

THE “PUBLIC” IN PUBLIC RECORDS: REPORTING ON FREEDOM OF INFORMATION
AS MORE THAN A PROFESSIONAL TOOL

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ANALYSIS

The case for reporting on the public’s access to public records

It’s understandable that the Osage people may not know much about their Freedom of Information law. It was only established in 2008, two years after the Oklahoma-based Native American tribe converted its traditional government to a three-branch system modeled after the United States.

“This is a new way for our people to operate,” says Shannon Shaw Duty, editor of the tribal newspaper Osage News. “Especially to question our elected leaders, who in the past (we) have just really looked on like kings and queens. I mean, they were untouchable.”

Shaw Duty, who is Osage, studied journalism and legal studies and worked at the Santa Fe New Mexican before taking the helm in 2007 at what was then called the Osage Nation News. What she thought was a newspaper turned out to be more like a PR newsletter for the chief, Shaw Duty says. When the Osage established a free press in 2008 as part of its evolving governance model, the newsletter transformed along with the tribe.

Shaw Duty has since used Freedom of Information laws to report on Osage budgets, policies, mineral rights, elections and more. She’s also used the newspaper

to educate tribal members about this new system of accountability, and about how they can use it, too.

“We have a series of news articles from that period where we detail that law and how to use it, and the limitations of it and the stipulations of it. So anyone who read our newspaper in that period should have a healthy understanding of what that law is,” she laughs. But in a tribe of 21,000 members, about 85 percent of whom live scattered around the U.S., Shaw Duty’s readership is limited.

She estimates that about 500 to 700 locals are really aware of the tribe’s open government laws. These are people actively involved in the community and following the government, she says. Among them, “fewer would know even how to get the request made.” Shaw Duty pegs that number at 200, including other members of the press, plus local attorneys and businesses.

“I think that a majority of the public who doesn't participate in government doesn't really understand what the point of accessing public records means — especially if it was taken away,” Shaw Duty says. “It would be a secret government where they could bury and hide files till kingdom come.”

Shaw Duty believes the best way she can educate her tribe and get them engaged in this new paradigm of accountability is through a combination of investigative and explanatory reporting. Her editorial staff will continue to explain in news stories how they access public records to inform their reporting. She’s also considering occasionally publishing reminders to readers about open government laws and how the public can avail themselves of these new rights.

Shaw Duty's reporting on open government and access to public records is both journalism and a form of advocacy — a rare confluence in a profession ruled by objectivity. Her experience is not unique to the Osage Nation.

Todd Wallack, an investigative reporter with the Boston Globe's Spotlight team, takes partial credit for major open government reforms enacted in Massachusetts in 2016. The law isn't perfect by a long shot, not the least of the reasons being that all three branches of state government actually claim to be exempt from it. Nonetheless, Wallack says, the reforms created penalties for the first time, in addition to other improvements.

"Lots of people have told me that if the Globe hadn't taken the leadership position in writing regularly about this, exposing problems and making both the public and the legislature aware of these problems, nothing would have happened," Wallack says.

Wallack, Shaw Duty and six other journalists and Freedom of Information experts interviewed for this report all agree that, while access to public records is a critical tool for our profession, it is also a public policy crucial to democracy that deserves scrutiny and rigorous reporting. They've each found their own ways to engage in this work without compromising their journalistic integrity, and offer insights from their experience to help other journalists develop a beat of reporting on access to information.

"If we don't write about problems getting records, nobody else will," Wallack says. "If we don't think it's important enough to focus on, why should anybody else care? And if we don't write about these problems and hold government accountable

for failing to provide basic access to information, it's never going to get better, and it's probably just getting worse.”

Reluctance to cover trends in access to information. America’s free press has had five decades to the Osage’s one to get used to its Freedom of Information law, which came into effect in 1967. Reporters have since used the law to produce stellar investigative reporting on waste, fraud and abuse in government.

Yet reporting on trends and abuses of Freedom of Information itself — for both journalists and other members of the public trying access government records — remains under-developed fodder for impactful public policy journalism.

Over-learned objectivity. David Cuillier, director of the University of Arizona School of Journalism, thinks America’s longer history with a free press is partly to blame. He says reporters over-learned the importance of journalistic “objectivity,” a notion that was only conceived in the early 1900s when a cadre of reporters and editors set about professionalizing the industry. They were trying to stem the tide of societal damage from unrestrained sensationalization and exaggeration in the press.

“And that was the whole start to objectivity, which had never been heard of before,” Cuillier says.

Apparently, it worked.

“It’s what everybody just assumes good journalism is. And therefore, it makes people feel uncomfortable covering public records issues, because they think it’s a conflict of interest,” Cuillier says. Reporters question whether they can report “objectively” about a policy on which they rely so squarely.

Cuillier says that's not how reporters should think about it. "It's not a conflict of interest to cover something that happens to have a nexus with our personal lives or our jobs or careers. We're covering an issue that's fundamental and important for everybody," he says.

Freelance journalist Miranda Spivack is the Eugene S. Pulliam Distinguished Visiting Professor of Journalism at DePauw University and a former Washington Post reporter. She takes Cuillier's logic a step further. It's not only acceptable for reporters who use public records laws to report on access to public records, she says. It's actually good.

"The fact that I had two kids in public school at one point, I don't think precluded me from writing about (education)," she says. "I actually think it helped inform my reporting." She feels the same way about public records. "The reason I know there are problems with access is that I've had them myself."

Kathy Kiely agrees. She's the Press Freedom Fellow for the National Press Club Journalism Institute and a journalism lecturer at the University of New Hampshire. "We need to educate the public (about access to public records) just like we need to educate the public about the toxic waste dump down the street or the city council vote tonight."

Kiely says it would be "disingenuous" for journalists to pretend that we don't have an interest in public records, and "too cute by half" for reporters to bow out of related coverage simply because we use the public records laws.

"Au contraire! What we should be doing is telling people the story of how we use public information and why we think it's important," Kiely says.

Wallack believes that this shared interest is one readers already understand. Because the interest is not hidden, he doesn't see it as a conflict. "I don't think the fact that journalists need access to information conflicts with their jobs as journalists. I think it complements their job as a journalist," Wallack says.

But he cautions: The job remains to examine all sides of an issue.

"I think it's important to understand that there can be differences of opinion on exactly how to write a law that achieves the best balance of keeping records open and preserves access to information, while respecting that there might be certain cases where agencies need to charge or certain cases where information has to be withheld," Wallack says. "(T)here can be conflicting ideas from people with good intentions on both sides on how to best achieve their goals."

Public access, not press access. "It gets back to our reluctance to talk about our own process. We don't want to seem to be the whiny center of the story," Kiely says. "But I really do think that in some cases, that is the story — that we can't get the information, and explaining to people why that's a scandal and why they should be upset about that."

As an example, Kiely described a long-term effort by the Sunlight Foundation, where she worked at the time, in collaboration with Free Press and ProPublica. The coalition balked at antiquated rules that allowed television stations to keep records of their political ad sales on-site in paper form, rather than filing the records electronically. Under that system, the only way to find out who was paying for political television ads was to drive to individual stations during business hours and manually search the files.

In response, the group created a reporting project — not to explain to the public how hard their jobs were, but to report both the political spending and the absurdity of allowing such urgent information to be relegated to physical filing cabinets after the dawn of the Internet and Information Age. And in response to their reporting, the Federal Communications Commission eventually required all broadcast and cable television stations to file those records electronically.

The press benefited from that policy change, but their own ease of use wasn't the primary driver of the initiative to make the records more accessible.

"I think the use that reporters made of that data helped make the case to the Federal Communications Commission that yes, there is a public utility in having this data online," Kiely says.

Lee Van Der Voo is a freelance journalist and author of the column *Redacted*, published by the Oregon-based website *Investigate West* from 2014 to 2017. She says the overwhelming majority of people who read her monthly installments about public records were not journalists.

"I think we just assume sometimes that it's part of how we do our jobs, the way we do business, and it's not something the broader public would like to know about," Van Der Voo says. "And I'm not sure that's actually true."

Who cares about access to information?

Van Der Voo says that polling in Oregon consistently shows about 80 percent of the public "overwhelmingly in favor of public records being public," regardless of party affiliation.

That may point to a public ripe for stories about public records. But Kiely and Wallack agree: Very few people are interested in news that reports on access to information in the abstract.

“But if you can talk about actual examples where it looks like government is covering up wrongdoing, people care,” Wallack says.

He started reporting in 2014 on police departments withholding records of cops caught driving drunk, “even though they routinely publish similar types of records about average citizens who are caught doing the same crime,” Wallack said. He also exposed state police using excessive fees for public records — they tried charging a lawyer \$2.7 million to turn over a single database — in an attempt to cover up evidence that the state’s breathalyzer machines were faulty.

“I think it's the individual examples that are really strong that make people care about this topic,” Wallack says. “Or if you talk about actual examples where people can't get access to their own records, or an average citizen can't get access to records they want on their community, people care.”

Van Der Voo says examples of non-journalists thwarted in their search for information can be especially compelling news stories. She still recalls a Redacted column she wrote about a man who sold off a rental property to finance his public records fight with county commissioners he caught meeting in secret at a local restaurant.

“He got really frustrated. He got in kind of a paper war with these folks and ended up making tremendous personal investments,” Van Der Voo says. “He just didn't feel like he wanted his community to run this way.”

Spivack says it's that personal interaction with government that hooks the public on the importance of access to information. People care the most when they need information to help solve a problem.

“Suddenly when something's being built in their backyard, or they don't want the wind turbines, or they're worried about hanky-panky at the public school or something, then they start to really burrow in,” Spivack says. “And they start to understand a lot about how their governments work and also what they can get access to. Often it's sort of problem-driven for the typical consumer or resident.”

Spivack reported just that scenario in a 2016 story for The Center for Investigative Reporting, about a family farm in suburban Maryland that was being kicked off its leased land by county officials to make way for a private soccer club. Neighbors rallied to the farmers' support, seeking documentation from public officials to explain the abrupt decision. Two years and at least \$100,000 in legal fees later, the residents forced disclosure of relevant emails, letters and calendars that pointed to political maneuvering for the soccer field behind closed doors — in alleged violation of the state's open meeting laws.

The next time local officials proposed a development plan that residents questioned, they were well trained for the fight, Spivack reported.

Journalistic perspective on public access to information

Research shows that the vast majority of records requests do not come from journalists, but rather businesses, researchers and lawyers.

“But journalists often just assume that they're mostly coming from journalists,” Wallack says. He thinks, in general, journalists understand very little about the

experience of non-journalists accessing public records. Yet stories like Wallack's, Van Der Voo's and Spivack's show that, indeed, those accounts are ripe for reporting.

One profoundly simple question can drive that journalistic inquiry: How often are members of the general public denied access to public information?

Mike Donoghue is a longtime reporter and executive director of the Vermont Press Association and vice-president of the New England First Amendment Coalition. Donoghue says lack of knowledge about the public's experience accessing government records is a top concern for NEFAC because most citizens don't have the necessary training or resources to fight for access.

"They just don't know what the next step is or that they really are entitled to these records," Donoghue says. "And citizens sort of shrug and walk out the door and go: 'Huh, OK. I guess I'm not entitled to those documents.'"

Andrew Seaman, chair of the Society of Professional Journalists' Ethics Committee, gives two more reasons journalists should work to understand more about the public's access to public records. First, as a source of story leads. "If you know what people are looking for, you know that there may be something there for you to look at, too," Seaman says. Plus, journalists' efforts to release information may be amplified by working in tandem with others, he suggests.

Embrace process. Kiely thinks fear of process is one big hurdle journalists need to overcome when considering reporting on open government issues. “We’re so afraid ... people will be bored,” she says.

“Well, let me let me just invite you to look at the sports pages. Somehow when our readers turn to the sports pages, in our views, they gain 20 IQ points,” Kiely says.

“We’re doing these in-depth regression analyses of when you’re supposed to put a left-handed pitcher in against a right-handed batter, all this stuff,” Kiely says. “And yet when we come to actual public interest issues that actually affect real people’s lives and what hospital they might want to go to, where they should send their kids to (school) ... suddenly no. That’ll be boring. They won’t be interested.”

Kiely doesn’t buy it. “Maybe I’m Pollyanna, but I think people hunger for the real deal. I think they would welcome guidance that would let them make more intelligent decisions as citizens,” she says. “So I just think we need to be a little braver and give our readers credit for more intelligence.”

Cuillier also thinks journalists need to be bolder when calling out public records and open meetings violations. He says tossing an attorney’s comment into a story about mishandled public records is not sufficient.

“We would write a story if the mayor got a DUI, right?” Cuillier asks. Improperly withholding information, pretending it doesn’t exist, making up exorbitant fees to access records, holding secret meetings — these are other ways public officials can break the law.

Such obstruction also undermines the concept of access to information as a fundamental human right — a concept acknowledged at the United Nations through the Universal Declaration on Human Rights in 1948.

“Just like we need water to live and we need to be free of slavery and humans are entitled to clean air and not being tortured, we're entitled to information about the world around us and our community,” Cuillier says. “Just like the cave people needed to know what was happening in their surroundings to survive — you had to know where the good berries are and where are the bad animals aren't that will eat you. It's a human right. If you don't have that information, you die. And just like today in modern society, if you don't know what's happening in your neighborhood, your city, your country, your world — you could die. It affects your life.”

The United States is not one of the countries that's signed onto Universal Declaration on Human Rights, yet Cuillier feels its global context is important to help Americans put our experiences with public records into perspective.

“We need to highlight that to people, and tell them what's possible,” he says.

Cautionary tales. This is all not to say, however, that every piece of information that's public ought to be published.

Seaman cites a controversial interactive map published by the Journal News in Westchester County, N.Y., following the mass shooting at Sandy Hook Elementary School in Newtown, Conn., in late 2012. The map revealed the names and addresses of every handgun permit owner in a two-county region. Many critics, including among the journalism community, saw it as over-reach — which can backfire.

“If you abuse the open records law and are careless with the information as a journalist, you risk harming other people's access, because then you get people who want to restrict access to that information,” Seaman says.

That’s exactly what happened in New York: Just weeks after the map was published, state legislators passed a law allowing gun permit holders to opt out of having their names disclosed.

“Ethical journalists need to be advocates for the government’s business to be conducted in the open,” Seaman says. “It doesn’t mean that you print everything you get.”

Van Der Voo adds that reporters on an open government beat also should check their assumptions about officials’ motivations when they uncover violations of public records or open meetings laws.

“I think sometimes it can be easy to assume that the people who aren't following the ... letter of law are not within the spirit,” Van Der Voo says. “Actually most of the time, it seems to be training gaps and ignorance, and in some cases fear.” She points out that when consequences for improper releasing of documents far outweigh the repercussions of improper withholding, “of course people are going to be afraid and of course they're going to be as conservative as possible.”

Van Der Voo also has learned to not make assumptions about where people stand on the issue. She says she’s been surprised by how many people in government feel just as strongly as her about disclosure. “They're definitely out there,” she says.

Conclusion

For this project, I chose to examine and experiment with journalistic coverage of access to government information because I feel drawn to produce it and, to a certain extent, advocate for access to public records. Having observed related coverage in my home state of Vermont, I found this type of reporting mostly lacking: Aside from occasional stories about egregious fees or newsy lawsuits, I don't see a sustained effort or strategy among any newsrooms for reporting on this as a civil right. I wanted to understand if reporters' reluctance to develop this beat is unique to the culture of the Vermont press, or if Vermont reflects a more endemic culture among journalists around the country. I also wanted to test editors' interest in related stories, as well as my ability to frame and pitch them in a compelling way.

The eight interviews I conducted for the analytical portion of the project confirmed that such failure to report on access to public records is not unique to Vermont, and that it stems from multiple factors. First, journalists forget that Freedom of Information is not just a professional tool, but a public policy designed for — and regularly used by — numerous other constituencies of the American public. Viewed through this limited lens, concerns of objectivity surface: Reporters and editors sometimes worry that harping on public records obstructions they face would be perceived by audiences as self-indulgent complaining. Worse, some journalists self-censor, however consciously or subconsciously, and limit coverage of legislative developments in state public records laws, fearing they may tread too close to a conflict of interest.

This tenuous grasp of Freedom of Information in its full context also leads many journalists to underestimate the public's interest in the topic. Forgetting that public records are for the public, not just for the press, reporters and editors assume that public records stories are "boring" to their audiences. Working from this false premise, too many opportunities are missed to both educate and inform audiences about violations of public records laws, and about positive or threatening developments in public records policies and access. Meanwhile, editors struggle to prioritize coverage about government access amid ever-dwindling newsroom resources. The self-defeating cycle is grim.

Yet my research to identify and choose interview subjects also introduced me to a thin but strong and growing lineage of reporters who have developed this tradition in recent years and decades — among them Jennifer LaFleur, who wrote the Citizen Watchdog column for the Dallas Morning News in the early 2000s; Lee Van Der Voo, who until recently wrote the Redacted column for Investigate West in Oregon; Eli James Shiffer, who covers government secrecy and public records and writes the Full Disclosure column for the Star Tribune in Minneapolis; Miranda Spivack, who's both producing investigative reporting on this beat for Reveal, and training her students to carry the torch at DePauw University; and Todd Wallack, an investigative reporter on the Spotlight team at the Boston Globe, who said his sustained coverage of state public records law violations grew naturally from his unofficial role as the paper's "FOIA nerd."

Those examples and my eight interviews deepened my understanding of the advocacy role that's implicit in the conceptualization of public interest journalism as

the “fourth estate” in a democracy. Access to public records and government information is a crucial tool for our profession, but more fundamentally a necessary ingredient of democracy and an essential human right. Journalistic objectivity and explicit endorsement of the Right to Information, therefore, are not mutually exclusive. They are inherently connected. I will be honored to continue reporting on that right — how it’s wielded, where it’s obstructed and when it must be balanced against other essential interests such as privacy or national security.

This beat, in its simplest form, is simply one way to report on power.

“It doesn’t matter how many AK-47s you have. In the current world, the government is always going to have more power even over the most well-armed citizens, because the real power in the 21st century is not bullets. It’s bytes,” Kiely says.

“So to the extent that the government controls our data, we really are enslaved. If we control our data, then we reassume agency over our citizenship. It’s as simple as that,” she says. “Once people start to use the information, then they’re going to become allies in the effort to make sure the information remains publicly available.”

Until then, some public officials will continue to get away with breaking public records laws, and legislatures will continue to pass special-interest exemptions from disclosure with little scrutiny. Fractured and weak federal, state and local public records laws will continue to foster an environment that lacks accountability and enforcement. The public will remain largely handicapped by ignorance of their right to public information.

Or, perhaps Americans and the U.S. press can take a lesson from the Osage Nation.

In early 2014, the tribal congress kicked Principal Chief John D. Red Eagle out of office after he was found guilty of six charges levied against him. Among the charges: improperly withholding a contract that should have been disclosed when two newspapers asked for it. The chief was also found guilty of abuse of power, interfering with an investigation, misuse of funds and refusing to uphold tribal law.

Shaw Duty's Osage News was one of the papers whose request precipitated the charges against the chief. "I think that set the precedent for everyone to realize that you have to turn over those records," she says.

Shaw Duty still feels the scars from the fight. "When we took our chief to court, that ostracized us from many people. We were (considered) troublemakers for quite a while, and it took a couple of years for some of those people to get over it and say hello again," she says.

It was also hard for her personally to see her chief publicly shamed, she says.

"Even though he is responsible for his actions, it's still hard to see stuff like that happen, especially for someone that had been so culturally revered for so long," Shaw Duty says. She counts herself among those who revered him, "until he got to that position and did what he did. And it all turned on its head."

Still, she doesn't regret her paper's position, or the time and emotional investment she put into exercising her newfound right to her tribal government's information.

“You really, really appreciate it when you've never had it,” Shaw Duty says. “Our tribal members never had it. And now that we do, the thought of it being taken away again — that is just unfathomable. That would be a disaster, a travesty.”

Seaman says it's too much for most people to think about access to public records in this fundamental way on a daily basis. But the reality remains.

“Access to information and the ability to hold your government accountable means that the public remains sovereign,” he says. “It's not the other way around, where the government is sovereign. It's that the people who give others the ability to run the government are actually the sovereign ones, because they can go in and they can vote based on that information.”

The same truism from every other arena of public policy reporting — whether access to health care, education or the criminal justice system — also applies to public records. The public cares when they understand how it affects their lives, and how they can effect policy change. Journalists who understand the Right to Information as a public policy can seek out stories and provide context to help the audiences understand this right and the importance of exercising and protecting it.

Suggestions for Further Research

In the course of this project, I engaged many colleagues locally about the topic of the public's access to public records. To explain the concept, I often referenced a consistent finding from many studies of public records requests: journalists are a minority of requesters. This surprised almost all of my colleagues, especially those who have not engaged in related advocacy or who did not study journalism in an academic setting. It belies the premise of this paper, that journalists need to

understand RTI as more than a professional tool. It also points to an area that merits further research: the motivations and experiences of other constituencies who avail themselves of this right. Some states and municipalities have begun documenting and proactively publishing databases of public records requests, and the organization MuckRock is doing interesting work to crowdsource records requests. Such data provides some material to understand who is using public records laws and why, but much more work is needed to adequately collect, catalog, clean and analyze the data for insights into who is using public records laws and why.

Commercialized data is another area ripe for research, especially in today's dynamic information landscape. First, it's important for reporters on the public records beat to understand the ways that businesses harvest and commercialize public data. This process, and its profitability, should be fully explained to audiences to inform dialogue and debate about Freedom of Information. Conversely, reporters who cover access to information also are well primed to investigate and explain the ways private companies collect data from individuals, and how personal information can migrate into the public sphere.

These discussions lead naturally to suggested research into the intersection between expectations of privacy and the right to information. Modern technology's capacity for voluminous data collection and modern publishing's global reach with the click of digital button continue to radically transform the realistic scope of attainable privacy. While technological advances are a boon to access, that increased access also can backfire if the public is not well grounded in both the theoretical and real benefits of RTI in democratic society. Privacy interests are legitimate, but must

be deeply understood by public records advocates if they're to guard against forces of secrecy using privacy as a veil to promote nefarious interests.