TRANSPARENCY DESERTS

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

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

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

The Article serves as a corrective to the scholarship’s current, myopic focus on federal transparency law. In doing so, it makes three central contributions. First, it provides a much-needed descriptive account of the state and local transparency regime. Second, it makes a normative contribution. It mines empirical and qualitative public records data to evaluate the costs and benefits of the current transparency regime and then applies those insights to contemporary academic and policy-oriented
debates. In the process, the Article reveals that unique features of state and local government both heighten the salience of statutory transparency mechanisms and challenge dominant strands of thought in the contemporary transparency scholarship. Third, the Article has implications for ongoing public law debates, demonstrating that failures in the local transparency regime undermine certain theories of federalism.

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INTRODUCTION

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

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

¹ E-mail from Sheri Fink, Correspondent, The N.Y. Times Co., to author (Oct. 25, 2019, 01:25 PST) (on file with author). The author previously served as an attorney at the *New York Times* and assisted Fink with some of these public records requests and appeals.
³ E-mail from Sheri Fink, supra note 1.
⁴ Id.
⁵ Id.
⁷ E-mail from Sheri Fink, supra note 1.
⁸ TEX. GOV’T CODE ANN. § 552.302 (West 2005) (“[I]nformation requested in writing is presumed to be subject to required public disclosure.”).
requiring that every record held by a covered government entity be turned over to the public unless it falls within a specific statutory exemption.\(^9\) In this case, the city argued that the report was protected from disclosure by a statute permitting the government to withhold records relating to “an act of terrorism or related criminal activity.”\(^10\)

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

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

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

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


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

\(^13\) See discussion infra Section III.D.3.a.

\(^14\) See, e.g., Mark Fenster, The Opacity of Transparency, 91 IOWA L. REV. 885 (2006) (outlining the ways in which excessive transparency can undermine effective governance); David E. Pozen,
Information Act (FOIA) in particular. The scholarship on this topic is both deep and diverse, but many articles are concerned, in one way or another, with the same central questions: whether the benefits of transparency laws such as FOIA outweigh the costs and whether these laws can be successfully amended to better serve the underlying goals of transparency advocates while minimizing the burdens to government. Despite this profusion of legal scholarship examining federal transparency laws, scholars have been curiously silent on transparency law issues at the subfederal level. There have been a handful of articles addressing particular slices of state-level transparency statutes. But scholars have not yet taken

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See, e.g., Mark Fenster, The Informational Ombudsman: Fixing Open Government by Institutional Design, 2 INT’L J. OPEN GOV’’T 275 (2015) (examining the role of ombudsman in state public records laws); Katherine Fink, State FOI Laws: More Journalist-Friendly, or Less?, in TROUBLING TRANSPARENCY, supra note 14, at 100–09 (examining the percentage of media requests sent to state environmental agencies across the country); Sarah Geraghty & Melanie Velez, Bringing Transparency and Accountability to Criminal Justice Institutions in the South, 22 STAN. L. & POL’Y
a more comprehensive look at how these statutes impact state government. And there has been virtually no scholarship at all examining transparency issues at the local level.18

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

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

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

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


21 “In 2014, the federal government civilian workforce was [roughly 2.7 million, while] . . . the combined state and local workforce in 2013 [was] more than 16 million . . . .” Richard Briffault & Laurie Reynolds, Cases and Materials on State and Local Government Law 4 (8th ed. 2016).
and local entities also exert greater political sway. State and local governments are now responsible for implementing large swaths of federal policy.\(^{22}\) Conversely, they also play a central role in resisting federal policies and actions.\(^{23}\) These state transparency laws take on increased importance as the governments they monitor assume a greater role in citizens’ lives.

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

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


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


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

\(^{27}\) See supra note 24.

\(^{28}\) See, e.g., Interview with Steve Eder, Reporter, The N.Y. Times Co., in N.Y.C., N.Y. (Aug. 28, 2018) (stating that he often submits requests through both FOIA and state public records logs but finds that he is better off “focusing energies on state” requests given the advantages they provide over FOIA, such as improved processing times). For further discussion of the specific advantages state public records laws provide over FOIA, see infra Section III.B.
This Article attempts to remedy this gap in the literature by exploring the example of state public records laws. The term “transparency” is broad and nebulous and can be interpreted to encompass a wide array of state statutes, including open meeting laws, open data laws, budgetary transparency requirements, and more. By focusing on one class of transparency laws, this Article sidesteps these definitional questions and narrows its analytical lens. This approach forecloses a more comprehensive examination of the ways in which various transparency laws interact with state and local governments. But homing in on one category of transparency law also offers considerable benefits. Much of the current transparency scholarship is focused on FOIA rather than on the array of other federal transparency statutes. As a result, an analysis of state-level public records laws, as well as the effects they have on state and local government, serves as a natural place to both push back on and fill the gaps within the existing literature. A robust theoretical and analytical framework already exists within which to plug an analysis of subfederal transparency laws.

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

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

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


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

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

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

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

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

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

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

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

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


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

Yet this is not the only area where FOIA looms large. The federal statute has also bled into state transparency laws. State legislatures often incorporate the statutory language of FOIA directly into state law. And judges interpreting state public records laws routinely look to federal judicial interpretations of FOIA for guidance.\(^{40}\) Even though some state public records laws predate FOIA,\(^{41}\) virtually every state law must now be considered in light of its federal counterpart. Moreover, the federal statute dominates the transparency scholarship, at least within the legal literature.\(^{42}\)

As a result, in order to understand what is distinctive and important about state transparency laws in general—and state freedom of information laws in particular—it is helpful to look to FOIA as a point of reference.

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


\(^{39}\) Pozen, Transparency’s Ideological Drift, supra note 14, at 118.

\(^{40}\) See discussion infra Section II.A.

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

\(^{42}\) See sources cited supra note 15.

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

\(^{44}\) Id. § 551(1). By its terms, the FOIA applies to “the Executive Office of the President,” id. § 552(f), but this term does not include either “the President’s immediate personal staff” or any
These federal agencies receive a large and growing number of requests each year. In 2017, they received more than 800,000 FOIA requests. The identities and motivations of these requesters is a question that has preoccupied legal scholars in recent years. Professor Margaret Kwoka, in particular, has conducted extensive research on FOIA requesters in an effort to understand whether the law is serving the original intent of its drafters. She has found that certain federal agencies are flooded with requests from commercial entities, while others receive an overwhelming percentage of requests from “first-person” requesters—individuals seeking information about themselves. In both studies, Professor Kwoka raises the concern that even if there is some public benefit conferred by these requests, much of this commercial and first-person use of the statute is not necessarily consistent with the public oversight function that the drafters of the law envisioned. These requests also raise the costs of the Act. In 2017, the federal government employed roughly 4,500 full-time FOIA officers and spent more than half a billion dollars responding to record requests.

Despite years of criticism and multiple revisions to the law, few agree that FOIA adequately serves the needs of either requesters or the public. The Executive Branch argues that the number and scope of requests has ballooned and that agencies lack sufficient resources to adequately respond
to requests. Members of Congress routinely accuse executive officials of creating obtuse procedures deliberately designed to confuse requesters. And members of the media argue that enumerated exemptions have been construed so broadly that they swallow vast categories of records and that excessive time delays make the statute nearly unusable. Increasingly, scholars have taken up the question of whether the statute can be adequately reformed to better fulfill the needs of the government or the public. Yet despite these persistent critiques, the statute continues to loom large in the public imagination. Scholars have even characterized the law as a “super-statute,” one that has assumed a “quasi-constitutional valence” over time.

II. The Centerpiece of the State Transparency Regime: State Public Records Laws

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

A. The History of State Public Records Laws

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

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


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

53 See discussion supra note 15.


55 See discussion supra notes 14–15.
At common law, members of the public were entitled to inspect certain categories of public records, including the records of municipal corporations.\textsuperscript{56} State legislatures began to codify this common law right in the mid-nineteenth century. Wisconsin passed what was likely the nation’s first public records law in 1849,\textsuperscript{57} requiring that “[e]very sheriff, clerk of the circuit court, register of deeds, county treasurer, and clerk of the board of supervisors” keep “all books and papers . . . in their offices . . . open for the examination of any person.”\textsuperscript{58} The law’s enforcement mechanisms were robust: for each day that an officer neglected to comply with this open records requirement, he was required to pay a fee of $5—roughly the equivalent of $160 per day today.\textsuperscript{59}

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

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

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


\textsuperscript{58} WIS. STAT. § 10.137 (1849).

\textsuperscript{59} Id.

\textsuperscript{60} CAL. CIV. PROC. CODE §§ 1888, 1892 (Deering 1937).

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


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

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

\textsuperscript{65} See, e.g., STUESSY, supra note 50, at 1 (referring to FOIA “as the embodiment of ‘the people’s right to know’” and citing the APA as its precursor).
drafter of FOIA were strongly influenced by these state public access laws. They drew heavily on the work of Harold Cross, a former counsel for the New York Herald Tribune, who wrote a book that surveyed these state public records laws and argued in favor of a federal law that would offer similar rights of access. Cross himself served as a legal advisor to the congressional committee charged with drafting FOIA. Through Cross’s contributions, these existing state statutes influenced the structure and substance of the new federal public records law.

The borders between these state and federal laws soon became permeable. FOIA began to influence the makeup of many state public records laws, even those that had been enacted prior to 1966. New state public records laws were enacted, some of which were patterned on FOIA. Amendments to existing state public records laws began to contain exemptions and provisions adopted from the federal law. And state court judges began to look to federal interpretations of analogous provisions of FOIA to guide their own interpretations of the state public records law. In this way, the federal and state statutory transparency regimes have become intertwined over time.

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

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

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


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

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

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

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

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

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

72 See infra notes 123–125 and accompanying text.

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

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

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

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

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76 For example, a nonprofit group that monitors public records in New York estimates that around 200,000 public records requests are filed in that state each year. See Editorial Board, Opening Up New York’s Public Records, N.Y. TIMES (Dec. 10, 2017), https://www.nytimes.com/2017/12/10/opinion/new-york-public-records.html [https://perma.cc/3URP-UDSW]. Washington State reported that the state and local governments received 285,000 requests in 2015. WASH. STATE AUDITOR’S OFFICE, PERFORMANCE AUDIT: THE EFFECT OF PUBLIC RECORDS REQUESTS ON STATE AND LOCAL GOVERNMENTS 3 (2016), http://mrsc.org/getmedia/d3dbec02-f6f2-4aa7-b1dd-94cd71af0b4a/w3saoPRA.aspx [https://perma.cc/C74B-9VKD] [hereinafter WASH. STATE AUDITOR’S REPORT].


79 See, e.g., Massachusetts State Dataset 2017, supra note 78 (the Department of State Police received the second highest number of requests); Texas State Dataset 2017, supra note 77 (the
Yet even agencies that perform similar administrative functions across states often receive disparate numbers of requests. The number and type of requests submitted to various government entities varies substantially at the local level as well.

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

III. TRANSPARENCY ECOSYSTEMS

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

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

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90 E-mail from Jessica Mishaan, Paralegal, Office of the Att’y Gen. of Vt., to author (Feb. 25, 2019) (on file with author).
91 See, e.g., Yue Quiu et al., How Does Your State Rank for Integrity?, CTR. FOR PUB. INTEGRITY (published Nov. 9, 2015; updated Feb. 2, 2018), https://publicintegrity.org/accountability/how-does-your-state-rank-for-integrity/ [https://perma.cc/629S-BHHK] (ranking states on various accountability measures including public access to information, electoral oversight, lobbying disclosures, and state budget processes).
92 See, e.g., ME. CONST. art. IV, pt. III, § 1-A (requiring hearings prior to apportionment); Ore. Const. art. VIII, § 8 (requiring publication of fiscal health of state educational system).
93 See, e.g., FLA. CONST. art. 1, § 24.
94 The concept of a transparency ecosystem is borrowed from Professor Seth Kreimer, who has argued that at the federal level, FOIA plays a central role in a broader “ecology of transparency that includes the permanent infrastructure of federal civil servants with integrity, internal watchdogs, reasonably open opportunities to publish and share information, and a set of civil society actors capable of pursuing prolonged campaigns for disclosure.” Kreimer, supra note 16, at 1017. This concept also borrows from the idea of a “news ecosystem.” See PEN AM., LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS 7 (2019), https://pen.org/wp-content/uploads/2019/12/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf [https://perma.cc/Q9EH-MESK].
others are less robust. Yet all fifty states have enacted a public records statute. Just as FOIA operates as the “crown jewel” of the federal transparency regime, the most significant transparency mechanism in state and local government are these public records statutes. This Section explores the formation of these local transparency ecosystems by examining the value and efficacy of these state public records laws.

A. Methodology

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

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

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

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95 See generally Massachusetts State Dataset 2017, supra note 78; Vermont State Dataset 2017, supra note 78.
96 Vermont State Dataset 2017, supra note 78.
97 Texas State Dataset 2017, supra note 77.
98 Washington State Dataset 2017, supra note 32.
established.\textsuperscript{99} The remaining states either did not track public records data or the attorney’s general offices failed to respond to my queries.\textsuperscript{100} No state gathered aggregate data on public records requests submitted to local governments.

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

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

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


\textsuperscript{100} The attorney general’s office in twelve states failed to respond to my queries.

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

\textsuperscript{102} About Us, MUCKROCK, https://www.muckrock.com/about/ [https://perma.cc/A3MA-KL2E].

\textsuperscript{103} This research approach was both inspired by and modeled on Professor Kwoka’s analysis of FOIA logs. See Kwoka, First-Person FOIA, supra note 15, at 2221–23 (discussing the methodology used in an analogous study); Kwoka, FOIA, Inc., supra note 15, at 1379–80 (same).
The advantage of this research approach is that it allowed me to concentrate my research efforts where usable data already existed. The disadvantage is that my analysis is, by necessity, spotty and incomplete. The acute lack of data at the state and local level makes it nearly impossible to conduct comprehensive comparative surveys.\textsuperscript{104} This is true across the fifty states, and it is especially true across the hundreds of thousands of local government entities subject to state public records laws. Even so, the limited data that I have collected helps begin to shed light on an opaque and underexamined area of the law.

\textbf{B. The Benefits of State Public Records Laws}

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

\textit{1. Informing the Public}

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

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

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

\textsuperscript{106} \textit{Robbins Tire & Rubber, 437 U.S. at 242.}
Section explores the ways that these two key categories of requests—media and first-person requests—facilitate the flow of information from the government to the public.

a. Media Requests

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

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

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

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107 See discussion infra notes 452–467 and accompanying text.
109 See, e.g., Fenster, supra note 14, at 926.
groundbreaking reporting on the sexual abuse crisis in the Catholic Church in 2004 and the Editor of the Storm Lake Times’s 2017 editorial exposé of the role powerful agribusinesses have played in covering up river pollution in Iowa. One study of submissions to the Investigative Reporters and Editors annual prizes found that a quarter of the stories about government misconduct relied on a federal or state public records request.

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

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

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

115 See discussion supra note 16.

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

50,000 requests submitted through its streamlined requesting service and found that the federal government took longer to process requests on average than all fifty states and the District of Columbia.\footnote{118 How Open Is Your Government? Find Out, MUCKROCK, https://www.muckrock.com/place/ [https://perma.cc/89PV-CUMG]. On the low end, Rhode Island took an average of nineteen days to process MuckRock requests, and on the high end, New Mexico took 140 days to process requests. Id.} Data reported directly by the states shows even more rapid processing timelines. In Hawaii, for example, the average turnaround time for requests submitted to state agencies in 2018 was just 8.5 days.\footnote{119 HAWAII PUBLIC RECORDS REPORT 2018, supra note 99, at 6.}

From the outside, the timeframe within which requested records are provided may seem a minor point. But for many requesters—and especially for the media—these time barriers are the single most significant obstacle to the effective use of public records laws. Reporters often work on tight deadlines and cannot afford to engage in protracted negotiations with the government over the release of records.\footnote{120 See, e.g., STAFF OF H.R. COMM. ON OVERSIGHT & GOV’T REFORM, supra note 51, at ii (“Members of the media described their complete abandonment of the FOIA request as a tool because delays and redactions made the request process wholly useless for reporting to the public.”).} The shortened timeframe for state transparency requests substantially increases the practical utility of these statutes.\footnote{121 These state and local governments process requests more quickly even in the face of significant financial and other resource constraints. See discussion infra note 176 and accompanying text. It is unclear why this is so. It is possible that these requests are less complex than the average FOIA request, or that state and local governments are more likely to deny requests outright.}

State laws also offer an expanded scope of coverage in comparison with FOIA. While federal transparency law is limited to federal agencies, many state laws cover a wider array of government offices, officials, and activity. Massachusetts is the only state that has curtailed its public records coverage to the boundaries of FOIA.\footnote{122 Todd Wallack, State Lawmakers Fail to Reach Consensus on Whether to Expand Public Record Law, BOS. GLOBE (Jan. 10, 2019), https://www.bostonglobe.com/metro/2019/01/10/state-lawmakers-fail-reach-consensus-whether-expand-public-record-law/XvwfD04o2TrQ4HWqmxI0BO/story.html [https://perma.cc/974M-XQZF].} Every other state extends public records coverage to a broader set of government officials. The majority of state public records laws apply to both the governor’s office and the legislative branch.\footnote{123 State Public Records Law Database, supra note 84.} And many state statutes also require at least some disclosure of judicial records.\footnote{124 Id. Some of these states’ coverage is only partial, requiring administrative or financial court records to be made public but exempting substantive judicial documents from disclosure. See, e.g., 38 R.I. GEN. LAWS § 38-2-2(4)(T) (2019) (“Judicial bodies are included . . . only in respect to their administrative function.”).} Moreover, these state laws apply not
merely to general purpose governments, such as cities and towns, but to special purpose institutions as well, which often receive even less public scrutiny despite wielding significant authority and power.\textsuperscript{125} This expanded coverage allows the public to monitor a much broader range of government actors than FOIA allows. And it permits the media, especially, to investigate a broader swath of government activity.

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

\textit{b. First-Person Requests}

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

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


\textsuperscript{127} Various general purpose and special purpose local governments often overlap. Counties may encompass cities and towns, and special purpose governments may be coterminous with city or town boundaries or may encircle multiple municipal or town units. See Briffault & Reynolds, supra note 21, at 15.

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

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

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

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

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

130 Kwoka, First-Person FOIA, supra note 15, at 2225.
132 Telephone Interview with David Turner, Dir. of Offender Due Process and Grievances & Pub. Records Officer, Vt. Dep’t of Corrections (Nov. 21, 2018).
these agencies, individuals will seek police or accident reports for a myriad of other, non-insurance-related reasons. They may need a police report to file a complaint with the landlord against a neighbor, to use as evidence in a custody dispute, or to obtain information about the death of a loved one. Lawyers representing criminal defendants also rely on public records requests to obtain law enforcement records that may not be available in discovery, such as documents demonstrating systemic issues within a particular department or information relating to a prosecution’s witness. Some states do not provide automatic discovery rights for those pursuing post-conviction relief, but instead require that the defendant seek permission from the court. When that request is denied, attorneys must rely exclusively on public records requests.137

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

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

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133 See discussion infra Section III.C.4.
136 See, e.g., MASS. R. CRIM. P. 30(c)(4).
138 See, e.g., Penn. Dep’t of State, Sept.–Dec. 2016 Public Records Log (on file with author) (around 20% of requests originated from inmates and roughly 50% from lawyers, many of whom were seeking information about a specific client).
139 See, e.g., Wis. Dep’t for Pub. Instruction, 2015 Public Records Log, at 5 (on file with author) (requesting “[r]ecord of changes to son’s IEP”).
140 See, e.g., N.J. Dep’t of Treasury, 2013 Public Records Log, at 187 (on file with author).
and she has questioned whether such first-person use advances the underlying transparency goals of the statute. Similar concerns apply at the state and local level. These state and local requests do not always effectively serve first-person requesters’ needs. Some statutes exclude certain categories of individuals from accessing government records, and virtually every state statute is plagued by time delays and other procedural barriers to release. Such obstacles can make these requesting channels an ineffective method of information gathering.

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

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

2. **Informing the Government**

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

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

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

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

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

148 *See* Fenster, supra note 14, at 914.
This occurs at all levels. Foreign governments submit requests to state agencies; county officials submit requests to towns; and towns submit requests to the federal government. Different agencies within the same executive structure even submit public records requests to one another.

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

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

149 See e.g., CONN. GEN. STAT. § 1-212(d)(4)–(5) (2019).
152 Id.
153 Telephone Interview with David Turner, supra note 132.
155 Id.; Telephone Interview with David Turner, supra note 132.
statistics. This horizontal information exchange also weakens a central argument of transparency critics: that statutory transparency requirements are unnecessary because sufficient transparency mechanisms are built into the structure of government itself. 157 This widespread governmental reliance on state public records laws underscores the extent to which these laws can foster cooperation between and among different levels of government.

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

3. Innovation and Experimentation

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

157 See, e.g., Scalia, supra note 16, at 19.
158 See, e.g., Interview with Chris Voss, supra note 104 (noting that “[t]here is benefit to seeing what people are asking in that particular types of records are sought after,” such as helping the agency determine which types of records to affirmatively post online).
159 Davidson, supra note 34, at 625. For a discussion of how entrenched flaws in these state public records laws undermine the concept of democratic laboratories more broadly, see infra notes 417–423 and accompanying text.
In Connecticut, for example, a centralized appellate commission is responsible for resolving administrative appeals for all state and local agencies across the state.\(^{161}\) While there are disadvantages to this structure, including lengthier response times,\(^ {162}\) there are also benefits. This approach removes the decision on appeal from the agency that made the initial public records determination.\(^ {163}\) To ensure political independence, appointment power is divided between the governor and the legislative branch,\(^ {164}\) and no more than five of the nine commission members may belong to the same political party.\(^ {165}\) Further, the commission is granted broad investigatory powers, including the authority to subpoena witnesses,\(^ {166}\) and it serves as a transparency liaison for both government agencies and for the public. This administrative appeals system is often held up as a model of appellate enforcement of public records laws.\(^ {167}\)

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


\(^{162}\) See infra note 289 and accompanying text.

\(^{163}\) Cf. 5 U.S.C. § 552(a)(6).

\(^{164}\) CONN. GEN. STAT. § 1-205 (2019).

\(^{165}\) Id.

\(^{166}\) Id.


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

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

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

1. Financial Costs

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

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

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


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

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

173 See, e.g., Massachusetts State Dataset 2017, supra note 78 (tally of employee hours spent responding to requests does not include labor costs of requests to local agencies).
substantial. Further, it suggests that local governments, in particular, may be disproportionately affected by these financial burdens. Given the personnel and budgetary restraints faced by many local governments, these entities are especially vulnerable to sudden spikes in the number of requests—for example, repeat requests intended to harass government officials, or large numbers of requests submitted in the wake of a high-profile event. One recent, infamous example is the town of Newtown, Connecticut, which has been flooded with public records requests submitted by employees of conspiracy theorist Alex Jones about the Sandy Hook massacre. But there are countless other such examples. A single or a handful of requesters can overwhelm a small government entity by submitting dozens or even hundreds of requests.

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

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

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


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


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

2. Opportunity Costs

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

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

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

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

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

3. \textit{Chilling Effects}

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

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

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


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

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

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

\textsuperscript{191} Polsky, supra note 17, at 292.

\textsuperscript{192} See, e.g., Erica L. Green & Stephanie Saul, \textit{What Charles Koch and Other Donors to George Mason University Got for Their Money}, N.Y. TIMES (May 5, 2018),
extent to which public records laws have been used by activists and critics to target and harass academics who work in politically contentious fields such as climate change or genetically modified organisms. She writes that in the most egregious cases, public records requests “have caused researchers to abandon politically sensitive lines of inquiry . . . , cease participation in public debate about such matters . . . , or defect from academia altogether.” Companies are also turning to state public records laws as a way to obtain information about their academic critics.

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

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

193 Polsky, supra note 17, at 265–66.
195 The Shelby Amendment allows requesters to access data produced by private entities that receive federal research grants, including universities, but this is a narrow exception. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681–495.
197 Davidson, supra note 34, at 593.
Given the difficulty of recruiting individuals to donate their time in the first place, the burdens and privacy harms imposed by public records laws can have a chilling effect on government participation as well.198

4. Commercial Requests

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

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

198 See, e.g., Bosma, supra note 196 (reporting that the chairman of a town committee in Ashland, Massachusetts said that repetitive and offensive public records requests are “terrible on morale” and have made it difficult to recruit volunteers to serve on the committee).
199 See Kwoka, FOIA, Inc., supra note 15, at 1382, 1388, 1398, 1401 (showing that in 2013, commercial entities submitted 69% of SEC requests, 75% of FDA requests, 79% of EPA requests, and 96% of Defense Logistics Agency requests).
200 See, e.g., COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, LCD-78-120, GOVERNMENT FIELD OFFICES SHOULD BETTER IMPLEMENT THE FREEDOM OF INFORMATION ACT, at ii (1978) (finding that FOIA “is being used mostly by businesses and law firms—sometimes for purposes not contemplated by the Congress”).
201 See, e.g., Kwoka, FOIA, Inc., supra note 15, at 1421 (“Rather than subsidizing transparency, FOIA’s commercial subsidy has the effect of paying for corporate ‘secrets’ discovered using FOIA.”).
202 See id. at 1427.
203 See Fink, supra note 17, at 109–11 (describing the limitations preventing a thorough analysis of commercial requests and their impact on state and local governments).
204 There are benefits to commercial requests as well. See discussion supra note 129 and accompanying text. I have categorized these commercial requests as a “cost” because this class of requests is least closely aligned with the original, democracy-enhancing intent of these transparency
reveals that the scholarly and legislative approach to these issues in the context of FOIA does not always track cleanly onto the state and local context.

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

State agencies in Vermont received 4,226 public records requests in 2017. Of these requests, roughly half originated from identifiable commercial requesters, including insurance companies, data brokers, law firms, and farmers.\textsuperscript{208} The actual percentage of commercial requests is most likely higher; roughly a third of these requesters provided no institutional affiliation and could not be coded, and 50\% therefore represents the lowest possible percentage of requests originating from commercial entities.\textsuperscript{209} In contrast, requests from identifiable academic, media, and nonprofit statues. Companies use these laws to generate profits, and these financial rewards, by their nature, accrue when the information is kept private. Cf. Kwoka, \textit{FOIA, Inc.}, supra note 15, at 1421 (noting that in the FOIA context “[s]ubsidizing records to resellers validates a sort of buy-low, sell-high arbitrage in federal records at great profit to the reseller, but no public or collective benefit in increased access to information”).

\textsuperscript{205} For a discussion of the limited data available at the state level, see \textit{supra} notes 95–96 and accompanying text.

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

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

\textsuperscript{208} Vermont State Dataset 2017, \textit{supra} note 78.

\textsuperscript{209} \textit{Id.}
organizations collectively accounted for roughly 5% of total requests.\textsuperscript{210} Within this category, around 3% of requests originated from the media, while academics and nonprofit agencies each submitted around 1% of total requests.\textsuperscript{211}

A handful of agencies in Vermont received a disproportionate share of requests. More than half of all requests in 2017 were submitted to the Department of Public Safety. Of these requests, nearly three-quarters originated from commercial requesters.\textsuperscript{212} Requests from or on behalf of insurance companies alone accounted for roughly 60% of all requests submitted to the public safety agency that year.\textsuperscript{213} These companies were generally looking to verify reports of burglaries, vandalism, and traffic and other accidents.\textsuperscript{214} And a single company—LexisNexis—accounted for more than half of those requests.\textsuperscript{215} Put another way, requests from this single company comprised roughly 30% of all public records requests received across the entire state of Vermont in 2017.\textsuperscript{216}

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

\footnotesize{210} Id.
\footnotesize{211} Id.
\footnotesize{212} Id. Again, the actual number is most likely higher because roughly 25% of total requests to the Department of Public Safety in 2017 provided no affiliation and could not be identified through internet searches.
\footnotesize{213} Id.
\footnotesize{214} Interview with Heidi Storm, Records and Alarm Adm’r, Vt. Dep’t of Pub. Safety, in Waterbury, Vt. (Nov. 20, 2018).
\footnotesize{215} Vermont State Dataset 2017, supra note 78. While these requests are generally straightforward, the records access officer must secure approval from the relevant police barracks and manually redact each report before it is released, both of which impose additional time and logistical costs. Interview with Heidi Storm, supra note 214.
\footnotesize{216} Vermont State Dataset 2017, supra note 78. While LexisNexis is not necessarily the dominant requester in other states, insurance companies and data resellers tend to make up a significant proportion of requesters to state and local law enforcement agencies throughout the country. See, e.g., Massachusetts State Dataset 2017, supra note 78 (showing that roughly two-thirds of requests to the Massachusetts Department of State Police in 2017 were for police reports, police recordings, and arrest reports).
\footnotesize{217} Vermont State Dataset 2017, supra note 78.
pre-discovery tool to help determine whether to bring a lawsuit against the state.218

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

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

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218 Interview with Mark Giguere, Records Officer, Vt. Dep’t of Transp., in Montpelier, Vt. (Nov. 20, 2018).
219 For a discussion of the minimal public benefits that such commercial requests provide in the federal context, see Kwoka, FOIA, Inc., supra note 15, at 1420–22.
220 See id. at 1415.
221 See, e.g., WASH. STATE AUDITOR’S REPORT, supra note 76, at 21 (finding that 8% of state and local requests in 2015 were submitted by insurance agencies, and another 12% were submitted by law firms). As Professor Katherine Fink’s research suggests, state environmental agencies appear to receive among the highest number of commercial requests. Fink, supra note 17, at 110–11; see also Colo. Dep’t of Pub. Health and the Env’t, 2016 Public Records Log, supra note 82 (on file with author) (roughly 90% of requests are commercial and fewer than 1% are from the media); Iowa Dep’t of Nat. Res., 2015 Public Records Log (on file with author) (roughly 80% of requests are commercial while just one request was received from the media); Interview with Chris Voss, supra note 104 (explaining that the agency receives high volumes of requests from third-party brokers who resell environmental information about specific properties, and commenting that these companies “make their money off this[,] and it’s an irritant to us”). State transportation departments also appear to receive a high number of commercial requests. See, e.g., Penn. Dep’t of Transp., 2016 Public Records Log (on file with author) (roughly 60% of requests are commercial and around 5% originated from members of the media).
Food and Markets, for example, received more than half of its requests from journalists, academics, and nonprofit groups in 2017, but less than a quarter from commercial entities.\footnote{Vermont State Dataset 2017, supra note 78 (out of twenty-eight requests, fifteen were academic, media, or nonprofits, while only four were commercial).} This holds true for other state and local agencies across the country as well.\footnote{See, e.g., Mass. Dep’t of State Police, Jan.–July 2018 Public Records Logs (on file with author) (more than 350 public records requests from media outlets, or roughly 35% of total requests); S.D. Dep’t of Educ., 2015 Public Records Log (on file with author) (roughly 40% of requests originated from the media); Nev. Governor’s Office of Econ. Dev., Sept. 2013–July 2015 Public Records Logs (on file with author) (of nineteen total requests, thirteen originated from either media organizations or think tanks, while just one request originated from a commercial requester); Vill. of Downers Grove, Ill., Jan. 2015–July 2017 Public Records Logs (on file with author) (roughly 15% of total requests originated from commercial entities).} Such discrepancies underscore the extent to which commercial requests vary substantially from one agency to another, suggesting that at least some public records activity is more closely aligned with the original intent of the statute. While this does not mitigate the problem of commercial dominance of the public records laws for other agencies, it does provide an important comparative perspective to counterbalance the data coming out of those government entities most affected by commercial interests.

At the local level, requester information is even more difficult to come by. No state aggregates records request data at the local level. But again, anecdotal evidence suggests that certain local agencies must likewise contend with high numbers of commercial requests.\footnote{See, e.g., ILLINOIS TASK FORCE REPORT, supra note 180, at 72, 133 (respondents to a survey on unfunded mandates listed “FOIA requests from large commercial companies” as among the most burdensome).} Commercial requests are especially burdensome for local law enforcement agencies. Local police departments and sheriffs’ offices, like state law enforcement agencies, receive large numbers of requests for traffic accident, burglary, vandalism and other police reports.\footnote{See, e.g., WASH. STATE AUDITOR’S REPORT, supra note 76, at 20 (noting that police and sheriff’s departments received twice the number of requests as other departments); Report from Miguel A. Santana, L.A. City Admin. Officer, to the Mayor and Council of L.A., at 1–2 (Sept. 24, 2015), https://clkrep.lacity.org/onlinedocs/2015/15-1140_rpt_CAO_09-24-2015.pdf [https://perma.cc/49FF-V795] (noting that 85% of the 75,000 requests the Los Angeles Police Department receives annually are for traffic accident reports); Town of Framingham, Mass., Jan. 17–Feb. 17, 2017 Public Records Logs (on file with author) (roughly 55% of requests in one month were for police/fire department reports).} And many of the same commercial actors that operate at the state level are frequent requesters at the local level as well.

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

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

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


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

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

232 In some cases, LexisNexis charges less for reports than the government previously charged. See, e.g., id. at 2–3.
consolidates police data in private hands.\textsuperscript{233} If we are concerned that information brokers at the federal level “de facto take[] over functions thought to be inherently governmental,”\textsuperscript{234} then the wholesale outsourcing of the records requesting process to a third party vests this power more fully in a commercial entity.\textsuperscript{235} Of course, law enforcement agencies are not the only local government entities that handle high volumes of commercial requests. A variety of other commercial interests routinely target data specifically held by local governments as well. Loan companies submit requests to towns or cities for lists of residents with unpaid taxes or code violations to target those individuals for loans.\textsuperscript{236} Real estate companies request lists of homeowners near foreclosure and approach those homeowners with offers to purchase their property.\textsuperscript{237} Recovery companies obtain lists of uncashed checks issued by the city and then offer to assist individuals with securing a reissued check in exchange for a percentage of the cash.\textsuperscript{238} And school districts receive a large number of requests for purchase orders, contracts, payroll data, and bid submissions.\textsuperscript{239} For cash-strapped local agencies, the costs these commercial requests impose can be substantial.


\textsuperscript{234} Kwoka, FOIA, Inc., supra note 15, at 1415.

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


\textsuperscript{237} See Schoenberg, supra note 236.

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

\textsuperscript{239} See, e.g., Mechanicsburg, Penn. Area Sch. Dist., 2010-2016 Public Records Logs (on file with author) (roughly 45% of requests were for purchase orders, contracts, payroll data, and bid submissions); Buffalo, N.Y. City Sch. Dist., 2012-2014 Public Records Requests (on file with author)
D. Barriers to Disclosure at the State and Local Level

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

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

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

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

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


Dave Maass et al., The Foilies 2018, ELEC. FRONTIER FOUND. (Mar. 11, 2018), https://www.eff.org/deeplinks/2018/03/foilies-2018 [discussing the Electronic Frontier Foundation’s “Foilie” awards recognizing “the worst responses to records requests, outrageous efforts to stymie transparency and the most absurd redactions.”]

See discussion supra note 15 and accompanying text.
explore, these barriers to disclosure both interact with and reinforce one another, leading to breakdowns in these broader state and local transparency ecosystems.

1. Statutory Barriers to Disclosure

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

a. Excessive Exemptions

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

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

244 See sources cited supra note 69.
245 5 U.S.C. § 552(b) (2012). There are other protections from disclosure contained throughout the federal code and incorporated into FOIA through Exemption 3.
246 See, e.g., NEV. REV. STAT. ANN. § 239.010 (listing 431 exemptions).
248 See, e.g., McCraw, supra note 15, at 234, 238 (describing the dramatic expansion of FOIA’s exemptions).
This explosion in public records exemptions can be traced in part to the successful lobbying efforts of special interest groups. Lobbying by the National Rifle Association (NRA), for example, has led to the enactment of public records exemptions for firearm permits and registrations around the country. In 2011, an NRA affiliate in Illinois backed a new public records exemption that protects the identities of gun owners in the state. And in 2018, NRA lobbying led to the enactment of an exemption to the Nebraska public records law for information contained in government firearm permits and licenses. After the law went into effect, the NRA praised the Nebraska legislature for preventing “unscrupulous media outlets and others access to” these firearms records.

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

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


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

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

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


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

257 GA. CODE ANN. § 42-8-109.2 (West 2017); Geraghty & Velez, supra note 17, at 476 (describing the nexus between Georgia’s legislature and the lucrative private probation industry).
products” are exempt. And in Tennessee, data regarding nursing home morbidity and mortality are protected.

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

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

b. Requester Fees

Many states have failed to enact meaningful statutory limits on the amount of money that may be recouped from requesters, requiring only that the costs imposed are “reasonable.” This grants agencies wide discretion in determining the fees charged to requesters. Such malleable fee requirements can be difficult for requesters to challenge as excessive, and they often yield inconsistent charges even within the same state.
Moreover, while FOIA directs agencies to reduce or waive requester fees when disclosure “is in the public interest,”265 few states provide public interest fee reductions or waivers.266

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

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

266 See State Public Records Law Database, supra note 84. Even in states that permit fee waivers, these waivers are often discretionary rather than mandatory. See, e.g., ARK. CODE ANN. § 25-19-105(d)(3)(A)(iv) (West 2019) (stating records “may be furnished without charge or at a reduced charge” if “in the public interest”); 65 PA. STAT. ANN. § 67.1307(f) (West 2019) (stating “[a]n agency may waive the fees” if it is deemed to be “in the public interest” or “the requester duplicates the record”).
267 See, e.g., MO. ANN. STAT. § 610.026 (West 2019) (permitting costs for research time required); TENN. CODE ANN. § 10-7-503 (West 2018) (imposing reasonable costs and allowing records custodians to set those costs); METRO. GOV’T OF NASHVILLE & DAVIDSON Cnty., PUBLIC RECORDS POLICIES AND PROCEDURES 2, 7 (2017) (authorizing agencies to charge for labor costs).
268 See, e.g., CAL. EDUC. CODE § 72694 (West 2012) (public records request requiring “data compilation, extraction, or programming” will require the requester to pay “the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record”).
269 See, e.g., Trammell v. Martin, 408 S.E.2d 477, 478–79 (Ga. App. 1991) (requester should not be billed for legal review and copies must be charged at the rate most economical for copying); Milwaukee Journal Sentinel v. City of Milwaukee, 815 N.W.2d 367, 369 (Wis. 2012) (public records laws cannot be construed to permit charges for time spent redacting records).
270 See, e.g., infra note 362 and accompanying text.
report stories. While exceptionally high cost estimates are not necessarily made in bad faith, media and advocacy organizations often claim that governments use requester fees to silence dissent and prevent meaningful oversight.

To provide just one example, in the wake of the shooting of Michael Brown in Ferguson, Missouri, the city contracted with a private company to handle its public records requests. The company charged reporters a base fee of $500 and a labor fee of $135 per hour to search city employees’ e-mails—nearly ten times the $13.90 hourly salary of an entry-level position in the clerk’s office. Media organizations like the Associated Press and St. Louis Public Radio were required to deposit $2,000 before the requests would be processed, and the city charged Vice News $1,200 for a five-hour e-mail search that turned up just seven responsive records.

News organizations widely viewed these charges as an effort to impede their reporting efforts and prevent public oversight of the city’s police department.

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


275 Jack Gillum, Ferguson Demands High Fees to Turn Over City Files, ASSOCIATED PRESS (Sept. 29, 2014), https://apnews.com/ca801d1dcebec4d42a06d4477dfb982a0 [https://perma.cc/4XC4-73H7].


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

Under federal law, any person may submit a public records request, regardless of citizenship, and agencies may not deny a request based on the requester’s motivation or purpose.\footnote{279} State law, in contrast, imposes a variety of additional restrictions on who may submit a public records request, and for what reason. A number of states, for example, limit public records access to state residents—a restriction that the Supreme Court upheld as constitutional in 2013.\footnote{280}

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

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

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

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


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

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

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

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

e. Private Contractors and Quasi-Public–Private Governments

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

285 State Public Records Law Database, supra note 84.
286 See Interview with Ellen Gabler, Reporter, The N.Y. Times Co., in N.Y.C., N.Y. (Aug. 31, 2018) (noting that the lack of a viable enforcement remedy other than suing is the most difficult obstacle to using state public records laws effectively).
288 D. John McKay, Alaska Open Government Guide, To Whom Is an Appeal Directed, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/open-government-guide/alaska/ [https://perma.cc/VX35-NAP7] (noting that in Alaska, “[t]he appeal of a denial of a request for state agency records must be directed to the head of the agency from which you are requesting the records . . . . regardless of whether the agency head or subordinate was the one who initially denied your request”).
289 See, e.g., CONN. GEN. STAT. § 1-206(b) (2019) (granting appellate body a year to issue a decision).
290 See Forsham v. Harris, 445 U.S. 169, 180 (1980) (requiring substantial control by the government to be considered a government agency); Pub. Citizen Health Research Grp. v. Dep’t of Health, Educ. & Welfare, 668 F.2d 537, 538 (D.C. Cir. 1981) (concluding that a medical foundation contracting with an agency to conduct a professional-standards review for Medicare and Medicaid was not subject to FOIA).
the military\textsuperscript{291} to the management of federal prisons.\textsuperscript{292} Privatization at the state and local level, however, raises unique transparency concerns.

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

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

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Martha Minow, \textit{Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy}, in \textit{GOVERNMENT BY CONTRACT} 120–21 (Jody Freeman & Martha Minow eds., 2009) (noting that FOIA’s exclusion of private contractors makes it difficult to hold private military contractors accountable).
\item See, e.g., Nicole B. Cásarez, \textit{Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records}, 28 U. MICH. J.L. REFORM 249, 303 (1995) (arguing that private prisons should be subject to public records requirements to protect the safety of prisoners and preserve the proper expenditure of public funds); see also Paul R. Verkuil, \textit{OUTSOURCING SOVEREIGNTY} 12 (2007) (“[The government’s] desire for secrecy encourages the use of private contractors, who can do jobs for the federal government exempt from FOIA and FACAC disclosures.”). Scholars have also tracked the ways that such privatization can enhance federal executive power more broadly. See, e.g., Jon D. Michaels, \textit{Privatization’s Pretensions}, 77 U. CHI. L. REV. 717, 719 (2010) (arguing that privatization allows the Executive Branch to exercise greater discretion to achieve policy goals with reduced interference from the other branches, the public, and successor administrations).
\item See discussion supra notes 228–231 and accompanying text.
\item See Feiser, supra note 169, at 830 (discussing Illinois press members’ worries about a private company having exclusive control of court records for its first seventy hours of existence).
\item See supra notes 228–231 and accompanying text. The private companies that hold these records will often sell them back to the public—or even back to the government that entered into the contract in the first place—for a fee. See, e.g., Assessment Techs. of Wis., LLC v. WIREdata, Inc., 350 F.3d 640, 642–43 (7th Cir. 2003) (rejecting private contractor’s argument that raw data collected by government tax assessors were protected by copyright); see also Rani Gupta, \textit{REPORTERS COMM. FOR FREEDOM OF THE PRESS, PRIVATIZATION V. THE PUBLIC’S RIGHT TO KNOW} 8–11 (2007), https://www.rcfp.org/wp-content/uploads/imported/PRIVATIZATION.pdf [https://perma.cc/S7N9-EHHC] (describing the access issues that arise when governments privatize the recordkeeping process).
\item See Gerald E. Frug, \textit{CITY MAKING} 38–45 (1999); Hendrik Hartog, \textit{PUBLIC PROPERTY AND PRIVATE POWER} 14 (1983) (recounting how New York City is regarded today as a typical public government, but that “an eighteenth-century judge, by contrast, could have looked only to the chartered foundations of a propertied corporation”).
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associate exclusively with governments, such as eminent domain. Moreover, smaller governments confront efficiency and resource concerns when providing services. And in the wake of the New Federalism policies of the 1980s, which reduced federal government funding in favor of locally funded services, local governments engaged in widespread privatization of their services.

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

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

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297 See FRUG, supra note 296, at 40–41 (pointing out that mercantile corporations had the power of eminent domain).
299 See Davidson, supra note 34, at 608.
301 See Rawlins & Kwon, supra note 300, at 585 (discussing Fresno, California’s use of private security guards for malls, apartments, sporting events, and concerts).
302 See, e.g., ESPN, Inc. v. Univ. of Notre Dame Police Dep’t, 62 N.E.3d 1192, 1197 (Ind. 2016) (finding that Notre Dame police officers are not covered by the state public records laws even though they are vested with general police powers); Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 840 N.E.2d 518, 521 (Mass. 2006) (declining to apply the public records law to Harvard University police officers). Other privatized services, such as private property assessors, are also beyond the reach of public records laws in some states. See, e.g., WIREdata, Inc. v. Vill. of Sussex, 751 N.W.2d 736, 755 (Wis. 2008) (finding that village property assessments used to determine residents’ property tax bills are not subject to disclosure when conducted by a private company).
federal prisoners being held in private prisons.\footnote{304} And some states have privatized large swaths of their prison operations. In New Mexico, for example, half of state prisoners are held in private facilities.\footnote{305}

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

2. Implementation Barriers to Disclosure

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

a. Hostile Government Actors

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


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


\footnote{307} See, e.g., State ex rel. Freedom Commc’ns, Inc. v. Elida Cnty. Fire Co., 697 N.E.2d 210, 213 (1998) (holding that private firefighters are subject to public records law); Whether a Volunteer Fire Dep’t is Subject to the Open Records Act, Op. Att’y Gen. of Tex., No. JM-821 (Nov. 17, 1987) (announcing that a volunteer fire department—a nonprofit corporation—is a “governmental body” subject to the Texas Open Records Act).
federal context—there are often large discrepancies in how government actors implement transparency laws. The willingness of agency officials to comply with transparency requirements can have a significant impact on the transparency effects of state public records laws, particularly requests from media or advocacy organizations.308

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

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

308 One study of law enforcement agencies’ compliance with public records requests in Florida found that if records “custodians felt some kind of sympathy or affinity for either the requesters or the people named in the documents, they would grant preferential treatment to the person for whom they sympathized.” Kimball, supra note 17, at 342.
310 See, e.g., CTR. FOR EFFECTIVE GOV’T, MAKING THE GRADE 2 (2015) (describing the federal Department of Agriculture’s “exceptional performance in processing” and strong disclosure rules).
312 See, e.g., Bronx Defenders v. N.Y.C. Police Dep’t, No. 156520/2016 (May 19, 2017) (order denying cross-motion to dismiss) (chastising the police department for engaging in “‘gotcha’ litigation tactic[s]”); OFFICE OF BILL DE BLASIO, OFFICE OF PUB. ADVOCATE FOR THE CITY OF N.Y., BREAKING THROUGH BUREAUCRACY 13 (2013) (giving NYPD an “F” transparency grade for failing to respond to 31% of FOIL requests).
attitudes toward transparency statutes may fluctuate drastically as even a single member joins or leaves the bench. The behavior of these individual government officials empowered to act on transparency issues—as well as the broader cultural attitudes toward transparency requirements that these government entities foster—can have a significant impact on the broader transparency ecosystem.

b. Reduced Resources and Expertise

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

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

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

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

316 See discussion supra note 176 and accompanying text.

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

318 See discussion supra note 116.

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

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

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

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320 Davidson, supra note 34, at 572.
321 Id. at 623.
322 See, e.g., Marta v. Sullivan, 248 A.2d 608, 610 & n.3 (Del. 1968) (invalidating a local ordinance in part over concerns that the ordinance would delegate authority to “neighboring residents,” which would include “transients, boarders, visitors, and summer-time tenants”); see also Davidson, supra note 34, at 623–24 (noting that the continued “vibrancy” of the nondelegation doctrine at the local level could be attributed to the “relative informality of local boards,” and arguing that “[l]egislative standards that might be acceptable when given to a deeply resourced, professionally staffed traditional agency may become more troubling when community members are tasked with the decision making”).
323 See, e.g., Interview with Wendy Houston Anderson, supra note 185 (Vermont state agency employee describing the extent to which employees must divert time from primary duties to respond to public records requests); see also Miriam Seifter, Gubernatorial Administration, 131 HARV. L. REV. 483, 521–22 (2017) [hereinafter Seifter, Gubernatorial Administration] (noting that “resource-strapped, under-staffed agencies may lack sufficient numbers of employees with appropriate qualifications”).
324 See, e.g., Kimball, supra note 17, at 331 (finding that among the records custodians surveyed “[v]ery few had any structured training in the public records law” and “almost all of them said they needed help understanding Florida’s Public Records Law”); FOI Audits, Alabama, NAT’L FREEDOM OF INFO. COAL., https://www.nfoic.org/foi-audits#ALABAMA [https://perma.cc/772L-EZZF] (finding that 52% of sheriffs’ offices in Alabama surveyed rejected public records requests, often in violation of state law, and attributed this noncompliance in part to a lack of understanding of the law’s requirements).
325 Interview with Steve Eder, supra note 28.
326 See, e.g., WASH. STATE AUDITOR’S REPORT, supra note 76, at 5 (“Maintaining records today requires investments in information technology to organize, store, secure, search and inventory records,
are often able to adopt technical solutions that allow for increasingly complex digital searches,\textsuperscript{327} many government entities at the state and local level struggle with even straightforward requests for electronic records such as e-mails or text messages.\textsuperscript{328} In 2018, for example, when an activist submitted a public records request to the Seattle mayor’s office requesting a search of the mayor and his aides’ text messages, staff members placed their phones on copy machines and produced photocopied images of responsive messages.\textsuperscript{329} This combination of reduced resources and expertise serves as a functional barrier to disclosure at the state and local level.

c. Lack of Meaningful Judicial Appeal

Litigating a public records request is expensive and time-consuming. This is as true for FOIA as it is for state transparency statutes. But while the average requester at any level of government has neither the skills nor the resources necessary to file a lawsuit in court, repeat FOIA requesters operating on a national scale are able to file a federal lawsuit relatively quickly, efficiently, and inexpensively. Increasingly, a handful of lawyers working on behalf of media and advocacy organizations are taking the lead in enforcing the provisions of FOIA that are most relevant to the public.\textsuperscript{330} Fifty-six percent of all FOIA lawsuits filed in 2018 were filed by nonprofit and trained employees to manage them. Many governments told us they do not have sufficient resources to conduct these activities.”).


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

\textsuperscript{329} Maass et al., supra note 242.

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

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

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

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

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

336 See E-mail from David McCraw, supra note 12.
and other advocacy organizations rarely litigate state public records requests. The organizations that lead the way in enforcing FOIA are relatively powerless when it comes to state public records laws.337

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

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

337 For a discussion of the structural barriers to civil society monitoring of state agencies generally, see Seifter, Further from the People?, supra note 34, at 109–10.
339 See id. at 9, 13 (65% of respondents believe that the news industry is less able today than it was ten years ago to pursue legal action involving free expression; of that 65%, 89% attribute the decline to financial restraints).
340 See discussion supra notes 263–264 (describing the vague language used in many public records laws’ fee requirements).
341 Patrick C. McGinley & Suzanne M. Weise, West Virginia Open Government Guide, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/open-government-guide/west-virginia [https://perma.cc/H46K-EFZ9]. The large numbers of exemptions in some states, as well as the frequency with which new exemptions are added, strongly suggests that this is an issue that plagues other states’ public records laws as well. See, e.g., supra notes 249–250 (describing the large number of exemptions in Florida, as well as the frequent enactment of new exemptions).
of each FOIA exemption. And without clear guidance from the courts, state and local governments have latitude to impose very broad or contorted definitions upon textually narrow exemptions.

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

3. External Barriers to Disclosure

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

a. Decline of Local Media

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


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

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

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

346 ABERNATHY, supra note 20, at 8.
typically a small weekly—and around 200 counties have no newspaper at all.347 Moreover, the local newspapers that still exist have seen their advertising and subscription revenue models collapse. Over the same fifteen years, weekday print circulation has declined 40%, leading to widespread layoffs and reduced local coverage.348 These reductions have curtailed newspapers’ ability to oversee state and local government. The number of statehouse reporters alone fell 35% between 2003 and 2014.349

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

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

347 Id.
348 Id. at 14.
351 Id. at 4.
352 Id. at 2. These governance benefits must be considered, however, against the backdrop of a more general decline in the public’s confidence in the media. See, e.g., GALLUP/KNIGHT FOUND., INDICATORS OF NEWS MEDIA TRUST 3 (2018) (69% of adults surveyed stated that their trust in the media has declined in the past decade); Sabrina Tavernise & Aidan Gardiner, ‘No One Believes Anything’: Voters Worn Out by a Fog of Political News, N.Y. TIMES (Nov. 18, 2019), https://www.nytimes.com/2019/11/18/us/politics-media-fake-news.html [https://perma.cc/2ZJJ-W8HZ] (describing the public’s loss of faith in the media). Put another way, even the highest quality reporting utilizing the most well-crafted transparency laws will be ineffective if the public has stopped listening.
has folded or because it no longer has the resources to engage in investigative reporting and mount legal challenges—reduces the quality of compliance with transparency requirements more broadly.

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

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

355 See, e.g., Denver Publ’g Co. v. Bd. of Cty. Comm’rs of Cty. of Arapahoe, 121 P.3d 190, 203 (Colo. 2005).
356 See, e.g., Denver Publ’g Co. v. Dreyfus, 520 P.2d 104 (Colo. 1974).
357 See Bob Diddlebock, Who Really Killed the Rocky Mountain News?, TIME (Mar. 6, 2009), http://content.time.com/time/business/article/0,8599,1883345,00.html [https://perma.cc/7G8N-UY5F].
359 See Vernon, supra note 358.
360 The most recent lawsuit available on Westlaw or Lexis is Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011). It is possible that the Denver Post filed a lawsuit since then that settled without a published decision.
and it has made similar cuts to papers throughout the country. But even for newspapers that remain independently owned, the financial pressures are intense. Many no longer have the luxury of engaging in access litigation. In a Knight Foundation survey of media editors, 65% of respondents believed that the industry is less able to pursue legal action around First Amendment-related issues than it was ten years ago.  

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

b. Weaknesses in Civil Society

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


362 KNIGHT FOUND., supra note 338, at 1; see also Seifter, Gubernatorial Administration, supra note 325, at 525 (“The media cannot report on what it cannot see, and state media groups may not have sufficient resources or incentives to conduct extensive records requests.”).

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


365 MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW 233–37, 249–51 (2015). Many have argued that civil society across the country is now on the decline. Scholars and journalists have ascribed this decline to a variety of factors. See, e.g., ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 235–36 (2000) (arguing that the rise of television strongly
prominent civil society organizations have historically paid less attention to state and local government, even as the size and power of these lower levels of government have expanded in recent decades.366

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

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

366 Seifter, Further from the People?, supra note 34, at 130.
368 Seifter, Further from the People?, supra note 34, at 137–38. At the federal level, in contrast, “business-oriented” lobbyists constituted an estimated 51.5% of all lobbyists in 2006. Id.
369 Id. at 138–39 (“In addition to being outnumbered and outspent on lobbying, public interest-oriented groups in the states are also likely to be comparatively resource poor.”); see also Seifter, Gubernatorial Administration, supra note 323, at 524 (noting a “probusiness skew among state lobbyists”).
370 See Jiahuan Lu, Organizational Antecedents of Nonprofit Engagement in Policy Advocacy: A Meta-Analytical Review, 47 NONPROFIT & VOLUNTARY SECTOR Q. 177S, 186S–87S (noting that larger, more professionalized, and better funded nonprofits are more likely to engage in policy advocacy work).
371 FOIA Project Staff, supra note 331.
collected at the state level, the dearth of state-level public records lawsuits overall suggests that state and local public interest groups are not using the courts to compel public records at these lower levels of government. Moreover, while there is limited data on the percentage of state and local public records requests submitted by nonprofit organizations, anecdotal evidence suggests that interest groups submit fewer state and local public records requests than they do FOIA requests. This combination of reduced media and civil society activity leaves large gaps in public oversight in comparison with the federal transparency regime.

IV. TRANSPARENCY DESERTS

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

A. The Case of Kansas

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

372 See discussion supra note 88–90 and accompanying text.
373 Compare 2017 Vermont State Dataset, supra note 78 (roughly 1% of requests submitted to state agencies were from identifiable nonprofit organizations), with Max Galka, Who Uses FOIA? – An Analysis of 229,000 Requests to 85 Government Agencies, FOIA MAPPER (Mar. 13, 2017), https://foiamapper.com/who-uses-foia [https://perma.cc/3R3A-5TR6] (analysis of 229,000 FOIA requests submitted to eighty-five federal agencies found that roughly 7.5% of requests originated from nonprofit entities).
374 This term borrows from the idea of a “news desert.” See discussion supra note 20.
In light of these obstacles, this Section explores a somewhat imperfect illustration of a transparency desert: the case of Kansas. To begin, the transparency regime binding state and local government in Kansas is relatively ineffective. The state has a weak public records law. The statute itself contains fifty-five exemptions, including a broad exemption for nearly all “[c]orrespondence between a public agency and a private individual,” and there are 250 or so additional exemptions from disclosure scattered throughout the state code. The law does not contain a fee waiver for requests submitted in the public interest, nor are there meaningful limits on the amount that government entities may charge requesters: they are free to impose a “‘reasonable’ fee,” which may include the cost of time spent responding to the request. Further, the law contains no provisions providing a route for administrative appeal. And while legislative bodies are covered by the law, the records of individual legislators are exempt, even those maintained in performance of their official duties.

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

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375 I refer to this as an “imperfect” example because local news outlets have exposed governmental deficiencies in the state. See infra note 399.
379 The attorney general’s office can receive complaints from the public about an agency’s failure to comply with an open records request, but it does not operate as a formal and binding appeals body. Koma-Kora Complaint Form, KAN. ATT’Y GEN., https://ag.ks.gov/complaint-center/koma-kora-investigation-request [https://perma.cc/N5HB-9HE4].
380 KAN. STAT. ANN. § 45-217(g)(3)(B).
unsealing of criminal affidavits, and it has no open data law requiring that the government affirmatively publish certain data online in an open format. In 2015, the Center for Public Integrity gave the state a failing grade for transparency and accountability regarding public access to information, electoral oversight, executive accountability, judicial accountability, the state budget process, procurement, internal auditing, lobbying disclosure, and ethics enforcement agencies.

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

Second, government actors in Kansas have been notoriously wary of transparency requirements, particularly during the eight-year reign of Sam Brownback, who served as governor of Kansas from 2011 to 2018. In 2012, Brownback pushed massive tax cuts through the legislature, commonly referred as the “Kansas experiment.” The law eliminated state income taxes for certain corporate entities and slashed individual income

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

383 Stumpe, supra note 378.

384 Id.


388 See infra notes 395–399.


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

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

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

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392 Id.


394 Hobson, supra note 390.


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

Third, Kansas has been disproportionately affected by the crisis in
local media and civil society oversight. More than half of the counties in
the state—nearly the entire western half of Kansas—do not have a daily
newspaper.\textsuperscript{400} Between 2004 and 2016, three newspapers in the state either
closed or merged, and another ten daily newspapers were converted into
weeklies.\textsuperscript{401} The state is tied for the fifth highest number of newspaper
closures in the country, and it has the second highest number of closures
per capita in the nation.\textsuperscript{402} Moreover, the newspapers that remain have
confronted severe reductions in newsroom staffing and declines in revenue.
Between the mid-1990s and 2018, print circulation for the \textit{Wichita Eagle},
the largest newspaper in Kansas, declined from 122,000 to 30,000.\textsuperscript{403} The
newspaper was forced to cut newsroom staff down from more than 100
reporters to fewer than three dozen, and the newspaper is currently
distributed in just 10 of the state’s 105 counties, down from its peak
distribution of 73 counties.\textsuperscript{404} The paper is now printed 200 miles away
from Wichita, forcing reporters to adhere to very early reporting deadlines
and reducing their ability to produce timely coverage of government
meetings and other nighttime events.\textsuperscript{405}

\textsuperscript{398} \textit{State Legal Costs Impede KORA}, supra note 273.
\textsuperscript{399} Bauer et al., \textit{supra} note 396. The newspaper that reported the story—the \textit{Kansas City Star}—was
later named a Pulitzer Prize finalist for “expos[ing] a state government’s decades-long “obsession with
secrecy” and efforts to “suppress transparency and accountability in law enforcement agencies, child
welfare services and other sectors of the government.” \textit{The 2018 Pulitzer Prize Finalist in Public
[https://perma.cc/XWG4-2VTX].
\textsuperscript{400} See Yemile Bucay et al., \textit{America’s Growing News Deserts}, COLUM. JOURNALISM REV. (2017),
https://www.cjr.org/local_news/american-news-deserts-donuts-local.php [https://perma.cc/F4CU-
4Z4G].
\textsuperscript{401} Penelope Muse Abernathy, \textit{UNC Sch. Media & Journalism, The Rise of a New Media
Baron and the Emerging Threat of News Deserts} app. 2 (2016),
http://newspaperownership.com/additional-material/closed-merged-newspapers-map/
[https://perma.cc/RM62-LTAL].
\textsuperscript{402} Id.
\textsuperscript{403} Id. at 20, at 21–22.
\textsuperscript{404} Id.
\textsuperscript{405} Id. at 22.
Civil society in the state also exhibits troubling weaknesses. Between 2013 and 2017, employment by social advocacy nonprofits in the state decreased 60%\(^{406}\). Moreover, lobbyist spending has more than doubled in Kansas over the last ten years.\(^{407}\) And much of that money is unaccounted for: in 2013, nearly three-quarters of lobbying money was categorized as “unitemized,” meaning that expenditures were not linked to a specific legislator or event.\(^{408}\) While this lobbyist data is not broken down by commercial versus noncommercial interests, the vast sums of money flowing into the state lobbying apparatus and the lack of transparency as to its origins and destination at least suggests that public interest groups in the state are comparatively resource-poor in relation to their state-level industry opponents.\(^{409}\)

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

**B. Transparency Deserts and Federalism Theory**

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

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\(^{409}\) See Seifert, *Further from the People?*, supra note 34, at 138.
regime, the problem of transparency deserts has implications for a second body of literature: federalism scholarship. A central normative claim of federalism is that lower levels of government are both easier to monitor and restrain\textsuperscript{410} and more reflective of citizens’ preferences.\textsuperscript{411} This principle is reflected in the oft-stated maxim that state governments will be “closer to the people.”\textsuperscript{412} Smaller and more local governments, the theory holds, allow citizens more direct access to government officials and greater ease of oversight.\textsuperscript{413} Yet the state and local transparency pitfalls chronicled here would suggest that the opposite is true. They suggest that a key component of this modern accountability system—public records laws—is less available to monitor state and local governments than it is to monitor the federal government. The cumulative flaws in state transparency laws, in both structure and implementation, expose the fallacy of enhanced public oversight at smaller units of government.

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

\textsuperscript{410} See Daryl J. Levinson, Foreword: Looking for Power in Public Law, 130 Harv. L. Rev. 31, 49 (2016) (“As the influential Antifederalist Federal Farmer put it, state governments ought to be both ‘strong and well guarded.’” (quoting Letter XVII from the Federal Farmer to the Republican (Jan. 23, 1788), reprinted in 17 The Documentary History of the Ratification of the Constitution 350, 356 (John P. Kaminski & Gaspare J. Saladino eds., 1995))).

\textsuperscript{411} See 3 The Records of the Federal Convention of 1787, at 312 (M. Farrand ed., 1911) (Madison, J.) (arguing that federal elections should be regulated by the states because they were “best acquainted with the situation of the people”); see also Michael W. McConnell, Federalism: Evaluating the Founders’ Design, 54 U. Chi. L. Rev. 1484, 1493 (1987) (reviewing Raoul Berger, Federalism: The Founders’ Design (1987)) (“The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes . . . .”).

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

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

\textsuperscript{414} Seifter, Further from the People?, supra note 34, at 128 (citation omitted).
smaller levels of government are closer to the people would suggest that local governments would be even more “well guarded” than the states.\textsuperscript{415} This review of public records laws suggests that the opposite is true—that the smaller the government, the greater the breakdown in public oversight.\textsuperscript{416} It suggests that local governments have even fewer resources to devote to complying with public records requirements, and that members of the public face even steeper barriers to disclosure.

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

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

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

\footnotetext[416]{This contradicts the assumption of some transparency theorists that transparency is greatest at the local level. See, e.g., Fenster, \textit{supra} note 14, at 934.}

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

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

\footnotetext[419]{Amar, \textit{supra} note 418, at 1236–37.}

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

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

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

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

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


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

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

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


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

V. REFORMING STATE AND LOCAL TRANSPARENCY ECOSYSTEMS

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

A. Are State Public Records Laws Worth Saving?

There is a robust strand of skepticism running throughout the federal transparency literature today. Scholars have begun to ask whether the transparency scale has tipped too far, emphasizing that transparency excesses can lead to distinct governance failures.430 FOIA has become a particular target of ire. Scholars have argued the law imposes costs that grossly outweigh its benefits, and that there are viable alternative transparency mechanisms that would adequately serve the needs of the public without the enormous financial and resource burdens that the public
records statute imposes.\textsuperscript{431} Academics such as Professor Pozen have persuasively argued that while FOIA originated as a progressive tool to promote good governance, it now largely functions as a regressive tool to advance corporate interests.\textsuperscript{432} Some have suggested it may be better to scrap FOIA altogether.\textsuperscript{433}

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

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

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

\textsuperscript{432} \textsc{Pozen, Freedom of Information Beyond the Freedom of Information Act, supra} note 15, at 1111.

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

\textsuperscript{434} See discussion \textsc{supra} Sections III.B–III.C.

\textsuperscript{435} See, e.g., Jacob E. Gersen & Anne Joseph O’Connell, \textit{Hiding in Plain Sight? Timing and Transparency in the Administrative State}, 76 U. CHI. L. REV. 1157, 1161 (2009) (noting that federal agencies are “some of the most extensively monitored government actors in the world”); Jacob E. Gersen & Matthew C. Stephenson, \textit{Over-Accountability}, 6 J. LEGAL ANALYSIS 185, 186–87 (2014) (noting that political economy scholarship has identified a “class of situations in which effective accountability mechanisms can decrease, rather than increase, an agent’s likelihood of acting in her principal’s interests” (emphases omitted)).
suffer from too little accountability rather than too much. It is doubtful that state and local governments in general are plagued by overattention from the public. Wherever this line is drawn, it is unlikely that current levels of public oversight of state and local governments have crossed it.436

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

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

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

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

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

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

441 Id. at 137.
This financial independence has allowed state and local governments to expand into areas previously occupied by the federal government. They often exercise control over land use, environmental regulation, public health, civil rights, and the local economy. They are also tasked with implementing a large and growing array of federal programs and grants today. Governors have consolidated their authority and face few checks to their power. And local governments exert significant control and discretion—delegated from the state government under “home rule” and delegated from the federal government under direct federal–local cooperative efforts. This increase in the size, role, and importance of state and local governments has increased the need for effective accountability mechanisms. Citizens must be able to access information about the government entities that wield increasing power over their lives.

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

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442 See Davidson, supra note 34, at 588–92.
443 Metzger, supra note 22, at 1853.
444 See Seifter, Gubernatorial Administration, supra note 323, at 518–29. Governors can reorganize the executive branch and disband agencies, and many have the authority to veto or rescind regulations. Id. at 487–88.
445 Davidson, supra note 34, at 570–71. Local governments exercise power through zoning, building and housing codes, wage rules, workplace conditions, environmental regulation, etc. Id. at 570.
446 See generally Nestor M. Davidson, Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty, 93 VA. L. REV. 959, 971–73 (2007) (providing examples of federal–local collaboration in areas ranging from criminal justice to homeland security to education). State legislatures and courts are often reluctant to interfere with this local autonomy. See Briffault, supra note 421, at 405–06.
National Intelligence, the Defense Intelligence Agency, and the intelligence offices of the various military branches.450

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

These accountability mechanisms are often weaker at the state level. Many states have a plural executive—a form of government that has been criticized for making it more difficult for the public to monitor and hold to account.452 Further, state legislative oversight is less robust than congressional review. The legislature is a low-paying, part-time position in forty states,454 and state legislatures convene far less often than Congress.455 State executive and legislative branches also tend to be controlled by the same party,456 further reducing the likelihood that partisan disputes will bring governance failures to light. More robust congressional monitoring has been posited as an alternative to FOIA.457 But legislative oversight in

450 For discussions of the extent to which overclassification prevents the disclosure of records under FOIA, see Fenster, supra note 14, at 922–24.
451 See Fenster, supra note 67, at 61. Justice Scalia even questioned whether any transparency measures at all are required outside “the institutionalized checks and balances within our system of representative democracy.” Scalia, supra note 16, at 19.
452 See Briffault & Reynolds, supra note 21, at 28.
453 See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2332 (2001) (arguing that a benefit of the unitary executive is that it “simplif[ies] and personaliz[es] the processes of bureaucratic governance,” making it easier for the public to hold the executive accountable for policy choices); see also The Federalist No. 70, at 427, 430 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that a plural executive is more inclined to “conceal faults and destroy responsibility,” in contrast with the more “narrowly watched and more readily suspected” unitary executive).
454 Seifter, Gubernatorial Administration, supra note 323, at 519.
456 Seifter, Gubernatorial Administration, supra note 323, at 520.
the states as it is constituted now is most likely too weak to serve as a viable transparency replacement.458

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

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

458 See Seifter, Gubernatorial Administration, supra note 323, at 520 (“Scholars of legislative oversight have theorized that legislators expend scarce resources on oversight only to the extent that it is likely to enhance their political fortunes.”).
460 See BRIFFAULT & REYNOLDS, supra note 21, at 28; Davidson, supra note 34, at 571.
461 Davidson, supra note 34, at 602.
462 BRIFFAULT & REYNOLDS, supra note 21, at 28.
464 Davidson, supra note 34, at 603–04.
465 Ball v. James, 451 U.S. 355, 371 (1981). Courts have also allowed business improvement districts, which require real property owners to pay additional taxes to the municipality to allocate voting authority in a way that privileges commercial over noncommercial property owners. See, e.g., Kessler v. Grand Cent. Dist. Mgmt. Ass’n, 158 F.3d 92, 108 (2d Cir. 1998).
enforcement, and health and safety regulations. Public records laws offer an alternative mechanism of accountability to those nonresidents deeply affected by the actions of government.

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

**B. Proposals for Reform**

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

1. **Government Reform**

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

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

468 See Davidson, *supra* note 34, at 627 (noting that administrative processes may help compensate for lack of representation).
real benefits to the government at large. Legislators could revise these statutes to ensure that exemptions to disclosure are clearly stated, narrowly tailored, and reflective of the public interest. More robust procedures to notify the public and facilitate public debate prior to the enactment of new exemptions could help constrain powerful interest groups’ ability to weaken the laws’ effects. Tightening the regulations that govern asset disclosures and conflicts of interest by members of state legislatures could help expose links between legislators and special interest groups as well.

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

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

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469 See discussion supra notes 252–255 and accompanying text.
470 See Nicholas Kusnetz, Only Three States Score Higher than D+ in State Integrity Investigation; 11 Flunk, CTR. FOR PUB. INT. (Nov. 9, 2015, updated Nov. 23, 2015), https://publicintegrity.org/accountability/only-three-states-score-higher-than-d-in-state-integrity-investigation-11-flunk [https://perma.cc/KE2F-EDSX] (noting that only two states conduct independent and comprehensive audits of legislators’ assets annually).
commercial requesters a higher fee for records productions and charge noncommercial requesters lower fees or even provide them with a fee waiver. The federal government and many states already carve out special treatment for requests in the public interest, so the definitional problem of distinguishing between commercial and noncommercial requesters would not be insurmountable. These discrepancies in fee schedule could also be tailored to allow local governments, which have fewer financial resources at their disposal to respond to requests, to impose higher costs upon commercial requesters than state agencies.

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

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

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

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

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

2. Media and Civil Society Reform

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

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

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


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

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

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

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482 See About VTDigger, VTDIGGER, https://vtdigger.org/about-vtdigger [https://perma.cc/P48P-NGSZ].
486 See About, MEDIA FREEDOM & INFO. ACCESS CLINIC, https://law.yale.edu/mfia/about [https://perma.cc/WPQ9-JHEE].

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

CONCLUSION

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

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