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Transparency Deserts

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TRANSPARENCY DESERTS

Christina Koningisor

ABSTRACT—Few contest the importance of a robust transparency regime in a democratic system of government. In the United States, the “crown jewel” of this regime is the Freedom of Information Act (FOIA). Yet despite widespread agreement about the importance of transparency in government, few are satisfied with FOIA. Since its enactment, the statute has engendered criticism from transparency advocates and critics alike for insufficiently serving the needs of both the public and the government. Legal scholars have widely documented these flaws in the federal public records law.

In contrast, scholars have paid comparatively little attention to transparency laws at the state and local level. This is surprising. The role of state and local government in the everyday lives of citizens has increased in recent decades, and many critical government functions are fulfilled by state and local entities today. Moreover, crucial sectors of the public—namely, media and advocacy organizations—rely as heavily on state public records laws as they do on FOIA to hold the government to account. Yet these state laws and their effects remain largely overlooked, creating gaps in both local government law and transparency law scholarship.

This Article attempts to fill these gaps by surveying the state and local transparency regime, focusing on public records laws in particular. Drawing on hundreds of public records datasets, along with qualitative interviews, the Article demonstrates that in contrast with federal law, state transparency law introduces comparatively greater barriers to disclosure and comparatively higher burdens upon government. Further, the Article highlights the existence of “transparency deserts,” or localities in which a combination of poorly drafted transparency laws, hostile government actors, and weak local media and civil society impedes effective public oversight of government.

The Article serves as a corrective to the scholarship’s current, myopic focus on federal transparency law. In doing so, it makes three central contributions. First, it provides a much-needed descriptive account of the state and local transparency regime. Second, it makes a normative contribution. It mines empirical and qualitative public records data to evaluate the costs and benefits of the current transparency regime and then applies those insights to contemporary academic and policy-oriented

debates. In the process, the Article reveals that unique features of state and local government both heighten the salience of statutory transparency mechanisms and challenge dominant strands of thought in the contemporary transparency scholarship. Third, the Article has implications for ongoing public law debates, demonstrating that failures in the local transparency regime undermine certain theories of federalism.

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INTRODUCTION

In the summer of 2018, Sheri Fink, a Pulitzer Prize-winning reporter for the *New York Times*, was finishing up a months-long investigation into the local government's response to Hurricane Harvey.¹ Her report focused on civilian fatalities during the hurricane and the extent to which communication and coordination failures among emergency response providers may have contributed to these deaths.² As part of the newsgathering process, Fink submitted multiple public records requests under the Texas public records law to state and local agencies involved with emergency response efforts.³ She requested 9-1-1 call logs, after-action reports, emergency dispatches, officials' e-mails, and an array of other government records. Some government entities handed over the requested records quickly and with little or no objection.⁴ Others invoked tenuous legal arguments to avoid disclosing records or simply failed to respond at all.⁵

The City of Houston issued a particularly illogical response. Fink had submitted a request for the city's Hurricane Harvey after-action report, a type of document routinely produced in the aftermath of natural disasters that analyzes the government's response to the event and outlines areas for improvement.⁶ But Houston refused to release the results of its investigation.⁷ Texas's public records law—like virtually every public records law in the country—is structured with a presumption of openness,⁸

¹ E-mail from Sheri Fink, Correspondent, The N.Y. Times Co., to author (Oct. 25, 2019, 01:25 PST) (on file with author). The author previously served as an attorney at the *New York Times* and assisted Fink with some of these public records requests and appeals.

² Sheri Fink, *Lost in the Storm*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/interactive/2018/08/30/magazine/hurricane-harvey-houston-floods-texas-emergency.html> [<https://perma.cc/J3RC-T6TU>].

³ E-mail from Sheri Fink, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ For example, Harris County—which encompasses the City of Houston, as well as the surrounding areas—voluntarily released its after-action report to the public. *See* HARRIS CTY. OFFICE OF HOMELAND SEC. AND EMERGENCY MGMT., HURRICANE HARVEY AFTER-ACTION REPORT 1 (2018), https://www.readyharris.org/Portals/43/PDFs/Hurricane%20Harvery%20AAR_Final.pdf?ver=2018-05-14-144548-187 [<https://perma.cc/DM8H-AA28>]; *see also* Press Release, Harris Cty., Harris County Releases Hurricane Harvey After Action Report (May 21, 2018), <https://web.archive.org/web/20180617175635/https://www.readyharris.org/News-Information/Ready-Harris-News/Post/32479> [<https://perma.cc/53MV-ZPN7>] (announcing the county's release of the report to the public).

⁷ E-mail from Sheri Fink, *supra* note 1.

⁸ TEX. GOV'T CODE ANN. § 552.302 (West 2005) (“[I]nformation requested in writing is presumed to be subject to required public disclosure.”).

requiring that every record held by a covered government entity be turned over to the public unless it falls within a specific statutory exemption.⁹ In this case, the city argued that the report was protected from disclosure by a statute permitting the government to withhold records relating to “an act of terrorism or related criminal activity.”¹⁰

Fink pointed out that a natural disaster like a hurricane cannot plausibly be categorized as either “an act of terrorism” or “related criminal activity.” She argued that the city was stretching the bounds of this exemption to the point of absurdity.¹¹ But the city’s attorneys held firm. This left the *Times* in a bind. It would most likely cost \$20,000–\$30,000 to hire local counsel in Texas and contest the decision in court.¹² Newspapers—even the largest in the country—are rarely able to afford that type of legal challenge given the substantial uncertainty involved.¹³ Such cases often linger for years, and even when the newspaper does prevail in court, the records at issue are often no longer newsworthy by the time they are disclosed. The costs become difficult to justify.

Fink’s experience touches upon a number of critical and interrelated threads raised by public records laws, including the willingness of a local agency to stretch the plain meaning of a statute intended to facilitate government oversight; the motivations and capabilities of the government officials responding to public records requests; the peculiarities of each state’s public records law; and the ability of Fink and the *Times* to appeal the city’s decision and enforce the requirements of the Texas statute. These are not necessarily new issues or concerns. What is unique is that they surfaced in the context of a local government public records request.

There has been a proliferation of scholarship in recent years focused on federal transparency laws in general,¹⁴ and on the Freedom of

⁹ See *id.* §§ 552.101–552.160 (listing exemptions).

¹⁰ Letter from James M. Graham, Assistant Att’y Gen., Att’y Gen. of Tex. Open Records Div., to Rahat Huq, Assistant City Att’y (Nov. 1, 2018), <https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2018/pdf/or201827608.pdf> [<https://perma.cc/JX4K-E8TS>].

¹¹ Letter from David McCraw, Vice President and Deputy Gen. Counsel, The N.Y. Times Co., to Ken Paxton, Att’y Gen. of Tex. (Sept. 7, 2018) (on file with author).

¹² E-mail from David McCraw, Senior Vice President and Deputy Gen. Counsel, The N.Y. Times Co., to author (Oct. 24, 2019, 06:13 PST) (on file with author). This amount generally doubles if the newspaper follows up with an appeal. *Id.* In this specific instance, the *Times* ended up pursuing an interim step and contesting the withholding through an appeal process with the state attorney general’s office. The newspaper achieved a partial legal victory and ultimately obtained a redacted version of the report. See Letter from James M. Graham, *supra* note 10.

¹³ See discussion *infra* Section III.D.3.a.

¹⁴ See, e.g., Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) (outlining the ways in which excessive transparency can undermine effective governance); David E. Pozen,

Information Act (FOIA) in particular.¹⁵ The scholarship on this topic is both deep and diverse, but many articles are concerned, in one way or another, with the same central questions: whether the benefits of transparency laws such as FOIA outweigh the costs and whether these laws can be successfully amended to better serve the underlying goals of transparency advocates while minimizing the burdens to government.¹⁶ Despite this profusion of legal scholarship examining federal transparency laws, scholars have been curiously silent on transparency law issues at the subfederal level. There have been a handful of articles addressing particular slices of state-level transparency statutes.¹⁷ But scholars have not yet taken

Transparency's Ideological Drift, 128 YALE L.J. 100 (2018) [hereinafter Pozen, *Transparency's Ideological Drift*] (demonstrating that many federal transparency requirements serve more neoliberal goals today such as reduced regulation and smaller government); Cass R. Sunstein, *Output Transparency vs. Input Transparency*, in TROUBLING TRANSPARENCY 187 (David E. Pozen & Michael Schudson eds., 2018) (arguing that input transparency is often less beneficial and more costly than output transparency); Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1 (2018) (arguing that transparency's real cost "is the loss of expressive ambiguity").

¹⁵ See, e.g., Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204 (2018) [hereinafter Kwoka, *First-Person FOIA*] (examining the extent to which FOIA is used to fulfill the personal interests of individual requesters); Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016) [hereinafter Kwoka, *FOIA, Inc.*] (examining the extent to which FOIA serves commercial interests); Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217 (2011) (criticizing procedural irregularities in FOIA lawsuits); David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. F. 232 (2016) (chronicling the flaws of FOIA and describing how these flaws have changed over time); David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097 (2017) [hereinafter Pozen, *Freedom of Information Beyond the Freedom of Information Act*] (describing the failures of FOIA and arguing for a more radical revision of the law).

¹⁶ One strand of this scholarship argues that the harms imposed upon the government by the law warrant a significant reevaluation of the law's continuing viability. See, e.g., Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1156 (arguing in favor of "displacing FOIA requests as the lynchpin of transparency policy and shoring up alternative strategies"); Antonin Scalia, *The Freedom of Information Act Has No Clothes*, 6 REGULATION 14, 15 (1982) (characterizing FOIA as "the Sistine Chapel of Cost-Benefit Analysis Ignored"). Another strand argues that the law is flawed but necessary, and proposes reforms. See, e.g., Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 195 (proposing reforms to FOIA that would privilege the press); Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1071–79 (2008) (using the example of FOIA requests during the "Global War on Terror" to argue that many of the perceived shortcomings of FOIA in fact have beneficial effects); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 664–83 (1984) (describing the costs of the law and proposing reforms).

¹⁷ See, e.g., Mark Fenster, *The Informational Ombudsman: Fixing Open Government by Institutional Design*, 2 INT'L J. OPEN GOV'T 275 (2015) (examining the role of ombudsman in state public records laws); Katherine Fink, *State FOI Laws: More Journalist-Friendly, or Less?*, in TROUBLING TRANSPARENCY, *supra* note 14, at 100–09 (examining the percentage of media requests sent to state environmental agencies across the country); Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y

a more comprehensive look at how these statutes impact state government. And there has been virtually no scholarship at all examining transparency issues at the local level.¹⁸

This Article attempts to remedy this gap. It does so by focusing attention on one category of state transparency laws: public records laws.¹⁹ It surveys the costs and benefits of these laws, concluding that these transparency statutes are both less effective and more critical to democratic governance at the state level than they are at the federal level. Based on this analysis, the Article then maps out the three central features that comprise a local transparency ecosystem: the substance of these transparency statutes; the attitudes of the government officials that implement them; and the strength of the media and civil society actors who monitor the government externally. It argues that when all three prongs of this transparency ecosystem fail—when the statutes themselves are poorly written, implemented by government actors hostile to transparency efforts, and enforced by weak or nonexistent civil society organizations—this creates a downward spiral of reduced government disclosure and public oversight, what I refer to as a “transparency desert.”²⁰

The lack of scholarly attention to such transparency failures at the state and local level is surprising. The power and influence of state and local governments have expanded in recent years, and these entities now fulfill a myriad of critical government functions. The size of state and local government dwarfs that of the federal government today.²¹ And these state

REV. 455, 456–70 (2011) (examining the persistent violation of public records laws by criminal justice institutions in southern states); Michele Bush Kimball, *Law Enforcement Records Custodians’ Decision-Making Behaviors in Response to Florida’s Public Records Law*, 8 COMM. L. & POL’Y 313, 326–50 (2003) (examining the behavior and attitudes of law enforcement records’ custodians in Florida); Claudia Polsky, *Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers*, 66 UCLA L. REV. 208, 212 (2019) (examining the impact of public records laws on academic research and speech).

¹⁸ There is, however, a thoughtful but relatively small body of literature examining transparency issues in the context of local policing. See, e.g., Barry Friedman, *Secret Policing*, 2016 U. CHI. LEGAL F. 99 (arguing in favor of greater transparency in domestic policing).

¹⁹ This Article uses the terms “public records laws,” “open records laws,” and “freedom of information laws” interchangeably.

²⁰ This term borrows from the concept of “news deserts,” or geographic areas that lack local news outlets. See PENELOPE MUSE ABERNATHY, *THE EXPANDING NEWS DESERT* 8 (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf [<https://perma.cc/UN4Z-BJJ3>].

²¹ “In 2014, the federal government civilian workforce was [roughly 2.7 million, while] . . . the combined state and local workforce in 2013 [was] more than 16 million . . .” RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 4 (8th ed. 2016).

and local entities also exert greater political sway. State and local governments are now responsible for implementing large swaths of federal policy.²² Conversely, they also play a central role in resisting federal policies and actions.²³ These state transparency laws take on increased importance as the governments they monitor assume a greater role in citizens' lives.

Moreover, an animating concern of the federal transparency scholarship is the extent to which the media is able to utilize FOIA to support its role as government watchdog.²⁴ While FOIA was enacted to provide records access to the public at large, the law's drafters were especially attuned to the needs of the news media. The law was designed largely to serve journalists, with the assumption that these journalists, in turn, would inform the general citizenry.²⁵ Under this view of FOIA, the media serves as a kind of "surrogate" for the public.²⁶ The media's ability to use the statute becomes especially critical from this perspective. Legal scholars, in turn, have devoted outsized attention to the issue.²⁷

In contrast, there has been comparatively little scholarly focus on the media's ability to effectively use these state-level transparency laws, even though many reporters themselves view state public records statutes as deeply integral to the reporting process. Certainly, local news outlets must turn to state laws to cover local government issues. But even at national media outlets, reporters rely heavily on state transparency laws—arguably as heavily as they rely on FOIA and other federal statutes.²⁸ We cannot understand the ways in which transparency laws facilitate the media's ability to perform its watchdog role without considering the role of these subfederal laws.

²² See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1853 (2015).

²³ See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (demonstrating the ways in which states use powers conferred by the federal government to resist federal policy).

²⁴ See, e.g., Carroll, *supra* note 16, at 211–15; Kwoka, *First-Person FOIA*, *supra* note 15, at 2212–15; Kwoka, *FOIA, Inc.*, *supra* note 15, at 1369–71.

²⁵ See Kwoka, *FOIA, Inc.*, *supra* note 15, at 1367–71.

²⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (noting that the public learns about legal proceedings primarily through the press, "validat[ing] the media claim of functioning as surrogates for the public").

²⁷ See *supra* note 24.

²⁸ See, e.g., Interview with Steve Eder, Reporter, The N.Y. Times Co., in N.Y.C., N.Y. (Aug. 28, 2018) (stating that he often submits requests through both FOIA and state public records logs but finds that he is better off "focusing energies on state" requests given the advantages they provide over FOIA, such as improved processing times). For further discussion of the specific advantages state public records laws provide over FOIA, see *infra* Section III.B.

This Article attempts to remedy this gap in the literature by exploring the example of state public records laws. The term “transparency” is broad and nebulous and can be interpreted to encompass a wide array of state statutes, including open meeting laws, open data laws, budgetary transparency requirements, and more.²⁹ By focusing on one class of transparency laws, this Article sidesteps these definitional questions and narrows its analytical lens. This approach forecloses a more comprehensive examination of the ways in which various transparency laws interact with state and local governments. But homing in on one category of transparency law also offers considerable benefits. Much of the current transparency scholarship is focused on FOIA rather than on the array of other federal transparency statutes.³⁰ As a result, an analysis of state-level public records laws, as well as the effects they have on state and local government, serves as a natural place to both push back on and fill the gaps within the existing literature. A robust theoretical and analytical framework already exists within which to plug an analysis of subfederal transparency laws.

Moreover, a common obstacle facing local government scholars is the sheer number of government entities that exist in the United States. There are roughly 90,000 local governments in the country.³¹ And public records laws generally apply to multiple entities even within a single local government, such as local zoning boards or police departments. Each state also has dozens—sometimes hundreds—of state-level agencies or other state-level bodies that are covered by the public records law. The result is a profusion of state and local government entities subject to state open records laws.³² This multitude of state and local governments nationwide,

²⁹ Cf. Pozen, *Transparency's Ideological Drift*, *supra* note 14, at 123–44 (examining various transparency measures in the federal context, including open records laws, open meetings laws, legislative transparency requirements, campaign finance transparency, and open data requirements).

³⁰ See, e.g., Pozen & Schudson, *Introduction*, in *TROUBLING TRANSPARENCY*, *supra* note 14, at 2 (explaining that the transparency anthology focuses on FOIA “both to contain what might otherwise be an unwieldy inquiry and because FOIA is an especially canonical transparency instrument, one of the ur-texts of the field”).

³¹ Press Release, U.S. Census Bureau, *Census Bureau Reports There Are 89,004 Local Governments in the United States* (Aug. 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html> [<https://perma.cc/F5SG-T5RN>] [hereinafter U.S. Census Bureau Press Release].

³² The executive director of New York’s Committee on Open Government estimates that there are 10,000 government entities subject to the public records statute in New York State alone. Interview with Robert J. Freeman, Exec. Dir., N.Y. State Comm. on Open Gov’t, in N.Y.C., N.Y. (Aug. 9, 2018). And in Washington State, there are roughly 2,300 state and local government entities subject to the state public records law. See Joint Legis. Audit and Rev. Comm., *Public Records Data Collection System, 2017 Data Set* (Oct. 9, 2018) (on file with author) [hereinafter *Washington State Dataset 2017*].

combined with the complexities of evaluating fifty separate and unique state laws, poses a research challenge. Focusing on one category of transparency laws allows for a more bounded area of inquiry as well as a deeper analysis of the laws' effects than would be possible with a fifty-state survey of multiple transparency-related statutes.

Elucidating this tangle of state public records laws and their effects—both good and bad—serves as a corrective to the legal scholarship's current, narrowed focus on federal law. In doing so, this Article makes three central contributions. First, it offers a descriptive account of a critical aspect of state and local governance. It examines the substance and application of state public records laws, as well as the extent to which distinctions in government structure at the federal, state, and local level complicate existing assumptions and theories about transparency law. One of the most significant obstacles to studying subfederal transparency issues—and state-level public records laws in particular—is lack of data. Few states track their public records laws at the state level, and no state tracks public records requests at the local level.³³ This Article helps remedy this informational gap by drawing upon public records datasets from various state and local governments, as well as conversations with public records officers, to better understand the public records process at the subfederal level.

Second, this Article makes a normative contribution. It mines this quantitative and qualitative data to evaluate the costs and benefits of the current public records regime. It then applies these insights to contemporary academic and policy-oriented debates. In doing so, it serves as a corrective to current scholarly and legislative discussions surrounding transparency laws. It undermines assumptions about transparency writ large that are embedded within the contemporary literature, revealing that certain claims that commonly surface in the transparency literature—such as the availability of traditional checks and balances as an alternative source of government transparency and accountability—do not necessarily hold up in the context of state and local government. And it shows that features unique to state and local government heighten the salience of statutory transparency mechanisms.

Finally, this analysis has implications for ongoing public law debates. Local government scholars have paid little attention to transparency laws, despite their relevance to such questions as the costs and benefits of decentralization and the potential for local governments to enhance

³³ See discussion *infra* Section III.A.

democratic participation.³⁴ This Article helps bridge this divide. It highlights the formation of transparency deserts—or localities in which a combination of poorly drafted transparency laws, hostile government actors, and weak local media and civil society organizations combine to shield the government from public scrutiny. In doing so, it demonstrates that these transparency deserts challenge certain assumptions underpinning theories of federalism—for example, that smaller governments are more closely monitored by their citizens or that state and local governments serve as effective democratic laboratories.

The Article proceeds in five Parts. Part I establishes a point of comparison by surveying the structure and application of FOIA, as well as the themes and preoccupations of the current transparency law scholarship. Part II addresses the history, structure, and application of state public records laws. Part III outlines the concept of state and local transparency ecosystems and evaluates the costs, benefits, and barriers to disclosure that exist at the state and local level. Part IV highlights the problem of transparency deserts and examines how these transparency deserts challenge certain theories of federalism. Finally, Part V addresses the ongoing viability of state transparency laws and outlines potential areas for reform.

I. IN THE SHADOW OF FEDERAL LAW: THE FREEDOM OF INFORMATION ACT

When legal scholars talk about government transparency, invariably they are referring to the web of federal statutes that comprise the federal transparency regime. Those statutes include the Government in Sunshine Act,³⁵ the Federal Election Campaign Act of 1971,³⁶ and the Digital Accountability and Transparency Act of 2014,³⁷ among others. But the

³⁴ See, e.g., Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 574, 625–29 (2017) (describing the “missing focus on the institutions of administration in local-government legal scholarship”); discussion *infra* Section IV.B (discussing the ways in which transparency failures in state and local government have implications for federalism scholarship). Professor Miriam Seifter has begun to address the role of transparency in state-level governance, although further work still needs to be done in this arena. See Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107 (2018) [hereinafter Seifter, *Further from the People?*].

³⁵ Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended in scattered sections of 5 U.S.C. and 39 U.S.C.).

³⁶ Pub. L. No. 92-225, 86 Stat. 3.

³⁷ Pub. L. No. 113-101, 128 Stat. 1146.

“crown jewel of transparency” is the Freedom of Information Act.³⁸ FOIA casts a long shadow on transparency discussions in law and policy contexts. Indeed, as Professor David Pozen has written, the statute is “arguably the canonical piece of transparency legislation in the modern world.”³⁹

Yet this is not the only area where FOIA looms large. The federal statute has also bled into state transparency laws. State legislatures often incorporate the statutory language of FOIA directly into state law. And judges interpreting state public records laws routinely look to federal judicial interpretations of FOIA for guidance.⁴⁰ Even though some state public records laws predate FOIA,⁴¹ virtually every state law must now be considered in light of its federal counterpart. Moreover, the federal statute dominates the transparency scholarship, at least within the legal literature.⁴² As a result, in order to understand what is distinctive and important about state transparency laws in general—and state freedom of information laws in particular—it is helpful to look to FOIA as a point of reference.

The basic outline of the law is most likely familiar to readers. The radical innovation of FOIA is that it establishes a private right of action: anyone can request a record under the law, and anyone may sue when their request is ignored or denied. The statute requires that all records held by federal government agencies are disclosed to the public upon request unless they fall within one of nine enumerated exemptions, the most significant of which offer protections for classified documents; interagency and other privileged communications; documents containing private information; and law enforcement records.⁴³ Critically, the law applies only to federal agencies. The statute does not apply to the legislative and judicial branches, nor does it apply to the President and his immediate staff.⁴⁴

³⁸ Pozen, *Transparency’s Ideological Drift*, *supra* note 14, at 124 (quoting TED GUP, NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE 119 (2007)); *see* 5 U.S.C. § 552 (2012).

³⁹ Pozen, *Transparency’s Ideological Drift*, *supra* note 14, at 118.

⁴⁰ *See* discussion *infra* Section II.A.

⁴¹ *See, e.g.*, CAL. CIV. PROC. CODE §§ 1888, 1892 (Deering 1937); WIS. STAT. § 10.137 (1849).

⁴² *See* sources cited *supra* note 15.

⁴³ *See* 5 U.S.C. § 552(b)(1), (3), (5)–(7). FOIA also protects records related to the internal rules and process of an agency, *id.* § 552(b)(2); trade secrets, *id.* § 552(b)(4); records relating to agency regulation of a financial institution, *id.* § 552(b)(8); and geological and geophysical data, *id.* § 552(b)(9).

⁴⁴ *Id.* § 551(1). By its terms, the FOIA applies to “the Executive Office of the President,” *id.* § 552(f), but this term does not include either “the President’s immediate personal staff” or any

These federal agencies receive a large and growing number of requests each year. In 2017, they received more than 800,000 FOIA requests.⁴⁵ The identities and motivations of these requesters is a question that has preoccupied legal scholars in recent years. Professor Margaret Kwoka, in particular, has conducted extensive research on FOIA requesters in an effort to understand whether the law is serving the original intent of its drafters. She has found that certain federal agencies are flooded with requests from commercial entities,⁴⁶ while others receive an overwhelming percentage of requests from “first-person” requesters—individuals seeking information about themselves.⁴⁷ In both studies, Professor Kwoka raises the concern that even if there is some public benefit conferred by these requests, much of this commercial and first-person use of the statute is not necessarily consistent with the public oversight function that the drafters of the law envisioned.⁴⁸ These requests also raise the costs of the Act. In 2017, the federal government employed roughly 4,500 full-time FOIA officers and spent more than half a billion dollars responding to record requests.⁴⁹

Despite years of criticism and multiple revisions to the law, few agree that FOIA adequately serves the needs of either requesters or the public. The Executive Branch argues that the number and scope of requests has ballooned and that agencies lack sufficient resources to adequately respond

person of the Executive Office of the President “whose sole function is to advise and assist the President.” *Meyer v. Bush*, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974)).

⁴⁵ OFFICE OF INFO. POLICY, U.S. DEP’T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2017, at 2 (2018), <https://www.justice.gov/oip/page/file/1069396/download> [<https://perma.cc/H9PK-3L9R>] [hereinafter SUMMARY OF ANNUAL FOIA REPORTS].

⁴⁶ Kwoka, *FOIA, Inc.*, *supra* note 15, at 1379–81 (evaluating the FOIA logs of six federal agencies and finding that all six received far more requests from commercial entities than they did from the media).

⁴⁷ Kwoka, *First-Person FOIA*, *supra* note 15, at 2210, 2221 (evaluating FOIA logs from nine federal agencies and determining that significant percentages were submitted by individuals for their own use in immigration proceedings, criminal proceedings, social security benefit proceedings, and genealogical research).

⁴⁸ *See id.* at 2208 (noting that many first-person requests fail to “advance Congress’s primary goal in enacting FOIA: to promote public democratic oversight of government activities”); Kwoka, *FOIA, Inc.*, *supra* note 15, at 1414–15 (noting that much of the commercial use of FOIA she uncovers “neither enhance[s] agency oversight nor promote[s] democratic participation in governance”); *see also* discussion *supra* notes 24–27 and accompanying text (noting that the drafters of FOIA were primarily concerned with ensuring an informed citizenry, and they envisioned that the media would play a central role in this process).

⁴⁹ SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 45, at 20. The government collected less than 1% of these costs back from requesters. *Id.*

to requests.⁵⁰ Members of Congress routinely accuse executive officials of creating obtuse procedures deliberately designed to confuse requesters.⁵¹ And members of the media argue that enumerated exemptions have been construed so broadly that they swallow vast categories of records and that excessive time delays make the statute nearly unusable.⁵² Increasingly, scholars have taken up the question of whether the statute can be adequately reformed to better fulfill the needs of the government or the public.⁵³ Yet despite these persistent critiques, the statute continues to loom large in the public imagination. Scholars have even characterized the law as a “super-statute,” one that has assumed a “quasi-constitutional valence” over time.⁵⁴

II. THE CENTERPIECE OF THE STATE TRANSPARENCY REGIME: STATE PUBLIC RECORDS LAWS

Much like the federal transparency landscape, the local transparency regime consists of an overlapping network of state statutes. This Article homes in on the impact and efficacy of the most significant of these transparency requirements: state public records laws. Similar to the Freedom of Information Act’s role in the federal context, these state law equivalents serve as the foremost transparency mechanism for monitoring state and local government.

A. *The History of State Public Records Laws*

While legal scholars have explored the origins of the “right to know” in the American legal tradition, these historical inquiries are generally confined to the federal context.⁵⁵ Despite scholars’ near-exclusive historical focus on federal law, the origin of the public access movement in the United States is in fact inextricably intertwined with state public records laws, which served as a precursor to FOIA.

⁵⁰ See, e.g., MEGHAN M. STUESSY, CONG. RESEARCH SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA): BACKGROUND, LEGISLATION, AND POLICY ISSUES 16 (2015) (noting that Department of Homeland Security officials had pointed to a “lack of funding” as one of the reasons the FOIA backlog had increased at the agency); see also Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1123–31 (discussing the democratic costs of FOIA).

⁵¹ See, e.g., STAFF OF H.R. COMM. ON OVERSIGHT AND GOV’T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT, at iii–iv (2016), <https://www.hsdl.org/?view&did=789831> [<https://perma.cc/8WTV-T7LW>].

⁵² See, e.g., Carroll, *supra* note 16, at 213–15 (chronicling the media’s frustration with FOIA).

⁵³ See discussion *supra* note 15.

⁵⁴ David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 314 n.204 (2010).

⁵⁵ See discussion *supra* notes 14–15.

At common law, members of the public were entitled to inspect certain categories of public records, including the records of municipal corporations.⁵⁶ State legislatures began to codify this common law right in the mid-nineteenth century. Wisconsin passed what was likely the nation's first public records law in 1849,⁵⁷ requiring that “[e]very sheriff, clerk of the circuit court, register of deeds, county treasurer, and clerk of the board of supervisors” keep “all books and papers . . . in their offices . . . open for the examination of any person.”⁵⁸ The law's enforcement mechanisms were robust: for each day that an officer neglected to comply with this open records requirement, he was required to pay a fee of \$5—roughly the equivalent of \$160 per day today.⁵⁹

Other states soon followed suit. In 1872, California enacted a limited statutory right of public access to the “written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive.”⁶⁰ By the turn of the century, Montana, Utah, Idaho, and Oregon had enacted similar provisions.⁶¹ And by 1940, at least twelve states had codified access rights to public records.⁶² These laws were usually concise—often just a few sentences long—and lacked a clear definition as to their scope of coverage. Still, they served as an important precursor to FOIA.⁶³

The origins of the federal public records law are usually traced back to Section 3 of the Administrative Procedure Act,⁶⁴ but no further.⁶⁵ Yet the

⁵⁶ See, e.g., *Mushet v. Dep't of Pub. Serv.*, 170 P. 653, 656 (Cal. Ct. App. 1917); *State ex rel. Colescott v. King*, 57 N.E. 535, 537, 538 (Ind. 1900); *State ex rel. Wellford v. Williams*, 75 S.W. 948, 958–59 (Tenn. 1903); *Clement v. Graham*, 63 A. 146, 153–54 (Vt. 1906).

⁵⁷ John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1027.

⁵⁸ WIS. STAT. § 10.137 (1849).

⁵⁹ *Id.*

⁶⁰ CAL. CIV. PROC. CODE §§ 1888, 1892 (Deering 1937).

⁶¹ See IDAHO C.C.P. §§ 902, 903 (1881), *repealed by* S.L. 1990; MONT. CODE ANN. §§ 10541, 3170–82 (1895), *repealed by* L. 2015, ch. 348, § 59; HILL'S ANN. LAWS OF OREGON §§ 717–18 (Hill 1892); UTAH CODE ANN. §§ 78-26-1–78-26-3 (1953); see also *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1319 (Alaska 1982) (noting that the common law right of access was codified in 1900 in Alaska, and that the language of this provision was similar to existing laws in Idaho, Montana, Oregon, and Utah).

⁶² William Randolph Henrick, Comment, *Public Inspection of State and Municipal Executive Documents: “Everybody, Practically Everything, Anytime, Except . . .”*, 45 FORDHAM L. REV. 1105, 1107 (1977).

⁶³ See HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 39 (1953).

⁶⁴ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

⁶⁵ See, e.g., STUESSY, *supra* note 50, at 1 (referring to FOIA “as the embodiment of ‘the people’s right to know’” and citing the APA as its precursor).

drafters of FOIA were strongly influenced by these state public access laws. They drew heavily on the work of Harold Cross, a former counsel for the *New York Herald Tribune*, who wrote a book that surveyed these state public records laws and argued in favor of a federal law that would offer similar rights of access.⁶⁶ Cross himself served as a legal advisor to the congressional committee charged with drafting FOIA.⁶⁷ Through Cross's contributions, these existing state statutes influenced the structure and substance of the new federal public records law.

The borders between these state and federal laws soon became permeable. FOIA began to influence the makeup of many state public records laws, even those that had been enacted prior to 1966.⁶⁸ New state public records laws were enacted, some of which were patterned on FOIA.⁶⁹ Amendments to existing state public records laws began to contain exemptions and provisions adopted from the federal law. And state court judges began to look to federal interpretations of analogous provisions of FOIA to guide their own interpretations of the state public records law.⁷⁰ In this way, the federal and state statutory transparency regimes have become intertwined over time.

B. *The Substance and Application of State Public Records Laws*

The structure of state public records laws broadly mirrors that of FOIA: these state statutes generally begin with a presumption of openness, and they carve out specific categories of records that are protected from

⁶⁶ See CROSS, *supra* note 63, at 7–9, 189, 201–202 (outlining state public records laws and arguing in favor of a federal equivalent); H.R. REP. NO. 89-1497, pt. 2, at 23 (1966) (noting in a committee report on the bill to amend the Administrative Procedure Act that “[t]he broad outlines for legislative action to guarantee public access to Government information were laid out by Dr. Harold L. Cross in 1953” in his book *The People’s Right to Know*).

⁶⁷ MARK FENSTER, *THE TRANSPARENCY FIX* 32 (2017).

⁶⁸ See, e.g., Linda de la Mora, Comment, *The Wisconsin Public Records Law*, 67 MARQ. L. REV. 65, 66, 89–92 (1983) (noting that Wisconsin’s original public records law, enacted in 1917, was amended in 1983 to create a new deliberative process exemption similar to FOIA’s Exemption 5); Katherine Fink, *State FOI Laws: More Journalist-Friendly, or Less?*, in *TROUBLING TRANSPARENCY*, *supra* note 14, at 92 (noting that after FOIA was enacted, “new [state] FOI laws were passed and old laws were updated”).

⁶⁹ See, e.g., *Fraternal Order of Police v. District of Columbia*, 52 A.3d 822, 829 (D.C. 2012) (“Passed ten years after the federal FOIA, and two years after the federal FOIA was amended, the D.C. FOIA was inspired by and modeled on the federal legislation.”); *Korner v. Madigan*, 69 N.E.3d 892, 895 (Ill. App. Ct. 2016) (noting that the Illinois public records law is “patterned” on FOIA).

⁷⁰ See, e.g., *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 815 P.2d 900, 910 (Ariz. 1991); *Times Mirror Co. v. Superior Court*, 813 P.2d 240, 247 (Cal. 1991); *Police Patrol Sec. Sys., Inc. v. Prince George’s Cty.*, 838 A.2d 1191, 1203 n.8 (Md. 2003).

disclosure.⁷¹ Yet there are also important distinctions between state and federal public records laws, as well as among the various state statutes.

One of the primary distinctions is in the size and scope of public records' coverage. In contrast with FOIA, many state public records laws apply to state legislative and judicial bodies, as well as to state executive agencies.⁷² Further, at the local level, the sheer number of local governments affects how these public records laws are both constructed and applied. The roughly 90,000 local governments that exist today range from general-purpose governments, which supervise cities, towns, and counties, to special purpose districts that serve a very limited number of functions, such as providing educational, fire protection, water supply, or sewerage services.⁷³ The size of a city or town will often dictate the number of local agencies—zoning boards, police commissions, education departments, etc.—that exist apart from the central governing unit.⁷⁴ These various local legislative and executive bodies, as well as local agencies, are all subject to public records laws.

This creates a diffuse and variegated public records system. It also makes it exceptionally difficult to gather public records data. State governments do not collect even basic statistics, such as the aggregate number of requests submitted in a year to state and local government entities.⁷⁵ This has important research implications. The absence of data regarding the public records requests submitted in each state makes it difficult to reach broad-sweeping conclusions about the statutes themselves—how well they function, and whether they are worth the costs they impose.

⁷¹ See Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. REV. 557, 591–92 (2018) (“As with the FOIA, the state statutes begin with a broad presumption of openness, then provide specific statutory exceptions that are narrowly construed.”).

⁷² See *infra* notes 123–125 and accompanying text.

⁷³ BRIFFAULT & REYNOLDS, *supra* note 21, at 13–16; U.S. Census Bureau Press Release, *supra* note 31.

⁷⁴ The structure of government in large cities like New York, for example, resembles the complex structures found at the state level: a strong executive who oversees multiple executive agencies, an elected city council that exercises legislative authority, and a web of city courts that serve as an independent judicial branch. *NYCdata: New York City (NYC) Governmental Structure*, BARUCH COLL., <https://www.baruch.cuny.edu/nycdata/nyc-government/index.html> [<https://perma.cc/6BZ3-RBG4>]. In smaller cities, however, power is often much more centralized. In the council–manager organizational structure, for example, voters elect a city council, which in turn selects an executive—generally a city manager—who is then responsible for appointing department heads. ICMA, FORMS OF LOCAL GOVERNMENT 1 (2008), <https://icma.org/documents/forms-local-government-structure/> [<https://perma.cc/UZH2-SXZX>].

⁷⁵ See discussion *infra* Section III.A.

That being said, various states collect different slices of data. A few states tally the aggregate number of requests submitted to state agencies, and this data allow for cautious insights.⁷⁶ Texas, for example, reported that state agencies received nearly 650,000 public records requests in 2017, a surprisingly high figure that does not include requests to local government officials.⁷⁷ This limited data also suggests that smaller states may receive more requests than might be expected given their population size, suggesting that the burden of responding to public records requests may be disproportionately higher for less populated states.⁷⁸

Further, this evidence reveals similarities in the types of state agencies that receive large numbers of requests. States organize their state agencies and state administrative responsibilities differently, making it difficult to draw direct comparisons between requests submitted to various agencies across different states. But patterns do emerge. For example, law enforcement agencies appear to consistently receive some of the highest numbers of requests,⁷⁹ as do state public health agencies⁸⁰ and corrections

⁷⁶ For example, a nonprofit group that monitors public records in New York estimates that around 200,000 public records requests are filed in that state each year. See Editorial Board, *Opening Up New York's Public Records*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/opinion/new-york-public-records.html> [<https://perma.cc/3URP-UDSW>]. Washington State reported that the state and local governments received 285,000 requests in 2015. WASH. STATE AUDITOR'S OFFICE, PERFORMANCE AUDIT: THE EFFECT OF PUBLIC RECORDS REQUESTS ON STATE AND LOCAL GOVERNMENTS 3 (2016), <http://mrsc.org/getmedia/d3dbec02-f6f2-4aa7-b1dd-94cd71a5fb4a/w3saoPRA.aspx> [<https://perma.cc/C74B-9VKD>] [hereinafter WASH. STATE AUDITOR'S REPORT].

⁷⁷ Search for the number of open records requests for 2017 in *Open Records Reports*, ATT'Y GEN. OF TEX., https://www2.texasattorneygeneral.gov/open/pia/reports/requests_tally.php?fy=2017&ag=all [<https://perma.cc/7CKH-VB33>] (reporting 642,945 requests in 2017) [hereinafter Texas State Dataset 2017]; *Open Records Reports*, ATT'Y GEN. OF TEX., <https://www.texasattorneygeneral.gov/open-government/governmental-bodies/open-records-reports> [<https://perma.cc/7RPM-RAMU>] (noting that data are based on monthly reports from state agencies).

⁷⁸ The population of Massachusetts was roughly eleven times the population of Vermont in 2017, but Massachusetts state agencies received only five times the number of requests as those received by Vermont agencies. Compare Sec'y of the Commonwealth of Mass., 2017 Agency Public Records Request Data as of 1/29/18, <https://www.sec.state.ma.us/pre/prepra/prapdf/2017-Agency-Public-Records-Request-Data-as-of-Jan-29-2018.xlsx> [<https://perma.cc/9B8L-7FVJ>] [hereinafter Massachusetts State Dataset 2017] (showing that Massachusetts state agencies received 22,646 public records requests in 2017), with Agency of Admin., State of Vt., 2017 Statewide Public Records Requests Database (on file with author) [hereinafter Vermont State Dataset 2017] (showing that Vermont state agencies received 4,226 public records requests in 2017); compare *Massachusetts Population*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/massachusetts-population> [<https://perma.cc/R6Z2-DYRS>] (2017 population of 6,863,246), with *Vermont Population*, WORLD POPULATION REV., <http://worldpopulationreview.com/states/vermont-population> [<https://perma.cc/9VXA-HC6H>] (2017 population of 624,525).

⁷⁹ See, e.g., Massachusetts State Dataset 2017, *supra* note 78 (the Department of State Police received the second highest number of requests); Texas State Dataset 2017, *supra* note 77 (the

departments.⁸¹ Yet even agencies that perform similar administrative functions across states often receive disparate numbers of requests.⁸² The number and type of requests submitted to various government entities varies substantially at the local level as well.⁸³

Very few requests are appealed administratively at the state and local level. Fewer than half of the states provide requesters the option of an administrative appeal.⁸⁴ But even in states that do offer an administrative appeals process, few requesters take advantage⁸⁵—with the exception of members of the media, who appear to submit a disproportionate number of appeals.⁸⁶ Public records litigation is also curtailed at the state and local level. While litigation data are difficult to obtain,⁸⁷ the limited evidence that is available suggests that very few requests proceed to litigation. In 2018, for example, only twelve public records lawsuits were filed in

Department of Public Safety received the second highest number of requests); Vermont State Dataset 2017, *supra* note 78 (the Department of Public Safety received more than half of all public records requests submitted that year, the highest of any state agency).

⁸⁰ See, e.g., Massachusetts State Dataset 2017, *supra* note 78 (the Department of Public Health received the highest number of requests); Washington State Dataset 2017, *supra* note 32 (of the state agencies that reported data, the Department of Health received the second highest number of requests).

⁸¹ See, e.g., Texas State Dataset 2017, *supra* note 77 (the Department of Criminal Justice received the fourth highest number of requests); Vermont State Dataset 2017, *supra* note 78 (the Department of Corrections received the third highest number of requests).

⁸² Compare, e.g., Wash. Dep't of Ecology, *Jan. 1–Nov. 14, 2016 Public Records Log* (on file with author) (the agency received 3,888 requests), with Colo. Dep't of Pub. Health and Env't, *Jan 1–Nov. 16, 2016 Public Records Log* (on file with author) (the agency received 687 public records requests).

⁸³ For example, the cities of Pleasant Grove, Alabama and Emeryville, California both have populations of roughly 10,000, and yet Pleasant Grove has received just two public records requests in the past sixteen years, while Emeryville received sixty-six public records requests in 2016 alone. Telephone Interview, City Clerk, City of Pleasant Grove, Ala. (Sept. 17, 2018) (specifying that these were requests submitted through the Clerk's office, and this does not include requests submitted through the police department); City of Emeryville, Cal., *Feb. 2016–Jan. 2018 Public Records Logs* (on file with author) [hereinafter Emeryville Public Records Log].

⁸⁴ State Public Records Law Database (on file with author).

⁸⁵ See, e.g., Massachusetts State Dataset 2017, *supra* note 78 (174 out of a total of 22,646 requests—0.8%—submitted to state agencies in 2017 were appealed administratively).

⁸⁶ See, e.g., OFFICE OF THE ATT'Y GEN., STATE OF ILL., PUBLIC ACCESS COUNSELOR ANNUAL REPORT 2 (2018), https://foia.ilattorneygeneral.net/pdf/2018_PAC_Report.pdf [<https://perma.cc/5ULQ-LTCV>] (noting that 16% of administrative appeals originated from members of the media in 2017).

⁸⁷ Few states keep track of public records lawsuits filed statewide. See, e.g., e-mail from Katie Conner, Spokesperson, Office of the Att'y Gen. of Ariz., to author (Feb. 20, 2019) (on file with author) (stating that the office does not track the number of statewide public records lawsuits); e-mail from Lauren Shipley, Constituent Servs., Office of the Att'y Gen. of Ark., to author (Mar. 5, 2019) (on file with author) (same); e-mail from Nicholas Weilhammer, Dir., Office of Pub. Records., Office of the Att'y Gen. of Fla., to author (Feb. 21, 2019) (on file with author) (same).

Connecticut,⁸⁸ seven in Hawaii,⁸⁹ and two against state agencies in Vermont.⁹⁰

III. TRANSPARENCY ECOSYSTEMS

The state and local transparency regime is comprised of a complex web of statutory requirements and state constitutional provisions. Statutory requirements at the state and local level include public records laws, open meetings laws, laws governing budget disclosures, open data requirements, and laws governing transparency in campaign finance, among others.⁹¹ State constitutional transparency provisions include, for example, those requiring public hearings prior to legislative reapportionment and mandating the publication of reports documenting the fiscal health of the state's educational system.⁹² At least one state even provides an explicit constitutional right of access to government information.⁹³

These statutory and constitutional requirements combine with other features of a local transparency environment—such as local media outlets and civil society organizations—to form a broader transparency ecosystem.⁹⁴ Some of these state and local requirements mirror federal law;

⁸⁸ E-mail from Thomas A. Hennick, Pub. Educ. Officer, Conn. Freedom of Info. Comm'n, to author (Feb. 20, 2019) (on file with author).

⁸⁹ OFFICE OF INFO. PRACTICES, STATE OF HAW., ANNUAL REPORT 2018, at 61 (2018), <https://oip.hawaii.gov/wp-content/uploads/2018/12/ANNUAL-REPORT-2018-OIP.pdf> [<https://perma.cc/KX6F-8XNS>]. In contrast, according to a nonprofit research center at Syracuse University, 651 FOIA lawsuits were filed in 2017. FOIA Project Staff, *FOIA Lawsuits Surge in Trump Administration's First Year*, FOIA PROJECT (Jan. 16, 2018), <http://foiaproject.org/2018/01/16/lawsuits-trump-first-year> [<https://perma.cc/BES6-XAU9>].

⁹⁰ E-mail from Jessica Mishaan, Paralegal, Office of the Att'y Gen. of Vt., to author (Feb. 25, 2019) (on file with author).

⁹¹ See, e.g., Yue Qiu et al., *How Does Your State Rank for Integrity?*, CTR. FOR PUB. INTEGRITY (published Nov. 9, 2015; updated Feb. 2, 2018), <https://publicintegrity.org/accountability/how-does-your-state-rank-for-integrity/> [<https://perma.cc/629S-BHHK>] (ranking states on various accountability measures including public access to information, electoral oversight, lobbying disclosures, and state budget processes).

⁹² See, e.g., ME. CONST. art. IV, pt. III, § 1-A (requiring hearings prior to apportionment); OR. CONST. art. VIII, § 8 (requiring publication of fiscal health of state educational system).

⁹³ See, e.g., FLA. CONST. art. I, § 24.

⁹⁴ The concept of a transparency ecosystem is borrowed from Professor Seth Kreimer, who has argued that at the federal level, FOIA plays a central role in a broader “ecology of transparency that includes the permanent infrastructure of federal civil servants with integrity, internal watchdogs, reasonably open opportunities to publish and share information, and a set of civil society actors capable of pursuing prolonged campaigns for disclosure.” Kreimer, *supra* note 16, at 1017. This concept also borrows from the idea of a “news ecosystem.” See PEN AM., *LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS* 7 (2019), <https://pen.org/wp-content/uploads/2019/12/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf> [<https://perma.cc/Q9EH-MESK>].

others are less robust. Yet all fifty states have enacted a public records statute. Just as FOIA operates as the “crown jewel” of the federal transparency regime, the most significant transparency mechanism in state and local government are these public records statutes. This Section explores the formation of these local transparency ecosystems by examining the value and efficacy of these state public records laws.

A. Methodology

The public records process at the state and local level is profoundly disaggregated. It is also vast: there are most likely hundreds of thousands of government entities—if not more—subject to these state public records statutes. Thousands of these requests are likely submitted each day to government entities around the country. This creates an enormous potential universe of public records data. At the same time, few governments keep track of these requests.

As a consequence, I have allowed the availability of data—and specifically, the availability of government-generated datasets cataloguing these public records requests—to drive my research agenda. In September and October of 2018, I called every state attorney general’s office in the country to ask whether they collected data on all state and local public records requests. At the time, only two states aggregated and published information about individual requests—Massachusetts and Vermont—and they did so only for state-level government agencies.⁹⁵ Vermont was the only state in the country to also publish the requesters’ identities—a crucial piece of information for understanding who submits requests to the government, and for what purpose.⁹⁶

A handful of other states tracked these requests in more limited form. Texas provided the total numbers of requests, fees recouped, and hours spent redacting records at the state level.⁹⁷ Washington collected data for a small group of state and local government entities—around 8% of total agencies in the state.⁹⁸ And Hawaii collected data for a subset of “nonroutine” requests, or those for which no fee schedule has been

⁹⁵ See generally Massachusetts State Dataset 2017, *supra* note 78; Vermont State Dataset 2017, *supra* note 78.

⁹⁶ Vermont State Dataset 2017, *supra* note 78.

⁹⁷ Texas State Dataset 2017, *supra* note 77.

⁹⁸ Washington State Dataset 2017, *supra* note 32.

established.⁹⁹ The remaining states either did not track public records data or the attorney's general offices failed to respond to my queries.¹⁰⁰ No state gathered aggregate data on public records requests submitted to local governments.

To supplement these statewide datasets, I submitted a handful of additional requests for public records logs that were especially relevant to my analysis.¹⁰¹ I also gathered every publicly available dataset that I could find. The richest source of these public records logs was MuckRock, a nonprofit organization that allows journalists and researchers to manage their public records requests and make their records available online.¹⁰² Many of the datasets analyzed here were downloaded from that website.

I concentrated my efforts on gathering public records logs that contained both the names and affiliations of requesters. I then coded these logs by type of requester: commercial, media, first-person, government, and so on. I occasionally subdivided these broad categories further—for example, by coding the number of commercial requests that were submitted by insurance companies, or the number of first-person requests submitted by inmates. When a requester provided only their name but not their institutional affiliation, I searched online to identify an organizational link. This effort was often only partially successful: for many logs, I was unable to code a substantial percentage of requests.¹⁰³

In some instances, I supplemented this quantitative material by speaking with individuals involved in the public records process—including public records officers, journalists, media lawyers, and public defenders—to better understand the various dimensions of the public records process. Further, I relied on a variety of other primary and secondary sources, including the text of these public records statutes, case law interpreting these laws, newspaper articles, and government and nonprofit advocacy reports. I did not limit this search to any single subject or state, but I did make an effort to obtain publicly available materials in states that were otherwise underrepresented in my analysis.

⁹⁹ OFFICE OF INFO. PRACTICES, STATE OF HAW., OIP'S REPORT OF STATE AGENCIES' UIPA RECORD REQUEST YEAR-END LOGS FOR FY 2018, at 2 (2018) [hereinafter HAWAII PUBLIC RECORDS REPORT 2018].

¹⁰⁰ The attorney general's office in twelve states failed to respond to my queries.

¹⁰¹ For example, I obtained hundreds of public records logs from state and local agencies in Hawaii through a formal public records request.

¹⁰² *About Us*, MUCKROCK, <https://www.muckrock.com/about/> [<https://perma.cc/A3MA-KL2E>].

¹⁰³ This research approach was both inspired by and modeled on Professor Kwoka's analysis of FOIA logs. See Kwoka, *First-Person FOIA*, *supra* note 15, at 2221–23 (discussing the methodology used in an analogous study); Kwoka, *FOIA, Inc.*, *supra* note 15, at 1379–80 (same).

The advantage of this research approach is that it allowed me to concentrate my research efforts where usable data already existed. The disadvantage is that my analysis is, by necessity, spotty and incomplete. The acute lack of data at the state and local level makes it nearly impossible to conduct comprehensive comparative surveys.¹⁰⁴ This is true across the fifty states, and it is especially true across the hundreds of thousands of local government entities subject to state public records laws. Even so, the limited data that I have collected helps begin to shed light on an opaque and underexamined area of the law.

B. The Benefits of State Public Records Laws

Statutory transparency requirements, such as state public records laws, comprise an important part of the informational ecosystem that sustains a liberal democracy. Effective transparency measures allow citizens to hold elected officials accountable, make informed democratic decisions, and understand the limits and confines of the exercise of government power.¹⁰⁵ Many of the benefits that flow from these state public records statutes are distinct from those provided by federal law, and yet they have been largely ignored by scholars. This Section explores some examples.

1. Informing the Public

The primary goal of these public records laws is to enhance democratic governance. As the Supreme Court has said in the context of FOIA, the “basic purpose” of the law “is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹⁰⁶ Yet these statutes also perform an important secondary function in informing the public: they allow citizens to obtain records about themselves. This

¹⁰⁴ One scholar who attempted to compare public records logs of state environmental agencies received usable data from fewer than half of the states. *See Fink, supra* note 17, at 109–11. Further, states often define their public records datasets differently. Some states may exclude certain types of routine requests from their tally. *See, e.g., HAWAII PUBLIC RECORDS REPORT 2018, supra* note 99, at 2. Others may exclude requests submitted in certain forms. *See, e.g.,* Interview with Chris Voss, Dir. of Admin. Servs. and Interim Records Access Officer, Mass. Dep’t of Env’tl. Prot., in Boston, Mass. (Dec. 19, 2018) (noting that walk-in requests for records are not always included in the public records database).

¹⁰⁵ *See Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (“[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” (citations omitted)); *see also Fenster, supra* note 14, at 895–99 (describing the democratic benefits of transparency).

¹⁰⁶ *Robbins Tire & Rubber*, 437 U.S. at 242.

Section explores the ways that these two key categories of requests—media and first-person requests—facilitate the flow of information from the government to the public.

a. Media Requests

The media is arguably the public’s most important tool of government accountability, especially at the state and local level, where government checks and balances are weaker.¹⁰⁷ When uncovering government malfeasance or misconduct, journalists generally have two options: convince someone with knowledge to come forward or obtain documents through public records requests. Often, these two paths are intertwined—a source will reveal government misconduct in an off-the-record interview and then direct the reporter to submit a public records request that substantiates the story.¹⁰⁸

This dual-track sourcing provides confidential sources an added layer of anonymity and protection. A common critique in the transparency literature is that the media relies on FOIA to “find[]” a government scandal.¹⁰⁹ But the mechanics of this claim do not hold up: the statute is too unwieldy a tool to blindly search for government wrongdoing.¹¹⁰ In reality, journalists generally rely on the law to substantiate a story that has come to their attention in some other way. In this way, FOIA facilitates the media’s role as government watchdog.

These state statutes serve as an equally important investigative tool at the state and local level. State public records requests have informed dozens of Pulitzer Prize-winning stories,¹¹¹ including the *Boston Globe’s*

¹⁰⁷ See discussion *infra* notes 452–467 and accompanying text.

¹⁰⁸ See, e.g., GOV’T ACCOUNTABILITY PROJECT, WORKING WITH WHISTLEBLOWERS: A GUIDE FOR JOURNALISTS 22 (2019), http://wordpress-350926-1087337.cloudwaysapps.com/wp-content/uploads/2019/07/GovAcctProj_JournalistsWhistleblowing-Guide_2019_single-pages.pdf [<https://perma.cc/2FT8-JQ5B>] (advising reporters that “[i]f your source has access to information that could show wrongdoing by the government, tutoring you for the right Freedom of Information Act requests can gain access to those materials”).

¹⁰⁹ See, e.g., Fenster, *supra* note 14, at 926.

¹¹⁰ See, e.g., Jake Lucas, *How Times Reporters Use the Freedom of Information Act*, N.Y. TIMES (July 21, 2018), <https://www.nytimes.com/2018/07/21/insider/information-freedom-reporters-pruitt.html> [<https://perma.cc/UW45-W34L>] (quoting a reporter’s finding that reporters use FOIA to “fill in details that are hard to find other ways”).

¹¹¹ See, e.g., *The 2005 Pulitzer Prize Winner in Public Service: L.A. Times*, PULITZER PRIZES, <https://www.pulitzer.org/winners/los-angeles-times-3> [<https://perma.cc/8Y45-UHMY>] (relying on public records requests in *One Doctor’s Long Trail of Dangerous Mistakes*); *The 2006 Pulitzer Prize Winner in Public Service: The Times-Picayune, New Orleans*, PULITZER PRIZES <https://www.pulitzer.org/winners/times-picayune> [<https://perma.cc/28WC-QTF2>] (relying on public records in *From Blue Tarps to Debris Removal, Many Layers of Contractors Drive Up the Cost of Recovery, Critics Say*).

groundbreaking reporting on the sexual abuse crisis in the Catholic Church in 2004¹¹² and the Editor of the *Storm Lake Times*'s 2017 editorial exposé of the role powerful agribusinesses have played in covering up river pollution in Iowa.¹¹³ One study of submissions to the Investigative Reporters and Editors annual prizes found that a quarter of the stories about government misconduct relied on a federal or state public records request.¹¹⁴

Of course, not every request yields national awards for investigative reporting. These laws also support hundreds of more rote investigations across the country each day. Yet the benefits of these laws can be difficult to quantify. In the federal context, a familiar debate plays out among transparency advocates and opponents: advocates point to groundbreaking media reports that elicited broader government reform, while opponents point to the law's rising toll and ask whether these scattered victories by the news media can really justify FOIA's costs¹¹⁵—financial and otherwise.¹¹⁶ This debate is not easily resolved. But it is worth emphasizing here that these state public records laws—like FOIA—play a critical role in allowing the media to report on government action and unearth government misconduct and abuse.

Further, state public records laws offer media requesters specific advantages over FOIA. Most notably, state and local governments turn requests around more quickly than federal agencies. In 2016, the average processing time for FOIA requests was 28 days for simple requests and 128 days for complex requests.¹¹⁷ In contrast, MuckRock tracked more than

¹¹² *The 2003 Pulitzer Prize Winner in Public Service: Bos. Globe*, PULITZER PRIZES, <https://www.pulitzer.org/winners/boston-globe-1> [<https://perma.cc/J5MV-G8Y7>] (relying on public records for *Scores of Priests Involved in Sex Abuse Cases: Settlements Kept Scope of Issue Out of Public*).

¹¹³ Kelly McGowan, *Iowa Newspaper Editor Wins Pulitzer Prize*, DES MOINES REG. (Apr. 10, 2017), <https://www.desmoinesregister.com/story/news/2017/04/10/iowa-newspaper-editor-wins-pulitzer/100299258/> [<https://perma.cc/WP9E-AM7M>]; see also *The 2017 Pulitzer Prize Winner in Editorial Writing: Art Cullen of the Storm Lake Times*, PULITZER PRIZES, <https://www.pulitzer.org/winners/art-cullen> [<https://perma.cc/SA2J-8P7Y>].

¹¹⁴ JAMES T. HAMILTON, DEMOCRACY'S DETECTIVES 158 (2016).

¹¹⁵ See discussion *supra* note 16.

¹¹⁶ Some scholars have looked beyond the financial costs of the law. Professor Pozen, in particular, has focused on the democratic costs of the law—the ways that FOIA not only fails to advance but in fact actively impedes democratic governance. See, e.g., Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1123–35 (describing the democratic costs of FOIA); Pozen, *Transparency's Ideological Drift*, *supra* note 14, at 154–59 (same).

¹¹⁷ OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2016, at 12–13 (2017), https://www.justice.gov/oip/reports/fy_2016_annual_report_summary.pdf/download [<https://perma.cc/LA2U-BLJ3>].

50,000 requests submitted through its streamlined requesting service and found that the federal government took longer to process requests on average than all fifty states and the District of Columbia.¹¹⁸ Data reported directly by the states shows even more rapid processing timelines. In Hawaii, for example, the average turnaround time for requests submitted to state agencies in 2018 was just 8.5 days.¹¹⁹

From the outside, the timeframe within which requested records are provided may seem a minor point. But for many requesters—and especially for the media—these time barriers are the single most significant obstacle to the effective use of public records laws. Reporters often work on tight deadlines and cannot afford to engage in protracted negotiations with the government over the release of records.¹²⁰ The shortened timeframe for state transparency requests substantially increases the practical utility of these statutes.¹²¹

State laws also offer an expanded scope of coverage in comparison with FOIA. While federal transparency law is limited to federal agencies, many state laws cover a wider array of government offices, officials, and activity. Massachusetts is the only state that has curtailed its public records coverage to the boundaries of FOIA.¹²² Every other state extends public records coverage to a broader set of government officials. The majority of state public records laws apply to both the governor’s office and the legislative branch.¹²³ And many state statutes also require at least some disclosure of judicial records.¹²⁴ Moreover, these state laws apply not

¹¹⁸ *How Open Is Your Government? Find Out*, MUCKROCK, <https://www.muckrock.com/place/> [<https://perma.cc/89PV-CUMG>]. On the low end, Rhode Island took an average of nineteen days to process MuckRock requests, and on the high end, New Mexico took 140 days to process requests. *Id.*

¹¹⁹ HAWAII PUBLIC RECORDS REPORT 2018, *supra* note 99, at 6.

¹²⁰ *See, e.g.*, STAFF OF H.R. COMM. ON OVERSIGHT & GOV’T REFORM, *supra* note 51, at ii (“Members of the media described their complete abandonment of the FOIA request as a tool because delays and redactions made the request process wholly useless for reporting to the public.”).

¹²¹ These state and local governments process requests more quickly even in the face of significant financial and other resource constraints. *See* discussion *infra* note 176 and accompanying text. It is unclear why this is so. It is possible that these requests are less complex than the average FOIA request, or that state and local governments are more likely to deny requests outright.

¹²² Todd Wallack, *State Lawmakers Fail to Reach Consensus on Whether to Expand Public Record Law*, BOS. GLOBE (Jan. 10, 2019), <https://www.bostonglobe.com/metro/2019/01/10/state-lawmakers-fail-reach-consensus-whether-expand-public-record-law/XvwfD04o2TtQ4HWqmxioBO/story.html> [<https://perma.cc/974M-XQZF>].

¹²³ State Public Records Law Database, *supra* note 84.

¹²⁴ *Id.* Some of these states’ coverage is only partial, requiring administrative or financial court records to be made public but exempting substantive judicial documents from disclosure. *See, e.g.*, 38 R.I. GEN. LAWS § 38-2-2(4)(T) (2019) (“Judicial bodies are included . . . only in respect to their administrative function.”).

merely to general purpose governments, such as cities and towns, but to special purpose institutions as well, which often receive even less public scrutiny despite wielding significant authority and power.¹²⁵ This expanded coverage allows the public to monitor a much broader range of government actors than FOIA allows. And it permits the media, especially, to investigate a broader swath of government activity.

Finally, state and local government entities often possess overlapping records. Administrative law scholars have detailed the extent to which duplication among federal agencies can be advantageous, noting that redundancy can prevent agency capture, produce healthy competition, and reduce the chances of system failure.¹²⁶ Given the fluid and overlapping nature of local government borders,¹²⁷ neighboring governments or special purpose governments extending across multiple jurisdictions often possess the same or similar records. Such redundancy allows the media multiple opportunities to request records, increasing the chance that they will be able to secure access. It most likely has a deterrent effect as well. The risk that a separate government entity will release a duplicate copy of a requested record can discourage government officials from withholding records unlawfully in an effort to avoid unfavorable media coverage.¹²⁸ In short, these state public records laws permit the media certain advantages when performing its watchdog role.

b. First-Person Requests

State public records laws also perform a secondary function in informing the public: they allow individuals to obtain records about themselves.¹²⁹ Professor Kwoka has documented the scope and impact of

¹²⁵ See, e.g., Davidson, *supra* note 34, at 603–04 (noting that special purpose districts often lack a direct electoral accountability mechanism); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010) (noting that federalism scholars have tended to ignore special purpose institutions).

¹²⁶ See, e.g., Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1676–78 (2006).

¹²⁷ Various general purpose and special purpose local governments often overlap. Counties may encompass cities and towns, and special purpose governments may be coterminous with city or town boundaries or may encircle multiple municipal or town units. See BRIFFAULT & REYNOLDS, *supra* note 21, at 15.

¹²⁸ See Albert Breton et al., *Introduction*, in THE ECONOMICS OF TRANSPARENCY IN POLITICS 1 (Albert Breton et al. eds., 2007) (noting that it is “easier for an organization (or an individual) to obfuscate—to be less transparent—when it is the only agency in possession or in control of particular pieces of information”); O’Connell, *supra* note 126, at 1722 (noting that when multiple federal agencies possess information, “it may be more likely to come out through a” FOIA request or leak).

¹²⁹ First-person requests arguably fall somewhere in between the “benefits” and “costs” distinction that this Article draws. They are less aligned with the democracy-enhancing goals of the statutes’

these first-person requests at the federal level, demonstrating that certain federal agencies receive up to 98% of their requests from individuals seeking copies of their own records.¹³⁰ Yet scholars have not yet examined the extent to which first-person requests make up the public records logs of state and local governments.

Lack of data at the state and local level, combined with the overwhelming number of state and local governments covered by the law, prevents any rigorous empirical analysis. Scattered empirical data, however, along with anecdotal evidence gleaned from interviews with public records officials, suggest that first-person requests comprise a significant percentage of requests to state and local agencies as well. State corrections departments, for example, seem to receive a large number of first-person requests from inmates.¹³¹ These requesters are often seeking sections of their prison file that contain disciplinary reports against them or complaints that they have lodged against specific corrections officers. Such records may be used to help substantiate a grievance or support a lawsuit that the inmate plans to file against the state or county.¹³²

State and local law enforcement agencies also seem to receive a substantial number of first-person requests. While insurance companies and commercial requesters generally dominate the public records dockets of

drafters, so they are less publicly beneficial than, say, requests submitted by journalists. At the same time, they provide greater public benefit than commercial requests, which I have categorized as a “cost” of these laws. *See* discussion *infra* Section III.C.4. I ultimately included first-person requests here, in the “benefits” Section, because these requests arm citizens with the information they need to advance their interests before government entities (for example, by obtaining records for use in social security or disability proceedings) and because such requests often end up having broader spillover effects (for example, requests filed by inmates about their own disciplinary record may inform a lawsuit that remedies broader civil rights abuses). Even so, the proper placement of these first-person requests lays bare some of the complexities that arise from the dichotomous cost/benefit structure of this Article. These first-person requests do have costs: they require significant public resources to advance the interests of one individual rather than society as a whole. *Cf.* Kwoka, *First-Person FOIA*, *supra* note 15, at 2208 (noting that first-person FOIA requests, while “frequently vital to the requestor’s interests,” fail to “advance Congress’s primary goal in enacting FOIA: to promote public democratic oversight of government activities”). Similarly, commercial requests can have broader benefits. *See infra* note 204 (discussing the benefits of commercial requests, in spite of their categorization as a “cost” of state public records laws).

¹³⁰ Kwoka, *First-Person FOIA*, *supra* note 15, at 2225.

¹³¹ *See, e.g.*, Penn. Dep’t of Corrections, *2016 Public Records Log* (on file with author) (roughly three-quarters of requests appear to have originated from prisoners); State of Vt., Public Records Request Database 2013–2018 (downloaded Sept. 13, 2018) (on file with author) [hereinafter Vermont State Dataset 2013–2018] (roughly 35% of requests originated from current or former inmates).

¹³² Telephone Interview with David Turner, Dir. of Offender Due Process and Grievances & Pub. Records Officer, Vt. Dep’t of Corrections (Nov. 21, 2018).

these agencies,¹³³ individuals will seek police or accident reports for a myriad of other, non-insurance-related reasons. They may need a police report to file a complaint with the landlord against a neighbor, to use as evidence in a custody dispute, or to obtain information about the death of a loved one.¹³⁴ Lawyers representing criminal defendants also rely on public records requests to obtain law enforcement records that may not be available in discovery, such as documents demonstrating systemic issues within a particular department or information relating to a prosecution's witness.¹³⁵ Some states do not provide automatic discovery rights for those pursuing post-conviction relief, but instead require that the defendant seek permission from the court.¹³⁶ When that request is denied, attorneys must rely exclusively on public records requests.¹³⁷

Individuals submit a wide variety of first-person requests to other state and local agencies as well.¹³⁸ Parents submit requests for copies of their children's individualized education plans to state and local educational agencies;¹³⁹ family members submit requests to state treasury departments seeking records about the estate of a deceased relative;¹⁴⁰ homeowners seek records showing any unpaid utility charges prior to purchasing or selling a property;¹⁴¹ and individuals engaged in genealogical research submit requests for family records to city clerks' offices.¹⁴²

Professor Kwoka has raised concerns about such first-person use of public records laws in the federal context. She has argued that in some instances, FOIA has been converted into a rudimentary tool for discovery,

¹³³ See discussion *infra* Section III.C.4.

¹³⁴ See, e.g., Kings Cty. Sheriff's Office, Wash., 2018 *Public Records Log* (on file with author).

¹³⁵ See Ion Meyn, *The Criminal Defense Attorney's Burden*, 31 AM. BAR ASS'N 36, 36, 38 (2014), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2014/september-october/the_criminal_defense_attorneys_burden/ [<https://perma.cc/86TF-K4ZL>].

¹³⁶ See, e.g., MASS. R. CRIM. P. 30(c)(4).

¹³⁷ See Telephone Interview with Ira Gant, Staff Counsel, Innocence Program, Mass. Comm. for Pub. Counsel Servs. (Apr. 3, 2019).

¹³⁸ See, e.g., Penn. Dep't of State, *Sept.–Dec. 2016 Public Records Log* (on file with author) (around 20% of requests originated from inmates and roughly 50% from lawyers, many of whom were seeking information about a specific client).

¹³⁹ See, e.g., Wis. Dep't for Pub. Instruction, 2015 *Public Records Log*, at 5 (on file with author) (requesting “[r]ecord of changes to son’s IEP”).

¹⁴⁰ See, e.g., N.J. Dep't of Treasury, 2013 *Public Records Log*, at 187 (on file with author).

¹⁴¹ See, e.g., S.F. Pub. Recs. Requests, Filtered by “Unpaid,” NextRequest <https://sanfrancisco.nextrequest.com/requests?filter=unpaid> [<https://perma.cc/9Z6Z-N38F>] (showing list of requests for unpaid utility bills).

¹⁴² See, e.g., City of L.A., Public Records Request #18-990 (May 2, 2018), <https://recordsrequest.lacity.org/requests/18-990> [<https://perma.cc/5KJR-ZB85>] (showing requests seeking information regarding grandfather's home ownership for family genealogy records).

and she has questioned whether such first-person use advances the underlying transparency goals of the statute.¹⁴³ Similar concerns apply at the state and local level. These state and local requests do not always effectively serve first-person requesters' needs. Some statutes exclude certain categories of individuals from accessing government records,¹⁴⁴ and virtually every state statute is plagued by time delays and other procedural barriers to release. Such obstacles can make these requesting channels an ineffective method of information gathering.¹⁴⁵

Even so, these first-person requests have substantial value. They are often critical to advancing the requester's interests. And actions taken against the government by individual requesters—for example, inmates suing for civil rights violations—can elicit more systemic reform as well as enhanced government oversight by the public at large.

Further, such first-person requests may have broader democratic benefits, especially at the state and local level. It is generally easier to engage directly with a public records officer in state and local government, and smaller governments, in particular, are often more willing to negotiate with requesters.¹⁴⁶ Records access officers often serve as the public face of state agencies or local governments, assisting citizens with their queries and pointing them in the right direction if their needs do not fit squarely within the scope of the law. In this way, such first-person requests can serve to strengthen democratic participation by allowing citizens a lower barrier of entry into the governmental process.¹⁴⁷

2. *Informing the Government*

Public records laws are generally thought of as a tool for citizens to obtain information about their government. Information flow is traditionally conceived as unidirectional, held by the government and transmitted to the public.¹⁴⁸ A review of public records logs at various government levels, however, reveals a critical yet overlooked function of these statutes: facilitating information exchange between governments.

¹⁴³ Kwoka, *First-Person FOIA*, *supra* note 15, at 2244.

¹⁴⁴ For example, some states bar inmates from accessing public records at all, making it difficult for pro se inmates to take action against the government. *See infra* notes 281–284 and accompanying text.

¹⁴⁵ *See, e.g.*, Geraghty & Velez, *supra* note 17, at 458–63 (describing criminal justice institutions' efforts to delay or block the release of public records about inmates); Kwoka, *First-Person FOIA*, *supra* note 15, at 2253.

¹⁴⁶ *See, e.g.*, Interview with Steve Eder, *supra* note 28 (noting that there is often “more of a dialogue” with government officials in the context of state and local public requests).

¹⁴⁷ *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–90 (1997) (arguing that a benefit of federalism is that more citizens can and do participate in smaller levels of government).

¹⁴⁸ *See* Fenster, *supra* note 14, at 914.

This occurs at all levels. Foreign governments submit requests to state agencies; county officials submit requests to towns; and towns submit requests to the federal government. Different agencies within the same executive structure even submit public records requests to one another.

These inter- and intragovernmental requests appeared in virtually every state and local public records log that I reviewed. Fee waivers for certain government entities are even written into the text of some state public records laws.¹⁴⁹ And the proportion of these governmental requests can be substantial.¹⁵⁰ The request log of the Vermont Department of Corrections offers a useful case study. Between January 2013 and July 2018, the agency received around 170 requests from government entities, or roughly 10% of its total requests.¹⁵¹ Foreign consulates submitted fifty-five of these requests,¹⁵² often asking for a list of inmates claiming to be citizens of their country.¹⁵³ The agency also received more than three dozen requests from the federal government. The largest number of requests came from the Department of Veterans Affairs, generally for specific inmate records to establish benefits eligibility for individual veterans. But other federal agencies, including the Social Security Agency and the Department of Justice, submitted multiple requests as well.¹⁵⁴ Requests also originated from federal legislators, often for statistics to be used as part of a nationwide legislative survey.¹⁵⁵ And the agency received a number of intrastate requests from Vermont legislators, from other state agencies, and from local police departments, fire departments, and high schools.¹⁵⁶

By facilitating intergovernmental cooperation and information exchange, public records laws perform an important yet overlooked function. These requests offer officials at all levels of government a process by which to obtain and exchange a variety of information, ranging from prison population levels to environmental pollution data to budgetary

¹⁴⁹ See e.g., CONN. GEN. STAT. § 1-212(d)(4)–(5) (2019).

¹⁵⁰ See, e.g., Washington State Dataset 2017, *supra* note 32 (a selection of thirty-seven state agencies collectively received around 2,200 government-to-government requests in 2017); Brian Duggan, *Reno Police Report Copies Used to Cost \$9. Now They're \$45—The Most Expensive in Nevada*, RENO GAZETTE J. (Sept. 10, 2018, 6:00 AM), <https://www.rgj.com/story/news/2018/09/10/reno-expensive-police-report-cost/1058349002/> [<https://perma.cc/R7PM-KHD2>] (noting that roughly 25% of the 10,000 requests received in 2017 by the Reno City Police Department were from other police departments and law enforcement agencies).

¹⁵¹ Vermont State Dataset 2013–2018, *supra* note 131.

¹⁵² *Id.*

¹⁵³ Telephone Interview with David Turner, *supra* note 132.

¹⁵⁴ Vermont State Dataset 2013–2018, *supra* note 131.

¹⁵⁵ *Id.*; Telephone Interview with David Turner, *supra* note 132.

¹⁵⁶ Vermont State Dataset 2013–2018, *supra* note 131.

statistics. This horizontal information exchange also weakens a central argument of transparency critics: that statutory transparency requirements are unnecessary because sufficient transparency mechanisms are built into the structure of government itself.¹⁵⁷ This widespread governmental reliance on state public records laws underscores the extent to which these laws can foster cooperation between and among different levels of government.

Further, public records laws also allow information to flow in the reverse, from members of the public to the government. Again, this is not how we traditionally conceive of the movement of information in the public records context. But elected officials also rely on public records logs and individual public records requests to identify trouble spots and gain insight into the issues that preoccupy the public. The requests themselves—not just the media stories or the public outcry that may follow their disclosure—can help alert government officials to governance problems.¹⁵⁸ This is particularly true at lower levels of government, where established feedback mechanisms that we take for granted at the federal level, such as periodic elections and sustained media coverage, are often lacking. In these instances, monitoring public records requests allows officials to better understand and respond to the public’s concerns.

3. *Innovation and Experimentation*

This profusion of state public records laws has allowed for state and local experimentation in the structure and management of the public records process. As local government scholar Nestor Davidson has noted: “If the fifty laboratories of democracy are beneficial in federalism, the argument goes, surely ninety thousand must provide even more fertile ground for variation, tinkering, and policy diffusion.”¹⁵⁹ Examples of this variation and experimentation are plentiful. One fertile area of innovation has occurred in the administrative process for appealing public records denials. While FOIA requires that requesters appeal an adverse determination to the head of the agency prior to filing a lawsuit,¹⁶⁰ states have experimented with a wide array of appellate administrative remedies.

¹⁵⁷ See, e.g., Scalia, *supra* note 16, at 19.

¹⁵⁸ See, e.g., Interview with Chris Voss, *supra* note 104 (noting that “[t]here is benefit to seeing what people are asking in that particular types of records are sought after,” such as helping the agency determine which types of records to affirmatively post online).

¹⁵⁹ Davidson, *supra* note 34, at 625. For a discussion of how entrenched flaws in these state public records laws undermine the concept of democratic laboratories more broadly, see *infra* notes 417–423 and accompanying text.

¹⁶⁰ 5 U.S.C. § 552(a)(6)(A)(i)–(ii) (2012).

In Connecticut, for example, a centralized appellate commission is responsible for resolving administrative appeals for all state and local agencies across the state.¹⁶¹ While there are disadvantages to this structure, including lengthier response times,¹⁶² there are also benefits. This approach removes the decision on appeal from the agency that made the initial public records determination.¹⁶³ To ensure political independence, appointment power is divided between the governor and the legislative branch,¹⁶⁴ and no more than five of the nine commission members may belong to the same political party.¹⁶⁵ Further, the commission is granted broad investigatory powers, including the authority to subpoena witnesses,¹⁶⁶ and it serves as a transparency liaison for both government agencies and for the public. This administrative appeals system is often held up as a model of appellate enforcement of public records laws.¹⁶⁷

Another area in which states have widely experimented is the scope of public records laws' coverage. This experimentation reaches beyond extending coverage to the legislative and judicial branches. For example, states have also taken widely divergent approaches to determining when private or semiprivate entities should be subject to open records laws. While FOIA generally does not extend coverage to private contractors,¹⁶⁸ states have pursued various ways of determining whether and when private entities performing traditional government functions should be subject to open records laws.¹⁶⁹ Many of these more flexible approaches have yielded

¹⁶¹ See *About Us*, CONN. FREEDOM OF INFO. COMM'N, <https://portal.ct.gov/FOI/Common-Elements/Top-Menu/About-Us> [<https://perma.cc/8FML-66ZK>].

¹⁶² See *infra* note 289 and accompanying text.

¹⁶³ Cf. 5 U.S.C. § 552(a)(6).

¹⁶⁴ CONN. GEN. STAT. § 1-205 (2019).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981, 1010 (describing Connecticut's commission as "exemplary" in handling open records disputes); Robert G. Vaughn, *Administrative Alternatives and the Federal Freedom of Information Act*, 45 OHIO ST. L.J. 185, 210 (1984) (citing the Connecticut commission as an example of a successful alternative model to insure agency compliance).

¹⁶⁸ See *Forsham v. Harris*, 445 U.S. 169, 178 (1980).

¹⁶⁹ Some states consider whether the entity is performing a traditional government function. See, e.g., *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 78–79 (Tenn. 2002) (extending public records coverage to private prison that served "as the functional equivalent of a government[] agency"). Others consider whether the nature of the records mandate public disclosure. See, e.g., *Int'l Bhd. of Elec. Workers Local 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 164 (Colo. App. 1994) (documents generated by private company qualified as public records because a government entity relied on them in the exercise of its official duties). These are not the only approaches for determining whether private information should be considered public. See

expanded coverage that reaches crucial private entities, such as private police and firefighters.¹⁷⁰ Such varied approaches can serve as a model for neighboring states and local governments.¹⁷¹

C. *The Costs of State Public Records Laws to the Government*

Critics of the federal transparency regime often home in on the costs these statutes impose, arguing that the benefits these laws provide are outweighed by the burdens—both financial and otherwise—that they place on government. This is a well-worn debate in the federal context. Widening the scope of the inquiry to include state and local governments, however, breathes new life into this discussion and invites a reexamination of these laws' comparative value.

I. *Financial Costs*

Information about the financial costs that public records laws impose upon state and local government is difficult to obtain. While the federal government tracks the costs of administering FOIA, the financial picture at the state level is far murkier. Many state and local agencies lack a dedicated public records employee, making it difficult to tally the salary costs incurred by public records laws. More importantly, the lack of public records data at the subfederal level makes it nearly impossible to determine the financial toll that public records laws impose across even a single state.¹⁷² As a consequence, states routinely enact and amend state public records laws in the dark, without any concrete understanding of the actual costs involved.

The limited data that is collected by states often fails to provide meaningful insight into the financial burdens imposed by these laws.¹⁷³ But scattered empirical and anecdotal evidence suggests that these costs are

generally Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825, 836–60 (2000) (describing and categorizing the various approaches to determining when the records of private entities are subject to disclosure under public records laws).

¹⁷⁰ See, e.g., UTAH CODE ANN. § 53-1-102 (2019) (applying public records law to university police); State *ex rel.* Freedom Commc'ns, Inc. v. Elida Cmty. Fire Co., 697 N.E.2d 210, 212 (1998) (applying public records law to private firefighters).

¹⁷¹ See, e.g., WASH. STATE AUDITOR'S REPORT, *supra* note 76, at 28–30 (reviewing public records laws in other states for solutions to public records obstacles in Washington State).

¹⁷² See discussion *supra* notes 95–96 and accompanying text.

¹⁷³ See, e.g., Massachusetts State Dataset 2017, *supra* note 78 (tally of employee hours spent responding to requests does not include labor costs of requests to local agencies).

substantial.¹⁷⁴ Further, it suggests that local governments, in particular, may be disproportionately affected by these financial burdens.¹⁷⁵ Given the personnel and budgetary restraints faced by many local governments,¹⁷⁶ these entities are especially vulnerable to sudden spikes in the number of requests—for example, repeat requests intended to harass government officials, or large numbers of requests submitted in the wake of a high-profile event.¹⁷⁷ One recent, infamous example is the town of Newtown, Connecticut, which has been flooded with public records requests submitted by employees of conspiracy theorist Alex Jones about the Sandy Hook massacre.¹⁷⁸ But there are countless other such examples. A single or a handful of requesters can overwhelm a small government entity by submitting dozens or even hundreds of requests.¹⁷⁹

This financial burden on local governments is often compounded by a lack of state funding. Local governments are usually required to pay the costs associated with public records laws out of their general budget. Many local government officials oppose legislative efforts to improve the public's access to government records on these grounds. They argue that public records laws essentially operate as an unfunded mandate, and that the costs of improving these laws for the public at large—by shortening response

¹⁷⁴ For example, Texas received nearly 650,000 public records requests in 2017, *see* Texas State Dataset 2017, *supra* note 77, but recouped only around \$800,000. *Open Records Reports, 2017 Monies Collected*, ATT'Y GEN. OF TEX., https://www2.texasattorneygeneral.gov/open/pia/reports/money_collected.php [<https://perma.cc/7JNW-6ZK6>].

¹⁷⁵ *See, e.g.*, WASH. STATE AUDITOR'S REPORT, *supra* note 76, at 4 (stating that state agencies spent around \$22 million responding to requests in 2015 while local governments spent roughly \$37 million); February 2018 Parish Attorney's Office Public Records Request Hours Report, Parish County, LA (on file with author) (stating that in a single month, the Parish County Attorney's Office spent nearly \$12,000 on public records requests).

¹⁷⁶ *See State and Local Fiscal Facts: 2018*, NAT'L GOVERNOR'S ASS'N (2018), <https://www.nasra.org/files/Fiscal%20Facts%202018.pdf> [<https://perma.cc/NJ84-QFSS>].

¹⁷⁷ *See, e.g.*, Kimball, *supra* note 17, at 343 (noting that an "inundation" of twenty requests in a single week was "overwhelming" to sheriff's office).

¹⁷⁸ *See, e.g.*, Elizabeth Williamson, *Sandy Hook Families Gain in Defamation Suits Against Alex Jones*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/politics/alex-jones-sandy-hook.html> [<https://perma.cc/B37Y-8KYY>] (describing a contributor to Alex Jones's company who "deluged Newtown officials with open records requests").

¹⁷⁹ *See, e.g.*, Susan Spencer, *Freedom of Information vs. Harassment: Towns Fight 'Excessive' Requests*, METROWEST DAILY NEWS (Oct. 29, 2017), <https://www.metrowestdailynews.com/news/20171029/freedom-of-information-vs-harassment-towns-fight-excessive-requests> [<https://perma.cc/V3HF-3ZFU>] (a single, repeat requester in a small Massachusetts town submitted one-third of all requests that year, forcing the town to spend 50% more than it had budgeted that year for legal costs); Plattsburgh City Sch. Dist., N.Y., *2012–2014 Public Records Log* (on file with author) (between March 2012 and August 2014, two requesters submitted roughly 90% of all requests to the school district).

times, for example—will be borne by local governments alone.¹⁸⁰ These governments routinely report funding difficulties when faced with changes to these statutes, such as new reporting requirements or limitations on what costs may be passed on to the requester.¹⁸¹

2. Opportunity Costs

Last year, the federal government employed 4,500 FOIA officers who worked full-time responding to public records requests.¹⁸² In contrast, few state and local agencies can afford to employ a full-time agency employee dedicated to the public records process. And even when agencies are able to hire a dedicated public records employee, that individual's salary often has a significant impact on the agency's total budget.¹⁸³ Many state and local government employees tasked with responding to public records requests are required to wear multiple hats: they must fulfill their regular agency duties while also overseeing and administering responses to public records requests.¹⁸⁴ The opportunity costs of responding to these requests can be significant. To provide just one illustration, the state employee responsible for enforcing water safety requirements in Vermont spends months at a time responding to public records requests, leaving her unable to engage in oversight of water quality in the state during these periods.¹⁸⁵

¹⁸⁰ See, e.g., TASK FORCE ON LOCAL GOV'T CONSOLIDATION & UNFUNDED MANDATES, STATE OF ILL., DELIVERING EFFICIENT, EFFECTIVE, AND STREAMLINED GOVERNMENT TO ILLINOIS TAXPAYERS 72, 74 (2015) (listing Freedom Information Act requirements among the burdensome unfunded mandates faced by local government) [hereinafter ILLINOIS TASK FORCE REPORT]; *Legislature Plans Vote on Public Records Bill That Would Impose New Unfunded Mandates*, MASS. MUN. ASS'N (July 17, 2015), <https://www.mma.org/legislature-plans-vote-on-public-records-bill-that-would-impose-new-unfunded-mandates/> [<https://perma.cc/XG53-XKFV>] (noting proposed amendments would “tax municipal capacity to administer and manage daily municipal operations and impose new unfunded mandates”).

¹⁸¹ See, e.g., *Public Records Bill Must Remain Balanced and Affordable*, MASS. MUN. ASS'N (Dec. 1, 2015), <https://www.mma.org/advocacy/public-records-bill-must-remain-balanced-and-affordable/> [<https://perma.cc/93GJ-RJ2U>] (describing the financial burdens that proposed amendments to the public records law would impose on local governments).

¹⁸² SUMMARY OF ANNUAL FOIA REPORTS, *supra* note 45, at 20.

¹⁸³ See, e.g., ILLINOIS TASK FORCE REPORT, *supra* note 180, at 244 (noting the high salary costs required to employ full-time public records officers).

¹⁸⁴ See, e.g., WASH. STATE AUDITOR'S REPORT, *supra* note 76, at 20 (noting that “[i]t is not uncommon for small organizations to depend on the same employee for providing critical services while also handling public records requests,” especially at smaller agencies); Interview with Chris Voss, *supra* note 104 (noting that every records response coordinator in the state environmental agency must juggle public records responses with other duties).

¹⁸⁵ Interview with Wendy Houston Anderson, Enf't Coordinator, and Scott Waterman, Policy and Comm'n Dir., Water Quality Div., Vt. Agency of Agric., Food, and Mkts., in Montpelier, Vt. (Nov. 20, 2018).

This diversion of state resources undermines the ability of state and local governments to focus on fulfilling their core government functions.¹⁸⁶

3. *Chilling Effects*

Legislators, judges, and scholars have long expressed concern over the potential chilling effects of government transparency requirements.¹⁸⁷ The deliberative process exemption found in FOIA and in virtually every state public records law embodies this fear: legislators reason that by protecting pre-decisional records from disclosure, policymakers will feel free to engage in free and open communications uninhibited by the threat of public disclosure of their deliberations.¹⁸⁸ But the chilling effect of government legislation is notoriously difficult to measure.¹⁸⁹ In the context of transparency legislation, it is impossible to prove that a particular policy debate would have been more robust had there not been a public records law in effect. Transparency scholarship often refers obliquely to the deliberative costs of transparency laws like FOIA, but scholars rarely attempt to identify concrete evidence of what these deliberative costs entail.¹⁹⁰

One recent exception is a study by Professor Claudia Polsky examining the ways that state public records laws can chill academic speech at public universities.¹⁹¹ While there are clear transparency benefits to extending coverage to universities,¹⁹² Professor Polsky demonstrates the

¹⁸⁶ For a discussion of such costs in the federal context, see Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1124 (discussing the “diversion costs” that FOIA imposes upon federal agencies).

¹⁸⁷ *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 705 (1974) (finding “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor . . . to the detriment of the decisionmaking process”); Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1126–27, 1126 n.170 (summarizing the literature on the potential deliberation costs of transparency requirements).

¹⁸⁸ *See, e.g.*, *Greenberg v. U.S. Dep’t of Treasury*, 10 F. Supp. 2d 3, 16 n.19 (D.D.C. 1998) (noting that FOIA Exemption 5 is designed to prevent the chilling of agency deliberations).

¹⁸⁹ *See generally* Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. Rev. 1095, 1097 (2015) (arguing that in order to measure the chilling effect of a particular government law on speech, researchers would have to measure the amount and quality of speech before and after the law took effect, and that “so far as we could ascertain, such data have not yet been collected and attempting to do so would raise difficult measurement questions”).

¹⁹⁰ *See, e.g.*, Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1126 (“To some unknown but seemingly nontrivial extent, the prospect of ‘being FOIA’d’ deters candor among executive branch officials and leads them to avoid recordkeeping in favor of oral exchanges and ‘*sub rosa* deals.’”).

¹⁹¹ Polsky, *supra* note 17, at 292.

¹⁹² *See, e.g.*, Erica L. Green & Stephanie Saul, *What Charles Koch and Other Donors to George Mason University Got for Their Money*, N.Y. TIMES (May 5, 2018),

extent to which public records laws have been used by activists and critics to target and harass academics who work in politically contentious fields such as climate change or genetically modified organisms. She writes that in the most egregious cases, public records requests “have caused researchers to abandon politically sensitive lines of inquiry . . . , cease participation in public debate about such matters . . . , or defect from academia altogether.”¹⁹³ Companies are also turning to state public records laws as a way to obtain information about their academic critics.¹⁹⁴

The application of public records laws to public university scholars has no equivalent in the federal context.¹⁹⁵ The targeted use of public records laws to harass scholars and researchers at public universities offers a powerful illustration of the ways in which transparency scholarship’s myopic focus on FOIA fails to capture the full universe of transparency-related issues at play. And to the extent that public records laws do chill government speech, those concerns are magnified by the extended scope of coverage of many state laws to reach not only state universities, but state legislators and judges as well.

There are other chilling effects unique to the state or local context. While government officials have long complained about the intrusive and burdensome nature of FOIA requests, few have argued that potential candidates for federal employment will be deterred from applying or running for office because of these laws. The chilling effect on government participation, however, is a concern. Many local government officials serve as unpaid volunteers,¹⁹⁶ and local administrative agencies often “resemble community meetings as much as they do public agencies, with the locus of gravity on locally appointed citizens or residents fulfilling a civic duty.”¹⁹⁷

<https://www.nytimes.com/2018/05/05/us/koch-donors-george-mason.html> [https://perma.cc/SZ2T-JUTA] (relying on public records requests to George Mason University to reveal the Koch brothers’ influence over academic appointments at the school).

¹⁹³ Polsky, *supra* note 17, at 265–66.

¹⁹⁴ See, e.g., Elizabeth Williamson, *Industries Turn Freedom of Information Requests on Their Critics*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/us/politics/freedom-of-information-requests.html> [https://perma.cc/KG98-LBWQ] (finding public records are being increasingly used against academic researchers by lobbyists, interest groups, and corporations).

¹⁹⁵ The Shelby Amendment allows requesters to access data produced by private entities that receive federal research grants, including universities, but this is a narrow exception. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681–495.

¹⁹⁶ See Davidson, *supra* note 34, at 623; Alison Bosma, *Public Record Requests, Associated Legal Fees Cost Ashland \$127,000*, WICKED LOCAL. ASHLAND (Nov. 2, 2017), <https://ashland.wickedlocal.com/news/20171102/public-record-requests-associated-legal-fees-cost-ashland-127000> [https://perma.cc/4EG3-3GAV] (noting most board members are volunteers).

¹⁹⁷ Davidson, *supra* note 34, at 593.

Given the difficulty of recruiting individuals to donate their time in the first place, the burdens and privacy harms imposed by public records laws can have a chilling effect on government participation as well.¹⁹⁸

4. *Commercial Requests*

Requests from commercial entities dominate the FOIA dockets of many federal agencies.¹⁹⁹ Critics have long argued that such overwhelming commercial use of the statute drains public resources while providing little public benefit.²⁰⁰ At worst, they argue, the statute operates as a commercial subsidy, underwriting for-profit information gathering.²⁰¹ Professor Kwoka, in particular, has chronicled the extent to which certain federal agencies are flooded with commercial requests, as well as the toll that these requests impose on these agencies' limited financial and human resources.²⁰² Yet little comparable effort has been made to determine the impact of commercial requests on state and local governments.²⁰³

An investigation into the effect of corporate interests on state and local transparency warrants its own separate paper. But this Section offers a preliminary look at this issue. Specifically, it argues that the limited data that are available—namely, select public records datasets, as well as interviews with public records officers—suggest that state and local governments confront similarly high volumes of commercial requesters. And the same concern that animates commercial use of FOIA applies in the state and local context as well: corporate use of these state statutes drains government resources without increasing government accountability or oversight.²⁰⁴ A closer look at commercial use of these state laws, however,

¹⁹⁸ See, e.g., Bosma, *supra* note 196 (reporting that the chairman of a town committee in Ashland, Massachusetts said that repetitive and offensive public records requests are “terrible on morale” and have made it difficult to recruit volunteers to serve on the committee).

¹⁹⁹ See Kwoka, *FOIA, Inc.*, *supra* note 15, at 1382, 1388, 1398, 1401 (showing that in 2013, commercial entities submitted 69% of SEC requests, 75% of FDA requests, 79% of EPA requests, and 96% of Defense Logistics Agency requests).

²⁰⁰ See, e.g., COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, LCD-78-120, GOVERNMENT FIELD OFFICES SHOULD BETTER IMPLEMENT THE FREEDOM OF INFORMATION ACT, at ii (1978) (finding that FOIA “is being used mostly by businesses and law firms—sometimes for purposes not contemplated by the Congress”).

²⁰¹ See, e.g., Kwoka, *FOIA, Inc.*, *supra* note 15, at 1421 (“Rather than subsidizing transparency, FOIA’s commercial subsidy has the effect of paying for corporate ‘secrets’ discovered using FOIA.”).

²⁰² See *id.* at 1427.

²⁰³ See Fink, *supra* note 17, at 109–11 (describing the limitations preventing a thorough analysis of commercial requests and their impact on state and local governments).

²⁰⁴ There are benefits to commercial requests as well. See discussion *supra* note 129 and accompanying text. I have categorized these commercial requests as a “cost” because this class of requests is least closely aligned with the original, democracy-enhancing intent of these transparency

reveals that the scholarly and legislative approach to these issues in the context of FOIA does not always track cleanly onto the state and local context.

Vermont is the only state in the country that both aggregates public records data for all state agencies and publishes the names and institutional affiliations of requesters.²⁰⁵ It therefore serves as a useful case study. Prior studies examining the role of commercial entities in the public records regime have focused on a select number of agencies, usually those most likely to receive large numbers of commercial requests.²⁰⁶ While this approach is effective in highlighting the severity of the problem at its most extreme, it sheds little light on the extent to which commercial use of public records laws affects the average government agency. Examining the complete public records logs across an entire state government, in contrast, allows for a more comprehensive look at public records use and its impact on government.²⁰⁷

State agencies in Vermont received 4,226 public records requests in 2017. Of these requests, roughly half originated from identifiable commercial requesters, including insurance companies, data brokers, law firms, and farmers.²⁰⁸ The actual percentage of commercial requests is most likely higher; roughly a third of these requesters provided no institutional affiliation and could not be coded, and 50% therefore represents the lowest possible percentage of requests originating from commercial entities.²⁰⁹ In contrast, requests from identifiable academic, media, and nonprofit

statutes. Companies use these laws to generate profits, and these financial rewards, by their nature, accrue when the information is kept private. *Cf.* Kwoka, *FOIA, Inc.*, *supra* note 15, at 1421 (noting that in the FOIA context “[s]ubsidizing records to resellers validates a sort of buy-low, sell-high arbitrage in federal records at great profit to the reseller, but no public or collective benefit in increased access to information”).

²⁰⁵ For a discussion of the limited data available at the state level, see *supra* notes 95–96 and accompanying text.

²⁰⁶ *See, e.g.*, COAL. OF JOURNALISTS FOR OPEN GOV’T, FREQUENT FILERS: BUSINESSES MAKE FOIA THEIR BUSINESS (2006), https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/intl/businesses_make_foia_their_business.pdf [<https://perma.cc/5JWW-K4V7>] (reviewing logs of seventeen federal agencies and finding that roughly two-thirds of requests originated from commercial requesters); Fink, *supra* note 17, at 100–03 (reviewing public records logs of state environmental agencies); Kwoka, *FOIA, Inc.*, *supra* note 15, at 1379–80 (reviewing public records logs of six federal agencies).

²⁰⁷ There are also drawbacks to this approach. The insights derived from the public records logs of a sparsely populated New England state may not necessarily apply to states in which distinct cultural, economic, geographic, and social forces are at play. Even so, evaluating requests across one state serves as a useful starting point for analysis given the absence of alternative sources of data at the state level.

²⁰⁸ Vermont State Dataset 2017, *supra* note 78.

²⁰⁹ *Id.*

organizations collectively accounted for roughly 5% of total requests.²¹⁰ Within this category, around 3% of requests originated from the media, while academics and nonprofit agencies each submitted around 1% of total requests.²¹¹

A handful of agencies in Vermont received a disproportionate share of requests. More than half of all requests in 2017 were submitted to the Department of Public Safety. Of these requests, nearly three-quarters originated from commercial requesters.²¹² Requests from or on behalf of insurance companies alone accounted for roughly 60% of all requests submitted to the public safety agency that year.²¹³ These companies were generally looking to verify reports of burglaries, vandalism, and traffic and other accidents.²¹⁴ And a single company—LexisNexis—accounted for more than half of those requests.²¹⁵ Put another way, requests from this single company comprised roughly 30% of all public records requests received across the entire state of Vermont in 2017.²¹⁶

Other state agencies in Vermont are also deeply affected by commercial requesters. The Agency of Transportation, for example, receives large numbers of public records requests from construction, engineering, surveying, and insurance companies, as well as from law firms.²¹⁷ The substance of these requests varies. Many are submitted by companies that lost a contracting bid and are looking for details about the winning bid. Surveying companies often seek the details of government land surveying projects to avoid repeating work that the government has already completed. And law firms often rely on public records requests as a

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* Again, the actual number is most likely higher because roughly 25% of total requests to the Department of Public Safety in 2017 provided no affiliation and could not be identified through internet searches.

²¹³ *Id.*

²¹⁴ Interview with Heidi Storm, Records and Alarm Adm'r, Vt. Dep't of Pub. Safety, in Waterbury, Vt. (Nov. 20, 2018).

²¹⁵ Vermont State Dataset 2017, *supra* note 78. While these requests are generally straightforward, the records access officer must secure approval from the relevant police barracks and manually redact each report before it is released, both of which impose additional time and logistical costs. Interview with Heidi Storm, *supra* note 214.

²¹⁶ Vermont State Dataset 2017, *supra* note 78. While LexisNexis is not necessarily the dominant requester in other states, insurance companies and data resellers tend to make up a significant proportion of requesters to state and local law enforcement agencies throughout the country. *See, e.g.*, Massachusetts State Dataset 2017, *supra* note 78 (showing that roughly two-thirds of requests to the Massachusetts Department of State Police in 2017 were for police reports, police recordings, and arrest reports).

²¹⁷ Vermont State Dataset 2017, *supra* note 78.

pre-discovery tool to help determine whether to bring a lawsuit against the state.²¹⁸

Such heavy commercial use of the state public records law is concerning. LexisNexis effectively operates as an information broker, with the government subsidizing its profit model by providing valuable information at a low price. Similarly, contractors' reliance on the public records law to obtain information about its competitors does little to advance democratic accountability or the public interest. While these commercial requests undoubtedly have value—to the companies that profit from them and to the companies that benefit from the convenience of this information resale—they offer little benefit to the public at large.²¹⁹ As Professor Kwoka has noted, these information sellers become “the true brokers of public information, thereby de facto taking over functions thought to be inherently governmental.”²²⁰ And while this present analysis is limited in scope, public records logs and interviews with public records officers in other states suggest that commercial interests play an equally if not more substantial role across the country.²²¹

The benefit of surveying request logs across an entire government, however, is that it provides insight into commercial requests across all agencies, not just those agencies most affected by commercial interests. And for some smaller agencies in Vermont, commercial requests are not nearly so prevalent, while requests from media and other public-facing entities consume more time and attention.²²² The Agency of Agriculture,

²¹⁸ Interview with Mark Giguere, Records Officer, Vt. Dep't of Transp., in Montpelier, Vt. (Nov. 20, 2018).

²¹⁹ For a discussion of the minimal public benefits that such commercial requests provide in the federal context, see Kwoka, *FOIA, Inc.*, *supra* note 15, at 1420–22.

²²⁰ *See id.* at 1415.

²²¹ *See, e.g.*, WASH. STATE AUDITOR'S REPORT, *supra* note 76, at 21 (finding that 8% of state and local requests in 2015 were submitted by insurance agencies, and another 12% were submitted by law firms). As Professor Katherine Fink's research suggests, state environmental agencies appear to receive among the highest number of commercial requests. Fink, *supra* note 17, at 110–11; *see also* Colo. Dep't of Pub. Health and the Env't, *2016 Public Records Log*, *supra* note 82 (on file with author) (roughly 90% of requests are commercial and fewer than 1% are from the media); Iowa Dep't of Nat. Res., *2015 Public Records Log* (on file with author) (roughly 80% of requests are commercial while just one request was received from the media); Interview with Chris Voss, *supra* note 104 (explaining that the agency receives high volumes of requests from third-party brokers who resell environmental information about specific properties, and commenting that these companies “make their money off this[,] and it's an irritant to us”). State transportation departments also appear to receive a high number of commercial requests. *See, e.g.*, Penn. Dep't of Transp., *2016 Public Records Log* (on file with author) (roughly 60% of requests are commercial and around 5% originated from members of the media).

²²² *See, e.g.*, Vt. Dep't of Children and Family Servs., *2013–2015 Public Records Logs* (on file with author) (roughly a quarter of requests from 2013–2015 originated from the media).

Food and Markets, for example, received more than half of its requests from journalists, academics, and nonprofit groups in 2017, but less than a quarter from commercial entities.²²³ This holds true for other state and local agencies across the country as well.²²⁴ Such discrepancies underscore the extent to which commercial requests vary substantially from one agency to another, suggesting that at least some public records activity is more closely aligned with the original intent of the statute. While this does not mitigate the problem of commercial dominance of the public records laws for other agencies, it does provide an important comparative perspective to counterbalance the data coming out of those government entities most affected by commercial interests.

At the local level, requester information is even more difficult to come by. No state aggregates records request data at the local level. But again, anecdotal evidence suggests that certain local agencies must likewise contend with high numbers of commercial requests.²²⁵ Commercial requests are especially burdensome for local law enforcement agencies. Local police departments and sheriffs' offices, like state law enforcement agencies, receive large numbers of requests for traffic accident, burglary, vandalism and other police reports.²²⁶ And many of the same commercial actors that operate at the state level are frequent requesters at the local level as well.

Increasingly, local law enforcement agencies outsource the work of handling these types of routine police report requests to third-party

²²³ Vermont State Dataset 2017, *supra* note 78 (out of twenty-eight requests, fifteen were academic, media, or nonprofits, while only four were commercial).

²²⁴ See, e.g., Mass. Dep't of State Police, *Jan.–July 2018 Public Records Logs* (on file with author) (more than 350 public records requests from media outlets, or roughly 35% of total requests); S.D. Dep't of Educ., *2015 Public Records Log* (on file with author) (roughly 40% of requests originated from the media); Nev. Governor's Office of Econ. Dev., *Sept. 2013–July 2015 Public Records Logs* (on file with author) (of nineteen total requests, thirteen originated from either media organizations or think tanks, while just one request originated from a commercial requester); Vill. of Downers Grove, Ill., *Jan. 2015–July 2017 Public Records Logs* (on file with author) (roughly 15% of total requests originated from commercial entities).

²²⁵ See, e.g., ILLINOIS TASK FORCE REPORT, *supra* note 180, at 72, 133 (respondents to a survey on unfunded mandates listed “FOIA requests from large commercial companies” as among the most burdensome).

²²⁶ See, e.g., WASH. STATE AUDITOR'S REPORT, *supra* note 76, at 20 (noting that police and sheriff's departments received twice the number of requests as other departments); Report from Miguel A. Santana, L.A. City Admin. Officer, to the Mayor and Council of L.A., at 1–2 (Sept. 24, 2015), https://clkrep.lacity.org/online/docs/2015/15-1140_rpt_CAO_09-24-2015.pdf [<https://perma.cc/49FF-V795>] (noting that 85% of the 75,000 requests the Los Angeles Police Department receives annually are for traffic accident reports); Town of Framingham, Mass., *Jan. 17–Feb. 17, 2017 Public Records Logs* (on file with author) (roughly 55% of requests in one month were for police/fire department reports).

entities.²²⁷ One of the largest vendors of these request-processing services is—perhaps unsurprisingly—LexisNexis.²²⁸ The company allows law enforcement agencies to funnel police report requests directly to the company,²²⁹ and it provides access to its centralized police report database, allowing members to search the accident reports of 4,500 agencies across the country.²³⁰ Further, it provides software that allows the public to report harassment, lost property, vandalism, or other incidents directly to the company when police presence is not required on the scene.²³¹

There are undoubtedly benefits to this outsourcing of public records activity. From the law enforcement agency’s perspective, these third-party requesting services reduce the amount of time an agency spends responding to requests and allow police departments to concentrate attention on law enforcement-related activities. And for the public, submitting a request electronically through LexisNexis can reduce the time, effort, and cost spent obtaining a police report.²³² But this privatization of the records request process also raises concerns. Rather than submitting huge volumes of requests to state and local agencies, LexisNexis cuts out the middleman and aggregates and processes requests for police reports directly. This effectively grants a private company a monopoly on public data and

²²⁷ Some state law enforcement agencies also rely on the company’s services as well. *See, e.g., LexisNexis eCrash Continues to Improve Automated Crash Reporting Process for Law Enforcement and Help Agencies Reallocate Resources Through Acquisition of iyeTek*, BUSINESSWIRE (May 22, 2014) <https://www.businesswire.com/news/home/20140522006171/en/LexisNexis-eCrash-Continues-Improve-Automated-Crash-Reporting> [<https://perma.cc/E52K-SRT6>] (noting that New Mexico State Police rely on LexisNexis to automate their police report process). On the whole, however, state agencies generally appear to manage the reporting process internally. *See, e.g., Colorado State Patrol – Central Records Unit*, COLO. ST. PATROL, <https://www.colorado.gov/pacific/csp/colorado-state-patrol-central-records-unit> [<https://perma.cc/EL82-Y4MF>] (showing internal request management system); *Public Records Unit*, ARIZ. DEP’T OF PUB. SAFETY, <https://www.azdps.gov/services/public/records/public> [<https://perma.cc/4Z7X-YJGE>] (same); *Crash Reports*, ALA. L. ENFORCEMENT AGENCY, https://www.alabamainteractive.org/dps_crash_report/mainMenu.action;wusid=94A00A187DDEE3857CDD7D4F213324A2F [<https://perma.cc/CWV8-XZBD>] (same).

²²⁸ *See* Report from Miguel A. Santana, *supra* note 226, at 2 (noting that LexisNexis provides report distribution services “to over 100 California law enforcement agencies including the cities of San Francisco, San Diego[,] and Sacramento police departments”).

²²⁹ LEXISNEXIS, LEXISNEXIS POLICE REPORTS (2018), https://risk.lexisnexis.com/-/media/files/government/police_reports%20solution%20sheet%20rev%20pdf.pdf [<https://perma.cc/9JX3-GTFK>].

²³⁰ *Id.* The company advertises a database of “173 million pieces of data, including 91 million person and 82 million accident records, more than 35,000 accident reports, and 62,000 VINs added daily.” *Id.*

²³¹ Report from Miguel A. Santana, *supra* note 226, at 1.

²³² In some cases, LexisNexis charges less for reports than the government previously charged. *See, e.g., id.* at 2–3.

consolidates police data in private hands.²³³ If we are concerned that information brokers at the federal level “de facto take[] over functions thought to be inherently governmental,”²³⁴ then the wholesale outsourcing of the records requesting process to a third party vests this power more fully in a commercial entity.²³⁵

Of course, law enforcement agencies are not the only local government entities that handle high volumes of commercial requests. A variety of other commercial interests routinely target data specifically held by local governments as well. Loan companies submit requests to towns or cities for lists of residents with unpaid taxes or code violations to target those individuals for loans.²³⁶ Real estate companies request lists of homeowners near foreclosure and approach those homeowners with offers to purchase their property.²³⁷ Recovery companies obtain lists of uncashed checks issued by the city and then offer to assist individuals with securing a reissued check in exchange for a percentage of the cash.²³⁸ And school districts receive a large number of requests for purchase orders, contracts, payroll data, and bid submissions.²³⁹ For cash-strapped local agencies, the costs these commercial requests impose can be substantial.

²³³ Some cities and towns require police or crash reports to be obtained through LexisNexis. *See, e.g., Accident Report Request*, VILLAGE OF CHESANING, http://www.villageofchesaning.org/departments/village_administration/police_department/accident_reports.php [<https://perma.cc/63V6-NK4J>]; *Obtain a Police Report or Traffic Collision Report*, FOUNTAIN VALLEY POLICE DEP’T, <https://www.fountainvalley.org/700/Obtain-a-Police-or-Traffic-Collision-Rep> [<https://perma.cc/LGU4-RJZH>]; *Police Reports*, HAWTHORNE POLICE, <https://hawthornepolice.com/police-reports/> [<https://perma.cc/FR5D-BTT3>]. In an e-mail, the company emphasized that “[w]e keep and maintain reports in our website but it is still owned by police departments.” E-mail from Jessie, Police Reports Customer Support, LexisNexis, to author (Jan. 7, 2020, 7:27 AM PST).

²³⁴ Kwoka, *FOIA, Inc.*, *supra* note 15, at 1415.

²³⁵ There are potential economic drawbacks as well. In Los Angeles, for example, the department estimated the loss of police report revenue cost roughly \$1.8 million. *See* Report from Miguel A. Santana, *supra* note 226, at 2, 3.

²³⁶ *See, e.g.,* Shira Schoenberg, *Here’s How Businesses Use Public Records to Drum Up Clients*, MASSLIVE (Dec. 30, 2018, updated Jan. 29, 2019), https://www.masslive.com/politics/2018/12/business_public_records_leads.html [<https://perma.cc/E8RL-NXYQ>] (describing how businesses use public records requests for commercial reasons); *Request #19-417*, in *Public Record Requests*, CITY OF MIAMI (Feb. 13, 2009), <https://miami.nextrequest.com/requests/19-417> [<https://perma.cc/3FHF-TVBX>] (seeking “a list of people who have not paid their taxes in two years or more”).

²³⁷ *See* Schoenberg, *supra* note 236.

²³⁸ *See, e.g.,* Emeryville Public Records Log, *supra* note 83 (showing five requests for lists of uncashed checks); Telephone Interview with Adam Loukx, Deputy Dir. of the Toledo Law Dep’t (Sept. 12, 2018) (reporting that Toledo received two to three requests for uncashed checks per month).

²³⁹ *See, e.g.,* Mechanicsburg, Penn. Area Sch. Dist., *2010–2016 Public Records Logs* (on file with author) (roughly 45% of requests were for purchase orders, contracts, payroll data, and bid submissions); Buffalo, N.Y. City Sch. Dist., *2012–2014 Public Records Requests* (on file with author)

D. Barriers to Disclosure at the State and Local Level

Citizens are rarely, if ever, satisfied with public records laws at any level of government. Discontent with these laws is so widespread that trading public records horror stories—high price quotes for public records requests, years-long delays, or nonsensical government responses—has become a routine pastime among journalists, academics, and nonprofit advocates. There are Twitter threads dedicated to chronicling these stories,²⁴⁰ and news outlets publish lists of their reporters' most frustrating public records experiences.²⁴¹ The Electronic Frontier Foundation hands out yearly “Foilie” awards recognizing “the worst responses to records requests, outrageous efforts to stymie transparency and the most absurd redactions.”²⁴²

The pitfalls associated with FOIA have been well documented in the legal literature.²⁴³ And many of the barriers to transparency that afflict FOIA impede transparency efforts at the state and local level as well. Excessive redactions, overreliance on certain exemptions, and failure to comply with statutory time limits: these are all overlapping features of both the federal and state public records landscape. But because these issues plague the federal public records law, they have been reviewed at length by scholars, advocates, and policymakers.

Scholars have paid less attention, however, to the distinct transparency problems that arise at the state and local level. These problems include defects in the transparency laws themselves—both in their construction and in their application—as well as in the broader information systems that encompass and sustain state and local governments. As this Section will

(roughly 40% of the requests submitted in 2013 were for purchase orders, contracts, payroll data, and bid submissions); Rochester, N.Y. City Sch. Dist., *2014 Public Records Log* (on file with author) (showing requests for food service bid documents from multinational companies like Aramark).

²⁴⁰ See, e.g., Justin Elliott (@JustinElliott), TWITTER (Mar. 8, 2016, 2:38 PM), <https://twitter.com/JustinElliott/status/707334676130746368> [<https://perma.cc/ZO3K-JUKW>] (“REPORTERS: have recent horror stories trying to use FOIA? I want to hear what happened. Please @ me or e-mail justin-at-propublica.org #WTFoia[.]”).

²⁴¹ See, e.g., *Cost-Related Access Challenges, Solutions in 18 States*, ASSOCIATED PRESS (Mar. 13, 2015), <https://www.ap.org/ap-in-the-news/2015/cost-related-access-challenges-solutions-in-18-states> [<https://perma.cc/5WWH-F75Y>] (discussing various states' impediments to accessing information); *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016), <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front> [<https://perma.cc/2BK7-9385>] (describing the organization's “reporters' most frustrating public record failures”).

²⁴² Dave Maass et al., *The Foilies 2018*, ELEC. FRONTIER FOUND. (Mar. 11, 2018), <https://www.eff.org/deeplinks/2018/03/foilies-2018> [<https://perma.cc/V76L-3ZGQ>].

²⁴³ See discussion *supra* note 15 and accompanying text.

explore, these barriers to disclosure both interact with and reinforce one another, leading to breakdowns in these broader state and local transparency ecosystems.

1. *Statutory Barriers to Disclosure*

While many state public records statutes have adopted certain parts or features of FOIA,²⁴⁴ each state law is unique, and each introduces distinct barriers to disclosure. This Section explores some of the textual distinctions across state public records laws. Some of these issues do not exist at all at the federal level. In other cases, the barriers to disclosure are more formidable at the state and local level than they are in the federal context.

a. *Excessive Exemptions*

Requesters at the state and local level must contend with large numbers of exemptions, many of which are vaguely written and reflect the narrow goals of special interest groups. In contrast to FOIA's nine enumerated categories of records protected from public disclosure,²⁴⁵ these state laws can contain hundreds of enumerated exemptions, either within the public records statute itself²⁴⁶ or scattered throughout the state code.²⁴⁷ Critics have claimed that FOIA's exemptions sweep too broadly, placing large swaths of public records beyond reach.²⁴⁸ But few have argued that FOIA has too many exemptions.

This is not the case at the state level. Florida law, for example, contains 1,000 exemptions to public disclosure.²⁴⁹ Twelve percent of all Florida statutes enacted in 2017 were new exemptions to the public records law.²⁵⁰ In Tennessee, there were 2 statutory exemptions when the law was enacted in 1957; 89 exemptions in 1988; and 538 exemptions by 2018.²⁵¹

²⁴⁴ See sources cited *supra* note 69.

²⁴⁵ 5 U.S.C. § 552(b) (2012). There are other protections from disclosure contained throughout the federal code and incorporated into FOIA through Exemption 3.

²⁴⁶ See, e.g., NEV. REV. STAT. ANN. § 239.010 (listing 431 exemptions).

²⁴⁷ See, e.g., OR. PUB. RECORDS ADVISORY COUNCIL, BIENNIAL REPORT 10 (2018), <https://digital.osl.state.or.us/islandora/object/osl:579069> [<https://perma.cc/7667-9LC9>] [hereinafter BIENNIAL REPORT OF THE PUBLIC RECORDS ADVISORY COUNCIL] (noting that there are at least 550 exemptions to the public records law contained in the Oregon state code).

²⁴⁸ See, e.g., McCraw, *supra* note 15, at 234, 238 (describing the dramatic expansion of FOIA's exemptions).

²⁴⁹ Elizabeth Koh & Emily L. Mahoney, *Legislature Adds to the More than 1,000 Exceptions to Florida's Public Records Law*, MIAMI HERALD (Mar. 11, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article204472014.html> [<https://perma.cc/3DQW-YJLL>].

²⁵⁰ Jarrod Holbrook, *Public Records Advocate Opposes Public Records Exemptions Passed by Legislature*, ABC NEWS (May 19, 2017), <https://www.abcactionnews.com/news/local-news/i-team->

This explosion in public records exemptions can be traced in part to the successful lobbying efforts of special interest groups.²⁵² Lobbying by the National Rifle Association (NRA), for example, has led to the enactment of public records exemptions for firearm permits and registrations around the country. In 2011, an NRA affiliate in Illinois backed a new public records exemption that protects the identities of gun owners in the state.²⁵³ And in 2018, NRA lobbying led to the enactment of an exemption to the Nebraska public records law for information contained in government firearm permits and licenses.²⁵⁴ After the law went into effect, the NRA praised the Nebraska legislature for preventing “unscrupulous media outlets and others access to” these firearms records.²⁵⁵

These special interest exemptions are often enacted quietly, without much publicity or public oversight.²⁵⁶ Even so, the plain language of these provisions frequently reveals the special interests involved. Georgia’s state legislature, for example, enacted a new exemption in 2006 protecting “all reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation”—all but ensuring that the activities of private probation companies would be shielded from public view.²⁵⁷ In Vermont, records documenting “the purchase and sale of maple

investigates/public-records-advocate-frustrated-over-exemptions-passed-by-legislature [https://perma.cc/F7NZ-WGFZ].

²⁵¹ TENN. COMPTROLLER OF THE TREASURY, STATUTORY EXCEPTIONS TO THE TENNESSEE PUBLIC RECORDS ACT (2018), https://comptroller.tn.gov/content/dam/cot/orc/documents/oorc/2018-01-19_ExceptionstotheTennesseePublicRecordsActFinal.pdf [https://perma.cc/NF3K-6Z4Y].

²⁵² See, e.g., Andrew Geronimo & David Marburger, *Ohio Open Government Guide, Exemptions in the Open Records Statute*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/ohio/#a-exemptions-in-the-open-records-statute> [https://perma.cc/J63F-5SAR] (noting there are more than 400 statutory provisions of the Ohio public records law, many of them exemptions); Telephone Interview with Fritz Byers, Att’y, Former Gen. Counsel for the *Toledo Blade* and the *Pittsburgh Post-Gazette* (Sept. 10, 2018) (stating that in recent years the Ohio legislature began to take “a balkanized approach” to the law by enacting “all these special interest amendments”).

²⁵³ 5 ILL. COMP. STAT. 140/7.5(v) (2011).

²⁵⁴ NEB. REV. STAT. ANN. § 84-712.05(23) (West 2019).

²⁵⁵ Chris Dunker, *NRA Praises New Nebraska Law Exempting Gun Records from Disclosure*, LINCOLN J. STAR (Apr. 17, 2018), https://journalstar.com/news/local/crime-and-courts/nra-praises-new-nebraska-law-exempting-gun-records-from-disclosure/article_f8a3c08e-681f-57f8-a16e-d4700440a80f.html [https://perma.cc/EJ2F-HRRZ].

²⁵⁶ See, e.g., BIENNIAL REPORT OF THE PUBLIC RECORDS ADVISORY COUNCIL, *supra* note 247, at 10 (“New exemptions are being generated each legislative session, presently without a mechanism in place to directly inform the public and requester community that new exemptions are pending and to allow for meaningful commentary during the legislative process.”).

²⁵⁷ GA. CODE ANN. § 42-8-109.2 (West 2017); Geraghty & Velez, *supra* note 17, at 476 (describing the nexus between Georgia’s legislature and the lucrative private probation industry).

products” are exempt.²⁵⁸ And in Tennessee, data regarding nursing home morbidity and mortality are protected.²⁵⁹

Exemptions are even passed directly in response to reports of government misconduct. In 2010, for example, reports that Kentucky led the nation in child deaths due to abuse and neglect prompted local reporters to submit public records requests to the state child services agency.²⁶⁰ The legislature responded by enacting “emergency” amendments that would exempt child abuse and neglect records from disclosure, which the agency then relied on to deny the public records request.²⁶¹ The reporters challenged the denial, and a state appeals court ultimately chastised the agency for “egregious” conduct in withholding the records, as well as a broader “culture of secrecy” within the department.²⁶²

This large and growing body of public records exemptions imposes both *ex ante* and *ex post* costs upon requesters. *Ex ante*, it can be difficult if not impossible for a requester to identify applicable exemptions and tailor a request accordingly. And *ex post*, these hundreds of exemptions provide government agencies with ample ammunition to withhold embarrassing information or records revealing government misconduct. Moreover, the growing number of exemptions that reflect powerful special interests raise questions about the public’s ability to rely on these state public records laws as a tool for accountability.

b. Requester Fees

Many states have failed to enact meaningful statutory limits on the amount of money that may be recouped from requesters, requiring only that the costs imposed are “reasonable.” This grants agencies wide discretion in determining the fees charged to requesters.²⁶³ Such malleable fee requirements can be difficult for requesters to challenge as excessive, and they often yield inconsistent charges even within the same state.²⁶⁴

²⁵⁸ VT. STAT. ANN. tit. 6, § 484 (West 2019).

²⁵⁹ TENN. CODE ANN. § 68-11-909 (West 2019).

²⁶⁰ See *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 378 (Ky. Ct. App. 2016) (explaining the litigation was spurred by denials by the state agency of newspapers’ open records requests of “child fatalities or near fatalities”).

²⁶¹ *Id.* at 379.

²⁶² *Id.* at 389.

²⁶³ Many states limit charges to the “actual cost” of completing the request. See State Public Records Law Database, *supra* note 84. But these provisions are often permissive rather than mandatory and still allow agencies wide discretion in determining which fees to impose. A number of other states require only that the charges are “reasonable.” *Id.*

²⁶⁴ See, e.g., Anna Clark, *How ‘The Public Is Priced Out of Public Records’ by Michigan Universities*, COLUM. JOURNALISM REV. (Apr. 5, 2016), https://www.cjr.org/united_states_project/

Moreover, while FOIA directs agencies to reduce or waive requester fees when disclosure “is in the public interest,”²⁶⁵ few states provide public interest fee reductions or waivers.²⁶⁶

Many states also permit government officials to recover the labor costs of time spent searching for a request and redacting records.²⁶⁷ These fees can add up quickly, particularly when agencies charge higher hourly amounts for redaction and review by lawyers or technical specialists.²⁶⁸ When challenged by requesters, excessive fees are often reduced or eliminated by the courts.²⁶⁹ But because litigating a public records request requires an enormous investment of time, money, and expertise, most requesters who receive these excessive bills either narrow their request or abandon their efforts.²⁷⁰ And even when requesters do prevail in these actions, offending agencies often continue to charge excessive fees to future requesters.²⁷¹

High public records fees are especially concerning when it comes to media requesters. These charges are more likely to impede the public’s ability to engage in effective oversight, and they may give the impression that the government is intentionally shielding itself from scrutiny. They can also have a significant impact on the media’s ability to investigate and

how_the_public_is_priced_out_of_public_records_by_michigan_universities.php [https://perma.cc/7KWC-U4KV] (noting that three Michigan public universities provided president and governing board expense records at no cost while the University of Michigan-Ann Arbor charged \$2,774 for the president’s expense records alone).

²⁶⁵ 5 U.S.C. § 552(a)(4)(A)(iii) (2012).

²⁶⁶ See State Public Records Law Database, *supra* note 84. Even in states that permit fee waivers, these waivers are often discretionary rather than mandatory. See, e.g., ARK. CODE ANN. § 25-19-105(d)(3)(A)(iv) (West 2019) (stating records “may be furnished without charge or at a reduced charge” if “in the public interest”); 65 PA. STAT. ANN. § 67.1307(f) (West 2019) (stating “[a]n agency may waive the fees” if it is deemed to be “in the public interest” or “the requester duplicates the record”).

²⁶⁷ See, e.g., MO. ANN. STAT. § 610.026 (West 2019) (permitting costs for research time required); TENN. CODE ANN. § 10-7-503 (West 2018) (imposing reasonable costs and allowing records custodians to set those costs); METRO. GOV’T OF NASHVILLE & DAVIDSON CTY., PUBLIC RECORDS POLICIES AND PROCEDURES 2, 7 (2017) (authorizing agencies to charge for labor costs).

²⁶⁸ See, e.g., CAL. EDUC. CODE § 72694 (West 2012) (public records request requiring “data compilation, extraction, or programming” will require the requester to pay “the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record”).

²⁶⁹ See, e.g., *Trammell v. Martin*, 408 S.E.2d 477, 478–79 (Ga. App. 1991) (requester should not be billed for legal review and copies must be charged at the rate most economical for copying); *Milwaukee Journal Sentinel v. City of Milwaukee*, 815 N.W.2d 367, 369 (Wis. 2012) (public records laws cannot be construed to permit charges for time spent redacting records).

²⁷⁰ See, e.g., *infra* note 362 and accompanying text.

²⁷¹ See, e.g., *John Browning, Op. Att’y Gen. of Ky.*, No. 94-ORD-77 (June 9, 1994) (chastising an agency for repeatedly ignoring limits on copying charges).

report stories.²⁷² While exceptionally high cost estimates are not necessarily made in bad faith, media and advocacy organizations often claim that governments use requester fees to silence dissent and prevent meaningful oversight.²⁷³

To provide just one example, in the wake of the shooting of Michael Brown in Ferguson, Missouri, the city contracted with a private company to handle its public records requests. The company charged reporters a base fee of \$500 and a labor fee of \$135 per hour to search city employees' e-mails²⁷⁴—nearly ten times the \$13.90 hourly salary of an entry-level position in the clerk's office.²⁷⁵ Media organizations like the *Associated Press* and *St. Louis Public Radio* were required to deposit \$2,000 before the requests would be processed,²⁷⁶ and the city charged *Vice News* \$1,200 for a five-hour e-mail search that turned up just seven responsive records.²⁷⁷ News organizations widely viewed these charges as an effort to impede their reporting efforts and prevent public oversight of the city's police department.²⁷⁸

²⁷² In a 2015 survey of reporters and lawyers who represent media organizations, 58% of respondents reported “unreasonable fees” among the tactics that government officials used to deny access to information. Q4 2015 NFOIC/MLRC/IRE OPEN GOVERNMENT SURVEY, NAT'L FREEDOM OF INFO. COAL. 10 (2016), https://www.nfoic.org/sites/default/files/pages/2017-11/2015_NFOICMLRC_Survey_Resp.pdf [<https://perma.cc/6ZGV-JHR8>]; see also *Paying for Public Access*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/journals/news-media-and-law-spring-2014/paying-public-access/> [<https://perma.cc/L52H-P73H>] (noting that “even a bill for several hundreds of dollars can be the equivalent of a denial for a freelancer or someone at a small publication”).

²⁷³ See, e.g., Geraghty & Velez, *supra* note 17, at 470 (asserting that governments in the south use excessive fees as a “strategy” to prevent public disclosure); Editorial, *State Legal Costs Impede KORA*, TOPEKA CAP.-J. (Dec. 22, 2015), <http://kssunshine.us/files/2017/04/cj-editorial-def-costs-122215.pdf> [<https://perma.cc/W8HJ-9YUZ>] (noting a “trend by government insiders to thwart public inquiry and minimize disclosure of potentially embarrassing information” by “padding” fee estimates with costly attorney fees).

²⁷⁴ Chris McDaniel, *How Ferguson Contracted a High-Priced Company to Search Its E-mails*, ST. LOUIS PUB. RADIO (Oct. 9, 2014), <https://news.stlpublicradio.org/post/ferguson-charging-thousands-public-records-st-louis-public-radio-files-complaint> [<https://perma.cc/6XFS-6PJN>].

²⁷⁵ Jack Gillum, *Ferguson Demands High Fees to Turn Over City Files*, ASSOCIATED PRESS (Sept. 29, 2014), <https://apnews.com/ea801dccbeca4d42a06d4477fdb982a0> [<https://perma.cc/4XC4-73H7>].

²⁷⁶ Chris McDaniel, *Ferguson Charging Thousands for Public Records, St. Louis Public Radio Files Complaint*, ST. LOUIS PUB. RADIO (Oct. 7, 2014), <https://news.stlpublicradio.org/post/ferguson-charging-thousands-public-records-st-louis-public-radio-files-complaint> [<https://perma.cc/6XFS-6PJN>].

²⁷⁷ Jason Leopold, *Ferguson Police E-mails Reveal 'Life is Very Rough' for Officers*, VICE NEWS (Nov. 4, 2014), https://www.vice.com/en_us/article/pa845k/ferguson-police-e-mails-reveal-life-is-very-rough-for-officers [<https://perma.cc/B75H-3V84>].

²⁷⁸ See *RTDNA Urges Missouri AG to Enforce Open Records Laws*, RADIO TELEVISION DIGITAL NEWS ASS'N (Sept. 29, 2014), https://www.rtdna.org/article/rtdna_urges_missouri_ag_to_enforce_open_records_laws [<https://perma.cc/5BMJ-7XR3>] (describing complaint submitted by a news advocacy group to the Missouri Attorney General asserting that the charges to media organizations

c. Requester Restrictions

Under federal law, any person may submit a public records request, regardless of citizenship, and agencies may not deny a request based on the requester's motivation or purpose.²⁷⁹ State law, in contrast, imposes a variety of additional restrictions on who may submit a public records request, and for what reason. A number of states, for example, limit public records access to state residents—a restriction that the Supreme Court upheld as constitutional in 2013.²⁸⁰

A handful of states also prohibit or curtail the rights of prisoners to submit public records requests. In Arkansas, incarcerated felons are barred from accessing any public records.²⁸¹ In Louisiana, a convicted felon who has exhausted his or her appellate remedies may only request public records related to the grounds upon which the inmate could obtain post-conviction relief.²⁸² And Michigan's law goes even further, wholly excluding public records access to individuals incarcerated in county, state, or federal correctional facilities.²⁸³ Such restrictions are concerning. Pro se inmates who wish to file a complaint or lawsuit over prison conditions, for example, may be unable to obtain the records needed to substantiate their claims, leaving them unable to enforce their constitutional rights.²⁸⁴

were “an effort by city officials to discourage or even eliminate efforts by the media to continue its investigation into this incident”).

²⁷⁹ *Frequently Asked Questions*, FOIA.GOV, <https://www.foia.gov/faq.html> [<https://perma.cc/MM6Z-25UG>] (FOIA provides for a presumption of openness whereby agencies should only withhold information “if they reasonably foresee that disclosure would harm an interest protected by an exemption, or if disclosure is prohibited by law”).

²⁸⁰ *McBurney v. Young*, 569 U.S. 221, 232 (2013) (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”).

²⁸¹ ARK. REV. STAT. § 25-19-105(a)(1)(B) (2019); *see also* KY. REV. STAT. ANN. § 197.025 (2019) (prohibiting inmate access to correctional department records except those that mention the specific inmate by name).

²⁸² LA. STAT. ANN. § 44:31.1 (2018).

²⁸³ MICH. COMP. LAWS ANN. § 15.232 (2019). In 2001, a Michigan appeals court upheld the constitutionality of this provision, reasoning that the exclusion of prisoners “rationally relate[s] to the Legislature’s legitimate interest in conserving the scarce governmental resources squandered responding to frivolous FOIA requests by incarcerated prisoners.” *Proctor v. White Lake Twp. Police Dep’t*, 639 N.W.2d 332, 340 (Mich. Ct. App. 2001).

²⁸⁴ *See* OHIO REV. CODE § 149.43(B)(8) (2019) (sentencing judge or their successor must consent to incarcerated individual’s request for records); *State ex rel. Wyant v. Brotherton*, 589 S.E.2d 812, 818 (W. Va. 2003) (restricting inmates from filing requests for the “purpose of filing a petition for writ of habeas corpus”).

d. Lack of Administrative Appeal

Only eighteen states offer requesters the option of appealing administratively.²⁸⁵ And because litigation is not a viable option for the vast majority of citizens, requesters in most states are left without a practical remedy for challenging an agency decision.²⁸⁶ At the federal level, in contrast, FOIA has a robust administrative appeals process: every federal requester has the option of appealing an agency's denial by submitting a letter to the agency head explaining why the decision was flawed.²⁸⁷

Even in those states that do provide for administrative appeals, flawed appeals processes can introduce separate barriers to disclosure. In some states, the decision-maker on appeal may be the same individual who denied the request in the first place.²⁸⁸ And other states either fail to provide a time limit within which an appeal must be decided or stipulate a very lengthy appeals deadline.²⁸⁹ These problems with the administrative appeals process, as well as the broader unavailability of administrative appeals, make it difficult for requesters to challenge an agency's response and vindicate their right to access public records in many states.

e. Private Contractors and Quasi-Public-Private Governments

Privatization at all levels of government impedes transparency efforts. At the federal level, FOIA does not extend to private contractors,²⁹⁰ and transparency advocates have tracked the ways in which this carve-out prevents meaningful public oversight in areas ranging from the operation of

²⁸⁵ State Public Records Law Database, *supra* note 84.

²⁸⁶ See Interview with Ellen Gabler, Reporter, The N.Y. Times Co., in N.Y.C., N.Y. (Aug. 31, 2018) (noting that the lack of a viable enforcement remedy other than suing is the most difficult obstacle to using state public records laws effectively).

²⁸⁷ 5 U.S.C. § 552(a)(6)(A) (2012).

²⁸⁸ D. John McKay, *Alaska Open Government Guide, To Whom Is an Appeal Directed*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/alaska/> [<https://perma.cc/VX35-NAP7>] (noting that in Alaska, “[t]he appeal of a denial of a request for state agency records must be directed to the head of the agency from which you are requesting the records . . . regardless of whether the agency head or subordinate was the one who initially denied your request”).

²⁸⁹ See, e.g., CONN. GEN. STAT. § 1-206(b) (2019) (granting appellate body a year to issue a decision).

²⁹⁰ See *Forsham v. Harris*, 445 U.S. 169, 180 (1980) (requiring substantial control by the government to be considered a government agency); *Pub. Citizen Health Research Grp. v. Dep't of Health, Educ. & Welfare*, 668 F.2d 537, 538 (D.C. Cir. 1981) (concluding that a medical foundation contracting with an agency to conduct a professional-standards review for Medicare and Medicaid was not subject to FOIA).

the military²⁹¹ to the management of federal prisons.²⁹² Privatization at the state and local level, however, raises unique transparency concerns.

First, in contrast to the federal government, some state and local governments outsource the very process of managing public records. Local agencies have hired private companies to both collect government information and disperse entire databases of police records.²⁹³ Some local governments have also contracted out the management of court records, with companies exercising exclusive control over the records for a period of time before releasing them to the public.²⁹⁴ This type of privatization permits the consolidation of public information in private hands.²⁹⁵

Second, the effects of privatization are often magnified at local levels of government. This is in part due to the distinct origins and nature of government at these lower levels. Many local governments originated as private corporations that blurred the public–private divide,²⁹⁶ and in early America, mercantile corporations wielded the power and authority we now

²⁹¹ See, e.g., Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in *GOVERNMENT BY CONTRACT* 120–21 (Jody Freeman & Martha Minow eds., 2009) (noting that FOIA’s exclusion of private contractors makes it difficult to hold private military contractors accountable).

²⁹² See, e.g., Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 303 (1995) (arguing that private prisons should be subject to public records requirements to protect the safety of prisoners and preserve the proper expenditure of public funds); see also PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 12 (2007) (“[The government’s] desire for secrecy encourages the use of private contractors, who can do jobs for the federal government exempt from FOIA and FACA disclosures.”). Scholars have also tracked the ways that such privatization can enhance federal executive power more broadly. See, e.g., Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010) (arguing that privatization allows the Executive Branch to exercise greater discretion to achieve policy goals with reduced interference from the other branches, the public, and successor administrations).

²⁹³ See discussion *supra* notes 228–231 and accompanying text.

²⁹⁴ See Feiser, *supra* note 169, at 830 (discussing Illinois press members’ worries about a private company having exclusive control of court records for its first seventy hours of existence).

²⁹⁵ See *supra* notes 228–231 and accompanying text. The private companies that hold these records will often sell them back to the public—or even back to the government that entered into the contract in the first place—for a fee. See, e.g., *Assessment Techs. of Wis., LLC v. WIREdata, Inc.*, 350 F.3d 640, 642–43 (7th Cir. 2003) (rejecting private contractor’s argument that raw data collected by government tax assessors were protected by copyright); see also RANI GUPTA, *REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRIVATIZATION V. THE PUBLIC’S RIGHT TO KNOW* 8–11 (2007), <https://www.rcfp.org/wp-content/uploads/imported/PRIVATIZATION.pdf> [<https://perma.cc/S7N9-EHHC>] (describing the access issues that arise when governments privatize the recordkeeping process).

²⁹⁶ See GERALD E. FRUG, *CITY MAKING* 38–45 (1999); HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* 14 (1983) (recounting how New York City is regarded today as a typical public government, but that “an eighteenth-century judge, by contrast, could have looked only to the chartered foundations of a propertied corporation”).

associate exclusively with governments, such as eminent domain.²⁹⁷ Moreover, smaller governments confront efficiency and resource concerns when providing services. And in the wake of the New Federalism policies of the 1980s, which reduced federal government funding in favor of locally funded services, local governments engaged in widespread privatization of their services.²⁹⁸

As a result, large sections of what we normally consider core government functions are now routinely operated by private or semiprivate actors at the local level.²⁹⁹ In some small cities and towns, core government functions like policing and firefighting have been wholly privatized.³⁰⁰ In others, private forces supplement the public police force by providing security or other services in certain regions or specified areas.³⁰¹ And in a handful of states, certain categories of privatized police—even those vested with general police powers—are not consistently subject to public records laws.³⁰²

Further, even when there are overlaps between the types of privatization occurring at the federal and subfederal levels, there are still important distinctions in scale. Governments at all levels have increasingly turned to private actors to operate prisons. These private prisons are not subject to FOIA, nor are they subject to many state public records laws.³⁰³ But the number of individuals affected is much larger at the state and local level. In 2017, there were over three times as many state prisoners as

²⁹⁷ See FRUG, *supra* note 296, at 40–41 (pointing out that mercantile corporations had the power of eminent domain).

²⁹⁸ Richard W. Pouder, *Privatizing Services in Local Government: An Empirical Assessment of Efficiency and Institutional Explanations*, 20 PUB. ADMIN. Q. 103, 103–04 (1996).

²⁹⁹ See Davidson, *supra* note 34, at 608.

³⁰⁰ Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 613–15; Pace William Rawlins & Sung-Wook Kwon, *Walking the Line on Police Privatization: Efficiency, Accountability, and Court Decisions*, 82 INT'L REV. ADMIN. SCI. 580, 581, 583–84 (2016).

³⁰¹ See Rawlins & Kwon, *supra* note 300, at 585 (discussing Fresno, California's use of private security guards for malls, apartments, sporting events, and concerts).

³⁰² See, e.g., *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1197 (Ind. 2016) (finding that Notre Dame police officers are not covered by the state public records laws even though they are vested with general police powers); *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 840 N.E.2d 518, 521 (Mass. 2006) (declining to apply the public records law to Harvard University police officers). Other privatized services, such as private property assessors, are also beyond the reach of public records laws in some states. See, e.g., *WIREdata, Inc. v. Vill. of Sussex*, 751 N.W.2d 736, 755 (Wis. 2008) (finding that village property assessments used to determine residents' property tax bills are not subject to disclosure when conducted by a private company).

³⁰³ See Beryl Lipton, *Your Annual Reminder: FOIA Still Doesn't Apply to Private Prisons*, MUCKROCK (July 24, 2017), <https://www.muckrock.com/news/archives/2017/jul/24/foia-still-doesnt-apply-private-prisons/> [<https://perma.cc/F2HF-8XYL>].

federal prisoners being held in private prisons.³⁰⁴ And some states have privatized large swaths of their prison operations. In New Mexico, for example, half of state prisoners are held in private facilities.³⁰⁵

The transparency perils of these privatized services are clear. Public oversight of core government functions, such as policing, is critical to preventing corruption, mismanagement, and abuse.³⁰⁶ Placing these government functions beyond the reach of public records laws shields critical government activity from public view. This is not to say that state legislators and judges have wholly ignored these aspects of local government: some states have adopted more flexible tests for determining when and where to extend public records coverage.³⁰⁷ But not all states have pursued this approach. As a consequence, certain private entities that wield enormous state-backed power, and that have a significant impact on the lives of citizens, remain insulated from public oversight.

2. *Implementation Barriers to Disclosure*

A host of separate transparency barriers arise not from the text and structure of state public records laws, but from defects in their application. Hostile government actors can subvert the intent of the statute by delaying the public records process and refusing to release records. Budgetary constraints may curtail the ability of state and local agents to act quickly and effectively to comply with requests. And a variety of judicial barriers—including a lack of meaningful judicial appeal—can prevent the judicial branch from serving as an effective check on state and local government discretion.

a. *Hostile Government Actors*

Government hostility toward public records requirements serves as an additional barrier to disclosure. In the state and local context—as in the

³⁰⁴ THE SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (2019), <https://www.sentencingproject.org/wp-content/uploads/2017/08/Private-Prisons-in-the-United-States.pdf> [<https://perma.cc/8ZAZ-TDRS>].

³⁰⁵ *Id.* While New Mexico applies a totality-of-the-circumstances approach to whether public records coverage extends to private companies, see *Pacheco v. Hudson*, 415 P.3d 505, 511 (N.M. 2018), the courts do not appear to have resolved whether this coverage extends to private prisons.

³⁰⁶ See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (noting that FOIA was intended to serve as a “check against corruption”); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1848–49 (2015) (describing harms of excessive secrecy in policing).

³⁰⁷ See, e.g., *State ex rel. Freedom Commc’ns, Inc. v. Elida Cmty. Fire Co.*, 697 N.E.2d 210, 213 (1998) (holding that private firefighters are subject to public records law); *Whether a Volunteer Fire Dep’t is Subject to the Open Records Act*, Op. Att’y Gen. of Tex., No. JM-821 (Nov. 17, 1987) (announcing that a volunteer fire department—a nonprofit corporation—is a “governmental body” subject to the Texas Open Records Act).

federal context—there are often large discrepancies in how government actors implement transparency laws. The willingness of agency officials to comply with transparency requirements can have a significant impact on the transparency effects of state public records laws, particularly requests from media or advocacy organizations.³⁰⁸

While this is true at all levels of government, such willful noncompliance with public records statutes often has an outsized effect at the state and local level, where barriers to enforcement of state public records laws often leave requesters with even fewer options for challenging an unreasonable denial or excessive fee determination. As a consequence, individual public records officers wield significant power and discretion over the practical availability of public information. In this way, they resemble the traditional “street-level bureaucrat” in that they operate relatively autonomously and the bureaucratic decisions they make can prove sticky and difficult to overturn.³⁰⁹

The attitude of individual government officials toward transparency laws is often influenced by the broader culture within a particular government unit. Many agencies, of course, take pride in their public records work and view their compliance with the law as a critical part of the democratic process.³¹⁰ But others foster a culture of secrecy and noncompliance.³¹¹ The New York City Police Department, for one, has long been accused of permitting an entrenched culture of secrecy and willful disregard for state public records law to flourish.³¹² Similarly, judges in some states have likewise proven hostile to transparency laws, imposing a cramped and narrow view of what these laws require.³¹³ These judicial

³⁰⁸ One study of law enforcement agencies’ compliance with public records requests in Florida found that if records “custodians felt some kind of sympathy or affinity for either the requesters or the people named in the documents, they would grant preferential treatment to the person for whom they sympathized.” Kimball, *supra* note 17, at 342.

³⁰⁹ MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 13, 16–18 (2010).

³¹⁰ See, e.g., CTR. FOR EFFECTIVE GOV’T, MAKING THE GRADE 2 (2015) (describing the federal Department of Agriculture’s “exceptional performance in processing” and strong disclosure rules).

³¹¹ See, e.g., *Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, 493 S.W.3d 375, 389 (Ky. Ct. App. 2016) (chastising a state agency for its “culture of secrecy”); Geraghty & Velez, *supra* note 17, at 458–62 (describing the “culture of secrecy” that exists at the Alabama Department of Corrections).

³¹² See, e.g., *Bronx Defenders v. N.Y.C. Police Dep’t*, No. 156520/2016 (May 19, 2017) (order denying cross-motion to dismiss) (chastising the police department for engaging in “‘gotcha’ litigation tactic[s]”); OFFICE OF BILL DE BLASIO, OFFICE OF PUB. ADVOCATE FOR THE CITY OF N.Y., BREAKING THROUGH BUREAUCRACY 13 (2013) (giving NYPD an “F” transparency grade for failing to respond to 31% of FOIL requests).

³¹³ See, e.g., Christian Sheckler & Ken Armstrong, *When Public Records Aren’t Public*, PROPUBLICA (Aug. 3, 2018), <https://www.propublica.org/article/elkhart-indiana-when-public-records-arent-public> [<https://perma.cc/QXA4-VCAW>] (describing an Elkhart, Indiana judge’s repeated denial of

attitudes toward transparency statutes may fluctuate drastically as even a single member joins or leaves the bench.³¹⁴ The behavior of these individual government officials empowered to act on transparency issues—as well as the broader cultural attitudes toward transparency requirements that these government entities foster—can have a significant impact on the broader transparency ecosystem.

b. Reduced Resources and Expertise

State and local governments often lack sufficient resources to manage and respond to public records requests,³¹⁵ particularly at the local level, where many town and municipal governments operate on tight budgets.³¹⁶ The requirements imposed by public records laws must be balanced against a multitude of other competing demands, such as funding schools, fixing roads, and providing adequate police and firefighting services.³¹⁷ These financial pressures can hinder the public records process at the state and local level, leading to delayed responses or efforts by government officials to skirt the boundaries of the law in order to conserve government resources.

These budgetary constraints can also have further effect. Professor Pozen has argued that the burdens FOIA imposes—financial and otherwise³¹⁸—appear “less sensible . . . when the relevant bureaucracies are already highly regulated and professionalized.”³¹⁹ Many local agencies, in contrast, are situated at the border between government action and community engagement. They operate more informally than federal or state agencies, and the procedural requirements binding these local agencies are

public records requests for even routine court documents such as briefs filed with the court); *see also* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 199–200, 204–11 (2013) (describing the federal judiciary’s tendency to ignore de novo review requirement of FOIA claims despite Congress’s decision to override a presidential veto to require de novo review).

³¹⁴ *See, e.g.*, Telephone Interview with Fritz Byers, *supra* note 252 (explaining that the loss of a single pro-transparency justice in 2002 significantly shifted the Ohio Supreme Court’s treatment of state public records law).

³¹⁵ *See* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 172–73 (1991) (describing the funding difficulties confronted by many state agencies); *State and Local Fiscal Facts: 2018*, *supra* note 176 (noting that the state “budget environment remains tight” and counties “face a constraining fiscal environment”); *see also* Interview with Chris Voss, *supra* note 104 (noting that the state environmental agency budget had been cut in half since 2000 and the staff now struggles to complete public records requests within the statutory timeframe).

³¹⁶ *See* discussion *supra* note 176 and accompanying text.

³¹⁷ In contrast, FOIA administrative costs represented 0.011% of federal agencies’ total department budgets between 1975 and 2015. *See* A.J. Wagner, *Essential or Extravagant: Considering FOIA Budgets, Costs and Fees*, 34 GOV’T INFO. Q. 388, 392 (2017).

³¹⁸ *See* discussion *supra* note 116.

³¹⁹ Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1130.

often unclear.³²⁰ Many local government officials serve in an unpaid, volunteer capacity,³²¹ and concerns about a lack of professionalization at the local level have led courts to refrain from extending deference to local agencies and to invalidate local agency action based on nondelegation principles.³²² If we accept the inverse of Professor Pozen's point—that with less professionalized bureaucracies, enhanced public oversight becomes more valuable—then public records laws would seem to be more prudent in the context of local administration.

Turning to the specific context of public records laws, state and local government officials sometimes lack sufficient expertise regarding the requirements of the law. Few agencies can afford dedicated public records officers, even when the public records caseload would support it.³²³ As a result, government officials responding to requests often lack an underlying familiarity with the law itself, and they issue responses that either misconstrue or outright ignore the requirements of the statute.³²⁴ One journalist at a national news outlet characterized this knowledge deficit as the single most significant impediment to disclosure at the state and local level.³²⁵

Some government officials responding to public records requests at the state and local level also lack the technical expertise required to respond to requests requiring electronic searches.³²⁶ While federal agencies

³²⁰ Davidson, *supra* note 34, at 572.

³²¹ *Id.* at 623.

³²² *See, e.g.*, *Marta v. Sullivan*, 248 A.2d 608, 610 & n.3 (Del. 1968) (invalidating a local ordinance in part over concerns that the ordinance would delegate authority to “neighboring residents,” which would include “transients, boarders, visitors, and summer-time tenants”); *see also* Davidson, *supra* note 34, at 623–24 (noting that the continued “vibrant[cy]” of the nondelegation doctrine at the local level could be attributed to the “relative informality of local boards,” and arguing that “[l]egislative standards that might be acceptable when given to a deeply resourced, professionally staffed traditional agency may become more troubling when community members are tasked with the decision making”).

³²³ *See, e.g.*, Interview with Wendy Houston Anderson, *supra* note 185 (Vermont state agency employee describing the extent to which employees must divert time from primary duties to respond to public records requests); *see also* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 521–22 (2017) [hereinafter Seifter, *Gubernatorial Administration*] (noting that “resource-strapped, under-staffed agencies may lack sufficient numbers of employees with appropriate qualifications”).

³²⁴ *See, e.g.*, Kimball, *supra* note 17, at 331 (finding that among the records custodians surveyed “[v]ery few had any structured training in the public records law” and “almost all of them said they needed help understanding Florida’s Public Records Law”); *FOI Audits, Alabama*, NAT’L FREEDOM OF INFO. COAL., <https://www.nfoic.org/foi-audits#ALABAMA> [<https://perma.cc/772L-EZZF>] (finding that 52% of sheriffs’ offices in Alabama surveyed rejected public records requests, often in violation of state law, and attributed this noncompliance in part to a lack of understanding of the law’s requirements).

³²⁵ Interview with Steve Eder, *supra* note 28.

³²⁶ *See, e.g.*, WASH. STATE AUDITOR’S REPORT, *supra* note 76, at 5 (“Maintaining records today requires investments in information technology to organize, store, secure, search and inventory records,

are often able to adopt technical solutions that allow for increasingly complex digital searches,³²⁷ many government entities at the state and local level struggle with even straightforward requests for electronic records such as e-mails or text messages.³²⁸ In 2018, for example, when an activist submitted a public records request to the Seattle mayor's office requesting a search of the mayor and his aides' text messages, staff members placed their phones on copy machines and produced photocopied images of responsive messages.³²⁹ This combination of reduced resources and expertise serves as a functional barrier to disclosure at the state and local level.

c. Lack of Meaningful Judicial Appeal

Litigating a public records request is expensive and time-consuming. This is as true for FOIA as it is for state transparency statutes. But while the average requester at any level of government has neither the skills nor the resources necessary to file a lawsuit in court, repeat FOIA requesters operating on a national scale are able to file a federal lawsuit relatively quickly, efficiently, and inexpensively. Increasingly, a handful of lawyers working on behalf of media and advocacy organizations are taking the lead in enforcing the provisions of FOIA that are most relevant to the public.³³⁰ Fifty-six percent of all FOIA lawsuits filed in 2018 were filed by nonprofit

and trained employees to manage them. Many governments told us they do not have sufficient resources to conduct these activities.”).

³²⁷ See, e.g., *Identifying Efficiencies when Leveraging Digital Tools for FOIA Processing*, OFFICE OF INFO. POL'Y, DEP'T OF JUSTICE (Mar. 14, 2013), <https://www.justice.gov/oip/blog/identifying-efficiencies-when-leveraging-digital-tools-foia-processing> [<https://perma.cc/HSB6-9X5X>] (describing pilot program by the DOJ using new technology to improve FOIA search and response time).

³²⁸ See, e.g., *Public Records Bill Must Remain Balanced and Affordable*, *supra* note 181 (objecting to broader affirmative disclosure requirements on the grounds that some local governments lack broadband service); Interview with Wendy Houston Anderson, *supra* note 185 (explaining the time and effort involved with learning to use software to conduct e-mail searches and redact records). A related problem is that some state and local governments maintain records in hard-to-search forms. The North Dakota state environmental agency, for example, maintains its public records request log by hand. See Fink, *supra* note 17, at 102.

³²⁹ Maass et al., *supra* note 242.

³³⁰ See Christine Mehta, *Annual Report: FOIA Lawsuits Reach Record Highs in FY 2018*, FOIA PROJECT (Nov. 12, 2018), <http://foiaproject.org/2018/11/12/annual-report-foia-lawsuits-reach-record-highs-in-fy-2018/> [<https://perma.cc/UF8K-B7H3>].

advocacy groups.³³¹ And the *New York Times* alone filed seventeen FOIA lawsuits in the first eighteen months of the Trump Administration.³³²

These decisions often have far-reaching effects. They set important judicial precedents interpreting the scope and application of the law, and they help enforce the law's mandate across the federal government.³³³ Negotiated settlements of public records lawsuits also play a critical role in holding agencies to account. This is especially true in the context of media requests. At the federal level, reporters routinely agree to dismiss their FOIA lawsuit in exchange for the records they requested.³³⁴ Such litigation allows the media to use the courts as a forcing mechanism to compel the agency to respond, allowing reporters to cut the lengthy FOIA line. This is not the most efficient way to ensure media access to records. But it does ensure a timely response and make the prospect of judicial enforcement real.³³⁵

These national media outlets and advocacy organizations face higher barriers to entry when litigating at the state level. Even an experienced FOIA litigator will not have the requisite bar qualifications or the knowledge of state law and practice required to litigate in most state courts. And hiring local counsel to litigate usually costs between \$20,000 and \$30,000 but can often cost far more.³³⁶ As a result, national media outlets

³³¹ FOIA Project Staff, *FOIA Suits Filed by Nonprofit/Advocacy Groups Have Doubled Under Trump*, FOIA PROJECT (Oct. 18, 2018), <http://foiaproject.org/2018/10/18/nonprofit-advocacy-groups-foia-suits-double-under-trump/> [<https://perma.cc/NM4L-L6ZY>].

³³² FOIA Project Staff, *Media Lawsuits Seeking Government Records Jump Under Trump*, FOIA PROJECT (Aug. 2, 2018), <http://foiaproject.org/2018/08/02/media-foia-lawsuits-jump-under-trump/> [<https://perma.cc/6JEQ-UPDB>].

³³³ See, e.g., David McCraw, *Think FOIA Is a Paper Tiger? The New York Times Gives It Some Bite*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/insider/foia-freedom-of-information-act-new-york-times.html> [<https://perma.cc/6V3H-42AA>] (“By suing regularly, [the *New York Times*] hope[s] to achieve two things. We put agencies on notice that we will take them to court if our requests are not handled properly, and it gives us a shot at shaping the law through court decisions.”).

³³⁴ See, e.g., Stipulation & Order of Settlement & Dismissal at 1, *N.Y. Times Co. v. U.S. Dep’t of Justice*, No. 18-cv-2054 (S.D.N.Y. Aug. 9, 2018), ECF No. 16 (agreeing to a voluntary dismissal of a FOIA complaint in exchange for the production of records); Stipulation & Order of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) at 2, *N.Y. Times Co. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 17-cv-2144 (S.D.N.Y. June 8, 2018), ECF No. 35 (same). The author assisted with both of these cases while working as an attorney for the *New York Times*.

³³⁵ Scholars have previously characterized negotiated FOIA settlements without attorneys’ fees as a loss to the requester—an indication that the lawsuit never had merit in the first place. See Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 713 n.152 (2002). To the contrary, such lawsuits can serve as an important transparency tool, particularly for journalists. See sources cited *supra* note 334.

³³⁶ See E-mail from David McCraw, *supra* note 12.

and other advocacy organizations rarely litigate state public records requests. The organizations that lead the way in enforcing FOIA are relatively powerless when it comes to state public records laws.³³⁷

In theory, local media outlets could adopt a similar model. Larger media and nonprofit organizations operating on a national scale could serve as the public's enforcer of the federal public records law, while local media and advocacy organizations could enforce various state public records laws. But the financial costs involved are often prohibitive for these local organizations. Many outlets do not employ an in-house lawyer, but instead rely on outside counsel to meet their legal needs.³³⁸ For these organizations, public records lawsuits—which are expensive, time consuming, and difficult to win—will rarely justify the costs required to fight.³³⁹

The consequences can be far-reaching. Most immediately, media and advocacy organizations are unable to obtain the records required to report on the government. But the absence of public records litigation also leads to broader ambiguity in the law. Many state laws contain expansive or vague provisions,³⁴⁰ and without plaintiffs challenging government records responses, large swaths of the public records laws are left undefined by the courts. This makes it more difficult for requesters and government officials alike to determine the scope and meaning of the law. This problem is particularly acute when it comes to public records exemptions. In West Virginia, for example, nearly half of the exemptions contained in the public records act have never been interpreted by a state judge.³⁴¹ In contrast, there are hundreds of federal court decisions addressing the meaning and scope

³³⁷ For a discussion of the structural barriers to civil society monitoring of state agencies generally, see Seifter, *Further from the People?*, *supra* note 34, at 109–10.

³³⁸ KNIGHT FOUND., IN DEFENSE OF THE FIRST AMENDMENT 26 (2016), https://knightfoundation.org/wp-content/uploads/2016/04/KF-editors-survey-final_1.pdf [<https://perma.cc/PWC3-9CP2>] (survey on file with the Knight Foundation) (in a survey of newspaper editors, 80% of respondents reported relying on outside counsel).

³³⁹ *See id.* at 9, 13 (65% of respondents believe that the news industry is less able today than it was ten years ago to pursue legal action involving free expression; of that 65%, 89% attribute the decline to financial restraints).

³⁴⁰ *See* discussion *supra* notes 263–264 (describing the vague language used in many public records laws' fee requirements).

³⁴¹ Patrick C. McGinley & Suzanne M. Weise, *West Virginia Open Government Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/west-virginia> [<https://perma.cc/H46K-EFZ9>]. The large numbers of exemptions in some states, as well as the frequency with which new exemptions are added, strongly suggests that this is an issue that plagues other states' public records laws as well. *See, e.g., supra* notes 249–250 (describing the large number of exemptions in Florida, as well as the frequent enactment of new exemptions).

of each FOIA exemption.³⁴² And without clear guidance from the courts, state and local governments have latitude to impose very broad or contorted definitions upon textually narrow exemptions.

The paucity of public records lawsuits at the state and local level may also reduce agencies' incentive to comply with the law. The chance that an agency's intransigence or delay will have real consequence is low, and overworked state and local government employees likely have little incentive to focus on public records compliance when they are faced with other pressing concerns. This makes it more difficult for all requesters—not just nonprofit and media requesters—to obtain public records. The absence of a viable judicial remedy has the potential to render public records laws ineffective.³⁴³ As one media editor noted, “Government agencies are well aware that we do not have the money to fight. More and more, their first response to our records request is ‘Sue us if you want to get the records.’”³⁴⁴

3. *External Barriers to Disclosure*

Pervasive weaknesses in public oversight operate as a third barrier to public disclosure. The absence of a robust media and civil society at the subfederal level leaves the public without access to the information necessary to hold the government to account. These external factors form the third category of obstacles to effective transparency mechanisms in state and local government.

a. *Decline of Local Media*

Local media—especially local print media—has experienced a precipitous decline over the past decade.³⁴⁵ Between 2004 and 2018, roughly one in five local newspapers in the United States closed.³⁴⁶ Today, half of the counties in the United States have only one newspaper—

³⁴² *Court Decisions Overview*, OFFICE OF INFO. POL'Y, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/oip/court-decisions-overview> [<https://perma.cc/4X2D-K4V8>] (“Each year the federal courts issue hundreds of decisions in FOIA cases, addressing all aspects of the law.”).

³⁴³ *See, e.g.*, Geraghty & Velez, *supra* note 17, at 461–62 (stating that the Alabama Department of Corrections “ignores Open Records Act requests for months, producing public documents only after repeated threats of litigation”).

³⁴⁴ KNIGHT FOUND., *supra* note 338, at 27; *see also* Timothy B. Wheeler, *Hogan ‘Executive Privilege’ Email Troubles Open-Government Advocates*, BALT. SUN (Feb. 20, 2015), <https://www.baltimoresun.com/politics/bs-md-hogan-executive-privilege-20150220-story.html> [<https://perma.cc/Q8HL-28QN>] (Director of Maryland Press Association noted that after receiving a public records denial, “[u]nless you’re willing to go to court, you’re over a barrel”).

³⁴⁵ This decline is generally attributed to the significant drop in advertising revenue as advertising activity increasingly moves online. *See* PEN AM., *supra* note 94, at 24–31.

³⁴⁶ ABERNATHY, *supra* note 20, at 8.

typically a small weekly—and around 200 counties have no newspaper at all.³⁴⁷ Moreover, the local newspapers that still exist have seen their advertising and subscription revenue models collapse. Over the same fifteen years, weekday print circulation has declined 40%, leading to widespread layoffs and reduced local coverage.³⁴⁸ These reductions have curtailed newspapers' ability to oversee state and local government. The number of statehouse reporters alone fell 35% between 2003 and 2014.³⁴⁹

This decline has had a substantial effect on local governance. One study found that in the wake of a local newspaper closure, the number of government employees, tax revenue per capita, and cost of municipal borrowing all increased.³⁵⁰ The government wage ratio—or the ratio between salaries at the top and bottom of an organization—also rose. The authors concluded that local newspapers are especially critical in localities that already suffer from “low quality governance.”³⁵¹ Other studies have demonstrated that reduced local media coverage corresponds with less informed voters, lower voter turnout, and reduced incentives for local politicians to serve as effective advocates for their constituents.³⁵²

The decline of local media has had an impact on the enforcement of local transparency laws as well. Reporters rely heavily on public records requests to inform their investigative reporting. The media's use of these statutes, in turn, improves the functioning of these public records laws. By submitting requests, engaging in administrative-level conversations and negotiations to expedite the requesting process, and challenging public records delays and denials in court, journalists play an outsized role in enforcing these transparency statutes. And the loss of local media participation in the public records process—either because the outlet itself

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 14.

³⁴⁹ Katerina Eva Matsa & Jan Lauren Boyles, *America's Shifting Statehouse Press*, PEW RES. CTR. (July 10, 2014), <https://www.journalism.org/2014/07/10/americas-shifting-statehouse-press/> [<https://perma.cc/E38G-8WB4>].

³⁵⁰ Pengjie Gao et al., *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance* 4–5 (Hutchins Ctr., Working Paper No. 44, 2018), <https://www.brookings.edu/wp-content/uploads/2018/09/WP44.pdf> [<https://perma.cc/4GLK-SH4C>].

³⁵¹ *Id.* at 4.

³⁵² *Id.* at 2. These governance benefits must be considered, however, against the backdrop of a more general decline in the public's confidence in the media. *See, e.g.*, GALLUP/KNIGHT FOUND., INDICATORS OF NEWS MEDIA TRUST 3 (2018) (69% of adults surveyed stated that their trust in the media has declined in the past decade); Sabrina Tavernise & Aidan Gardiner, 'No One Believes Anything': Voters Worn Out by a Fog of Political News, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html> [<https://perma.cc/2ZJJ-W8HZ>] (describing the public's loss of faith in the media). Put another way, even the highest quality reporting utilizing the most well-crafted transparency laws will be ineffective if the public has stopped listening.

has folded or because it no longer has the resources to engage in investigative reporting and mount legal challenges—reduces the quality of compliance with transparency requirements more broadly.

Denver offers a useful case study. For more than a century, the city was home to two competing daily newspapers: the *Rocky Mountain News* and the *Denver Post*.³⁵³ For decades, the two newspapers litigated landmark public records lawsuits that ultimately helped define the scope of the state's public records law. Lawsuits filed by the two newspapers established whether private companies are subject to the open records laws,³⁵⁴ when e-mails sent by public officials are subject to disclosure,³⁵⁵ and whether the law requires a showing of special interest to access records.³⁵⁶ But the *Rocky Mountain News* closed in 2009 in the wake of declining revenue and corporate mismanagement.³⁵⁷ And in 2010, a hedge fund company assumed control of the *Denver Post*'s management and operations.³⁵⁸ The company made drastic cuts to newsroom staff, reducing the number of employees from a peak of 300 down to around 70.³⁵⁹ Unsurprisingly, the paper has also stopped investing in access litigation. According to a search of Westlaw and Lexis, neither publication has filed a public records lawsuit for nearly a decade.³⁶⁰

The trend in Denver is emblematic of the state of local media in many other towns and cities across the country. The company that owns the *Denver Post* owns more than fifty other newspapers in the United States,

³⁵³ See *Statement from the Companies*, DENVER POST (May 11, 2000), <https://extras.denverpost.com/business/statement0511.htm> [<https://perma.cc/7U39-CXNR>].

³⁵⁴ See, e.g., *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d 36, 41 (Colo. App. 2000).

³⁵⁵ See, e.g., *Denver Publ'g Co. v. Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 121 P.3d 190, 203 (Colo. 2005).

³⁵⁶ See, e.g., *Denver Publ'g Co. v. Dreyfus*, 520 P.2d 104 (Colo. 1974).

³⁵⁷ See Bob Diddlebock, *Who Really Killed the Rocky Mountain News?*, TIME (Mar. 6, 2009), <http://content.time.com/time/business/article/0,8599,1883345,00.html> [<https://perma.cc/7G8N-UY5F>].

³⁵⁸ Pete Vernon, *The Media Today: Denver Post Cuts Fit a Disturbing Pattern at Hedge-Fund Owned Papers*, COLUM. JOURNALISM REV. (Mar. 16, 2018), https://www.cjr.org/the_media_today/denver-post-cuts-digital-first.php [<https://perma.cc/PVW2-2Y4J>]; Laurel Wamsley, *'Denver Post' Calls Out Its 'Vulture' Hedge Fund Owners in Searing Editorial*, NAT'L PUB. RADIO (Apr. 9, 2018), <https://www.npr.org/sections/thetwo-way/2018/04/09/600831352/denver-post-calls-out-its-vulture-hedge-fund-owners-in-searing-editorials> [<https://perma.cc/WX36-A6ZQ>].

³⁵⁹ See Vernon, *supra* note 358.

³⁶⁰ The most recent lawsuit available on Westlaw or Lexis is *Denver Post Corp. v. Ritter*, 255 P.3d 1083 (Colo. 2011). It is possible that the *Denver Post* filed a lawsuit since then that settled without a published decision.

and it has made similar cuts to papers throughout the country.³⁶¹ But even for newspapers that remain independently owned, the financial pressures are intense. Many no longer have the luxury of engaging in access litigation. In a Knight Foundation survey of media editors, 65% of respondents believed that the industry is less able to pursue legal action around First Amendment-related issues than it was ten years ago.³⁶²

Local media plays a critical role in the transparency ecosystem through the aggressive use and enforcement of state public records laws. The collapse of local media has led to fewer investigative resources devoted to covering state and local government, fewer public records requests submitted from the media, and fewer public records challenges pursued in court. While some major media and advocacy organizations are still devoting resources to access litigation, those national organizations face both financial and logistical barriers to litigating in state court. In this way, the decline of the media as the public enforcer of public records laws has had a significant negative impact on the broader local transparency ecosystem.

b. Weaknesses in Civil Society

Civil society actors have long played a crucial role in government oversight. This is particularly true for civil society groups that “pursu[e] the interests of a diffuse public.”³⁶³ These organizations are often focused on a particular subset of government action or on trans-substantive government issues, such as prison reform or enhanced protection for civil liberties.³⁶⁴ At the federal level, civil society oversight of the federal government expanded dramatically between the 1950s and ’70s with the enactment of a range of federal transparency laws and the rise of “monitory democracy,” as well as with the increased power and influence of civil rights, antiwar, and other activist and public interest groups.³⁶⁵ Yet the largest and most

³⁶¹ See Jack Shafer, *This Is How a Newspaper Dies*, POLITICO (May 13, 2018), <https://www.politico.com/magazine/story/2018/05/13/denver-post-profits-newspaper-industry-218360> [<https://perma.cc/C5UY-A3PL>]; Wamsley, *supra* note 358.

³⁶² KNIGHT FOUND., *supra* note 338, at 1; see also Seifter, *Gubernatorial Administration*, *supra* note 323, at 525 (“The media cannot report on what it cannot see, and state media groups may not have sufficient resources or incentives to conduct extensive records requests.”).

³⁶³ Seifter, *Further from the People?*, *supra* note 34, at 135.

³⁶⁴ See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 547–51 (2015).

³⁶⁵ MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW* 233–37, 249–51 (2015). Many have argued that civil society across the country is now on the decline. Scholars and journalists have ascribed this decline to a variety of factors. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 235–36 (2000) (arguing that the rise of television strongly

prominent civil society organizations have historically paid less attention to state and local government, even as the size and power of these lower levels of government have expanded in recent decades.³⁶⁶

Smaller, more locally focused civil society actors have only partially filled this gap. To be sure, there are countless organizations—ranging in size and scope from state chapters of nationally recognized advocacy groups to small neighborhood organizations—monitoring state and local government and advocating for policy change.³⁶⁷ But these state and local public interest groups often operate at a significant financial disadvantage. At the state level, lobbying activities are largely dominated by private sector interests, even more so than at the federal level. Public interest groups represented only 12.4% of lobbying activity at the state level in 2007, and 86% of state lobbying expenditures that year were incurred by corporations and trade associations.³⁶⁸

State-level public interest groups also have fewer resources than similar organizations advocating on a national level, placing these state-level public interest groups at a greater financial disadvantage in comparison with the private interest groups lobbying against them.³⁶⁹ This imbalance makes it more difficult for state and local public interest groups to engage in sustained government oversight.³⁷⁰ A comparison of public records lawsuits filed at the federal versus the state and local level illustrates this dynamic. Lawsuits filed by national nonprofit organizations like the ACLU comprised more than half of all FOIA lawsuits in 2018—roughly 500 lawsuits in total.³⁷¹ While comparative litigation data are not

contributed to a decline in civil society activities); Emma Green, *What America Lost as Women Entered the Workforce*, ATLANTIC (Sept. 19, 2016), <https://www.theatlantic.com/politics/archive/2016/09/what-women-lost/500537/> [<https://perma.cc/FX2S-GSVK>] (arguing that a partial explanation for why civil society activity has declined is that women moved into the workforce and replaced unpaid activism and volunteerism with paid work).

³⁶⁶ Seifter, *Further from the People?*, *supra* note 34, at 130.

³⁶⁷ See, e.g., Christopher A. Cooper et al., *Perceptions of Power: Interest Groups in Local Politics*, 37 ST. & LOC. GOV'T REV. 206 (2005).

³⁶⁸ Seifter, *Further from the People?*, *supra* note 34, at 137–38. At the federal level, in contrast, “business-oriented” lobbyists constituted an estimated 51.5% of all lobbyists in 2006. *Id.*

³⁶⁹ *Id.* at 138–39 (“In addition to being outnumbered and outspent on lobbying, public interest-oriented groups in the states are also likely to be comparatively resource poor.”); see also Seifter, *Gubernatorial Administration*, *supra* note 323, at 524 (noting a “probusiness skew among state lobbyists”).

³⁷⁰ See Jiahuan Lu, *Organizational Antecedents of Nonprofit Engagement in Policy Advocacy: A Meta-Analytical Review*, 47 NONPROFIT & VOLUNTARY SECTOR Q. 177S, 186S–87S (noting that larger, more professionalized, and better funded nonprofits are more likely to engage in policy advocacy work).

³⁷¹ FOIA Project Staff, *supra* note 331.

collected at the state level, the dearth of state-level public records lawsuits overall suggests that state and local public interest groups are not using the courts to compel public records at these lower levels of government.³⁷² Moreover, while there is limited data on the percentage of state and local public records requests submitted by nonprofit organizations, anecdotal evidence suggests that interest groups submit fewer state and local public records requests than they do FOIA requests.³⁷³ This combination of reduced media and civil society activity leaves large gaps in public oversight in comparison with the federal transparency regime.

IV. TRANSPARENCY DESERTS

The example of state public records laws helps illuminate the various factors that either advance or impede transparency efforts. Through this analysis, three central features of a local transparency ecosystem emerge: (1) the substance of transparency requirements binding the government; (2) the resources, expertise, and attitudes of state and local government actors tasked with implementing these laws; and (3) the robustness and health of local media and civil society organizations. This Part examines localities in which poor performance on all three factors have combined to create a downward spiral of reduced disclosure and public oversight—what I refer to as a transparency desert.³⁷⁴

A. *The Case of Kansas*

Elucidating the concept of local transparency deserts presents something of a paradox: a true transparency desert, by definition, will be invisible. In localities that fail all three prongs of the transparency ecosystem, there will be no journalists documenting the ways that government officials have subverted transparency laws to hide government malfeasance. Government attitudes towards transparency will be obscured if there is no one to request information. A perfect transparency desert will hide both the government's failure to comply with transparency obligations and any underlying corruption or wrongdoing.

³⁷² See discussion *supra* note 88–90 and accompanying text.

³⁷³ Compare 2017 Vermont State Dataset, *supra* note 78 (roughly 1% of requests submitted to state agencies were from identifiable nonprofit organizations), with Max Galka, *Who Uses FOIA? – An Analysis of 229,000 Requests to 85 Government Agencies*, FOIA MAPPER (Mar. 13, 2017), <https://foiamapper.com/who-uses-foia/> [<https://perma.cc/3R3A-5TR6>] (analysis of 229,000 FOIA requests submitted to eighty-five federal agencies found that roughly 7.5% of requests originated from nonprofit entities).

³⁷⁴ This term borrows from the idea of a “news desert.” See discussion *supra* note 20.

In light of these obstacles, this Section explores a somewhat imperfect illustration of a transparency desert: the case of Kansas.³⁷⁵ To begin, the transparency regime binding state and local government in Kansas is relatively ineffective. The state has a weak public records law. The statute itself contains fifty-five exemptions, including a broad exemption for nearly all “[c]orrespondence between a public agency and a private individual,”³⁷⁶ and there are 250 or so additional exemptions from disclosure scattered throughout the state code.³⁷⁷ The law does not contain a fee waiver for requests submitted in the public interest, nor are there meaningful limits on the amount that government entities may charge requesters: they are free to impose a “‘reasonable’ fee,” which may include the cost of time spent responding to the request.³⁷⁸ Further, the law contains no provisions providing a route for administrative appeal.³⁷⁹ And while legislative bodies are covered by the law, the records of individual legislators are exempt, even those maintained in performance of their official duties.³⁸⁰

Although this Article focuses attention on a single category of transparency statutes, the substance of other statutory transparency requirements in the state affect the broader transparency ecosystem as well. And in Kansas, these other transparency requirements are similarly flawed. It is one of the few states that permits anonymous authors to sponsor legislation, and in 2017, 94% of all laws enacted that year were sponsored anonymously.³⁸¹ Kansas was the last state in the nation to permit the

³⁷⁵ I refer to this as an “imperfect” example because local news outlets have exposed governmental deficiencies in the state. *See infra* note 399.

³⁷⁶ KAN. STAT. ANN. §§ 45-215 to -250 (2019).

³⁷⁷ *Government Records*, KAN. OPEN GOV’T, <http://medialaw.ku.edu/opengovt/kansasstatutes.shtml> [<https://perma.cc/RE84-W6U7>].

³⁷⁸ Joe Stumpe, *Kansas Gets F Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015, updated Nov. 12, 2015), <https://publicintegrity.org/accountability/kansas-gets-f-grade-in-2015-state-integrity-investigation/> [<https://perma.cc/JH5L-UGJY>].

³⁷⁹ The attorney general’s office can receive complaints from the public about an agency’s failure to comply with an open records request, but it does not operate as a formal and binding appeals body. *Koma-Kora Complaint Form*, KAN. ATT’Y GEN., <https://ag.ks.gov/complaint-center/koma-kora-investigation-request> [<https://perma.cc/NH5B-9HE4>].

³⁸⁰ KAN. STAT. ANN. § 45-217(g)(3)(B).

³⁸¹ Judy L. Thomas & Bryan Lowry, *How Kansas Lawmakers Keep You from Finding Out What They’re Doing—Until It’s Too Late*, KAN. CITY STAR (Nov. 12, 2017), <https://www.kansascity.com/news/politics-government/article184176596.html> [<https://perma.cc/3FWS-ZNMW>].

unsealing of criminal affidavits,³⁸² and it has no open data law requiring that the government affirmatively publish certain data online in an open format.³⁸³ In 2015, the Center for Public Integrity gave the state a failing grade for transparency and accountability regarding public access to information, electoral oversight, executive accountability, judicial accountability, the state budget process, procurement, internal auditing, lobbying disclosure, and ethics enforcement agencies.³⁸⁴

These weaknesses in the state statutory regime are amplified by certain structural features of state government in Kansas. Transparency statutes operate in conjunction with other transparency mechanisms, such as periodic elections and legislative oversight of the executive and judicial branches. In Kansas, however, the state legislature is only part-time. It meets in regular session for only ninety days every two years,³⁸⁵ and legislators are paid just \$88.67 per day.³⁸⁶ Moreover, some state legislators employ relatively small staffs, further limiting their ability to engage in time-consuming investigatory and oversight activity.³⁸⁷

Second, government actors in Kansas have been notoriously wary of transparency requirements, particularly during the eight-year reign of Sam Brownback,³⁸⁸ who served as governor of Kansas from 2011 to 2018.³⁸⁹ In 2012, Brownback pushed massive tax cuts through the legislature, commonly referred as the “Kansas experiment.”³⁹⁰ The law eliminated state income taxes for certain corporate entities and slashed individual income

³⁸² Laura Bauer et al., *When Cops Kill in Kansas, You Probably Won't Hear Their Names or See the Video*, KAN. CITY STAR (Nov. 12, 2017), <https://www.kansascity.com/news/politics-government/article184172776.html> [<https://perma.cc/VK92-S98W>].

³⁸³ Stumpe, *supra* note 378.

³⁸⁴ *Id.*

³⁸⁵ *Legislative Session Length*, NAT'L CONF. ST. LEGISLATURES (Dec. 2, 2010), <https://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx> [<https://perma.cc/QWP4-QTNB>].

³⁸⁶ Johnny Kauffman, *Low Pay in State Legislatures Means Some Can't Afford the Job*, NAT'L PUB. RADIO (Jan. 9, 2017), <https://www.npr.org/2017/01/09/508237086/low-pay-in-state-legislatures-means-some-cant-afford-the-job> [<https://perma.cc/CEA8-2QR5>].

³⁸⁷ *Full- and Part-Time Legislatures*, NAT'L CONF. ST. LEGISLATURES (June 14, 2017), <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx#gold> [<https://perma.cc/AT4H-A48H>].

³⁸⁸ *See infra* notes 395–399.

³⁸⁹ *Sam Brownback (2011–2018)*, KAN. ST. LIBR., <https://kslib.info/949/Sam-Brownback-2011-2018> [<https://perma.cc/J3MN-7559>].

³⁹⁰ Jeremy Hobson et al., *As Trump Proposes Tax Cuts, Kansas Deals with Aftermath of Experiment*, NAT'L PUB. RADIO (Oct. 25, 2017), <https://www.npr.org/2017/10/25/560040131/as-trump-proposes-tax-cuts-kansas-deals-with-aftermath-of-experiment> [<https://perma.cc/MJ45-WXZ8>].

tax rates.³⁹¹ By 2016, the state had lost nearly \$700 million in tax revenue per year,³⁹² forcing schools to implement four-day weeks and consolidate classes,³⁹³ and causing the state's bond rating to plummet.³⁹⁴ Underfunded state agencies and local governments had fewer resources to devote to public records compliance as well.

As the financial situation worsened, Brownback's administration began to take a harder line on public records requests. For example, it took the position that budget recommendations submitted by state agencies were predecisional and therefore exempt from disclosure, even though the agencies themselves asserted that the documents submitted to the Governor were final.³⁹⁵ The head of one advocacy organization in the state who routinely relies on public records requests lamented the blanket of secrecy that had settled over state government. "There's something about once that culture sets in," he noted, "[i]t's really difficult to move out of."³⁹⁶

This hostility toward disclosure requirements extended to state agencies as well. In the wake of the deaths of children under its supervision, for example, the Kansas Department for Children and Families asked family members to sign gag orders promising not to talk about the circumstances of the death or about the agency's involvement. Former agency officials reported receiving instructions not to document anything in the wake of a child's death and to shred any notes so that they could not be produced in response to open records requests.³⁹⁷ The agency also began

³⁹¹ Jim Tankersley, *Kansas Tried a Tax Plan Similar to Trump's. It Failed.*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/politics/kansas-tried-a-tax-plan-similar-to-trumps-it-failed.html> [https://perma.cc/R3D4-TWGZ].

³⁹² *Id.*

³⁹³ Emily Richmond, *School Building Upkeep Left to Local Taxpayers in Kansas, so Sometimes Sun Peers Through the Walls*, NAT'L PUB. RADIO (Apr. 22, 2019), <https://www.kcur.org/post/school-building-upkeep-left-local-taxpayers-kansas-so-sometimes-sun-peers-through-walls#stream/0> [https://perma.cc/R7AS-NPKZ]; Suzanne Perez Tobias, *Southeast Kansas District Implements Four-Day School Week*, WICHITA EAGLE (Apr. 19, 2016), <https://www.kansas.com/news/local/education/article72631157.html> [https://perma.cc/W5VR-YZEB].

³⁹⁴ Hobson, *supra* note 390.

³⁹⁵ Tim Carpenter, *Brownback Administration Exempting Cabinet Budget Plans from KORA*, TOPEKA CAP.-J. (Sept. 23, 2016), <https://www.cjonline.com/news/2016-09-23/brownback-administration-exempting-cabinet-budget-plans-kora> [https://perma.cc/38AU-E2WC]; Bryan Lowry, *Brownback's Office Won't Release Budget Documents*, WICHITA EAGLE (Sept. 23, 2016), <https://www1.kansas.com/news/politics-government/article103744216.html#> [https://perma.cc/LK4U-FEHY].

³⁹⁶ Laura Bauer et al., *'One of the Most Secretive, Dark States': What Is Kansas Trying to Hide?*, KAN. CITY STAR (Nov. 12, 2017), <https://www.kansascity.com/news/politics-government/article184179651.html> [https://perma.cc/2TPW-XQ8P].

³⁹⁷ Laura Bauer, *Secrecy Inside Child Welfare System Can Kill: 'God Help the Children of Kansas,'* KAN. CITY STAR (Nov. 12, 2017), <https://www.kansascity.com/news/politics-government/article184177786.html> [https://perma.cc/SL6P-ZJVK].

issuing high fee estimates, at one point charging nearly \$3,000 for copies of two days' worth of e-mails for six employees.³⁹⁸ It even ignored public records' requirements altogether. In one instance, a reporter submitted a request for records relating to the death of a ten-year-old who had been stabbed by his mother. The agency acknowledged that the records were subject to disclosure but stated that it "didn't have [the] staffing resources [at that time] 'due to its current workload of KORA requests.'"³⁹⁹

Third, Kansas has been disproportionately affected by the crisis in local media and civil society oversight. More than half of the counties in the state—nearly the entire western half of Kansas—do not have a daily newspaper.⁴⁰⁰ Between 2004 and 2016, three newspapers in the state either closed or merged, and another ten daily newspapers were converted into weeklies.⁴⁰¹ The state is tied for the fifth highest number of newspaper closures in the country, and it has the second highest number of closures per capita in the nation.⁴⁰² Moreover, the newspapers that remain have confronted severe reductions in newsroom staffing and declines in revenue. Between the mid-1990s and 2018, print circulation for the *Wichita Eagle*, the largest newspaper in Kansas, declined from 122,000 to 30,000.⁴⁰³ The newspaper was forced to cut newsroom staff down from more than 100 reporters to fewer than three dozen, and the newspaper is currently distributed in just 10 of the state's 105 counties, down from its peak distribution of 73 counties.⁴⁰⁴ The paper is now printed 200 miles away from Wichita, forcing reporters to adhere to very early reporting deadlines and reducing their ability to produce timely coverage of government meetings and other nighttime events.⁴⁰⁵

³⁹⁸ *State Legal Costs Impede KORA*, *supra* note 273.

³⁹⁹ Bauer et al., *supra* note 396. The newspaper that reported the story—the *Kansas City Star*—was later named a Pulitzer Prize finalist for “expos[ing] a state government’s decades-long “obsession with secrecy” and efforts to “suppress transparency and accountability in law enforcement agencies, child welfare services and other sectors of the government.” *The 2018 Pulitzer Prize Finalist in Public Service: The Kansas City Star*, PULITZER PRIZES, <https://www.pulitzer.org/finalists/kansas-city-star> [<https://perma.cc/XWG4-2VTX>].

⁴⁰⁰ See Yemile Bucay et al., *America’s Growing News Deserts*, COLUM. JOURNALISM REV. (2017), https://www.cjr.org/local_news/american-news-deserts-donuts-local.php [<https://perma.cc/F4CU-4Z4G>].

⁴⁰¹ PENELOPE MUSE ABERNATHY, UNC SCH. MEDIA & JOURNALISM, THE RISE OF A NEW MEDIA BARON AND THE EMERGING THREAT OF NEWS DESERTS app. 2 (2016), <http://newspaperownership.com/additional-material/closed-merged-newspapers-map/> [<https://perma.cc/RM62-LTAL>].

⁴⁰² *Id.*

⁴⁰³ ABERNATHY, *supra* note 20, at 21–22.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 22.

Civil society in the state also exhibits troubling weaknesses. Between 2013 and 2017, employment by social advocacy nonprofits in the state decreased 60%.⁴⁰⁶ Moreover, lobbyist spending has more than doubled in Kansas over the last ten years.⁴⁰⁷ And much of that money is unaccounted for: in 2013, nearly three-quarters of lobbying money was categorized as “unitemized,” meaning that expenditures were not linked to a specific legislator or event.⁴⁰⁸ While this lobbyist data is not broken down by commercial versus noncommercial interests, the vast sums of money flowing into the state lobbying apparatus and the lack of transparency as to its origins and destination at least suggests that public interest groups in the state are comparatively resource-poor in relation to their state-level industry opponents.⁴⁰⁹

In sum, Kansas measures poorly on all three central prongs of a local transparency ecosystem: the robustness of state transparency laws, the extent to which government actors effectively implement those laws, and the strength of local media and civil society. This has combined to create a downward transparency spiral in the state. Lack of media and civil society oversight has facilitated the executive branch’s disregard of public records requirements, allowed the legislature to enact new exemptions that reflect concentrated special interests, and permitted corporate lobbyists to spend ever-increasing funds in relative secrecy. These weaknesses in the public records law’s text and implementation, in turn, have made it more difficult for media and civil society actors to rely on state transparency laws to hold government officials accountable.

B. *Transparency Deserts and Federalism Theory*

While this Article primarily identifies holes in the transparency scholarship created by scholars’ neglect of the state and local transparency

⁴⁰⁶ Compare U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 2017 Nonprofit Establishment Employment & Wage Estimates, <https://www.bls.gov/bdm/nonprofits/nonprofits.htm> [<https://perma.cc/K9XX-7USQ>] (911 people employed in social advocacy organizations in Kansas), with U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 2013 Nonprofit Establishment Employment & Wage Estimates, <https://www.bls.gov/bdm/nonprofits/nonprofits.htm> [<https://perma.cc/K9XX-7USQ>] (2,251 people employed in social advocacy organizations in Kansas).

⁴⁰⁷ Reid Wilson, *Amid Gridlock in D.C., Influence Industry Expands Rapidly in the States*, WASH. POST (May 11, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/05/11/amid-gridlock-in-d-c-influence-industry-expands-rapidly-in-the-states/?utm_term=.be927545cbcf [<https://perma.cc/BP36-V862>].

⁴⁰⁸ Dion Lefler & Brent Wistrom, *74% of Lobbyist Spending on Kansas Lawmakers Unaccounted For*, KAN. CITY STAR (May 4, 2013), <https://www.kansascity.com/news/local/article318681/74-of-lobbyist-spending-on-kansas-lawmakers-unaccounted-for.html> [<https://perma.cc/35BD-WFSB>].

⁴⁰⁹ See Seifter, *Further from the People?*, *supra* note 34, at 138.

regime, the problem of transparency deserts has implications for a second body of literature: federalism scholarship. A central normative claim of federalism is that lower levels of government are both easier to monitor and restrain⁴¹⁰ and more reflective of citizens' preferences.⁴¹¹ This principle is reflected in the oft-stated maxim that state governments will be "closer to the people."⁴¹² Smaller and more local governments, the theory holds, allow citizens more direct access to government officials and greater ease of oversight.⁴¹³ Yet the state and local transparency pitfalls chronicled here would suggest that the opposite is true. They suggest that a key component of this modern accountability system—public records laws—is less available to monitor state and local governments than it is to monitor the federal government. The cumulative flaws in state transparency laws, in both structure and implementation, expose the fallacy of enhanced public oversight at smaller units of government.

Professor Miriam Seifter has chronicled the weaknesses of civil society oversight of state agencies and concluded that "[f]ar from the Antifederalist ideal of states as 'well guarded,' state administration today is a largely unguarded giant."⁴¹⁴ The shortcomings of the state transparency regime identified here suggest that this thesis should sweep even more broadly—that the accountability gaps Professor Seifter identifies at the state administrative level may exist throughout all branches of state government. But these implications also extend further. The theory that

⁴¹⁰ See Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 49 (2016) ("As the influential Antifederalist Federal Farmer put it, state governments ought to be both 'strong and well guarded.'" (quoting Letter XVII from the Federal Farmer to the Republican (Jan. 23, 1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 350, 356 (John P. Kaminski & Gaspare J. Saladino eds., 1995))).

⁴¹¹ See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 312 (M. Farrand ed., 1911) (Madison, J.) (arguing that federal elections should be regulated by the states because they were "best acquainted with the situation of the people"); see also Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) ("The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes . . .").

⁴¹² See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 41 (2013) (Alito, J., dissenting) ("Because the States are closer to the people, the Framers thought that state regulation of federal elections would 'in ordinary cases . . . be both more convenient and more satisfactory.'" (quoting THE FEDERALIST NO. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961))). See generally Seifter, *Further from the People?*, *supra* note 34, at 146–48 (discussing how scholars are in general agreement "that states are closer to the people," but casting doubt on "claims that state implementation offers the advantage of proximity to public eyes").

⁴¹³ Some federalism scholars have suggested that local government may offer a cure for the problem of the democratic deficit in the United States in which remote bureaucrats remove important decision-making processes from public view. See, e.g., Friedman, *supra* note 147, at 393.

⁴¹⁴ Seifter, *Further from the People?*, *supra* note 34, at 128 (citation omitted).

smaller levels of government are closer to the people would suggest that local governments would be even more “well guarded” than the states.⁴¹⁵ This review of public records laws suggests that the opposite is true—that the smaller the government, the greater the breakdown in public oversight.⁴¹⁶ It suggests that local governments have even fewer resources to devote to complying with public records requirements, and that members of the public face even steeper barriers to disclosure.

These pitfalls in the state public records regime also have implications for the states-as-laboratories view of federalism.⁴¹⁷ For this theory to work, the lessons learned from state experimentation must be disseminated—there must be informational channels in place to transmit word of experimental failures or successes to neighboring governments or to the public.⁴¹⁸ The existence of transparency deserts calls this assumption into question. The combination of poorly crafted transparency requirements, inadequate media and civil society oversight, and hostile government actors impedes the dissemination of information about state and local governance.

The existence of transparency deserts also implicates the “political market” view of federalism, or the view that jurisdictions compete with one another to present “the most appealing bundle of local laws, customs, and attitudes.”⁴¹⁹ This view is often traced back to Professor Charles Tiebout’s classic 1956 article *A Pure Theory of Local Expenditures*, which argued that “consumer-voters” may choose local governments based on individual preferences.⁴²⁰ The classic Tieboutian concept of local competition and

⁴¹⁵ See Gerken, *supra* note 125, at 23–24 (summarizing the view among some federalism scholars that “localities represent *better* sites for pursuing federalism’s values because they are closer to the people, offer more realistic options for voting with one’s feet, and map more closely onto communities of interest”).

⁴¹⁶ This contradicts the assumption of some transparency theorists that transparency is greatest at the local level. See, e.g., Fenster, *supra* note 14, at 934.

⁴¹⁷ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing the “happy incident[] of the federal system” where a “State may . . . serve as a laboratory”).

⁴¹⁸ See Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1234 (1994) (describing the “laboratories” view of federalism as one in which “innovative states can conduct controlled legislative ‘experiments’ whose results can be monitored” and “sound policy conclusions derived and applied elsewhere, if appropriate”); Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1692, 1694 (2014) (arguing that “[i]nformation is necessary for policy experimentation because of the need for learning—jurisdictions must glean lessons from others,” and that “[d]espite the importance of baseline policy information for quality experimentation . . . this data is often unavailable, or available yet incomplete”).

⁴¹⁹ Amar, *supra* note 418, at 1236–37.

⁴²⁰ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–18 (1956); see also Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 65 (2013) (describing the Tieboutian model of federalism).

mobility has been challenged on a number of grounds.⁴²¹ But this account of transparency deserts bolsters a central critique: lack of knowledge.⁴²² This view of federalism only works if a citizen has sufficient information to know when to leave and where to go.⁴²³

Further, the existence of transparency deserts may undermine the federal government's ability both to monitor state governments' implementation of federal policies and to effectively serve as a check on state government power. Under the cooperative federalism view of federal-state relations, states serve as "servants and allies to the federal government," working to enact federal goals.⁴²⁴ But the transparency barriers described here may make it difficult for the federal government to monitor whether state and local governments are, in fact, working to implement federal policy.⁴²⁵ Media and civil society actors may be unable to alert the federal government to breakdowns in state and local administration of federal policies and goals.⁴²⁶

Additionally, absent adequate transparency measures, federal congressional and executive actors may remain ignorant of broader state and local governance failures. The Department of Justice, for example, will be unable to investigate civil rights abuses by state and local law enforcement agencies if it remains ignorant of such violations.⁴²⁷ Congress may not be alerted to governance failures in areas of civil rights, voting, and utilities regulation at the state and local level without these mechanisms of transparency. And at the state level, governors may not know to step in to assume control of local government in times of crisis.⁴²⁸

⁴²¹ See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420–21 (1990) (outlining the social and economic costs that prevent people from moving jurisdictions).

⁴²² For critiques of Professor Tiebout's assumption of perfect knowledge, see, for example, Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1355 & n.131 (2014).

⁴²³ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (arguing that federalism "makes government more responsive by putting the States in competition for a mobile citizenry").

⁴²⁴ See Bulman-Pozen & Gerken, *supra* note 23, at 1258.

⁴²⁵ Professors Jessica Bulman-Pozen and Heather K. Gerken have famously described states' efforts to resist federal mandates as "uncooperative federalism." *Id.* at 1263.

⁴²⁶ Cf. Seifter, *Further from the People?*, *supra* note 34, at 165–66 (describing the role of civil society in alerting both the state and federal government to breakdowns in the safety and quality of Section 8 housing).

⁴²⁷ See, e.g., Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (2012) (authorizing DOJ investigations into local law enforcement violations of the Constitution and federal statutory law); Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d (same).

⁴²⁸ See, e.g., Mo. Exec. Order No. 14-09 (Aug. 18, 2014), https://www.sos.mo.gov/library/reference/orders/2014/eo14_09 [<https://perma.cc/7JDU-58N2>] (Missouri governor, following declaration of a state of emergency in the city of Ferguson, authorizing

Transparency deserts may hinder federal and state governments' ability to effectively monitor lower levels of government.⁴²⁹

V. REFORMING STATE AND LOCAL TRANSPARENCY ECOSYSTEMS

By chronicling a litany of flaws in the state and local transparency regime, this Article begs the obvious question: what can and should be done to improve these transparency ecosystems? This Part first addresses the threshold question of whether public records laws are worth saving. It teases out the central paradox of these laws: that although deeply flawed, they are still better than the alternative. In doing so, it demonstrates that unique features of state and local government increase the salience of statutory transparency mechanisms. It then provides suggestions for reform, proposing amendments to both the transparency statutes and to the broader information ecosystems that surround them.

A. *Are State Public Records Laws Worth Saving?*

There is a robust strand of skepticism running throughout the federal transparency literature today. Scholars have begun to ask whether the transparency scale has tipped too far, emphasizing that transparency excesses can lead to distinct governance failures.⁴³⁰ FOIA has become a particular target of ire. Scholars have argued the law imposes costs that grossly outweigh its benefits, and that there are viable alternative transparency mechanisms that would adequately serve the needs of the public without the enormous financial and resource burdens that the public

the state highway patrol to close streets and activating the state militia); *see also* Seifter, *Gubernatorial Administration*, *supra* note 323, at 540 (“[G]overnors commonly use executive actions to take control of local affairs in times of crisis.”).

⁴²⁹ Further, even when the federal government is alerted to a governance problem through alternative channels—for example, an affected constituent reaches out to his or her senator or congressional representative directly—these transparency deserts may impede the federal government’s efforts to investigate and remedy the governance problem. To provide one illustration, a 2015 investigation into fatal police shootings by the *Washington Post* uncovered twice as many fatal police shootings as the number reported by local police to the FBI. Kimberly Kindy et al., *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), https://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000/?utm_term=.e3deaf383cdb (last visited Mar. 29, 2020). FBI Director James Comey stated that it was “unacceptable” that a media organization was able to gather more accurate crime statistics than the agency could. *Id.*

⁴³⁰ *See, e.g.*, ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 181–82 (2007) (outlining the costs of too much transparency, including silencing dissenters); Fenster, *supra* note 14, at 902–03, 906–10 (describing the problems that can flow from “potential excesses of disclosure requirements”); Sunstein, *supra* note 14, at 13–15 (arguing that the harms of most “transparency inputs” can outweigh the benefits they provide).

records statute imposes.⁴³¹ Academics such as Professor Pozen have persuasively argued that while FOIA originated as a progressive tool to promote good governance, it now largely functions as a regressive tool to advance corporate interests.⁴³² Some have suggested it may be better to scrap FOIA altogether.⁴³³

In comparison with the federal law, state public records laws seem to impose relatively greater burdens upon government and introduce comparatively steeper barriers to disclosure. In other words, state public records laws appear to be both more costly to the government and less beneficial to the public than FOIA.⁴³⁴ The case for replacing public records laws with less onerous alternatives would therefore seem to be even stronger at the subfederal level. And yet there are competing considerations, specific to local transparency ecosystems, which caution against the wholesale abandonment of state public records statutes. Namely, unique features of the state and local governance landscape increase the salience of public records laws in comparison with FOIA. Put another way, although these state laws are deeply flawed, they are still worth saving.

First, legal scholars have emphasized that there is such a thing as too much transparency, and that over-accountability in government produces its own pathologies.⁴³⁵ Assuming that this is a legitimate concern in the federal context, it is still unlikely that we have reached this tipping point in the state and local context. Along a variety of oversight measures—from media coverage, to the attention of civil society actors, to the effectiveness of intergovernmental checks and balances—state and local governments

⁴³¹ See, e.g., VERMEULE, *supra* note 430, at 200–08 (arguing for increased opacity at the early stages of the federal budgeting process and for delayed disclosure of certain aspects of the budgeting process); Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1101 (arguing in favor of alternatives for executive branch transparency such as affirmative disclosure requirements or denying legally binding effect to government policies and decisions that are not publicized in a timely manner).

⁴³² Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1111.

⁴³³ See, e.g., Scalia, *supra* note 16, at 17; cf. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1156 (“The most promising path forward . . . involves displacing FOIA requests as the lynchpin of transparency policy and shoring up alternative strategies . . .”).

⁴³⁴ See discussion *supra* Sections III.B–III.C.

⁴³⁵ See, e.g., Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1161 (2009) (noting that federal agencies are “some of the most extensively monitored government actors in the world”); Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 186–87 (2014) (noting that political economy scholarship has identified a “class of situations in which effective accountability mechanisms can decrease, rather than increase, an agent’s likelihood of acting in her principal’s interests” (emphases omitted)).

suffer from too little accountability rather than too much. It is doubtful that state and local governments in general are plagued by overattention from the public. Wherever this line is drawn, it is unlikely that current levels of public oversight of state and local governments have crossed it.⁴³⁶

Second, the importance of government oversight increases with the power and authority of the government entity that is being monitored. And state and local governments' influence over the everyday lives of citizens has grown in recent years. State and local governments have grown larger: while the number of federal employees has remained fairly steady over the last half-century, the number of state government employees has increased threefold.⁴³⁷ They have also grown wealthier. Roughly two-thirds of local governments' operating budgets today derive from local sources of revenue, permitting local governments' increased economic independence.⁴³⁸ State spending has increased eightfold since 1960 after accounting for inflation.⁴³⁹ Many local governments now enjoy substantial discretion over the allocation of local budgets, the setting of tax rates, and the regulation of local land use. The amount of money in state and local politics has also increased, and the majority of these lobbyists—roughly 70%—represent private sector interests.⁴⁴⁰ This “bias towards business” is even more pronounced at the state level than it is at the federal level.⁴⁴¹

⁴³⁶ See Seifter, *Further from the People?*, *supra* note 34, at 169 (noting that while there can be too much civil society oversight in theory, this critique is “not apt given conditions in the states today”). Another potent critique of FOIA is that by concentrating public attention on the public sector while casting little light on the private sector, it creates an “anti-public-sector bias.” See Pozen, *Transparency's Ideological Drift*, *supra* note 14, at 156–58. While this criticism applies in the state and local context as well, reduced public oversight of state and local government more generally will presumably lessen this attention imbalance.

⁴³⁷ Seifter, *Further from the People?*, *supra* note 34, at 128–29. The state and local workforce is roughly six times the size of the federal workforce. See BRIFFAULT & REYNOLDS, *supra* note 21, at 4.

⁴³⁸ Roughly two-thirds of local government revenue in 2016 derived from a combination of property, sales, and other taxes and miscellaneous charges, such as fees for water collection and parking meters. The remaining third derived from state and federal transfers. TAX POLICY CTR., URBAN INST. & BROOKINGS INST., THE STATE OF STATE (AND LOCAL) TAX POLICY, <https://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-local-governments> [https://perma.cc/E4FF-JMY8].

⁴³⁹ Seifter, *Further from the People?*, *supra* note 34, at 129; see also Stephen S. Jenks & Deil S. Wright, *An Agency-Level Approach to Change in the Administrative Functions of American State Governments*, 25 ST. & LOC. GOV'T REV. 78, 80 (1993) (demonstrating the expansion over time of the type of state administrative agencies).

⁴⁴⁰ Seifter, *Further from the People?*, *supra* note 34, at 137. The number of registered lobbyists in the states rose from 15,000 in 1980 to 47,000 in 2013. In the twenty-eight states that disclosed lobbying data, \$2.2 billion was spent on lobbying expenditures between 2013 and 2014. *Id.* at 135–36.

⁴⁴¹ *Id.* at 137.

This financial independence has allowed state and local governments to expand into areas previously occupied by the federal government. They often exercise control over land use, environmental regulation, public health, civil rights, and the local economy.⁴⁴² They are also tasked with implementing a large and growing array of federal programs and grants today.⁴⁴³ Governors have consolidated their authority and face few checks to their power.⁴⁴⁴ And local governments exert significant control and discretion—delegated from the state government under “home rule”⁴⁴⁵ and delegated from the federal government under direct federal–local cooperative efforts.⁴⁴⁶ This increase in the size, role, and importance of state and local governments has increased the need for effective accountability mechanisms. Citizens must be able to access information about the government entities that wield increasing power over their lives.

Third, distinctions in the federal, state, and local administrative regime rob some of the criticisms of federal transparency law of their force. Most notably, the absence of a national security apparatus at the state and local level eliminates one of the most potent criticisms of FOIA: that it lacks teeth to enforce oversight of the very agencies that require it most.⁴⁴⁷ To be sure, inadequate oversight of domestic law enforcement agencies remains a problem in state and local government.⁴⁴⁸ But there is no equivalent at the state and local level to the trillions of pages classified by the federal government,⁴⁴⁹ nor are there gaping transparency holes such as those left by federal agencies like the CIA, the NSA, the Office of the Director of

⁴⁴² See Davidson, *supra* note 34, at 588–92.

⁴⁴³ Metzger, *supra* note 22, at 1853.

⁴⁴⁴ See Seifter, *Gubernatorial Administration*, *supra* note 323, at 518–29. Governors can reorganize the executive branch and disband agencies, and many have the authority to veto or rescind regulations. *Id.* at 487–88.

⁴⁴⁵ Davidson, *supra* note 34, at 570–71. Local governments exercise power through zoning, building and housing codes, wage rules, workplace conditions, environmental regulation, etc. *Id.* at 570.

⁴⁴⁶ See generally Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 971–73 (2007) (providing examples of federal–local collaboration in areas ranging from criminal justice to homeland security to education). State legislatures and courts are often reluctant to interfere with this local autonomy. See Briffault, *supra* note 421, at 405–06.

⁴⁴⁷ See, e.g., Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1118–23.

⁴⁴⁸ See, e.g., BRIDGET DUPEY ET AL., UNIV. OF DENVER STURM COLL. OF LAW, ACCESS DENIED: COLORADO LAW ENFORCEMENT REFUSES PUBLIC ACCESS TO RECORDS OF POLICE MISCONDUCT 5 (2018).

⁴⁴⁹ See PUB. INTEREST DECLASSIFICATION BD., TRANSFORMING THE SECURITY CLASSIFICATION SYSTEM 5 (2012), <https://www.archives.gov/files/declassification/pidb/recommendations/transforming-classification.pdf> [<https://perma.cc/VX7A-YRPB>].

National Intelligence, the Defense Intelligence Agency, and the intelligence offices of the various military branches.⁴⁵⁰

Fourth, unique structural features of state and local government increase the salience of these statutory transparency measures. At the federal level, the system of checks and balances among the three branches of government ensures some measure of accountability and transparency. The Constitution permits Congress to check the President through legislative investigations and oversight committees; the judiciary enables public disclosure through its review of legislative and executive action; and the public is empowered to express displeasure with the government's lack of transparency through periodic elections.⁴⁵¹

These accountability mechanisms are often weaker at the state level. Many states have a plural executive⁴⁵²—a form of government that has been criticized for making it more difficult for the public to monitor and hold to account.⁴⁵³ Further, state legislative oversight is less robust than congressional review. The legislature is a low-paying, part-time position in forty states,⁴⁵⁴ and state legislatures convene far less often than Congress.⁴⁵⁵ State executive and legislative branches also tend to be controlled by the same party,⁴⁵⁶ further reducing the likelihood that partisan disputes will bring governance failures to light. More robust congressional monitoring has been posited as an alternative to FOIA.⁴⁵⁷ But legislative oversight in

⁴⁵⁰ For discussions of the extent to which overclassification prevents the disclosure of records under FOIA, see Fenster, *supra* note 14, at 922–24.

⁴⁵¹ See FENSTER, *supra* note 67, at 61. Justice Scalia even questioned whether any transparency measures at all are required outside “the institutionalized checks and balances within our system of representative democracy.” Scalia, *supra* note 16, at 19.

⁴⁵² See BRIFFAULT & REYNOLDS, *supra* note 21, at 28.

⁴⁵³ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001) (arguing that a benefit of the unitary executive is that it “simplif[ies] and personaliz[es] the processes of bureaucratic governance,” making it easier for the public to hold the executive accountable for policy choices); see also THE FEDERALIST NO. 70, at 427, 430 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that a plural executive is more inclined to “conceal faults and destroy responsibility,” in contrast with the more “narrowly watched and more readily suspected” unitary executive).

⁴⁵⁴ Seifter, *Gubernatorial Administration*, *supra* note 323, at 519.

⁴⁵⁵ Compare *Legislative Session Length*, NAT’L CONF. ST. LEGISLATURES (Dec. 2, 2010), <https://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx> [<https://perma.cc/RCN9-HQ6A>] (showing that many state legislatures impose session limits of ninety days or fewer), with Courtney Connley, *Here’s How Many Days Congress Will Spend Away from the Office in 2018*, CNBC (Mar. 29, 2018), <https://www.cnbc.com/2018/03/29/heres-how-many-days-congress-will-spend-away-from-the-office-in-2018.html> [<https://perma.cc/QT36-LVFJ>] (noting that Congress was in session 145 days in 2017).

⁴⁵⁶ Seifter, *Gubernatorial Administration*, *supra* note 323, at 520.

⁴⁵⁷ Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1107, 1110.

the states as it is constituted now is most likely too weak to serve as a viable transparency replacement.⁴⁵⁸

If these alternative mechanisms of government transparency and accountability built into federal democratic systems are weaker at the state level, they are virtually absent in the local context. One state supreme court has claimed “that the separation of powers doctrine is a concept foreign to municipal governance.”⁴⁵⁹ Many local governments collapse legislative, executive, and even judicial functions into a single governing body.⁴⁶⁰ The majority of local governments house the executive branch within the legislative branch, and partisan competition at the local level is comparatively low.⁴⁶¹ As a result, many of the accountability and transparency benefits that flow from this interbranch system of checks and balances are absent at the local level.

Moreover, periodic elections serve as a comparatively weak source of government accountability in the local context. Many local governments are dominated by a political machine, elections are often nonpartisan, and turnout at local elections is generally much lower.⁴⁶² Further, government power is often divorced from representation in local government. The Supreme Court has applied the principle of one-person, one-vote to general-purpose local government elections, such as a city or county governing body.⁴⁶³ Yet this rule does not extend to a variety of other forms of local government. Some special purpose districts lack any direct electoral accountability mechanism.⁴⁶⁴ And even where there are elections, courts have permitted special districts to allocate voting power by acreage rather than population.⁴⁶⁵ In addition, courts have authorized municipalities to exert governmental authority over individuals who do not have the right to vote in city elections, such as those living in adjacent unincorporated communities but who are still subject to the city’s zoning, criminal

⁴⁵⁸ See Seifter, *Gubernatorial Administration*, *supra* note 323, at 520 (“Scholars of legislative oversight have theorized that legislators expend scarce resources on oversight only to the extent that it is likely to enhance their political fortunes.”).

⁴⁵⁹ *Moreau v. Flanders*, 15 A.3d 565, 579 (R.I. 2011).

⁴⁶⁰ See *BRIFFAULT & REYNOLDS*, *supra* note 21, at 28; *Davidson*, *supra* note 34, at 571.

⁴⁶¹ *Davidson*, *supra* note 34, at 602.

⁴⁶² *BRIFFAULT & REYNOLDS*, *supra* note 21, at 28.

⁴⁶³ *Avery v. Midland Cty.*, 390 U.S. 474, 476 (1968).

⁴⁶⁴ *Davidson*, *supra* note 34, at 603–04.

⁴⁶⁵ *Ball v. James*, 451 U.S. 355, 371 (1981). Courts have also allowed business improvement districts, which require real property owners to pay additional taxes to the municipality to allocate voting authority in a way that privileges commercial over noncommercial property owners. See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 108 (2d Cir. 1998).

enforcement, and health and safety regulations.⁴⁶⁶ Public records laws offer an alternative mechanism of accountability to these nonresidents deeply affected by the actions of government.⁴⁶⁷

In other words, to the extent that we view transparency laws as part of a continuum of democratic accountability—one of a set of choices citizens have for holding their government accountable—then the absence of these other democratic mechanisms at the local level increases the importance of statutory alternatives.⁴⁶⁸ Statutory measures to promote government transparency become increasingly critical to public oversight of the government when democratic alternatives such as interbranch checks and balances and periodic elections are weakened or wholly absent.

B. Proposals for Reform

Scholars' neglect of state public records laws has normative implications as well. The absence of descriptive accounts of these subfederal laws—the costs these statutes impose upon government, the identity and motivations of requesters, and the flaws in the laws' structure—has skewed the policy debate around transparency in government, making it more difficult for policymakers and advocates alike to identify pervasive and persistent problems in the current regime. This Section draws upon the lessons learned from these state public records laws and offers suggestions for reform. While many of these proposals are modest in scope, even incremental changes to the local transparency regime have the potential to effect meaningful improvements in accountability and governance.

1. Government Reform

The most obvious—and arguably the easiest—path toward improving transparency in state and local government is reforming the statutes themselves. Some of these changes are straightforward. Public records exemptions that narrowly reflect the interests of powerful corporate actors, for example, impose barriers to public disclosure without providing any

⁴⁶⁶ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–70 (1978). Courts have also permitted municipalities to tax the wages of nonresidents who work within city limits. See, e.g., *City of Pittsburgh v. Commonwealth*, 559 A.2d 513, 514, 516 (Pa. 1989).

⁴⁶⁷ The extent to which state judges serve as a more or less robust source of accountability than the federal judiciary is a matter open to debate. For a summary of arguments on both sides of the issue, see Seifter, *Gubernatorial Administration*, *supra* note 323, at 523.

⁴⁶⁸ See Davidson, *supra* note 34, at 627 (noting that administrative processes may help compensate for lack of representation).

real benefits to the government at large.⁴⁶⁹ Legislators could revise these statutes to ensure that exemptions to disclosure are clearly stated, narrowly tailored, and reflective of the public interest. More robust procedures to notify the public and facilitate public debate prior to the enactment of new exemptions could help constrain powerful interest groups' ability to weaken the laws' effects. Tightening the regulations that govern asset disclosures and conflicts of interest by members of state legislatures could help expose links between legislators and special interest groups as well.⁴⁷⁰

As scholars have discussed elsewhere, amending these statutes to incentivize more robust affirmative disclosure of certain records may further improve transparency outcomes.⁴⁷¹ This suggestion offers only a partial solution: affirmative disclosure requirements cannot adequately replace the individual right of request contained in the statutes. Yet requiring proactive disclosure of certain categories of records routinely generated, such as those containing budgetary information, could increase transparency while reducing burdens on agencies.⁴⁷² Governments' growing ability to post large categories of records electronically presumably reduces the costs associated with large-scale affirmative disclosure. And some states have already begun to experiment with providing a centralized database or website to host government financial data. Utah, for example, posts state and local financial data on a centralized website that is designed to allow citizens to conduct their own analysis of government spending.⁴⁷³

More often, however, legislators will confront a trade-off: legislative measures that reduce barriers to disclosure also increase costs to the government. That being said, there are ways to strike a more effective balance. One option is to craft fee schedules that distinguish between commercial and noncommercial requesters. Governments could charge

⁴⁶⁹ See discussion *supra* notes 252–255 and accompanying text.

⁴⁷⁰ See Nicholas Kusnetz, *Only Three States Score Higher than D+ in State Integrity Investigation; 11 Flunk*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015, updated Nov. 23, 2015), <https://publicintegrity.org/accountability/only-three-states-score-higher-than-d-in-state-integrity-investigation-11-flunk> [<https://perma.cc/KE2F-EDSX>] (noting that only two states conduct independent and comprehensive audits of legislators' assets annually).

⁴⁷¹ See Pozen, *Freedom of Information Beyond the Freedom of Information Act*, *supra* note 15, at 1149–52 (suggesting more robust affirmative disclosure requirements as a partial fix for the problems plaguing FOIA).

⁴⁷² See, e.g., Soubhik Barari, *Mapping Local Government Transparency in the U.S.*, MIT GOV/LAB (July 2018), <https://mitgovlab.org/updates/mapping-local-government-transparency-in-the-us> [<https://perma.cc/9BVQ-7C59>] (finding that more than half of local governments surveyed in a study failed to post financial reports).

⁴⁷³ *About Transparent Utah*, TRANSPARENT UTAH, <https://www.utah.gov/transparency/about.html> [<https://perma.cc/29FY-55BM>].

commercial requesters a higher fee for records productions and charge noncommercial requesters lower fees or even provide them with a fee waiver. The federal government and many states already carve out special treatment for requests in the public interest, so the definitional problem of distinguishing between commercial and noncommercial requesters would not be insurmountable.⁴⁷⁴ These discrepancies in fee schedule could also be tailored to allow local governments, which have fewer financial resources at their disposal to respond to requests, to impose higher costs upon commercial requesters than state agencies.⁴⁷⁵

In other cases, the transparency benefits of a particular legislative reform arguably outweigh the incremental increase in costs. Establishing an independent administrative review process in those states that lack one, for example, would impose an additional financial burden. But the independent review of request decisions would provide at least some check against agency determinations made in bad faith and act as a deterrent to government efforts to distort the law to shield government misconduct. Such reforms would better align these state statutes with both FOIA and with public records statutes around the world, which increasingly emphasize the importance of cost-effective administrative-level appeals processes.⁴⁷⁶ Given the high barriers to judicial review of public records denials, such administrative review would allow for a meaningful appellate check on agency discretion. It is likely worth the costs involved.

The executive and judicial branches could take steps to improve the transparency regime as well. Simply collecting state-level data about the

⁴⁷⁴ See, e.g., 5 U.S.C. § 552(a)(4) (2012) (distinguishing between requests in the public interest and all other requests); MASS. GEN. LAWS ch. 66, § 10(d)(iv) (2017) (same). Some members of the media have argued that these fee waivers have been interpreted too narrowly. See, e.g., Shawn Musgrave, *For Some Agencies, Online Media Doesn't Count as Media at All*, MUCKROCK (July 26, 2013), <https://www.muckrock.com/news/archives/2013/jul/26/navy-news-media-limited-publishers-and-broadcaster> [<https://perma.cc/4YKD-BW8M>] (critiquing federal and state public records laws for excluding nontraditional journalists from fee waivers). And some have raised the inverse argument—that commercial requesters are improperly granted public interest status. See, e.g., Kwoka, *FOIA, Inc.*, *supra* note 15, at 1382–83 (describing a repeat requestor for SEC data that has likely been wrongly categorized as a media requester). Remedies discussed elsewhere in this Part—such as improved administrative appeals processes—may help ease such flaws in the application of such statutory distinctions between commercial and public interest requesters.

⁴⁷⁵ See, e.g., MASS. GEN. LAWS ch. 66, § 10(d)(ii)–(iii) (2017) (allowing local agencies to charge requesters after the first two hours of labor but allowing state agencies to charge only after the first four hours).

⁴⁷⁶ See DAVID BANISAR, *PRIVACY INT'L, FREEDOM OF INFORMATION AROUND THE WORLD* 23 (2006), www.freedominfo.org/documents/global_survey2006.pdf [<https://perma.cc/V7JD-NMEX>] (noting that twenty-two countries have created independent information commissions to handle appeals).

public records process—how many requests agencies receive, how quickly they are fulfilled, and how much money it costs to respond to them—would allow legislators to make more informed decisions about how best to structure these laws.⁴⁷⁷ And judges could ensure that doctrines developed in the context of federal law are not inappropriately incorporated into the state legal context.⁴⁷⁸ Such reforms only scratch the surface. There are myriad ways that these statutes could be amended to give real effect to the underlying goals of their drafters. Even the modest solutions proposed here, however, illustrate that relatively small-scale changes in the laws could elicit real improvements in local transparency ecosystems.

2. *Media and Civil Society Reform*

The decline in both local media and in resource-intensive investigative reporting diminishes public oversight of state and local governments. In the public records context, reduced media use of these laws creates a downward transparency spiral, making it easier for the government to both ignore the requirements of the law and to enact changes to the law that further reduce its force. Reversing this decline is a massive undertaking, one that far exceeds the bounds of this Article. But journalists, scholars, and legislators have explored a variety of potential solutions in recent years, from enhancing government funding for local journalism⁴⁷⁹—similar to the mixed private–public media models pursued in many other Western democracies⁴⁸⁰—to encouraging social media companies like Facebook to feature local news content more prominently in news feeds.⁴⁸¹

⁴⁷⁷ See Fink, *supra* note 17, at 111–12 (recommending that states collect more comprehensive public records data).

⁴⁷⁸ For example, the Court of Appeals in New York recently permitted state and local agencies to invoke the “Glomar response,” or a refusal to acknowledge the existence or nonexistence of records, despite the fact this response was developed to protect national security interests. See *Abdur-Rashid v. N.Y.C. Police Dep’t*, 100 N.E.3d 799, 801 (N.Y. 2018).

⁴⁷⁹ See, e.g., Rick Rojas, *News from Your Neighborhood, Brought to You by the State of New Jersey*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/nyregion/nj-legislature-community-journalism.html> [<https://perma.cc/QU5R-SGAJ>]; John Temple, *My Newspaper Died 10 Years Ago. I’m Worried the Worst Is Yet to Come*, ATLANTIC (Feb. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/who-is-going-to-save-local-news/583696> [<https://perma.cc/6WDH-V3Z7>].

⁴⁸⁰ See, e.g., RODNEY BENSON & MATTHEW POWERS, *FREE PRESS, PUBLIC MEDIA AND POLITICAL INDEPENDENCE: LESSONS FOR THE FUTURE OF JOURNALISM FROM AROUND THE WORLD* 8 (2011), <https://www.issuelab.org/resources/13259/13259.pdf> [<https://perma.cc/8LXY-5KZ6>] (“In contrast to the highly fragmented and mostly commercial American media, the media in virtually every other western democratic nation-state are a mix of private and public.”).

⁴⁸¹ See, e.g., Christine Schmidt, *Facebook Is Committing \$300 Million to Support News, with an Emphasis on Local*, NIEMANLAB (Jan. 15, 2019), <https://www.niemanlab.org/2019/01/facebook-is-committing-300-million-to-support-news-with-an-emphasis-on-local> [<https://perma.cc/H8TZ-Y9NE>].

Increased nonprofit funding for journalism could also help. Smaller nonprofit upstarts such as the Montpelier-based *Vermont Digger* are trying to fill the oversight gaps left by the decline of traditional print-based outlets.⁴⁸² These efforts often involve a commitment to pursuing longer term investigative reporting on state and local government. The *Digger*, for example, submitted over 200 public records requests to state agencies between January 2013 and July 2018—more than any other news outlet, including the state’s flagship newspaper, the *Burlington Free Press*.⁴⁸³ Other nonprofit media organizations dedicated to a particular substantive area, such as the *Trace*, which reports on guns in America, and the *Marshall Project*, which reports on the criminal justice system, are also helping fill these oversight gaps.⁴⁸⁴ Nonprofit funding of local journalism will not replace the loss of thousands of daily newspapers across the country. But it may offer a partial solution in some localities and some subject areas.

The narrower problem of declining access litigation might also be addressed in a variety of ways. One solution may be to provide public records litigants access to government funding, similar to a government program in Canada that secures government financing on behalf of private citizens who commit to litigating “test cases of national significance.”⁴⁸⁵ Nonprofit organizations could also help address the narrower problem of declining access litigation by newspapers. Law school clinics like the Media Freedom and Information Access Clinic at Yale Law School represent reporters in FOIA and state public records litigation without charge.⁴⁸⁶ And a group of First Amendment clinics and advocacy organizations are now creating a national network of organizations engaged in pro bono transparency litigation.⁴⁸⁷ A standalone nonprofit law firm committed to First Amendment and right of access work for local media outlets might also offer at least a partial solution to falling rates of access

⁴⁸² See *About VTDigger*, VTDIGGER, <https://vtdigger.org/about-vtdigger> [https://perma.cc/P48P-NGSZ].

⁴⁸³ 2013–2018 Vermont State Dataset, *supra* note 131.

⁴⁸⁴ See *About The Trace*, TRACE, <https://www.thetrace.org/about-the-trace> [https://perma.cc/AS6L-LMYL]; *About Us*, MARSHALL PROJECT, <https://www.themarshallproject.org/about> [https://perma.cc/EH32-N3TR].

⁴⁸⁵ See *Court Challenges Program*, GOV’T CAN., <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program/background.html> [https://perma.cc/WPQ9-JHEE].

⁴⁸⁶ See *About*, MEDIA FREEDOM & INFO. ACCESS CLINIC, <https://law.yale.edu/mfia/about> [https://perma.cc/WPQ9-JHEE].

⁴⁸⁷ *About FELN*, FREE EXPRESSION LEGAL NETWORK, <https://freeexpression.law/about-feln> [https://perma.cc/AKX9-53NK].

litigation. Again, these pro bono legal services cannot wholly fill the gap left by local media's collapse. But they could help chip away at the edges of the problem and breathe new life into access litigation efforts at the state and local level.

CONCLUSION

Public records statutes are situated at the heart of the local transparency regime. These laws provide the public a direct pipeline to government and offer citizens a tool for holding government to account. They serve as a check on state and local governments, which have grown in power, size, and influence in recent decades, and they allow the media to perform its function as the government's watchdog. Despite the importance of both these transparency laws and the governments they monitor, however, scholars have largely ignored transparency issues at the subfederal level. This Article takes initial steps to illustrate why this matters. It is not intended to provide a comprehensive review of the local transparency landscape, but rather, to tee up a variety of issues that merit further exploration.

In doing so, it demonstrates that many of the problems that plague FOIA are made worse in the state and local context. And it identifies the problem of transparency deserts, or discrete geographic areas in which a confluence of factors—including poorly written transparency laws, deficiencies in the application of these laws, and weak civil society organizations—impedes effective government oversight. At the same time, a close analysis of these laws in conjunction with the structure and nature of state and local government reveals that these transparency statutes, although flawed, play an even more critical role at lower levels of government than they do in the federal context, where there is a wealth of statutory and constitutional alternatives to FOIA to check government power. In sum, these laws are both more important and more flawed than the legal scholarship has previously recognized. This makes it all the more urgent that legislators and policymakers take steps toward reform.

