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Editor's Note: Enduring Darkness for Sunlight

David Cuillier, Ph.D., Editor, *University of Arizona*

As we enter this dark season of winter, civic information champions can still prepare for the light of spring.

I am talking about the impending state legislative sessions, to launch in January in statehouses throughout the United States, where open-government advocates work frenetically to quash exemptions and hold back the tide of secrecy. Meanwhile, in the courts, those who would intimidate requesters through reverse-FOI litigation arm their attorneys for what essentially amount to Strategic Lawsuits Against Public Participation (SLAPP). Yet, there is light ahead. Hope, even.

This second issue of *The Journal of Civic Information* highlights critical threats to government transparency today, but also provides beacons of hope for those who otherwise would be deterred.

The first article, by Patrick C. File and Leah Wigren of the University of Nevada-Reno, focuses on an increasingly used tactic applied by those who wish to keep civic information locked away: reverse-FOI lawsuits. The system already is stacked against the citizen, but some government agencies have the gall to sue records requesters, forcing average people to hire attorneys to defend themselves for simply asking to see what their government is up to. File and Wigren examine the 31 state anti-SLAPP laws to find that many protect citizens from such brute-force anti-transparency tactics. While not a panacea, anti-SLAPP laws could help in pushing back. More, however, is needed. The article earned the third-place award in the National Freedom of Information Coalition's first blind-reviewed FOI research competition in April 2019.

Next, Ryan Mulvey and James Valvo, legal counsel at the Cause of Action Institute, take a deep-dive analysis into how state public record laws apply to legislatures. Many people assume legislatures – like Congress – conveniently exempted themselves from the very public record laws they impose on the executive branch. Not so! In fact, Mulvey and Valvo found that thirty-eight states have adopted FOI statutes that permit requesters to access legislative records at some level, and of those, twenty-four states' laws plainly and explicitly cover their legislatures. Some state laws focus on the nature of the record, others the nature of the agency. Some access is implied, and some interpreted by the courts. Only twelve states specifically exclude their legislatures from their public record laws. Mulvey and Valvo explain the statutes, the nuances, the case law, and then lay out each state in tables for easy scanning and comparison, an invaluable tool for anyone who follows or cares about state politics.

The third article, by Rutgers University public administration doctoral student Kayla Schwoerer, provides a fascinating look at #FOIA tweets through social network analysis. She found that tweets soar in March during national Sunshine Week, indicating that the 15-year-old advocacy event drives public dialogue about government transparency. She discovered the power tweeters, such as MuckRock and the Reporters Committee for Freedom of the Press, who adeptly drive much of the FOIA social media traffic through videos, photos, and links to their websites – a good lesson for any organization seeking exposure and impact. She also found that while journalists create much of the content, average citizens respond in enormous numbers when engaged. This groundbreaking research opens new avenues for examining how journalists, advocates, public officials, and average people can better converse about civic engagement and government accountability, and how to maximize that discussion’s scope and reach.

All three articles provide hope for the spring. Legislatures in most states can be held accountable by the same laws they apply to executive agencies and local jurisdictions. Anti-SLAPP laws can provide relief in some states for requesters who face being hauled to court by government for simply submitting a public records request. And, this March, Sunshine Week will once again infuse energy and vigor into the American dialogue in support of open government and civic information.

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SLAPP-ing Back: Are Government Lawsuits Against Records Requesters Strategic Lawsuits Against Public Participation?

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Abstract

Open government advocates have expressed alarm at recent lawsuits that government agencies have filed against people requesting public records. Such suits bear a resemblance to “SLAPP” suits, the label given to “strategic lawsuits against public participation,” intended to harass active citizens out of the public sphere. This article considers whether these recent lawsuits could be considered SLAPP suits in their states, and examines whether 31 anti-SLAPP laws around the country might apply to these types of circumstances. We categorize the laws based on their various definitions for public participation, finding that many laws could cover public records requests, and argue that although not all anti-SLAPP laws will offer a defense when a government entity sues a records requester, courts do not look charitably on government plaintiffs in these circumstances.

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Introduction

In the spring of 2016, James Finney and Michael Deshotels engaged in a routine part of participatory democracy: requesting government records related to a public issue. But the government's response was anything but routine. Instead of complying with the request, denying it, or even asking for more time or fees to gather and produce the records, the Louisiana Department of Education sued Finney and Deshotels.¹ According to the suit, the department sought a declaratory judgment that suppressing the data at issue was "compliant with state and federal law and not a violation Louisiana Public Records law," and requested attorney's fees and costs.² When the case was settled a few months later and the records were released, both sides declared victory. The education department said the lawsuit was a necessary and successful move to resolve "tension" between state and federal rules, while the defendants called it a decisive win for citizens seeking public records.³ But Deshotels also called the suit "purely an attempt to discourage citizens from seeking to independently research the claims and conclusions" of the government and warned of the risks to transparency "if citizens are forced to face legal challenges and high legal fees for seeking public records."⁴

Lawsuits like the one against Finney and Deshotels might be more commonplace than we assume. Between June 2015 and May 2018, for example, government agencies filed at least eight such lawsuits from Michigan to Florida and Oregon to New Jersey, targeting private individuals, government accountability groups, journalists, and even student media.⁵ In the suits, the

¹ Complaint for Declaratory Relief, Louisiana Education Dep't v. Deshotels et al., No. 647953-D (19th Dist. La. 2016), <https://deutsch29.files.wordpress.com/2016/05/white-vs-deshotels-et-al.pdf>; See also Chris Nakamoto, *Department of Education Sues Citizens Who File Public Records Requests*, WBRZ NEWS (June 1, 2016), <http://www.wbrz.com/news/department-of-education-sues-citizens-who-file-public-records-requests/>.

² Complaint, *supra* note 1.

³ Joe Gyan, *Louisiana Education Activists Declare Victory in Public Records Fight*, THE ADVOCATE (Oct. 6, 2016) https://www.theadvocate.com/baton_rouge/news/courts/article_76e860ca-8bd9-11e6-9963-cf5829bedcf3.html.

⁴ *Id.*

⁵ See Barbara Clowdus, *SFWMD Plagued by Martin County's Public Records, Legal Shenanigans*, SUNSHINE STATE NEWS (Apr. 23, 2018), <http://sunshinestateneews.com/story/sfwmd-plagued-martin-countys-public-records-legal-shenanigans>; Matt Mencarini, *Michigan State Loses FOIA Lawsuit Against ESPN for Second Time Since 2015*, LANSING STATE JOURNAL (Sept. 18, 2017),

<https://www.lansingstatejournal.com/story/news/local/2017/09/18/michigan-state-espn-foia-lawsuit-sexual-assault/676752001/>; Betsy Hammond, *Portland Public Schools Loses Records Secrecy Lawsuit*, THE OREGONIAN

(May 12, 2018), www.oregonlive.com/education/2018/05/portland_public_schools_loses.html; Linda Blackford, *WKU Sues Student Newspapers Over Sexual Misconduct Records*, LEXINGTON HERALD LEADER (Feb. 28, 2017),

<https://www.kentucky.com/news/local/counties/fayette-county/article135400309.html>; Jonathan Peters, *How One Paper Filed a FOIA Request in Michigan – and Got Sued by the County*, COLUM. JOURNALISM REV. (Aug. 2, 2016),

www.cjr.org/united_states_project/michigan_lawsuit_daily_news_foia.php; Joe Gyan, *Louisiana Education Chief Asks Courts to Block Public Records Request, Claims Release of Data May Violate Student Privacy Rights*, THE ADVOCATE (June 4, 2016),

https://www.theadvocate.com/baton_rouge/news/education/article_536e2fac-b5e2-575c-87f6-1a991bf0f455.html;

Tim Cushing, *Court Tells City No You Cannot Sue Someone for Making a FOIA Request*, TECHDIRT (July 1, 2015),

<https://www.techdirt.com/articles/20150630/16393431506/court-tells-city-no-you-cannot-sue-someone-making-foia-request.shtml>. See also Ryan J. Foley, *Governments Turn Tables by Suing Records Requesters*, AP NEWS (Sept. 17, 2017),

<https://apnews.com/7f6ed0b1bda047339f22789a10f64ac4>; Jonathan Peters, *When Governments Sue Public Records Requesters*, COLUM. JOURNALISM REV. (June 30, 2015),

https://www.cjr.org/united_states_project/when_governments_sue_public_record_requesters.php. Not all relevant ongoing or previous cases may be included here, because they may not be in the news.

government typically asked for a judicial declaration that the records sought could be withheld.⁶ Although requesters who fought the eight suits have mostly prevailed,⁷ it is unclear how many others have abandoned their requests when sued or threatened with a lawsuit, considering the burdens of litigation and uncertainty about whether they could recover costs even if they eventually won. Indeed, experts have echoed Deshotels' concerns about government agencies intimidating requesters with these suits, drawing comparisons to "SLAPP" suits: "strategic lawsuits against public participation" intended to harass or intimidate citizens out of engaging with public issues and government bodies.⁸ In recognition of the "potentially grave consequences for the future of representative democracy"⁹ posed by SLAPP suits, 31 states, the District of Columbia, and the territory of Guam have passed "anti-SLAPP" laws, which typically aim to discourage such suits through an expedited hearing, early dismissal, and award of attorney's fees to the target of the suit.¹⁰

The central question for this article is whether records requesters like Finney and Deshotels could use an anti-SLAPP law to knock down a state's lawsuit against a records request. We take two tracks of analysis to answer that question. One track looks closely at three lawsuits filed between 2015 and 2018 in which records requesters were sued in response to their requests, using the available record to consider whether state anti-SLAPP laws could have been applied, to what outcome, and other legal lessons those cases offer.¹¹ The second track examines the states' various

⁶ See, e.g., Hammond and Gyan, *supra* note 5.

⁷ See *id.* See also Mencarini, *supra* note 5; Peters, *supra* note 5; Donna Weaver, *Failed Lawsuit by Hamilton Could Cost Taxpayers \$75,000*, THE PRESS OF ATLANTIC CITY (June 27, 2015), https://www.pressofatlanticcity.com/news/failed-lawsuit-by-hamilton-could-cost-taxpayers/article_18e06236-1c66-11e5-bd9a-e313fdc17f42.html.

⁸ See Peters, *How One Paper Filed a FOIA Request in Michigan – and Got Sued by the County*, *supra* note 5 and *When Governments Sue Public Records Requesters*, *supra* note 5; see also GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1984). It is important to note that because these suits involve the government suing requesters, they differ from "reverse-FOI" actions, in which non-governmental third parties sue to prevent the release of records. Such suits are also harmful to the public's right to know, and might be considered a form of SLAPP suit, but they are not included in this analysis.

⁹ Pring & Canan, *supra* note 8, at 2.

¹⁰ ARIZ. REV. STAT. § 12-751 (2007); ARK. CODE ANN. § 16-63-501 (Michie 2006); CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006); CONN. GEN. STAT. § 52-196a (2017); DEL. CODE ANN. § 8136 (1999); D.C. CODE ANN. § 16-5501 (2010); FLA. STAT. ANN. § 768.295 (West 2005); GA. CODE ANN. § 9-11-11.1 (2006); 7 GUAM CODE ANN. §§17101-17109 (2006); HAW. REV. STAT. § 634F-1 (Michie 2005); 735 ILL. COMP. STAT. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1 (Michie 2006); KAN. STAT. ANN. § 60-5320 (2016); LA. REV. STAT. ANN. § 971 (West 2006); 14 ME. REV. STAT. ANN. § 556 (West 2003); MD. CODE ANN. CTS. & JUD. PROC. § 5-807 (2006); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MINN. STAT. § 554.01 (2015); MO. REV. STAT. § 537.528 (2006); NEB. REV. STAT. § 25-21.243 (1995); NEV. REV. STAT. ANN. § 41.635 (Michie 2002); N. M. STAT. ANN. § 38-2-9.1 (Michie 2004); N.Y. C.P.L.R. § 3211, Pt. 1/7 (McKinney Supp. 2007); OKLA. STAT. § 1430 (West 1993); OR. REV. STAT. § 31.150 (2006); 27 PA. CONS. STAT. ANN. § 7707 & 8301 (West Supp 2006); R. I. GEN. LAWS § 9-33-1 (1997); TENN. CODE ANN. § 4-21-1001 (2005); TEX. REV. CIV. STAT. § 27.002 (West 2011); UTAH CODE ANN. § 78B-6-1401 (2002); VT. STAT. ANN. § 1041 (2005); VA. CODE ANN. § 8.01-223.2 (Michie 2017); WASH. REV. CODE § 4.24.510 (2002). See Public Participation Project, <https://anti-slapp.org/your-states-free-speech-protection/>. Washington's statute was ruled unconstitutional in 2015 and Minnesota's was ruled unconstitutional in 2017, meaning 31 are still in effect spring 2019. See *Davis v. Cox*, 351 P.3d 862 (Wash. 2017); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017). Two states, Colorado and West Virginia, have recognized a form of anti-SLAPP protection through case law. See *Protect Our Mountain Environment, Inc. v. Dist. Court of County of Jefferson*, 677 P.2d 1361 (Colo. 1984); *Harris v. Adkins*, 432 S.E.2d 549 (W. Va. 1993).

¹¹ The eight cases identified and three cases discussed here were found through news databases and trade publication reports and checked against court records available online and in legal databases Lexis Advance and Westlaw. The state anti-SLAPP laws were collected using the legal database Lexis Advance. See *supra* note 5. Although not all

anti-SLAPP laws to consider whether they might apply to similar suits in those states.¹² We categorize state anti-SLAPP laws based on their wide variety of definitions for public participation, finding that many laws could cover public records requests. We argue that although not all anti-SLAPP laws will offer a defense when a government entity sues a records requester, courts do not look charitably on government plaintiffs in these circumstances. Such suits are strategic lawsuits against public participation in form and function, if not by letter of the law. Preceding the explication of that analysis and those conclusions, however, is a brief explanation of the legal landscape surrounding government lawsuits against records requesters and strategic lawsuits against public participation.

Government Lawsuits Against Records Requesters and Anti-SLAPP Law

Government lawsuits against public records requesters may be surprisingly common, but there is little research examining them. Media law scholar Cathy Packer provided one comprehensive overview in which she examined 38 such cases between 1975 and 2006.¹³ Of those, seven resulted in a court ruling that the government could not sue a records requester.¹⁴ Packer found that most cases did not address the government’s ability to sue over a records request at all, but the 14 cases where courts considered the question focused on whether the government plaintiff had standing to sue over a records request or whether the government’s lawsuit impermissibly asked for an advisory opinion in a case that did not warrant one.¹⁵ Among the findings most relevant here were that Texas’s public records law explicitly denies standing to the government to sue requesters¹⁶ and, in contrast, the Colorado and Missouri open records laws explicitly grant the government standing in such cases.¹⁷ Courts in California and North Carolina found no standing for preemptive government lawsuits in their states’ public records laws.¹⁸ Meanwhile, courts also disagreed on the advisory opinion question.¹⁹ Packer argues that allowing the government to sue records requesters “turns access law on its head” because it provides “a tool to punish and intimidate” contrary to the purpose of government transparency laws.²⁰ In spite of the clear parallel between her research subject and SLAPP suits, however, Packer’s analysis only briefly mentions

relevant cases may be included here, we do not believe their omission significantly undermines our central insights or argument.

¹² The state anti-SLAPP laws were gathered and reviewed using the legal database Lexis Advance. The “Shepardize” function was used to identify and review relevant case law.

¹³ Cathy Packer, *Don't Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requesters*, 13 COMM. L & POL’Y 29 (2008). Packer found 38 cases in 31 years between 1975 and 2006; we found eight in three years between 2015 and 2018, suggesting the lawsuits have not slowed, and may have even accelerated.

¹⁴ *Id.* at 30-31, 44-60.

¹⁵ *Id.* at 39. Both questions are related to the doctrine of justiciability, or whether a case is suitable for adjudication by a court. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 49-50 (2006).

¹⁶ Packer, *supra* note 13, at 40. See also “Texas Public Information Act,” TEX. REV. CIV. STAT. ANN. § 552.001, *et seq.* (West 1993).

¹⁷ See “Colorado Open Records Law,” COLO. REV. STAT. § 24-72-201-206 (1968). See also “Sunshine Law: Missouri Open Records and Meeting Law,” MO. REV. STAT. § 610.027 (1973). See also Packer, *supra* note 13, at 40.

¹⁸ *City of Santa Rosa v. Press Democrat*, 232 Cal. Rptr. 445, 448 (Cal. Ct. App. 1987) (citing CAL GOVT. CODE § 6258) (Thomson West/Westlaw through 2007 Reg. Sess.); *McCormick v. Hanson Aggregates Southeast, Inc.* 596 S.E.2d 431, 463 (N.C. Ct. App. 2004) (citing N.C. GEN. STAT. § 132-9(a)). See also Packer, *supra* note 13, at 40-1.

¹⁹ See Packer, *supra* note 13, at 44.

²⁰ *Id.* at 33.

SLAPPs, and does not meaningfully engage with them.²¹

Concern about SLAPPs arose in the late 1980s, as research illuminated the prevalence of lawsuits brought by powerful individuals or organizations against people for simply “talking to government, circulating a petition, writing a letter to the editor, speaking at a school board meeting, or testifying in a public hearing.”²² George Pring and Penelope Canan, pioneering scholars on the issue, defined SLAPPs in their 1996 book as civil actions aimed at nongovernmental actors or institutions who communicated with government “to influence governmental action or outcome” on an issue of “public interest or social significance.”²³ Classic SLAPP suits are meritless and not intended by plaintiffs to win, but to “deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court.”²⁴ Although there is not a single quintessential SLAPP claim, plaintiffs commonly sue for defamation, invasion of privacy, abuse of process, malicious prosecution, conspiracy, and tortious interference with contract or business relationships.²⁵

Acknowledging that SLAPP suits undermine the constitutional rights of petition and freedom of speech and risk chilling effects on important democratic processes,²⁶ the 31 anti-SLAPP statutes in effect across the country generally attempt to deter would-be plaintiffs by providing defendants with an expedited procedure to seek dismissal of a suit—typically through a special motion to dismiss or a motion for summary judgment—and award attorney’s fees to a defendant/movant whose motion is successful.²⁷ The statutes have raised some confusion or controversy, however. For example, scholars have pointed out problems in how courts interpret

²¹ *Id.* at 58, citing a defendant newspaper’s brief calling a city’s preemptive lawsuit “a stereotypical SLAPP suit.” See Defendant-Appellee’s New Brief at 8–9, *City of Burlington v. Boney Publishers, Inc.*, 611 S.E.2d 833 (N.C. 2005).

²² Pring and Canan, *supra* note 8, at 3.

²³ *Id.* at 8-9.

²⁴ Shannon Hartzler, *Protecting Informed Public Participation: Anti-Slapp Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1240 (2007). See also Bruce Johnson and Sarah Duran, *A View from the First Amendment Trenches: Washington State’s New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495 (2012). Johnson and Duran echoed the concern related to SLAPP suits noting that, “The strategy is to file weak claims with the goal of silencing speakers because they fear the expense and travails of litigation. Ordinary citizens—not to mention experts and academics—are less likely to participate in or contribute to democratic legitimation if they fear their speech will be punished or subject to expensive litigation.” Johnson and Duran, at 496-7. *But see* Pring and Canan, *supra* note 8. Pring and Canan argue that not all SLAPP plaintiffs necessarily sue with ill will, even if their actions are pernicious. Similarly, this argument is applicable here, because we do not assume that every government lawsuit against a records requester is filed in bad faith.

²⁵ Hartzler, *supra* note 24, at 1241.

²⁶ U.S. CONST. AMEND. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). See, e.g., CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006) (“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”); FLA. STAT. ANN. § 768.295 (West 2005) (“It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.” See also Pring and Canan, *supra* note 8, at 2.

²⁷ See, e.g., ARIZ. REV. STAT. § 12-752 (2007); LA. REV. STAT. ANN. § 971 (West 2006). See also Hartzler, *supra* note 24, 1241-42; Robert Sherwin, *Evidence: We Don’t Need No Stinkin’ Evidence: How Ambiguity in Some States’ Anti-SLAPP Laws Threaten to De-Fang a Popular and Powerful Weapon against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431 (2017).

and apply the evidentiary standards for special motions to dismiss,²⁸ and inconsistency in federal courts' willingness to incorporate state anti-SLAPP laws in diversity cases.²⁹ Recently, supreme courts in Washington and Minnesota struck down state anti-SLAPP laws for unconstitutionally violating the right to trial by jury guaranteed by the state constitutions,³⁰ highlighting an overarching if not existential conflict for anti-SLAPP statutes nationwide.³¹ Most significant for the purposes here, however, is the fact that the laws define protected petition and speech activity in a variety of ways, ranging from the broad inclusion of communication related to any matter of public concern to much more narrow statutes that are limited to specific circumstances—usually speaking or communicating with a government body that is considering a specific question.³²

More fundamentally, anti-SLAPP laws' varying and context-specific definitions of petition and free speech might complicate the broader proposition that an open records request should be considered an exercise of those First Amendment-protected rights. The U.S. Supreme Court asserted in 2004 that open records laws are “a structural necessity in a real democracy” because they provide a “means for citizens to know what the Government is up to.”³³ On the other hand, as noted by constitutional scholar Robert Post, the court has been reluctant to argue that the First Amendment or any other portion of the U.S. Constitution guarantees the “right to know” or requires access to government information, leaving the specifics of what information should be public and why to the legislatures.³⁴ Thus, whether a preemptive government lawsuit against a public records requester is ripe for an anti-SLAPP motion depends mostly on what counts as “public participation” in a given state’s law and how that law is interpreted by courts.

Applying anti-SLAPP Laws to State Cases: Florida, Louisiana, Oregon

Of the eight recent preemptive government lawsuits against records requesters included in this study, only three—in Louisiana, Florida, and Oregon—occurred in states with anti-SLAPP statutes.³⁵ Although none of the defendant requesters filed an anti-SLAPP motion, applying the facts of those cases to the relevant state statutes allows an analysis of whether the lawsuit could have been subject to dismissal upon an anti-SLAPP motion.³⁶ Additionally, the cases illuminate

²⁸ See Sherwin, *supra* note 27.

²⁹ Aaron Smith, *SLAPP Fight*, 68 ALA. L. REV. 303 (2016). See also Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845 (2010).

³⁰ *Davis v. Cox*, 351 P.3d 862 (Wash. 2017); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017). See *Washington Supreme Court Strikes Down Anti-SLAPP Law as Unconstitutional*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (May 28, 2015), <https://www.rcfp.org/washington-supreme-court-strikes-down-anti-slapp-law-unconstitutiona/>; Mike Mosedale, *Anti-SLAPP law perishes at Supreme Court*, MINN. LAWYER (May 30, 2017), <https://minnlawyer.com/2017/05/30/anti-slapp-law-perishes-at-supreme-court/>.

³¹ See Nick Phillips and Ryan Pumpian, *A Constitutional Counterpunch to Georgia's Anti-SLAPP Statute*, 69 MERCER L. REV. 407 (2018) (also noting judicial challenges to a proposed anti-SLAPP law in New Hampshire).

³² Hartzler, *supra* note 24, at 1248-70.

³³ *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 160 (2004). See also Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH U. L. Q (1976); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 SUP. CT. REV. 1 (1980); Lillian BeVier, *An Informed Public, and Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).

³⁴ ROBERT POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 37-38 (2012); see also MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW* (2015).

³⁵ See Gyan, Clowdus, Hammond, and discussion accompanying *supra* note 5.

³⁶ The analysis here is not intended to second-guess the strategy of the defendants' attorneys, who we assume put forward the best defense for their clients that they could, accounting for the procedural or other particularities of

key questions that could arise in the other jurisdictions if requesters attempt to apply an anti-SLAPP statute to their cases.

The Louisiana lawsuit may provide the most textbook anti-SLAPP case of the three.³⁷ Finney and Deshotels had filed numerous public records requests for enrollment information, and the education department filed equitable causes of action against both individuals, seeking declarations from the court that it was not required to release the records and an award of attorney's fees and costs.³⁸ Publicly, the education department identified the "tension" between free disclosure of public records according to Louisiana law and protection of student information under federal law as justification for the suits.³⁹

Deshotels had been involved in litigation with the education department over records requests on four prior occasions, and each time courts resolved the matters in his favor.⁴⁰ Along the way, he had discovered by way of records requests that the education department was falsely identifying "drop-outs" as having transferred out of state or to home-schooling, which led to inaccurate student enrollment numbers and per-pupil funding calculations.⁴¹ The department's balking at Deshotels's records requests can fairly be described as an attempt to avoid further disclosures of that kind. Meanwhile, Finney made around 50 records requests over a seven-month period.⁴² In its petition against Finney, the government asked the judge to rule that the department is not required to produce records for the requests because the requests are "unduly burdensome and ... exempt from public records law,"⁴³ which also calls into question the justification for the suits on the basis of a conflict between state and federal law. Ultimately, the parties settled the case, with the department agreeing to acknowledge that withholding the records was "not in compliance with the Louisiana Public Records Act," and agreeing not to suppress such data going forward and to make publicly available similar data going back to 2006.⁴⁴

On these facts, however, and in light of what is stipulated in the settlement, the Louisiana case would have been appropriate for a special motion to strike under Louisiana's anti-SLAPP law. The law allows a special motion to strike against a cause of action arising from a person's right of petition or free speech under the United States or Louisiana constitutions.⁴⁵ In addition to defining petition or free speech as written or oral statements made in government proceedings and those "made in connection with an issue under consideration or review" by a government body, the law also extends to "any other conduct in furtherance of the exercise of ... the constitutional right of free speech in connection with a public issue or an issue of public interest."⁴⁶ Moreover, although

their given jurisdiction. It is beyond the scope of the research here to investigate every possible legal angle beyond the anti-SLAPP question.

³⁷ Complaint, *supra* note 1.

³⁸ Gyan, *supra* note 5.

³⁹ *Id.* See LA. REV. STAT. ANN. § 44-1 (2011).

⁴⁰ Carol June Ostrow, *Louisiana Department of Education Sues Two Educators Over Public Data Queries*, LOUISIANA RECORD (June 15, 2016), <https://louisianarecord.com/stories/510811178-louisiana-department-of-education-sues-two-educators-over-public-data-queries>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Gyan, *supra* note 3.

⁴⁴ *Id.*; Ostrow, *supra* note 40.

⁴⁵ LA. CIV. CODE ANN. § 971(1) (2006) ("Special motion to strike: A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established a probability of success on the claim.").

⁴⁶ *Id.* at § 971(F)(1).

Louisiana courts have not specifically considered whether the definition of petition or free speech extends to public records requests, the state supreme court has said the anti-SLAPP law “applies to any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, so long as it is made in connection with a public issue.”⁴⁷ Given the relatively broad commonsense interpretation of the Louisiana anti-SLAPP law, and the short stretch needed to consider the defendants’ records requests to be statements related to a public issue made in an “official proceeding authorized by law,” the lawsuit faced by Deshotels and Finney provides a straightforward example of the type of lawsuit well-postured for the filing of a motion to strike under the relevant anti-SLAPP law.

A case in Florida, on the other hand, provides an example of a more complicated government lawsuit over a public records request, where an anti-SLAPP statute might apply, absent other factors. Here, the Everglades Law Center (ELC), an environmental law firm, sought five transcripts from the South Florida Water Management District’s “shade meetings” related to ongoing litigation with an entity called Lake Point.⁴⁸ The water district withheld one transcript, which memorialized a mediation between its governing board and attorneys during which the board decided to settle the Lake Point matter.⁴⁹ The water district also filed an action for declaratory relief, asking the court for direction with respect to the request.⁵⁰

Florida’s anti-SLAPP law specifically prohibits governmental entities from suing a person or entity in response to the exercise of free speech, freedom of assembly, or for petitioning for government redress.⁵¹ It defines “free speech in connection with public issues” as any statement “made before a governmental entity in connection with an issue under consideration or review” or “in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work.”⁵² Case law on the statute does not provide helpful guidance on the interpretation of those terms, though the sweeping language in the statute’s preamble underlines that its protections constitute “fundamental state policy,”⁵³ so one could expect it to be interpreted in a defendant-friendly way, making the Florida case an excellent candidate for a motion for summary judgment under the statute.⁵⁴

The ELC filed a motion to dismiss the case in response to the water management district’s declaratory action, but the Martin County Circuit Court instead found that the Florida open meetings law did not apply, invoking the state’s mediation law, which affords confidentiality to mediation participants.⁵⁵ Thus, the court ruled that the water district was not required to release the fifth transcript.⁵⁶ The ELC appealed this ruling.⁵⁷ Given the outcome, and the ruling that the

⁴⁷ *Shelton v. Pavon*, 236 So. 3d 1233, 1241 (La. 2017).

⁴⁸ Clowdus, *supra* note 5.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ FLA. STAT. ANN. § 768.295 (West 2005).

⁵² FLA. STAT. ANN. § 768.295(2)(a) (West 2005).

⁵³ *Id.* at § 768.295(1).

⁵⁴ The Florida anti-SLAPP law allows defendants to move for summary judgment rather than file a special motion to dismiss. *See* FLA. STAT. ANN. § 768.295 (West 2005).

⁵⁵ Clowdus, *supra* note 5. *See* FLA. STAT. ANN. § 44.405 (2000) (stating in relevant part: “Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel. . . . If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney’s fees, and mediator’s fees.”).

⁵⁶ Clowdus, *supra* note 5.

⁵⁷ *Id.*

transcript is confidential, it is unclear whether a motion under the Florida anti-SLAPP law would have resulted in a more favorable outcome for the ELC.

A case in Portland, Oregon, raises at least two reasons an anti-SLAPP statute might not provide a viable response for a public records requester against a preemptive government lawsuit. Reporter Beth Slovic and parent Kim Sordyl requested records from the Portland School District seeking information about employees on leave, and were denied.⁵⁸ In Oregon, if an agency declines to release records, the process allows appeal to the local district attorney's office, which decides if the records should be released. This is what Slovic did, resulting in an order from the district attorney to provide the records.⁵⁹ Nevertheless, instead of complying with the order, the school district sued, seeking a declaratory judgment that it did not have to release the records.⁶⁰ Slovic and Sordyl prevailed on a motion for summary judgment, which dismissed the lawsuit and required the school district to release the records.⁶¹

Oregon's anti-SLAPP statute, like Louisiana's and Florida's, broadly applies to "any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest," among other things.⁶² A defendant who is sued for those actions may file a special motion to strike under the statute.⁶³ In this case, the reporter and parent were arguably exercising free speech rights on a matter of public interest given they were seeking records about public school employees on leave. Considering the basis of the lawsuit was that request, an anti-SLAPP motion would have been an option in this case.

However, one key barrier could undercut many other anti-SLAPP motions responding to government lawsuits over records requests in Oregon. The Oregon anti-SLAPP law includes unique language exempting "action[s] brought by the Attorney General, a district attorney, a

⁵⁸ *With Anti-Accountability Lawsuit Targeting Journalist, Parent, Portland Schools Get It Wrong: Editorial Agenda*, OREGONIAN (Apr. 1, 2017), https://www.oregonlive.com/opinion/2017/04/with_anti-accountability_lawsu.html.

⁵⁹ Letter from Rod Underhill, Multnomah County District Attorney, to Stephanie Harper, Portland Public Schools General Counsel (March 20, 2017), http://mcda.us/wp-content/files_mf/14900365991715Order.pdf. The district attorney found the information sought was not the type an ordinary person would find offensive to disclose, as typically employees know why other employees are on leave and for how long.

⁶⁰ Beth Slovic, *Portland Public School Will Sue Reporter and Parent to Block Release of Records*, PORTLAND TRIBUNE (Mar 28, 2017), <https://pamplinmedia.com/pt/9-news/351888-231430-portland-public-schools-will-sue-reporter-and-parent-to-block-release-of-records>.

⁶¹ Hammond, *supra* note 5. Under Oregon Civ. Proc. R. 47, entitled "Summary Judgment," if there is no genuine issue of material fact the moving party is entitled to judgment in their favor. Whatever record is before the court is analyzed in the light most favorable to the non-moving party, and if no objectively reasonable juror could find for the non-movant, judgment as a matter of law is entered for the party filing the motion. This is a summary process designed to cull weak or meritless lawsuits.

⁶² OR. REV. STAT. § 31.150 (2006)

⁶³ OR. REV. STAT. § 31.150 (2)(d) *et seq.* (2006) (stating in relevant part: "A special motion to strike may be made under this section against any claim in a civil action that arises out of: ... Any ... conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.")

county counsel or a city attorney acting in an official capacity.”⁶⁴ Although the lawsuit in the instant case came from a school district, presumably other lawsuits over records cases would come from one of the exempted attorneys, thus holding the anti-SLAPP statute out of reach for Oregon records requesters-cum-civil defendants.

Additionally, and in contrast to the abbreviated process offered under Oregon’s civil procedure rules for summary judgment, the state anti-SLAPP law involves a preliminary hearing that may result in drawn-out litigation. This may require more time for resolution, and depending on the results of the preliminary hearing, may involve depositions, interrogatories, requests for production, and requests for admission—typical discovery tools in a civil action. Compared to a motion for summary judgment, the anti-SLAPP process could result in a defendant expending significantly more resources while allowing agencies holding records to delay their release even longer. It is beyond the scope of this research to explore the procedural specifics of each state’s anti-SLAPP law, but the realities illustrated in the Oregon case could certainly come to bear on whether any particular defendant might choose the anti-SLAPP route—as opposed to a regular motion for summary judgment—in responding to a government lawsuit over a records request.

The cases in Louisiana, Florida, and Oregon neatly illustrate how anti-SLAPP laws might apply to lawsuits against public records requesters, depending on how those laws define public participation, as well as other procedural particularities and exemptions. The section below examines these issues in more detail across all the states that have anti-SLAPP laws.

Applying State Anti-SLAPP Laws to Lawsuits Against Records Requesters

One key question that will determine whether a state’s anti-SLAPP law can be used to knock down a preemptive government lawsuit over a public records request is whether the law’s definition of public participation encompasses public records requests. A second question, somewhat more straightforward and dispositive, is whether the law exempts the government from an anti-SLAPP motion.

The definition question is unwieldy; none of the 31 state anti-SLAPP laws explicitly includes public records requests as a form of public participation. Access to information about “what the government is up to” may not be considered a clearly established constitutional right,⁶⁵ but communicating with the government about issues of public concern is surely considered an exercise of free speech under the First Amendment, and a commonsense understanding of democratic civic engagement surely includes public records requests as engaging in public participation more generally. Case law that answers questions surrounding the definition question can be helpful: Have courts provided guidance about whether public records requests would be considered “public participation” for the purposes of an anti-SLAPP law? Have they provided a broad or narrow interpretation of that definition that suggests that the law would include or exclude records requests? Using the letter of each law and the case law surrounding them, the analysis here categorizes the 31 laws into three tiers, from most likely to least likely to extend to public records requests.

The first tier includes laws with a broad definition of public participation that can apply to many circumstances inclusive of public records requests. It also includes a few special cases worth

⁶⁴ OR. REV. STAT. § 31.155(1) (2006). As discussed *infra* at text accompanying notes 102 to 103, other state statutes exempt “enforcement” actions brought by government attorneys, but this would presumably include a smaller range of actions than Oregon and be less likely to apply to public records requests.

⁶⁵ See discussion accompanying *supra* notes 33 and 34.

consideration. The 13 anti-SLAPP statutes in this tier are in Arkansas, California, Connecticut, Florida, Guam, Louisiana, Maryland, Massachusetts, Nevada, Oklahoma, Oregon, Rhode Island, and Texas.⁶⁶

Most of these states' laws are either facially broad or include provisions that could logically extend to a public records request because they protect speech aimed at prompting government action on issues of public interest or concern. Guam's anti-SLAPP law might be the most facially broad, providing in full: "Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, regardless of intent or purpose, except where not aimed at procuring any government or electoral action, result or outcome."⁶⁷ A records request in Guam could logically be considered an act of "participating in the processes of government"—using the open records law—with an aim of "procuring government action"—the production of the records. Maryland's law is also broad, and could be interpreted to include a records requester, as it applies to "a party who has communicated with a federal, State, or local government body or the public at large to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment of the U.S. Constitution or [state constitution] regarding any matter within the authority of a government body or any issue of public concern."⁶⁸ Meanwhile, Arkansas' statute "includes, *but is not limited to* ... any written or oral statement" made before or in connection with a proceeding or issue under consideration by the government.⁶⁹ Neither Guam, Maryland, nor Arkansas has case law expanding on the specific speech or activities to which these broad definitions apply.

Some states specify that the protected class of speech or action must be related to an issue of public interest or concern, which would generally set a low bar for a public records request to clear. This is the case with Louisiana's law, for example, as discussed above. Connecticut's anti-SLAPP law encompasses "communicating, or conduct furthering communication, in a public forum on a matter of public concern," "communication that is reasonably likely to encourage consideration or review of a matter of public concern" by a government body, or "communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue" by a government body—all of which could be said of a public records request.⁷⁰ Oklahoma defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern" where "matter of public concern" pertains to numerous topics that would likely include a records request, such as "an executive or other proceeding before a department or agency," as well as "a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body."⁷¹ On the other hand, a court in Massachusetts ruled that it is "not necessary that the petitioning activity [covered

⁶⁶ See generally, ARK CODE ANN. § 16-63-501 (Michie 2006); CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006); CONN. GEN. STAT. § 52-196a (2017); FLA. STAT. ANN. § 768.295 (West 2005); 7 GUAM CODE ANN. §§17101-17109 (2006); LA. REV. STAT. ANN. 971 (West 2006); MD. CTS. & JUD. PROC. ANN. § 5-807 (2006); MASS. GEN. LAWS. ch. 231, § 59H (West 2000); NEV. REV. STAT. ANN. § 41.635 (Michie 2002); 12 OKLA. STAT. ANN. § 1430 (West 1993); OR. REV. STAT. § 31.150 (2006); R.I. GEN. LAWS § 9-33-1 (1997); TEX. REV. CIV. STAT. 27.002 (West 2011).

⁶⁷ 7 GUAM CODE ANN. §§17101-17109.

⁶⁸ MD. CTS. & JUD. PROC. ANN. § 5-807.

⁶⁹ ARK CODE ANN. § 16-63-501 (emphasis added).

⁷⁰ CONN. GEN. STAT. § 52-196a (2017).

⁷¹ 12 OKLA. STAT. ANN. § 1430 (West 1993).

by the anti-SLAPP law] be motivated by a matter of public concern.”⁷² Some states connect public participation to asking the government to do something, like in Oklahoma, where free speech or petitioning activity is that which is “reasonably likely to encourage consideration or review,”⁷³ and Nevada, which protects “good faith communication in furtherance of the right to petition or the right to free speech ... aimed at procuring any governmental or electoral action, result or outcome.”⁷⁴ A court in those states could easily see asking the government to produce public records as encouraging consideration or review or seeking a government action.

Texas, California, and Oregon all define public participation in broad terms that would presumably cover public records requests, placing them in the first tier of anti-SLAPP laws.⁷⁵ However, additional factors bear mentioning in the context of a preemptive government lawsuit against a records requester. In Texas, for example, the public records law explicitly states “a governmental body, officer for public information, or other person or entity ... may not file suit against the person requesting the information.”⁷⁶

The situation in California is more complex. In 2002, the Supreme Court of California ruled in *Filarsky v. Superior Court* that allowing a public agency to preemptively sue a records requester “frustrate[es] the legislature’s purpose of furthering the fundamental right of every person in the state to have prompt access to information in the possession of public agencies” because it “circumvent[s] the established special statutory procedure,” “eliminate[s] statutory protections and incentives for members of the public in seeking disclosure of public records,” and “discourage[es] them from requesting records.”⁷⁷ However, in a 2012 case involving a public school teacher’s attempt to enjoin the release of his personnel record, *Marken v. Santa Monica-Malibu Unified School District*, a California appellate court drew a distinction between “the preemptive, agency-initiated declaratory relief action” at issue in *Filarsky*, and the teacher’s third-party suit seeking judicial review of an agency decision, which it said did not “impair the important procedural protections available to a party requesting information under the CPRA.”⁷⁸ Although the *Filarsky* ruling still stands as a barrier to preemptive lawsuits by public agencies against requesters in California, advocates have argued that a “proliferation” of reverse-CPRA suits subsequent to the *Marken* ruling—including by current and former government officials—“has forced requesters to engage in CPRA litigation that they did not initiate and discourages members of the public from making CPRA requests in the first place.”⁷⁹

Oregon, meanwhile, poses an almost opposite problem. The anti-SLAPP law broadly

⁷² *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 249 (2007). The Massachusetts anti-SLAPP law covers “any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding.” See MASS. GEN. LAWS. ch. 231, § 59H (West 2000).

⁷³ 12 OKLA. STAT. ANN. § 1431(4)(b) (West 1993).

⁷⁴ NEV. REV. STAT. ANN. § 41.637 (Michie 2002).

⁷⁵ TEX. REV. CIV. STAT. 27.002 (West 2011); CAL. CODE CIV. PROC. § 425.16 (West Supp. 2004 & 2006); OR. REV. STAT. § 31.150 (2006).

⁷⁶ TEX. GOV’T CODE § 552.325 (a)(1995). See also Packer, *supra* note 13, at 40.

⁷⁷ *Filarsky v. Superior Court*, 28 Cal. 4th 419, 423 (Cal. 2002). See also *City of Santa Rosa v. Press Democrat*, 187 Cal. App. 3d 1315 (Cal. App. 1st Dist. 1986) (denying government’s action for declaratory relief because no live controversy existed suitable for adjudication).

⁷⁸ *Marken v. Santa Monica-Malibu Unified School District*, 202 Cal. App. 4th 1250, 1265-1269 (2012).

⁷⁹ Brief for Reporters Committee for Freedom of the Press and 15 Media Organizations, pp. 9-10, Los Angeles v. Metropolitan Water District of Southern California, San Diego Union-Tribune, 2019 Cal. App. LEXIS 1149 (2019). See also Shawna Chen, Pariss Briggs and Simren Verma, *How Reverse-CPRA Lawsuits Harm the Public’s Right to Know*, Reporters Committee for Freedom of the Press (May 14, 2019), <https://www.rcfp.org/how-reverse-cpra-lawsuits-harm-the-publics-right-to-know/>.

applies to “any ... conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”⁸⁰ As discussed above, however, the law also exempts actions brought by government attorneys in their official capacities. So, Oregon’s broad definition of speech or activity in the interest of public participation is tempered by a clause that makes it very difficult to bring an anti-SLAPP motion in response to a government lawsuit.

The second tier of anti-SLAPP laws includes laws with narrower textual definitions of public participation, including statutory language that applies to fewer circumstances than the more inclusive first tier statutes, or case law that limits those definitions, making it more difficult to foresee a public records requester using the anti-SLAPP law in response to a preemptive government lawsuit. The 13 anti-SLAPP statutes in this tier are in Arizona, Delaware, the District of Columbia, Georgia, Illinois, Indiana, Kansas, Maine, Nebraska, New Mexico, New York, Utah, and Vermont.⁸¹

The statutes in D.C., Arizona, New Mexico, and Maine are focused on more traditional acts of petitioning the government. For example, in D.C., to use the anti-SLAPP law in response to a preemptive lawsuit, a defendant would need a court to conclude that a records request qualified as an “act in furtherance of the right of advocacy on issues of public interest” including “expression or expressive conduct that involves ... communicating views to members of the public in connection with an issue of public interest.”⁸² While a records request could be seen as related to such acts—i.e., gathering information to communicate it to the public—it might not be considered such an act in itself. The Arizona, New Mexico, and Maine anti-SLAPP statutes cover communication or statements related to issues currently under consideration by a government body.⁸³ Presumably, this could exclude lawsuits over records requests related to issues not under consideration.⁸⁴ And the Delaware, Nebraska, and New York anti-SLAPP laws extend protection only to the targets of lawsuits by people who are seeking government permits and licenses.⁸⁵ For example, in Nebraska, this means “any person who has applied for or obtained a permit, zoning change, lease, license, certificate, or other entitlement for use or permission to act from any government body.”⁸⁶

Otherwise broad laws in Georgia, Vermont, and Illinois have been interpreted narrowly by courts. Georgia’s law defines public participation as “any ... conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern.” In *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, the state Supreme Court ruled that although that definition was “not required to constitute a petition for redress of grievances, but instead could relate to an official proceeding instigated by someone else and

⁸⁰ OR. REV. STAT. § 31.150 (2)(d) (2006).

⁸¹ ARIZ. REV. STAT. § 12-751 (2007); DEL. CODE ANN. § 8136 (1999); D.C. CODE ANN. § 16-5501 (2010); GA. CODE ANN. § 9-11-11.1 (2006); 735 ILL. COMP. STAT. 110/15 (West 2007); IND. CODE ANN. § 34-7-7-1 (Michie 2006); KAN. STAT. ANN. § 60-5320 (2016); 14 ME. REV. STAT. ANN. § 556 (West 2003); NEB. REV. STAT. § 25-21.243 (1995); N. M. STAT. ANN. § 38-2-9.1 (Michie 2004); N.Y. C.P.L.R. § 3211, Pt. 1/7 (McKinney Supp. 2007); UTAH CODE ANN. § 78B-6-1401 (2002); VT. STAT. ANN. § 1041 (2005).

⁸² D.C. CODE ANN. § 16-5501(1) (2010).

⁸³ ARIZ. REV. STAT. § 12-751 (1)(b) (2007); N. M. STAT. ANN. § 38-2-9.1 (Michie 2004); 14 ME. REV. STAT. ANN. § 556 (West 2003).

⁸⁴ *But see* Schelling v. Lindell, 942 A.2d 1226, 1231 (Me. 2008) where the Supreme Judicial Court of Maine held, “the definition of the right to petition the government provided by the statute is unquestionably broad enough to encompass activities related to matters not currently pending before a legislative body.”

⁸⁵ DEL. CODE ANN. § 8136 (a) (1999); NEB. REV. STAT. § 25-21.242 (1) (1995); N.Y. CLS CIV R § 76-a (1993).

⁸⁶ NEB. REV. STAT. § 25-21.242 (1) (1995).

constitute an act in furtherance of the right of free speech” the law should not be read “to expand the scope ... beyond its terms so as to encompass a wide range of speech and conduct which is arguably connected with any issue of public interest or concern.”⁸⁷ Vermont anti-SLAPP protection extends to the “exercise, in connection with a public issue, of the right to freedom of speech or to petition the government for redress of grievances under the U.S. or Vermont Constitution.”⁸⁸ But the state Supreme Court has said “the anti-SLAPP statute should be construed as limited in scope and ... great caution should be exercised in its interpretation.”⁸⁹ Illinois’ law covers acts “in furtherance of the moving party’s rights of petition, speech, association, or to otherwise participate in government ... when genuinely aimed at procuring favorable government action, result, or outcome.”⁹⁰ In *Sandholm v. Kuecker*, however, the state Supreme Court required that anti-SLAPP motions show that suits are “directed solely at [movant’s] petitioning activities” as well as that the plaintiff’s claims are meritless.⁹¹ Conceivably, a case where the government plaintiff claims its intention is to resolve a question about public records law and is thus not directed solely at defendant’s petitioning activities could fall short of the standard set in *Sandholm*.

The requirement that the defendant who brings an anti-SLAPP motion bears the initial burden of proof also appears in at least four other statutes: Indiana, Utah, Kansas, and Nebraska.⁹² This is arguably counter to the spirit of open records laws, which typically do not require records requesters to justify or explain their requests. For example, in Indiana, an anti-SLAPP motion must specifically identify the public issue that prompted the lawsuit and show that the plaintiff’s legal action is aimed at that act.⁹³ In Utah, the motion must show that the SLAPP suit at issue is aimed at harassing the defendant.⁹⁴

The third tier includes the five laws that either explicitly or implicitly exclude open records requests as the basis for an anti-SLAPP motion: Hawaii, Pennsylvania, Tennessee, Virginia, and Missouri. Hawaii’s anti-SLAPP law applies to “any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding.”⁹⁵ Case law in that state has reinforced this narrow language as protecting only “testimony.”⁹⁶ Pennsylvania’s anti-SLAPP law applies only to “communication to a government agency relating to enforcement

⁸⁷*Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 281 Ga. 439, 442 (2006).

⁸⁸ VT. STAT. ANN. § 1041 (a) (2005).

⁸⁹ *Felis v. Downs Rachlin Martin PLLC*, 133 A.3d 836, 851 (Vt. 2015).

⁹⁰ 735 ILL. COMP. STAT. 110/15 (West 2007).

⁹¹ *Sandholm v. Kuecker*, 962 N.E.2d 418, 430 (Ill. 2012).

⁹² IND. CODE ANN. § 34-7-7-1 (Michie 2006); UTAH CODE ANN. § 78B-6-1401 (2002); KAN. STAT. ANN. § 60-5320 (2016); NEB. REV. STAT. § 25-21.243 (1995).

⁹³ IND. CODE ANN. § 34-7-7-9 (b) (Michie 2006) (“The person who files a motion to dismiss must state with specificity the public issue or issue of public interest that prompted the act in furtherance of the person’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana”). *See also* Hartzler, *supra* note 24, at 1279, arguing that “Indiana’s requirement that the party invoking anti-SLAPP protection bear the burden of proof that its actions were lawful defeats the purpose of an anti-SLAPP law because placing the burden of proof on the party invoking the law’s protection weighs on the party under attack instead of putting the pressure on a party filing such a suit to reconsider its actions.”

⁹⁴ UTAH CODE ANN. § 78B-6-1405(1)(b) (2002) (“A defendant in an action involving public participation in the process of government may maintain an action, claim, cross-claim, or counterclaim to recover ... other compensatory damages upon an additional demonstration that the action involving public participation in the process of government was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution.”).

⁹⁵ HAW. REV. STAT. § 634F-1 (Michie 2005).

⁹⁶ *See Cabatbat v. Curtis*, 2011 Haw. App. LEXIS 937 (2011); *Perry v. Perez-Wendt*, 129 Haw. 95 (2013).

or implementation of an environmental law or regulation.”⁹⁷ Tennessee’s is based on the intent to protect “good faith reports of wrongdoing to appropriate governmental bodies,” and therefore only applies to the communication of “information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency.”⁹⁸ Virginia anti-SLAPP law applies only to claims of tortious interference with an existing or prospective contract, or defamation—a vanishingly narrow set of circumstances for an open records request.⁹⁹ While Missouri’s law applies to “conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state,”¹⁰⁰ defendants in the types of cases discussed here would struggle to succeed on an anti-SLAPP motion, as the state’s courts have ruled that government entities have standing to sue requesters under the state’s open records law.¹⁰¹

Meanwhile, records requesters sued by the government in some states might not be able to raise the question of whether their request is considered public participation under the anti-SLAPP law at all, because government litigants may be exempted from anti-SLAPP motions in the first place. Such is likely the case in Oregon, as previously discussed, where the law’s provisions “do not apply to an action brought by the Attorney General, a district attorney, a county counsel or a city attorney acting in an official capacity.”¹⁰² Other states exempt an “enforcement action” brought by the state from being subject to an anti-SLAPP motion. These include Arizona, California, Connecticut, Indiana, Kansas, Louisiana, Oklahoma, Texas, and Vermont.¹⁰³

The definition of enforcement action is not facially clear, and the statutes and courts do not parse their meaning further. Most obviously, states want to prevent a criminal defendant from using an anti-SLAPP motion to delay or interfere with a criminal prosecution, which would not apply to an open records request. But the term could also apply to civil sanctions or the enforcement of administrative regulations, which might be more likely to extend to a public records request, depending on how a state’s open records law works.¹⁰⁴ Florida’s anti-SLAPP law, on the other hand, explicitly applies in circumstances where “a person or entity [is] sued by a governmental entity or another person in violation of this section.”¹⁰⁵

⁹⁷ 27 PA. CONS. STAT. ANN. § 7707 (West Supp. 2006).

⁹⁸ TENN. CODE ANN. § 4-2-1002(a) and § 4-2-1003(a) (2005).

⁹⁹ VA. CODE ANN. § 8.01-223.2(A) (Michie 2017).

¹⁰⁰ MO. REV. STAT. § 537.528 (1) (2006).

¹⁰¹ *City of Springfield v. Events Publ’g Co.*, 951 S.W.2d 366, 370 (Mo. Ct. App. 1997). *See also* discussion accompanying *supra* notes 17-21.

¹⁰² OR. REV. STAT. § 31.155(1) (2006).

¹⁰³ ARIZ. REV. STAT. § 12-7529(E)(2) (2007); CAL. CODE CIV. PRO. § 425.16(d) (West Supp. 2004 & 2006); CONN. GEN. STAT. § 52-196 (2017); IND. CODE ANN. § 34-7-7-1(b) (2006); KAN. STAT. ANN. § 60-5320(h) (2016); LA. REV. STAT. ANN. (2006); OKLA. STAT. § 12-1439(1) (West 1993); TEX. REV. CIV. STAT. § 27.010(1) (West 2011); 12 VT. STAT. ANN. § 1041(h) (2005).

¹⁰⁴ It is beyond the scope of this project to review all state open records laws, though subsequent research should examine this issue more closely.

¹⁰⁵ FLA. STAT. ANN. § 768.295(4) (West 2005). The Florida legislature has also contemplated explicitly prohibiting government entities from filing lawsuits against those seeking public records. *See* John Kennedy, *Lawsuits a New Tactic Against Those Seeking Public Records*, DAILY COMMERCIAL (May 28, 2018), <https://www.dailycommercial.com/news/20180528/lawsuits-new-tactic-against-those-seeking-public-records>.

Discussion, Conclusions

Anti-SLAPP laws that define public participation broadly could be used by public records requesters to defend against preemptive government agency lawsuits seeking to prevent the release of records. In some cases, the laws might work as originally intended—as a relatively fast and cost-effective way to fight back against attempts to silence and discourage critics. This appears most likely in some of the states in the first tier of anti-SLAPP laws discussed above: Arkansas, California, Connecticut, Florida, Guam, Louisiana, Maryland, Massachusetts, Nevada, Oklahoma, Rhode Island, and Texas. On the other hand, it is clear that anti-SLAPP law more generally is not a panacea for requesters sued by the government, as demonstrated by the fact that close to half of the state anti-SLAPP laws might not, or would not, apply to the type of lawsuits at the center of this research. From the history of concerns about SLAPP suits, the diverse language of the laws enacted in response, and their judicial interpretation, we can see that few if any of the laws were explicitly intended to prevent lawsuits against records requesters as a means to ensure government transparency and accountability.

However, the lukewarm findings outlined above do not mean that public records requesters are in grave jeopardy when preemptively sued by the government. Note that in Oregon, the records requesters succeeded on their motion for summary judgment in response to the Portland School District’s lawsuit through a procedure that may well have taken less time and energy than an anti-SLAPP motion. This is no small consideration, as withholding records for any amount of time deprives people of information about matters of public concern¹⁰⁶ and can render coverage about such matters “old news,” undermining the fundamental purpose of an open records law. Taking the most expeditious route for dismissal under a jurisdiction’s civil procedure rules can provide a more direct and economical solution in light of these concerns. In Louisiana, similarly, the state education association settled its suit against Finney and Deshotels on terms that released the records sought and guaranteed the availability of similar data going forward.

Meanwhile, the results of five other recent cases in states without anti-SLAPP laws suggest that government entities should not expect an easy path when they preemptively sue records requesters. Suits by Michigan State University against the television network ESPN, a Michigan county government against a local newspaper, and a New Jersey township against an individual requester all resulted in rulings against the government, in which courts generally found that such suits run against the spirit and the letter of state open records laws.¹⁰⁷ California has strong case law and Texas a clear statutory provision to this effect. Cases are still ongoing in Kentucky, where two state universities have sued their student newspapers over requests for records related to faculty sexual harassment allegations.¹⁰⁸

The fact that courts may tend to reject them notwithstanding, history seems to show us that preemptive government lawsuits against public records requesters will likely continue, especially where legislatures or courts have not clearly foreclosed that line of attack. Because they deviate from the purpose and procedure of open records laws and risk a chilling effect on public records requests, open government advocates should press lawmakers to see these lawsuits for what they are: strategic lawsuits against public participation.

¹⁰⁶ See Hartzler, *supra* note 24, at 1237, and discussion accompanying *supra* note 24.

¹⁰⁷ See Mencarini and Peters, *supra* note 5 and Donna Weaver, *supra* note 7.

¹⁰⁸ See Blackford, *supra* note 5.



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Opening the State House Doors: Examining Trends in Public Access to Legislative Records

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Abstract

Freedom of Information (“FOI”) laws apply principally to the executive branch of government and the administrative state. Yet many state FOI statutes also provide access to legislative records, whether they have been created or obtained by individual legislators, committees, or legislative-branch agencies. A comprehensive survey of state FOI laws reveals trends in how such legislative records are treated. A minority of states, for example, categorically excludes legislative records from the scope of disclosure. The remaining states provide at least some basic level of access, either in explicit terms or implied through judicial or executive-branch interpretation. In the latter case, the interpretation of an FOI statute often involves consideration of broader context and the interplay of various provisions, including exemptions applicable only to legislative records. Regardless, the data suggest a clear trend of interpreting state FOI laws to resolve any ambiguity in favor of public access.

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Introduction

Freedom of Information (“FOI”) statutes play a vital role in good governance and accountability by providing the public with a right to access government information. That access ensures that the media, citizen activists, and other interested persons obtain documents that reveal the functioning—or wrongdoing—of elected and bureaucratic officials. Both at the federal and state levels, FOI laws typically apply to the executive branch of government and the administrative state. Whether the records of the legislature, individual legislators, or other legislative branch entities are, or should be, subject to the same level of public access is a more contentious issue.

Some state FOI statutes are explicit about whether the public can access legislative records. In a significant number of jurisdictions, however, the law is ambiguous and calls out for interpretation by the courts and executive branch officials. Prolonged legal disputes inevitably arise when requesters attempt to test the limits of access in cases of ambiguity. For example, there are cases pending on appeal in both Washington¹ and Georgia² that will determine the extent to which legislative records are subject to public disclosure in those states.

Based on a comprehensive survey of state FOI laws, only a small number of states—twelve, to be precise—disallow access to legislative records, whether by express statutory language or interpretation of the courts or other state officials. Most other states, by contrast, provide requesters with at least some basic level of access. This access may be provided in explicit terms. But in many jurisdictions, the ability to access legislative records depends on statutory construction and the interpretation of language that only impliedly authorizes requests for records of any “branch,” “department,” or “authority.” Other states provide access to legislative records because their laws are organized with reference to certain types of documents rather than certain entities. Interpreting a FOI statute, in those cases, also may involve consideration of broader statutory context and the interplay of other statutory provisions, such as exemptions applicable only to legislative records. Taken together, the data suggest a clear trend of interpreting state FOI laws to resolve ambiguities in favor of public access.

The first section of this article details the jurisdictions where access to legislative records is either expressly provided for by statute or impliedly recognized by judicial or other legal interpretation. The second section details the minority of jurisdictions where access to legislative records is expressly excluded. The third section extends the paper’s analysis to the federal Freedom of Information Act (“FOIA”). Although the FOIA’s definition of an “agency” explicitly excludes Congress and has been interpreted to exclude congressional components and individual legislators, the application of the statute to legislative branch agencies is a more complicated matter. This paper describes the current case law regarding legislative branch agencies, suggests how Congress and the courts may further transparency by subjecting certain legislative agencies to the FOIA, and ends by analyzing the relevant test for “agency control” over legislative branch records that end up under the control of entities subject to the FOIA.

¹ See *infra* note 49 and accompanying text.

² See *infra* notes 97, 103 and accompanying text.

Most FOI statutes provide some form of access to legislative records

Thirty-eight states have adopted FOI statutes that permit requesters to access legislative records.³ In some states, that access is unrestricted. The type of records subject to the FOI statute may vary and include records maintained by individual legislators, as well as materials created by legislative committees or legislative branch agencies. In other instances, access is limited to only certain types of legislative records. No matter the exact scope of disclosure, however, there are recognizable trends that reveal how lawmakers deal with the legislative branch in a FOI statute—typically, with express language—and how executive officers, such as state attorneys general, and courts tend to resolve cases of ambiguous statutory language.

States with express access to legislative records

Almost half of all states—or twenty-four—have FOI laws that cover the legislature in explicit terms. There is some diversity in how those states reach that result.⁴ In two states, the law focuses on the *nature of the record* subject to disclosure. Under the North Carolina FOI statute, for example, a “public record” is defined broadly to include almost anything “made or received” by an “agency . . . includ[ing] every public office, public officer or official (State or local, elected or appointed)[.]”⁵ The Colorado FOI statute similarly focuses on the definition of a “public record,” which “includes all writings made, maintained, or kept by the state,” plus the correspondence of elected officials.⁶

Other states focus on the kinds of government entities that must disclose their records upon request, rather than on the nature of the records themselves. Nine states have FOI laws that define the term “agency” to include the entire legislative branch.⁷ In Connecticut, for example, an

³ See App. Table 1. For ease of reading, the capitalization of language in statutory references has been changed throughout the article and the appendix. Internal quotation marks and citations also have been omitted.

⁴ Two states enshrine the right of access to legislative records in their constitutions. See, e.g., FLA. CONST. art. I, § 24(a) (In Florida, “[e]very person has the right to inspect or copy any public record This specifically includes the legislative, executive, and judicial branches of government[.]”). Missouri voters recently approved a constitutional amendment to ensure that legislative records are subject to the state’s Sunshine Law. See MO. CONST. art. 3, § 19(b) (“Legislative records shall be public records and subject to generally applicable state laws governing public access to public records[.]”). This change compliments and broadens existing law, which defines a “public government body” whose records are subject to the FOI statute to include any “legislative entity.” MO. ANN. STAT. § 610.010(4). The Missouri House has prepared a series of FOI amendments that would introduce exemptions for “constituent case files” and other deliberative records. See H.B. 445, 100th Gen. Assembly, Reg. Sess. (Mo. 2019). The proposed legislation is still pending, as of this writing, in the Senate. See Jack Suntrup, *Missouri House votes to curtail state open records law after voters subject lawmakers to it*, ST. LOUIS POST-DISPATCH (Feb. 7, 2019), <http://bit.ly/2E4ZF3G>.

⁵ N.C. GEN. STAT. ANN. § 132-1(a).

⁶ COLO. REV. STAT. ANN. § 24-72-202(6)(a)(I)–(II).

⁷ Those states include Connecticut, Idaho, Indiana, Kentucky, Montana, New Jersey, Ohio, Pennsylvania, and Rhode Island.

“agency means any executive, administrative or legislative office[.]”⁸ The Ohio FOI statute includes a similar reference to the entire legislative branch,⁹ as does the Montana law.¹⁰

Although New Jersey defines “agency” broadly to include the legislature, as well as legislative entities “within or created by the Legislative Branch,”¹¹ certain legislative records are exempted. Specifically, the New Jersey FOI statute provides a broad exclusion for records, such as constituent correspondence, that belong to individual legislators.¹² Access to records of individual legislators is similarly limited in Pennsylvania, notwithstanding a broad definition of “agency” that covers legislative bodies, including each deliberative house and attendant legislative agencies.¹³

Indiana is another state where, despite an expansive definition of “agency,” the application of the FOI statute is complicated by other statutory provisions and judicial precedent. Under the Indiana FOI law, a “[p]ublic agency . . . means . . . [a]ny [entity] exercising any part of the executive, administrative, judicial, or legislative power of the state.”¹⁴ Courts have recognized the breadth of this definition.¹⁵ At the same time, they have refused to adjudicate disputes over legislative determinations on the withholding of exempt work product.¹⁶ That refusal is premised on a theory of separation of powers and the deference afforded to public agencies in making certain redactions.¹⁷ Nevertheless, the Indiana courts also have refused to rely on constitutional grounds to invalidate the broad definition of a “public agency.” In the context of the executive branch, for example, the Indiana Court of Appeals only recently rejected then-Governor Mike Pence’s argument that a lawsuit challenging his refusal to disclose public records was a non-justiciable

⁸ CONN. GEN. STAT. ANN. § 1-200(1)(A).

⁹ OHIO REV. CODE ANN. § 149.011(B) (“State agency includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including . . . the general assembly [and] any legislative agency[.]”).

¹⁰ MONT. CODE ANN. § 2-6-1002(10) (“Public agency means the executive, legislative, and judicial branches of Montana state government[.]”).

¹¹ N.J. STAT. ANN. § 47:1A-1.1 (“Public agency or agency means . . . the Legislature . . . and any office, board, bureau, or commission within or created by the Legislative Branch[.]”).

¹² *See id.* (“A government record shall not include [constituent correspondence and related records or] . . . any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member’s official duties[.]”). The New Jersey Senate Judiciary Committee is considering, as of this writing, a proposal to broaden this exemption. *See* S.B. 187, 218th Leg., Reg. Sess. (N.J. 2018).

¹³ *Compare* 65 PA. STAT. AND CONS. STAT. ANN. § 67.102 *with* *Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 239 (Pa. 2003) (“Any right of access under the common law was supplanted when the General Assembly defined the term ‘agency’; it did not include *members* of the General Assembly. To conclude such access exists would be tantamount to rewriting the definition of ‘agency’ in the Act.”). In other contexts, courts have more carefully considered whether records created by individual legislators may be still subject to disclosure. *See, e.g., Parsons v. Penn. Higher Educ. Assistance Agency*, 910 A.2d 177, 187–88 (Pa. Commw. Ct. 2006) (rejecting argument that “official records of the acts of legislator members of . . . an independent administrative agency” were “legislative records” exempt from disclosure).

¹⁴ IND. CODE ANN. § 5-14-3-2(q)(1).

¹⁵ *See, e.g., Citizens Action Coal. v. Koch*, 51 N.E.3d 236, 243 (Ind. 2016) (“The general question of whether [the state FOI statute] applies to the Indiana General Assembly and its members is justiciable, and we hold that [it] does apply.”); *id.* at 242 (“[T]he General Assembly and its members constitute a ‘public agency[.]’”).

¹⁶ *See id.* at 242 (“[O]nly the General Assembly can properly define what work product may be produced while engaging in its constitutionally provided duties. Thus, defining work product falls squarely within a ‘core legislative function.’ . . . Since the General Assembly and its members constitute a ‘public agency,’ the statute itself expressly reserves to the General Assembly the discretion to disclosure or not to disclose its work product.”).

¹⁷ *See, e.g., State ex rel. Masariu v. Marion Superior Court No. 1*, 621 N.E.2d 1097, 1098 (Ind. 1993).

question; the court characterized the Governor’s position as “render[ing] [the FOI statute] meaningless.”¹⁸ Similar reasoning presumably should apply to the legislative branch.

Eleven state FOI laws include legislative records by referring to legislative “departments,” “bodies,” “committees,” or “entities” when defining the set of “public” or “governmental bodies” and “entities” whose records are subject to disclosure.¹⁹ Thus, in New Hampshire, a “public body means any . . . legislative body, governing body, . . . or authority[.]”²⁰ In Nevada, a “governmental entity” includes “an elected or appointed officer of th[e] State[.]”²¹

Once again, even in cases of ostensibly clear statutory direction, there can be disagreement over the exact scope of the law. The Michigan FOIA, for example, expressly covers any “agency, board, commission, or council in the legislative branch.”²² But the state’s Attorney General has relied on legislative history to interpret the law to exclude individual legislators.²³ The original version of the Michigan FOIA, as introduced, included the term “legislator” in the same provision that referenced other legislative entities; the “intentional deletion” of that word, the Attorney General reasoned, “demonstrate[d] beyond peradventure the legislative intent . . . to exclude a state legislator from the definition of a ‘public body.’”²⁴ That interpretation has neither been widely litigated nor received much legislative attention. Still, there is pending legislation in the Michigan legislature that would significantly alter the scope of the FOI statute by excluding “an[y] entity in the legislative branch” from the definition of a “public body” and create a parallel “Legislative Open Records Act” (“LORA”), which would effectively subject the entire legislature, including individual members, officers, agencies, and committees to disclosure requirements that mirror the FOIA.²⁵ The LORA—a series of ten bills—has passed the Michigan House of Representatives and is being considered by the state Senate.²⁶

States with implied access to legislative records

Fourteen states have promulgated open records laws that impliedly grant access to legislative records.²⁷ These states have FOI statutes that lack provisions expressly addressing the legislature, legislative agencies, or individual members; instead, they contain other terms or provisions that have been interpreted by the courts and responsible executive officials to provide access to legislative records. They can be grouped into several general categories.

¹⁸ See *Groth v. Pence*, 67 N.E.3d 1104, 1115 (Ind. Ct. App. 2017) (“[T]he Governor does not assert a particular statutory exemption . . . [but] makes a categorical claim of executive privilege from disclosure The Governor’s argument would, in effect render [the FOI statute] as meaningless as applied to him and his staff. [The law] does not provide for any such absolute privilege, and the separation of powers doctrine does not require it.”).

¹⁹ Those states include Alabama, Delaware, Illinois, Michigan, Nevada, New Hampshire, New Mexico, Texas, Utah, Virginia, and West Virginia.

²⁰ N.H. REV. STAT. ANN. § 91-A:1-a(VI)(d). References to the legislature were only added to the New Hampshire FOI statute in 2008. Previously, courts had held that the Right-to-Know law did not apply to the legislature. See, e.g., *Hughes v. Speaker of the N.H. House of Representatives*, 876 A.2d 736, 744–47 (N.H. 2005). The status of individual legislators’ records is still undecided. See generally N.H. Att’y Gen. Op. No. 11-01 (June 29, 2011).

²¹ NEV. REV. STAT. ANN. § 239.005(5)(a).

²² MICH. COMP. LAWS ANN. § 15.232(h)(ii).

²³ See Mich. Att’y Gen. Op. No. 6390 (Sept. 26, 1986).

²⁴ *Id.*

²⁵ See H.B. 4007 to 4016, 100th Leg., Reg. Sess. (Mich. 2019).

²⁶ See Tyler Arnold, *Legislative Open Records Bills Overcome Constitutional Hiccup*, MICH. CAPITOL CONFIDENTIAL (Apr. 16, 2019), <http://bit.ly/2Q4oV5m>; David Egger, *House OKs Subjecting Lawmakers, Governor to Record Requests*, U.S. NEWS & WORLD REPORT (Mar. 19, 2019), <http://bit.ly/2X1n3MX>.

²⁷ See App. Tables 2–4.

Implied access based on the terms defining the governmental entities whose records are subject to disclosure

In ten states, the relevant FOI statute covers the legislature, or certain legislative offices, based on an interpretation of the terms defining which governmental entities' records are subject to disclosure. Six of those states have open records laws that cover the legislature by use of the term "branch" (*i.e.*, the legislative branch of government). Although the term "branch" can be ambiguous on its own, in these states, any ambiguity has been resolved in favor of public access.

In Arizona, for example, "public records and other matters in the custody of any officer shall be open to inspection by any person[.]"²⁸ The term "officer" means "any person elected or appointed to hold any elective or appointive office of any public body[.]"²⁹ And the term "public body," in turn, covers the "state, any county, city, [*etc.*] . . . [and] any branch, department, [*etc.*] . . . of the foregoing."³⁰ The Arizona Attorney General has read these definitions in concert and concluded "that every legislator is an 'officer' and that the Legislature and the houses therefore constitute a branch or department of State Government, and, therefore, is a 'public body' under the public records statutes."³¹

Other states employing the term "branch" have reached a similar conclusion. In Vermont, a "public agency or agency means any agency, board, department, commission, committee, *branch*, instrumentality, or authority of the State[.]"³² The Vermont Supreme Court has determined that this definition applies to the governor with reasoning that is equally applicable to the legislature: In *Herald Ass'n, Inc. v. Dean*, the court wrote that it "is hardly disputable that the Office of the Governor of the State of Vermont is a 'branch, instrumentality or authority of the State.'"³³ "Because the Governor is an 'agency' . . . any paper or document 'produced or acquired' during the course of the Governor's business is a public record subject to disclosure[.]"³⁴

The interpretation of the term "branch" in the Nebraska Public Records Law to cover the legislature is supported by an explicit exemption for records belonging to individual legislators, namely, "correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature in whatever form."³⁵ An indefinitely postponed bill from the previous session of the legislature, which would have exempted audio and video recordings of legislative proceedings, may add further support to this interpretation, at least to the extent it illustrates how some legislators interpret the law.³⁶ The three remaining states that cover the legislature by using the term "branch" include Iowa,³⁷ Louisiana,³⁸ and South Dakota.³⁹

Another four states—North Dakota, South Carolina,⁴⁰ Washington, and Wisconsin—cover their legislatures based on the interpretation of other statutory terms. In North Dakota, "all records

²⁸ ARIZ. REV. STAT. ANN. § 39-121.

²⁹ *Id.* § 39-121.01(A)(1).

³⁰ *Id.* § 39-121.01(A)(2).

³¹ Ariz. Att'y Gen. Op. 78-76 at 2 (Apr. 18, 1978).

³² VT. STAT. ANN. tit. 1, § 317(a)(2) (emphasis added).

³³ 816 A.2d 469, 473 (Vt. 2002) (citing, *inter alia*, VT. CONST. ch. II, § 1).

³⁴ *Id.*

³⁵ NEB. REV. STAT. ANN. § 84-712-05(12).

³⁶ See L.B. 1018, 105th Leg., 2d Sess. (Neb. 2018).

³⁷ IOWA CODE ANN. § 22.1(1).

³⁸ LA. STAT. ANN. § 44:1(A)(1), (3).

³⁹ In South Dakota, the legislature has explicitly excluded the judicial branch from the state's Sunshine Law. See S.D. CODIFIED LAWS § 1-27-1.12.

⁴⁰ South Carolina is discussed in detail below. See *infra* nn. 65–70 and accompanying text.

of a public entity are public records” open to inspection.⁴¹ The code defines a “public entity” as any “public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota, state statute, or executive order[.]”⁴² As an entity created by the state constitution, the legislature qualifies as a “public entity.” That conclusion is supported, moreover, by an explicit exemption for certain legislative materials; records of the “legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly” may be withheld, if they are purely personal, legislative council work product, or if they reveal private communications of a member of the assembly.⁴³ This exemption would not make sense if the legislature, as a whole, were not covered by the FOI statute. Indeed, the North Dakota Attorney General’s Office has adopted exactly that understanding.⁴⁴ The North Dakota FOI law also details how a “record” subject to disclosure cannot “include records in the possession of a court,” a carve-out that does not extend to the legislature.⁴⁵

Under the Washington Public Records Act, each “state agency” must provide the public with access to records. The Act defines a “state agency [to] include[] every state office, department, division, bureau, board, commission, or other state agency.”⁴⁶ Although this language does not explicitly include or exclude the legislature, an examination of other statutory definitions, including some outside of the Public Records Act, reveals that at least *some* legislative offices must be covered. For example, a “state office,” which is part of the definition of a “state agency,” includes a “state legislative office.”⁴⁷ That office, in turn, includes the “office of a member” of the legislature.⁴⁸ At least one state court accepted that reading when it held that “the plain meaning of the Public Records Act defines the offices of all state senators and representatives to be ‘agencies’ subject to the customary disclosure requirements[.]”⁴⁹ The court also explained that the Public Records Act covered certain records from two non-member legislative offices—the Secretary of the Senate and the Office of the Chief Clerk for the House of Representatives—based on the Act’s definition of a “public record.”⁵⁰

⁴¹ N.D. CENT. CODE ANN. § 44-04-18(1).

⁴² *Id.* § 44-04-17.1(13)(a).

⁴³ *Id.* § 44-04-18.6.

⁴⁴ See STATE & LOCAL GOV’T DIV., OFFICE OF ATT’Y GEN., N.D., OPEN RECORDS MANUAL at 37 (2017), available at <http://bit.ly/2zIV9e4> (affirming application of open records law to legislature and discussing exemptions).

⁴⁵ N.D. CENT. CODE ANN. § 44-04-17.1(16) (“Record . . . does not include records in the possession of a court of this state.”); cf. *supra* note 39 (discussing similar provision in South Dakota).

⁴⁶ WASH. REV. CODE ANN. § 42.56.010(1).

⁴⁷ *Id.* § 42.17A.005(49).

⁴⁸ *Id.* § 42.17A.005(33).

⁴⁹ *Associated Press v. Wash. State Legislature*, No. 17-2-04986-34, slip op. at 10 (Wash. Thurston Cty. Sup. Ct. Jan. 19, 2018), *appeal filed*, No. 95441-1 (Wash. Nov. 2, 2018). At the time of publication of this article, the parties in *Associated Press* had briefed the questions presented and already argued the case on June 11, 2019. Efforts in the previous legislative session to revise the FOI law to restrict access to legislative records failed. See S.B. 6617, 65th Leg., Reg. Sess. (Wash. 2018); see also Joseph O’Sullivan, *Gov. Inslee vetoes Legislature’s controversial public-records bill*, SEATTLE TIMES (Mar. 1, 2018), <http://bit.ly/2QnpZAK> (“The veto marks a stunning turnaround since . . . legislators voted overwhelmingly to pass the bill that would have exempted the Legislature from the Public Records Act.”). Although the state legislature is currently in recess, some members renewed efforts earlier this year to explicitly cover the legislature under the FOI law while adding a “permanent exemption” for records revealing its deliberative process. See S.B. 5784, 66th Leg., Reg. Sess. (Wash. 2019); Jessie Gomez, *Washington state to see second bill extending public records act to legislators*, MUCKROCK (Feb. 8, 2019), <http://bit.ly/2EQA7hU>.

⁵⁰ *Associated Press*, slip op. at 11–12; see also WASH. REV. CODE ANN. § 45.26.010(3).

Finally, in Wisconsin, a “requester has a right to inspect any record,”⁵¹ which includes “any material . . . that has been created or is being kept by an authority.”⁵² An “authority,” in turn, is defined as anyone “having custody of a record [including,] [an] elective official[.]”⁵³ The legislature is covered because it is made up of “elective officials,” as confirmed by the courts. While requiring a state senator to disclose emails, the Wisconsin Court of Appeals “observe[d] that the legislature wrote the open records law to apply to ‘elected official[s]’ generally, without any special exception for individual state legislators or houses of the legislature[.]”⁵⁴

Implied access based on the definition of a ‘public record’

In four states, the relevant analysis turns on the type of record at issue, rather than the entities covered by the open records law.⁵⁵ The Maryland Public Information Act, for example, provides access to “public record[s],” a term that includes “any documentary material that is made [or received] by a unit or instrumentality of the State . . . in connection with the transaction of public business[.]”⁵⁶ The Maryland Court of Appeals has held that the “Act applies to ‘public records,’ not ‘agency records.’”⁵⁷ Thus, “[t]he coverage of the Act is dependent upon the scope of the term ‘public records,’ and not upon whether the governmental entity holding the records is an ‘agency’ rather than some other type of governmental entity.”⁵⁸ The Maryland Attorney General also has determined that the Act “covers virtually all public agencies or officials in the State . . . includ[ing] all branches of State government – legislative, judicial, and executive . . . [although] [t]he Maryland courts have not definitively addressed the status of records of individual legislators, many of which are covered by constitutional privileges.”⁵⁹

The Tennessee Public Records Act similarly provides access to “all documents, papers, letters . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]”⁶⁰ Because the statute does not provide a definition of “governmental entity,” courts have focused on whether the information at issue was made or received while transacting “official business.”⁶¹ The Tennessee Office of the Attorney General, for its part, has advised that “[a]ny [state legislator’s] e-mail that meets this definition, therefore, would be a public record subject to public inspection under the statute, unless otherwise provided by state law.”⁶² The Tennessee FOI statute also provides specific exemptions for certain legislative records, thereby strengthening the conclusion that the legislature, as a whole, is covered by the open records law.⁶³

⁵¹ WIS. STAT. ANN. § 19.35(1).

⁵² *Id.* § 19.32(2).

⁵³ *Id.* § 19.32(1).

⁵⁴ John K. MacIver Inst. for Pub. Policy, Inc. v. Erpenback, 848 N.W.2d 862, 866 (Wis. Ct. App. 2014).

⁵⁵ Those states include Maine, Maryland, Tennessee, and Wyoming.

⁵⁶ MD. CODE ANN., GEN. PROVIS. § 4-101(j)(1)(i).

⁵⁷ Office of Governor v. Wash. Post Co., 759 A.2d 249, 257 (Md. 2000).

⁵⁸ *Id.*

⁵⁹ OFFICE OF THE ATT’Y GEN., MD., MARYLAND PUBLIC INFORMATION ACT MANUAL at 1-2, 1-4 (2015), available at <http://bit.ly/2ietGta>.

⁶⁰ TENN. CODE ANN. § 10-7-503(a)(1)(A)(i).

⁶¹ See, e.g., Griffin v. City of Knoxville, 821 S.W.2d 921, 924 (Tenn. 1991) (holding that a state representative’s handwritten notes were public records because they “were received by the Knoxville Police Department in connection with the transaction of official business.”).

⁶² Tenn. Att’y Gen. Op. No. 05-099 (June 20, 2005).

⁶³ See TENN. CODE ANN. § 3-10-108 (providing exemptions for legislative computer systems).

Implied access based on statutory exemptions unique to the legislature

In states where an open records law does not explicitly cover the legislature, references to other provisions in the FOI statute can provide helpful guidance in interpreting the law. In at least six states, the presence of exemptions for certain—but not all—legislative records counsels in favor of determining that the legislature is covered by the open records law.⁶⁴

In South Carolina, for example, “a person has a right to inspect, copy, or receive ... any public record of a public body[.]”⁶⁵ A “public body” includes “any department of the State, ... any state board, commission, agency, and authority, any public or governmental body, . . . or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds[.]”⁶⁶ Although this language by itself does not explicitly include or exclude the legislature, the available exemptions set forth in the FOI law suggest that the legislature is covered.⁶⁷ These exemptions, which apply to only a specific set of documents, would be superfluous if the legislature—or, at least, offices of individual legislators—were not considered a “public body.” Pending legislation that would expand the scope of the legislative exemption to include more deliberative work product further reinforces the point.⁶⁸ Relatedly, the South Carolina Attorney General’s Office has “concluded that Legislative Delegations are ‘public bodies’ for purposes of the FOIA and, thus, the provisions of the Act apply to such entities.”⁶⁹ The Attorney General “also [has] concluded that the possession of public records by a Legislative Delegation triggers the applicability of the FOIA[.]”⁷⁰

In Wyoming, the public enjoys access to “any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business[.]”⁷¹ A “governmental entity” includes “the state of Wyoming, an agency, political subdivision or state institution[.]”⁷² The legislature implicitly falls within that definition because the public is disallowed access “to audits or investigations of state agencies performed by or on behalf of the legislature or legislative committees.”⁷³

⁶⁴ See App. Table 4.

⁶⁵ S.C. CODE ANN. § 30-4-30(A)(1).

⁶⁶ *Id.* § 30-4-20(a). In early March 2019, a South Carolina trial court ruled that the state legislature’s House Republican Caucus was not a “public body,” despite the fact that it was “supported in whole or in part by public funds” because it received a legislative stipend and enjoyed the use of legislative facilities. See *State Media Co. v. S.C. House Republican Caucus*, No. 2017-CP-40-02523, slip op. at 12–17 (S.C. Richland Cty. Ct. of Common Pleas Mar. 1, 2019). The court viewed the receipt and use of legislative resources as an indirect financial benefit, and it relied on legislative intent and legislative procedural rules, which both advised that caucus activity was not subject to the FOIA.

⁶⁷ S.C. CODE ANN. § 30-4-40(a)(8) (exempting “memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs[.]”).

⁶⁸ See H.B. 3259, 123d Leg., Reg. Sess. (S.C. 2019).

⁶⁹ Letter from Paul Koch, Assistant Att’y Gen., Office of the Att’y Gen., S.C., to Hon. Ronald P. Townsend, Chairman, Anderson Cty. Legislative Delegation, at 2 (Oct. 7, 1998) (citing S.C. Att’y Gen. Op. (Sept. 6, 1984)), available at <http://bit.ly/2mnPWFm>.

⁷⁰ *Id.* (citing S.C. Att’y Gen. Op. (Oct. 6, 1993)).

⁷¹ WYO. STAT. ANN. § 16-4-201(a)(v). Until last year, this same provision defined “public records” as “any information . . . created, accepted, or obtained by the state or any agency, institution, or political subdivision of the state[.]” See *id.* (2017); see generally S.B. 57, 56th Leg., Gen. Sess. (Wyo. 2019).

⁷² WYO. STAT. ANN. § 16-4-201(a)(xiii).

⁷³ WYO. STAT. ANN. § 28-8-113(a).

The definition of a “public record” under the Maine Freedom of Access Act provides two types of “exemptions” that, by negative inference, demonstrate why the legislature must be covered. First, the Act provides a special condition for the release of “legislative papers and reports,” which are to be “signed and publicly distributed in accordance with legislative rules.”⁷⁴ Second, it exempts “records, working papers, drafts and interoffice and intraoffice memoranda used or maintained . . . to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees” during the current legislation session, the session in which the records are “prepared or considered,” or the session into which they are “carried over.”⁷⁵

Three other states, which already have been addressed—*viz.*, Nebraska,⁷⁶ North Dakota,⁷⁷ and Tennessee⁷⁸—also have statutory exemptions that meaningfully inform whether the legislature is covered under their respective open records laws.

A minority of states exclude access to legislative records

Only twelve states exclude their legislatures from their FOI statute.⁷⁹ Eight of those states do so in explicit terms.⁸⁰ In Hawaii, for example, an “agency” includes “each state or county board, commission, department, or office . . . *except* those in the legislative or judicial branches.”⁸¹ Oklahoma likewise excludes the “Legislature” and “legislators” from its definition of a “public body” whose records are subject to disclosure.⁸²

New York presents something of an odd case. The state FOI statute defines an “agency” to “mean[] any state or municipal . . . governmental entity,” but there is an exclusion for “the judiciary [and] the state legislature.”⁸³ Special provisions impose a more limited disclosure regime on the legislature, insofar as legislative leadership is required to “promulgate rules and regulations . . . *in conformity with the provisions of* [the FOI Law], pertaining to the availability, location and nature” of certain enumerated types of records.⁸⁴ More generally, New York law directs the legislature to make various records reflecting formal business (*e.g.*, records of votes, committee reports, and other sorts of legislative history) available for public inspection and copying.⁸⁵ There have been unsuccessful attempts in recent years to repeal this limited proactive disclosure regime for

⁷⁴ ME. REV. STAT. ANN. tit. 1, § 402(3)(C).

⁷⁵ *Id.*

⁷⁶ *See supra* notes 35–36 and accompanying text.

⁷⁷ *See supra* notes 43–44 and accompanying text.

⁷⁸ *See supra* note 63 and accompanying text.

⁷⁹ *See App.* Table 5.

⁸⁰ Those states include Arkansas, California, Hawaii, Kansas, Mississippi, New York, Oklahoma, and Oregon.

⁸¹ HAW. REV. STAT. ANN. § 91-1 (emphasis added).

⁸² OKLA. STAT. ANN. tit. 51, § 24a.3(2).

⁸³ N.Y. PUB. OFF. LAW § 86(3).

⁸⁴ *Id.* § 88(1) (emphasis added); *see also* Polokoff-Zakarin v. Boggess, 62 A.D.3d 1141, 1142 (N.Y. App. Div. 2009) (“While FOIL, as it applies to agencies, is based on a presumption of access such that all records are available to the public unless they fall within a specific statutory exception . . . , the Legislature is only obligated to disclose records that fall within a specifically enumerated category.”). A similar limited disclosure regime outside the FOI statute for legislative records exists in California. *See generally* CAL. GOV’T CODE §§ 9070 *et seq.*

⁸⁵ N.Y. PUB. OFF. LAW § 88(2)–(3).

legislative records and expand the definition of an “agency” under the New York FOI law to include the state legislature in explicit terms, and thereby subject it to the regular FOI law.⁸⁶

Four additional states—Alaska, Georgia, Massachusetts, and Minnesota—exclude the legislature by implication or judicial decision. Under the Alaska Public Records Act, for example, an “agency . . . means . . . [any entity] created under the executive branch of the state government[.]”⁸⁷ As the legislature is not a creature of the “executive branch” it cannot be subject to the FOI statute.

In Minnesota, the only legislative-related records subject to disclosure appear to be “long-distance telephone bills paid for by the state or a political subdivision, including those of representatives, senators, . . . and employees thereof[.]”⁸⁸ Current and previous efforts to expand the reach of Minnesota’s open records law to include the legislature may provide helpful, if non-authoritative, clarification about the proper reading of the law, too.⁸⁹

Massachusetts is one of two states that has relied on judicial interpretation of the term “agency” to categorically exclude the legislature. The Massachusetts Public Records Act mandates access to a “public record [if it] is within the possession, custody or control of [an] agency or municipality[.]”⁹⁰ In *Westinghouse Broadcasting Co. v. Sergeant-At-Arms of the General Court of Massachusetts*, the Supreme Judicial Court addressed the scope of term “agency” and held that the “Legislature is not one of the instrumentalities enumerated” because “[i]t is not an ‘agency, executive office, department, [etc.] . . . ’ within the meaning of [the statute].”⁹¹ The court wrote that, although the legislature could be conceived of as a “department” of the state government, the use of that term, in context, “has a much more restricted meaning.”⁹²

Notwithstanding that ostensibly straightforward reasoning, a closer examination of *Westinghouse* suggests that the holding did not turn on whether the Massachusetts General Court—that is, the state legislature—was an “agency” or a “department.” The court instead paid close attention to the fact that the Public Records Act “specifically exempt[ed] the records of the” legislature *in toto*.⁹³ In other words, to borrow the language of the Massachusetts FOI statute, the Act simply did “not apply to the records of the general court[.]”⁹⁴ Thus, the exclusion of the legislature may have depended less on a context-bound construction of the term “agency” than it did the consideration of statutory exemptions.

Georgia is the only other state to have excluded the legislature based on a judicial interpretation of its open records law. Under the Georgia FOI statute, “public records” are defined as anything prepared, maintained, or received by an “agency.”⁹⁵ An “agency,” in relevant part, includes “every state department, agency, board, bureau, office, commission, public corporation, and authority.”⁹⁶ Despite this broad language, a state trial court recently ruled, in *Institute for*

⁸⁶ See, e.g., S.B. 7510, 202d Leg., Reg. Sess. (N.Y. 2018); see also A.B. 9510, 202d Leg., Reg. Sess. (N.Y. 2018); S.B. 4584, 202d Leg., Reg. Sess. (N.Y. 2018); S.B. 2010, 202d Leg., Reg. Sess. (N.Y. 2017); A.B. 3010, 202d Leg., Reg. Sess. (N.Y. 2017).

⁸⁷ ALASKA STAT. ANN. § 40.21.150.

⁸⁸ MINN. STAT. ANN. § 10.46.

⁸⁹ See S.B. 1142, 91st Sess. (Minn. 2019); H.B. 1065, 90th Sess. (Minn. 2018); H.B. 2954, 90th Sess. (Minn. 2018); S.B. 1393, 90th Sess. (Minn. 2017).

⁹⁰ MASS. GEN. LAWS ANN. ch. 66, § 10(a)(ii) (emphasis added).

⁹¹ 375 N.E.2d 1205, 1208 (Mass. 1978).

⁹² *Id.*

⁹³ *Id.* (emphasis added).

⁹⁴ MASS. GEN. LAWS ANN. ch. 66, § 18.

⁹⁵ GA. CODE ANN. §§ 50-18-71(a), 50-18-70(b)(2).

⁹⁶ *Id.* § 50-14-1-(a)(1).

Justice v. Kemp, that the Georgia Open Records Act did not apply to the legislative branch, “including the General Assembly and its subordinate committees and offices,” because the legislature did not qualify as a “department.”⁹⁷ In reaching that conclusion, the *Kemp* court looked to the settled meaning of “department” in the definition of an “agency” under the Georgia Open Meetings Act.⁹⁸ In a split 2-1 decision issued in July 2019, the Georgia Court of Appeals affirmed the dismissal, finding that the statute did not extend to the legislature.⁹⁹

There is one aspect of the Georgia FOI law, and the *Kemp* decision, worth examining further. At the time the *Kemp* court issued its decision, the Georgia Open Records Act included two “exceptions” for various legislative records. The first of these provisions, which has since been removed by the General Assembly, exempted records from a series of legislative offices, including the Legislative and Congressional Reapportionment Office, the Senate Research Office, and the House Budget and Research Office.¹⁰⁰ The second provision, which is still in force, exempts certain records from the Office of Legislative Counsel.¹⁰¹ All of the foregoing offices were—and still are—contained within the legislative branch. But the *Kemp* court decided against drawing any meaningful inference from the existence of these exemptions. It did so on rather conclusory, and questionably coherent, grounds:

[The exemptions] do not demonstrate that the legislative branch is subject to the Open Records Act. Instead, these exemptions affirm that because the legislature has explicitly enacted rules about which documents/records are subject to disclosure and when, the Open Records Act does not apply to the General Assembly.¹⁰²

As addressed above, no other state has interpreted its FOI statute to exclude legislative records as a whole when the open records law provides exemptions limited to specific legislative offices or types of legislative records. Instead, the presence of such exemptions has been understood to imply that legislative records, as a general matter, are subject to public disclosure. In other words, if legislative records were categorically excluded, individual exemptions that applied only to *some* legislative records would make no sense in the broader statutory scheme.

The exclusion of the legislature from the scope of the Georgia FOI statute is not yet settled precedent. Although the Georgia Court of Appeals upheld the *Kemp* court’s ruling, the requester has filed a petition for writ of certiorari with the state Supreme Court.¹⁰³ In the view of the authors, the *Kemp* court misread the law.¹⁰⁴ Interpreting the broad definition of “agency” and “department” to include the legislature is consistent with the overarching purpose of Georgia’s FOI statute, which is to foster “open government” and to limit the withholding of records on strict, enumerated

⁹⁷ *Institute for Justice v. Kemp*, No. 2016-281578, slip op. at 7 (Ga. Fulton Cty. Sup. Ct. Sept. 21, 2017).

⁹⁸ *Id.* (citing *Coggin v. Davey*, 211 S.E.2d 708, (Ga. 1975)).

⁹⁹ *Institute for Justice v. Reilly*, 830 S.E. 2d 793 (Ga. App. 2019).

¹⁰⁰ See GA. CODE ANN. § 50-18-72(a)(12) (2017).

¹⁰¹ *Id.* § 28-4-3.1; cf. GA. CODE ANN. § 50-18-75 (2016).

¹⁰² *Kemp*, slip op. at 10. The court also mentioned internal legislative procedures for records management. *Id.*

¹⁰³ See *Institute for Justice v. Reilly*, 830 S.E.2d 793 (Ga. Ct. App. 2019), *appeal docketed*, No. S19C1559 (Ga. July 22, 2019).

¹⁰⁴ The authors filed an *amicus* brief with the appeals court presenting the findings of the survey presented herein. See Br. of *Amicus Curiae* Cause of Action Inst., *Inst. for Justice v. Reilly*, No. A19A0076 (Ga. Ct. App. filed Oct. 23, 2018), available at <https://coainst.org/2Hfo0Nz>.

terms.¹⁰⁵ Further, the Open Records Act itself demands that its terms “be broadly construed to allow the inspection of governmental records.”¹⁰⁶

Finally, from an analytical perspective and regardless of the merits of *Kemp*, interpretation of the Georgia FOI statute to exclude all legislative records deviates from the clear trend in the interpretation of other state FOI laws. At least nine states have adopted open records statutes that employ expansive terms when defining an “agency”—including “department” and “authority”—and in each instance the legislature has been understood to be impliedly covered. Massachusetts is an exception, but even then, the relevant precedent seems to rely on the presence of a categorical statutory exclusion for legislative records. The more limited exemptions found in the Georgia Open Records Act, on the other hand, are akin to those found in the six states where the presence of such exemptions have counseled in favor of interpreting the FOI law to cover the legislature.

Legislative records under the Federal Freedom of Information Act

The federal FOIA provides access to records of an “agency,” a defined term in the statute, thereby limiting the scope of its application. That definition begins by cross-referencing the Administrative Procedure Act (“APA”) and provides a seemingly exhaustive list of FOIA-subject entities, including:

any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]¹⁰⁷

Although the legislative branch is not mentioned, the cross-referenced section of the APA fills out the gap by further defining an “agency” to “mean[] each authority of the Government.”¹⁰⁸ “Congress” is the first exclusion from that definition.¹⁰⁹ Federal courts have confirmed that Congress,¹¹⁰ its components (*e.g.*, congressional committees),¹¹¹ and individual legislators¹¹² are all outside the FOIA’s definition of an “agency.” But this seemingly total exclusion does not resolve all questions about using the FOIA to access records of the legislative branch.

The problem of legislative branch agencies

The scope of the FOIA becomes somewhat more complicated when the question turns from whether Congress is subject to the statute to the proper treatment of *legislative branch agencies*. Sources vary in the precise number of such agencies; one government source indicates that there

¹⁰⁵ GA. CODE ANN. §§ 50-18-70, 50-18-71(a).

¹⁰⁶ *Id.* § 50-18-70(a); *see generally* Reilly, 830 S.E.2d at 797–799 (McFadden, C.J., dissenting).

¹⁰⁷ 5 U.S.C. § 552(f)(1).

¹⁰⁸ *Id.* § 551(1).

¹⁰⁹ *Id.* § 551(1)(A).

¹¹⁰ *See* Dunnington v. Dep’t of Def., No. 06-0925, 2007 WL 60902, at *1 (D.D.C. Jan. 8, 2007) (“Neither branch of Congress is an executive agency subject to FOIA.”).

¹¹¹ *See* Dow Jones & Co., Inc. v. Dep’t of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (rejecting argument that U.S. House of Representatives Ethics Committee qualified as an “agency” under the FOIA for Exemption 5 purposes).

¹¹² *See* Owens v. Warner, No. 93-5415, 1994 WL 541335, at *1 (D.C. Cir. 1994) (*per curiam*) (“[The FOIA’s] requirements do not apply to records maintained by members of Congress.”).

are approximately twenty.¹¹³ Legislative branch agencies are tasked with aiding Congress in its legislative capacity, but without “execut[ing] law” or exercising “authority.”¹¹⁴ Examples include the Congressional Budget Office, Government Accountability Office, and Library of Congress.

Courts that have addressed the status of legislative branch agencies routinely determine that they are *not* subject to the FOIA. For example, in *Mayo v. U.S. Government Printing Office*, the U.S. Court of Appeals for the Ninth Circuit held that the Government Printing Office (“GPO”) was excluded from the definition of an “agency” under the FOIA because it was “a unit of Congress.”¹¹⁵ The circuit rejected the suggestion that “Congress,” as used in the APA, could have referred “merely” to “the two houses of Congress.”¹¹⁶ Instead, “[j]ust as the [FOIA] exclude[s] . . . not only the courts themselves but the entire judicial branch, so the entire legislative branch has been exempted[.]”¹¹⁷

In *Kissinger v. Reporters Committee for Freedom of the Press*, the Supreme Court noted in passing that the Library of Congress was not an “agency” for purposes of the FOIA.¹¹⁸ Interestingly, the district court below explained that the Library could, in some instances, be treated as an “executive agency” for purposes of requiring the government to provide back pay because of unjustified personnel actions.¹¹⁹ But, in the context of the FOIA, the statutory definition of an “agency,” with its cross-reference to the APA, was controlling.

The Library of Congress, however, is an interesting and complicated case. Although courts tend to take a categorical view towards legislative branch agencies, including the Library of Congress,¹²⁰ that categorical approach can sometimes break down. For example, as set forth in its regulations, the Library of Congress has devised its own disclosure regime, which “follows the spirit” of the FOIA.¹²¹ That policy does not provide any legal right of action, and therefore bypasses judicial review, but it does create an administrative appeals process.¹²² (Other legislative branch agencies have done the same.¹²³) Yet the Copyright Office—a “service” component of the Library of Congress¹²⁴—*does* qualify as an “agency” under the FOIA,¹²⁵ despite some courts having intimated otherwise.¹²⁶

The case law is hardly illuminating when it comes to determining why courts have not developed a more nuanced approach to legislative branch agencies. In one lawsuit, which

¹¹³ See *Legislative Branch Agencies*, USA.GOV, <http://bit.ly/2CidMrU> (last visited Dec. 6, 2019).

¹¹⁴ Cf. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

¹¹⁵ 9 F.3d 1450, 1451 (9th Cir. 1993).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 445 U.S. 136, 145 (1980); see also *Ethnic Emps. of Library of Cong. v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985).

¹¹⁹ *Reporters Comm. for Freedom of the Press v. Vance*, 442 F. Supp. 383, 385 n.5 (D.D.C. 1977) (citing 5 U.S.C. § 5596).

¹²⁰ See *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) (“[W]e have interpreted the APA exemption for ‘the Congress’ to mean the entire *legislative* branch. . . . Thus, we have held that the Library of Congress (part of the legislative branch but a separate entity from ‘the Congress,’ narrowly defined) is exempt[.]”).

¹²¹ 36 C.F.R. § 703.1; see generally *id.* subpt. A (“Availability of Library of Congress Records”).

¹²² *Id.* § 703.6(g)–(h).

¹²³ See, e.g., 4 C.F.R. pt. 81 (similar disclosure procedures for records of the Government Accountability Office).

¹²⁴ 36 C.F.R. § 703.1(b).

¹²⁵ See 37 C.F.R. pt. 203; see also *Freedom of Information Act (FOIA) Records*, U.S. COPYRIGHT OFFICE, <http://bit.ly/2UvXh2v> (last visited Dec. 9, 2019).

¹²⁶ See, e.g., *Mayo*, 839 F. Supp. at 700 (explaining that “‘quasi-congressional bodies and institutes,’ such as . . . the Copyright Office . . . are exempt from the FOIA” (citation omitted)).

concerned the status of the GPO, a district court denied the government’s motion to dismiss for lack of subject matter jurisdiction and explained that it lacked the facts to make an “informed decision” about the GPO’s “organizational arrangements.”¹²⁷ “Sorting out the ‘organizational arrangements’ of the GPO,” the court reasoned, would “be vital to determining its status within the federal government and thus its coverage under FOIA.”¹²⁸ The court, in other words, was unwilling to accept the mere fact that the GPO was situated within the “legislative branch” as sufficient to exclude it from the definition of an “agency”; an examination of the functions and responsibilities of the GPO was necessary.

This sort of “functional” approach to construing the term “agency” is similar to the tests that the U.S. Court of Appeals for the District of Columbia Circuit has developed for determining whether offices within the Executive Office of the President (“EOP”) are subject to the FOIA. Those tests pose various inter-related questions: Is the EOP entity composed of the “President’s immediate personal staff” or is its “sole function . . . to advise and assist the President”?¹²⁹ Does it “exercise[] substantial independent authority”?¹³⁰ Does it have a “self-contained structure,” or is it “operationally close” to the President?¹³¹ What is the nature of the entity’s authority—is it delegated by the President or granted by Congress?¹³² Does it issue “guidelines to federal agencies” or “regulations . . . implementing” a statute?¹³³ Yet, as the D.C. Circuit once explained, “[h]owever the test has been stated, common to every case in which [it] h[as] held that an EOP unit is subject to FOIA has been a finding that the entity in question ‘wielded substantial authority independently of the President.’”¹³⁴

It is unclear whether a more rigorous application of a “functional” test in the rare cases dealing with legislative branch entities would have resulted in different outcomes. And such a test may not create a meaningful change in FOIA law moving forward. But it is possible to imagine that, at least in some instances, legislative branch agencies *do* conduct their business without the direct oversight of Congress and in a way that impacts the functioning of the rest of the government. In those situations, the FOIA should apply to guarantee public access to the entity’s records. The typical concerns about revealing the legislature’s internal deliberative processes are hardly implicated, and neither are the constitutional concerns present when considering records created by individual legislators and their office staffs. Given the current state of the jurisprudence, however, this result will likely need to be achieved through congressional amendment of the FOIA.

¹²⁷ *Cong. Info. Serv., Inc. v. U.S. Gov’t Printing Office*, No. 86-3408, 1987 WL 9509, at *1 (D.D.C. Apr. 7, 1987) (“As a leading commentator on FOIA has noted, ‘[c]ourts trying to define coverage of the *agency* term are confronted constantly with the “myriad organizational arrangements for getting the business of the government done.”’” (citation omitted)).

¹²⁸ *Id.*

¹²⁹ *Kissinger*, 445 U.S. at 156.

¹³⁰ *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 558 (D.C. Cir. 1996); *see* *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1042 (D.C. Cir. 1985).

¹³¹ *Meyer v. Bush*, 981 F.2d 1288, 1293 (D.C. Cir. 1993).

¹³² *See* *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978); *Soucie v. David*, 448 F.2d 1067, 1073–75 (D.C. Cir. 1971).

¹³³ *Pac. Legal Found. v. Council on Env’tl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980).

¹³⁴ *Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 566 F.3d 219, 222 (D.C. Cir. 2009) (citation omitted).

Congressional records and the agency control test

In most cases, FOIA requesters will not deal with the foundational question of whether a government entity, such as a legislative branch agency, is subject to the FOIA. Instead, the fight between the government and requester will be over the status of records maintained by a FOIA-subject “agency,” but which were either obtained from the legislative branch or created or compiled in response to a congressional inquiry or records request. A careful reading of the relevant case law in this area shows that courts take seriously their obligation to construe the FOIA narrowly and to presume that records are disclosable when maintained or controlled by an agency. In that respect, there is a strong parallel with the trends at the state level identified in the first section of this article .

The mere fact that a record relates to the legislative branch, was created by the legislative branch, or was transmitted by an agency to the legislative branch does not, by itself, render it a congressional record outside the scope of the FOIA. Instead, its status as an “agency record,” and its availability under the FOIA, is dependent upon two factors. *First*, the agency that maintains the record must have “either create[d] or obtain[ed]” it.¹³⁵ *Second*, the agency must have “control” of the record “at the time [a] FOIA request is made.”¹³⁶ “Control” is typically analyzed with the four-factor *Burka* test, which examines:

- (1) the intent of the document’s creator to retain or relinquish control over the records;
- (2) the ability of the agency to use and dispose of the record as it sees fit;
- (3) the extent to which agency personnel have read or relied upon the document;
- and (4) the degree to which the document was integrated into the agency’s record systems of files.¹³⁷

With purported congressional records, however, the first two *Burka* factors are dispositive because they speak to “whether Congress manifested a clear intent to control the document.”¹³⁸ This is known as the “modified control test.”¹³⁹

Under the modified control test, records are considered “congressional” in nature, and thus outside the scope of the FOIA, when there has been some “affirmatively expressed intent” on the part of the legislative branch to control the documents.¹⁴⁰ That can be accomplished through “contemporaneous and specific instructions” limiting an agency’s use or disclosure of records,¹⁴¹ or the legislative branch can provide instructions particular to records prior to their creation.¹⁴²

¹³⁵ *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989) (citation omitted).

¹³⁶ *Id.* at 145.

¹³⁷ *Burka v. Dep’t of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (citation omitted).

¹³⁸ *United We Stand Am., Inc. v. Internal Revenue Serv.*, 359 F.3d 595, 597 (D.C. Cir. 2004) [hereinafter *United We Stand*]; see also *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983) (“[E]xplicit focus on Congress’ intent to control (and on the agency’s) reflects those special policy considerations which counsel in favor of according due deference to Congress’ affirmatively expressed intent to control its own documents.”), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984).

¹³⁹ See generally *Cause of Action v. Nat’l Archives & Records Admin.*, 753 F.3d 210, 214–15 (D.C. Cir. 2014) (declining to apply *Burka* factors when congressional entities transfer records to the National Archives and Records Administration, a FOIA-subject agency, for storage and preservation).

¹⁴⁰ *Paisley*, 712 F.2d at 693, 693 n.30.

¹⁴¹ *Id.* at 694; see also *Holy Spirit Ass’n for the Unification of World Christianity v. Cent. Intelligence Agency*, 636 F.2d 838, 843 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982).

¹⁴² See *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 823 F.3d 655, 666–67 (D.C. Cir. 2016) [hereinafter *ACLU*], *cert. denied*, 137 S. Ct. 1837 (2017).

Taken together, these requirements address the first two *Burka* factors: (1) Congress' intent to retain or relinquish control, and (2) an agency's ability to use or dispose of records as it sees fit.

The D.C. Circuit—the court primarily responsible for the development of the modified control test—has held that, “[i]n the absence of any manifest indications that Congress intended to exert control over documents in an agency’s possession,” one should conclude that the documents are “agency records.”¹⁴³ If sufficient indicia suggest that the legislative branch intended to retain only *some* control, records can still be disclosed after being redacted to protect the substance of any confidential congressional matters.¹⁴⁴

The decisions leading up to the D.C. Circuit’s most recent treatment of the “congressional record” issue illustrate a developing appreciation for the foregoing principles and a recognition that congressional intent must be indicated in a specific, non-generalized manner. For example, in the earliest case of *Goland v. Central Intelligence Agency*, the court concluded that a congressionally-created transcript was not subject to the FOIA because of “the circumstances attending [its] generation and the conditions attached to its possession” by an agency,¹⁴⁵ thus highlighting the importance of a specific and pre-established manifestation of congressional intent to retain control of records later possessed by executive branch agencies.

Later, in *Holy Spirit Ass’n v. Central Intelligence Agency*, the court held that the exemption from disclosure could “be lost” if Congress did not appropriately “designate[] the documents as falling within [its] control.”¹⁴⁶ Records could not be exempt based simply on some “general characterization” that they were “confidential,” and non-specific testimony concerning the conditions under which they were transferred to an agency would be insufficient to demonstrate otherwise.¹⁴⁷ As for documents created or compiled by an agency and sent to Congress in response to an official inquiry, the court determined that those records could “los[e] their exemption . . . [if] Congress failed to retain control” upon returning them without further instruction.¹⁴⁸

In *Paisley v. Central Intelligence Agency*, the D.C. Circuit required that Congress intend to control or restrict an agency’s use of records contemporaneous with their transfer.¹⁴⁹ In doing so, the court discussed the importance of “external indicia of control or confidentiality,”¹⁵⁰ and it rejected an attempt to rely, among other things, on a “pre-existing agreement” of blanket confidentiality.¹⁵¹ As for agency-created records, the *Paisley* court was careful to examine whether the connection between those records and Congress was “too insubstantial and commonplace to establish congressional control,” especially given the danger of designing a test that would exempt “a broad array of materials otherwise clearly categorizable as agency records, thereby undermining the spirit of broad disclosure that animates the [FOIA].”¹⁵²

¹⁴³ *Paisley*, 712 F.2d at 692–93.

¹⁴⁴ *United We Stand*, 359 F.3d 595, 601 (D.C. Cir. 2004) (citation omitted); *see also Holy Spirit*, 636 F.2d at 841 n.3.

¹⁴⁵ 607 F.2d 339, 347 (D.C. Cir. 1978).

¹⁴⁶ 636 F.2d at 841.

¹⁴⁷ *Id.* at 841–42. The court also rejected a letter from the Clerk of the House of Representatives, “which objected to the release of any portion of the . . . documents,” but which was written “as a result of the FOIA request and th[e] litigation[.]” *Id.* at 842 (citations omitted).

¹⁴⁸ *Id.* at 843.

¹⁴⁹ 712 F.2d at 694 (“The Government points to no *contemporaneous* and *specific* instructions from the SSCI to the agencies limiting either the use or disclosure of the documents.”).

¹⁵⁰ *Id.* at 694.

¹⁵¹ *Id.* at 694–95 (citation omitted). The court also rejected reliance on a letter from the SSCI that was “too general and sweeping to provide sufficient proof, when standing alone, of a specific intent to transfer” the particular records at issue “for a ‘limited purpose and on condition of secrecy.’” *Id.* at 695 (citing *Goland*, 607 F.2d at 348 n. 48).

¹⁵² *Id.* at 696.

United We Stand America, Inc. v. Internal Revenue Service involved a directive appended to the end of a Joint Committee on Taxation (“JCT”) oversight request, which indicated that “[t]his document is a Congressional record and is entrusted to the [agency] for [its] use only. This document may not be disclosed without the prior approval[.]”¹⁵³ The court held that the “limited scope of the confidentiality directive” was insufficient to cover the agency’s prepared responses to the JCT inquiry.¹⁵⁴ Moreover, the *United We Stand* court refused to accept the agency’s internal policy on the confidentiality of congressional communications as dispositive, and it could not accept the “far too general,” albeit “consistent course of dealing,” that the agency claimed as a sort of “pre-existing agreement” for legislative-branch control of records.¹⁵⁵

In its most recent congressional records decision, *American Civil Liberties Union v. Central Intelligence Agency*, the D.C. Circuit determined that a congressional report was a legislative record, despite its transmission to the executive branch, because the SSCI had explicitly and “unambiguously” indicated that records generated during its investigation would be “property of the Committee” and indefinitely “remain congressional records in their entirety[.]”¹⁵⁶ Even in the absence of a “secret” marking or legend on the records themselves, the existence of a detailed letter created at the outset of the investigation, and prior to the creation and dissemination of the report, was sufficiently clear to indicate congressional intent to retain control.¹⁵⁷ Nevertheless, the court explained that such intent could be “overcome” if there were evidence that “Congress subsequently acted to vitiate [its] intent to maintain exclusive control over the documents[.]”¹⁵⁸

To summarize, the case law described above establishes the requisite indicia of congressional intent to retain control of records acquired by agencies within the “legitimate conduct of [their] official duties.”¹⁵⁹ In all cases, the legislative branch must manifest its intent clearly and with specific language particular to the records at issue.¹⁶⁰ Neither Congress (or its components or agencies) nor agencies can rely on general, far-reaching, and pre-existing arrangements.¹⁶¹ Post-hoc attempts to establish intent for control after the filing of a FOIA request or after the beginning of litigation also are inadequate.¹⁶² The legislative branch must instead establish its intent to maintain control over records before they are created,¹⁶³ or contemporaneous with their transfer to an agency,¹⁶⁴ and not act in some subsequent way so as to vitiate that original intent.¹⁶⁵ These principles reflect a developing awareness by the D.C. Circuit of the danger of broadly extending congressional control over legislative branch records that find their way into the hands of agencies. Notwithstanding the limited judicial application of the FOIA to legislative branch agencies, the courts have at least taken seriously the importance of transparency when faced with records reflecting the Congress’s dealings with the administrative state and *vice versa*.

¹⁵³ *Id.* (“If the [JCT] intended to keep confidential not just ‘this document’ but also the IRS response, it could have done so by referring to ‘this document and all IRS documents created in response to it.’” (citation omitted)).

¹⁵⁴ *Id.* at 600–01.

¹⁵⁵ *Id.* at 601–02.

¹⁵⁶ 823 F.3d at 655; *id.* at 658 (citation omitted).

¹⁵⁷ *Id.* at 665.

¹⁵⁸ *Id.* at 664.

¹⁵⁹ *Tax Analysts*, 492 U.S. at 145.

¹⁶⁰ *Paisley*, 712 F.2d at 692–93.

¹⁶¹ *United We Stand*, 359 F.3d at 601–602; *Holy Spirit*, 636 F.2d at 841.

¹⁶² *United We Stand*, 359 F.3d at 601–02; *Holy Spirit*, 636 F.2d at 842.

¹⁶³ *ACLU*, 823 F.3d at 665.

¹⁶⁴ *Paisley*, 712 F.2d at 694.

¹⁶⁵ *ACLU*, 823 F.3d at 664; *cf.* *Cause of Action v. Nat’l Archives & Records Admin.*, 926 F. Supp. 2d 182 (D.D.C. 2013), *aff’d*, 753 F.3d 210 (D.C. Cir. 2014).

Conclusion

In an ideal world, FOI statutes would grant access to the broadest range of records detailing the operations of government. Regardless of which branch of government created or controls those records, disclosure would have the same disinfecting effect. Increased transparency, as a rule, should lead to greater accountability and better government. But the political and legal reality is hardly straightforward. Many states have adopted FOI laws that permit some basic level of access to legislative records. At times this access is expressly provided, but in other instances it relies on the interpretation of language that only impliedly authorizes requests for records of any “branch” or “authority.” In the cases where states have chosen to exclude the legislative branch, that exclusion is often done with explicit statutory language. The clear trend is to provide access to legislative branch records and, in cases of textual ambiguity, to favor public access.

Under the federal FOIA, Congress, its components, and individual legislators are either explicitly excluded from the definition of an “agency,” or long-standing interpretations of administrative law preclude a pro-disclosure interpretation. The status of legislative branch agencies is more complicated: Some courts have demonstrated interest in rejecting a categorical approach and adopting a functional test that considers an agency’s role and responsibility within the broader scheme of government. In any case, Congress should consider subjecting certain legislative branch agencies to the FOIA. Finally, with respect to the “agency control” test, courts have been careful to avoid an overbroad approach that would threaten to sweep records out of the reach of requesters’ hands merely because they reflect an agency’s interaction with Congress.

Appendix

Table 1: States that expressly cover the legislature

Alabama
“Governmental bod[ies] [include] all boards, bodies, and commissions of the . . . legislative departments . . . ; multimember . . . instrumentalities of the . . . legislative departments . . . ; all quasi-judicial bodies of the . . . legislative departments . . . ; and all standing, special, or advisory committees or subcommittees of, or appointed by, the body[.]” ALA. CODE § 36-25A-2.
Colorado
“Public records means and includes all writings made, maintained, or kept by the state . . . includ[ing] the correspondence of elected officials,” subject to four exemptions. COLO. REV. STAT. ANN. § 24-72-202(6)(a)(II).
Connecticut
“Public agency or agency means: Any executive, administrative or legislative office of the state[.]” CONN. GEN. STAT. ANN. § 1-200(1)(A).
Delaware
“Public body means . . . any regulatory, administrative, advisory, executive, appointive or legislative body of the State[,] . . . [but] shall not include any caucus of the House of Representatives or Senate of the State.” DEL. CODE ANN. tit. 29, § 10002(h).
Florida
“Every person has the right to inspect or copy any public record This . . . specifically includes the legislative . . . branch[] of government[.]” FLA. CONST. art. I, § 24(a).
Idaho
“State agency means every state [entity] . . . including those in the legislative . . . branch[.]” IDAHO CODE ANN. § 74-101(15).
Illinois
“Public body means all legislative, executive, administrative, or advisory bodies of the State[.]” 5 ILL. COMP. STAT. ANN. 140/2 § 2(a).
Indiana
“Public agency . . . means . . . [a]ny [entity] exercising any part of the executive, administrative, judicial, or legislative power of the state.” IND. CODE ANN. § 5-14-3-2(q)(1).
Kentucky
“Public agency means . . . [e]very state or local legislative board, commission, committee, and officer[.]” KY. REV. STAT. ANN. § 61.870(1)(c).
Michigan
“Public body means . . . an agency, board, commission, or council in the legislative branch[.]” MICH. COMP. LAWS ANN. § 15.232(h)(ii).

Missouri
<p>“Legislative records shall be public records and subject to generally applicable state laws governing public access to public records, including the Sunshine Law. Legislative records include, but are not limited to, all records, in whatever form or format, of the official acts of the general assembly, of the official acts of legislative committees, of the official acts of members of the general assembly, of individual legislators, their employees and staff, of the conduct of legislative business and all records that are created, stored or distributed through legislative branch facilities, equipment or mechanisms, including electronic. Each member of the general assembly is the custodian of legislative records under the custody and control of the member, their employees and staff. The chief clerk of the house or the secretary of the senate are the custodians for all other legislative records relating to the house and the senate, respectively.” Mo. CONST. art. III, § 19(b).</p> <p>“Public governmental body [includes] any legislative, administrative or governmental entity created by the Constitution or statutes of this state[.]” MO. ANN. STAT. § 610.010(4).</p>
Montana
<p>“Public agency means the executive, legislative, and judicial branches of Montana state government[.]” MONT. CODE ANN. § 2-6-1002(10).</p>
Nevada
<p>“Governmental entity means an elected or appointed officer of this State[.]” NEV. REV. STAT. ANN. § 239.005(5)(a).</p>
New Hampshire
<p>“Public body means any . . . legislative body, governing body, commission, committee, agency, or authority[.]” N.H. REV. STAT. ANN. § 91-A:1-a (VI)(d).</p>
New Jersey
<p>“Public agency or agency means . . . the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch[.]” N.J. STAT. ANN. § 47:1A-1.1.</p>
New Mexico
<p>“Public body means the executive, legislative and judicial branches of state and local governments[.]” N.M. STAT. ANN. § 14-2-6(F).</p>
North Carolina
<p>“Public record . . . shall mean all documents . . . made or received . . . by any agency . . . [which shall] . . . include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority, or other unit of government[.]” N.C. GEN. STAT. ANN. § 132-1(a).</p>
Ohio
<p>“State agency includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including . . . the general assembly, [and] any legislative agency[.]” OHIO REV. CODE ANN. § 149.011(B).</p>
Pennsylvania
<p>“Agency [includes] . . . a legislative agency . . . [which includes, among other entities,] [t]he Senate . . . [and] [t]he House of Representatives[.]” 65 PA. STAT. AND CONS. STAT. ANN. § 67.102.</p>

Rhode Island
“Agency . . . means any executive, legislative, judicial, regulatory, or administrative body of the state[.]” 38 R.I. GEN. LAWS ANN. § 38-2-2(1).
Texas
“Governmental body means a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch . . . and that is directed by one or more elected or appointed members[.]” TEX. GOV'T CODE ANN. § 552.003(1)(A)(i).
Utah
“Governmental entity means . . . the Office of the Legislative Auditor General, Office of the Legislative Fiscal Analyst, Office of Legislative Research and General Counsel, the Legislature, and legislative committees, except any political party, group, caucus, or rules or shifting committee[.]” UTAH CODE ANN. § 63G-2-103(11)(a)(ii).
Virginia
“Public body means any legislative body, authority, board, bureau, commission, district or agency[.]” VA. CODE ANN. § 2.2-3701.
West Virginia
“Public body means every state officer, agency, [and] department, including the executive, legislative and judicial departments[.]” W. VA. CODE ANN. § 29B-1-2(4).

Table 2: States that cover the legislature based on the interpretation of terms defining the entities subject to an open records law

Arizona
<p>“Officer means any person elected or appointed to hold any elective or appointive office of any public body[.]” ARIZ. REV. STAT. ANN. § 39-121.01(A)(1).</p> <p>“Public body means this state . . . [and] any branch, department, board, bureau, commission, council or committee of the foregoing[.]” ARIZ. REV. STAT. ANN. § 39-121.01(A)(2).</p>
Iowa
<p>“Government body means this state . . . or any branch, department, board, bureau, commission, council, committee, official, or office[.]” IOWA CODE ANN. § 22.1(1).</p>
Louisiana
<p>“Public body means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, [or] any other instrumentality of state . . . government[.]” LA. STAT. ANN. § 44:1(A)(1).</p> <p>“Custodian means the public official or head of any public body having custody or control of a public record, or a representative specifically authorized . . . to respond to requests to inspect any such public records.” LA. STAT. ANN. § 44:1(A)(3).</p>
Nebraska
<p>Granting access to public records of “any agency, branch, department, board, bureau, commission, council, subunit, or committee[.]” NEB. REV. STAT. ANN. § 84-712.01(1).</p> <p>Exempting “correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature[.]” NEB. REV. STAT. ANN. § 84-712.05(12).</p>
North Dakota
<p>“Public entity means all public or governmental bodies, boards, bureaus, commissions, or agencies of the state, including any entity created or recognized by the Constitution of North Dakota . . . to exercise public authority or perform a governmental function[.]” N.D. CENT. CODE ANN. § 44-04-17.1(13)(a).</p> <p>“The following records, regardless of form or characteristic, of or relating to the legislative council, the legislative management, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly are not subject to [the Open Records Statute]: a record of a purely personal or private nature, a record that is legislative council work product or is legislative council-client communication, a record that reveals the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental entity determining the proper use of telephone service, a record of telephone usage which identifies the parties or lists the telephone numbers of the parties involved.” N.D. CENT. CODE ANN. § 44-04-18.6.</p> <p>“Record means recorded information of any kind . . . [but] does not include records in the possession of a court[.]” N.D. CENT. CODE ANN. § 44-04-17.1(16).</p>

South Carolina
<p>“Public body means any department of the State, . . . any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, . . . or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body[.]” S.C. CODE ANN. § 30-4-20(a).</p> <p>“A public body may but is not required to exempt from disclosure . . . memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs; however, nothing herein may be construed as limiting or restricting public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information under the provisions of this chapter and not specifically exempted by any other provisions[.]” S.C. CODE ANN. § 30-4-40(a)(8).</p>
South Dakota
<p>“Unless any other statute, ordinance, or rule expressly provides that particular information or records may not be made public, public records include all records and documents, regardless of physical form, of or belonging to this state, any county, municipality, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.” S.D. CODIFIED LAWS § 1-27-1.1.</p> <p>“The provisions of this chapter do not apply to records and documents of the Unified Judicial System.” S.D. CODIFIED LAWS § 1-27-1.12.</p>
Vermont
<p>“Public agency or agency means any agency, board, department, commission, committee, branch, instrumentality, or authority of the State[.]” VT. STAT. ANN. tit. 1, § 317(a)(2).</p>
Washington
<p>“State agency includes every state office, department, division, bureau, board, commission, or other state agency.” WASH. REV. CODE ANN. § 42.56.010(1).</p>
Wisconsin
<p>“Authority means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic created by the constitution or by any law, ordinance, rule or order[.]” WIS. STAT. ANN. § 19.32(1).</p>

Table 3: States that cover the legislature based on an interpretation of the definition of a “public record”

Maine
<p>“Public records means any written, printed or graphic matter or any mechanical or electronic data compilation . . . that is in the possession or custody of an agency or public official of this State . . . and has been received or prepared for use in connection with the transaction of public or government business or contains information relating to the transaction of public or government business[.]” ME. REV. STAT., tit. 1, § 402(3).</p> <p>Exempting “legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over[.]” ME. REV. STAT., tit. 1, § 402(3)(C).</p>
Maryland
<p>“Public record means the original or any copy of any documentary material that is made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business[.]” MD. CODE. ANN., GEN. PROVIS. § 4-101(j)(1)(i).</p>
Tennessee
<p>“Public record or records or state record or records . . . means all documents, papers, letters . . . or other material . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity[.]” TENN. CODE ANN. § 10-7-503(a)(1)(A)(i).</p> <p>Providing exemptions for access to legislative computer systems. TENN. CODE ANN. § 3-10-108.</p>
Wyoming
<p>“Public records . . . includes any information in a physical form created, accepted, or obtained by the state or any agency, institution or political subdivision of the state in furtherance of its official function and transaction of public business[.]” WYO. STAT. ANN. § 16-4-201(a)(v).</p> <p>“The provisions of W.S. 16-4-201 through 16-4-205 [<i>i.e.</i>, the Open Records Act] do not apply to audits or investigations of state agencies performed by or on behalf of the legislature or legislative committees.” WYO. STAT. ANN. § 28-8-113(a).</p>

Table 4: States that impliedly cover the legislature based on specific statutory exemptions

Maine	South Carolina
Nebraska	Tennessee
North Dakota	Wyoming

Table 5: States expressly or impliedly excluding the legislature

Alaska
“Agency . . . means . . . [an entity] created under the executive branch of the state government[.]” ALASKA STAT. ANN. § 40.21.150.
Arkansas
“The following shall not be deemed to be made open to the public . . . unpublished memoranda, working papers, and correspondence of . . . members of the General Assembly[.]” ARK. CODE ANN. § 25-19-105(b)(7).
California
“State agency means every state office . . . except those agencies provided for in Article IV [legislature] . . . or Article VI [judiciary] of the California Constitution.” CAL. GOV’T CODE § 6252(f)(1). <i>But see</i> CAL. GOV’T CODE § 9073 (“[A]ny person has a right to inspect any legislative record, except as hereafter provided [in the Legislative Open Records Act].”); <i>see also id.</i> § 9072 (defining “legislative records”).
Georgia
“Agency means: Every state department, agency, board, bureau, office, commission, public corporation, and authority[.]” GA. CODE ANN. § 50-14-1(a)(1)(A).
Hawaii
“Agency means each state or county board, commission, department, or officer . . . except those in the legislative or judicial branches.” HAW. REV. STAT. ANN. § 91-1.
Kansas
“Public record[s] shall not include . . . records which are made, maintained or kept by an individual who is a member of the legislature[.]” KAN. STAT. ANN. § 45-217(g)(3)(B).
Massachusetts
“A records access officer . . . shall at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record . . . within the possession, custody or control of the agency or municipality that the records access officer serves[.]” MASS. GEN. LAWS ANN. ch. 66, § 10(a)(ii).
Minnesota
“Government entity means a state agency, statewide system, or political subdivision.” MINN. STAT. ANN. § 13.02, subdiv. 7a. “Long-distance telephone bills paid for by the state or a political subdivision, including those of representatives, senators, . . . and employees thereof, are public data.” MINN. STAT. ANN. § 10.46.

Mississippi
“Within the meaning of [the Mississippi Public Records Act], . . . [an] entity shall not be construed to include . . . any appointed or elected public official.” MISS. CODE ANN. § 25-61-3(a).
New York
“Agency means any state or municipal . . . governmental entity . . . except the judiciary or the state legislature.” N.Y. PUB. OFF. LAW § 86(3) <i>But see</i> N.Y. PUB. OFF. LAW § 88(1)–(2) (Legislative leadership “shall promulgate rules and regulations. . . pertaining to the availability, location and nature of [ten enumerated categories of] records[.]”); <i>see also id.</i> § 88(3).
Oklahoma
“Public body . . . does not mean . . . the Legislature, or legislators[.]” OKLA. STAT. ANN. tit. 51, § 24a.3(2).
Oregon
“State agency . . . does not include the Legislative Assembly or its members, committees, officers or employees insofar as they are exempt under . . . the Oregon Constitution.” OR. REV. STAT. ANN. § 192.311.



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Individuals' Use of Twitter to Discuss Freedom of Information in the United States: A Social Network Analysis

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Abstract

This study employs social network analysis to examine more than 10,000 Twitter interactions that include the U.S. Freedom of Information Act hashtag (#FOIA) to understand who is engaging online, and to what extent. The analysis finds evidence of a dynamic conversation online among citizens, journalists, advocates, and public agencies. Findings offer insights into how citizens are using social media to engage with government and one another in conversations around important public policies, such as government transparency, as well as how technologies such as social media can be leveraged to better understand citizens' interest. The study also found a significant increase in tweets during national Sunshine Week, a vehicle that increases national dialogue about FOI, and highlights effective social media strategies employed by MuckRock and other advocacy organizations.

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Introduction

The introduction of social media platforms such as Twitter, Facebook, and Instagram have shifted the way in which people interact with the world, one another, and their government. Social media no longer function simply as places for individuals to connect with one another superficially; they have since become places for breaking news and disseminating information of all kinds, including governmental practices and laws like the U.S. Freedom of Information Act.

Elected officials and those seeking election are adopting social media to connect with constituents and brand themselves in unprecedented ways. Governments at all levels are also adopting social media to encourage citizen participation and collaboration and increase transparency (Snead, 2013; Bertot, Jaeger, & Grimes, 2010). This widespread adoption of social media technologies has been influenced by both top-down policy initiatives such as the Obama administration's Open Government Initiative as well as bottom-up pressure from citizens as social media platforms continue to permeate marketing, popular culture, and social norms. As a result, scholars have argued that social media adoption by citizens, governments, and political actors has the potential to change drastically the ways in which actors involved in the political process interact with one another (Karakiza, 2015).

To date, the literature has examined several facets of social media adoption and its effects on government and citizens. Most notably, scholars have identified important factors that lead to the adoption of social media technologies by governments (Picazo-Vela, Fernandez-Haddad, & Luna-Reyes, 2016; Reddick & Norris, 2013; Mergel & Bretschneider, 2013), subsequent impacts on citizen participation (Boulianne, 2015; Loader, Vromen, & Xenos, 2014; Evans & Campos, 2013; Zuniga, Jung, & Valenzuela, 2012; Effing, Hillegersberg, & Huibers, 2011), coproduction (Linders, 2012), and transparency (Song & Lee, 2016; Welch, 2012; Bertot, Jaeger, & Grimes, 2010).

Much of the literature on the use of social media in government has placed great emphasis on its potential to increase citizen participation but with little attention paid to who actually uses social media for that purpose. Therefore, this paper asks, first and foremost, who uses social media to engage with government and in what way? It focuses specifically on the social media platform Twitter, with special attention paid to the types of interactions that take place on the platform between different types of users and their roles regarding government transparency. Understanding who uses social media for participation, and in what ways, is integral to assessing the reality of social media's promise as a tool to achieve open government values.

One way to examine how individuals use social media for civic participation is by examining online dialogue around a particular policy issue. This paper will look specifically at the dialogue on Twitter around Freedom of Information (FOI). As more and more governments around the world adopt transparency policies, FOI and open government agendas have become more salient to both citizens and policymakers. Furthermore, the rapid advancement of technology has changed the way in which individuals seek information and even pursue public record requests, often turning to the internet for information-seeking in such pursuits (Cuillier & Piotrowski, 2009). The ability to quickly and efficiently share information between government and its stakeholders due to advancements in information and communication technologies (ICTs) has arguably led to increased demands on governments to adapt their FOI processes.

Simultaneously, advocacy around FOI in the United States has increased greatly as a result of efforts by journalists, citizens, and legal experts to strengthen and protect FOI laws at the local and state levels. Using data from the popular social media platform Twitter, this paper presents an

exploratory social network analysis that provides evidence of a dynamic multi-stakeholder dialogue around FOI taking place on social media. These findings offer insight into how social media are being used by individuals, the media, and interest groups to come together and share information about important policy issues, such as FOI and open government.

This article first provides an overview of FOI, including a discussion of the many stakeholders involved in its advocacy. Second, social media as a tool for participation is introduced and existing literature is reviewed. The methodology, data, and analysis are then presented and followed by a discussion of the findings. Finally, implications for practice and opportunities for future research are discussed.

Background

Freedom of information (FOI) advocacy

Freedom of Information (FOI) is an important issue to examine for a number of reasons. First introduced in the United States in 1966, the federal Freedom of Information Act (FOIA) has become a model for transparency and good governance. Since its introduction in the U.S., there has been an explosion of similar FOI laws across the world (Ackerman & Sandoval-Ballesteros, 2006) with 128 countries having established FOI laws as of November 2019 (Right to Information Ratings, 2019). The right to seek and receive information has even been called a universal human right under Article 19 of the Universal Declaration of Human Rights (1948) and in the United States and many other democratic governments, citizens' "right to know" is considered a fundamental democratic principle (Piotrowski, 2014). As more countries have adopted FOI laws, the push for open government, greater government transparency, and citizens' "right to know" has become more commonplace in both scholarship and political discourse.

Freedom of Information (FOI) laws generally refer to legal protections that guarantee citizens the right to access information, the right to inform, and the right to be informed (Villanueva, 2003). It is through such laws that citizens have both the right and ability to request information by way of formal requests at the federal, state, and local levels of government. In the United States, FOIA is the federal law that offers citizens these protections at the federal level while state governments have each established their own versions of laws that offer protections at the state and local levels. It is important to note that while all citizens have the same protections at the federal level under FOIA, state laws vary a great deal.

Due to the nature of FOI laws and the protections they offer for freedom of speech and the value of transparency, it is not surprising that there are many groups engaged in FOI advocacy across the United States. For example, the National Freedom of Information Coalition (NFOIC) is a non-partisan, nonprofit organization that works with coalitions across 40 states and the District of Columbia to promote open government and access to information. NFOIC supports and encourages coalitions, which are made up of a diverse group of stakeholders including journalists, legal experts and nonprofit leaders, in their work to both improve and protect open FOI laws and policies at the state and local levels.

Additional groups heavily involved in promoting and preserving FOI and "right to know" laws include Open the Government, which works at the national level in the U.S. to promote open government policies; MuckRock, a nonprofit organization that helps individuals make requests for information and share records in an effort to increase transparency; and others such as the Reporters Committee for the Freedom of the Press and the News Leaders Association (formerly

American Society of News Editors), which advocate for access to information for journalists. News Leaders Association coordinates a campaign each March to promote freedom of information, called national Sunshine Week. Established in 2005, the event coincides with James Madison's birthday and Freedom of Information Day to promote government transparency and engage the public. While organizations such as these are active in FOI advocacy, the rights that FOI laws and policies afford make promoting and defending them a concern for all citizens.

Social media and participation

“Social media” is understood to mean various activities that seek to integrate technology, social interaction, and content through applications such as blogs, wikis, photo and video sharing platforms, podcasts, and social networking sites. These web-based applications are designed for social interaction and have come to dominate society in a number of ways.

Bryer and Zavattaro (2011) identify five particular types of technologies classified as social media: Blogs, wikis, media sharing tools, networking platforms, and virtual worlds. These five categories are consistently examined throughout the literature. Within these broader categories are more specific platforms that have become quite popular. For example, media sharing tools refer to platforms that produce, distribute or exchange audio, photo, video, and text content. More specifically, it refers to companies and applications such as Skype, Instagram, Snapchat, and YouTube. Furthermore, networking platforms such as Facebook, Twitter, and LinkedIn have come to dominate many social media spaces. What is particularly special about these types of platforms is that, unlike traditional e-government such as web portal applications, they rely on user-generated content and are underpinned by the exchange of information between two or more parties.

Mergel (2013a) argues that social media channels such as those described above, represent an opportunity to uphold a core value of the public sector, which is to engage the public. The bidirectional nature of social media allows for interaction and sharing between governments and the public over platforms that afford the opportunity for increased engagement compared to the unidirectional nature of most early Web 1.0 and traditional e-government applications. There has been a substantial push for technologies such as these as a result of the Obama administration's Open Government Initiative (2009), which encouraged the use of new and innovative technologies to increase participation, collaboration, and transparency.

Social media applications, when managed effectively, have the potential to provide citizens with the opportunity to engage with government and vice versa. Engagement in this manner can take on a number of forms depending on the platform used, but the most common ways observed and discussed in the literature are through user generated content such as blog comments, direct messages, Facebook comments, and sharing or re-tweeting existing content with or without sharing opinions related to the content (Mergel, 2013b; Mossberger, Wu, & Crawford, 2013; Mergel, 2012; Hand & Ching, 2011). Scholars have argued that a great advantage of social media is that it can serve as a tool to increase democratic engagement and reach audiences not historically involved in the political process (Bertot, Jaeger, & Grimes, 2010; Mergel, 2013a). This is because of the virtual nature of the technologies and the relatively low cost of both implementation of technologies in governments and access of technologies by citizens. A majority of platforms on the market today are third-party providers, so all it takes is an agency or individual creating a profile in order to establish a presence on social media. However, social media presence in and of itself is not enough for governments or individuals to engage with one another. Furthermore, it is

still unknown whether social media has the power to engage individuals historically absent from political participation.

To date, the literature has examined how social media has been used to increase citizen participation at the local level (Mossberger, Wu, & Crawford, 2013; Sandoval-Almazan & Gil-Garcia, 2011; Hand & Ching, 2011), empower citizens as co-producers (Linders, 2012), and disseminate critical information that can aid in disaster and crisis management (Kavanaugh et al., 2012). Existing studies have primarily examined how governments are using social media to increase participation and share information but little attention has been paid to the individuals on the other side of those efforts; those who are using social media for participation and/or consuming and aiding in the dissemination of information via social media platforms. The goal of this paper is to contribute to this gap by mapping how social media is being used in this way and by whom. The study posed three research questions:

RQ1: Do national advocacy campaigns, such as Sunshine Week, increase public discourse via social media?

RQ2: Do some tweets attract more comments or retweets than others?

RQ3: Who is using Twitter to share information about freedom of information?

Methodology

This study applies social network analysis (SNA) to explore the individuals and groups who use social media to engage in dialogue about issues relevant to government, such as transparency. The unit of analysis is a post on Twitter, called a “tweet.” Posts are limited to 280 characters of text and often shared out toward a general audience. However, tweets can be directed toward another user or in response to a user when the “@” symbol is included in the tweet. Furthermore, users may repost another user’s tweet in the form of a “retweet.” Retweets can be as simple and straightforward as a repost of the original tweet with no comment or users may include a comment with the retweet.

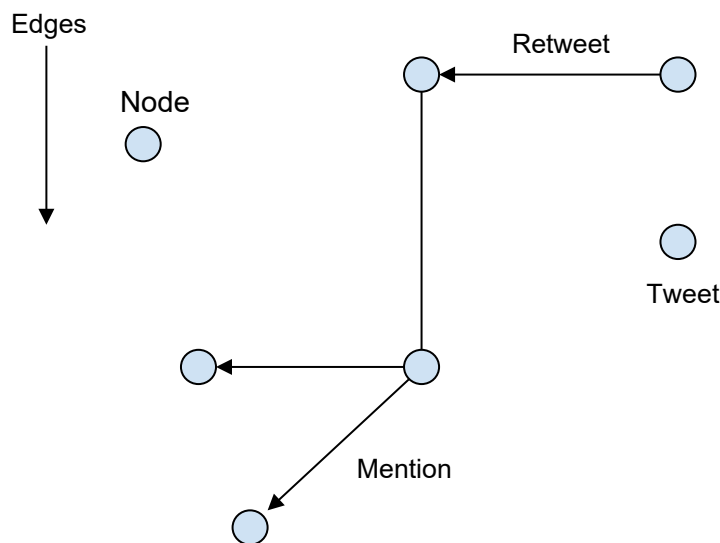
This study focuses on tweets that include a particular hashtag (#FOIA), as hashtags are a way of organizing content around specific themes or topics and, therefore, a way to target individuals posting about the issue of interest in this particular study. Data were collected using an application programming interface (API), which allowed for the mining of tweets from Twitter using the chosen hashtag #FOIA. “FOIA” was chosen over FOI because of its heavy prevalence on Twitter and recognition in the United States.

Tweets including the #FOIA hashtag were collected from 5:30 p.m. on Tuesday, March 5, 2019, through 5:30 p.m. on Friday, March 15, 2019. This eleven-day period was chosen because it roughly coincided with “Sunshine Week 2019” (March 10-16). As mentioned previously, Sunshine Week is an annual national initiative promoted by News Leaders Association (formerly American Society of News Editors), which aims to bring awareness to freedom of information, transparency, and open government in the United States. Observing tweets over this time period allows us to see what conversation might look like when increased attention is being paid to FOI. In all, the application programming interface identified 4,043 original tweets and 10,099 retweets using the #FOIA hashtag during the eleven days.

The social network analysis software program NodeXL, developed by the Social Media Research Foundation (Smith et al., 2010), was used for analysis and generation of graphs and maps presented in the findings on subsequent pages of this article. The software program illustrates each tweet or retweet, called a “node” or “vertex,” as a round dot. The software also identifies how those nodes are related to one another using an arrow, called a tie, or “edge.” These symbols are illustrated below in Figure 1.

Figure 1

Social network analysis terms and symbols



Findings

Overall, total tweets, including retweets, mentions, and comments that included the #FOIA hashtag, started from just 61 on March 5 and increased to a high of 1,783 during the second day of Sunshine Week, a Monday. Tweets tapered as the week progressed, but were still relatively strong into the following week (see Table 1 next page). The trend is shown graphically in a bar chart on the next page, as well (Figure 2). To answer the first research question, Sunshine Week appears to have a significant effect on total tweets.

Over 41% of all tweets posted during the time period analyzed are retweets, which suggest that these users are not only using Twitter to disseminate information about FOI related content but they are then spreading such information outside of their direct networks. The number of retweets during Sunshine Week increased by almost 330% over the preceding week. This significant increase suggests that users were leveraging Twitter to share information about Sunshine Week. This is also reflected in the increase in the number of original tweets generated during this time, which almost tripled as well. Still, the ratio of retweets to original tweets (8.4-to-1) during Sunshine Week suggests that a small number of tweets were highly influential and

shared widely as a result. Furthermore, nearly 50% of tweets included mentions, a feature which allows users to directly tag another user either as a method of calling their attention to something or tagging them as a topic of discussion if information is related to a particular organization, agency, or public official. This number increased two-fold during Sunshine Week, suggesting even more interaction between users during the week of advocacy.

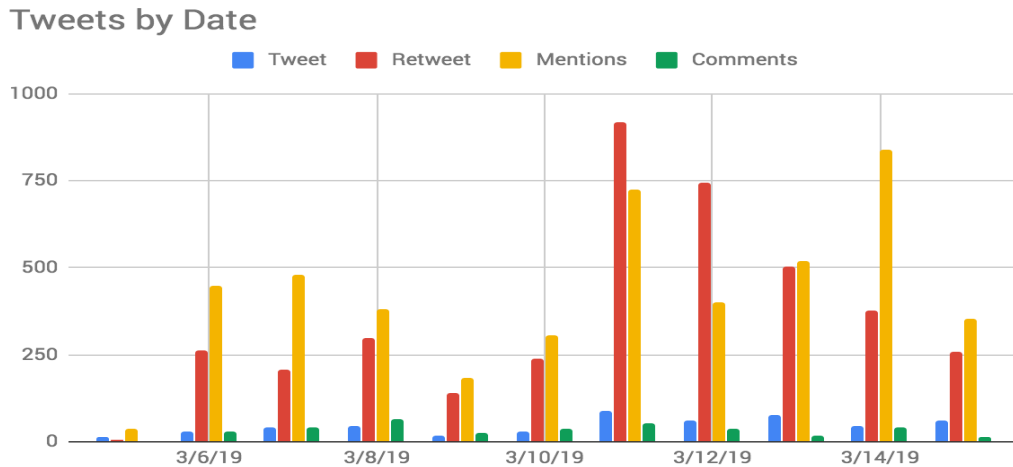
Table 1

Total tweets by day

Date	Total Interactions	Retweet	Mentions	Comments	Unique Tweets
3/5	60	14	6	37	3
3/6	769	262	450	28	29
3/7	769	207	481	40	41
3/8	791	298	382	66	45
3/9	368	139	185	26	18
3/10	611	240	305	38	28
3/11	1783	919	723	52	89
3/12	1242	743	399	39	61
3/13	1118	502	520	18	78
3/14	1306	377	841	43	45
3/15	684	259	352	12	61

Figure 2

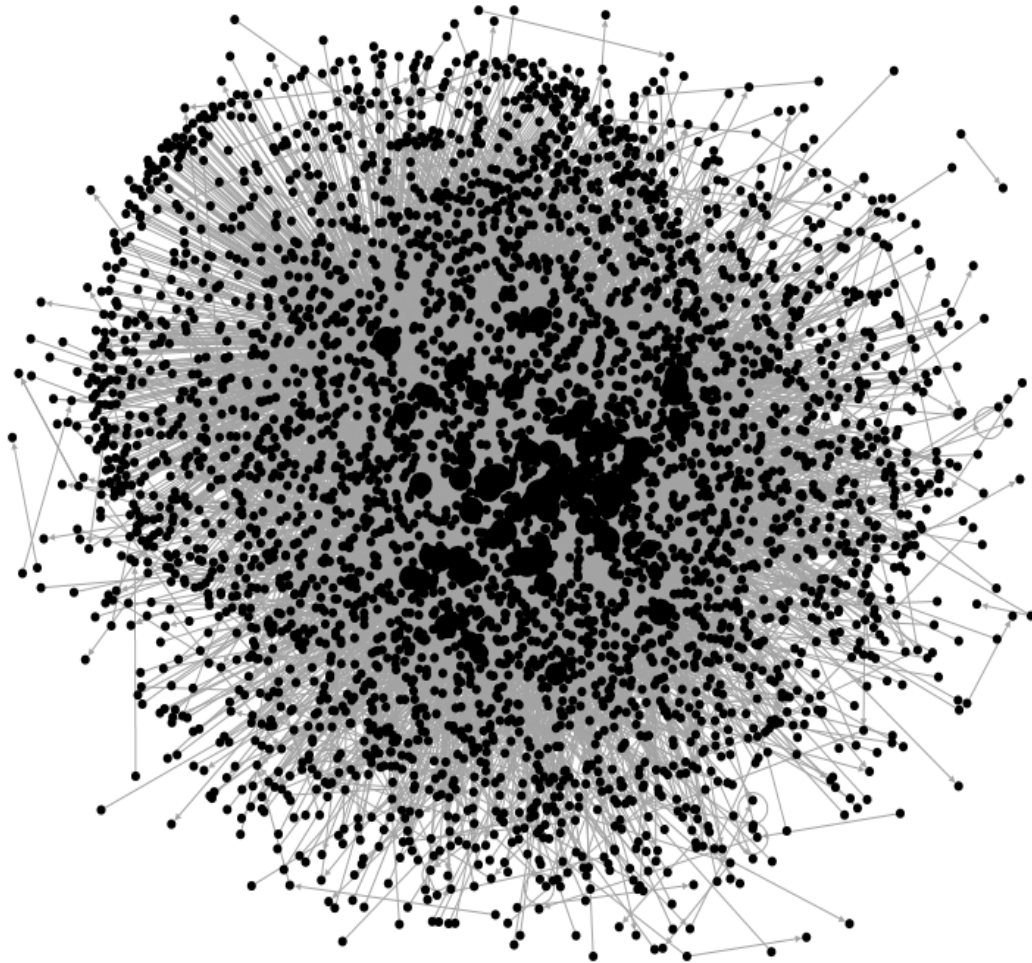
Tweets by day



The second research question asked whether different tweets had higher impact, reach, or interactivity than other tweets. The graph below (Figure 3) illustrates the breadth of discussion about FOI on Twitter across 4,043 unique users (nodes), which resulted in 10,099 total interactions (edges) in the form of original tweets, retweets, comments, or tags (mentions). These data suggest a dynamic conversation about FOIA taking place on Twitter. The tweets that were retweeted or commented on the most are magnified in darker concentration to show their high “betweenness centrality” which refers to the tweet’s degree of influence within the network. This graph indicates that some tweets were more popular than others.

Figure 3

Tweet betweenness centrality



Across the time period analyzed, there were relatively few unique tweets. Of the 10,099 total edges, or interactions, in the network, only 498 of those edges represent original tweets posted by users. Those 498 tweets were then retweeted 3,960 times. A closer look at those tweets that were retweeted the most, shows that many of the tweets contained some form of media being shared. These media included links to articles, photos, or blog posts. A majority of the tweets that were retweeted contained URL links, which suggests that individuals are using Twitter to share content from third-party sites.

For example, links to sunshineweek.org, muckrock.com, progressmichigan.org, opengovva.org, washingtonpost.com, and youtube.com were among the most retweeted tweets containing links. The high influence of tweets containing content from other websites, especially those sites aimed at producing and sharing content about FOI, open government, and transparency, such as MuckRock and Progress Michigan, suggests that Twitter is being used as a platform for promoting and disseminating information by advocacy groups.

Furthermore, high engagement from these tweets, as measured by the number of retweets, suggests that there is both a demand for this type of information and that Twitter is an effective method for promoting content. For instance, the data show that tweets posted by advocacy groups with links to full stories located on their websites are retweeted more often. This can be an efficient and effective way to promote an organization's work and drive traffic to its website. For example, an organization such as the Virginia Coalition for Open Government (opengovva.org) might use Twitter to share its monthly Sunshine Report or any other FOI related news posted on its blog or website. Furthermore, an individual, whether a citizen or journalist, seeking FOI news can look to Twitter to stay caught up on what is happening and share information with his or her own networks by retweeting or tagging other users to direct them to information, as well.

To answer the third question, regarding who is using Twitter to share information about FOIA, each node was coded individually by user role and plotted in the SNA software. Users were categorized by five different roles: Media/Journalist, Public Official, Interest/Advocacy Group, Government Agency, and Citizen (Table 2, next page). Roles were determined based on a keyword analysis of each users' Twitter bio. For example, accounts belonging to media outlets or individuals' whose bios referenced affiliations with media outlets whether as reporters, editors, or contributors were coded as Media/Journalist. In these cases, media referred to outlets as large as MSNBC and as small as local newspapers. Accounts that referenced freelance or independent journalism work were also included in this group. Public officials were coded based on references to serving the public in an official capacity within the users' bios. Similarly, any account belonging to an official government agency was coded as such. Accounts belonging to advocacy groups were also coded. For example, official accounts belonging to organizations such as the Reporters Committee, American Civil Liberties Union (ACLU) and other organizations promoting open government, transparency and individuals' right to know.

The rest of the tweets were coded as "Citizen." Special care was taken to exclude accounts that made reference to acting in the interest of the media or a specific cause in any way. Care was also taken to include accounts with disclaimers such as "personal account" or "opinions are my own," which insinuate the use of accounts for personal opinion sharing only. While great effort was made to carefully sort each user into the categories specified, it is important to note that analysis was limited to the information included in each user's bio. Therefore, it is possible that a user tweeting about FOIA during the time period analyzed could be a journalist but did not specify any media affiliation in his or her bio and was thus, coded as a

citizen. However, due to the nature of Twitter as such a popular platform for media and journalists to share information, the likelihood that a user would be tweeting as a journalist without noting association with a particular media platform or as an independent/freelance journalist is low.

Table 2, below, shows a breakdown of the users (nodes), coded by stakeholder group.

Table 2

Number of users, by stakeholder group

Stakeholder	Nodes/Users
Media/Journalist	706
Public Official	71
Interest/Advocacy Group	105
Government Agency	64
Citizen	3,097

To further examine the connectivity of the various users, the graph was plotted again (Figure 4, next page) but with each node color coded by user role. The graph illustrates the overall activity as well as the activity by user role. Journalists (red nodes) were very active in both generating original tweets as well as their influence in the network as measured by retweets. The data show that 128 unique tweets were generated by journalists/media during this time and were retweeted 1,111 times. Twitter tends to be a popular platform for journalists as well as media outlets to post breaking news as well as links to news stories on their websites so these findings are not entirely surprising.

Accounts belonging to advocacy/interest groups (green) generated 137 unique tweets and were retweeted 269 times. Similar to the findings discussed above, this suggests that Twitter is effective for promoting information on behalf of advocacy groups. Surprisingly, public officials (purple) and government agencies (blue) generated the least amount of unique tweets at 4 and 19, respectively. However, nodes representing public officials or agencies were much higher at 71 and 64, respectively. This suggests that these accounts did not drive discussion as much as they were the subject of it. In other words, these accounts were much more likely to be tagged in content than they were to tweet or retweet content. For example, a user, whether an individual or an organization, likely tweeted or retweeted information and tagged the public agency or official involved. This could be a way of calling attention to government in an effort to hold agencies or officials accountable or just a way of tagging a relevant actor. This mechanism is hard to discern in this particular analysis but warrants further study.

The remaining accounts coded as those accounts tweeting from the perspective of a citizen (black) were responsible for generating 274 unique tweets. These tweets accounted for

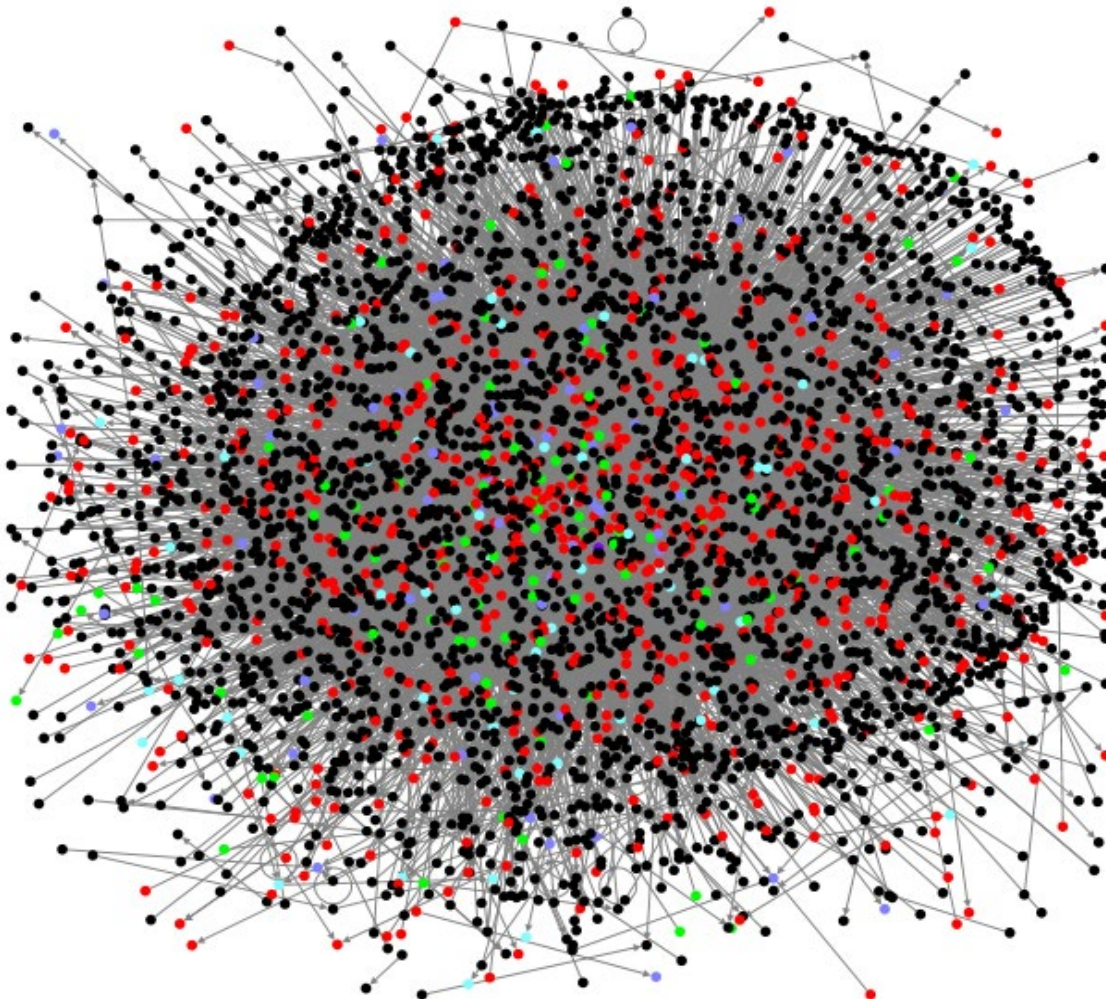
over 50% of the original content generated during the time period analyzed and were retweeted 2,181 times. These data suggest a citizen-driven dialogue or at least high engagement from citizens. It is important to note, though, that little is known about this group of “citizens” other than they are present in the network and not tweeting on behalf of government, the media or organized interest or advocacy groups. Further subgroup analysis is needed to better understand who these individuals are and what has drawn them to Twitter to discuss FOI.

Social media platforms such as Twitter offer an unprecedented way for groups to participate and interact in the absence of traditional barriers such as geographic limitations. These data illustrate a dynamic dialogue about FOI that is taking place across stakeholder groups on Twitter. The high number of retweets suggests high information sharing across, within and between groups that may not otherwise interact in this way.

Figure 4

Tweets by user role

Red = Media; **Purple** = Gov Official; **Green** = Advocacy Group; **Blue** = Gov Agency; **Black** = Public



The overall SNA statistics (Table 3, below) provide evidence of a network with a very low density but high levels of betweenness centrality. These measures suggest a very wide and unconnected network, though with a handful of nodes possessing a great deal of influence over the network. Given that this is a digital network in which actors are engaging not necessarily with one another, but with pieces of information, the low density makes sense. A high-density network is usually indicative of a close-knit and highly connected network. However, in this case, it is unlikely that the actors represented in the network actually know one another outside of Twitter, so it is not expected that the network would be connected in a way that would produce a high graph density.

However, the very high betweenness centrality suggests the influence of a few key actors. This is indicative of the less than 500 unique tweets which were retweeted nearly 4,000 times during the time period analyzed. The influence of these particular tweets could be attributed to the influence of the information itself or the actor that is tweeting the information. The high centrality could also indicate the presence of influential media sources, public officials, government agencies, or highly active advocacy groups within the network. These accounts may have been tweeting but were more likely to have been mentioned in a tweet, retweet or comment given the findings for tweets generated by user roles.

Table 3

Social network analysis statistics

Vertices	4,043
Total Edges	10,099
Graph Density	0.000506248
Minimum Betweenness Centrality	0
Maximum Betweenness Centrality	6,777,890.705
Average Betweenness Centrality	12,417.987

Discussion

The analysis presented here provides new insights into how social media is being used for civic participation, and by whom. Findings have several implications for theory and practice.

First, the data suggest that individuals do in fact use social media platforms such as Twitter to participate in discussions related to policy issues that they care about. The findings presented in this paper illustrate a dynamic and ongoing dialogue on Twitter between a diverse community of stakeholders regarding government transparency policies. Over 10,000 tweets using the hashtag #FOIA were posted, retweeted, mentioned, or replied to over an eleven-day period.

Second, Sunshine Week appears to have a significant impact on FOIA-related tweets. The increase of all Twitter activity related to FOI during Sunshine Week – from 60 interactions per day to more than 1,700 per day – suggests that advocates may have been using Twitter as a platform for promoting Sunshine Week.

Third, tweets that included photos, video, or links to advocacy organization websites generated more response, indicating an effective method for raising awareness and attention. Groups such as MuckRock and Reporters Committee for Freedom of the Press, in particular, make excellent use of Twitter to drive readers to their materials. Given that resources for many nonprofits and interest groups are especially challenging to secure and often insufficient even once secured, leveraging Twitter could be a way for organizations to do more with less. Organizations advocating for open government and FOI can look to Twitter to connect with journalists and mainstream media outlets, hold public officials and agencies accountable, and empower citizens to get involved relatively easily and efficiently.

Fourth, while journalists are represented in significant numbers on Twitter, the amount of citizens contributing to the conversation is striking. This suggests that Twitter is a place where citizens may be going to obtain information from media and advocacy organizations about policy issues they care about as well as exercise voice about such issues. It also represents a place where stakeholders have the opportunity to contact public officials, government agencies and the media directly about such issues in an unprecedented way. The bidirectional nature of social media offers users the opportunity to do all of this relatively easily and efficiently.

This study is not without its limitations, however. First, it is largely exploratory in that it focuses primarily on descriptive statistics available from a social network analysis of tweets exported from Twitter over a limited period of time. Analysis over longer periods of time is necessary to truly understand who is using Twitter to engage with issues related to open government and Freedom of Information laws and policies on a regular basis. Subgroup analysis also is needed to understand more about the “citizens” included in the analysis. It would be especially helpful to understand what is driving these users to use Twitter in this way and why they are interested in engaging with others about FOI related topics. Lastly, a more comprehensive analysis of the content of the tweets can inform understanding of not just who is using Twitter for these purposes, but how they are using Twitter. Understanding the type of information that is being shared can be especially illuminating. Specifically, understanding more about the type of information that is more likely to be retweeted can inform how individuals and organizations can more effectively leverage a platform such as Twitter to share information and garner support for their efforts.

This study contributes to a growing literature on social media use in the public sector while connecting such literature to the study of FOI in a way not previously explored. The rapid development of technology, especially the internet, has allowed for cheaper and easier dissemination of information to wider audiences than ever before. In addition, the internet offers the opportunity for greater access and sharing capabilities among individuals. This is especially true of social media, an inherently interactive and internet-based technology, which allows for collaboration and participation among users through the sharing of information in real time. By employing a social network analysis of individuals’ use of Twitter to discuss Freedom of Information in the United States, this article illustrates who is using social media to engage in a dialogue about one particular policy area: Freedom of Information.

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