different tone than in the past.

“I try to be a voice for everybody in the state on open government matters without being a bomb thrower or an extremist on open government,” Landon said.

### **Alternative to Litigation**

When the joint subcommittee studying Virginia’s open government laws began discussing creation of a “sunshine office,” Landon hailed it as a move toward alternative ways to resolve disputes besides litigation, the only remedy available at the time.

“It clearly represents the understanding that court is not the right place to resolve many of these disputes,” Landon said in 1999.<sup>403</sup>

But as the study group moved away from an agency with enforcement powers and more toward an ombuds model, Landon said he had some concerns about how well the council could serve as a way to build relationships and keep cases out of court. Those

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<sup>403</sup> Associated Press, *supra* note 380.

concerns have been eased, Landon said, by the weight that people have given to Everett's advice and opinions.

"In the years that have gone by, it's been less and less significant that there's no binding nature to Maria's opinions," Landon said. "As the office has gained clout and gained awareness around the state of what it does, as the numbers have shown its use, as the training sessions have occurred free in any community wherever there's any conflict going, that's become less and less important."

There may have been a reduction in the number of lawsuits,<sup>404</sup> but sources had different perspectives on the reasons for this. Wiley said the office has served as an alternative to litigation and has "probably...kept some cases out of court," citing a scarcity of cases that make it up to the Virginia Supreme Court.

"Because the rights that are conferred by this act are purely statutory, there's more of a tendency when something seems out of whack to change the statute rather than going to court to get an interpretation," Wiley said. "The number of cases going to the Virginia Supreme Court has been relatively small."

He cited the Culpeper County case as an outlier unique to its unusual facts, which involved a three-way contract with a school board, a county board and an architectural firm.

"The county board had a closed meeting with the architect on how to bring the school board around on a matter in dispute in the contract negotiations," Wiley said.

"The court said you couldn't do that. I think that's the kind of relatively unusual fact

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<sup>404</sup> Or, as Rodgers noted about the amount of litigation on public access matters, "I don't think they've increased it."

situation that will lead to litigation in these cases. Most of the stuff is pretty straightforward.”

Rodgers agreed that the kinds of cases that wind up in court are the kinds were going to be litigated anyway, regardless of the availability of the council as a resource.

From the news media perspective, Stanley attributed any drop in litigation regarding the FOIA council to other factors.

“We’ve seen a drop-off recently because newspapers just don’t have money to take the cases forward,” Stanley said. “But I don’t think we’ve seen a drop-off in litigation since the council went into operation. There are still pockets in this state where it’s just not working, where there are good-old-boy networks, and nobody’s going to take them to task, nobody’s going to jump up and down about open records. The FOI Council will give advice, they will intervene to the point of making phone calls and come and do training, but not anything else. That’s just not their mandate.”

Even without a mandate to issue binding opinions or to enforce the open government laws, the council has had tremendous influence in the way open government matters proceed when disputes arise. Schrad mentioned that Everett has become the state’s expert on FOIA matters, and the opinions of the council carry great weight.

“That has been a critical element,” Schrad said. “People don’t question the opinions that come out of it hardly ever. We have a very helpful council as a result.”

The opinions of the council are not binding in court, but Wiley says Everett and the council undoubtedly are persuasive.

“There have been a couple of cases in which I’ve seen the court has looked at her opinions and cited them, but not always conclusively,” Wiley said. “I hope that over

time, it will become more persuasive, but courts are not bound by it. There was a lower court case recently where the judge openly disagreed with what she said, but if you ask most people, they would say the judge was wrong and she was right.”

## **Conflict Management**

When the joint subcommittee began reviewing Virginia’s open government laws, there was evident tension between people seeking access to records and meetings and the government. Landon mentioned that citizens and news media had a “history of frustration” in access issues, while Wiley said members of the news media must “share the blame” for driving government bodies to have private meetings because they spotlight controversy.<sup>405</sup>

Everett recalled a tense exchange at one of the earliest sessions of the study group in a discussion about records custodians where access advocates and government groups were showing signs of distrust in one another.

“I remember one of the first meetings was pretty contentious,” Everett said. “The term ‘custodian’ came up, and people were asking, ‘Who in the world is the right person to ask for a record?’ Somebody said that at a school system they made a request to a janitor. I said, ‘Come on, I’m not believing that.’ My partner in general laws said, ‘OK, we’re a little bit over the top here.’”

Everett said her instinct was to “call crap” on parties when conversations would take a destructive turn, but she and other sources agree that the leadership of Woodrum helped to promote more constructive dialogue, helping the parties recognize the

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<sup>405</sup> Christine Neuberger, “Lawyer cites reasons for secret sessions,” Richmond Times-Dispatch (March 19, 1999).

legitimate interests of one another and forge a legislative proposal that would work for all sides.

While sources noted that tensions still remain, things seem to have improved since the creation of the FOI Advisory Council.

“I could definitely state that it has helped in several instances to lessen the degree of tension, yes,” Stanley said, specifically mentioning Everett’s approach as the council’s executive director. “Maria’s, let me put it gently, her bedside manner won’t always win at the end of the day, and her ability to convey her vast knowledge of FOIA law is sometimes lacking. She can be quite flip and quite abrupt, sometimes just because she knows she’s right. Do I wish for someone with more ability to talk about things in a persuasive manner as our attorney? Yes. But we’ve got a fair person, a knowledgeable person running it, and there’s great value in what she does. Her skills aren’t going to make it all warm and fuzzy, no she’s not.”

Landon agreed that the advisory council had ameliorated conflict, but that there is only so much it can do to improve the tone of conversation between people when disputes over access arise.

“You still have conflicts,” Landon said. “You still have people in media who don’t know about Maria’s office and who don’t know about FOI law, that it doesn’t always say what they want it to. It’s the same thing for citizens, who get told, ‘We don’t like the way you asked for that record, to heck with you.’ But it’s nothing like it used to be. I give Maria’s office a lot of credit for that.”

Still, journalists do not necessarily seek the aid of the advisory council much, a point that most sources mentioned. This could be because journalists have other ways of



seeking access to records and meetings, such as calling the press association, Stanley said.<sup>406</sup>

“I’m the first call that they make, and I will personally try to intervene,” Stanley said. “I’ll call whoever it is that they’re not able to get the record from, and if that is not successful, they can get advice from our counsel free of charge... They (also) can call Maria to see if they can get more than I got. Some folks will call straight to Maria because they have built a relationship with her. Looking at the statistics, the media is far below in the number of requests, but that’s because they have me, I’m first call they make, and most of the time I can get these resolved.”

Several sources noted that the most persistent conflict remains in matters of access involving law enforcement.

“It’s particularly elected sheriffs who are reluctant to give up information,” Wiley said. “They release it only when they think it’s useful. That makes it difficult.”

The most recent audit of public records showed improved compliance in law enforcement, a fact that Schrad said she was very proud of. However, the numbers still hovered around a 50 percent compliance rate.<sup>407</sup> Both Jones and Schrad attributed this to an older generation of police chiefs and sheriffs, and both expressed hopes that new people in those positions can change the approach that led to some unfortunate comments from the 2006 audit. A Prince Edward County sheriff’s captain said, “I told you straight up, we’re not giving out no records,”<sup>408</sup> and a Petersburg police receptionist who

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<sup>406</sup> Wiley noted that the press has other resources to call, but he couldn’t resist a tongue-in-cheek remark about why journalists may not contact the advisory council for advice. “It may be that they don’t want to know the right answer, too, but that’s my own bias.”

<sup>407</sup> Bacque, *supra* note 399.

<sup>408</sup> Minium, *supra* note 398.

responded to a reporter who told her that records were open under state law, “Not in this office they’re not.”<sup>409</sup>

Jones said the council’s outreach efforts in training and education have helped law enforcement improve in these areas.

“That has worked extremely well,” Jones said. “The reason I say that is that when a sheriff comes into office, there’s a sense of ownership of this information, and they don’t own it, the public owns it. Every time we have new sheriffs school, we have someone from that office come and talk, and she’ll tell them here’s what you should do, here’s where you lose if you get sued, here’s where you win if you get sued.”

#### **e. Analysis**

Through thoughtful design and implementation, Virginia seems to have created a system for managing disputes arising under open government laws that satisfies major stakeholders and has increased knowledge and awareness about freedom of information issues in the state.

Interviews with several sources who were involved in both the joint subcommittee and have been involved in the continuing work of the Virginia Freedom of Information Advisory Council had few criticisms of the creation of the office or how it has worked out since it was implemented. As an attorney representing government groups, Wiley said the group has worked out as planned, with the added benefit of being a place to consider and refine open government legislation. As a former newspaper editor now representing the state’s press association, Stanley said she has been “very satisfied” with the council as it was created and as it has worked since its creation.

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<sup>409</sup> Lindsay Kastner, “Local responses run the gamut,” *Richmond Times-Dispatch*, A-9, Dec. 31, 2006.

While the design of the FOI Advisory Council does not appear to have been explicitly influenced by the tenets of Dispute Systems Design, the process nonetheless reflected several of the elements of DSD.<sup>410</sup> The joint subcommittee studying Virginia’s freedom of information laws spent parts of two years discussing the creation of a “sunshine office” that could handle disputes arising under the state’s open government laws. The subcommittee itself included Democrats and Republicans from both branches of the state legislature, and it included people who represented citizen, news media and government interests. Other stakeholders representing these varied interests – such as private investigators, state government, local government, law enforcement, and citizen watchdogs – were also present at the meetings of the subcommittee. The group did a thorough examination of how other states managed disputes arising under open government laws and sought consensus on each issue before drafting a bill to send to the legislature.<sup>411</sup> The subcommittee itself was moderated by a respected legislator who encouraged informal discussions and compromise between the stakeholders, and when issues became contentious, the non-partisan legislative services staff that was present – headed by Maria Everett, who would build her reputation as an independent and impartial source who could serve as the executive director of the council once it was created – was called upon to facilitate and help reach consensus. The subcommittee also shrewdly placed the council in a place where it could be as independent as possible, avoiding overtures from the governor and the attorney general and thus avoiding potential conflicts

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<sup>410</sup> Sources were asked if they had any knowledge about Dispute Systems Design at the time the subcommittee was created and none said they did. Everett said the process was common for the way studies were done by legislative subcommittees. “The whole point of studies is to bring people to the table and figure out what the answer is,” she said.

<sup>411</sup> Everett pointed out that the alternative to consensus would be to have the legislature sort out any differences by majority vote, “and nobody wanted them to make that call.”

of interests that could arise with their oversight of the council. The council seems to have operated free of outside influence as a result.<sup>412</sup>

Perhaps equally important in creating an effective “sunshine office” to resolve disputes was ensuring that the stakeholders embraced it early on as a resource to turn to when issues arose under the Freedom of Information Act. Both Landon and Wiley described their efforts to build support among their constituents – Landon for citizens and media, Wiley for local governments – for the council’s work. The office did extensive outreach to various groups, conducting training sessions for citizens, students, government employees and people in the news media. Everett herself made multiple efforts to sell her office as a valuable resource to government employees and officials, helping to encourage them to buy in. Inquiries to the office grew steadily, from 840 in the council’s first full year in 2001 to nearly 1,700 in both 2007 and 2008.

Every source credited Everett’s forceful personality and reputation for independence as crucial elements in the council’s effectiveness. As executive director, Everett is in charge of the day-to-day operations of the office, and her performance as the face of the council in both outreach and dispute resolution has helped to establish it as a trusted resource for citizens, media and government.

However, every source attributed a great amount of the council’s success to Everett’s performance as executive director. When Everett must be replaced, the council will face a challenge to maintain the consistent voice and tremendous respect that Everett commands from stakeholders in open government matters. Additionally, Everett’s efforts may be hampered by budget cuts in a difficult economy. She noted that the office has

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<sup>412</sup> Stanley raised one worry, which is that as a legislative office, the council would have to be funded in the budget each year, meaning it could possibly be cut as a cost-saving measure. However, none of the sources interviewed thought this was very likely to happen.

“never operated in the black,” with actual expenses closer to \$215,000 rather than the budgeted amount of \$185,000 expected in 2009. She said that this may mean reduced travel and outreach opportunities, one of the strengths noted by many sources. Other sources noted that because the office is in the legislature, it must be reauthorized each year, meaning it could be cut altogether during lean years, though none of the sources thought that was a realistic possibility.

It is possible that this case study is colored by the sources who were interviewed, most of whom has had some important tie to the FOI Advisory Council. Everett and Wiley were both part of the subcommittee that created the council, and Wiley has been one of the council’s 12 members since its inception. Landon, who pushed vigorously for the study group as the director of the Virginia Coalition for Open Government, is also currently a member of the council. Stanley participated in meetings of the subcommittee and works closely with the council, particularly on legislative matters. Both sources representing law enforcement participated in the creation of the council and have known Everett well for several years. As Schrad put it, referring not just to Everett but also to the other major players involved in open government issues, “As they say in Virginia, we’ve been knowing each other a long time.”

However, finding sources who have not been involved in either the creation or the normal operations of the council is difficult; so many stakeholders have been involved in both the design and implementation of the office that there are few sources who could provide a true outsider perspective.

The Virginia Freedom of Information Advisory Council has not solved all of the state’s issues regarding open government, but it appears to have had a major impact as a

resource for thoughtful handling of open government disputes and legislation. Expanding its reach to areas where open government principles have not been as warmly embraced, particularly more rural areas, smaller communities and in law enforcement, remain as important areas that Everett and the council must continue to extend its influence and build its reputation as a trusted resource. Sources were confident, however, that the council was on the right course to tackle these issues appropriately.

## CHAPTER 6: CASE STUDY – ARIZONA

### a. Historical Background – Arizona’s Open Government Laws

Arizona’s Public Records Law and Open Meetings Law have developed in very different ways. The state’s records laws are more than a century old but were without alternatives to litigation as a dispute resolution tool until recent years, while the open meetings laws were created more recently and have long been policed by the Office of the Attorney General.

The Public Records Law<sup>413</sup> was adopted in 1901 and creates a presumption of openness of any record in the office of any government officer.<sup>414</sup> The Arizona Supreme Court has long affirmed the strong public purpose of the law, making the point in 1952 that allowing the state to determine which documents should be open to the public is “inconsistent with all principles of Democratic Government,” instead requiring judicial review of state efforts to deny access to its records.<sup>415</sup> The court later noted that “access and disclosure is the strong policy of the law.”<sup>416</sup>

The courts, however, provided the only recourse for a person who believed he or she had been denied access to records. Complainants were allowed to file a cause of action to challenge an “alleged refusal to provide public documents,” but there was no administrative agency in place to handle such actions.<sup>417</sup> John Fearing, the deputy

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<sup>413</sup> A.R.S. 39-121 et seq. (Lexis 2008).

<sup>414</sup> Arizona Board of Regents v. Phoenix Newspapers, 167 Ariz. 254, 257 (1991). *See also* Daniel C. Barr & Amy J. Oliver, “Foreword,” Open Government Guide: Arizona (2006), [www.rcfp.org/ogg/index.php?op=browse&state=AZ](http://www.rcfp.org/ogg/index.php?op=browse&state=AZ).

<sup>415</sup> Mathews v. Pyle, 75 Ariz. 76, 80-81 (1952).

<sup>416</sup> Carlson v. Pima County, 141 Ariz. 487, 491 (1984).

<sup>417</sup> Moulton v. Napolitano, 205 Ariz. 506, 515 (Ct. App. 2003); *See also* A.R.S. § 39-121.02

executive director of the Arizona Newspapers Association, said this made enforcing violations of the open records law extremely difficult.

“The problem in Arizona is that if you didn’t have a lawfirm at your fingertips and some government person said, ‘No, you can’t have that record,’ then you’re done,” Fearing said. “You either have to sue in Arizona or you have to run away with your tail between your legs.”

The Open Meetings Law<sup>418</sup> is a much more recent creation. The first version of the law was enacted in 1962 after several failed attempts by the legislature to pass a law ensuring public access to meetings of government agencies.<sup>419</sup> The legislature clearly stated the purpose of the law:

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.<sup>420</sup>

Similar to the Public Records Law, the Open Meetings Law had no formal mechanism in the statute for resolving disputes under the act besides judicial remedies.<sup>421</sup> Unlike the records law, however, the Open Meetings Law called for enforcement by the attorney general or county attorney, who “may commence a suit” in superior court “for the purpose of requiring compliance with, or the prevention of violations of, this article.”<sup>422</sup> To respond to these issues, the Arizona attorney general created the Open

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<sup>418</sup> A.R.S. § 38-431 et seq.; *see also* Cooner v. Board of Education, 663 Ariz. 11, 11 (Ct. App. 1982), in which the court noted that “the open meeting law was enacted in 1974...although it was preceded in 1962 declaring that it was the public policy of the state that proceedings of government bodies be conducted openly.”

<sup>419</sup> *See* Barr & Oliver, *supra* note 402.

<sup>420</sup> A.R.S. § 38-431.09.

<sup>421</sup> A.R.S. § 38-431.07.

<sup>422</sup> A.R.S. § 38-431.07(A).



Meeting Law Enforcement Team (OMLET) in 1982 to handle complaints from citizens about violations.

David Merkel, who worked as the Tempe City Attorney for more than 30 years before becoming general counsel for the Municipal League of Arizona Cities and Towns in 1998, said that the open meeting laws had been on the books for several years but were largely ignored until the late 1970s, when local government bodies “started cranking up the volume” of executive sessions. This was when the attorney general stepped in.

“When the volume started cranking up, the attorney general’s office said, ‘Hey, we have to add a little structure to this, we have to have some intake mechanism and enforcement mechanism,’” Merkel said. “And they’ve become very knowledgeable in this particular area. Which is good, now there’s some consistency there.”

The attorney general created a Public Records Task Force in the late 1990s, said Paula Bickett, an assistant attorney general who was the task force’s first chair. However, that group’s mission was to advise state agencies on public records law policy, not to serve as a resource for citizens or other groups when disputes arose over access.

“In Arizona, the attorney general is in charge of enforcing open meetings laws, but they just wouldn’t go for that with open records laws,” Fearing said.

The lack of enforcement in public records issues became more publicized with the results of an audit conducted in 2001 by several media organizations in Arizona.<sup>423</sup> Just over half of the law enforcement agencies audited complied with a request under the Public Records Law,<sup>424</sup> and “(a)uditors who visited school district offices often had to

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<sup>423</sup> The Arizona Daily Star, “Open & Shut: An Arizona statewide public records audit,” Jan. 22, 2002, [www.azstarnet.com/publicrecords/index.html](http://www.azstarnet.com/publicrecords/index.html).

<sup>424</sup> Jacques Billeaud & Enric Volante, “Police less likely to open records,” *The Arizona Daily Star*, Jan. 22, 2002, [www.azstarnet.com/publicrecords/20122-police.html](http://www.azstarnet.com/publicrecords/20122-police.html).

cite the law to get documents.”<sup>425</sup> An officer for the St. John’s Police Department filed a “suspicious person” report about a reporter from the Associated Press who had asked to see the crime log and refused to say why he wanted it.<sup>426</sup>

The audit prompted several newspapers to publish editorials calling for stronger enforcement of the Public Records Law, including calls for the legislature to do something about it.<sup>427</sup> Fearing, representing the Arizona Newspapers Association, said the audit made it clear that people needed other options to aid them in open government matters.

“I thought that there has to be some alternative dispute resolution for common person in Arizona, including if you’re a journalist, because journalists have no special status in our society over regular people,” Fearing said.<sup>428</sup>

Fearing sought support for an office similar to Indiana’s Public Access Counselor, an independent office to oversee open government matters and issue advisory opinions. He went to attorney general and gubernatorial candidate Janet Napolitano, who he said expressed some support.

“Me and my attorneys and newspaper folks had lunch with her,” Fearing said.

“We said, ‘Janet, this is one thing we have to get done.’ She said it’s a great idea, and if I

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<sup>425</sup> Jon Kamman & C.T. Revere, “Open government concept under strain,” *The Arizona Daily Star*, Jan. 23, 2002, [www.azstarnet.com/publicrecords/20123-main.html](http://www.azstarnet.com/publicrecords/20123-main.html)

<sup>426</sup> Associated Press, “St. John’s officer files report on ‘suspicious’ AP reporter,” *The Arizona Daily Star*, Jan. 22, 2002, [www.azstarnet.com/publicrecords/20122-st.html](http://www.azstarnet.com/publicrecords/20122-st.html)

<sup>427</sup> Associated Press, “Editorial reaction: a ‘disturbing trend’ among public officials,” *The Arizona Daily Star*, Jan. 24, 2002, [www.azstarnet.com/publicrecords/editorials.html](http://www.azstarnet.com/publicrecords/editorials.html)

<sup>428</sup> Daniel C. Barr, a media law attorney who represents newspapers and who had some objections to the creation of a public access counselor, said Fearing had other motives besides standing up for regular people. “That’s what he says now. John was sort of naïve about it. He thought it would be a great tool for smaller newspapers.”

get elected, I will appoint somebody in my office to do this. She got elected, but after that, she never took my calls. But she liked the idea.”

He also went to the board of the newspapers association to talk about lobbying for a bill, but he received lukewarm support at first, with some newspapers telling him they thought it would slow down the records access process.

“It was just me and my attorney,” Fearing said. “The TV and radio folks weren’t there, and the First Amendment Coalition attorney thought it was the worst idea since fill-in-the-blank. I was about the only person who pushed it from day one. The board (of the Arizona Newspapers Association) backed it, but they had to overcome one of the metro papers in town.”

Fearing said he and his attorney drafted a bill and got state Senator Dean Martin to sponsor it. In 2005, the Arizona Senate passed a bill that would have appropriated \$185,000 to create a “public access adviser’s office.”<sup>429</sup> The office would have been placed in the Arizona State Library, Archives and Public Records, but some legislators objected to this, said Patrick Shannahan, who has served as the Arizona Ombudsman since the office’s creation in 1996.

“So then they had to say, ‘What do we do with it?’” Shannahan said. “In the very last days of the session, they said to give it to the state ombudsman and to give me \$50,000 to do this additional mission. But it was too late in session to resolve that, so it died.”

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<sup>429</sup> Associated Press, “House defeats bill on public access,” May 11, 2005.

The new duties of the Ombudsman's office would have been focused on training and educational purposes, which Martin said were already being conducted by other groups.<sup>430</sup>

Fearing persevered, coming back for the 2006 legislative session with a new sponsor and another bill, one that would create new duties in the office of Ombudsman-Citizens' Aide to investigate public access complaints and to conduct training and education.

"In the second year, things changed, and we found the chairman of the Senate Appropriations Committee to sponsor the bill," Fearing said, referring to Senator Robert Burns. "It was his bill that created the ombudsman's office to start with. We went to this guy and floated this bill with him, and we said that the ombudsman's office would be great place for this kind of person. He agreed and carried the bill."

Burns contacted Shannahan to talk about the ombudsman's expanded role under the proposal.

"My advice to them was that I work for you, I work for the legislature, so if you want to give me this additional mission, we can do that, just give me additional resources to allow me to make this successful," Shannahan said. "They asked, 'What do you need?' I told them two people and \$185,000, I can do it for that, and they said OK."

Shannahan said there was little opposition to the bill, noting that it "sailed through the legislature." Chris Thomas, director of legal services and general counsel for the Arizona School Boards Association, recalled that he was the only one at many of the legislative sessions who raised any objections about the bill.

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<sup>430</sup> *Id.*

“In Arizona, we already have the attorney general as the primary enforcer of the open meetings law, and I was concerned about adding another layer to that,” Thomas said. “I stated those objections on the record, and I was assured that that was not the intent of the bill. The bill was intended to give citizens a resource to navigate these relatively complex laws that the attorney general doesn’t have the resources to deal with. We were kind of told it would be a more collaborative thing.”

Fearing agreed that while some people branded it as a “newspaper bill,”<sup>431</sup> he saw it as a bill that would help regular citizens far more than newspapers.

“People complain about special interest groups, but almost every piece of legislation is brought by some special interest group,” Fearing said. “It just happens to be that our special interest is information from government.”

The bill appropriated \$185,000 to the Ombudsman’s office to hire two assistants, one of whom was to be an attorney, to handle public access matters. The bill passed the Senate by a vote of 27-2, and Napolitano signed the bill into law on June 21, 2006.<sup>432</sup>

## **b. Design and Formal Structure**

The ombudsman’s office began work in 1996, and Shannahan, a retired Army colonel, was chosen to be the state’s first ombudsman. The office has several specific duties outlined by statute, including:

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<sup>431</sup> Senator Jack Harper, who voted against the final version of the bill, said, “We now have a government program for everybody, including privately owned newspapers.” Christian Palmer, “State ombudsman role expands to mediate AZ’s public records requests,” *Arizona Capitol Times*, June 23, 2006.

<sup>432</sup> *Id.*

- Investigating administrative acts of agencies that may be “contrary to law”<sup>433</sup> or “unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion or unnecessarily discriminatory”<sup>434</sup>
- Seek an “appropriate remedy” upon filing of a complaint<sup>435</sup>
- Notify complainants within 30 days of receipt whether their complaints will be investigated<sup>436</sup>
- Provide written annual reports to the governor, the legislature and the people,<sup>437</sup> and
- Appoint a deputy ombudsman and hire other employees.<sup>438</sup>

The ombudsman’s office operates free of charge to citizens filing complaints.<sup>439</sup> After investigations are concluded, the ombudsman may present its opinions to the governor, legislature, and/or prosecuting attorneys.<sup>440</sup>

Shannahan said the office is intended to be a “neutral, impartial and independent” resource for citizens and government officials.<sup>441</sup> The office is in the legislative branch of government, but it has the power to investigate complaints about all areas of government except for the judiciary and state universities.<sup>442</sup> The office’s physical

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<sup>433</sup> A.R.S. § 41-1377(A)(1).

<sup>434</sup> A.R.S. § 41-1377(A)(2).

<sup>435</sup> A.R.S. § 41-1377(B).

<sup>436</sup> A.R.S. § 41-1378(B).

<sup>437</sup> A.R.S. § 41-1376(A)(2).

<sup>438</sup> A.R.S. § 41-1376(A)(4).

<sup>439</sup> A.R.S. § 41-1378(C).

<sup>440</sup> A.R.S. § 41-1376(B).

<sup>441</sup> Christian Palmer, “Up close with Patrick Shannahan, Arizona ombudsman-citizens’ aide,” *Arizona Capitol Times*, Aug. 4, 2006.

<sup>442</sup> A.R.S. § 41-1371(2)

location also is intended to represent its independence; the office cannot be in the state office complex or next to any state agency.<sup>443</sup>

“We're the ones who are supposed to take what people say with a grain of salt,” Shannahan said. “I look at the complaint and what they are saying with a critical eye and I look at what the agency says with a critical eye. The point of having us in the legislative branch, instead of the executive branch, is to give us the independence to do that. In other words I can say something that one of these big agency directors doesn't want to hear and my parking space is not going to change. They don't affect my resources and they can't fire me.”<sup>444</sup>

After the first bill failed to create an independent office in the State Library, Archives and Public Records division, another possibility was giving the duties to the attorney general's office, which had been investigating open meetings issues for years. But there were concerns about the office's independence there, Fearing said.

“If it was in the attorney general's office, they were afraid the attorney general couldn't be fair because it also serves as a representative for state agencies,” Fearing said.

Fearing said that when the ombudsman was brought up, there were some fears by citizen and media advocates that government employees would ask questions about every public access request to the ombudsman, thus slowing down the access process. But he says those fears turned out to have been unfounded, and that the ombudsman's office is “the right place for it.” Besides being an independent location, Fearing said the ombudsman's office provided a resource and a shield for public employees who were uncertain about the law.

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<sup>443</sup> A.R.S. § 41-1382.

<sup>444</sup> Palmer, *supra* note 441.

“Suppose I want to go down to city hall for a copy of an accident report my son was involved in,” Fearing said. “The person down at City Hall doesn’t know what the records are, doesn’t want to get in trouble, doesn’t want to her get boss in trouble, so she says, ‘No, you can’t have that.’ My argument was that a public access ombudsman gives them somebody to go to shift blame to if something goes wrong. If at future point in time, some person goes to the clerk to harass her about giving out records, she can tell them, ‘The public access ombudsman said it was OK.’ It gives the government somebody else to shift blame to, and blame I don’t mean in negative terms. I’m a clerk, I process these reports, I don’t know anything about public records, but if somebody else says it’s a public record, take it.”

When the legislature added public access duties to the ombudsman’s office, it was a new charge for the office, which had rarely handled complaints about public access issues in the past, according to Shannahan.<sup>445</sup> Shannahan said the most egregious abuse he had seen before 2007 was when the office once investigated the Arizona Department of Transportation had refused to respond to company’s request for documents about contracts for seeding and planting next to state roads for more than two years.<sup>446</sup> Besides that, however, complaints to the office on public access issues were not common.

“We haven’t gotten into a lot of public access complaints,” Shannahan said in 2006. “I don’t have a lot of case history to fall back on. I don’t know enough about it.”<sup>447</sup>

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<sup>445</sup> “Anyone denied access to records is welcome to seek help from his office, Shannahan said, but the ombudsman has no authority to force any official to comply.” Kamman & Revere, *supra* note 425.

<sup>446</sup> Palmer, *supra* note 441.

<sup>447</sup> *Id.*



Shannahan said he approached the new public access duties the same way he did the other duties of the office, with two major exceptions. First, the statute creating the public access duties calls for one of the two new assistant ombudsmen to be an attorney.<sup>448</sup> Though none of the other assistants in the office were attorneys, Shannahan said he saw the necessity of having an attorney in this role.

“It is absolutely essential to have an attorney do this as opposed to a lay person like me,” Shannahan said. “The other stuff we do, we don’t have attorneys doing it, we have lay people doing it, and it works. But when it comes to public access, there’s so much law involved, and people calling the shots are often attorneys. There’s a tremendous amount of attorney to attorney discussion going on, so it’s absolutely essential that our person is an attorney. If I didn’t have an attorney in that position, I think we’d be lost. We need an attorney to be credible, someone who can cite case law and have conversations with attorneys.”

Second, the statute calls for the public access ombudsman “to train public officials and educate the public” about public access laws through “interpretive and educational materials and programs.”<sup>449</sup>

Shannahan emphasized the importance of these duties in public access.

“(We) don’t approach it just as a case complaint office,” Shannahan said. “I think the education piece of it is critically important. What we find is that government people out there are eager to be taught, school boards and city councils and fire districts are always asking us, can you come out and spend a day with us? They are eager and thirsty to be told how they should do this because it’s very complicated.”

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<sup>448</sup> A.R.S. § 41-1376.01(A).

<sup>449</sup> *Id.*

When the ombudsman's office is approached by citizens or government with inquiries about any manner, including public access, Shannahan said the office has three distinct approaches to resolving disputes: coaching, assistance, and investigation.<sup>450</sup>

Shannahan said the first level, coaching, is used when the office believes that people are capable of resolving problems on their own.

"We talk them through what their options are," Shannahan said. "It could be a city clerk calling us asking about a request for these personnel records, but there's personal information in them, what should we redact? Or a citizen wants to get copies, this is what I'm looking for, how do I go about doing that? We're coaching them about things. We want them to be focused and targeted and not too general in their requests, and we're coaching them about how they can do their part."

The second level, assistance, is when the office makes contact, usually by telephone, with an agency to help a citizen through a dispute.

"Typically with records, it would be, 'I submitted a request a month ago and I haven't gotten a response yet,'" Shannahan said. "We can contact the government agency and say this person called us, he hasn't gotten a response, what's going on? We can kind of facilitate that, we can get the person the record, and we can do it very informally, with no pointing fingers or assigning blame."

If coaching and assistance fail to resolve disputes, the office may then consider an investigation, for example, when a person has requested a record and feels that the request was denied unlawfully. At this point, a more formal process begins under the

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<sup>450</sup> See Arizona Ombudsman-Citizens' Aide, Annual Report 2007, 5 (2008).

statute, under which the ombudsman's office can examine offices and confidential records and can even hold hearings.<sup>451</sup>

After the legislature passed the changes creating the new public access duties in the ombudsman's office, Shannahan had a little more than six months to get the office ready to begin work on Jan. 1, 2007. He began by deciding that the office would have general responsibility for public access matters, with the new attorney position serving as the primary contact person. The second full-time position, Shannahan said, would help with the additional workload brought on by the public access duties but would assist in other matters in the office as well.

"The second person is not working full-time on public access," Shannahan said. "We added it to the mix, and now everybody in my office does public access work. There's not a separate telephone number to call for public access. When they have a problem, they call our number, and whoever answers the phone, they help them."

If a complainant were requesting an investigation or a legal opinion, those calls would be passed on to the attorney. But if the call required more coaching or assistance, "anybody could do that," Shannahan said.

Because Shannahan intended for the attorney position to serve as the primary contact on public access matters, he created an informal search committee to sort through the hundreds of applications for the position and make recommendations to him about finalists. The committee included representatives from the Office of the Attorney General, the State Library, Archives and Public Records, and the Arizona Newspapers Association to inform his hiring decision. Shannahan had a vision for what he wanted in the person who would take on this new position.

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<sup>451</sup> A.R.S. § 41-1376.01(C).

“I was looking for someone who would be capable of working independently, because this is a job that requires a lot of travel throughout the state,” Shannahan said. “I wanted...someone who was an attorney who had some experience, but not somebody straight out of law school, and not an old attorney because we couldn’t afford an old attorney. If they had experience with open records or open meetings, that was a plus. I wanted someone who was very articulate, who would be able to talk to other lawyers and to legislators and officials and also be able to talk with public people off the street. I was looking for someone with a positive personality, who would say, ‘Let’s make this thing better, let’s work to improve the situation,’ not someone with a negative regulator sort of attitude. And I wanted somebody who was capable of taking the program from scratch and building it up.”

Ultimately, Shannahan hired Elizabeth Hill, an attorney who had worked in the attorney general’s office for three years and who had spent time on the Open Meetings Law Enforcement Team. While Shannahan said that her experience on the enforcement team was not the primary consideration in her hiring, several other sources noted it as an advantage Hill brought to the new position.

“I’ve been very pleasantly surprised since the law went into effect, and a lot of that went into who they hired,” Thomas said when talking about Hill’s performance in the position. “She had a real good backing in open meetings law, so that helped.”

Hill said her background at the attorney general’s office helped, but that she had to make a transition from that culture to the approach of the ombudsman’s office.

“I didn’t know about anything about being an ombudsman formally,” Hill said. “I have an attorney background, and I was a litigator for a while, so it was a transition from

being an advocate to more of a mediator approach. But as far as training goes, it was mostly sitting down with Patrick Shannahan and discussing our role and what I should be doing, reading various materials. He's been doing this for 13 years."

### **c. Implementation and Developments**

Hill joined the office in February 2007, and she and Shannahan began to build the public access part of the ombudsman's office from scratch.

"When she and I started work together, the first thing we did was develop a business plan, kind of analyze the mission," Shannahan said. "Who do we need to talk to, what do we need to say, what are our objectives? Then, we had to figure out how to get the word out to two sides. First, the public needed to know that the office existed, and second, how to get the word out to clerks and lawyers to know the office was in place."

The office issued a press release and expanded the office's web site to include public access resources for the public.<sup>452</sup>

Hill said this involved making "point of contacts" for public bodies across the state and other key players in open government matters.

"For the first month or so, I spent time drafting an introductory letter that I sent out to close to a thousand public entities, key public people such as city attorneys and county attorneys, with the idea that they would then trickle information down to their clients," Hill said. "And hitting some of the associations that provide assistance to these local government entities, such as the League of Cities and Towns, the Counties

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<sup>452</sup> Arizona Ombudsman-Citizens' Aide, *supra* note 450 at 14.

Association, building rapport and contact within them to help spread the word about what it is that I do.”

Hill said that in the first couple of months, it was sometimes difficult because the people she would call would not know her or what the ombudsman’s office was doing in public access matters. She continued to send out letters, educational materials and offered to meet face-to-face with several people to build the office’s personal contacts.

“Now, very rarely do I get the reaction, ‘I’ve never heard of you, what do you do?’” Hill said. “Sometimes I do in rural communities.”

Because Shannahan’s plan was to have the attorney position serve as the primary contact on public access matters, Hill has been able to focus on open meetings and public records matters exclusively.

“Other people in the office can get any issue,” Hill said. “Anyone who feels they’ve been treated unfairly by a state agency can call and complain. Mine are very different. I’m very isolated from the rest of the group from the nature of the laws involved. It’s just because in public records, there’s a lot of interpretation involved and a lot of legal analysis involved. That’s why the legislature requires an attorney to do this.”

Much of Hill’s early outreach work involved creating educational materials. By April, she had created “open meeting law and public records law handbooks” that include statutes and recent attorney general opinions on open government matters.<sup>453</sup> The office distributed more than 4,000 of the handbooks – more than 2,000 each for public records and open meetings issues – to agencies across the state in 2007.<sup>454</sup>

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<sup>453</sup> *Id.* The most recent handbook, dated May 2008, is available at [azleg.gov/ombudsman/Public\\_Records\\_Book.pdf](http://azleg.gov/ombudsman/Public_Records_Book.pdf)

<sup>454</sup> *Id.* at 15.

Hill also began conducting training sessions, conducting 11 sessions – six on open meetings and five on public records – in the office’s first year.<sup>455</sup>

“Now, I get calls every day requesting training, and a huge part of what I do is travel around state providing training for people who ask for it,” Hill said. “It’s the most fantastic opportunity to make face-to-face contact with these folks, to show them I’m not a scary person and that I’m here to work with them.”

She said that requests for training sessions have more than doubled each year. She said that she conducted 38 sessions in 2008, and that she has already scheduled 30 in the first two months of 2009.

“My role involves a lot of education,” Hill said. “I offer trainings that are three hours each, three hours of open meetings, three hours on public records, so it takes up a full day. I’ll sometimes come in to see the city staff, the manager, the mayor. And I do a lot of training for attorneys through the state bar association. I’ll even do training for the attorney general’s office. So it really is a huge role, with lots of outreach and traveling. With budget cuts, I don’t know how much traveling I’ll do this year, but I may do more webcasts. Every month, I have a training session downtown, and anyone who wants to come can come.”

Government sources praised Hill’s role in education and training. Bickett said she sometimes advises state agencies to seek training on public records matters through the ombudsman. Merkel said Hill has done “a wonderful job” in training, and Thomas said she has added a valuable resource to public officials.

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<sup>455</sup> *Id.*

“She has been real proactive in terms of doing training and working proactively with public agencies,” Thomas said. “We do a lot of that ourselves just with school boards, but we welcome another voice that is doing that.”

Thomas emphasized the importance of conducting the seminars without cost for participants.

“Our presentations we do on the open meetings law tend to be part of a larger conference or a seminar, and there’s a registration fee for it,” Thomas said. “We mostly do them for cost. The ombudsman does them for free, and for those who are cost-conscious, which is even more so today, that’s really attractive.”

Hill said her training sessions have had an unexpected impact as well, leading to an increase in calls to the office.

“People who’ve never heard of me before now have heard of me and listened to me for six hours,” Hill said. “Hopefully, it decreases the complaint calls I get because the government employees are educated and in-tune. On the other hand, I think it increases my call volume because now I’ve become their personal legal advisor. They call every day, any time they have a question about open records or public meetings law. They should talk to their attorney, of course, but I don’t mind talking to them about these issues. I’m kind of their go-to person.”

In July 2008, Hill began writing a series of Public Access Newsletters to serve as educational resources as well, providing updates on recent legislation, case law and attorney general opinions. She had produced four newsletters through January 2009.<sup>456</sup>

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<sup>456</sup> These reports are available on the web site of the Arizona Ombudsman-Citizens’ Aide, [www.azleg.gov/ombudsman/reports.asp](http://www.azleg.gov/ombudsman/reports.asp).



Shannahan said that Hill's role as public access "teacher" is just one of her primary duties. The other role is as a "problem solver."

"People contact her with questions and complaints and concerns, and she looks into it," Shannahan said. "That's the ombudsman role. She helps to resolve those problems. If they're legitimate, she tries to change what the agency is doing. If it's not legitimate, she works to resolve the problem with the complainant."

Shannahan has required that each of the assistants in the ombudsman's office go through a 40-hour mediation training program, which Hill did in 2008. The office itself rarely uses the term "mediation" to describe how it can intervene in cases requiring assistance, but Shannahan said that mediation skills are crucial for an ombudsman to resolve disputes effectively. Rather than use the word "mediation," though, the office prefers "informal assistance" to describe how it approaches disputes.

"It's one thing I learned early on," Shannahan said. "If I call a government agency and say who I am and say, 'This person has a complaint and I'm calling to see how to work it out, and we kind of do what a mediator would do but don't use the word 'mediation,' people are willing to work with us, and that seems to work. If I call and say, 'Let's have a mediation,' flags go up, they say, 'I can't, I have to have an attorney present.'

"That raises warning flags for them. They want to get attorneys involved, and it becomes more difficult to do. It's easier for us to mediate doing all the things a mediator would do. It's easier for us to mediate a dispute but not really use the term 'mediation.' There's an expectation about mediation, where people go into this room, and there's a

table, and there are rules, and you sign things. We kind of want to do it using that process, but in a less formal way.”

Hill said her approach is to help parties identify the problems and come up with their own resolution.

“A lot of times in public records stuff, there is either some legal basis for why they’re not giving out the record, so then I’m educating the person who called and made the complaint,” Hill said. “I do a lot of coaching and assistance. Some of it is investigation if it warrants it, if based on facts there is a question on whether something was done properly, and then saying, ‘This is a violation, it was not done correctly, and this is what I recommend that you do.’ Only if they don’t accept my recommendations do we go through the formal reporting process. If they’re willing to accept the recommendations, my involvement pretty much ends there.”

But she said that resolving problems informally, and ideally before they even become problems, is her goal.

“When people call, sometimes they just need some assistance,” Hill said. “We can make some calls, send some e-mails, and try to get the ball rolling. We can be proactive, too. Last week, I got a call about an agenda item the caller thought was improper before a meeting ever took place. I could call the school district and express concerns about an agenda item that wasn’t done properly. We were able to fix a problem before it ever happened.”

Sources representing government and citizens both said Hill has so far succeeded in providing this kind of “informal assistance.”

“Sometimes she’ll tell me if one of client issues taking position that’s problematic,” said Bickett, an assistant attorney general on the Public Records Task Force. “I’ll contact the attorney for that agency and we can do some informal things that hopefully will avoid Liz having to take any formal action against one of our agencies.”

However, sources representing news media said the mediation-style approach often means seeking middle ground when journalists feel they are not in a position to compromise on public access matters, particularly when avoiding delay in providing records is essential.

“Their tendency is to split the baby, and that’s fine if you want to split the baby, but my clients don’t believe that they should have to,” said Daniel C. Barr, a media law attorney in Phoenix who works with the First Amendment Coalition of Arizona. “For easy cases, it’s very useful, but in the cases I deal with, where the positions are pretty well known, splitting the baby is not satisfying.”

David Cuillier, a professor at the University of Arizona and the chairman of the Freedom of Information Committee for the Society of Professional Journalists, said the mediation approach can work, but difficulties can arise if agencies choose not to cooperate.

“When you have these situations, hopefully Liz might be able to mediate everything out here, but some agencies can dig in their heels and it’s going to take a lawsuit or litigation to get this fixed. It hasn’t solved those big problems,” Cuillier said. “My guess it has helped in a lot of places where ignorance was the issue, where an agency clerk or a citizen just didn’t know the law. But there’s still some percentage of these requests where an ombudsman’s not going to help.”

These points underscored a major theme raised by all sources – that the public access ombudsman has turned out to be primarily a resource for citizens and government agencies, not for the news media that lobbied for the creation of the position. More than half of inquiries have been made by members of the public, while just under 9 percent have been made by people in news media. (see Table 4)

Fearing said this was what he expected all along, particularly considering the experience in other states that had ombudsman and public access counselors such as Indiana and Iowa.<sup>457</sup> Others have been more surprised by this.

“I expected there would be more cases brought to us by the media,” Shannahan said. “That was one of the concerns over at the legislature because the main sponsor outside of the legislature was the newspaper association, where the media said they were trying to open up the government. Going in, I anticipated that a large number of calls would be from the media, but that really hasn’t been the case.”

**Table 4 – Public Access Inquiries to Arizona  
Ombudsman-Citizens’ Aide**

<b>Year</b>	<b>Government (pct)</b>	<b>Citizens (pct)</b>	<b>Media (pct)</b>	<b>Total</b>
2007	138 (37.5%)	198 (53.8%)	32 (8.7%)	368
2008	231 (36.3%)	351 (55.2%)	54 (8.5%)	636
TOTAL	369 (36.8%)	549 (54.7%)	86 (8.6%)	1,004

Source: 2007 Annual Report of the Arizona Ombudsman-Citizens’ Aide and interviews with Ombudsman-Citizens’ Aide Patrick Shannahan

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<sup>457</sup> Fearing said he requested that the statute include a requirement that the ombudsman track users of the program and compile annual statistics, which is part of the law creating the public access duties. *See* A.R.S. § 41-1376.01(B)(1). “One of things I wanted in the bill was statistics at end of year,” Fearing said. “I wanted to throw those numbers in their face. Nobody believed government or citizens would be a big user. Everybody believed it was newspaper bill.”

Shannahan noted that this meant that the agency had been a better resource for government agencies than he had imagined.

“That kind of shows that going into this thing, one of the things I said in my testimony (before the legislature) is that I don’t think a lot of people out there are trying to hide stuff from the public,” Shannahan said. “When that happens, we can take care of it. But in most cases, they want to do the right thing, but they don’t know what the right thing is. If we can coach them, be an information resource for them, they’ll do the right thing first, and there won’t be complaining about it, and they’ll do the right thing again and again and again. That’s why the education part of this is so important.”

Thomas said that from the school boards perspective, the ombudsman has been a good resource for people in government.

“It’s come a long way,” Thomas said. “I feel like it’s been a positive addition, and oftentimes it has worked opposite of what I thought. A citizen might be irate about what they see as a violation of the open records or open meetings law, and they’ve already been told ‘no’ by a school district, and then they’re told ‘no’ by the ombudsman. If they’re advocating for something that’s not supported by the law, it actually helps to have a third party who is further removed from the situation.”

Representing news media, Cuillier said that one reason may be that journalists have other resources available that can be of more assistance than the ombudsman.

“We already have a media hotline that Dan Barr runs,” Cuillier said. “It’s funded by the Arizona First Amendment Coalition, so when the media have issues, they call this hotline, or Dan can write a letter. You can get an attorney to hit them over the head.”

Barr agreed that the ombudsman is a better resource for citizens.

“The ombudsman does a lot of good, especially for non-media requests,” Barr said. “But when people like me get involved, with clients in the media, in situations like those, the ombudsman doesn’t do much good.”

Still, Cuillier noted, the office’s new duties have overall been “a good thing for the state,” and he said his student journalists have had some success when seeking Hill’s assistance.

“I’ve had students who have gone to her because agencies have illegally denied them info for class projects, stories, reporting, data, that sort of thing,” Cuillier said. “They’ve had kind of mixed results. She’s been very responsive about responding immediately and contacting agency, and when it’s blatant, she’s good at talking sense to them.”<sup>458</sup>

When the ombudsman’s office is contacted on public access matters, most of the inquiries have been about public records rather than open meetings, with public records inquiries topping 70 percent each year.<sup>459</sup> Shannahan attributed this at least in part to the existence of other resources to handle open meetings disputes such as the attorney general’s Open Meetings Law Enforcement Team.

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<sup>458</sup> Cuillier specifically mentioned Hill’s response to the Tucson Police Department, which he said would “just come up with ludicrous reasons for blowing off students and saying no.” Hill mentioned an incident involving a student reporter and Tucson police in 2007, saying that when the student asked for a database of auto thefts, “she got the run around for more than two weeks” before receiving a document without the make and model of the cars stolen. The reporter was later denied access to the database by a supervisor who cited the federal Freedom of Information Act – which does not apply to state agencies – as a reason. Hill said she called and she also “received the run around for several days” before contacting an attorney for the department, who provided an electronic copy of the record. *See Arizona Ombudsman-Citizens’ Aide, supra* note 450 at 16.

<sup>459</sup> *Arizona Ombudsman-Citizens’ Aide, supra* note 450 at 15. The 2008 numbers were provided by Shannahan during a telephone interview.

Shannahan and Hill said the ombudsman's office has coordinated with the attorney general to prevent duplication of efforts and to make sure that the public is receiving a consistent message about the application of the state's open government laws.

"We met with them before we even got going into this thing," Shannahan said. "My philosophy is that I don't feel compelled to agree with the attorney general. He can do what he wants to, and I don't have to agree with that because I don't work for the attorney general. However, it certainly is nice, good, desirable for us and the attorney general to be saying the same things."

Complaints on meetings issues may be filed either with the attorney general or the ombudsman, but both offices have expressed intentions to defer to the other if the other agency is contacted first.<sup>460</sup>

"Typically, we don't very often have a situation where someone calls OMLET with a complaint and then they call us," Shannahan said. "Usually, if they call OMLET, they take care of it, and if they call us, we take care of it."

Bickett said that on public records matters, there have been no instances of "stepping on each other's toes," and a representative from the OMLET said the offices have worked together well, particularly on training and education matters.

"It seems like they were created with a lot of duties for education, so we've actually shifted some of our educational focus over to them," said Chris Munns, an assistant attorney general and member of OMLET. "A lot of times when we find violations with public bodies, we refer them to Liz for training. They do also have the authority to investigate complaints and to take evidence and hold hearings, but they don't

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<sup>460</sup> "If a complaint has been filed with the Open Meeting Law Enforcement Team, we will defer to them to handle the complaint and any investigation." Arizona Ombudsman-Citizens' Aide, Frequently Asked Questions, [www.azleg.state.az.us/ombudsman/faq.html#open](http://www.azleg.state.az.us/ombudsman/faq.html#open)

have the enforcement ability to go to superior court. I think she really does want to focus on the educational side and facilitating disputes.”

Hill said that on a couple of occasions, she has referred cases to the attorney general for investigation when she thought that the situation called for enforcement.

“One time, it was a repeat offender,” Hill said. “I was familiar with them and their previous violations from when I worked in the Attorney General’s office. I tried to work with them to get them on the right path, but the same violations were reoccurring, so I referred them to OMLET, and I said they need more serious enforcement and penalties or they’re never going to learn.”

Shannahan agreed, noting that when agencies have been reluctant to cooperate with the ombudsman’s office in an inquiry or investigation.

“Sometimes, if the problem is so severe it should get the attorney general’s office involved for enforcement, I’ve said, ‘You know, you guys should take a look at this,’” Shannahan said. “We work independently, we’re on separate tracks, we don’t do joint investigations, but we try to make sure we’re consistent. And there are times when we’ve referred cases over to OMLET when enforcement was necessary, when we needed that hammer to make sure a government body does what it’s supposed to do.”

A more recent development in the ombudsman’s office has been having a role in legislation on public access matters. While these duties are not specifically mentioned in the statute, Hill said the duties have put her in a position to see issues that the legislature should address, such as clarifying access to electronic records and fee charging for electronic records.<sup>461</sup>

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<sup>461</sup> Arizona Ombudsman-Citizens’ Aide, “Winter Highlights,” 2 The Public Record 1, 3 (January 2009).



“Our office has proposed legislation this year,” Hill said. “This is the first year I’ve done it, but we’ll do it on an annual basis, outlining trends we see in public records open meetings law... We work for the legislature. The legislature is Patrick Shannahan’s boss, and the purpose of our office is for us to be the eyes and ears of the legislature. They look for us to identify problems in government and with statutes.”

#### **d. Issues**

From interviews with sources and other historical research, three additional themes emerged: independence and impartiality, the ombudsman’s role in diverting disputes from litigation, and broader conflict management implications. These are discussed below.

#### **Independence and Impartiality**

Each of the sources raised the importance of the ombudsman’s office being both independent – that is, free from external influences, particularly in government – and serving as an impartial resource for parties who seek assistance or investigation. Shannahan said that independence and impartiality are “essential elements of any ombudsman’s office,” and most sources agreed that the office has been independent and has remained impartial since being charged with its new public access duties in 2006.

Shannahan said that even though the ombudsman’s office is in the legislative branch, he feels no pressure from the legislature and does not cater to it or any other

political subdivisions. He said some of this security comes from the structure of the office, which by law makes it difficult for him to be influenced.<sup>462</sup>

“The way we get that is that the legislature appoints me to five-year terms, and I then have complete control over other decisions,” Shannahan said. “Who I hire, who I fire, how we operate, I have control of that. During that five-year term, it takes a two-thirds majority of the legislature to fire me, and in Arizona, getting two-thirds to agree on anything is next to impossible. It helps to assure the independence of the office.”

Shannahan noted the importance of public perception that the office is, in fact, independent, and he said that his office has done in its more than 12 years of work. However, Barr said he still feared that the office could not truly be independent of the legislature, thus making it a questionable resource for his media clients who have a dispute with a government agency.

“The news media have heightened protection in our system (from government interference),” Barr said, specifically talking about the free press guarantee in the First Amendment. “And then to turn to a government agency for help in enforcing the law against the government? It’s one thing to go to the courts, that’s in the judicial system. But the ombudsman gets a paycheck and is funded by the legislature.”

Fearing disagreed, saying that any concerns people had about the ombudsman having difficulties with independence or impartiality had not been realized.

“There was some fear in the beginning that this person, because they’re paid by the government, would favor the government, but I don’t believe that has happened,”

Fearing said.

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<sup>462</sup> See A.R.S. § 41-1375, which outlines the five-year term of office for the ombudsman-citizens’ aide and how he or she may be removed from office.

Shannahan said the office has been free to criticize any government group publicly, and in his experience, that has not been an issue for the ombudsman's office.

In a similar way, Shannahan described how the office's independence had cultivated a track record for being impartial as well.

"I haven't seen concerns by people in government or people outside of government about our ability to be impartial," Shannahan said. "I think they feel they're going to get a fair shake from us. It's our attitude, that we're not just trying to make someone think we're impartial, we really are impartial. When you have that attitude, that's the way you talk to a government person or a citizen, that's going to come across. You can't fake it."

To build a reputation for impartiality, Hill said she made an effort early on in her outreach, particularly to government groups, to explain what she planned to do as the point person on public access matters in the ombudsman's office.

"I did a number of presentations at luncheons, telling them, here's what you can expect from me, here's what my plan is, here's my role," Hill said. "I didn't want to call them and have them be automatically on the defensive, so I had to show them that I'm impartial and independent, and I'm not calling as an advocate or as an attorney for anyone."

Hill added that the only time she would take on more of an advocacy role was when a person in government was relying on invalid or unlawful reasons for not complying with a request.

"If a public official says, 'We're not going to give it to them because of this reason,' I can tell them, 'That doesn't seem like a valid reason,' and I try to provide them

information to do the right thing,” Hill said. “If they don’t do it, then I can tell them I am pursuing it and follow through on behalf of the person calling. If they don’t, then I do file a report of misconduct.”

She said this has only happened one time so far. A citizen had requested copies of e-mails of board members and other records from the Peoria Unified School District Governing Board in September 2007. The board did not respond for a month, leading the citizen to contact the ombudsman’s office. After a formal investigation, Hill determined in March 2008 that the board should release some of the e-mails immediately and recommended that the board undergo public records law training.<sup>463</sup> After this didn’t happen, Hill said she filed a formal report of misconduct with the head of the agency and with the legislature.

Thomas said that the ombudsman’s office has also been able to take an advocacy approach both when talking to citizens who are “wrong on the law” and with his school board clients.

“I’ll do a training for a board, the board will hear what they want to hear, then they’ll go to Liz and say I said this, but of course I’ll tell her I said the opposite,” Thomas said “We’ve been on the same page about things for the most part. I think she’s got a great reputation out there, and specializing particularly in this area has helped.”

### **Alternative to Litigation**

Most sources said it was too early to tell if the ombudsman’s office was having an effect on the number of disputes that end up in court. However, several doubted that

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<sup>463</sup> Arizona Ombudsman-Citizens’ Aide, Final Report of Investigation, Case # 702863 (March 18, 2008).

placing public access responsibilities in the ombudsman's office would serve as a substitute for litigation as an option for parties in dispute over access.

"I'm not aware of any (impact on litigation)," Thomas said. "I think people are better trained, but I don't really see a decrease in litigation as a result of this. Districts that usually find themselves in trouble have decided willfully not to do things one way, but it's not because the ombudsman hasn't interceded."

Some of this, another attorney representing government said, could be that so few cases are litigated in the first place.

"If you look through the annotations for reported cases, which means they made it to the appellate level, and there are probably some that didn't advance that far, but you look at how long the laws have been on the books and how many cases reported there, it's fairly infrequent," Merkel said. "I think it's a very, very small fraction of 1 percent. Maybe one to two cases a year, I'd say one a year would actually be more accurate."

More common, Merkel said, are threats of lawsuits that come through the negotiation process. He also cited a strong deterrent factor for government groups in pursuing litigation – the negative publicity it can bring to an agency if a news media plaintiff wins a case.

"If they win one, they splash it all over the front pages," Merkel said. "You don't want to lose one. They love attorney's fees. They love to write how they won attorney's fees."

Cuillier and Barr both mentioned that the lack of enforcement power by the ombudsman's office makes it almost impossible that the office can effectively serve as an alternative to litigation. Cuillier said part of the reason the Arizona Newspapers

Association had pushed for the legislation creating the new ombudsman duties was to provide “an outlet for weeklies that can’t afford to go to court,” and that it had not worked out that way so far.

“A major flaw is that (the ombudsman) really doesn’t have any teeth or authority,” Cuillier said. “It’s a real weakness. Agencies can just blow her off. Up in Phoenix, they’re just a bunch of yahoos. It’s out of control what these agencies do, particularly sheriffs and police.”

He mentioned a situation in which Phoenix police were refusing to include any personal identifiers such as date of birth or addresses of arrested suspects in response to anti-identity theft legislation<sup>464</sup> that specifically mentioned that it was not intended to alter or otherwise impact the Public Records Law.<sup>465</sup> Hill received a legal opinion from the legislative council stating that the new law “did not modify what is considered a public record.”<sup>466</sup>

“Well Liz is like, ‘What the?’ She wrote a letter opinion to everybody, to law enforcement agencies and said, ‘See, read the law here, it says see, don’t do this,’” Cuillier said. “And they just ignored her and ignored everybody else.”

Barr agreed that it was issues such as this that showed that without the power to write legally binding opinions, the ombudsman’s office would sometimes have difficulty getting agencies to comply with its recommendations.<sup>467</sup> The result, he said, is that the

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<sup>464</sup> See A.R.S. § 41-4172, which orders government agencies to “develop and establish commercially reasonable procedures to ensure that...personal identifying information...is secure and cannot be accessed, viewed or acquired unless authorized by law.”

<sup>465</sup> See Ray Stern, “Phoenix Police to Limit Release of Public Information Based on Anti-Identity-Theft Law,” Phoenix New Times (Jan. 7, 2009), [blogs.phoenixnewtimes.com/valleyfever/2009/01/phoenix\\_police\\_to\\_limit\\_releas.php](http://blogs.phoenixnewtimes.com/valleyfever/2009/01/phoenix_police_to_limit_releas.php)

<sup>466</sup> Legislative Council Memo, “Effect of Identity Theft Legislation” (Sept. 26, 2008), [www.azleg.gov/ombudsman/Effect\\_of\\_Identity\\_Theft\\_Legislation.pdf](http://www.azleg.gov/ombudsman/Effect_of_Identity_Theft_Legislation.pdf).

<sup>467</sup> As quoted by Eric Graf, “Ombudsman office helps public obtain records,” *Tucson Citizen*, Oct. 5, 2007.

ombudsman may be able to help journalists on rare occasions, but that the only real remedy for journalists in particular was consistently seeking redress of open government law violations in court.

“The founding fathers and the legislature, when they set up the system, they gave some special rights to the news media that they didn’t give to anyone else,” Barr said.

“They protected private businesses and their right to publish. And they gave them some tools to deal with. But there was an unspoken quid pro quo. You have to go out and use them. Not using your powers and instead going to an agent of government to step in and help is a cop out.”

### **Conflict Management**

Sources were generally in agreement that the ombudsman’s office has been more successful in managing conflict between citizens and government than between media and government. Through training, education, and informal assistance, the office has created an environment that is less adversarial and more cooperative when dealing with government agencies and members of the public, Thomas said, ameliorating some of his initial concerns that the office may serve as an advocate for citizens at the expense of government interests.

“Being an attorney who trains in it and being on a school board for four years, I’ve come to the understanding that some of the things I train boards on (about public records and open meetings) is not so easy to do,” Thomas said. “We could all do a little bit better job on that, and I think areas like creating the ombudsman and having

somebody who is more there for assistance is a good thing as opposed to someone who's in a more adversarial position...The ombudsman is out there more in a proactive way."

The roots of conflict between government and citizens often stems from a lack of trust, Hill said, and dealing with this issue has been one of her primary concerns. One way she does this is by responding to all inquiries within 24 hours, even if it means having her Blackberry on her at all times, including weekends. She said she tries to have all inquiries resolved within three days unless they require more formal investigation.

"That goes back to people's perception of government," Hill said. "I'm still the government, but I think it goes a long way if you acknowledge people or respond to them soon. Even if I know I can't get right to it because I'm traveling, I can tell them to get me all of the information, but I won't be able to start this until next week. Nobody gets upset about that, if you contact them and let them know."

Shannahan and Hill both said that the tone of negotiations varies, but that when citizens are most upset, it is usually because of some history or personality conflict with the representative of the agency they are dealing with.

"Some people who call, they think the government is against them, government is bad, and they automatically assume that whatever they want to do, the government is going to give them a hard time," Hill said. "How we handle that is explain to them how the process works and why the government may be reluctant in certain instances to provide information."

She sees the same issues when talking with government agencies.

"Usually, if it's the agency I need to disarm them and try to get the crux of what biases are with this person, because of the history, and try to figure out what those are



and work around that,” Hill said. “It’s disarming them, working around problems, putting personal issues aside, and let’s just focus on the request and what the law requires and see why we’re having a problem here.”

Any improved levels of comfort and trust that have been built in the office’s first two years working with government and citizens has not been reflected by managing the relationship between media and the government. In part, several sources noted, this has been because journalists use other resources to handle disputes arising in public access matters, such as the First Amendment Coalition’s hotline.

Fearing said there may be a more consistent personal relationship between journalists and government officials that may not require intervention by the ombudsman.

“It helps the general public far more than it benefits journalists, and we believe that’s because journalists are smart enough to know the open records laws and are more persistent, more well-known by the person they’re trying to get records from, so there’s less distrust.”

However, several other sources noted that distrust still lurks in the relationship between media and government, a situation that Barr said is not only unavoidable but is virtually required by the American constitutional scheme.

“My original thought is that the way the press and the government are set up, there’s a tension between the two of them,” Barr said. “It’s systemic. There’s tension, and I don’t view that as a bad thing. But it’s problematic for the press then to go to someone in government to turn to with issues about the government. Again, I don’t view it as a bad thing. They have different interests. They’re supposed to have different interests.”

One of the main interests that creates difficulties, sources noted, is having public records requests handled in a timely manner that satisfies journalists' need for information when they are on a deadline.

"It's one thing for people who are not members of the media," Barr said. "But for my clients, the timeliness of getting access means everything. Delay means denial, and getting a record four months from now is not a win."

Hill said that she keeps this in mind when dealing with inquiries from the media. She said she often sees more tension between disputing parties when journalists make an inquiry, and dealing with the matters of timeliness and with the personal history between journalists and government officials can be challenging.

"With the media, I find that when I read their requests, with the tone that they use, I can see why the government gets defensive," Hill said. "They put them on the defensive. It almost becomes accusatory in the request before the government has chance to respond. When I contact them, I try to be as neutral and impartial as possible, be professional and assertive without putting them on the defensive. The same goes for the government. Sometimes the responses are overly harsh, and they could deny access nicer, rather than saying, 'We're the government, we get to decide.'"

Other statements from interview sources made it clear that managing conflict between media and government would be a very difficult thing for the ombudsman. Merkel, an attorney representing local government interests, noted that other incentives were what motivated his clients to deal with journalists.

"I think having good relations with the media if you work for government is an essential qualification," Merkel said, mentioning two aphorisms he likes to tell his

clients. “Don’t get into pissing contest with a skunk, and don’t get in an argument with man who buys ink by the barrel. They can get the last laugh.”

From the media perspective, Fearing said he has personally experienced the tension in the relationship between a person seeking access and government agencies while participating in one of the public records law compliance audits conducted by newspapers.

“I was in a small town in northern Arizona. I go down to the police station and go to ask to look at a current log of calls,” Fearing said. “Holy crap, you’d have thought that what’s-his-name from Afghanistan was there in person. The sheriff asked me, ‘Who are you?’ and ‘Why do you want them?’ I said, ‘My name is John Fearing,’ and he said, ‘You can’t have that, it’s not a public record.’ I didn’t get anywhere.”

#### **e. Analysis**

According to Shannahan, the creation of the public access program in the ombudsman’s office was “an effort to increase government awareness and provide the citizens of Arizona an effective and efficient means to get answers and resolve public access disputes” by providing a free service to help people “untangle the public access web.”<sup>468</sup> In a little over two years, the office has unquestionably made inroads with people in government and citizens to establish itself as a resource for open government matters, public records issues in particular.

The creation of the public access program in the Arizona Ombudsman-Citizens’ Aide office was largely a legislative matter pushed by the executive director and the lobbyist of the Arizona Newspapers Association, which mostly represents smaller,

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<sup>468</sup> Arizona Ombudsman-Citizens’ Aide, *supra* note 450 at 14.

community newspapers. The office was created despite skepticism or outright lack of support from other people usually on the same side in access matters, such as the First Amendment Coalition of Arizona and some metro newspapers, and citizen representatives do not appear to have been involved in discussions about creating the program. Opposition from government groups, while presented during consideration of the legislation by a representative of the Arizona School Boards Association, also did not seem to have any impact on shaping the legislation that created the office. This lack of stakeholder involvement and lack of consensus-building at the early stages of the program's creation would create obstacles that the ombudsman's office would have to deal with as the program was implemented in 2007.

However, the program appears to have worked as it was intended to for citizens and for people in government, the two groups who have been by far the most likely to make public access inquiries to the ombudsman. The culture within the ombudsman's office, which had been in existence for more than a decade before it was handed the new public access duties, seems to have eased Hill's transition to the ombudsman role. The ombudsman's reputation for independence and impartiality also seems to have aided the program as it began reaching out to people, government representatives in particular, to establish the ombudsman as an authoritative voice on public access matters in Arizona. All of the non-media sources interviewed for this case study had nothing but praise to offer for Hill and her performance as the assistant ombudsman for public access, noting her credibility as an attorney who was experienced in open government matters and her effectiveness as an educator and dispute resolver. The early emphasis Shannahan and Hill placed on outreach and getting the government to buy in to the office as a credible

resource appears to have paid off with what they see as substantial participation by government agencies.

The office, however, still faces significant challenges in building trust with some in the news media. While Hill said she has built good relationships with several journalists, Barr and Cuillier both expressed some doubts about how well the ombudsman could handle disputes involving news media. Part of this could go back to the legislative process, when these concerns were initially expressed and were either never heard or outright disregarded. While Fearing and the Arizona Newspapers Association were clearly supporters of the office and could be counted on to build support among constituents in using the office as a resource on public access matters, that same level of support has been lacking from other areas of news media.

The ombudsman's office also must continue to make outreach efforts and to build Hill's credibility as the authoritative resource for public access inquiries for people in government. An ombudsman, which does not traditionally have any formal enforcement power, must rely on persuasion and voluntary compliance to intervene in disputes and to coerce cooperation with the law effectively. Some agencies have apparently chosen to disregard Hill's advice, leading to 30 investigations and at least one formal report of misconduct in the office's first year of operation.<sup>469</sup> Other anecdotal evidence points to agencies openly refusing to heed the ombudsman's advice on public access matters, leading some people in the news media to question further the effectiveness of the program.

Because the public access program is only two years old, this case study comes at a time when much of the impact of the program may still be yet to come. It could be that

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<sup>469</sup> *Id.*

two years is simply not enough time for the program to build a reputation for independence, impartiality and credibility with the news media. Similarly, any difficulties the program has had in reaching more rural areas or with law enforcement agencies in larger population centers could just be a matter of not having enough time to make inroads and build stronger relationships with these government agencies.

The relative newness of the program also made it difficult for even people who spend much of their time dealing with open government matters to evaluate the effectiveness and impact of the ombudsman's office. Several of the sources interviewed for this case study admitted that they had only had a few dealings with the office, and that these were often during public access training sessions rather than during disputes over access. So while the sources are undoubtedly representatives of interests in government, citizens and the news media who have participated in the creation of the public access ombudsman program or who have followed it closely, this case study is necessarily limited by their individual experiences with the office in its two years of existence.

So far, however, the public access program in the ombudsman's office appears to be providing valuable outreach in training and education that can proactively help avoid disputes and, in the case of the relationship between citizens and government, may be building a more constructive framework for managing conflict. To do the same for the media-government relationship and to build credibility as an authoritative voice for dispute resolution in public access matters, the program appears to need at least more time.

## **CHAPTER 7: CONCLUSION**

Government transparency is essential in a democracy to ensure that citizens and their proxy, the news media, can effectively scrutinize the conduct of public business. For this reason, the federal government, the District of Columbia, and all 50 states have passed open government laws that are intended to ensure public access to government records and meetings.

And yet, more than a century after the earliest of these “sunshine laws” went into effect, citizens and journalists still struggle to consistently receive access to meetings and records as the laws require. Tension is certainly inherent in the relationship between a citizenry that wants to remain informed and agents of government who seek to control information, and the tension may be even greater between government and those given special protection under the First Amendment to monitor government, the news media.

Since Connecticut created the state’s Freedom of Information Commission in 1975, several jurisdictions have developed programs to manage disputes concerning public access to government records and meetings. While every state offers judicial remedies for parties who feel they have wrongfully been denied access to records or meetings under the law, alternative programs have been created in 32 states, the federal government, and the District of Columbia. Through the use of frameworks in Conflict Theory and Dispute Systems Design, this research has sought to build understanding of these alternative dispute resolution programs in the context of public access.

In Chapter 2, five types of systems were identified and described – Multiple Process, Administrative Facilitation, Administrative Adjudication, Advisory, and

Litigation. These systems are typically formal, created by legislation or other official government action; however, beyond lines of informal negotiation through advocacy groups, as described in Chapter 3, there are no realistic options for citizens and journalists other than proceeding with litigation or using the more formal dispute resolution system.

Sixteen jurisdictions have created programs following the Administrative Facilitation model in the past 20 years to provide an alternative means to resolving disputes over access without relying on litigation. A more recent trend has been the development of ombuds programs, which call for an independent office to handle inquiries, resolve disputes and provide training to help avoid future disputes. The first of these was Virginia, which established its Freedom of Information Advisory Council in 2000 after two years of legislative study. Iowa created a new position in the Office of Citizens' Aide/Ombudsman for public access matters in 2001, and Arizona created a similar program in its Ombudsman-Citizens' Aide office in 2007. Washington's attorney general created an Open Government Ombudsman position in his office in 2005, and Tennessee formally began work in its Office of Open Records Counsel in 2008. Congress has appropriated \$1 million to establish an ombudsman to be placed in the National Archives to oversee federal Freedom of Information Act matters, and hearings were held in the fall of 2008 to begin laying the groundwork for establishing that office as early as 2009.<sup>470</sup>

A review of literature revealed that no empirical research had been done on these public access ombuds programs. To build understanding of the design, creation, implementation and development of these ombuds programs, case studies were

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<sup>470</sup> See Hannah Bergman, "Congressional hearing focuses on new FOIA ombudsman," News Media Update (Sept. 17, 2008), [www.rcfp.org/newsitems/index.php?i=7010](http://www.rcfp.org/newsitems/index.php?i=7010).



conducted of the programs in Iowa (Chapter 4), Virginia (Chapter 5) and Arizona (Chapter 6). These case studies were intended to help inform the development of other recently-created ombuds programs and to aid the design and creation of new ombuds programs.

In this concluding chapter, the approaches to conflict management in open government matters will be evaluated, with a particular emphasis on the three ombuds programs examined in Chapters 4, 5 and 6. The case studies will also be analyzed to consider the implications for Dispute Systems Design theory. Finally, recommendations for designing a public access ombuds program will be made in light of the experiences of the programs in Iowa, Virginia and Arizona.

#### **a. Improving Conflict Management**

Access to public records and meetings is just one aspect in the complex relationships among citizens, the news media and the government. As such, dispute resolution systems dealing with public access matters only address one aspect in the culture of conflict in these relationships, which have roots dating back to the earliest days of the country, when the founders laid out the rights, powers and duties of each.

However, open government dispute resolution systems can aim to address the culture of conflict in public access matters, which many of the sources interviewed for Chapters 3, 4, 5 and 6 described in terms that represent destructive, rather than constructive, conflict. Sources described deep suspicion on both the part of those seeking access and government employees who control access, with poor channels for communicating their interests and a lack of trust about the motives of the other party.

People in government were described as fearful of the way requesters would use information once it was released, while those seeking access feared corruption and conspiracy by the government when it denied or delayed access to information. Several aspects of government, particularly law enforcement, are inclined to favor privacy as a fundamental interest, while information seekers see inherent value in openness. The lack of trust in the motives and values of the other party leads to using various coercive tactics. The government can deny access, stonewall, and delay, leading requesters to use more formal processes such as litigation, or using the press to shame and embarrass the government when access disputes arise. This tit-for-tat, contentious behavior seems to have caused conflict about access to information to have escalated in every jurisdiction, according to sources interviewed.

Public access ombuds programs are one way to work toward constructively managing the conflict in this aspect of the citizen-government-media relationship, and as the Virginia experience has shown, the tone of discussions and understanding about the roles and motivations of the other parties can be improved through a trusted and impartial third party that has the power to manage disputes informally and to facilitate compliance through outreach, education, training, informal mediation, and investigation. However, sources in each jurisdiction were nearly unanimous in their belief that the existence of a public access ombuds program is, on its own, unlikely to change the culture of conflict between people seeking access and government.

In this sense, then, designing an effective dispute resolution system appears to be just one step in constructively managing conflict in public access matters. How, then, can the broader goal of transforming destructive conflict into constructive conflict be

achieved? After reviewing public access dispute resolution systems in the 50 states, the federal government, and Washington, D.C., and interviewing more than 30 sources representing several various interests in open government law and policy, three major factors appear to be essential to improving conflict management: (1) building knowledge of the rights and duties inherent in open government laws, (2) building trust in the relationship among parties in conflict on open government matters, and (3) taking time to allow transformation to occur.

Building knowledge of both the requirements of open government laws and the centrality of these laws in ensuring transparency in democratic governance has been the greatest contribution of public access dispute resolution programs, particularly those that invest significant time and resources into outreach, education and training. In this sense, conflict is managed by proactively avoiding certain disputes and unnecessary escalation of the conflict between those who control access to information and those seeking access to that information. However, even in jurisdictions with strong commitments to outreach, there are still pockets that the open government message has not penetrated, which several sources identified as more rural areas and smaller communities. Outreach to these areas is crucial, as is a consistent commitment to transparency by leadership in each state, county and city in the country. Consider the top-down approach in Florida described by Pat Gleason in Chapter 3, an approach that begins with a commitment to openness by the governor that is mirrored by the attorney general's office and is actively pursued by open government advocates in the state. The federal government will surely provide a test of the effectiveness of this top-down approach, and open government advocates hope that President Barack Obama's stated commitment to openness and

transparency, announced on the first full day he took office in 2009,<sup>471</sup> can be a positive step toward changing the culture of conflict in public access.

Building trust in the relationship among the parties in conflict presents more of a challenge. The goal is not to have journalists, citizens and government always believe one another; that would run counter to the watchdog role and the need for an informed citizenry that are central to the American system of democracy. However, conflict management can be improved by having the parties minimize suspicion in one another and trust the other's roles, responsibilities and motivations in public access matters. Interviews with numerous sources made it clear that trust was lacking on all sides. Government representatives complained that journalists did not understand the legal and technical difficulties of handling complex access requests, while also expressing reservations about perceptions of journalists' intention to cause mischief once records were handed over. News media representatives were skeptical of any reason for closure, and many said they were frustrated that more cases did not proceed to litigation, where government could be sanctioned and required to pay attorney's fees. Horror stories about obstinate public officials and citizens convinced of government conspiracy and cover-ups were disturbingly frequent in interviews and news accounts. Trust can be built through improved relationships and conflict management skills; public access dispute resolution programs have potential to build these relationships by requiring parties to engage one

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<sup>471</sup> See Sheryl Gay Stolberg, "On First Day, Obama Quickly Sets a New Tone," *The New York Times*, Jan. 21, 2009, [www.nytimes.com/2009/01/22/us/politics/22obama.html](http://www.nytimes.com/2009/01/22/us/politics/22obama.html). The administration's memorandum on the Freedom of Information Act, issued the day after Obama became president, began with the line, "A democracy requires accountability, and accountability requires transparency," and calls for the act to "be administered with a clear presumption: In the face of doubt, openness prevails." The White House, Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009), [www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct).

another at a less formal level, but these programs are also just one aspect that can impact these complex social dynamics.

Clearly, improving knowledge and building trust are not short-term matters, nor should they be addressed in a shortsighted manner. Managing conflict in public access matters constructively will take time, and parties interested in improving constructive conflict management should recognize this and develop long-term plans accordingly. Connecticut's Freedom of Information Commission and New York's Committee on Open Government have both been in operation for more than 30 years, and while both have reputations for success in handling public access disputes, neither has been able to achieve perfect or near-perfect compliance with open government laws. They have also failed to transform the tone of conflict in their jurisdictions. However, few would doubt that they have had some positive impact on the citizen-government-journalist relationship. The three public access ombuds programs examined in this research are each less than a decade old, and while Virginia seems to have laid the groundwork for increased knowledge of open government requirements and better relationships between disputing parties, the state still has work to do to ensure compliance with the law. Open government advocates should remember that improving conflict management takes time and requires long-term, consistent commitment to building knowledge and establishing trusting relationships.

#### **b. Dispute Systems Design Implications**

As discussed in Chapter 1, Dispute Systems Design theory provides a framework both for designing new dispute resolution systems and for evaluating dispute resolution

systems that are already in place. The case studies of public access ombuds programs in Iowa, Virginia and Arizona provide illustrations of the design process as these programs were created and implemented. The case studies also provide details about the current operation of the public access ombuds programs, which can be evaluated from a Dispute Systems Design perspective.

None of the three states explicitly used a Dispute Systems Design process in the design and creation phase of their public access ombuds programs. As outlined by Costantino & Merchant, the ideal way to design a dispute resolution system to ensure its effectiveness was to involve stakeholders in the process, to train and educate the stakeholders about resolving disputes, and constantly evaluate the effectiveness of the system once it has begun.<sup>472</sup> This kind of empirical research that examines both the design process and the outcome can help build theory in Dispute Systems Design, particularly by addressing Bingham's question of how systems design affects the function of that system.<sup>473</sup>

In her "distillation" of the Dispute Systems Design literature, Fader focused on the importance of "thorough self-assessment" at the front end of a systems design process.<sup>474</sup> Through this self-assessment, relevant stakeholders are brought together to discuss the characteristics of their disputes and their existing procedures, with a goal of determining the proper kind of system that can address these kinds of disputes most

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<sup>472</sup> Costantino & Merchant, *supra* note 7 at 49, 134-135, 168.

<sup>473</sup> Bingham, *supra* note 55 at 376-377.

<sup>474</sup> Hollie Fader, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 Harvard Negot. L. Rev. 481, 486 (2008).

effectively. It is only after this kind of self-assessment is completed and supported by leadership that the actual design of the new dispute system should begin.<sup>475</sup>

All three of the public access ombuds programs examined in this study were developed through the legislative process. Of them, only Virginia approached this depth of self-assessment through convening relevant stakeholders, considering multiple options, and building consensus in the design process.

In Iowa, the legislative council and the ombudsman discussed the possibility of adding a new position to handle public records, open meetings and privacy matters, and after a brief consideration about funding for a new position and the new responsibilities of the office, the matter was approved. Stakeholders such as local government groups, law enforcement agencies, citizen advocates and the news media did not take part in the discussions or, once the decision was made to fund the new group, in the implementation of the program. Outreach to these groups was not made until after the office began work in 2001, though since then, the ombudsman's office has worked to educate citizens and government employees on both public access matters and how to handle disputes without the assistance of the office. The activities of the public access program have been reviewed each year in the ombudsman's annual reports, and the program was scrutinized further during the 2008 legislative session when a new enforcement agency was being considered as an option for handling public access disputes.

Similar to Iowa, Arizona's public access program was created by legislation that added new duties to an existing ombudsman's office in 2007. Because the creation involved passage of a bill in the legislature, some stakeholders were present for hearings, including the lobbyist and executive director of the Arizona Newspapers Association, the

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<sup>475</sup> *Id.* at 486-487.

legal advisor to the Arizona School Boards Association, and the ombudsman himself. However, there were several interested organizations that did not participate, or necessarily approve, of these new duties being created in the ombudsman's office. In spite of this, the office has had some success in its implementation phase, largely due to the efforts of the assistant ombudsman for public access, who has reached out to stakeholder groups to inform them about the office and to get them to consider it as a resource. Reviews of the program in its first two years have been positive, though some skepticism remains from the news media about the usefulness of the office as a resource for them.

Despite the fact that Virginia's FOI Advisory Council was also legislative creation, it came as a result of a two-year study conducted by a legislative subcommittee that involved major stakeholders from government, law enforcement, schools, citizens, news media and other interested groups. The stakeholders not only were involved in the design of the program, but they also reached consensus on all major issues before submitting a proposal to the legislature. This process, which seems to be part of the legislative culture in Virginia, may have helped to train the stakeholders about dispute resolution skills and "joint problem-solving techniques," which Costantino & Merchant say groups "will need in order to use the system with satisfaction and empowerment."<sup>476</sup> Once the program officially began work in 2000, stakeholder groups such as the Virginia Coalition for Open Government and the Local Government Attorneys group helped to raise visibility of the council as a resource for inquiries and dispute resolution. The effectiveness office has constantly been evaluated, not just through its annual reports but

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<sup>476</sup> *Id.* at 54.



also through audits of government compliance with open government laws by news media groups.

Considering that the Virginia design and implementation experience most mirrors the tenets of Dispute Systems Design in this area, it is not surprising that it continues to have strong support from stakeholders years after its creation. As Costantino & Merchant note:

When the system's stakeholders are involved collaboratively in the design process, they become true partners in identifying, understanding, and managing their disputes – and have a more vested responsibility for the successful operation of the conflict management system.<sup>477</sup>

While it may be a product of the legislative culture in Virginia that is difficult to replicate elsewhere, other jurisdictions should strongly consider applying a similar stakeholder process when designing open government dispute resolution programs.

To what extent, then, do the public access ombuds programs themselves reflect the principles of Dispute Systems Design, which call for an interest-based approach to resolving disputes through early identification and intervention in disputes, using low-cost processes and “loop-backs” to less formal and lower-cost options as disputes progress? Because these principles were developed in the organizational dispute resolution context, it is unsurprising that they are perhaps better reflected by an “organizational ombudsman” approach.<sup>478</sup> Rowe notes that in the organizational context, such as ombuds programs in the corporate workplace, ombuds have more facilitative powers such as “shuttle diplomacy” and mediation, with the ability to conduct informal investigations but rarely advancing to formal investigations.<sup>479</sup>

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<sup>477</sup> *Id.* at 54.

<sup>478</sup> *See* Rowe, *supra* note 272 at 353.

<sup>479</sup> *Id.* at 356-357.

The classical ombudsman approach belongs more to the “adversarial dispute resolution” tradition, Gadlin notes, distinguishing it from the voluntariness and flexibility of a more mediation-oriented approach.<sup>480</sup> Rather than taking an interest-based approach, which would allow the parties more flexibility to create solutions outside of the legal framework, a classical ombuds would focus more on dealing with parties’ rights.<sup>481</sup>

The public access ombuds programs clearly fall more into the classic ombuds conceptualization, particularly when it comes to ensuring that the legal rights and duties created by the open government laws are followed. The somewhat legalistic approach is not typical for ombuds; Hill is the only attorney in the Arizona ombudsman’s office, and sources said having an attorney in this position was necessary, while at least one source in Iowa desired that the public records, open meetings and privacy position be filled by an attorney to address the complex legal issues involved. Representatives from each office described their role as advocates for the open government laws, a rights-based approach which seems to supersede the interests of parties disputing public access matters and may also overlook power issues between the parties. This focus on rights fulfills just one of these three major issues that Ury, Brett & Goldberg identified as essential for effective dispute resolution systems.<sup>482</sup>

However, the public access ombuds programs also embrace some of the Dispute Systems Design principles more common in organizational ombuds programs. Each of the offices operates at no cost, a benefit not only for citizens seeking help but also for people in government to be provided free training and free educational materials.

Further, each office emphasizes the importance of handling inquiries at an informal level

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<sup>480</sup> Gadlin, *supra* note 261 at 42.

<sup>481</sup> *Id.* at 42-43.

<sup>482</sup> Ury, Brett & Goldberg, *supra* note 43 at 15-18.

as much as possible. Beginning with training, the ombuds programs try to educate the public and government employees about freedom of information matters to avoid confusion and disputes in the future. When disputes arise, the programs prefer to resolve matters through informal investigation, with most matters resolved in a short period of time after making phone calls and answering questions. This kind of informal facilitation could, if the dispute was not resolved, result in a more formal investigation or a written advisory opinion, though the offices viewed these as a last option and a less than desirable outcome. While loop-backs from more formal processes to less formal processes were not evident, the public access ombuds programs are able to remain flexible in serving the needs of disputing parties.

Another issue complicates the evaluation of the public access ombuds programs, particularly in Iowa and Arizona. In Virginia, the FOIA Council is the only formal dispute resolution option available for parties with open government issues that does not involve filing a lawsuit. Iowa and Arizona, on the other hand, have attorneys general with the power to prosecute violations of open government laws, and both have made some efforts at enforcement; Arizona's attorney general really only deals with meetings issues with its Open Meetings Law Enforcement Team, while Iowa's attorney general has recently assigned investigation and enforcement duties on freedom of information law matters to an assistant attorney general. While the public access ombuds programs in Iowa and Arizona often serve as a primary point of contact on open government matters, people can seek the aid of the attorney general in addition to or instead of going to the ombudsman's office. The more formal enforcement options available at the attorney general's office are not necessarily coordinated with the operations of the public access

ombuds program, meaning that disputes may not begin with the less formal options offered by the ombuds.

The public access ombuds programs in Iowa, Virginia and Arizona do not reflect all of the tenets of Dispute Systems Design, but they do illustrate some of the important principles that should be considered when creating a dispute resolution system, particularly in the open government context. The attention Virginia paid to involving stakeholders and seeking consensus while creating its Freedom of Information Advisory Council seems to have paid off in the stakeholders' efforts to support the program as it began work and had to build trust with both the public and the government. The emphasis each program places on training and education can work as a dispute avoidance mechanism, one important way for these programs to be an effective resource on public access matters at a very informal and low-cost level. Additionally, the programs' attempts to manage disputes at an informal level as much as possible makes it a more efficient resource for parties with public access inquiries or complaints, allowing a more flexible approach even while the programs remain committed to ensuring that the rights and duties established by the open government laws are handled properly. Still, a level of formality may be necessary to ensure that the complex legal issues involved are handled in a way that can vindicate the public policy underlying open government laws, so having an attorney serving as public access ombuds is advisable.

### **c. Evaluating Public Access Ombuds Programs**

The three ombuds programs examined in this study seem to fit into the conceptualization of the classical ombudsman. All three programs were established by

statute and created to be independent and impartial reviewers of inquiries and complaints about public access matters. The Iowa and Arizona programs were built into ombuds offices that were already in existence; the heads of these programs, Iowa Citizens' Aide/Ombudsman Bill Angrick and Arizona Ombudsman-Citizens' Aide Patrick Shannahan, are both members of the United States Ombudsman Association and mentioned the organization as providing guiding principles for their respective offices. Angrick was on the standards committee of the association that adopted these guidelines in 2003. The Virginia Freedom of Information Advisory Council was not formally created as a "classical ombudsman" office; the word "ombuds" or "ombudsman" does not appear in the statute that created it, though the word was often used in discussions during the legislative study group that recommended creation of the office. However, by its establishment as an independent agency with similar powers and duties as the Iowa and Virginia programs, and by Executive Director Maria Everett's own description the council "serving as an ombudsman" on open government matters,<sup>483</sup> the Virginia FOIA Council also fits into the "classical ombudsman" conceptualization.

The case studies of these three offices revealed that each aims to comport with these standards, but that some issues have arisen as they try to follow them in the context of handling inquiries and complaints in public access. The studies did not specifically address confidentiality of the complaint process, though the Iowa and Arizona programs allow the offices to provide confidentiality to complainants,<sup>484</sup> while in Virginia, sources confirmed that the council and staff could provide confidentiality as well. The other

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<sup>483</sup> House Document No. 25, *supra* note 396 at 2.

<sup>484</sup> See Iowa Code 2c.9(4) and A.R.S. 41-1376(A)(3).

three standards – independence, impartiality and credibility of the review process – are addressed in more detail below.

### **Independence**

All three of the ombuds programs have safeguards in place to ensure that they are free of control or persuasion by other political bodies, and nearly every source interviewed agreed that these offices had succeeded in being politically independent. As the Arizona and Virginia programs were being considered in the legislation process, each time the executive and judicial branches of government were rejected as possible homes for the programs because of the potential of political interference; the independent reputation of the already-existing ombuds offices in Iowa and Arizona made them natural homes to provide independent oversight of public access matters.

Each program is located in the legislative branch, meaning each technically serves in the same branch of government that created it. All three ombuds programs serve as advisors to the legislature on public access matters, and as the programs have developed, they have increasingly proposed legislation to solve problems with loopholes and exemptions and other procedural and substantive matters in the open government laws.

Further, the hiring and firing of personnel remain in the discretion of each agency; Shannahan and Angrick have the power to control these decisions without outside influence in Arizona and Iowa, respectively, while the 12-member Freedom of Information Advisory Council has the power to hire its employees, including the executive director, as well. Choosing the heads of the Iowa and Arizona ombuds programs are also done through bipartisan committees, with Iowa using the legislative

council to appoint the citizens' aide to a four-year term,<sup>485</sup> and Arizona using an "Ombudsman-Citizens' Aide selection committee" to hire a person to serve a five-year term.<sup>486</sup> The 12 members on Virginia's council include a broad array of political and non-political appointees who serve four-year terms.<sup>487</sup>

The main concern for each office is continued funding, particularly in a time of shrinking state budgets. The programs are small – Iowa has one assistant ombudsman, Virginia has one and a half positions, and Arizona has two positions – and operate on annual budgets of about \$200,000 or less. None of the sources interviewed thought that the programs would be targeted during budget cuts, though sources in Arizona mentioned that hiring freezes were a possibility in the ombuds office there.

### **Impartiality**

In its nine years of existence, Maria Everett and the Virginia FOIA Council has built a strong reputation for being fair and even-handed in handling inquiries, conducting investigations and writing opinions. Every source interviewed affirmed this, mentioning it as essential in the council's success as a resource on open government matters. In her early outreach efforts, Everett had to establish the council as an impartial agency on open government matters, particularly to government employees and representatives. Her ability to do this has been a crucial development in Virginia, leading sources from both government and news media to praise Everett and her efforts greatly.

Sources generally also praised the efforts of the primary contacts in the Arizona and Iowa programs – Elizabeth Hill and Angela Dalton, respectively – to handle public

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<sup>485</sup> Iowa Code 2c.3 and 2c.5.

<sup>486</sup> A.R.S. 41.1373 and 41.1375(C).

<sup>487</sup> Va. Code Ann. 30-178(B) and 30-178(C).

access inquiries and complaints. However, sources expressed concerns about the impartiality, either real or perceived, of the approaches in these programs. In Arizona, sources generally said it was too early to gauge the impartiality of the public access program, though a couple of representatives for the news media expressed concerns that the program may lean toward the government perspective too often. The opposite was the case in Iowa, with every source outside the ombudsman's office expressing a perceived bias against government agencies by the program.

Dalton and Angrick both expressed their desire to approach public access cases impartially, and it is reasonable to expect that outside perceptions that the program favors citizen and media complainants could stem from the structure of the state's open government laws, which presume records and meetings to be open and require government agencies to give specific reasons for exempting records or closing meetings. In these cases, being an impartial advocate of the law could mean being perceived as the open government police, who only come calling when a complaint has been made. Dalton and Angrick also both touted the program's availability as a resource to government agencies, which make inquiries and receive training on public access matters from the ombudsman's office.

Any perceptions that the public access ombuds programs are partial in their approach will make it difficult for them to perform their duties effectively. A program perceived as being biased will face grave challenges when it comes to voluntary compliance and having its recommendations taken seriously.



## Credibility of Review Process

Any perceived lapses in independence or impartiality will necessarily implicate the credibility of an ombuds program as it handles inquiries and complaints. As Gadlin noted:

(W)ith no formal authority to compel compliance, the effectiveness of the ombudsman's advocacy depends to a very large extent on the respect that the office and the person command as well as on the independence of the office – its ability to be free of direct attempts at political influence.<sup>488</sup>

Each of the three public access ombuds programs in this study have made efforts to build credibility among the parties who are most commonly involved in open government disputes. Through their education and training missions, each program has had its agents with the lead public access duties – Everett in Virginia, Dalton in Iowa, Hill in Arizona – involved in outreach efforts, which can help build relationships between the people in the ombuds program and the people most likely to use it as a resource. Any concerns about the council's impartiality in Virginia were met forcefully in its earliest days. When local government groups in Virginia expressed skepticism about Everett and the FOIA Council, she made several direct overtures to them to assure that the council was intended to be an impartial resource, not an advocate for citizens or news media. A similar forceful and persuasive response to skeptics from the programs in Iowa and Arizona could help build the credibility of those offices.

All three programs prefer to operate at an informal level first, conducting inquiries by phone and trying to avoid escalation to more formal investigations. Once cases reach a formal level, each program has the powers of a classical ombudsman to issue public recommendations and to seek voluntary compliance. The offices in Iowa

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<sup>488</sup> Gadlin, *supra* note 261 at 42.

and Arizona have another option, one that is unavailable in Virginia. The attorneys general in Iowa and Arizona have taken on enforcement authority in public access matters and have made pledges to pursue violations of open government laws. In these states, the ombuds programs have worked to coordinate with the attorney general when enforcement may be necessary. The effectiveness of these enforcement options is unclear; Iowa's attorney general only recently announced its intentions to cooperate with the ombudsman on open government matters, while Arizona's attorney general does not have formal enforcement authority on public records matters, and the public access program is still in its early years of coordinating with the office on open meetings matters.

The only state in which sources did not express concerns about compliance or credibility was Virginia, which is the one without the attorney general to turn to as an enforcement option. The FOIA Council appears to have established itself as the authoritative voice on open government matters in the state, and those who come to it as a resource seem to be satisfied with its advice and decisions. Some situations still end up in litigation, but sources said these were usually the kinds of cases that focused on narrow legal issues and required more formal judicial interpretation.

Building a similar level of credibility would be ideal for the programs in Iowa and Arizona. When a program lacks this kind of credibility, as the Iowa experience shows, stakeholders may work to create another option, such as the independent open government enforcement agency that was supported by several groups and considered by the legislature in 2008.

While the public access ombuds programs in Iowa, Virginia and Arizona all are formally representative of the “classical ombudsman” concept, in practice, they may actually have elements more representative of other kinds of ombuds offices. For example, the experience recounted by several sources in Iowa makes the public records, open meetings and privacy duties appear to be more like an “advocate ombudsman,” one that becomes an advocate once it finds that violations have occurred. When this happened, one researcher notes, it can cause “an adversarial situation to develop with those being investigated.”<sup>489</sup>

While its development seems to fit into the major standards outlined for being a “classic ombudsman,” Virginia’s Freedom of Information Advisory Council may in fact be distinct from the Iowa and Arizona programs because it is more of a “quasi ombudsman,” a term one researcher used to describe a uniquely American phenomenon of an office being created to “perform functions similar to those of an ombudsman” without the same structural requirements of a “true ombudsman.”<sup>490</sup> The program was modeled after New York’s Committee on Open Government, an agency in the executive branch that does not refer to itself as an ombuds office but has similar powers to answer inquiries, conduct informal and formal investigations, and write advisory opinions.

Regardless of categorization or nomenclature, the public access programs in Iowa, Arizona and Virginia have made important contributions to the understanding of open government laws in each state, and they have provided valuable services to citizens, government and journalists. They are at their best when they are perceived to be

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<sup>489</sup> Hill, *supra* note 265 at 37. Hill noted an orientation toward citizen advocacy despite the fact that the ombudsman was not supposed to be a citizens’ advocate in Hawaii. *Id.* at 34.

<sup>490</sup> *Id.* at 36.

independent, impartial and credible agencies for people to turn to when open government issues arise, and the long-term effectiveness of these offices will hinge on the extent to which they can be seen as an authoritative source in public access matters.

#### **d. Best Practices for Designing a Public Access Ombuds Program**

After interviewing more than 30 sources closely involved in public access matters and conducting case studies of public access ombuds programs in Iowa, Virginia and Arizona, and in light of the tenets of Dispute Systems Design theory, the following recommendations for best practices in designing a public access ombuds office became evident.

##### **1. Involve stakeholders in the design**

Dispute Systems Design suggests that stakeholders – the people most impacted by a dispute processing system – should have a significant role in evaluating the need for a new system and in designing that system.<sup>491</sup> Of the three public ombuds programs examined in this study, only Virginia engaged in a thorough stakeholder evaluation and design process at the front end, and it appears to be more successful than Iowa and Arizona in terms of stakeholder satisfaction with the system and in stakeholder use of the system. Bringing major players in disputes to the table – citizen advocates, news media organizations, state and local government representatives, and others who are interested in access to public records and meetings – and building consensus on an approach to access policy seems to have worked out well in Virginia. This level of consensus also helps to build confidence in the system in its early years, when buy-in by stakeholders is crucial to the long-term success of the program.

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<sup>491</sup> See Costantino & Merchant, *supra* note 7 at 49.

While it may seem obvious that people are more likely to appreciate and participate in a system they have helped to design, this does not appear to have been the case when public access ombuds programs have been created in many jurisdictions. Rather, as was the case in Arizona, the more traditional process of lobbying and legislation pursued by John Fearing and the Arizona Newspapers Association seems to be the norm.<sup>492</sup> When stakeholders are not involved at all, as was the case in Iowa, there may be growing discontent among stakeholders on the goals and procedures of the ombuds program, and there may be perceptions, accurate or otherwise, about the way the program intends to process disputes. While a more thorough stakeholder process in the Iowa legislature failed to come up with consensus on a new program in the 2008 legislative session, the eager participation by several interest groups signaled dissatisfaction with the current system of handling disputes on public access manners in the ombudsman's office.

## **2. Ensure impartiality**

The concern most often voiced by sources interviewed in Iowa was that the ombudsman's office either as not impartial, violating one of the central tenets of ombuds programs. Though sources within the ombudsman's office denied that this was the case, the appearance of partiality by the office in favor of citizen complaints – noted by

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<sup>492</sup> As Fearing noted, he thinks that lobbyists and special interest groups are essential in getting any kind of legislation passed, including the Arizona Newspapers Association's support of a public access ombuds program. "The public doesn't understand the (legislative) process. If there weren't lobbyists in the legislature, there's no telling what those guys would come up with... We came up with the legislation, we wrote the legislation. Then you start shopping it around, you get people this legislation will affect to get on board, and then you go to a legislator who will sponsor it and go get them to do it."

advocates for both news media and government organizations – is a fatal flaw for an ombuds office.

Part of the difficulty is housing the public access ombuds program within a larger ombuds office that includes “citizens’ aide” as part of its title – as is the case in both Arizona and Iowa. Government employees perceive an organization serving as “citizens’ aide” to lean toward citizen advocacy, and they may expect undue hostility from that organization. This is the case even if the organization intends to be impartial, holds itself out as impartial, and tries to act in an impartial manner. The appearance of partiality is almost as damaging as actual partiality because it negatively impacts use of the office by government groups and, perhaps more importantly, it can lead them to doubt the legitimacy of the ombuds program’s findings and recommendations. For an office that has no formal enforcement authority and relies on voluntary compliance, stakeholder acceptance of these findings and recommendations is essential.

Each of the three public access ombuds programs have made efforts to hold themselves out as an impartial resource for anybody with a question or complaint about public access matters, and years of data shows that citizens and government are the primary users of these programs in each jurisdiction.<sup>493</sup> While these are good signs for the programs, they still must be able to encourage cooperation with their recommendations to be effective. While sources in Iowa and Arizona complained about government agencies that refused to cooperate with the ombuds’ advice, sources in Virginia did not see the same problem. The structure of Virginia’s FOI Advisory Council, which as more of a quasi-ombuds program can give informal advice but does not have the power to conduct investigations, is more likely to encourage cooperation by

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<sup>493</sup> See Table 2 and Table 4, *supra*.

government agencies, which may not feel as threatened as they would by a more traditional ombuds. Jurisdictions should strongly consider the quasi-ombuds approach of Virginia and New York that eschews formal investigative powers and calls more for answering inquiries, informally mediating disputes and writing non-binding advisory opinions when considering options for creating a new public access ombuds program.

Creating a program that is specifically designed to address public access matters also has its benefits. Because the Iowa and Arizona programs were housed in existing ombuds offices, they came with the expectations and perceived “citizens’ aide” role attached to that structure. Virginia’s experience as an independent, public-access-specific program enhances its perception as an authoritative, impartial resource for any citizen, government employee or journalist who has a question about a sunshine law dispute.

### **3. Choose a strong leader**

Sources interviewed in every jurisdiction emphasized the need for strong leadership in the program. The Virginia FOI Advisory Council’s selection of Maria Everett as executive director was universally praised, and every source said this was a critical step in ensuring the program’s success. Arizona Ombudsman Patrick Shannahan said he was also seeking a strong leader when he hired Elizabeth Hill to be the assistant ombuds for public access, and Iowa Ombudsman Robert Angrick and other sources praised Angela Dalton’s work as the assistant in charge of Public Records Open Meetings and Privacy.

However, different dynamics shape these offices, meaning a different role for the leader in each. As executive director of the FOI Advisory Council, Everett is in charge of

day-to-day operations and is seen as the face and voice of the council. The council itself comes to decisions on advisory opinions, but it is Everett who fields most of the phone calls and who coordinates most of the training for the program. Her forceful personality and her depth of knowledge in public access matters are widely respected, giving her and the council a sense of authority when inquiries are made. Hill appears to be building a similar level of authority in her less than two years as the lead ombuds on public access matters. Hill works in the ombudsman's office and reports to Shannahan, but she is largely free to conduct matters as she sees fit.

Dalton is in a different organizational structure in Iowa ombudsman's office, one that makes her role more challenging. Because she is one of several assistant ombuds who handle public access matters, there is no one person of authority for people with inquiries to consult with in Iowa. This could diminish the effectiveness of the office.

Further, one source<sup>494</sup> noted that the lead ombuds in charge of public access matters in Iowa should be an attorney because of the complexity of the freedom of information laws in the state. Sources in both Virginia and Arizona cited the importance of Everett and Hill being attorneys in serving their roles. Because an attorney has both a depth of experience in the analysis and application of laws, and because an attorney has a more easily apparent credibility in dealing with legal matters, public access ombuds offices should strongly consider requiring leaders to be attorneys.

Each of the three leaders in the case studies had some background in public access matters before being elevated to their ombuds positions. Dalton had some background in dealing with public records in her career in law enforcement; Everett had experience drafting the laws and serving on the legislative council considering revisions to the laws;

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<sup>494</sup> The source, a representative of an organization of government bodies, requested to remain confidential.



and Hill had experience as an assistant attorney general dealing with public meetings disputes. However, sources generally did not say that a specific background in freedom of information matters should be necessary for serving as a public access ombuds. More important were the general legal knowledge and experience, the ability to do outreach and training, and skills as both a mediator and a decision-maker that can be respected by disputing parties.

#### **4. Get stakeholders invested early**

Stakeholder involvement in the design process is an essential element in ensuring that they have an opportunity to provide their input and experience and to make sure their voices are heard and considered as a dispute system is created. This kind of process will help to ensure that the stakeholders support, use and promote the dispute system once it has been established.

However, stakeholder involvement should not stop there. Public access ombuds programs should immediately seek to reach out to potential users and to establish itself as an independent and impartial resource on public access matters. This is an essential step toward establishing the office as the authority to turn to for public access inquiries or when disputes arise.

In the case studies, sources gave several examples of the value of outreach and building stakeholder buy-in. Dalton mentioned her early outreach efforts through training sessions and at a booth at the State Fair as ways of connecting with potential users of the Iowa ombudsman's office. In Virginia, when Everett sensed concern about the office's impartiality from local government attorneys, she worked to address their

concerns by speaking at their conferences and penning an article touting the benefits of the FOI Advisory Council for government groups. Further, the Virginia Coalition for Open Government secured funding to help promote the council by printing informational posters in its first year of existence. In Arizona, Hill offers numerous information sessions throughout the state, regularly writes in the ombudsman's newsletter, and she wrote introductory letters and press releases announcing the creation of the program in its early days. These efforts to build credibility with potential users of the office should, in the long term, help them establish themselves as their respective states' authority on public access issues.

### **5. Emphasize training and education**

Perhaps the greatest difference between traditional ombuds offices and the public access ombuds programs is the training mission. Each public access ombuds program examined here takes a proactive approach to conflict management, offering educational sessions to various groups of citizens, news media, government employees, students and others build a culture of knowledge and understanding about freedom of information laws and how they are supposed to work.

Every source interviewed agreed that the training mission was a crucial one for public access ombuds programs. Besides being another way for the public access ombuds to reach out and build connections with stakeholders and potential disputants who could turn to the office in the future, training can lead to fewer conflicts in the future by building the knowledge base among stakeholders about freedom of information matters.

Training is not only conducted by the public access ombuds, nor should it be. However, to ensure that people are receiving a consistent message about the role and importance of government openness, the public access ombuds should reach out to advocacy organizations, both those representing government interests and those representing citizen and news media interests, to offer assistance or to take part in joint training sessions. This is an area in which the more formalized alternative dispute resolution system in an ombuds office can work in conjunction with less formal channels of dispute resolution involving knowledgeable experts in organizations to build trust and knowledge among potential disputants. Publication of handbooks and newsletters on public access matters for the public are another way ombuds programs can build knowledge about freedom of information laws.

## **6. Periodically evaluate the program**

Costantino and Merchant recommend that dispute systems build in a mechanism for regularly evaluating their effectiveness and performance, thus allowing modifications as circumstances demand over time.<sup>495</sup> Each of the public access ombuds programs reviewed in this study generates annual reports detailing the activity of the office from the prior year, but no other formal mechanisms to evaluate effectiveness are in place.

Outside investigations such as compliance audits typically conducted by news media organizations also provide an alternate route for evaluation of a program's effectiveness. In Iowa, Arizona and Virginia, people in the ombuds office admitted to keeping a close eye on these audits and using them to gauge effectiveness of the office. However, while these independent investigations have value, they are more relevant to

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<sup>495</sup> Costantino & Merchant, *supra* note 7 at 168.

understanding how public officials apply freedom of information laws rather than the function of the ombuds office in particular. Regular surveys of public access ombuds program users, similar to one reviewing Indiana's Public Access Counselor in 2006 conducted by the Indiana Coalition for Open Government and the Indiana University School of Journalism,<sup>496</sup> would help programs understand the interests and needs of users.

By following the six aforementioned recommended best practices for creating a public access ombuds program, jurisdictions can move closer to creating a flexible and impartial office that serves the interests of all stakeholders – citizens, government, and news media – who in turn would be more likely to use, promote and support the program. A program with this kind of support can build its respect over time, establishing itself as the authority for people to turn to when questions about freedom of information matters arise. Such an office would not necessarily serve as an alternative to litigation, but it could help to create a culture of knowledge and trust among sunshine law disputants. Conflict may be avoided through effective training of potential disputants, and the destructive elements evident in the conflict among parties in public access matters could be addressed in a more constructive manner.

Transforming the long-standing conflict between people seeking access to information and those who control information is a difficult challenge that requires long-term commitments by all parties, and improvement of public access dispute resolution systems is one important step in the right direction. Public access ombuds programs are

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<sup>496</sup> Yunjuan Lao & Anthony L. Fargo, "Measuring Attitudes About the Indiana Public Counselor's Office: An Empirical Study" (2008), indianacog.org/files/PAC\_final2.pdf. In the survey of 120 people who had used the program, 68.3 percent rated their experience with the office as "excellent" or "good," and more than 90 percent said they wanted the Public Access Counselor to have enforcement powers.

just one avenue for jurisdictions to consider, and as the states examined in this study have shown, if designed, implemented and administered properly, they have great potential to serve the needs of disputants and improve the culture of conflict.

## **Appendix A: Depth Interview Questions for Freedom of Information Experts (Chapter 3)**

The following questions were generally incorporated into the unstructured interviews:

When a dispute over access to government records or meetings arises in your jurisdiction, what does the law say is supposed to happen?

Suppose a person is denied access and finds the formal legal process to be too cumbersome to resolve the dispute adequately. What options does this person have?

Who would a person call if he or she was denied access to a record or meeting but did not want to go to court or through another formal legal system?

Are there people in place who serve as informal mediators or facilitators of these negotiations? If so, what do they do?

What has been your experience regarding the jurisdiction's management of conflict over access?

How, if at all, do the formal systems and the informal systems for managing conflict interact?

Can you give some examples of times when the informal system worked or did not work?

What role does the state Freedom of Information advocacy group or other advocacy groups have in negotiations over access?

How would you characterize the tone of negotiations over access to information? Do negotiations seem to be more destructive or constructive in nature?

How would you characterize the relationship between information requesters and government information managers? Does this relationship seem to be more destructive or constructive in nature?

How do you think the formal and informal systems in place to manage conflict over access to information in your jurisdiction impact the relationship between government officers and people seeking access?

## **Appendix B: Interview Sources (Chapters 4, 5, and 6)**

### **Iowa**

William P. Angrick II, Citizens' Aide/Ombudsman – Jan. 9, 2009

Angela Dalton, assistant ombudsman for public records, open meetings and privacy – Jan. 14, 2009, and Feb. 12, 2009

Mary Gannon, counsel for Iowa Association of School Boards – Feb. 17, 2009

Kathleen Richardson, director, Drake University School of Journalism and Mass Communication, former executive secretary of the Iowa Freedom of Information Council – Feb 3, 2009

Terry Timmins, general counsel for the Iowa League of Cities – March 5, 2009

Confidential Source #1, attorney working with local government entities – Feb. 3, 2009, and Feb. 6, 2009

Confidential Source #2, source working with local government entities – Feb. 5, 2009

Confidential Source #3, attorney working with local government entities – Feb. 13, 2009

### **Virginia**

Maria J.K. Everett, executive director, Virginia Freedom of Information Advisory Council – Aug. 27, 2008, and Jan. 7, 2009

John W. Jones, the executive director of the Virginia Sheriffs Association – Feb. 19, 2009

Forrest M. “Frosty” Landon, current council member of Virginia Freedom of Advisory Council and former executive director of the Virginia Coalition for Open Government – Feb. 2, 2009

Leo W. Rodgers, county attorney for James City County – Feb. 26, 2009

Dana Schrad, executive director of the Virginia Association of Chiefs of Police – Feb. 19, 2009

Ginger Stanley, counsel to the Virginia Press Association – Feb. 6, 2009

Roger C. Wiley, current council member of Virginia Freedom of Information Advisory Council and attorney for several local government entities – Feb. 9, 2009

## **Arizona**

Daniel C. Barr, media law attorney, partner at Perkins Coie – Feb. 24, 2009

Paula Bickett, assistant attorney general and member of the Public Records Task Force – Feb. 24, 2009

David Cuillier, assistant professor, University of Arizona School of Journalism, and national chairman of the Freedom of Information committee of the Society of Professional Journalists – Jan. 30, 2009

John Fearing, deputy executive director, Arizona Newspapers Association – Feb. 11, 2009

Elizabeth Hill, assistant ombudsman for public access, Arizona Ombudsman-Citizens' Aide – Feb. 4, 2009

David Merkel, general counsel for Arizona League of Cities and Towns – Feb. 11, 2009

Chris Munns, assistant attorney general and member of the Open Meetings Law Enforcement Team – Feb. 24, 2009

Patrick Shannahan, Arizona Ombudsman-Citizens' Aide – Feb. 23, 2009

Chris Thomas, director of legal services and general counsel for the Arizona School Boards Association – Feb. 18, 2009



## VITA

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Stewart began his journalism career as a sportswriter in Dallas, Texas, before earning a J.D. from the University of Texas School of Law in 1998. After practicing law for two years, he returned to journalism as an assistant city editor at the *Columbia Missourian* in 2000. He earned his master’s in journalism in 2004 with an emphasis on media law matters. His thesis, “The Missouri Sunshine Law: Toward a Model of Enforcement,” examined the enforcement mechanisms in state and federal open government laws and proposed a model statute.

As part of that research, it was clear that several states had adopted alternative dispute resolution programs in their open government laws. Interested in studying these kinds of programs, Stewart became the first student at the University of Missouri to pursue a new joint program combining a Master of Laws in Dispute Resolution and a Ph.D. in Journalism. He completed the LL.M. at the University of Missouri School of Law in 2007. This dissertation is the result of that dual degree program.