

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

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A Project

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by

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## DEDICATION

I'm grateful to my family for gently, and sometimes not so gently, nudging me to finish this work.

Most especially, I'm grateful to my husband, Rick Agran, for believing in me and convincing me that a longtime bartender and wannabe writer who once dropped out of college could, in fact, go back to school and love it.

I dedicate this project to Rick, his love of education and his abundant thinking.

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## Chapter 1: Introduction

A couple years after my graduate coursework at the Missouri School of Journalism, I attended a professional skills training program on investigative journalism. During a session on Freedom of Information, one panelist stated that, while public records laws can be great for access to government information, good journalists can talk sources into leaking any information they need. Therefore, the veteran newspaperman encouraged the room, reporters should not let official noncompliance with public records laws stand in our way.

He had a point: Deep sourcing and perseverance against odds are two essential attributes of any investigative reporter.

His theory, however, falls short. Consider cub reporters still learning the basics of the profession and the inverted pyramid: Covert acquisition of government records — much less the ability to protect the identity of sources who leak documents — is likely over their heads. The adage is equally unrealistic for a reporter on a new beat, someone who may have a great lead but has not yet developed the requisite degree of trust with sources who can bypass a particular instance of bureaucratic stonewalling. Likewise, even the most connected and skilled of daily reporters may know just how to work their sources, and be up for the challenge, but they might also be struggling already with limited time to keep pace with mounting demands for content.

At the time, I accepted my colleague's talk as the catalyst for perseverance I believe it was intended to be. But I also intrinsically knew that, regardless of a

reporter's skill level, public records matter to our profession. Besides, I reasoned at the time, our job is to hold public officials accountable when they fail to follow the letter or intent of the law — any law. Including public records laws.

Gradually, though, as I continued to use public records laws and started to advocate for public records reforms in my state, I came to understand how my perception of the issue also had been incomplete. Public records laws are not written to afford the press access to government information. They are written to afford the public access to government information. The “press” is merely the “public” by another name. So, why had I only been evaluating whether reporters can get our hands on the information we need? It's the public's access that matters. And if I, a trained journalist whose job description literally includes obtaining government records, continually struggle with that task, then what prospects for civic engagement await untrained citizens seeking public information in their free time?

It's not their job to access government records. It's their right.

Yet that right — enshrined in statutory law and even in some state constitutions, and internationally recognized as a fundamental human right — is routinely violated at every level of government across the United States.

And journalists — busy journalists, myopic journalists, responsible journalists, competitive journalists — routinely ignore this pervasive injustice that threatens the very democratic system we strive to hold accountable.

References to reporters' own public records requests, and occasional stories about a news outlet's fight to access government information, are not uncommon in

the media. And a handful of reporters around the country go out of their way to report on public access to public records. Yet by and large, the direct applicability of Right to Information laws to average citizens is so little understood by journalists that their own audiences' struggles are seldom even considered as stories in and of themselves — as my colleague's advice to fellow journalists revealed.

I believe the public's engagement with this fundamental right merits regular reporting, along the lines of the familiar topics of access to education, access to health care or access to the criminal justice system.

The related inquiry embodied by this master's project aligns with my volunteer work in journalism, both as a member of the Society of Professional Journalists' Freedom of Information Committee and through grassroots work to connect reporters in my state around our shared interests in public records through ad hoc gatherings and professional advocacy. The project also informs a potential direction to pursue in my freelance business: establishing a specialty of public interest reporting on Freedom of Information and open government.

As tensions between government and the press continue to heighten, and the public's distrust of media continues to deepen, I feel this project's relevance extends beyond my own career. It also offers practical applicability to a pressing need in journalism and society today.

## **Chapter 2: Activity Log / Weekly Field Notes**

### **Memo 1, December 22, 2017**

#### **Summary**

This project is up and running! It was a great first week, with two encouraging notes to highlight:

- The topic appears to be genuinely interesting to members of the public I mention it to, and
- Many of those people have stories of their own about public records quests, or questions about how to access public records.

I am getting the sense that I'm tapping into an under-developed topic of relevance in the community, and opening up space for dialogue among stakeholders to compare notes and share information about this civil right. I'm also encouraged by the level of interest the journalism community is showing — interest in both the dialogue, and my coverage of the topic.

That said, the two pitches I've made so far both returned some concern about the appropriateness of my reporting on public records, because I am already identified as somewhat of a public records advocate in the state. (This is discussed in greater detail below.) This is a potential challenge, but also germane to the white paper, so I'm taking it in stride. I'm optimistic that I can find a solution.

Here is a quick-hit summary of my activity this week; detailed notes follow:

- Pitched series to two statewide news organizations. (Talks ongoing.)



- Sat in as invited guest to discuss public records on a public radio talk show.
- Interviewed three citizens about their struggles with public records.
- Talked up random strangers and a couple sources about public records, and found some unexpected potential stories and interest.
- Wrote to Mal Leary, a reporter for the Maine Public (the state's public broadcasting network) and president of the National Freedom of Information Coalition, to request an interview for white paper. (Haven't heard back yet.)

### **Activity**

#### SKILLS COMPONENT

I pitched the story series to solid contacts at two statewide news organizations. Both are interested and promised to bring the idea up their respective chains of command.

#### CONTENT

We are discussing two options of how the content could be structured and delivered:

- Straightforward content to be sold to each newsroom through traditional freelance channels, one story at a time, or:
- A single-issue news website collaboratively funded by several news outlets in the state. After each outlet runs the content on their own respective platforms, it would be archived on the single-issue site, which would also feature explanatory materials and resources about public records in

Vermont. This would be a time-limited project of about four months, with plans to evaluate its performance about  $\frac{2}{3}$  or  $\frac{3}{4}$  of the way in. At that time, a determination would be made about the website's future — whether it gets archived for future reference, replicated as a great model to follow for a different topic, or extended for ongoing coverage of public records.

### PITCHES

News Organization #1, was most resistant to the idea of my reporting on a topic with which I'm also associated as an advocate. We discussed the terms "objectivity" and "fairness," and the editorial process that renders a piece of reporting objective even if the reporter is not. We agreed that public access to information is a foundational social value in our democracy — something that can be espoused in principle the same way that we can all agree genocide is bad; reporters do not lose their credibility for saying so.

The news director also equated this with the value of clean water, which of course we all want; but he noted he is not a member of Trout Unlimited, which advocates for clean water. I countered that I agree with abstaining from membership in such organizations. But I pointed to the existence of press freedom- and FOI-related committees of nearly every major journalism association as evidence that the issue of public records is unique among public policies for journalists.

He is considering proposing that my work be classified as a new kind of content, akin to the New York Times' Op-Docs series. There are still some conversations to be had higher up in the organization, but I believe we both left the meeting

optimistic that we can find a way to make it work. He is a little concerned about resistance from the digital director, whose purview makes him wary of any collaborations that may dilute their site's own web traffic. But he will frame the pitch as an opportunity to innovate, which is solidly within the organization's stated mission.

News Organization #2 is extremely enthusiastic about the single-issue website prospect. He said explained though that they're in a unique position of already having more content from staff writers than they can run in print; but, it's likely they could give all my work a home online. (But that decision ultimately will be up to higher management.)

Although my contact is also keen to tread carefully when it comes to advocacy and journalism, I believe I impressed upon him that my advocacy role would be limited to general support for strong public records laws. I explained to him that vision for this series is not to advocate for specific legislation related to public records, but to pursue rigorous solutions journalism that documents problems with the current state of public records in Vermont — problems both for requesters and for public records stewards — and that illuminates the state's dialogue about pending public records reforms by reporting out potential policy changes, as well as what's worked in other states.

- Appeared as a guest with Vermont Secretary of State Jim Condos on a statewide daily public radio talk show, Vermont Edition, to discuss access to the state's public records. The segment was about 40 minutes total, and generated numerous calls and emails to the show. Upon my request, the

producer asked each email commenter for permission to share their messages with me; six agreed, meaning I have even more leads on stories now. Interestingly, three of comments were from public officials who themselves had trouble accessing records in the course of their work.

- Interviewed three citizens about their distinct public records plights. This is a decent start, but I want to be careful to not focus too much on citizens with political agendas, which all three of these have. (They came to me when they learned that I'm working on public records issues.)
  - Shay Totten is a former journalist and now Communications Director at Rights and Democracy, a 501(c)4 political organization active in Vermont and New Hampshire. He shared with me a Vaughn Index identifying records withheld from a request he filed with a local school district, ostensibly acting as a private citizen rather than in professional capacity. The withheld records include many email threads related to the school district's communications strategies surrounding teacher contract negotiations; Shay feels these records do not appear to meet the criteria for exemption from disclosure. However, as he put it, "Lacking a lawyer or money to pay for one, I had to let it drop." In a follow-up, Shay filled me in on a request he made, with about a dozen other citizens, asking for information related to the recent sale of a city-owned telecom to a private firm; they requested a fee waiver, saying their request was in the public interest. In response, the city attorney estimated between \$1300-\$1700 in

charges, saying it was not clear how releasing the information to a dozen citizens represents the public interest.

- James Ehlers is the founder of Lake Champlain International, a 501(c)3 organization that advocates for water quality in Lake Champlain, and also a current gubernatorial candidate for the state's 2018 election. He shared with me a fee estimate of \$33,000 from the Agency of Agriculture, in response to his request for the Nutrient Management Plans (NMP) of "Large Farm Operations" (LFOs) near Lake Champlain. The agency wrote: "Each NMP is 400 pages long and in color print, which is a \$1/page charge in the public records law." James said he views this as a functional denial due to the exorbitant cost; he did not appeal, nor am I aware of him tailoring the request, asking for black-and-white copies, or requesting to inspect the records for free. The fact that he didn't even try to appeal in any way makes this a not terribly compelling example in my view; however, the fact that Nutrient Management Plans are so hard to obtain is interesting, because Lake Champlain cleanup plans and agricultural water pollution is a major issue in the state, both financially and culturally.
- Dean Corren is a former Vermont legislator who lost a bid for lieutenant governor as the Democratic and Progressive candidate in 2014. Corren ran that race as a publicly financed candidate, but faced a steep fine when the Attorney General's office accused him of

violating public financing laws by accepting a “contribution” from the Vermont Democratic Party in the form of an email encouraging people to attend a rally of Corren’s. Corren fought the allegation and attendant fine (\$72,000) in court. He says it was only in the course of discovery that he obtained documentation estimating the value of the email (\$255). If he had compensated the Democratic Party for that email, it would not have been construed as an illegal “contribution” to Corren’s campaign; however, Corren alleges that the email’s valuation was suppressed for three years, despite his numerous attempts to obtain it and promptly pay the party. Corren feels this was not just an act to sabotage his own campaign, but to undermine the prospects of publicly financed candidates in general. (He remains engaged in a federal civil rights case against the AG, currently scheduled for a hearing in January at the 2nd Circuit in New York.) This story seems like a minefield in a way, but impossible to ignore because withheld records form the basis of the lawsuit.

- Spoke with multiple citizens about my work to develop this series reporting on the public’s access to public records. A few of those conversations may bear fruit:
  - Accident data for bike safety analysis: One man (Eric, I don’t know his last name but he works out of the same building I do) expressed interest in accessing accident data. He has a friend in Germany who recently wrote a script or developed a program to analyze the

occurrence of accidents involving bicycles, in order to identify potential solutions for bike safety. Eric's friend offered to conduct the same analysis for Eric if he can get his hands on the right data. This is interesting as a use case, but also because Eric said he had no idea whether the data would be accessible — which gets to the point that there is currently not a clear resource for members of the public seeking access to public records in Vermont.

- Haunting history: I learned of a man (friend of someone who works in my building) who recently moved to a nearby town, and heard from a neighbor that his new home was the site of a notorious murder in the early 20th century. The new resident went to the town offices, where the historical society is located, to find out more. According to this man's friend, who relayed the story to me, the clerk tried to dissuade him from his research. He persisted, and verified the story. It's not clear to me if the historical society is an official town office; if not, the point is moot for the purposes of my project. But if it is operated by the town, this seems like a ripe story for the telling, especially because it can be tied to the more universal issues of property values as well the impulse to suppress history in order to preserve an arguably false, or at least incomplete, identity for a locale. (I have heard similar stories of people in towns where infamous lynchings occurred not wanting to acknowledge such an episode of the town's past.)

- Inspection tagalong: There is an active citizen requester — not universally appreciated, to put it mildly — named Stephen Whitaker, with whom I'm in regular touch. Whitaker has successfully sued for access to records of third-party contractors for the state. He is currently researching the state's contract with AT&T to adopt a federal broadband network for first responders. He is planning to inspect a new batch of records in the coming days, and although I won't be able to tag along to gather sound for a potential broadcast story, he offered to record his inspection trip himself and provide me with the audio, should I choose to pursue a related story. I made it clear to him that my interest would not so much be about the broadband network and whether the state should opt-out of the federal contract (which is his pet issue) but about the process of a citizen exercising his civil right to inspect public records for free.
- Least favorite requester: I also spoke with a state employee about a prolific requester, who this person described as hard to deal with in a harmless kind of way. This requester apparently obtains public data to slice, dice and re-sell. I learned about an email chain in which several employees from the Department for Children and Families complained about him and wondered if they could get a no-trespass order to prevent him from showing up at their offices. (The response: Absolutely not; he may be a pain to deal with, but he's exercising his



rights and there's no reason to stop him.) He seems like an interesting character to try to talk with.

### ANALYTICAL COMPONENT

I Talked with Vermont Press Association director Mike Donoghue. My aim was to find out what sort of archives the VPA keeps of a) legislative and regulatory developments related to the state public records laws, and b) press coverage of those changes.

The answer: not much. (Mike is a longtime fixture in the Vermont press, and longtime director of VPA, but essentially does that as a volunteer.) He did not indicate that there is any central repository of member newsletters to search; rather, that would require combing through his 80,000+ emails, which would best be accomplished by isolating the timeframe and bill number. Whether in his emails or his files, or as referenced in any member communications, he said the best bet is to find the actual bill number and corresponding year. So I'll have to do some legislative research on my own before going back to Mike.

One other interesting thing he noted is that the most direct advocacy (ie: legislative testimony) he really ever did, even as VPA director, was when he was on the Sports desk at the Burlington Free Press — because it was then he was least likely to ever be interviewing lawmakers the day after he showed up at the Statehouse to advocate for a certain policy. I think this reluctance to get involved is really important to explore for my white paper.

I requested one interview, with Mal Leary. Leary is a longtime public radio reporter from Maine and current president of the National Freedom of Information

Coalition. I met him at the NFOIC Summit in Nashville last October and we actually had a brief conversation about whether or not journalists should advocate for public records, so he seemed like a natural place for me to start.

I also opened a discussion within the SPJ FOI Committee about the roles of public records reporter vs. advocate.

#### NEW STORY LEADS

From: "Scott Woodward" <scott@forestandwater.com> to Vermont Edition:  
There's a category of executive appointments - advisory appointments to the Governor, especially those created by executive order - that escape the public eye. The Executive branch can choose how much or how little to share with the public (also a problem at the national level). This escapes the broader goal of public accountability and provides little insight at to what advisory bodies are actually doing on behalf of the public. What are your guests thoughts on whether and to what degree the activities of advisors to the Governor should be made public?"

From: "Steve Goodkind" <bludriver@aol.com> to Vermont Edition: "The city of Burlington has a practice of giving documents that they do not want to reveal to the public, to "consultants". These consultants make recommendations to the city and the city has taken actions based upon these recommendations. However, when FOIA requests are made to see the documents, the city claims they cannot comply because they don't have them, only the consultant has them. What do your guests think of this practice?"

From: "Bram Towbin" <hihoau@gmail.com> to Vermont Edition: "As a town official I made a request to the Public Service Department to see a map of broadband

infrastructure and cable in my town. This is considered 'privileged' information. Let me translate that - a local public official making a request of a state official for what is in THE PUBLIC RIGHT WAY was denied the information. I was told the legislature shield these private companies as they claimed it was some sort of 'trade secret'."

From: "Kenny Smith" <kennysweethoneysucklehomestead@gmail.com> to Vermont Edition: Season's Greetings Folks, I believe the essence of the resistance of government to freely release public information is due to a generally convoluted notion of authority. Fundamentally, WE as individuals are the only True as authority, and we have falsely come to perceive our government as the ultimate authority over each of us. That said, I am specifically curious if an average Vermont citizen can freely access our state Homeland Security plan as dictated by the federal government? Thank you for this vital conversation." Blessings, Kenny Smith, Hyde Park

From: "Bruce Post" <bruce.post@yahoo.com> to Vermont Edition: I cannot listen today, but I wanted to mention two examples, from my experience as a Selectboard member in Essex, of flagrant attempts by governmental bodies to violate our state laws on open meetings and public records. 1. First, when I was on the Selectboard, we went into Executive Session to discuss transition agreements for two senior Town employees. A lawyer from the Town Attorney's law firm was present. All seemed on the up and up. Then, without any advance notice, the Selectboard Chair distributed a proposed contract extension for the Town Manager. As far as I know, no members of the Selectboard were given this document in advance. I certainly was not, nor did I know the contract would be discussed in this meeting. I then asked to

see the Town Manager's existing contract, and the Selectboard Chair refused to give it to me. I then said, "I believe that the existing contract is a public document and you cannot deny me my right to to see it. How do you think it would look if a Selectboard member had to sue the Selectboard to be able to examine a public document?" The attorney's eyes got very big, and then the Town Manager pulled his contract out of a file folder and distributed it to the other members. 2. Second, a special committee was established by the Town of Essex and the Village of Essex Junction to study how to combine services for greater efficiencies. Three individuals represented the Town and three represented the Village. The Town Manager and the Chair of the Selectboard and the Village Manager and the Village President were all on the committee as well as two citizens who were appointed privately by the Board Chair and Village President. Obviously, this is an important issue, but no public notice was given by either municipality other than a release distributed by the Village at the trustees meeting the night before. During the meeting, which I found out about that morning, members discussed an intent to try to keep these discussions as controlled as possible to avoid formal meetings and to, in the words of one of the citizen members, have meetings " structured so that we don't get chaos." No minutes were kept, but I know this because I attended the meeting and brought my digital recorder. // What is truly disheartening about this is that in both cases the Selectboard Chair was, and continues to be, a State Representative, and the citizen member who wanted to avoid chaos was, and continues to be, the State Economist. So, if even state official s can seem to so cavalierly violate the law, what chance do our citizens have? Thanks -- Bruce S. Post, Essex, Vermont

From: "JP Hanke" <jphanke@gmavt.net> to Vermont Edition: "I haven't heard the whole show today, so maybe you addressed this, but we have a case here in the Mad River Valley where an individual is requesting school district records, which they will happily provide IF he pays thousands of dollars in copying fees! That's an effective denial."

### EXISTING LEADS

Disability Rights Violations. A quasi-governmental agency in Vermont charged with investigating claims of abuse, neglect and serious rights violations against people with disabilities (Disability Rights Vermont) is frequently denied access to records they need to carry out their investigations.

Town Secrets. A resident of Essex, Vt., claims to have had difficulty obtaining information from town officials — even when he was a member of the town's selectboard.

Shuttered Town Websites. This story would follow up on a 2014 law intended to improve access to information, which actually backfired. The law clarified that official town websites must comply with state open meetings laws: notice must be given prior to meetings with agendas posted in advance, and minutes of those meetings must be posted within five days, or else the town could face monetary fines. In response, the Vermont League of Cities and Towns advised municipalities to take their websites offline if they were not certain they could meet the requirements. Many towns did just that. I propose a follow-up to find out how many towns have since gotten their sites back online, how the still-shuttered websites

have affected town engagement (if at all), and whether the League has developed more rigorous solutions to assist municipalities with limited technical resources.

**Off-site Records.** A title researcher in New Hampshire is dismayed to learn that the registry of deeds has moved much of its archive to an off-site location under contract with a private company. The information she needs to conduct research is now much more time-consuming and cumbersome to obtain; I do not know yet if the change has altered her costs. I would like to look into whether off-site storage is a growing trend in records management among states and, if so, what precipitates the shift and how it affects public access. (This story could be pitched to New Hampshire news outlets and/or regionally, depending on my findings.)

**Third Party Management.** New commercial technology is emerging to help governments better manage increasing volumes of data and information. I propose a review of these developments, including consideration of both access and privacy when third parties manage government information. This reporting may also include specific technology being used by or pursued by the State of Vermont. (This story is related to off-site storage, but distinct. The two would run best as a pair.)

**Public Records Studies.** As Vermont lawmakers begin marking up an “omnibus” public records reform bill in January, it’s worth hearing from neighboring states that are further along the same path, especially the demographically comparable states to our east: New Hampshire, where a state-mandated commission recently concluded its work to recommend improved processes for resolving public records disputes; and Maine, which established a Right to Know advisory committee in

2005. (This story would be best paired with the Ombudsmen explainer, described below.)

**Ombudsmen.** A perennial legislative proposal to establish a public records ombudsman in Vermont is expected to resurface when the Legislature reconvenes in January. To help inform the public and legislative dialogue about this proposal, I would like to present an overview of other states that have instituted such an office, in order to explain the concept to Vermonters and to examine the pros and cons of various ways the office can be structured.

**Government Perspective.** It's only fair to consider the perspective of government officials who must respond to public records requests — from the town level where some clerks still keep hand-written budgets, to state agencies with general counsel on staff. What is the “culture” regarding public records requests, and what shapes those values and responses? Where specifically is the demand coming from and landing, and are sufficient resources allocated to respond to public inquiries in a timely and thorough manner?

**Secret Public Comments.** Recently the state body that regulates health care in Vermont (Green Mountain Care Board) opened a public comment period on proposed regulatory changes. State agencies involved in health care responded, but their input was deemed exempt from public disclosure. To my knowledge, this has not yet been reported, which means that not only does the public not have access to the information; but most people probably don't even know it exists.

**Hidden Water Quality:** Vermont, like many states, is plagued with water quality problems — from perfluorooctanoic acid (PFOA) contamination in the city of

Bennington to extensive evidence of elevated nitrate levels in groundwater throughout the state. Yet water quality data are hard to come by: The state maintains that it must protect the privacy of land owners by not revealing the precise locations where elevated nitrate levels are detected, and routine violations of water quality reporting are met with little to no enforcement measures. This lack of data represents a deficit of information in the state's ongoing dialogue about water quality, and a deficit of information on which residential and commercial real estate decisions are based.

### **Next Steps**

- Sort out the story lead list to prioritize what I want to pursue.
- Continue pitching the reporting series:
- Follow up with VPR.
- Follow up with Seven Days. (Paul will pitch it first, by email over the holiday break. If people seem receptive, he'll ask me for a more formal proposal, including a budget. If that goes well, he expects management could give me a green or red light by early or mid January.)
- Reach out to Tommy Gardner, news director at the Waterbury Record, Stowe Reporter and News & Citizen. (We recently were fellows together at the New England First Amendment Institute and have stayed in touch; he's very interested in pursuing this topic.)
- Reach out to Greg Sukiennik, managing editor for New England Newspapers / Manchester Journal. (We recently were fellows together at the New



England First Amendment Institute and have stayed in touch; he's very interested in pursuing this topic.)

- Paul Heintz offered to connect me with John Gregg, news editor at the Valley News.
- Reach out to the Randolph Herald; Paul said the new owner is fairly savvy about modern journalism models.
- Try The Commons. (Although Paul said they have little to no money to spare.)
- Later: The Times-Argus.
- Later: VTDigger
- Later: other broadcast (WCAX, WDEV, community access)
- Conduct legislative research to identify major policy changes in recent years — esp. the reforms I've heard about in 2011. So far, I have found the most recent legislative report listing current exemptions by subject area and in statutory order.
- Conduct clip review of reporting on those legislative reforms.
- After holidays: Request more interviews for white paper.

### **Questions for the Committee**

1. How does this first weekly memo compare to the scope and length of what you are expecting?
2. Do you have any thoughts or guidance for me as I navigate the area between reporting on public records and advocating for access to public records?

3. Would you prefer that I send a Word doc, or does this Google Doc format work for you?

## **Memo 2, December 29, 2017**

### **Summary**

Focused on brainstorming, prioritizing and online research b/c I figured people would mostly be out of the office this week.

### **Activity**

1. Made pitch tracker
2. Made story bank
3. Pitched related session to IRE for the organization's summer conference.

"Public Access to Public Records: The right to access public records is more than a tool for journalism. It's a critical public policy for business, law, free expression and private citizenship in a democracy. Come learn how to build a beat covering access to public records, much the way journalists are already accustomed to covering access to education or access to health care.

Panelists will share a range of experiences with this work, a roster of resources for reporters and editors who need to get up to speed on the topic, and a tipsheet offering best practices for how to ethically cover a topic that is also critical to our own profession." I proposed this as a panel with myself as a speaker, and one or two other panelists (TBD). I expect to hear back sometime in April whether it's accepted.

4. Checked out grant opportunities as back-up/supplementary plan to fund my reporting and/or white paper ... See below and also spreadsheet. But after a little research, I got to feeling like I was wasting my time and need to focus

instead on finding a home for the white paper and prioritizing my reporting goals.

- a. Arthur Carter Reporting Award (no — they want wide circulation)
- b. Vermont Community Foundation (maybe — but their “small and inspiring” category of grants is being re-evaluated; more info in January 2018)
- c. VPR Journalism Fund (maybe)
- d. Ben & Jerry’s Foundation (probably not — looks either like a mismatch compared to the profile they’re seeking, or else too political and not appropriate for journalism)
- e. Open Society Foundations: There are no pre-set grants for either organizations or individuals that match my project and/or white paper, but it’s a wicked good fit so I might just reach out to them directly, but I should see if I can find an introduction first.
- f. Vermont Arts Council (probably not — the closest fit seems to be their Creation Grant, but it’s the wrong timing and there’s little to no precedent for journalism, so it would probably take some working)
- g. Knight Foundation — Potential.
- h. Checked out Hearken for crowdsourcing and engagement — I’m pretty sure VPR already subscribes to this, so perhaps if they sign on as a partner, I could set up a Hearken module to help inform and generate engagement around this series.

5. Looked for a home for the white paper.
  - a. API — no, “not a great fit for API’s editorial agenda in 2018.” Jeff Sonderman suggested I try Sunlight Foundation or Open Society instead.
  - b. Sunlight is already a client I’m doing a major project for. It’s true that it’s right up their alley, but I’d rather branch out and keep my relationship with them focused on my current project.
  - c. Open Society — see above.
  - d. CJR — CJR accepts unsolicited queries. They can be submitted through e-mail or regular mail. Include a resume and a brief summary of your journalism experience and qualification to write the piece. We publish six times a year, and lead time for a piece is typically at least one month. We pay a kill fee of one-third of the agreed upon amount if the piece is delivered satisfactorily and then not used.
  - e. Investigative Reporting Workshop — I bet I could try to sell them on the white paper for their iLab, and they could help me line up publication of a related article in CJR, and the tagline for the article and also for the tipsheet would say “developed with support from the Investigative Reporting Workshop.”
6. Interviewed Secretary of State and Assistant Secretary of State on pending omnibus bill they’re drafting. Got legislative strategy (committee

bill to be introduced in the first couple weeks of the session) and list of topics they plan to address.

7. Started research of relevant case law, because I believe that recent legislative changes sought to clarify language referenced in some controversial Supreme Court rulings.
8. Started research of recent legislative changes, to aid clip review. I started with 2011 because I have been hearing a big reform push that occurred then.
9. Learned about the Vermont Coalition for Open Government that formed in 2011, but promptly fizzled. Apparently they even passed bylaws and spent some energy getting organized and advocating for the 2011 reforms, but the coalition did not stay active following passage of H.73. I have the email list, which I'll use for stakeholder outreach.

### **Developments**

As I lay out a more detailed schedule and deadlines for myself and hold preliminary discussions with colleagues both in Vermont and around the country (ie: SPJ FOIC Slack convo), I realize >>> I need to complete the VT clip review first, and possibly some on-record interviews with VT editors/reporters, because I think I need to establish the case for the case I'm trying to make: That I should be reporting on this topic even as I'm raising it publicly as a policy issue with demonstrable problems that deserve to be solved. Reporters and editors are reluctant about covering and/or advocating for public records and not in touch with the universe of

public records requests and requesters, so there is a need for articulated standards outlining how to do so properly.

See comment on Memo 1 for additional take/source on the off-site records issue.

### **Next Steps**

- Follow up with news organizations on my pitches to each.
- Pitch series to:
  - New England Newspapers, which publishes:
    - Bennington Banner (daily)
    - Brattleboro Reformer (daily)
    - Manchester Journal (weekly)
  - Pitch series to Stowe Reporter, which publishes:
    - The Stowe Reporter, paid circulation 5,000 (weekly average)
    - The Waterbury Record, circulation 4,500
    - The News & Citizen, circulation 13,500
    - The Citizen, circulation 5,000
    - Shelburne News, circulation 5,000
    - Chester Telegraph (online)
- Pitch white paper to Investigative Reporting Workshop (with hopeful CJR hook?)
- Develop list of preferred interviewees for white paper and begin requesting interviews
- Start reporting:
  - Fees & (Free) Inspection

- Consultant Secrecy
- WTF is going on in Essex — I've gotten three tips of shenanigans in this town, including from (former) public officials
- Reach out to an attorney within state government I've worked with before who has tipped me on public records shadiness.

### **Questions for the Committee**

1. Is this an OK format, length and scope for my memo?
2. Are my memos and other work products part of my project's official record, that could be published or obtained through academic research?



## **Memo 3, January 7, 2018**

### **Summary**

It feels good to be getting my hands on the preliminary reporting. Figuring out the best business model for freelancing these stories is a really great challenge that I'm trying to not get bogged down by. And I'll feel very relieved once I find a home for the white paper.

### **Activity**

#### SKILLS COMPONENT

Story priorities. To get started, I've prioritized roughly three stories, described below:

#### *Secrecy by Consultant*

Someone claims that the City of Burlington "has a practice of giving documents that they do not want to reveal to the public, to 'consultants'. These consultants make recommendations to the city and the city has taken actions based upon these recommendations. However, when FOIA requests are made to see the documents, the city claims they cannot comply because they don't have them, only the consultant has them."

A separate source provided me a Vaughn Index supplied by the Burlington School District in response to a public records request. The index includes numerous documents — many of these involve a contracted consultant — cited as exempt for their subject matter "relating specifically to negotiation of contracts, including collective bargaining agreements with public employees." However, many also refer to the subject matter not as contract negotiations

specifically, but rather communications strategies related to ongoing contract negotiations.

>>> I have followed up with both sources for more documentation and context; if either/both seem credible, I will seek a legal source to respond to the legitimacy of the withholdings. I will also contact additional sources to get a sense of whether this alleged practice is a growing trend.

#### *Fees and (Free) Inspection*

I'm in the process of collecting examples of fees charged for access to records, and how people respond. Following are some examples. I will gather a little more string, then determine which anecdote(s) are most representative of the whole.

The Valley Reporter has been covering reporting on a local resident seeking financial records from Harwood School District. The superintendent claims the request is over-broad, and that many of the requested materials are available on the district's website. The resident is questioning both the estimated costs of supplying the records, and the process followed for responding to his request.

>>> I will follow up with the resident to seek documentation, with the reporter for context/background if she'll share it, and with the superintendent to understand more about the scope of the request and what information is already proactively published.

A group of Burlington residents filed a request of the city, and asked for a fee waiver because the material was in the public interest. The city responded that the records would cost \$1300-\$1700 because "it is not clear from your request

how disclosure to you and a dozen other individuals benefits the public.” This seems like an interesting legal argument and important philosophical debate. I’d like to find out if there is legal precedent to help answer the question. >>> I’ve got the response in-hand, and will follow up first with legal/professional sources to vet the concept.

An environmental activist (and upcoming gubernatorial candidate) was quoted more than \$33,000 from the Agency of Agriculture in response to his request for the Nutrient Management Plans (NMP) of “Large Farm Operations” (LFOs) near Lake Champlain. The agency wrote: “Each NMP is 400 pages long and in color print, which is a \$1/page charge in the public records law.” James said he views this as a functional denial due to the exorbitant cost; he did not appeal, nor am I aware of him tailoring the request, asking for black-and-white copies, or requesting to inspect the records for free. The fact that he didn’t even try to appeal in any way makes this a not terribly compelling example in my view; however, the fact that Nutrient Management Plans are so hard to obtain is interesting, because Lake Champlain cleanup plans and agricultural water pollution is a major issue in the state, both financially and culturally. >>> I will ask around to see if there is a simpler way to get these Nutrient Management Plans.

Despite a Superior Court ruling that the state’s public records law clearly intends for access to be freely given for inspection (even when electronic records have to be printed for inspection), there are numerous cases of agencies attempting to charge for inspection. This will be important to include in a story

about fees for access. >>> I can always cite a journalist's example, but will also try to mine for stories from non-journalists through other sources.

### *WTF Essex*

I've gotten four tips (from three people) from one town about public records and public meetings shenanigans. >>> I have reached out to two sources by email to ask them to chat more by phone, and I've tracked down the third source's phone number in lieu of email.

Story pitches. I heard from News Organization #1 that the news director there is still not sure about me reporting on public records, because he feels that I am advocate on the topic. He has not broached the subject yet with higher-ups. News Organization #2 is enthusiastic about the concept of a single-issue news website, but concerned about the cost. They have asked me for a more formal proposal (I previously pitched it by phone to my contact there).

I'm still scoping out the business model I want to use for this, so I have begun drafting the proposal and I've begun conceptualizing the website, but there's still a lot I'm sorting out as I got. I truly believe it's a fantastic idea. I just need to figure out what sort of shape will be best, given both time constraints and monetary needs.

But in the meantime, I'm moving forward with my reporting to keep that as primary focus.

### ANALYTICAL COMPONENT

- Research white paper outlets. I scoped out an array of white papers and articles to get a better sense of the shape and scope various publications prefer. I had been imagining something more middle-range, perhaps 4,000 to

6,000 words. However, I'm a little concerned that my preliminary review didn't turn up much material in that range. Here are a handful:

- API: Samantha Sunne's strategy paper how to get into data was nearly 10,000 words.
  - IRE: Feature articles are about 1600 to 1700 words.
  - IRW w/ Poynter: This rundown of media outlets figuring out how to cover the topic of hate is ~1330 words.
  - IRW w/ Poynter: This story about drones and disaster coverage is just under 1000.
  - IRW: Analysis of women in journalism is ~2000.
  - IRW w/ CJR: Analysis of Cuban media is ~2900.
  - IRW: Analysis of Asian media and internet is ~3100.
  - IRW: White paper on measuring impact of non-profit news is ~8200.
  - CJR stories: roughly range between 1300 to 2300 words.
  - Poynter: Their news stories seem to be much shorter than the scope I imagine for this project.
- Pitching white paper. My pitch is ready for the the Investigative Reporting Workshop. I'll send it first thing Monday.
  - Requesting interviews. I've identified about a dozen potential experts to interview, and I've prioritized nine of them to reach out to first. I'll start this week.

### **Question for the Committee**

For the white paper length/scope: Most of the material I found in what I had figured would be my target publications was under 2000 words — which seems to short. A couple full-length white papers I measured (well, one of which I co-authored a couple years ago) are between 8000 to 10,000 words — which seems too long. I had been imagining something more middle-range, perhaps 4,000 to 6,000 words. However, I'm a little concerned that my preliminary review didn't turn up any material that length. Should I go shorter? Longer? Look for better examples elsewhere to emulate and different target publications?

## **Memo 4, January 15, 2018**

### **Summary**

Reporting has traction and story pitches are on the horizon. White paper proposal has been accepted.

### **Activity**

#### SKILLS COMPONENT

##### *WTF Essex*

I've interviewed two people in the city of Essex about public records challenges there. One person is gathering up a bunch of documentation for me; the other person wanted to speak off the record for political reasons, so I put that source on hold. There's one more lead I haven't been able to reach yet. I also got the name of a fourth source to try, and I learned that the longtime (25+ years) town manager is about to retire.

##### *Consultant Secrecy*

I interviewed the main source for this lead, and learned that the issue has already been litigated in a state superior court and is now on appeal to the Supreme Court. Essentially, the plaintiff appealed a denial by the City of Burlington, which claimed that only the city's third-party consultant possessed an unredacted economic feasibility study for a new tax-increment financing proposal. Although unredacted hard copies had been provided to the City Council at a meeting, those copies were returned to the consultant; therefore, the city argues, they cannot comply with the request to disclose unredacted copies of the study because they simply don't have them. Additionally, the city argues that the unredacted copies are

exempt from disclosure anyhow under the trade secrets provision of Vermont law.

I'm trying to verify whether the Supreme Court has indeed agreed to take the case. If so, this seems like an obviously viable story, especially considering the high-profile nature of the development at the heart of the debate.

The second lead I mentioned previously, after further reporting, seems less related to consultant secrecy than a questionable application of a specific exemption. This is the situation of the Vaughn Index showing that the Burlington School Board withheld numerous documents related to communications strategies, claiming they were exempt under the labor negotiations clause. I think that is also a good story potential — just different from the consultant secrecy idea.

#### *Fees & (Free) Inspection*

No new traction here.

#### *Weaponized Withholding*

I spoke with a former, publicly financed candidate for Lieutenant Governor who was sued by the Attorney General for violating campaign finance laws by accepting an email promotion from the Vermont Democratic Party that encouraged people to attend a rally for this candidate (among others). Setting aside the intricacies of Vermont's laws regulating public financing of political campaigns, and setting aside the intensely political nature of the lawsuit, the heart of the issue actually comes down to the value of the email promotion in question. Following is my current understanding of the situation, though it needs to be verified with corresponding documentation:



Dean Corren, the former candidate, was accused of violating campaign finance laws by accepting the in-kind “donation” of the email promotion. Corren believes this endorsement was and is actually allowed, but when he was challenged on it by the Attorney General’s office, he agreed to compensate the party for the value of the email. He needed guidance from the Attorney General’s office, however, on how to value it. Such guidance was not forthcoming: The Democratic Party said they didn’t know how to value it, and the AG’s office said pretty much nothing. The deadline for paying the compensation lapsed, after which time the Attorney General sued the Corren campaign. In the course of discovery while fighting that lawsuit, Corren and his lawyer found a letter from the Democratic Party to the AG’s office that not only valued the email (at \$255) but also documented the method by which that value was estimated. Despite numerous requests from the Corren campaign to the VDP and the AG for the value of the email so that he could reimburse the party for it, this record was not disclosed.

I don’t know if this is worth pursuing as a public records story, but for the time being I’ve invited Dean Corren to send me any documentation he has of his requests for this information, as well as the responses he received.

### *Story Pitches*

I expect that this week, I’ll have enough reporting complete on my first three stories that I’ll be able to pitch them. Even if I don’t pursue the idea of the single-issue website, I think it makes sense to pitch to multiple news outlets and try to get them to agree to non-exclusive rights. That would achieve two goals:

- Get the word out more broadly about the issue, and

- Achieve an economy of scale for my business that makes it viable to work with smaller and lower-paying news outlets.

#### ANALYTICAL COMPONENT

The Investigative Reporting Workshop is onboard with the white paper. They will provide editorial guidance, as well as assistance finding a co-publisher. They are also checking their budget to see if they can help underwrite the cost of my time producing the paper.

#### **Next Steps**

- Do just enough reporting on my first three stories to develop pitches.
- WTF Essex: Gather documentation to vet allegations, and make sure I can get at least three people on the record talking about a history of public records and open meetings violations.
- Consultant Secrecy: Confirm if the Supreme Court has agreed to hear the appeal regarding documents held by a third-party consultant being non-public.
- Fees & (Free) Inspection: Follow up with leads to confirm that I will have sources.
- Weaponized Withholding: See what I get from Dean Corren before putting any more time into this.
- Secret PR Strategies: Run the Burlington School Board withholdings by a couple public records experts to see what they think.

- Negotiate white paper details with Investigative Reporting Workshop and review interviewing strategy with managing editor there before I reach out to prospects.

### **Questions for the Committee**

I would like to drill down on the line between reporting and advocacy. As I mentioned in Memo 1:

I *\*have\** advocated among journalists for us to get together on this issue across mediums and across newsrooms, and to advocate for solutions to egregious abuses and flagrant violations of the state's public records laws, as well as solutions for what the law is lacking (such as any consequences whatsoever for violations). I have also advocated for connecting with other stakeholders on the issue, but I have not engaged in that kind of outreach to date. The ACLU of Vermont is leading a public records reform advocacy campaign; I and a handful of other journalists have been in touch with them about it, but my role is limited.

In response to that, Scott said: "As long as you're not lobbying for specific reforms or legislation, I think your good, despite the reservations some of your contacts have expressed."

To be more specific on my contact with the ACLU: The coalition of journalists I convened hammered out the priority problems we feel need to be addressed, and a few ideas for fixing those problems. I provided these priorities and ideas to the ACLU, which incorporated them into a list of recommendations for legislative reform that they, in turn, provided to legislators. A group of us met with the ACLU to discuss strategy for catalyzing public records reform.

However, the ACLU to my knowledge has not been contacted during the drafting of the pending public records reform bill, and I certainly haven't either. I did talk to the Secretary of State, whose office is drafting the bill, just to find out what's going to be in it; but it's not like they were consulting me at all about it, and I was careful to remain neutral on what they told me — with the exception of pointing out that public officials are most likely always going to err on the side of withholding as long as there's nothing to lose when they refuse information that should be disclosed.

Additionally, the ACLU has endorsed the survey I created to collect stories about access to public records from members of the public. (The Vermont Press Association and the SPJ FOI Committee have also endorsed the survey.)

So, I still feel like I'm kosher for reporting. But of course I have a vested interest in that position. Do y'all have any further thoughts on this issue?

Also, to be clear: I'm committed to the reporting one way or another. But I want to be super confident in my standing as I go to make my pitches.

### **Scheduling Defense**

I would love to set a date for my thesis defense so that I can start booking travel & other logistics. I believe my 14th week of work will be complete as of Friday, March 23. I expect to have filed all six of my stories and finished the white paper by that time. How much time do you need between March 23 and the defense?

I see that Mizzou's Spring Break runs March 26-30, so I'm assuming that's out.

I will likely be traveling to visit family in Houston from March 29-April 2, so I could easily travel to Columbia anytime the following week (April 3-6).

The next week is also possible — preferably between April 9-12, as April 13 is a travel day for me on my way to North Carolina.

Thank you!

## **Memo 5, January 22, 2018**

### **Summary**

I've done enough reporting to start pitching, and I'm ready to go full-steam ahead on the white paper.

### **Activity**

#### SKILLS COMPONENT

#### *Weaponized Withholding*

This is now off the table. This is the story idea related to the AG's office not just telling Dean Corren what he owed for the email that the VT Dems sent on his behalf back in 2014. It's all complicated, but I studied the Trial Memo he sent me, as well as the original complaint and the settlement I was eventually able to find online and, as I told Dean by email:

“Ultimately though, I don't think this is a story I can work into my series — but not because it's not super interesting. I just have to stay laser focused on the matter of public records, and it's not clear to me that possession of the \$255 valuation before your campaign's books closed would have really solved anything. There would still have been the essential question of how much of that email was your share, and also whether it was even considered a contribution to begin with.

“I think the real takeaway of this case is that, instead of clarifying important questions about campaign finance laws as they apply to publicly financed candidates, the ruling actually cements the very concerns that fueled so much grappling over the email blast to begin with. THAT'S the story I would tell if I weren't already committed to the public records series. (And then there's the

interesting political angle, although I tend to focus more on policy.) Trying to make this story about public records is just not realistic, when the disclosure of the valuation document still would have left the case's essential questions unanswered.”

### *Consultant Secrecy*

This is the issue of the City of Burlington denying access to an unredacted economic feasibility report for a proposed TIF project. The City said they could not disclose the unredacted version because they only have the redacted version in their possession. (The third-party consultant who conducted the study apparently provided unredacted copies to the City Council at a meeting, but collected them all at the meeting's close.) Additionally, the city claims the redacted contents constitute a trade secret, which is exempt from disclosure under Vermont law.

The requester sued for access, and a Superior Court granted summary judgment in favor of the city, asserting that the unredacted study did not even meet the definition of a public document, and upholding the trade secret exemption applied to it. An interesting note: This was the same judge who ruled that public business the former Attorney General conducted via his private email account did not qualify as a public record — a ruling heartily overturned by the Supreme Court.

Based on my review of this current appeal filed with the Supreme Court, I think this is a solid story to pitch. The City of Burlington still has time to respond to the appellant's brief, so the case does not appear to be fully active at this time.

Nonetheless, the public interest case for it is clear, and I think the lower court judge's recently overturned decision on public records makes it all the better of a news hook.

### *Private Public Strategies*

Based on further reporting, I have pulled this out as a separate story from the Consultant Secrecy idea.

This is the issue of the Burlington School Board withholding documents in their entirety that relate to the board's media strategy, draft press releases, etc. on the topic of pending contract negotiations. I've reviewed the Vaughn Index of withheld documents and run this concept by public records experts in Vermont and elsewhere in the Northeast, and I think this is worthy of public dialogue that hopefully can be sparked through news coverage.

### *Fees & (Free) Inspection*

I have enough to go on here to confirm this as a story. Based on my legislative research, I can also include the historical contextual note that the last public records reform bill, in 2011, sought to standardize the fees charged. It's interesting that currently, there seems to be less discrepancy in, for example, how much an agency can charge per page, but plenty of discrepancy in when fees actually get charged. Also, the draft legislation that's pending in the House Government Operations Committee \*may\* attempt to clarify that fees cannot be charged for inspection or on-site copying by the requester.

### *WTF Essex*

My main source of documentation for this story has been out of town. He promised to get me documents this week.

### ANALYTICAL COMPONENT



My contract negotiations with the Investigative Reporting Workshop are still pending. I had been thinking I should wait to get officially onboard with them before doing much more outreach to experts I'd like to interview. However, I don't think I have time to wait. In the meantime, I have identified one new interview target to prioritize:

- James Eli Shiffer is a government secrecy and public records reporter at Star Tribune. He writes the paper's Full Disclosure column and serves as a board member for the Minnesota Coalition on Government Information.
- I've reached out to Mal Leary twice, and he hasn't gotten back to me, so I might ask Dan Bevarly at the NFOIC to help put me in touch.

### **Next Steps**

- Pitch three stories:
  - Fees & (Free) Inspection
  - Private Public Strategies
  - Consultant Secrecy.
- Go/No Go decision on WTF Essex. If "Go," articulate nut graf / story mission statement.
- Try to schedule three white paper interviews:
  - Mal Leary
  - James Eli Shiffer
  - David Cuillier
- Finalize (hopefully!) white paper arrangements with Investigative Reporting Workshop.

### **Scheduling Defense**

How does sometime between Monday, April 9, and Thursday, April 12, look for scheduling my defense? If not that week, perhaps the following?

## **Memo 6, January 30, 2018**

### **Summary**

Pitching and reporting underway. White paper interviews pending.

### **Activity**

#### SKILLS COMPONENT

##### *Pitches*

I have reluctantly accepted that my grand plan about the single-issue website — although an AWESOME idea that's really worth pursuing, whether for public records coverage or another topic — is not realistic within the scope of this project due to competing demands for my time. Realistically, I think it will need more coordination/management that I've got the bandwidth for now, and more advance planning than the public records coverage affords at this time.

So, I've pitched three stories to my primary target paper on the condition of selling non-exclusive rights. My goal is to saturate coverage of the issue throughout Vermont publications — which also is the business model that keeps the prospect both financially viable for me and affordable for the state's relatively small news outlets. As planned in Memo 5, the pitched stories are:

- Consultant Secrecy
- Private Public Strategies
- Fees & (Free) Inspection

##### *WTF Essex*

After reviewing a trove of documents from my main source, I believe this is worth pursuing. My primary next step is to identify more recent examples of

violations of open meetings laws and public records access, because the documentation I have is several years old. However, the very fact that questions about town leaders' transparency have persisted for so long may illustrate exactly the kind of "culture" of secrecy that's often so hard to pinpoint and explore in-depth.

I'm not sure yet if this will end up as a series, or as a single feature, but I have the sense it will include a robust discussion of the tension between efficient decision-making by elected representatives and their delegates, versus messy democratic engagement that keeps citizens engaged in the process of governance.

#### ANALYTICAL COMPONENT

No traction on contract negotiations with the Investigative Reporting Workshop, but I'm trusting that will work out in good time and moving forward on interview requests in the meantime.

#### **Next Steps**

- Report three stories, continue pitching to local/regional publications with the aim of getting editors to agree to simultaneous publication.
  - Fees & (Free) Inspection
  - Private Public Strategies
  - Consultant Secrecy.
- Slow-burn WTF Essex:
  - Identify more recent examples of open meetings violations and thwarted access to public records for WTF Essex.
  - Identify sources to speak on the record about the governance culture in Essex.

- Continue trying to schedule three white paper interviews:
  - Mal Leary
  - James Eli Shiffer
  - David Cuillier
- Finalize (hopefully!) white paper arrangements with Investigative Reporting Workshop.

### **Questions for Committee**

It occurs to me that I'm a little unclear whether I will have something additional to write up to submit to the committee for defense, or if my existing proposal plus six articles and white paper constitute the sum total of what I am defending?

If the latter — if my work is done once the articles and white paper are done — then the week of April 9-12 seems like a safe bet, as long as it works for Mark. If the former — if there's something additional for me to write up or pull together — then it would make sense to look at the week of April 16-20. I am also open to scheduling that later week if it simply works better for anyone's schedule or just on the principle of building in some buffer.

Thank you!

Hilary

## **Memo 7, February 6, 2018**

### **Summary**

I've self-assigned deadlines for reporting while pitching continues, and my first white paper interviews are scheduled.

### **Activity**

#### SKILLS COMPONENT

##### *Pitches*

I made two more pitches to Vermont papers last week, and I'm working my way up the chain from my editorial contacts to the managing editors and publishers who make business decisions. My main considerations are:

Selling the papers on the notion of simultaneous publication, which is important to me for two reasons:

It's my editorial strategy for saturating the market with related coverage in order to boost the topic's place in public dialogue.

It's my business strategy for keeping the content affordable for local papers with *\*very\** limited freelance budgets, and economically viable for me to invest the necessary time in the reporting and writing.

In only three pitches, I've encountered two papers that actually do not struggle to feed the beast. One of them actually has more content than they can fit in their paper — and though they love the idea, more news is an admittedly hard sell for an overstaffed newsroom.

That said, I also realize I can't wait until I have assignments in-hand to start writing, so I've drafted the following schedule for self-assigned deadlines. The order

may end up changing, but the upshot is that I plan to produce one story per week for the next six weeks.

- Week of Feb. 12: Consultant Secrecy
- Week of Feb. 19: Private Public Strategies
- Week of Feb. 26: Fees & (Free) Inspection
- Week of March 5: Ombudsman. This is a previously identified story that I've prioritized in light of legislative discussion. Instituting an ombudsman position is a priority for the Secretary of State (whose office was deeply involved in drafting the pending legislation) and I hear it is a major point of contention for municipal stakeholders.
- Week of March 12: Open Meetings. This is a new story identified in light of legislative discussions and heated debate. It also happens to blend perfectly with the issues I've been reporting out from the town of Essex. I believe this subject is legitimately included in a series on public records because documentation from meetings can only be accessed if the public knows the meeting occurred.
- Week of March 19: TBD

### *Reporting*

I've found it very helpful to sit in on some legislative testimony to get a better sense of the draft public records bill, the types of questions lawmakers are asking, and the stakeholders who are showing up to testify and lobby. Keeping the pulse of the legislative process will help me prioritize my reporting, so that with a solutions journalism mindset, I can investigate problems and report on potential solutions for

issues Vermont lawmakers are actually grappling with. I feel this will help make the series grounded, relevant and productive.

Of course, there must be room for enterprise, so I'm also trying to nudge the ball forward with a source for one backburner story: A quasi-governmental agency charged with investigating claims of abuse, neglect and serious rights violations against people with disabilities is frequently (I'm told) denied access to records they need to carry out their investigations.

#### ANALYTICAL COMPONENT

Still no word from the Investigative Reporting Workshop on contract negotiations, but I'll ring their bell again this week.

In the meantime, I'm happy to say I've tentatively lined up interviews with James Eli Shiffer at the Minneapolis Star Tribune, who focuses his reporting on government secrecy and public records; and David Cuillier from University of Arizona School of Journalism.

Cuillier also recommended Leonard Downie, Jr., from Arizona State University's Cronkite School of Journalism and former executive editor and vice president of The Washington Post. Cuillier said that to the best of his knowledge, Downie has in the past has disavowed reporting on public records because he believes it's a conflict of interest. Downie's strong credentials and (assuming he still holds that belief) position contrary to my own would make him a perfect addition to my white paper for the sake of pushback and to deepen my inquiry. I may end up replacing another interview target with Downie, but first I'll just reach out to him to see if he'd be willing to talk.



## **Next Steps**

- Report and write stories to meet the following schedule:
  - week of Feb. 12: Consultant Secrecy
  - week of Feb. 19: Private Public Strategies
  - week of Feb. 26: Fees & (Free) Inspection
  - week of March 5: Ombudsman
  - week of March 12: Open Meetings + WTF Essex
  - week of March 19: disability rights violations?
- Continue pitching to local papers
- Conduct and transcribe two interviews:
  - James Eli Shiffer
  - David Cuillier
- Schedule two more interviews:
  - Leonard Downie, Jr., ASU Cronkite School
  - Kathy Kiely, Press Freedom Fellow, National Press Club Journalism Institute
- Finalize (hopefully!) white paper arrangements with Investigative Reporting Workshop.

## **Scheduling Defense**

It looks like Wednesday, April 18, at 9am local time in Columbia is the only spot both Scott and Randy can make. Mark, does this work for you? If not, I'll try to get some scheduling basics from each of you to look for times with a higher likelihood of overlap.

Also, how long of a meeting should I be planning for?

Thank you!

Hilary

## **Memo 8, March 19, 2018**

### **Summary**

This memo summarizes the my work on this project during the recent break I had to take for personal reasons, and lays out a detailed plan for completing the deliverables in time to defend before summer break.

### **Activity**

#### SKILLS COMPONENT

I've been keeping up with legislative developments on the pending state public records reforms. A *\*very\** abridged and weakened version of the original draft bill was passed by the House, and assigned to the Senate Government Operations Committee last week.

I've heard there is some disagreement over whether farms' Nutrient Management Plans should be disclosed. You may recall this was an issue that came up in my original scoping (see Memo 3), when an environmental activist who's also running for governor was going to be charged \$33,000 by the Agency of Agriculture for the Nutrient Management Plans (NMP) of "Large Farm Operations" (LFOs) near Lake Champlain. The fact that this issue in particular is being discussed in committee raises its profile for me as a possible Story #6, the subject of which is yet to be determined.

An interesting development on the public records front is a recent decision by the Attorney General's Office to proactively disclose not only all public records requests the office receives, but also all responses to those requests. I was

interviewed for a story about the policy by a reporter from a statewide nonprofit news website that covers state policy and politics.

### ANALYTICAL COMPONENT

I've received a contract and settled on a price with the Investigative Reporting Workshop. I have questions about a couple clauses in the contract, but nothing that's a deal-breaker. Lynne Perri (managing editor at the Workshop) would like Jennifer LaFleur (data editor) to consult on the project due to her subject-matter expertise stemming from the FOI column Jennifer wrote years ago at the Dallas Morning News.

Also: IRE accepted my proposal for a session on the topic at their upcoming conference in Orlando this summer. The session will most likely be presented as a "commons" rather than a panel, meaning the session will be a more conversational than presentational format. I have the opportunity to invite two other speakers to join me, and I'll still have the chance to promote the white paper and share the tipsheet.

### **Next Steps**

My priority is to finish my work in time to defend in May before summer break. I realize the recent delay will probably rule out a spring finish, and I am OK with that, as long as I qualify for summer graduation.

One tactical shift is to concentrate my focus first on the reporting (skills component) to complete all stories due, and then switch gears to the white paper (analytical component). I think this approach will boost my momentum. Also, I think

the contextual experience will enhance my interviews for the white paper, because I'll be speaking with the experts more from a place of practice than strictly theory.

Following is a detailed schedule of deadlines:

- Week of March 19: Complete two stories (Open Meetings and Consultant Secrets)
- Week of March 26: Complete two stories (Fees/Inspection and Private Strategies)
- Week of April 2: Complete two stories (Ombudsman, TBD)
- Week of April 9: Complete three interviews
- Week of April 16: Complete three interviews
- Week of April 23: Write "Best Practices" report (i.e.: white paper) and Tipsheet; draft project due to chair
- Week of April 30: Revise project per chair edits; project due to committee
- Week of May 7: Defend project
- Week of May 14: Revise project per committee edits
- Week of May 21: Final paperwork

### **Questions for the Committee**

Does this plan look acceptable to you?

Will you be in Columbia the week of May 7?

Will you be available the week of May 14 to review my final edits?

Thank you!

Hilary

## **Memo 9, March 26, 2018**

### **Activity**

Last week I kicked back into full gear, focusing my efforts on reporting out the Open Meetings and Consultant Secrets stories. The first is reported and the other is drafted, based on the following activity:

#### *Story 1: Open Meetings*

- Review of pending legislation to change the state's open meetings laws. One bill (H.700) would exclude holidays from the number of days public bodies have to post minutes of their meetings. A different bill (H.910, which contains additional provisions around public records) attempts to address the issue of "serial" meetings, whereby a public official engages with colleagues in multiple groups that comprise less than a quorum, in order to avoid triggering open meeting protocols. I intend to focus more on the serial meetings issue, but will mention the deadline in my article.
- Interview with Chris Winters, deputy Secretary of State
- Interview with Cheri Goldstein, former Selectboard Chair in the town of Worcester (pop. 902) about the challenges of avoiding inadvertent serial meetings in a small town.
- Pending interview with a representative from the Vermont League of Cities and Towns, a member organization that provides training, advice and service benefits to municipalities statewide. (My contact was unexpectedly out of town late last week, so I will conduct the interview this week.)

#### *Story 2: Consultant Secrets*

- Review of Supreme Court briefs from plaintiff and two defendants, and plaintiff's reply brief.
- Interview with lawyer for plaintiff.
- Attorneys and representatives for both defendants declined to be interviewed, instead referring me to their briefs for any material to quote.
- First draft is complete.

### *Potential for Story 6*

I spoke with someone who says he obtained unredacted versions of two important telecom reports, the public version of which is redacted. He believes the redactions illustrate the extent to which the Public Service Department is doing favors for the telecom industry. I've asked him to share the un-redacted documents with me, so that I can compare the versions and suss out its story potential.

The public interest in this story could be significant, because the reports involve incomplete cell phone coverage in the state.

### **Next Steps**

- Finish Story 1
- Revise and tighten Story 2.
- Report and draft Stories 3 and 4: Fees/Inspection and Private Strategies (unless the telecom story pops).
- Circle back to editors I've pitched the series to.

## **Memo 10, April 13, 2018**

### **ACTIVITY**

#### *Consultant Secrets*

My first draft revealed a couple places I needed more clarity or information, so I did additional reporting and have one source on the record stating that the un-redacted feasibility study was, in fact, handed out at a 2016 Finance Board meeting. (That assertion has been made by the plaintiff. The city has challenged the plaintiff's right to raise the issue for technical legal reasons related to timing, but the city has not responded directly to confirm or deny the assertion.)

I also interviewed Noelle MacKay (the city's economic development director) to clarify details of the TIF agreement.

#### *Open Meetings*

I conducted additional research (clip review) on the incidents in Vermont of alleged Open Meetings Law violations, and studied one case from 2016 that perfectly demonstrates concerns about "serial meetings" (a series of one-on-one meetings) being used to circumvent public debate. There is no case law on the subject, but an informal AG's opinion letter was issued in this one case, declaring that the law had not been violated.

The letter of that law is what some stakeholders are seeking to change. The Secretary of State's office and the Vermont League of Cities and Towns have testified that they routinely get questions about serial meetings from members of the public and town/city officials, and they routinely offer the same conservative advice to



avoid them. The parties are united in their request for new statutory language to codify their interpretation and thereby clarify the issue.

I attended a Senate Government Operations Committee meeting on the proposed legislation, where the potential unintended consequences of the clause were hotly debated. The new material brings the story to life. I've completed the first draft.

#### **NEXT STEPS**

- Finalize "Consultant Secrets"
- Edit and revise "Open Meetings"
- Finish reporting and draft "Private Strategies"
- Finish reporting and draft "Ombudsman"
- Report and draft "Fees/Inspections"
- Select topic for final story, report and draft.
- Move on to Analysis.

## **Memo 11, April 15, 2018**

### **SUMMARY**

My skills component is nearing completion, the analytical component is underway, and the defense is scheduled for Wednesday, May 9, 5-6pm.

### **ACTIVITY**

#### **SKILLS COMPONENT**

##### *Open Meetings*

After my initial draft of this story (following last week's Senate committee meeting where changes to the Open Meeting Law were debated) I realized I need a little more context.

I interviewed the former mayor of Montpelier (Vermont's capital city) regarding allegations from 2016 that he violated the law by orchestrating a daisy-chain of meetings to conspire outside of a public forum to end the city manager's contract.

I corresponded with the Attorney General's office by email regarding the new AG's willingness to prosecute Open Meeting Law violations — a stark reversal from his predecessor, who refused to do so. In that context, I got a comment about the proposed changes the Senate is now considering.

A revision incorporating this new information is underway.

##### *Ombudsman*

I interviewed the Deputy Secretary of State about his office's stalled proposal to create an Open Government Ombudsman in Vermont, and the policy advisor for the ACLU, which has mixed feelings about that initiative. I also conducted research on a national level about various ombudsman programs.

This story is now drafted.

*Private Strategies / Exemptions*

I considered ditching this story because my interviews with both the Deputy Secretary of State (who is also an attorney) and an attorney for the ACLU revealed little to no concern over this. (Reminder: In response to a citizen request, a school board withheld correspondence relating to public information strategies about teacher contract negotiations.) Both said they can see justification for protecting that information as part of contract negotiations. However, the former director of the Vermont ACLU differs.

Ultimately, I decided to continue this story, but reframe it in the context of exemptions, and how nuanced the interpretation of exemptions can be. This also presents the vehicle for discussion Vermont's exemptions more broadly, including the challenge of how they're scattered throughout state law, an unfinished effort to evaluate them all, and a suggestion from the ACLU to institute a default sunset to all exemptions.

The first draft of this story is underway.

*Fees/Inspections*

The reporting for this story is nearly complete, and the focus narrowed to the issue of whether agencies can charge for records inspections. The argument that inspections should be free is anchored by an interview with an ACLU attorney. The argument that agencies should be able to charge for inspections (because it takes just as much time to prepare the documents for inspection as for copying them) is anchored by testimony from a police chief discussing body camera footage.

The first draft of this story is underway.

### ANALYTICAL COMPONENT

I reached out to 10 potential interview subjects. I've interviewed Kathy Kiely, and I'm scheduling with Miranda Spivack.

### **Defense**

We have one time slot in the second week of May that works for everyone: Wednesday, May 9, 5-6pm. I will work on booking a room and provide that information ASAP. I've booked my flight.

### **Next Steps**

Finalize Open Meetings story.

Finalize Consultant Secrets story.

Revise Ombudsman story.

Finish drafting Private Strategies / Exemptions story.

Finish drafting Fees / Inspections story.

Report Telecom Redactions story.

Continue with interviews.

## **Memo 12, April 18, 2018**

### **ACTIVITY**

#### SKILLS COMPONENT

Reporting is now complete for the following stories:

- Open Meetings — story drafted
- Fees/Inspections — draft underway
- Exemptions (formerly Private Strategies) — draft underway
- Consultant Secrets — story drafted
- Ombudsman — story drafted

For the sixth story, I had been planning to report on a redacted telecommunications plan for which a source provided me with the un-redacted version. However, my clip review revealed that this fact had already been reported. I did not feel I could turn over new ground on the subject. Instead, I'm going to save that as fodder for a broader potential story about the pros and cons of exempting public safety information from disclosure.

Instead of that story about redactions, I chose to revisit an earlier lead about the high cost charged to access farms' "nutrient management plans" — documents detailing how agricultural operations will manage their fertilizers, manure and organic byproducts. The purpose of nutrient management planning is to promote healthy soils and productive growing, and also to minimize water and air pollution. Many nutrient management plans are developed in consultation with public agencies and with the assistance of public funding. A legislative tug-of-war is currently underway to either explicitly exempt NMPs from disclosure, or

alternatively to explicitly mandate that they be considered public documents not qualified for exemption as trade secrets. The effect of farm run-off on Vermont's waterways is a longstanding issue of great public interest for agricultural, recreational, tourism, environmental and financial reasons. The implications of this legislative debate are potentially monumental, and it is currently going un-reported in local and statewide press.

My current activity to catch the story is:

- I've interviewed one senator working to mandate disclosure.
- I've interviewed the policy director of the ACLU on the matter.
- I've scheduled an interview with one senator working to exempt the documents from disclosure.
- I've reached out to two environmental lobbyists advocating for NMPs as public records.
- I will work the sources above to identify stakeholders with a more direct interest in the topic (i.e.: farmers and/or abutters with a shared water supply).

#### ANALYTICAL COMPONENT

I have completed four interviews: Kathy Kiely, Dave Cuillier, Lee Van Der Voo, Miranda Spivack

I have scheduled two additional interviews for Friday: Andrew Seaman, Todd Wallack

I have reached out to seven additional potential interview subjects: Traci Griffith, Shannon Shaw Duty, Mike Donoghue, Jonathan Peters, Eli James Schiffer, Mal Leary, Len Downie

### **Defense**

I have booked RJI 103 for the defense, which is scheduled for Wednesday, May 9, 5-6pm.

### **Next Steps**

Finish reporting Nutrient Management Plans.

Finalize all stories.

Continue with interviews — two scheduled, and two additional needed.

## **Memo 13, April 21, 2018**

### **ACTIVITY**

#### SKILLS COMPONENT

Based on the following reporting, I have finished drafting my final story about Nutrient Management Plans.

- Interviewed one senator working to exempt the plans from disclosure.
- Attended two legislative hearings in the House Government Operations Committee to catch discussion of the issue.
- Interviewed the chair of House Government Operations, whose committee is working to exempt the plans from disclosure.
- Interviewed an environmental activist lobbying to make the plans public.
- Researched a federal regulation that exempts from disclosure NMPs developed with federal financial assistance.

#### ANALYTICAL COMPONENT

I have completed three more interviews: Andrew Seaman, Todd Wallack, Mike Donoghue.

### **Next Steps**

Complete drafts for Fees/Inspections and Exemptions.

Complete eighth interview.

Write best practices report and tipsheet.



## **Memo 14, April 28, 2018**

### **ACTIVITY**

#### SKILLS COMPONENT

Reporting and writing of the Nutrient Management Plans story is complete, and the Fees/Inspection story is finished.

This activity completes the skills component of the project.

#### ANALYTICAL COMPONENT

I have completed my eighth interview (with Shannon Shaw Duty) and written the analytical report and related tipsheet.

### **Next Steps**

Compile project work into project package for consideration of the chair.

Make revisions as necessary before submitting project to the full committee.

Defend thesis Wednesday, May 9, 5-6pm in RJI 103.

## **Chapter 3: Evaluation**

### **Self-evaluation of work product**

I'm proud of the work I produced for this project — both the reported stories and the analysis.

I recognize, in hindsight, that I spun my wheels too long at the outset, worrying about big-picture packaging and funding. Once I re-framed the project as a pilot project to test the market for this reporting (and my interest in it), I was able to get the work done. I consider it a good investment in my freelance business.

### **Lessons from the project**

I ended up producing the stories first, then conducting the interviews for my analysis. At one point, I considered inverting the order, so that I could apply insights from the interviews to my own work. However, treating the project as somewhat of an experiment, I decided to dive right into the reporting. I reasoned that would prove more instructive about common stumbling blocks on this beat — lessons valuable for my ultimate goal is to encourage other reporters to also carry this torch.

The most important lesson I learned is not new, but a reminder to allow for more time in my reporting process to connect with individuals affected by these policies. The stories are much more engaging when told from their perspectives, rather than framed around the pending legislative changes that came to dominate my stories. I did my best to reflect the impact, but I feel some stories are more heavily reliant on people interpreting the public's experiences from a theoretical or ideological viewpoint.

This project also helped expand my conceptualization of “public records” as a beat to Freedom of Information more broadly, including open meetings and access to government officials.

From the analytical interviews, I was especially inspired by the work of Todd Wallack and Lee Van Der Voo, who used sustained reporting to effect change by sparking and informing a public discussion about access to public records. I like their enterprising, investigative, solutions oriented approach. On that note, I found discussions with interviewees about the intersection and boundaries between reporting and advocacy very interesting, and possibly meriting further research.

My most important lesson, though, came from first-hand experience of how interested people are in this topic. As soon as I started the work, I began talking to people — friends and strangers alike — in random or social encounters as I went about my day. People responded with a lot of curiosity, not to mention story leads.

## Chapter 4: Physical Evidence

### Pitching

A primary goal of this project was to lead by example, producing six publishable stories that frame access to public records as a public policy — not just a journalistic tool. To that end, I have been in conversation with four editors associated with a combined eight newspapers in Vermont, all of whom have expressed interest in the series.

They also are open to considering potential simultaneous or co-publication of the series. That publication strategy is important to me for two reasons: audience reach and financial viability for my freelance business.

Vermont is a state with only one statewide daily newspaper — a Gannett property that's been gutted in recent years. Although remaining staff at the Burlington Free Press continue to ply the trade honorably, the newspaper has lost not just circulation but also social standing in the state. On the flip side of that coin is a robust statewide alt-weekly paper, which pushes 100 pages 52 times a year. Seven Days produces serious investigative and narrative public policy journalism, in addition to its ample arts and culture reporting. However, as an alt-weekly, its audience remains somewhat self-selecting and limited. (Additionally, there are a handful of statewide radio and television stations, but broadcast news is outside the scope of this project.)

Contrast those limited statewide print options with a roster of about 50 news websites, semi-weekly or weekly papers, some of which reach only a few towns in

this state of a combined 624,000 people. I pursued a collaborative model for publication of this series because it seemed like the best way to reach the most geographically and demographically diverse audience.

Additionally, co-publication may be a helpful model to financially sustain my freelance business. Based on previous contacts with local publications, I knew that no one local newspaper could fairly compensate the time I've put into these stories. Rather than rule them all out and throw my hands up in the air, I decided to test the waters of collaboration, figuring that a handful of too-modest fees can add up to viable compensation.

That said, as I entered into preliminary conversations with editors, it became clear to me that working out the individual fees, logistics, editorial protocols and scheduling for multiple publications could easily turn into a half-time job in itself. For that reason, I ultimately decided to focus on simply drafting the entire series and fulfilling the obligations of this project. Now with the drafts complete, I will have begun pitching and pricing negotiations with editors.

In addition to publication of the reported series, I made arrangements to publish my analytical component (or a version of it) with the Investigative Reporting Workshop. I am in touch with Lynne Perri, the managing editor at the Workshop, and with Jennifer LaFleur, the Workshop's data editor. Although this is not a data project, Jennifer LaFleur was brought into the discussion due to her experience writing the Dallas Morning News "Citizen Watchdog" column in the early 2000s.

## **Research**

One of my first steps in the project was to familiarize myself with Vermont's recent legislative and judicial history regarding access to public records. I learned that a number of public records reforms were passed in 2011 (summarized below) and I compiled a reference list of relevant case history (copied below).

## 2011 [H.73](#) SUMMARY

### **timing & exemptions**

- public record shall be produced for inspection or shall be certified as exempt within three business days of receipt of a request.
- If a record is certified as exempt, the public agency shall include the asserted statutory basis for the denial.
- in unusual circumstances, an agency has 10 business days from receipt of a request for a record to respond.
- authorizes a public agency to consult with a requesting party regarding the scope of a records request, and, in unusual circumstances, to request that a person seeking a voluminous amount of records narrow the scope of the request.
- clarifies that when a public agency asserts an exemption for part of a document, the agency should redact the exempt information and not withhold the record in its entirety.
- public agency shall accommodate a request for a public record from a person with a disability by providing alternative access to the record unless such an accommodation would result in a fundamental alteration of agency service, programs, or activities or would result in an undue financial and administrative burden.

### **attorney's fees and litigation costs**

- a court shall assess reasonable attorney's fees and other litigation costs against a public agency when the complainant substantially prevails, except if the public agency, within the 20-day period for response to a complaint, concedes the contested record is public and provides it to the complainant.

- When a public agency concedes a contested record within 20 days of service of a complaint, the court may award reasonable attorney's fees and other litigation costs when the complainant substantially prevails.
- authorizes a court to assess against a complainant reasonable attorney's fees and other litigation costs when the court finds that the complaint violated court rules.

**establishes a legislative study committee**

- meet over three years to review the requirements of the public records act and the numerous exemptions to the act.
- Prior to each legislative session, the study committee shall submit to the general assembly recommended amendments to the public records act.
- requires legislative council to compile all of the exemptions to the public records act as a statutory note to the act.

**state reporting**

- The secretary of administration shall report to the general assembly regarding the records request system and whether to implement a document management system for state agencies.
- The act also requires the secretary of state to survey municipalities regarding whether there is an increased number of requests to inspect records at no cost.
- requires the court administrator's office to report annually to the general assembly regarding the number and disposition of public records act cases filed in the civil division of the superior court.

**JUDICIAL HISTORY**



- [Public Records Act](#)

**2017 Toensing v. Attorney General of Vermont**

[2017 VT 99](#)

[Docket No. 500-6-16 Cncv](#) in Superior Court (Chittenden Unit)

... (Brady Toensing sued for access to former Attorney General Bill Sorrell's

work-related emails sent to/from his private account. He won.)

- "PRA's definition of 'public record' includes digital documents stored in private accounts, but emphasize that it extends only to documents that otherwise meet the definition of public records."

**2013 Rutland Herald v. City of Rutland**

[2013 VT 98](#)

[Docket No. 221-3-10 Rdcv](#) Superior Court (Rutland)

[2012 VT 26](#)

[Docket No. 221-3-10 Rdcv](#) Superior Court (Rutland)

- Public has right to know how police investigate their own employees.
- There's no privacy interest for officers viewing porn at work. (Duh!)

**2012 Galloway v. Town of Hartford (2011-211)**

[2012 VT 61](#)

[Superior Court ruling \(Windsor\)](#)

Police responded to a suspected burglary, but the suspected burglar was actually the homeowner who, due to a medical condition, was not responsive to their orders

when they found him sitting naked on a toilet. They pepper-sprayed him, beat him with a baton and eventually handcuffed him so tightly that he required two stitches in his wrist. There was no arrest.

- “We hold that because the homeowner’s detention amounted to an arrest, the records in question must be disclosed under the PRA’s proviso that ‘records reflecting the initial arrest of a person . . . shall be Public.’”

### **2012 Rutland Herald v. Vermont State Police and Office of the Attorney**

#### **General**

##### [2012 VT 24](#)

- Effectively permanently seals investigatory records unless/until the Legislature clarifies otherwise.
- No Vaughn Index for categorical records
- No balancing test for exempting records related to detection and investigation of crime: “The exception in § 317(c)(5) is not information-based. There is no balancing process involved in the implementation of § 317(c)(5) and no statutory standards the court could use to determine what information to disclose and what to redact. Redaction does not apply.” (in direct contradiction to balancing test called for in 2011 Bain v. Clark???)

### **2012 Bain v. Clark (Stephen Robert Bain v. Keith Clark)**

##### [2012 VT 14](#)

[2008-183](#) (appealed from Windham Superior Court DOCKET NO. 30-1-08

Wmcv)

- Not all records generated by police comprise crime-related records that are conditionally exempt under 317c5. Police must first evaluate whether the requested records ARE related to detection and investigation of a crime, and:
- There's a balancing test to weigh 317c5 exemption against competing public interests, as well as consideration of whether the documents might endanger or damage the investigation.

### **2011 VSEA v. Vermont Agency of Natural Resources**

[No. 517-7-10 Wncv \(Crawford, J., Jan. 6, 2011\)](#) Superior Court (Washington Unit)

ruled with VSEA v. Vermont Department of Human Resources (518-7-10 Wncv)

- Agencies cannot charge to prepare records for inspection, even if it means they have to print out just as many pages as they would if they were providing hard copies to the requester and even if it means they have to spend hours redacting.
- Apparently chief assistant AG, Bill Griffin, told Secretary of State Jim Condos he just flat-out doesn't believe and won't follow.

### **2004 Wesco v. Sorrell**

[2004 VT 102](#)

- ¶ 10. The issue presented is whether the documents sought by appellants are exempt from public disclosure under Vermont's Access to Public Records Act, 1 V.S.A. §§ 315-20, because they are "relevant to litigation," id. § 317(c)(14). We have established a method for analyzing appeals arising under the Act. **The Public Records Act represents a strong policy favoring access to public documents and records.** See [Trombley v. Bellows Falls Union High Sch., 160](#)

[Vt. 101, 106-07, 624 A.2d 857, 861 \(1993\)](#) (emphasizing that the Act is to be construed liberally and in favor of granting access). Exceptions to that general policy of disclosure are listed in 1 V.S.A. § 317(c). **We construe these exceptions strictly against the custodians of records and resolve any doubts in favor of disclosure.** Id. at 107 (citing [Caledonian-Record Publ'g Co. v. Walton, 154 Vt. 15, 20, 573 A.2d 296, 299 \(1990\)](#)). **The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure.** [Finberg v. Murnane, 159 Vt. 431, 434, 623 A.2d 979, 981 \(1992\)](#). (emphasis mine)

#### **2002 Springfield Terminal Ry. Co. v. Agency of Transp.**

174 Vt. 341, 345, 816 A.2d 448, 452 (2002)

- This case sets a precedent of "strong policy favoring access to public records and documents."

#### **1993 Trombley v. Bellows Falls Union High School**

[160 Vt. 101, 106-07, 624 A.2d 857, 861 \(1993\)](#)

- The Public Records Act represents a strong policy favoring access to public documents and records.

#### **1992 Finberg v. Murnane**

[159 Vt. 431, 438, 623 A.2d 979, 983 \(1992\)](#)

- Burden of proof is on the agency seeking to exempt records from disclosure. This case establishes that PRA exemptions must be "construed strictly against the

custodian of ... records, and that the custodian must do more than provide 'conclusory claims or pleadings' to establish that the exemption applies."

- See also [1 V.S.A. § 319\(a\) \(agency bears burden of justifying its decision to deny access\)](#).

### **1990 Caledonian-Record Publ'g Co. v. Walton**

[154 Vt. 15, 20, 573 A.2d 296, 299 \(1990\)](#)

- Exceptions should be construed strictly against the custodians of records, and any doubts should be resolved in favor of disclosure.

### **Balancing test for personnel privacy vs. public interest**

In protecting personal documents relating to an individual (including information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency, information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation), the court must balance the public interest in disclosure against the harm to the individual. See:

- *Kade v. Smith*, 2006 VT 44, ¶ 14, 180 Vt. 554, 904 A.2d 1080 (mem.)
- *Trombley v. Bellows Falls Union High Sch.*, 160 Vt. 101, 109, 624 A.2d 857, 863 (1993)

## Reporting

### Story 1: Open Meetings

*HED: Open Meeting Laws under review*

*DEK: Proposed changes get stuck against worries they could paralyze local governance.*

Lawmakers are grappling with a proposal to clarify what public officials can and can't discuss outside public meetings. Their decision could affect officeholders from the Green Mountain Care Board and every subcommittee of every school board in the state, right down to the tiniest village's cemetery commission.

Current law prohibits a "quorum" of any public body (in other words: a majority of members) from meeting in private to discuss public business. Recent testimony to the Legislature registered concerns that this restriction is being skirted.

Sen. Jeannette White (D-Windham), chair of the Senate Government Operations Committee, told colleagues at a recent legislative hearing that she's convinced she's been to local meetings where town leaders have effectively taken action before the meeting even began.

"Their intent is to take the action, outside of there, and then go to the meeting and choreograph this little dance about who's going to say what, and then reach the agreement," White said.

State law allows for fewer than half the members of a public body to engage in such plans, but not a quorum.

Legislation now under consideration in White's committee seeks to clarify that this restriction applies not just to a gathering where all members of a quorum gather at the same place in the same time, but also to "serial meetings." The term, which does not currently appear in the state's open meeting laws, describes a series of one-on-one or small group conversations, directly or through intermediaries, that would add up to a quorum of the public body.

Some refer to it as a "daisy-chain" series of meetings. Not Cheri Goldstein.

"It's like serial monogamy," Goldstein quipped in an interview. Goldstein, who recently retired as Worcester Selectboard chair, teaches medical ethics at Norwich University. She compared the serial meeting prohibition to the ethical standard of not making a handshake deal with a counterpart when you run into each other at the dump. She favors the restriction.

Limiting the decision-making process to open meetings gives a voice to citizens, Goldstein says. "It's where they can actually make a difference. And where you can be questioned. And sometimes it can be really uncomfortable. But it keeps things a lot cleaner."

Scores of other public officials may agree. But enough allegedly don't that the Secretary of State's office propelled serial meetings to the top of their priority list for H.910, a bill that tweaks Vermont's laws for both open meetings and public records.

Deputy Secretary of State Chris Winters says the new language simply makes official the legal interpretation his office and the Vermont League of Cities and Towns have always followed and offered to the dozens of citizens and public

officials who call with complaints about serial meetings, or seeking advice about how to follow the law.

The draft language, based in part on similar clauses from other states, has already passed the House. But it raised hackles in the Senate Government Operations Committee room at the Statehouse on April 12. There, lawmakers hotly debated its impact on everything from socializing at the grocery store to the very nature of politics and the process of governance.

Sen. Chris Pearson (TK-TK) was especially galled by the implication that there's anything wrong with a public official rallying support for a proposal among colleagues outside of official meeting times.

"I would call this governing," Pearson said. He described a scenario in which a city councilor might want to propose an amendment to a pending bill.

"I would like to get a majority of (council members) to vote for my amendment. So I talk to the chair of the relevant committee and get that person on board with my amendment," Pearson said. "Then, doesn't this say that I may not say to the chair, 'Can you get the rest of your committee on board?'"

That's exactly what the proposed language says, the legislative attorney confirmed.

"But that's preposterous," Pearson replied.

One of Pearson's concerns is that members of a minority party on a larger public body, like the Burlington City Council, have the chance to drum up support for their initiatives. He maintained that political lift is not realistically feasible within the confines and time constraints of an official public meeting.



“It seems to me ... that I could do that as long as I never had a majority of the body as a sponsor,” Pearson said. “But the goal of the amendment is to get a majority! I mean, that’s crazy.”

Gwynn Zakov is a municipal policy advocate with the Vermont League of Cities and Towns, which previously came to agreement with the Secretary of State’s office on the draft clause after much back-and-forth in the House.

“I think this just highlights the problem of the one-size-fits-all measure,” Zakov said. “You’re treating every agency and department the same as you are a three-person Selectboard.”

Winters, from the Secretary of State’s Office, acknowledged that small-town scenarios present their own challenges. A conversation between any two people on a three-person Selectboard, after all, constitutes a quorum.

“I’m on a school board, and three of us are baseball coaches,” Winters testified. “So, we’re chattering with each other, and then we wander off into: ‘Hey, what about this new teacher?’ And we have to — stop. We catch ourselves all the time.”

But that type of social interaction, and Pearson’s hypothetical organizing from a minority perspective, contrast with a potentially more nefarious scenario — where a majority’s daisy-chain communications in advance of a public meeting may effectively, and intentionally, shut out both minority opposition and public debate.

That’s the scenario White described to her committee, and the problem this proposed legislation is trying to solve.

Winters said that given the degree of distrust in government today, more transparency and accountability may help restore faith.

“People have a right to know what their representatives are up to,” Winters said. “All we’re asking is that they make those decisions in an open forum with an opportunity to have the public observe and perhaps even participate.”

Zakov said by email after the hearing that the new language defining “serial meetings” would be a big move forward.

“Although we support it, we understand that it will create problems for some and will create a wholly new legal standard.”

After nearly two hours of debate, however, White’s committee was contemplating striking the clause altogether. In that case, if a concern about serial meetings ever gets to litigation, it would be up to the courts to decide what the state statutes mean — a question state lawmakers are struggling to answer themselves.

## **Story 2: Fees/Inspections**

*HED: Lawsuit challenges fees for access to police body camera footage*

*DEK: Some agencies charge the public to inspect government records, access that a Vermont court has already judged should be free.*

Burlington resident Reed Doyle was walking his dog near Roosevelt Park in June 2017 when a scuffle between city police and a group of kids caught his attention.

One of the kids had just been arrested. When the others protested, officers threatened to pepper-spray them if they didn't back off. Doyle says that as one of the boys — who he guessed was between 11 and 13 — walked away with his hands in the air, one officer used both arms to forcibly push him. The boy protested. The officers huddled up. Then they arrested him, too.

Doyle felt police had used excessive force, and he filed a formal complaint with the department. But its response left him unsure of whether the situation was being investigated, much less if any disciplinary action had been taken against the officers.

So he asked to see the police body camera footage for himself. That was Aug. 21, 2017. He has not seen the video yet.

Doyle was first told the video couldn't be released for various legal and technical reasons. He got help from ACLU Vermont to successfully appeal that decision. Now, the department has agreed to make the video available but only after Doyle pays at least \$220 for the time it will take to redact the video by blurring or blacking out individual faces to protect people's privacy.

The fee is not insurmountable. But the amount is not the point, according to ACLU attorney Jay Diaz. He's representing Doyle in a lawsuit against the Burlington

Police Department. The complaint challenges the department's position that the video must be redacted to begin with, because the situation unfolded in a public place where there's not a presumption of privacy for the people involved.

But even if the footage did require redactions to protect people's identity, Diaz says, the department should not charge for the time the redactions take.

"It's not about the time it takes them," Diaz says. "This is about whether the government should get paid to give the public access to the public's records."

Key to this case is that Doyle did not ask for a copy of the body cam footage. He only asked to review it.

That's an important distinction in Vermont law — merely "inspecting" a public record versus getting a copy to take home. Vermont's Public Records Act explicitly sets out to "provide for free and open examination of records." Elsewhere in the law, rules are laid out for how much an agency can charge for copying records for the public to take home.

Burlington Police Chief Brendan del Pozo did not respond to a request for comment for this story. His written response to Doyle's appeal referenced a part of state law that sets out charges for copying records as justification for the police department's charges to inspect the footage. Aside from the actual cost of any paper photocopies or DVDs, the Uniform Fee Schedule, as it's known, also specifies what agencies are allowed to charge for the staff time involved.

Diaz said that in conversations preceding the lawsuit, the police department's position was that department operations could be brought to a virtual stand-still if all the untold hours of police footage were free to inspect. Administrative staff

would have to review all the footage in advance to ensure that no protected information would be disclosed. Based on prior experience with the process, the department estimates it takes eight to 10 hours to review and redact just one hour of video.

However, it's not only camera footage that police departments throughout Vermont attempt to charge inspection fees for. And it's not only police departments that refuse to let the public inspect records for free.

The Attorney General's Office, which often advises attorneys at other state agencies, uses the same Uniform Fee Schedule to set charges for responses to public records requests, regardless of whether the request is to inspect or obtain a copy of a record.

"Producing public records for inspection or photocopying is an important obligation incurred by a democratic government," Assistant Attorney General Josh Diamond said by email. He added that his office often provides those records for free, even when they're allowed to charge.

But there's a limit, he says. "Vermonters expect the Vermont Attorney General's Office to fight for a clean environment, protect consumers from fraudsters and defend Vermonters' civil rights. When we respond to broad public records searches, we are taking time away from our limited resources devoted to this important mission."

Gwynn Zakov, a municipal policy advocate for the non-governmental organization Vermont League of Cities and Towns, says VLCT errs on the side of

providing conservative legal advice to help keep its member organizations out of hot water.

“Our rule of thumb is to not charge for inspections,” Zakov said by email. “That said, there are so many nuances built in to the (public records act) that it’s never black and white when an ‘inspection’ actually turns into a copying scenario or when there are other limitations ... also in the (public records act).”

Diaz acknowledges that preparing records for inspection takes just as much time as preparing them to be physically copied. But to say that the same charges apply “is an argument for not having access to public records at all,” he says.

“Otherwise, access would be based on ability to pay, and that’s not real transparency.”

Washington County Superior Court Judge William Crawford found a similar reason to overturn an agency’s inspection charges when a similar case came before him in 2011.

“An individual — aggrieved, or a gadfly, or a visionary — is likely to be in a poor position to pay for the cost of her inquiries,” Crawford wrote. “But as taxpayers and members of the community, we all benefit from these inquiries because government (like the rest of us) behaves best in an open, public setting.”

But Crawford’s decision did not rest solely on principle.

“First — and most importantly — the statute provides no authority for an agency to impose a charge for inspection of documents. The Act always has permitted the free inspection of public records,” he wrote. Crawford also noted that

a legislative proposal to allow inspection fees bubbled up in 2008 but was killed before other amendments to the public records act were passed.

Crawford, too, acknowledged the inconvenience that producing records may be for public officials: It's both time-consuming and potentially can reveal embarrassing actions or communications. He noted that the Legislature itself acknowledged this in its crafting of the state's public records laws. Nonetheless, lawmakers put the burden of compliance squarely on state and local governments to be consistent with the state's Constitutional imperative for accountability, he said.

Crawford's decision is acknowledged by some agencies Diaz has encountered in public records searches, he says.

"Some agencies don't bother charging," Diaz said. "They say, 'You're welcome,' and move on." But he's received the opposite response from others.

ACLU Vermont has asked the Legislature to clarify these divergent interpretations of the law by adding a clause that says: "Unless otherwise provided by law, a public agency shall not charge or collect a fee in response to a request to inspect a public record."

To date, the proposal is not reflected in any drafts of a related bill to tweak other aspects of the public records and open meeting laws.

In the absence of that clarity, Doyle's lawsuit against the Burlington Police Department will continue. And more litigation — from other instances of people unable to access public records unless they pay — may follow.

### **Story 3: Private Strategies**

*HED: Public records exemption for contract negotiations is tested*

*DEK: Advocates are split on whether a school board can withhold draft press releases about teacher contract negotiations.*

A week after Burlington voters approved an \$85.5 million school budget in 2017, months-long contract negotiations between the school board and teachers' union were failing. Shay Totten and Rich Nadworny, both local parents and community activists, wanted to know why.

"We were trying to figure out who was influencing the (school) board," Totten said. "Is it the superintendent? The consultant? Is it their own beliefs?"

Totten — a former journalist who now volunteers for the activist group Burlington Friends of Education, which advocates for school budgets — said it seemed like the Burlington School Board's messaging had been crafted by a "ghostwriter."

Totten and Nadworny filed a public records request with the school board, asking for all correspondence board members and the superintendent had with their labor consultant, Joe Blanchette, a former teacher and union negotiator who now consults for school boards.

Totten said what he and Nadworny got in response to their records request was roughly 20 pages of emails about scheduling meetings — and a list of 194 email threads, spanning at least a six-month period, that the school board considered exempt from disclosure. This type of list, known as a Vaughn Index, documents an agency's justification for withholding anything from disclosure. The subjects of the



withheld email threads included draft press releases, research and communications strategies about the pending contract negotiations.

In this case, the scope of the Vaughn Index demonstrates just how nuanced the interpretation of public records laws can be.

The school board's law firm, McNeil Leddy & Sheahan PC, reviewed 807 pages of documents in response to the Totten and Nadworny's request. Citing primarily attorney-client privilege and an exemption for contract negotiations, attorney Joe Farnham made the call on behalf of the firm about what to release and what to hold back.

"We consider the records ... as all 'relating specifically to negotiation,' as those words are used in 1 VSA 317(c)(15)," Farnham said by email. The state statute he cited is one of hundreds of exemptions from Vermont's public records laws, one reason among hundreds that public officials may withhold public information from disclosure.

Attorney-client privilege is a commonly invoked clause for withholding or redacting public documents, and the school board's attorney, Joe McNeil, was included or cc'd on most of the emails in question.

What struck Totten about this response was an exemption for contract negotiations being applied to emails regarding draft press releases, research, communications strategies and other public messaging about contract negotiations.

"This isn't even political strategy," Totten said. "This is straight-up communication to the public." He said he cannot fathom why communication among public officials about public messaging should be exempt from disclosure.

Allen Gilbert, former director of ACLU Vermont, can't understand it, either.

"(I)t's hard for me to believe a government official can argue with a straight face that preparing a press release is the same as negotiating a contract," Gilbert said by email. "A kitten in the oven still deserves to be treated as a kitten and not a biscuit, to twist an old Vermont adage."

Jay Diaz, an ACLU attorney, also agrees — somewhat.

He characterized the public disclosure exemption for contract negotiations as "pretty narrow ... relating specifically to negotiation of contracts." Diaz thinks the wording of the exemption likely applies strictly to the "actual back-and-forth negotiations."

But, Diaz said wryly, "it's at least more arguable than some things I've seen."

Deputy Secretary of State Chris Winters is sympathetic to the school board's argument that its internal communications about contract negotiations should be protected, even when the emails are used to hammer out a press release about the unfolding situation.

"It's a negotiation strategy," Winters said about public messaging. "And I can understand how an attorney for the town or for the city would think that premature public knowledge of that strategy would impair their ability to negotiate."

That said, Winters also acknowledged some gray area in how the exemption for contract negotiations could or should be interpreted. He said the instance is a "perfect example" of one that could benefit from an Open Government Ombudsman program in Vermont. Winters and Secretary of State Jim Condos lost their legislative push to create such a position this year.

“We’d love to see an ombudsman with a little bit of authority to make decisions on these questionable areas of the open meetings and public records law,” Winters said.

In the meantime, Totten and Nadworny are still wondering just how the school board’s public messaging was developed in the course of negotiations that ultimately led to a teacher strike last fall. Their one chance to appeal the decision was denied, and Totten said he didn’t have the money to challenge the school board’s decision in court.

#### **Story 4: Nutrient Management Plans**

*HED: Farmers fight to keep their nutrient management plans private*

*DEK: Thousands of farms must develop detailed plans for the state's Lake Champlain cleanup efforts, and environmentalists want to see them.*

First came the paperwork. Now comes the fight over who gets to see it.

As statewide efforts to clean up Lake Champlain continue, farmers, environmentalists and lawmakers this spring are playing tug-of-war over whether farm-specific plans to contain agricultural runoff should be disclosed to the public.

Vermont's Agency of Agriculture uses the documents, called Nutrient Management Plans, to check that each farm is complying with required agricultural practices. Of special interest is phosphorus runoff, a leading contributor to the scourge of blue-green algae polluting Lake Champlain, Lake Carmi and other waters. Vermont's federally mandated Lake Champlain cleanup plan relies in part on these plans to keep agricultural pollution in check, in addition to other tools for both farm and non-farm sources of phosphorus.

Large farms have been required since 1999 to file certain components of their nutrient management plans with the state, Laura DiPietro, deputy director of the Agricultural Resources Management Division in Vermont's Agency of Agriculture, said.

The plans always have been treated as public records available for disclosure, although just how public they really are is debatable. In May 2017, Michael Colby, an environmental activist with Regeneration Vermont, was quoted \$33,200 for three

years worth of documents: \$1 per page for 83 400-page plans. Colby declined to pay the fee, so he has yet to see the public records.

And those are just the plans historically required to be on file with the state. Medium-size operations, required since 2006 to develop nutrient management plans, have kept their documents on site. Farmers simply haul out the paperwork when state inspectors pay a visit. Since 2015, certified small farm operations also must develop nutrient management plans. Like the medium-size farms, the smaller operations' documents can be kept on-site.

Now, there's talk of requiring the medium-size and smaller farms to file their NMPs electronically with the state, too, for easier access by the agency as the state ramps up its federally mandated, 20-year Lake Champlain cleanup plan.

This sparks worry among some farmers. Their fear, which found sympathetic ears among key lawmakers on the House and Senate agricultural committees, is that the detailed data about their land and soil will show not only which fields are leased (rather than owned) but also how healthy those leased lands are. While environmentalists may be keen to identify polluted land, the farmers worry that competitors could out-bid them to lease the healthiest fields.

Plus, some farmers argue, they generally pay out of pocket for their own plans, without taxpayer-funded assistance. Since the plans are privately financed, they shouldn't be disclosed to people who didn't pay for them, the farmers argue.

Rep. Partridge and Sen. Bobby Starr, chair of the House and Senate agricultural committees, respectively, are both working to exempt the plans from Vermont's Public Records Act. They agree on legislative language that would do just that, in a

new draft of S.276, an act relating to rural economic development. Partridge also is considering a compromise that would allow the plans to be disclosed after three years.

Not all lawmakers are on board.

“Nutrient Management Plans are vital to our clean water efforts,” said Sen. Chris Pearson. “The idea that the House Agriculture Committee would walk back public disclosure of more than 15 years, when we’re trying to address our public water crisis, is unconscionable.”

Pearson is leading a counter-charge to mandate disclosure of NMPs — albeit with some limitations. On April 19, the Senate Natural Resources Committee passed an amendment to a different agricultural bill, H.904, that would allow approved organizations researching “agricultural land, farming, or conservation practices” to access the complete, un-redacted documents. Otherwise, the documents would only be available to the public “in a form that does not disclose the identity of the individual persons, households, or businesses who submitted the plan.”

That approach aligns with an existing protocol at the Agency of Agriculture, which prohibits the disclosure of such identifying information associated with its numerous statistical data sets. For example, the agency’s groundwater contamination test results are disclosed only to the town and county level, with additional data revealing the type of well each sample was taken from and the water source (i.e.: farm, non-farm or public water supplies). Specific locations and well owners are not identified.

It is not clear from the proposed amendment to H.904 the degree to which a farm's location would be revealed, since revealing merely town-level data could, in some cases, give away the farm operator's identity.

Rebekah Weber, with the Conservation Law Foundation, says nutrient management plans became public documents the moment the state decided to use them as a tool for environmental remediation.

"It was the state's choice to incorporate NMPs into a regulatory framework," Weber said, referring to the federally mandated Lake Champlain cleanup effort. The Environmental Protection Agency set the allowable limits of phosphorus for each segment of the lake, and the state was free to come up with its own strategy to reduce pollution accordingly.

"(State officials) chose to rely in part on NMPs," Weber said. "Our point is, don't make them regulatory documents and then put a veil of secrecy around them."

Just two years into the 20-year cleanup plan, Weber said it's critical for the public, including groups like hers, to be able to access the nutrient planning data. Otherwise, the public can only hope and trust — but not verify — that the agricultural practices on which the nutrient management plans are based are adequate to reduce lake pollution in time to meet the federal deadline.

## **Story 5: Consultant Secrets**

*HED: Fight over access to Burlington Town Center study reaches Supreme Court*

*DEK: City claims economic feasibility report is not a public record because officials never actually received it.*

When the city of Burlington struck up a public-private partnership with developer Don Sinex to overhaul a dilapidated downtown mall, officials knew they'd need to pull in some outside expertise to vet the deal. They hired ECONorthwest to review the Burlington Town Center's economic feasibility report.

But before that review began, Sinex's business and the consultant worked out a non-disclosure agreement: Devonwood Investors would share his development's feasibility report with ECONorthwest only if ECONorthwest promised not to disclose certain portions of it that showed sensitive financial information or proprietary business strategies — "trade secrets," they're called.

The potential for disclosure was heightened due to the public-private nature of the deal. Burlington residents were being asked to commit about \$22 million in tax-increment financing to pay for infrastructure improvements on public property, as part of large-scale changes to the streetscape around Sinex's new, \$225 million mixed-use development.

Burlington's City Council got the consultant's thumbs-up on the project in September 2016, along with a redacted version of the economic feasibility study. Within a few weeks, a group of residents who oppose the mall development asked the city for the un-redacted version of the study.



The city said no — for two reasons. First, the city never “obtained” an un-redacted version of the study, so there was nothing city officials could hand over, they said. Plus, even if they did have it, the state’s public records laws would exempt the redacted trade secrets from disclosure, they argued.

The mall opponents sued for access to the un-redacted document. A Chittenden Superior Court judge upheld the city’s position, and the opponent’s first appeal of that decision failed. Now, they’ve taken the battle to the Supreme Court.

The trade secrets exemption is both a common and debatable standard for what can and should be withheld from public disclosure. What’s unique, and potentially impactful, about this case is the question of whether the city can claim to not have obtained the un-redacted economic feasibility report, even though the consultant they hired to review it has a copy.

“It’s a new one on me,” says attorney John Franco, who’s representing mall opponents Michael Long, Lynn Martin, Steve Goodkind and the Coalition for a Livable City in the case.

Franco believes the precedent that the lower court set when it upheld the city’s denial is “dangerous,” because it could create a mechanism for public bodies to use third parties as “surrogates or straw men” capable of hiding all manner of information.

“Then the basis for their decisions would never be subject to public inspection,” Franco says.

Attorneys for the city and the developer declined to comment for this story. Court records show them doubling down on the city's contention that the un-redacted study is not a public record to begin with.

The state's public records act defines a public document as "any written or recorded information, regardless of physical form or characteristic, which is produced or acquired in the course of public agency business," their brief states. "Therefore, documents not produced or acquired by a public agency are not subject to disclosure under the (Public Records Act)."

There's no dispute that the city hired the consultant to review the study. But because of the non-disclosure agreement, city attorneys argue, the city has no legal right to acquire the un-redacted version.

That argument is complicated, however, by the opponents' allegation that the City Council's Finance Board was shown the un-redacted study at a meeting in September 2016. Representatives from the consulting firm passed around un-redacted copies, and took them back after city officials had the chance to review the sections they had not seen before.

City attorneys point out that Franco has not produced clear evidence that this occurred, but neither has the city disputed that it happened. Instead, the attorneys are citing procedural rules to keep the issue off the table for the Supreme Court's consideration.

City Councilor Karen Paul recalls the incident. So does Noelle MacKay, the director of Burlington's Community & Economic Development Office, who was in the

room for an executive session of the Board of Finance. Several other city council members who were contacted for this story did not respond.

“I never opened the envelope,” MacKay recalled. She said she knew it was important not to share the information, so she didn’t even want to see it. And since the decision about moving forward with the project was not up to her, she didn’t feel the need.

MacKay said she’s aware of non-disclosure agreements with private partners in the past. “There are a lot of Freedom of Information requests now,” MacKay said. “It’s daunting for private partners who aren’t used to that.”

She is unsure of whether the public status of a document has hinged on those agreements. The city attorneys did not respond to a follow-up request for comment about the prevalence and potential impact of non-disclosure agreements regarding other public records.

Both sides presented oral arguments in the Supreme Court on April 25. It’s not the first time the high court will review a public records decision by Chittenden Judge Robert Mello.

In 2017, the Vermont Supreme Court unanimously overturned Mello’s earlier decision that would have exempted from disclosure any emails or text messages about public business that then-Attorney General Bill Sorrell had sent from his personal accounts.

## **Story 6: Ombudsman**

*HED: Push to create an Open Government Ombudsman fails*

*DEK: Without such an office, the public has little recourse to challenge violations of the state's public records and open meeting laws.*

For the eighth year in a row, Secretary of State Jim Condos is about to be disappointed. Condos has talked with lawmakers about creating an open government ombudsman position in state government since he took office in 2011. He finally submitted a formal proposal in 2017.

“A state ombudsperson would be a resource for both citizens and government officials, providing advisory opinions and acting as a first-level, less formal alternative to a lawsuit,” Condos pitched to the House Government Operations Committee this winter.

But again, lawmakers this year will likely decline to take him up on the suggestion.

Currently, Vermont laws allow for a single appeal when a member of the public questions the government's response to a public records request. There's little to no recourse for extended delays in responding to requests. Suspected violations of open meeting laws, likewise, advance quickly to litigation — if the aggrieved party possesses the wherewithal and resources to fund a lawsuit.

Short of court action, most allegations of open government violations in Vermont pass unchallenged, unexamined and undocumented.

One early draft of a bill addressing numerous open government issues would have created the ombudsman job Condos proposed. He suggested it as a part-time position reporting to the State Ethics Commission.

“The Ombudsman is empowered to investigate Public Records Act and Open Meeting Law complaints, to adjudicate the acts of public bodies and public agencies alleged to have violated the Open Meeting Law and the Public Records Act, and to recommend appropriate changes in these laws in order to promote accountability consistent with Chapter I, Article 6 of the Vermont Constitution,” the law would have read.

But the House Government Operations Committee, which generated this year’s open government bill, H.910, struck the provision.

“Most of us agree (the ombudsman) is a good idea,” said Rep. Jim Harrison (R-North Chittenden). Harrison sits on the House Government Operations Committee, with whom the Secretary of State’s Office worked this winter to draft the proposal.

Harrison and Maida Townsend, who chairs the committee, said their group’s unanimous decision to vote down the proposal hinged more on logistics than principle.

For example, the ombudsman was proposed as a part-time position. Yet the Secretary of State’s Office convincingly cited so much need for this new role that the committee felt a part-time position would be insufficient to handle the anticipated volume of alleged violations of public records and open meeting laws by state and local agencies, Harrison said.

The stripped-down public records bill, which would not create an ombudsman position, has passed the House. It's now under consideration in the Senate Government Operations Committee.

Condos' deputy, Chris Winters, doubts the ombudsman will resurface there.

"I don't have a lot of hope it will get put back in in the Senate, given where we are in the session and the little bit of time they have left, and how much time it took the House just to take that issue up when it was over there," Winters said. "So it's something we'll bring to their attention. We'll raise the issue for them again, and we hope to come back and try again another year."

His let-down is less disappointing for the ACLU's policy director, Chloe White, who's leading the organization's public records reform efforts this year.

"It's not that we're vehemently opposed," White said. Her main concern is the single person holding the position may actually be biased against transparency.

White cited input from ACLU colleagues in Minnesota, where the ombudsman is a former law enforcement official. Some believe she makes decisions biased in favor of law enforcement, White said.

That's why, if and when the position is created, the ACLU would be very keen to help craft its structure, especially to ensure the ombudsman's decisions would not be final and could be appealed. The organization would also want plaintiffs to retain the option of proceeding straight to court without a detour to the ombudsman.

And there's another reason creating an ombudsman position doesn't top her priority list: "Putting an ombudsman in Vermont without other attendant reforms

for the (Public Records Act) wouldn't do anything," White said. "It would not be a panacea. What we really need is a sustained commitment to open records."

## Next Steps

This project was conceived and is proving to be somewhat of a pilot to test the potential for cultivating a specialty around public records reporting in my career and freelance business. In the course of pursuing co-publication for the series, I hope the relationships I build and logistics I figure out will lay the groundwork for ongoing reporting that follows this business model, or potentially an even more collaborative publication approach. I also am in very preliminary discussion with the New England First Amendment Coalition about potentially partnering on sustained coverage of open government in Vermont and around the region.

Regardless of the business model I follow, my reporting indicated there are ample stories to tell. Below is some of the story potential I encountered. Please note: These are tips and leads only, not yet verified or fact-checked.

1. Disability Rights Violations: I've been told that a quasi-governmental agency in Vermont charged with investigating claims of abuse, neglect and serious rights violations against people with disabilities (Disability Rights Vermont) is frequently denied access to records they need to carry out their investigations.
2. Shuttered Town Websites: This story would follow up on a 2014 law intended to improve access to information, which actually backfired. The law clarified that official town websites must comply with state open meetings laws: Notice must be given prior to meetings with agendas posted in advance, and minutes of those meetings must be posted within five days, or else the town could face monetary fines. In response, the Vermont League of



Cities and Towns advised municipalities to take their websites offline if they were uncertain they could meet the requirements. Many towns did just that. I propose a follow-up to find out how many towns have since gotten their sites back online, how the still-shuttered websites have affected town engagement (if at all) and whether the League has developed more rigorous solutions to assist municipalities with limited technical resources.

3. **Off-site Records:** A title researcher in New Hampshire is dismayed to learn that the registry of deeds has moved much of its archive to an off-site location under contract with a private company. The information she needs to conduct research is now much more time-consuming and cumbersome to obtain. I do not know yet if the change has altered her costs. I would like to look into whether off-site storage is a growing trend in records management among states and, if so, what precipitates the shift and how does it affect public access. (This story could be pitched to New Hampshire news outlets and/or regionally, depending on my findings.)
4. **Third-party Management:** New commercial technology is emerging to help governments better manage increasing volumes of data and information. I propose a review of these developments, including consideration of both access and privacy when third parties manage government information. This reporting may also include specific technology being used by or pursued by the State of Vermont. (This story is related to off-site storage, but distinct. The two would run best as a pair.)

5. **Public Records Studies:** As Vermont lawmakers begin marking up an “omnibus” public records reform bill in January, it’s worth hearing from neighboring states that are further along the same path, especially the demographically comparable states to our east: New Hampshire, where a state-mandated commission recently concluded its work to recommend improved processes for resolving public records disputes; and Maine, which established a Right to Know advisory committee in 2005. (This story would be best paired with the ombudsmen explainer, described below. One note: Vermonters discussing the number of exemptions are aghast at the volume, yet I talked with people at NFOIC whose states had hundreds more, and they have persevered to chip away at reviewing each one, rather than throw up their hands as Vermonters appear to have done. What went wrong with that study process? And can it get back on track?)
6. **Government Perspective:** It’s only fair to consider the perspective of government officials who must respond to public records requests — from the town level where some clerks still keep hand-written budgets, to state agencies with general counsel on staff. What is the “culture” regarding public records requests, and what shapes those values and responses? Where specifically is the demand coming from and landing, and are sufficient resources allocated to respond to public inquiries in a timely and thorough manner?
7. **Secret Public Comments:** Recently the state body that regulates health care in Vermont (Green Mountain Care Board) opened a public comment period on

proposed regulatory changes. State agencies involved in health care responded, but their input was deemed exempt from public disclosure. To my knowledge, this has not yet been reported, which means that not only does the public lack access to the information; but most people probably don't even know it exists.

8. Hidden Water Quality: Vermont, like many states, is plagued with water quality problems — from perfluorooctanoic acid (PFOA) contamination in the city of Bennington to extensive evidence of elevated nitrate levels in groundwater throughout the state. Yet water quality data are hard to come by: The state maintains that it must protect the privacy of land owners by not revealing the precise locations where elevated nitrate levels are detected, and routine violations of water quality reporting are met with little to no enforcement. This lack of data represents a deficit of information in the state's ongoing dialogue about water quality, and a deficit of information on which residential and commercial real estate decisions are based. // See also James Ehlers attempt to obtain Nutrient Management Plans (which is double-tagged here and on the story lead about expensive fees).
9. Private Advisers: Question from a listener during a radio talk show episode about public records: "There's a category of executive appointments — advisory appointments to the Governor, especially those created by executive order — that escape the public eye. The executive branch can choose how much or how little to share with the public (also a problem at the national level). This escapes the broader goal of public accountability and

provides little insight at to what advisory bodies are actually doing on behalf of the public. What are your guests' thoughts on whether and to what degree the activities of advisers to the governor should be made public?"

10. Broadband Infrastructure: Comment from a listener during a radio talk show episode about public records: "As a town official I made a request to the Public Service Department to see a map of broadband infrastructure and cable in my town. This is considered 'privileged' information. Let me translate that: A local public official making a request of a state official for what is in THE PUBLIC RIGHT OF WAY was denied the information. I was told the legislature shield these private companies as they claimed it was some sort of 'trade secret.'"

11. Homeland Security Plan? Question from a listener during a radio talk show episode about public records: "Season's Greetings Folks, I believe the essence of the resistance of government to freely release public information is due to a generally convoluted notion of authority. Fundamentally, WE as individuals are the only True as authority, and we have falsely come to perceive our government as the ultimate authority over each of us. That said, I am specifically curious if an average Vermont citizen can freely access our state Homeland Security plan as dictated by the federal government? Thank you for this vital conversation."

12. WTF Essex? Part 1: A resident of Essex, Vt., claims to have had difficulty obtaining information from town officials — even when he was a member of the town's selectboard. "I encountered difficulty getting public records and

straight answers from the Town of Essex, and I WAS ON THE

SELECTBOARD!!!" See comment at

<https://www.sevendaysvt.com/OffMessage/archives/2017/04/19/walters-vermont-shield-bill-passes-key-house-vote>.

13. WTF Essex? Part 2: Question from a listener during a radio talk show episode about public records: "I cannot listen today, but I wanted to mention two examples, from my experience as a Selectboard member in Essex, of flagrant attempts by governmental bodies to violate our state laws on open meetings and public records. 1. First, when I was on the Selectboard, we went into Executive Session to discuss transition agreements for two senior Town employees. A lawyer from the Town Attorney's law firm was present. All seemed on the up and up. Then, without any advance notice, the Selectboard Chair distributed a proposed contract extension for the Town Manager. As far as I know, no members of the Selectboard were given this document in advance. I certainly was not, nor did I know the contract would be discussed in this meeting. I then asked to see the Town Manager's existing contract, and the Selectboard Chair refused to give it to me. I then said, "I believe that the existing contract is a public document and you cannot deny me my right to to see it. How do you think it would look if a Selectboard member had to sue the Selectboard to be able to examine a public document?" The attorney's eyes got very big, and then the Town Manager pulled his contract out of a file folder and distributed it to the other members. 2. Second, a special committee was established by the Town of Essex and the Village of Essex

Junction to study how to combine services for greater efficiencies. Three individuals represented the Town and three represented the Village. The Town Manager and the Chair of the Selectboard and the Village Manager and the Village President were all on the committee as well as two citizens who were appointed privately by the Board Chair and Village President.

Obviously, this is an important issue, but no public notice was given by either municipality other than a release distributed by the Village at the trustees meeting the night before. During the meeting, which I found out about that morning, members discussed an intent to try to keep these discussions as controlled as possible to avoid formal meetings and to, in the words of one of the citizen members, have meetings "structured so that we don't get chaos." No minutes were kept, but I know this because I attended the meeting and brought my digital recorder. // What is truly disheartening about this is that in both cases the Selectboard Chair was, and continues to be, a State Representative, and the citizen member who wanted to avoid chaos was, and continues to be, the State Economist. So, if even state officials can seem to so cavalierly violate the law, what chance do our citizens have?"

14. WTF Essex? Part 3: Email from a listener following public radio talk show episode about public records: "Staff, elected officials, and a powerful local 'leader' who stood to benefit used an improperly warned meeting to set the stage for dominoes that fell (and cost \$) as planned by these powers-that-be - until our grassroots coalition informed voters and GOTV'd to undermine their crafty plan at a special election held 12 days before Xmas '16. ...

Actually, I can offer a simpler example of how questionable plans were overturned by grassroots activists, ending in a favorable outcome at the polls, only to see the SB cut a deal behind closed doors that undermined the election outcome."

15. Private Servers: The *Toensing v. Sorrell* Supreme Court decision is the highest profile example and already has been well reported, so I don't want to re-tread old ground here, but I also feel this is a crucial issue to cover. Probably the way to do that would be to examine how widespread it is, and not just at state but also — and perhaps especially — at the local level, and how difficult it must be to enforce. Also, this would be a good place to bring in the perspective of the retired town administrator from Johnson who called into VTED and mentioned that people are reluctant to serve on public bodies because they're concerned about invasions of privacy.
16. Quasi-Governmental Bodies: Separate but related to third-party contractors is quasi-governmental agencies — like VIT was, and like (I think) regional planning commissions are, or municipalities like the new telecommunications districts. I literally have no idea how this category is/would be defined, what entities fit that profile, what the laws are governing access to their records and what the actual access is like. But I want to find out and could probably easily cite problems with similar entities in other states.
17. Third-party Contractors: It seems we have good case law for access to third-party contractor records with the *Prison News & VITL* cases, but a) what are

the limitations of what exists now, b) how effectively closed are their records because the public generally is going to get less accountability play with the private sector than they would with the public, and c) what are the legitimate challenges for the companies and the contracts? For example, will it effectively raise the price of third-party services if they have to also account for replying to public records requests, and also there's a legitimate cultural split in the paradigm that needs to be overcome.

18. Bike Accident Data: Accident data for bike safety analysis: One man I spoke with expressed interest in accessing accident data. He has a friend in Germany who recently wrote a script or developed a program to analyze the occurrence of accidents involving bicycles, in order to identify potential solutions for bike safety. Eric's friend offered to conduct the same analysis for Eric if he can get his hands on the right data. This is interesting as a use case, but also because Eric said he had no idea whether the data would be accessible. That gets to the point that there is no clear resource for members of the public seeking access to public records in Vermont.

19. Haunting History: I learned of a man who recently moved to a nearby town, and heard from a neighbor that his new home was the site of a notorious murder in the early 20th century. The new resident went to the town offices, where the historical society is located, to find out more. According to this man's friend, who relayed the story to me, the clerk tried to dissuade him from his research. He persisted and verified the story. It's not clear to me if the historical society is an official town office; if not, the point is moot for the



purposes of my project. But if it is operated by the town, this seems like a ripe story for the telling, especially because it can be tied to the more universal issues of property values as well the impulse to suppress history in order to preserve an arguably false, or at least incomplete, identity for a locale. (I have heard similar stories of people in towns where infamous lynchings occurred not wanting to acknowledge such an episode of the town's past.)

20. Least Favorite Requesters (nuisance, prolific and pain-in-the-ass requesters (ie: Wally, SW case studies). I spoke with a state employee about a prolific requester, who this person described as hard to deal with in a harmless kind of way. This requester apparently obtains public data to slice, dice and re-sell. I learned about an email chain in which several employees from the Department for Children and Families complained about him and wondered if they could get a no-trespass order to prevent him from showing up at their offices. (The response: Absolutely not; he may be a pain to deal with, but he's exercising his rights and there's no reason to stop him.) He seems like an interesting character to try to talk with.

21. Non-statutory Directives: I've heard of "directives" related to exempting records from disclosure. This is a mechanism outside the scope of statutory law, and one that not even many local FOI activists and stakeholders know about.

22. Court Records Inaccessible: Vermont's state government does not have a great track record with major IT projects. One IT system sorely in need of improvement is court records, very few of which are available online.
23. Cloak of Privacy: This is many-fold: 1) Legitimate rise of privacy concerns, 2) Mission confusion as privacy concerns have grown and people are not as in touch with the idea of public interests outweighing privacy concerns, and 3) Use of "privacy" concerns as a disingenuous cloak for secrecy.
24. Police Body/Dash Cams: Major issue for our time, not just in Vermont. Part of what's interesting here is the massive quantity of records, and the time required to review footage before releasing it. Anecdotally, it also seems there's little consistency in decisions about releasing footage related to high-profile police actions.
25. VSP Press Discretion: Vermont State Police last year changed their policy regarding press releases, giving officers and PIOs much more discretion to decide what's "significant" enough to be published and placing strict limits on the amount and type of information that can be released. This merits follow-up reporting. Also, I could pull in the example of Cynthia being denied police logs (see #26) to illustrate that a tendency toward secrecy among police is not isolated, and that it can potentially be very problematic and even unconstitutional.
26. No Secret Police: This would probably be the best single journalist-sourced story I could do, a recount story of Chester Telegraph having to fight for

access to police logs, and then the positive relationship she's since built with all the players.

## Chapter 5: 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.

## **Tipsheet: Reporting on the public's access to public records**

Perhaps the most common mistake journalists make with public records has nothing to do with their own requests. It's forgetting that other members of the public need access to government information, too.

Whether attorneys, businesses, activists, researchers or citizens working on their own behalf, countless constituencies avail themselves every day of this fundamental right. Yet journalists' conception of Freedom of Information too often stops where our use of it as a professional tool ends.

Journalists also often get squeamish about reporting on public records laws, feeling that it's too much "inside baseball" or too much about our own process for it to be either appropriate or interesting.

This tipsheet will help you correct those mistakes. As journalism professor and FOI expert David Cuillier says about access to public records: "We have to cover it, just like we would any other fundamental part of our society. It's part of our responsibility."

Rest assured, there's no magic to it. Reporters can develop a specialty of reporting on the open government beat just like any other. Here are some tips\* to get you started:

### **Stay current**

- **Read your state and the federal FOI and open meetings laws every year,** word-for-word, and keep them bookmarked on your internet browser.

- **Set up a Google alert** for stories about your state (or city) that mention public records.
- **Follow court cases** involving public records laws.
- **Find out if your state maintains logs or statistics on public records requests.** Study them to find out who’s exercising this right, what they’re looking for, and how agencies are doing with compliance. Some agencies even proactively publish online every request they receive.
- **Keep up with scholarly research** on the topic. This will help you keep apprised of new trends and insights, and build your credibility with sources. It will also help you identify experts to call on as sources in your reporting.
- **Subscribe to your nearest open government coalition’s email list.** There’s one in almost every state. Check the National Freedom of Information Coalition to find the one closest to you.

### **Identify stakeholders**

- **Think of stakeholders in two groups:** people who are already interested in public information and public data, and people who may be interested in particular information or data if you point out its relevance to them.
- **Many constituencies are inherently interested in public records:** defense attorneys, government watchdog groups, campaign finance reform advocates, “government minders” from the nonprofit sector, community-level public service folks, unions, academics and researchers.



- **Attend legislative proceedings** about potential changes to open government to find other sources.
- **Understand that businesses sit on both sides of the stakeholder coin.** As a constituency, businesses are among the most voluminous requesters of public information. Yet some of the most intractable exemptions from disclosure are written at the behest of the business community.
- **Find the pro-transparency people within government** — often data geeks with low profiles. There are more of these folks than you may think.

### Story ideas

- **Remember that the core tenet of public records laws is not just access to information, but equal access.** What fees are agencies charging, and who can (or can't) surmount that hurdle? How are minorities treated when they seek access to public records or open meetings as citizens? Compare this to the reception businesses and lawyers receive. Equal access to democracy is an important social justice issue.
- **The missing data story:** Sometimes data don't exist, or information is withheld. Sometimes pointing that out is the best story. (Tip: Poll your colleagues to find out what questions they are not getting answers to.)
- **Watch your open government laws for changes.** Know that many times, exemptions are written into unrelated legislation, for example economic development or agricultural bills.

- **Think beyond simply writing or producing stories about public records.**  
Can your newsroom host a hack-a-thon to turn loose citizens and developers on a public data set? Instead of trying to anticipate how your audience would like to use the data, let them tell you themselves with an interactive event like this. It requires more work but has the added benefit of cultivating more audience engagement and, potentially, understanding and loyalty.
- **Develop evergreen news websites or news apps,** where public data can be kept updated and processed into a usable format for the public. (For inspiration, visit ProPublica’s many news apps, or the Texas Tribune website.)
- **Keep a “tickler” file** of potential stories you’re following. Mark your calendar with the dates of when a records response is due, or when a court decision is expected.

### **Concepts for the beat**

- **Don’t frame it as a “press issue”** when you do write about yourself or another member of the press being denied access to government. Remember that there’s no such thing as “the press” legally. We are merely members of the public who happen to avail ourselves of public records laws. When we are kicked out of a meeting or denied access to records, it’s the public whose rights the government is limiting.
- **Provide context for whatever conflict you’re writing about.** For example, do other states —especially neighboring states — handle their records the

same way? (Helpful resources to answer these questions are the Reporters Committee on Freedom of the Press, and the State Secrets database compiled by Miranda Spivack for the Center for Investigative Journalism. NOTE: If you find an error in any of these resources, let the authors know! State-level laws are incredibly difficult to track and compare, so on-the-ground perspectives really help keep these resources current and accurate.)

- **For more context**, remember that access to information is internationally recognized as a fundamental human right by the United Nations' Universal Declaration on Human Rights (1948) and subsequent International Covenant on Civil and Political Rights (1966).
- **For still more context**, be sure to consider, and ask your sources, whether a particular violation is unusual, or reflective of a more systemic problem.
- **Acknowledge and be proud of any personal or professional interest in access to government.** According to the SPJ Code of Ethics, journalists should "(s)ee to ensure that the public's business is conducted in the open, and that public records are open to all." There's no conflict of interest in your reporting on this. It is an ethical interest.
- **Check your assumptions:** Violations of public records or open meetings laws are not always nefarious. Public officials often are not properly trained, and usually err on the side of withholding information because they face harsher consequences for improper disclosure.
- **Be realistic:** It can be hard for small, rural towns with limited resources to conform with laws designed to rein in sprawling bureaucracies. Likewise, it's

hard for legislators to craft laws that apply effectively to that whole spectrum.

- **Understand that reporting on open government is time intensive.** One lead will often require five more phone calls to figure out the actual story. These are not quick-turn stories.
- **Make your reporting relatable** to audiences by telling the human stories of why access to government information makes a difference in their lives. This applies just as much to explanatory reporting or exploring the gray area in public records laws and administration as it does to exposing blatant violations of both the letter and the spirit of the laws.

Finally, as with all reporting: Remember that patience and persistence pay off. As you develop sources and start to publish stories about this topic, both experts and the public at large will recognize your interest. At that point, stories will start to come to you.

But when that happens, it will also entail some members of the public seeing you as a resource. People will call or email to ask for advice with their own quests for public records. Embrace that role. You can't offer legal advice; but as a journalist, it's part of your responsibility to promote government transparency and facilitate a healthy democracy.

*\* All tips were gleaned from interviews with: **Dave Cuillier**, director of the University of Arizona School of Journalism; **Mike Donoghue**, executive director of the Vermont Press Association and vice-president of the New England First Amendment Coalition;*

**Kathy Kiely**, Press Freedom Fellow for the National Press Club Journalism Institute and journalism lecturer at the University of New Hampshire; **Andrew Seaman**, chair of the Society of Professional Journalists' Ethics Committee; **Shannon Shaw Duty**, editor of the tribal newspaper Osage News and chair of the Native American Journalists Association's Free Press Committee; **Miranda Spivack**, Eugene S. Pulliam Distinguished Visiting Professor of Journalism at DePauw University; **Lee Van Der Voo**, freelance journalist and author of the now-retired column Redacted, published by the Oregon-based website Investigate West; and **Todd Wallack**, an investigative reporter with the Boston Globe's Spotlight team.

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# **Appendix A: Project Proposal**

**The “Public” in Public Records:**

**Journalistic Coverage of the Public’s Access to Government Information**

By Hilary Niles

December 2017

A Master’s Project Proposal

Presented to the University of Missouri-Columbia School of Journalism

Committee Chair: Mark Horvit

Committee Members: Randall Smith and Scott Swafford

## **Introduction**

A couple years after my graduate coursework at the Missouri School of Journalism, I attended a professional skills training program on investigative journalism. During a session on Freedom of Information, one panelist stated that, while public records laws can be great for access to government information, good journalists can talk sources into leaking any information they need. Therefore, the veteran newspaperman encouraged the room, reporters should not let official noncompliance with public records laws stand in our way.

He had a point: Deep sourcing and perseverance against odds are two essential attributes of any investigative reporter.

His theory, however, falls short. Consider cub reporters still learning the basics of the profession and inverted pyramid: Covert acquisition of government records — much less the ability to protect your source's identity — are likely over their heads. The adage is equally unrealistic for a reporter on a new beat — who may have a great lead, but who has not yet developed the requisite degree of trust with the right sources who can bypass a particular instance of bureaucratic stonewalling. Likewise, even the most connected and skilled of daily reporters may know just how to work their sources, and be up for the challenge — but already may be struggling with limited time to keep pace with mounting demands for content.

I accepted my colleague's talk as the catalyst for perseverance I believe it was intended to be. But I also intrinsically knew that, regardless of a reporter's skill level, public records matter to our profession. Besides, I reasoned at the time, our

job is to hold public officials accountable when they fail to follow the letter or intent of the law — any law. Including public records laws.

Gradually though, as I continued to use public records laws and started to advocate for public records reforms in my state, I came to understand how my own perception of the issue also had been incomplete. Public records laws are not written to afford *the press* access to government information. They are written to afford *the public* access to government information. The “press” is merely the “public” by another name. So, why had I only been evaluating whether reporters can get our hands on the information we need? And if I, a trained journalist whose job description literally includes obtaining government records, continually struggle with that task, then what about the rest of the public?

What about the people whose jobs and families and community involvement leave little time to jump through the funhouse of hoops that so often appear between the requester and the requested? What about the people not trained to interpret legalese? Or too shy to negotiate, much less play hardball when circumstances merit? What about someone with a developmental disability or a mental illness? Someone who’s sick, or in mourning?

It’s not their job to access government records. It’s their right.

Yet that right — enshrined in statutory law and in even in some state constitutions the country over, and internationally recognized as a fundamental human right — is routinely violated at every level of government across the United States.

And journalists — busy journalists, myopic journalists, responsible journalists, competitive journalists — routinely ignore this pervasive injustice that threatens the very democratic system we strive to hold accountable.

References to reporters' own public records requests, and occasional stories about a news outlet's fight to access government information, are not uncommon in the media. And a handful of reporters around the country go out of their way to report on public access to public records. Yet by and large, the direct applicability of Right to Information laws to average citizens is so little understood by journalists that their own audiences' struggles are seldom even considered as stories in and of themselves — as my colleague's advice to fellow journalists revealed.

I believe the public's engagement with this fundamental right merits regular reporting, along the lines of the familiar topics of access to education or access to health care.

### **Professional Skills Component**

Since December 2015, I have worked full-time as a freelance reporter for public radio, print and online publications. The professional skills component of my graduate project, broadly speaking, will culminate in a series of news stories that focus on the public's access to public records. The "public" perspective considered will reflect the broad applicability of the right to access public records, including activists, lawyers, the business community and citizens acting in a personal capacity. Although journalistic experience may also be considered, it will not occupy the primary spotlight of this project.

This series represents new work I will undertake independently for the primary purpose of the graduate project, which will dovetail with my freelance business and volunteerism through the Society of Professional Journalists' Freedom of Information Committee and the organization's New England Pro chapter.

My qualifications to undertake this project start with my graduate studies at the Missouri School of Journalism, including studies of media law and access to information with Charles Davis, and studies and practice in investigative reporting on public policy with Mark Horvit and Scott Swafford. Since finishing my coursework, I have continued my professional development through Investigative Reporters and Editors (IRE), the National Institute on Computer Assisted Reporting (NICAR), the National Freedom of Information Coalition (NFOIC), the Society of Professional Journalists (SPJ) and the New England First Amendment Coalition (NEFAC). Additionally, on a volunteer basis, I have worked to connect Vermont journalists around our shared interests in public records through ad hoc gatherings and advocacy.

For my graduate project, I will:

- Engage with public records stakeholders to better understand their perceptions of public records, their experience accessing public records, their interest in news and feature stories about public records, and their expectations of journalistic objectivity in the course of reporting on access to public records. This audience engagement will help inform my editorial decisions to produce the most helpful and compelling stories possible.

- Conduct a clip review of recent news coverage about public records within Vermont, and of industry news within the state’s journalism community about the state’s public records laws. The clips will be identified through bibliographic searches in Lexis-Nexis, online or in-person searches through the archives of major news outlets in the state, and/or by working in conjunction with the Vermont Press Association and Vermont Association of Broadcasters to identify relevant material in their member newsletters and other communications. The clip review will be summarized to establish the degree to which public access to public records has been covered in the state, and will inform my editorial decisions about how best to push forward coverage of this topic.
- Produce six publishable stories about access to public records that I identify in the course of community engagement and other reporting. Generally, this coverage will explore the experiences of individuals who have accessed (or tried to access) public records for a variety of reasons, current trends in public records laws and administration, and the ways that recent or proposed changes in public records laws and practices may affect access to public records. (Ten specific, potential stories are outlined in Appendix A.)

My primary target publications for these stories are in-state: Vermont Public Radio, an alt-weekly newspaper called Seven Days, Vermont Business Magazine and various local news outlets. It is possible that, in the course of reporting on Vermont’s pending legislative changes to open records laws, I may also include some reporting on laws and experiences in neighboring states. It is also possible that, in the course

of my reporting and audience engagement, I will identify a federal public records issue that merits national reporting.

These target publications are within reach, as I have existing relationships with all of them: I have worked extensively with Vermont Public Radio, I have reported intermittently for Seven Days and Vermont Business Magazine, and I have interacted with other newspaper staff through volunteer work to strengthen the network of Vermont journalists, specifically around the subject of public records and a reporter's shield law that was passed earlier in 2017. Regionally, I have worked with the New England News Collaborative (a collaboration of all eight public radio stations in New England) and I've reported for the Boston Globe. I am also active in the SPJ New England chapter of journalism professionals, and I'm a past fellow at the New England First Amendment Institute organized by NEFAC. Potential national outlets include the Sunlight Foundation and the Investigative Reporting Workshop, both of which I maintain a working relationship with.

The work I conduct in the course of my regular schedule of 30 hours per week from Dec. 15, 2017, through March 23, 2018 (14 weeks) will be documented in weekly memos distributed to committee members, who will supervise this independent project. The memos, plus at least six publishable news stories, will collectively comprise the requisite "abundant physical evidence" to demonstrate completion of the professional skills component of this project.

Any feedback or guidance from committee members will be promptly incorporated into my work process. I will be available by email, phone and video conference throughout the project timeline.

## **Professional Analysis Component**

The “skills” component of my graduate project seeks to create a body of work that will demonstrate the viability of substantial journalistic coverage of public access to public records, and provide a range of models for ways this type of story can be reported and produced.

My analysis, on the other hand, will dive deeper into professional norms and practices, in an effort to help remedy what I believe is a missed opportunity and obligation to treat the right to access government information not just as a professional tool, but also as an essential human right that merits reporting.

Many journalists are aware that reporters initiate only a minority of all public records requests. However, most reporters fail to pay attention to the plight of non-journalists who seek to access government information for their own various reasons. Aside from the occasional mention when a story is based in part on information obtained through a public records request, or the occasional story about outlandish obfuscation by government officials, the topic of public records is virtually invisible. Not only do reporters not reveal much about their process of obtaining access to information; we also largely ignore RTI as a public policy with implications that extend beyond our own profession. Yet our audiences — be they environmental activists, curious citizens, aspiring government contractors or dutiful real estate title researchers — need access, too. One factor that may discourage coverage of public access to information is concern about the journalistic pillar of “objectivity.” My impression — from conversations with colleagues and RTI advocates at related conferences — is that many journalists are concerned that



reporting on public records represents a conflict of interest for them, precisely because the topic is so crucial to our profession.

My analytical goals are to make a case for reporting on public access to public records, and recommend specific techniques for newsrooms to engage in this reporting without compromising ethical standards of the profession. If these goals are to meet any success, I will need to first understand and then address the cultural and professional barriers that currently keep journalists away from this topic. To that end, my analysis will seek to answer two research questions:

1. Why do journalists often fail to report on the public's access to public records?
2. What are best practices for journalists reporting on a public policy that is also crucial to our own profession?

**Methodology.** The analysis will open with recognition of the Right to Information as an essential human right. This conceptualization will be grounded by a review of related literature, history and legal precedents, as previewed below in the literature review.

Theories of journalistic objectivity will then be introduced to frame discussion of professional norms and audience expectations of professional standards — first generally as applied to all journalism, then specifically among reporters, editors, publishers and audiences regarding journalistic coverage of public records laws. This research will entail:

- Relay the results of Vermont clip review (from Professional Skills portion of this project) to summarize the breadth and depth (or lack thereof) with which public access to public records is covered in today’s media landscape.
- Conduct unstructured interviews with eight professionals around the country who are producing or who have produced related work, or who study such work. This research will describe the tradition (to the extent one exists) of reporting on public records. That description, in turn, will provide context to guide my own contributions to the tradition, and will inform the “best practices” portion of the professional analysis described below.
  - The subjects sought for these interviews will include at least one of the following professions: reporter, editor, academic with expertise in journalism, and an RTI expert. The specific individuals will be identified through networking with chapters of the National Freedom of Information Coalition and members of the Society of Professional Journalists FOI Committee.
  - Interviews will cover the same general topics, with room to diverge according to the expertise and experience of the individual:
    - Why does the topic of access to public records merit reporting?
    - How much does the public care about it? Who among the public cares? Why do they care? Who *should* care, but doesn’t appear to?
    - What do you think the public needs to know, or to better understand, about access to public records?

- Are you familiar with the concept of the Right to Information as a human right?
- Do you consider yourself a public records advocate? (Why or why not?)
- Do you personally use public records laws to obtain government information? (If so: How would you characterize those interactions with government?)
- Do you see a conflict of interest when journalists who use public records laws themselves also report on access to public records? (Why not? Or: Why, and how does your newsroom handle that, or how should a newsroom handle that, in order to uphold professional standards?)
- Do you or does your newsroom/company engage in public records advocacy, either directly or indirectly (i.e.: through a professional association)?
- *For reporters and editors:* To the extent that this is a “beat” you’ve developed, how have you accomplished it — i.e.: developing sources, staying current with related policy or legal developments, distinguishing stories worth telling and pitching those stories successfully within your newsroom. What pitfalls have you learned to avoid? What advice do you have for other reporters looking to establish themselves on this beat?

- *For academics/RTI experts:* What do reporters get right in their coverage of access to public records? Where do they misfire?
- Who else should I talk to about this? What should I be reading?

From this research, the analysis will conclude with a summary of “best practices” to help journalists navigate related coverage with professional integrity.

**Target Publications.** This research will culminate first in a white paper, publishable in a target publication such as American Press Institute, or the Investigative Reporting Workshop with possible co-publication in Columbia Journalism Review. The API byline would be a new step in my freelance portfolio, beneficial for the sake of continuing my learning curve by working with new editors, as well as expanding my roster of editorial contacts and my byline exposure. It will likely be my primary target because it represents the biggest stretch. I have an existing relationship with the Investigative Reporting Workshop from my graduate internship there in the summer of 2012. The managing editor there has expressed interest my contribution to the Workshop’s blog, and she offered to facilitate co-publication with CJR for coverage of public records issues.

Finally, a tipsheet — conceived as a condensed version of the white paper — will be broadly and freely distributed locally, through my networks of Vermont journalists, and nationally through professional networks such as the Society of Professional Journalists, the National Freedom of Information Coalition, and Investigative Reporters and Editors.

## Literature Review

The following review of related literature will begin with discussion of the Right to Information as a human right. It will then consider theories and practices regarding journalistic objectivity as a framework to guide ethical coverage of a public policy that is essential to our own profession.

But first, a note on terminology: The literature of information access reveals a multitude of specific terms, many of which are defined by overlapping (if not identical) concepts. The most important term to explain for the purposes of this study is that of “information access” itself. Intricately related to the concepts of press freedom, government transparency and the modern “open government” movement, information access here refers specifically to “legislation giving effect to the right to access information held by public authorities” (Mendel, 2011).

Globally, many legislative acts granting information access are named after some variation of “Access to Information,” or ATI. Other common terminology includes “FOI” for Freedom of Information (such as the federal law in the United States) and “RTI” for Right to Information. In this study, the term RTI is employed for the sake of semantic alignment with the thesis that access to public records should be covered journalistically as a human *right*.

**RTI as a Human Right.** To understand the place of RTI in the world today, it is essential first to orient oneself to the global human rights movement, as well as the spectrum of opinions about the political and real-world implications of human rights.

The right of a public to access its government's information is increasingly recognized as an essential human right by countries around the world (FOIANet, 2013; Relly 2008). While not technically born within the United Nations, that and other international bodies certainly have aided the global promulgation of RTI along with a host of other human rights, as discussed below.

The United States and European nations, in their push toward global democratization and often at the helm of international organizations, also promoted press freedom as a partial antidote to oppression and violence. This, in turn, created conditions of ripeness for adoption of Right to Information laws. As history and the literature demonstrate, RTI increasingly is regarded on its own merits as a human right, both independent from and also working in concert with all other human rights.

***Human Rights as a Global Movement.*** Donnelly (1982) argues that human rights are universal and inalienable — belonging either to all humans, or none — and allocated solely on the condition of being human. As such, human rights would transcend history and culture, and therefore would have existed long before they were codified, since time immemorial.

Nickel argues, however, that without the rights being codified as legally binding promises or agreements, humans would have had little recourse to claim them. "Victims of human rights violations could appeal to heaven, and invoke standards of natural justice, but there were no international organizations working to formulate and enforce legal rights of individuals" (Nickel, 2007, p. 23). This limitation started to be rectified with the formation of the League of Nations

following World War I, when some minority rights were protected through European treaties. But the quest for human rights came into its own as a global movement with the formation of the United Nations in 1945. Recognition of “fundamental human rights” was baked into its charter, and a new era began.

Human rights, including the right to information, had been recognized prior to World War II and prior even to the 20<sup>th</sup> century, but never as international agreements. The French Declaration of the Rights of Man and of the Citizen was adopted in 1789, closely followed by the United States Bill of Rights in 1791. These French and American documents served as models for what would become the world’s first international bill of rights, intended to apply to every person in every country.<sup>1</sup> While the United Nations General Assembly’s Universal Declaration of Human Rights (1948) ultimately was not ratified as a binding agreement for all member nations, currently “almost all of the norms in the Universal Declaration have been incorporated in widely-ratified UN human rights treaties” (Nickel, 2007, p. 24).

Subsequent international treaties not only recognized a multitude of human rights, but even superseded the United Nations example in their enforcement mechanisms. Yet compliance remains a challenge, in no small part due to the a key characteristic on which Nickel pegs his explication of human rights as they are

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<sup>1</sup> The first UN treaty to create a legally binding obligation to adhere to human rights was the Genocide Convention, “approved in 1948 — just one day before the Universal Declaration” (Nickel 2007, p. 25).

codified in human laws: "(T)hey are usually mandatory in the sense of imposing duties on their addressees, but they sometimes do little more than declare high-priority goals and assign responsibility for their progressive realization" (Nickel, 2007, p. 5).

Enforcement is complicated, in part, by sensitivity to national sovereignty. John Rawls proposes in *The Law of Peoples* that international human rights agreements should, by their nature, delineate the boundary beyond which international intervention is justified (Nickel, 2007). Nickel argues that such a prospect is unrealistic. To advance Rawls's notion, such massive realignment of consensus and such endless logistical maneuverings would be required as to render it pure ideology. Thus, despite having been codified into dozens of national and international treaties in the past six decades, the very notion of human rights remains nebulous, and violations persist.

***RTI as a Human Right.*** Embedded within the constellation of modern human rights is the right to access information (RTI). Unfortunately, the somewhat nebulous nature of the human rights construct renders no clear enforcement mechanism for RTI. Its status as a human right is also complicated somewhat by the various human rights merits ascribed to it (outlined below) by individual countries and smaller political subdivisions, including American states.<sup>2</sup>

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<sup>2</sup> RTI advocates around the world have invoked a multitude of concepts and legal clauses on which to base their claims that RTI is, in fact, a bona fide human right. The fact that the line of reasoning behind these justifications is not singular and unified can complicate discussions of RTI; however, the



In their work to pass RTI laws, advocates in recent decades have ascribed its urgency to any one of a number of different mechanisms, based on any one of a number of different principles. Freedom of expression is the most common host for RTI, but McDonagh points out that international human rights treaties “have, on occasion, based their recognition of a right to information on the enjoyment of other rights such as: the right to respect for private life; the right to a fair trial, the right to life; social and economic rights; and the right to take part in public affairs” (McDonagh, 2013, p. 26).

Mendel (2011) makes the case that the widely recognized human right of freedom of expression is the proper home for RTI. After all, he argues, what of substance would there be to express if a public did not have access to information on which to base their expressions? Many other texts acknowledge the instrumental role of RTI: without access to information, the right to freedom of movement, for example, would be meaningless. The right to information, they say, is the underlying right by which a public accesses all others.

But McDonagh pushes harder (2013), suggesting that RTI is demoted as long as it’s defined in relation to and in service to other rights. Allocated through the prism of other rights, she argues, the scope of RTI faces limitations it may avoid being subjected to if only it were given the chance to stand on its own merits. The past six decades of international treaties on human rights, she points out, have

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breadth of legal and philosophical justifications could also been interpreted as a further boost to the claim of RTI as a human right: It is a foundational principle that underlies all other rights.

produced only one agreement that explicitly and strongly guarantees RTI: The Council of Europe's Convention on Access to Official Documents, adopted in 2009 (McDonagh, 2013, p. 45). This was a landmark document, but only for the member states that adopted it.

In his recent report on the state of RTI laws within the United States, for example, David Cuillier calls for the U.S. to officially recognized RTI as a human right, "as outlined in the United Nations' Universal Declaration of Human Rights since 1948" (Cuillier, 2017, p. 28). He refers in that passage to Article 19 of the declaration, which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Cuillier's argument finds justification in the a Human Rights Resolution on democracy and the rule of law, promulgated by the UN's Office of the High Commissioner for Human Rights in 2005, which called on all members "to make continuous efforts to strengthen the rule of law and promote democracy" by: "Ensuring public access to information in a manner that can be understood by people and groups in society regarding the exercise of their rights, as described in article 19 of the International Covenant on Civil and Political Rights ..." The Article 19 in question traces back to the International Covenant on Civil and Political Rights of 1966, which was ratified by the U.S. in 1992.

However, despite such international concurrence on RTI's fundamental place among human rights and in democracy, its place in American law remains disjointed.

RTI is not yet recognized by American law as a human right, as Cuillier (2017) points out. And the federal RTI law (known by the acronym FOI, for Freedom of Information) is a legislative rather than constitutional safeguard — therefore less baked into national dialogue about civil liberties, and also more vulnerable to the whims of ever-changing congressional priorities. At the American state level, RTI laws not only vary widely among themselves, but individually are potentially even more vulnerable to political whims and legislative horse-trading, as state policy and politics play out with a lower barrier to entry than the federal sphere, amid a landscape where local organizations increasingly struggle with resources to maintain their missions, much less advance the cause (Cuillier, 2017).

***RTI Beyond the Press.*** The paper “Press freedom and development,” published by UNESCO (Guseva et al., 2008), interprets press freedom as “a derivative of the fundamental right constituted by freedom of information.” The paper cites United Nations Resolution 59 (I), adopted at the first session of the U.N. General Assembly in 1946 to call for an international conference on freedom of information:

*“Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated; Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world ...” (UN General Assembly, 1946)*

Although press freedom may find its roots in RTI, however, one must examine RTI from perspectives beyond journalism. While RTI is certainly a tool employed by journalists, it simply cannot be characterized only in those terms, because its utility

is hardly limited to that of the press. The right to access government information directly benefits and is employed heartily by individuals, business interests, non-governmental organizations and even members of the government itself. As the UN resolution states, it is a “fundamental human right,” not solely of interest to the press.

*Journalistic Objectivity.* Academia and the journalism industry have produced plenty of literature on the topic of objectivity: from why it’s important to why it’s impossible, from how to uphold it as a pillar of the profession to how to disclose when a conflict of interest exists. A thorough understanding of objectivity is called for in the context of this professional analysis because — although I argue that RTI is at its core is a public policy deserving of coverage like any other — I acknowledge that its crucial role in the practice of journalism necessitates careful navigation of ethical standards and audience perceptions of journalistic credibility. In other words, a conflict of interest is practically inevitable for any journalist reporting on access to public records. Yet we hold responsibility for reporting on this fundamental human right.

So, can the work be carried out with journalistic objectivity? The answer depends largely on how one defines “objectivity” — a concept whose definition in the profession remains as contested as it is old.

The notion of objectivity dates back to the early 20<sup>th</sup> century, concurrent with both the professionalization of the industry and the maturation of its dominant business models, as well as an American society’s embrace of the scientific method (Cunningham, 2003; Gans, 2003). Following a period of extreme partisanship that

drove newspaper publication, the “objectivity” model sought not to eliminate all opinion from the mind of the reporter, but to prevent the reporter’s opinion from undermining the completeness and accuracy of his journalism. In *Elements of Journalism*, Kovach & Rosenstiel (2007, pp.81-83) sum up famed journalist Walter Lippman’s concept of objectivity as recognition that “the journalist is not objective, but his method can be.” Practically for the profession, this objective approach also facilitated wider circulation of syndicated material and broader appeal to audiences across the political spectrum by not taking sides and instead reporting “just the facts (Gans, 2003).”

Neutral language and an aura of journalistic detachment, however, cannot compensate for failures in that process. In an excellent literary tour of various definitions for “news balance” and “objectivity,” Applegate (2007) cites Dale Minor’s book *The Information War*, which lambasts gutless lazy journalists who debase the concept of objectivity when they use it as a cloak to hide beneath: “Unfortunately, it is a principle observed most often in the breach or to avoid the perils of seeking the truth, and it is often prostituted as an excuse for superficiality or as a cover for the less than true.”

Brent Cunningham, former managing editor of the *Columbia Journalism Review*, cites just such an example in his 2003 article “Rethinking Objectivity,” which points out the shameful complicity of a press that impassively reported on lynchings in the late 19<sup>th</sup> century. The press at the time struck a “false balance on the issue and failed ‘to recognize a truth, that African-Americans were being terrorized across the nation.’” (Cunningham, 2003).

The manner in which journalists wrote about such pressing social and humanitarian issues as Cunningham describes may be part of why audiences have increasingly lost faith in journalism and the notion of journalistic objectivity — a trend that dates back as early as 1939, when a *Fortune* survey that found “nearly half of respondents felt the newspapers soft-pedalled (sic) unfavorable news about ‘friendly politicians’ and ‘friends of the publisher.’ Over a quarter also felt that the papers were ‘too friendly’ toward ‘people of wealth’ as compared to about 10 percent who said they were too friendly to labor” (Gans, 2003, p.34).

Theodore Glasser argues that strict objectivity in fact contradicts journalism’s self-defined role in democracy, “that of a Fourth Estate, the watchdog role, an adversary press” (Glasser, 1983). He argues that, as little more than stenography of “observable and retrievable facts,” journalistic objectivity ironically imbues bias into reporting, by encouraging reporters to rely on “the prominent and the elite.” In the process, he says, journalists abdicate their responsibility as humans and citizens.

Over the decades of the 20<sup>th</sup> century, through increasing consolidation of media ownership and amid significant national scandals and international crises (Gans, 2003), mindless adherence to superficial objectivity gradually made room for a more nuanced reporting (Cunningham, 2003). “No longer is objective reporting enough. Interpretive reporting is needed,” Applegate declares (2003, p.7).

*But reporters have to make sure they use facts — verifiable facts — and not opinion. If they investigate a story and it demands in-depth reporting, they must make sure they explain what happened rather than accuse someone of causing it. They may clarify and even analyze in the story, in which case the focus should be on why. But they have to remember that personal opinion should not be in the report.*

Applegate's assertion that objectivity must give way to interpretive reporting, in other words, is promptly followed by a definition of proper interpretive reporting that closely track the process-based definition of objectivity espoused by Kovach and Rosenstiel.

Yet still, audience dissatisfaction with the news persisted — to the extent that a Pew Center study in 1999 found “nearly a majority [of respondents] seconding a statement that journalists do not care about democracy (Gans, 2003, p. 34).” Gans describes a variety of responses to audience disapproval — including, it should be noted, blaming the audience for its own intellectual shortcomings. But deep self-reflection is also an outcome, plus innovation of a new vein of reporting called “public journalism,” dedicated to civic education and engagement” (Gans, 2003, p. 36).

This, in turn, split off into a more “proactive” form of journalism (Bowman and Ubayasiri), which includes what became known as “public journalism” (Gans, 2003; Merritt, 1995). As described by Merritt, “public journalism is a search for ways that journalism can serve a purpose beyond — but in place of — merely telling the news. That purpose is reinvigorating public life by re-engaging people in it — by renewing civic capital (Merritt, 1995, p.263).”

This notion was not universally embraced, however. Davis Merritt, regarded as one of the “fathers” of public journalism, lamented a reflexive and uninformed recoiling from the idea of a reporter's personal interest in social outcomes that the very nature of public journalism implies. It is a fear-based reaction that he flatly rejects: “Moving away from detachment need not mean abandoning ‘objectivity,’ or

what passes for it in the context of journalism,” he wrote. “Even if we assume that a rough sort of objectivity can exist in humans, it is not the same thing as detachment (Merritt, 1995).” Despite much reflection and rigorous debate, the question of objectivity hardly was solved.

In the years since public journalism emerged, technological developments have only further complicated audience perceptions of the news and journalistic objectivity. While self-publishing software and platforms, on the one hand, are great equalizers in an increasingly stratified society, they also carry risk: Any sentient being with an email address can start publishing and call himself or herself a “journalist,” despite an absolute lack of training in the profession and utter disregard for its precepts (Boburg et al., 2017; Project Veritas, 2017)<sup>3</sup>. And so we find American journalism returns to a new era of untrained reporters, much like what Lippman lamented in the early 20<sup>th</sup> Century. (Kovach and Rosenstiel, 2007, p. 82).

Only now, it’s worse, because today “journalists” don’t even have to be sentient beings. Virtual “robots” engineered by foreign governments can deliberately produce fake news in an attempt to influence an American election and undermine journalistic credibility. The disparate understandings of reality also tears at the fabric of American society and shared values of democracy and equal rights

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<sup>3</sup> See references regarding Project Veritas attempt to dupe *Washington Post* reporters with a fake news story, then call themselves journalists in a repudiation of the actual journalism that exposed their scam.



(Albright 2017; O'Connor and Schneider, 2017; Confessore and Wakabayashi, 2017; Calabresi 2017)<sup>4</sup>.

## **Conclusion**

The only thing clear about the vocabulary of “objectivity” is that it’s contested: Definitions abound, and many conflict with each other. Yet core values persist in the literature. Whether it’s called “objective” or anything else, in order to be “journalism,” reporting must be rigorous — employing skepticism, thoroughness, careful sourcing, verification and neutral language — and leave no room for the personal opinions of the reporter, editor or publisher. It must reach beyond stenography to explore and investigate the opinions and experiences and assertions of all, including the portions of society that are affected by the powerful, yet lack the agency to make their own voices heard. It must tell the full story, not just the convenient one.

I argue that journalism must own its place not only as democracy’s watchdog, but also as civic educator. After all, what is journalism if not biased toward democratic ideals and human rights? My project will embrace that bias. Through “objective” processes that uphold the standards of our profession, I will step into the responsibility that democracy requires of an independent press.

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<sup>4</sup> See references regarding Jonathan Albright’s research for the Tow Center on Digital Journalism, and extensive news coverage of the allegedly successful Russian campaign to get Donald Trump elected as President of the United States.

## Appendix B: Story Ideas for Professional Skills Project

As stated in the body of this proposal, my reporting on public records generally will explore: the experiences of individuals who have accessed (or tried to access) public records for a variety of reasons, current trends in public records laws and administration, and the ways that recent or proposed changes in public records laws and practices may affect access to public records. Specifically, potential stories are outlined below, with the understanding that these represent only existing leads or story ideas that have not yet been fully vetted. Additional story opportunities may arise, and some of what's presented here may not come to fruition.

1. **Disability Rights Violations.** A quasi-governmental agency in Vermont charged with investigating claims of abuse, neglect and serious rights violations against people with disabilities (Disability Rights Vermont) is frequently denied access to records they need to carry out their investigations.
2. **Town Secrets.** A resident of Essex, Vt., claims to have had difficulty obtaining information from town officials — even when he was a member of the town's selectboard.
3. **Shuttered Town Websites.** This story would follow up on a 2014 law intended to improve access to information, which actually backfired. The law clarified that official town websites must comply with state open meetings laws: notice must be given prior to meetings with agendas posted in advance, and minutes of those meetings must be posted within five days, or else the town could face monetary fines. In response, the Vermont League of Cities and Towns advised municipalities to take

their websites offline if they were not certain they could meet the requirements. Many towns did just that. I propose a follow-up to find out how many towns have since gotten their sites back online, how the still-shuttered websites have affected town engagement (if at all), and whether the League has developed more rigorous solutions to assist municipalities with limited technical resources.

4. **Off-site Records.** A title researcher in New Hampshire is dismayed to learn that the registry of deeds has moved much of its archive to an off-site location under contract with a private company. The information she needs to conduct research is now much more time-consuming and cumbersome to obtain; I do not know yet if the change has altered her costs. I would like to look into whether off-site storage is a growing trend in records management among states and, if so, what precipitates the shift and how it affects public access. (This story could be pitched to New Hampshire news outlets and/or regionally, depending on my findings.)
5. **Third Party Management.** New commercial technology is emerging to help governments better manage increasing volumes of data and information. I propose a review of these developments, including consideration of both access and privacy when third parties manage government information. This reporting may also include specific technology being used by or pursued by the State of Vermont. (This story is related to off-site storage, but distinct. The two would run best as a pair.)
6. **Public Records Studies.** As Vermont lawmakers begin marking up an “omnibus” public records reform bill in January, it’s worth hearing from neighboring states that are further along the same path, especially the demographically comparable states to our east: New Hampshire, where a state-mandated commission recently concluded its

work to recommend improved processes for resolving public records disputes; and Maine, which established a Right to Know advisory committee in 2005. (This story would be best paired with the Ombudsmen explainer, described below.)

7. **Ombudsmen.** A perennial legislative proposal to establish a public records ombudsman in Vermont is expected to resurface when the Legislature reconvenes in January. To help inform the public and legislative dialogue about this proposal, I would like to present an overview of other states that have instituted such an office<sup>5</sup>, in order to explain the concept to Vermonters and to examine the pros and cons of various ways the office can be structured.
8. **Government Perspective.** It's only fair to consider the perspective of government officials who must respond to public records requests — from the town level where some clerks still keep hand-written budgets, to state agencies with general counsel on staff. What is the “culture” regarding public records requests, and what shapes those values and responses? Where specifically is the demand coming from and landing, and are sufficient resources allocated to respond to public inquiries in a timely and thorough manner?
9. **Secret Public Comments.** Recently the state body that regulates health care in Vermont (Green Mountain Care Board) opened a public comment period on proposed regulatory changes. State agencies involved in health care responded, but their input was deemed exempt from public disclosure. To my knowledge, this has not yet been

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<sup>5</sup> Including but not limited to: Maine, New York (not technically called an ombudsman, but akin to one), Arizona, Washington, Connecticut, Iowa and Maryland.

reported, which means that not only does the public not have access to the information; but most people probably don't even know it exists.

10. **Hidden Water Quality:** Vermont, like many states, is plagued with water quality problems — from perfluorooctanoic acid (PFOA) contamination in the city of Bennington<sup>6</sup> to extensive evidence of elevated nitrate levels in groundwater throughout the state<sup>7</sup>. Yet water quality data are hard to come by: The state maintains that it must protect the privacy of land owners by not revealing the precise locations where elevated nitrate levels are detected, and routine violations of water quality reporting are met with little to no enforcement measures. This lack of data represents a deficit of information in the state's ongoing dialogue about water quality, and a deficit of information on which residential and commercial real estate decisions are based.

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<sup>6</sup> <https://www.usnews.com/news/best-states/vermont/articles/2017-09-08/vermont-seeks-approval-of-settlement-over-pfoa-contamination>

<sup>7</sup> I know of the nitrate contamination from my own reporting in 2017.