

Editor's Note

Time for a 28th Amendment?

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When it comes to government transparency, do constitutions really matter?

We often assume the answer is “yes,” and we would like to believe that laws, particularly the highest laws of the land, make a difference. More and more research, however, is beginning to question that assumption.

Take the United States, for example. Nothing in the U.S. Constitution says anything about citizens having a right to acquire government records or observe government proceedings.¹ Scholars have made strong cases for a constitutional right-to-know, either via the First Amendment or passage of a new explicit freedom of information amendment.²

In comparison, many other countries (63 to be exact) specifically guarantee a right to government information in their constitutions, including Belarus, Afghanistan, Azerbaijan and Kyrgyzstan, and 17 provide a limited constitutional right to know.³ Does that mean citizens in those countries have better access to government records than people in the U.S.? Not likely.⁴

But could a constitutional amendment in the U.S. still make a difference? Maybe, maybe not.

For this issue of the *Journal of Civic Information*, University of Florida law students Jessica Terkovich and Aryeh Frank explored this topic by examining the seven U.S. states⁵ that specifically protect the public's ability to acquire government information or observe proceedings

¹ Albeit, the U.S. Supreme Court has afforded some constitutional rights for the press to attend criminal proceedings. See *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986). Some pro-access litigants continue to try to argue for a First Amendment right to government information, but the U.S. courts have been reluctant to move down that path.

² See Chad G. Marzen, *A Constitutional Right to Public Information*, 29 B.U. PUB. INT. L.J. 223, 224 (2020), and Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L.REV. 1 (2012).

³ See the Global Right to Information Ratings for each country that has a freedom of information law, specifically Indicator 1 regarding each nation's constitutional right to access, <https://www.rti-rating.org/country-data/by-indicator/1/>.

⁴ Toby Mendel, *The Fiftieth Anniversary of the Freedom of Information Act: How it Measures up Against International Standards and Other Laws*, 21 COMM. L. & POL'Y 4 (2016).

⁵ The seven states with explicit language in their constitutions granting citizens a right to acquire public records or attend government proceedings are California, Florida, Illinois, Louisiana, Montana, New Hampshire, and North Dakota.

in their constitutions. They examined state appellate decisions in each state to get a sense for how heavily courts weigh the constitution in their decisions.

What we learn, like in so much research, is it depends. A constitutional right to know might make a difference, or maybe not.

A. Jay Wagner from Marquette University recently evaluated public record law compliance in 10 states, and the one state with a constitutional right to know, Florida, did fairly well compared to the other nine states.⁶ On the other hand, other research indicates that states with constitutional rights to know don't perform more transparently in the trenches.⁷

This is affirmed, at least anecdotally, in this issue's other two research articles.

In the first, Imani J. Jackson requested high school football concussion records from 23 schools in Florida, and only four provided the actual records while the rest simply reported the total number for the school year. Not a great showing from the Sunshine State that enjoys a strong constitutional right to access, and a troublesome finding for student athletes and their parents.

In the other research article, Jonathan Anderson and Sarah K. Wiley requested data from 44 public universities in the United States, finding that compliance varied widely, including in the states that guarantee a constitutional right to access. On the one end, Montana State University, the University of Illinois at Urbana-Champaign, and the University of New Hampshire, were all forthcoming with data. But North Dakota State University, the University of California, Los Angeles, and Louisiana State University, performed poorly. Again, no real evidence that a constitutional right matters.

Perhaps other factors are more important, such as political culture, public education, or strong statutory penalties. More studies are needed to figure this out so that reform efforts can be applied efficiently and effectively. Information advocates and funders should know how best to focus their time and resources for maximum impact.

Despite the ambiguity, what we can say with some certainty is it doesn't hurt to enact strong freedom of information laws. An explicit constitutional right to know—in all state constitutions and the U.S. constitution—could send a strong message that government transparency and accountability matter.

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⁶ A. Jay Wagner, *Probing the People's Right to Know: A 10-State Audit of Freedom of Information Laws*, MARQUETTE UNIVERSITY (March 2020), <https://static1.squarespace.com/static/57c99b8829687f97347637d8/t/5e53f5c510f5de6af19b3414/1582560710809/10-State+FOI+Audit+Report.pdf>.

⁷ Apologies for citing myself, but this study of 7,000 public records requests sent throughout the U.S., in every state and the District of Columbia, indicated no correlation between actual compliance and a constitutional right to know: David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Records Statutes on Agency Transparency in the United States*, GLOBAL CONFERENCE ON TRANSPARENCY RESEARCH (June 26, 2019), available at <https://www.documentcloud.org/documents/6182080-Sticks-and-Compliance-Cuillier.html>.