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Editor's Note
Fences Make for Bad Government

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

Sometimes a property owner will install a fence on a neighbor's land, accidentally or otherwise, and then eventually, over time, legally claim the land as theirs. In property law it's called "adverse possession" or "squatter's rights" – when that encroachment is open to the world and hostile to the interests of the true owner.

The same thing can happen to public information, as discovered by the citizens of Washington state.

This tale of information adverse possession – a warning to residents of all states – began in 1972, after the Washington state electorate overwhelmingly approved Initiative 276, which included a section dictating that all of government's records shall be open to citizen inspection. About 15 years ago, while in graduate school at Washington State University, I interviewed the initiative organizers and opponents, and they told me that at the time everyone knew the law covered all three branches of government – executive, judicial, and legislative.

"It applied to everyone. Absolutely," said Bennett Feigenbaum, who led the Coalition for Open Government that spearheaded the initiative. "It didn't really have to come up and be discussed because it was assumed."[1]

Yet, the Legislature gradually staked out a position over time that it was not subject to the public records law, and that fence went unchallenged for years, brashly open to the world and hostile to the interests of the true owners, the public.

In 2017 that all changed. Journalists challenged the Legislature's boundary on public records and prevailed in court and in the court of public opinion, culminating in a state Supreme Court ruling last December.

Peggy Watt, an associate professor at Western Washington University, recounts that battle in this issue of the *Journal of Civic Information*, providing key takeaway points for legislators and transparency advocates everywhere: We do not have to accept walls built to hide information.

Tear. Down. The wall.

[1] David Cuillier, David Dean, and Susan Dente Ross (May 4, 2004). "History of Initiative 276: The genesis of the Washington Public Disclosure Act." AccessNorthwest, Washington State University (document available at bit.ly/Initiative276)

Throughout the nation, public agencies often erect such barriers, even in contradiction of the law. Sometimes it's simply agency "policy," or just "how it's done." The longer that barrier is allowed to stand the stronger it gets, the more cemented their argument for adverse possession. We must all keep vigilant to eradicate such encroachments on the people's right to know.

Similarly, some of those barriers are imposed on the frontlines – at the agency countertops – by usually well-meaning public records officers.

In this issue, Brett G. Johnson, an assistant professor at the University of Missouri, presents findings from an exploratory survey of state and federal public records officers to find out what they think of journalists and how the records dissemination system works. Turns out many of them feel stuck in the middle, between requester and agency leaders, and that public records dissemination is given little emphasis or support in government.

The study supports previous research by Michele Bush Kimball, Suzanne Piotrowski and others, who have found that custodians are often supportive of transparency but that the process can be arbitrary and messy. Every journalist should read Johnson's findings to see just how they are perceived from the other side of the counter (spoiler alert: not very well!).

Johnson provides practical suggestions for record custodians and requesters to help the system go a little smoother. After all, this is a people process, and people are complicated. The better custodians and requesters understand each other the better the information will flow.

Of course, given the current spread of coronavirus throughout the world, access to free, unfettered, truthful information is more important than ever. Journal Publisher Frank LoMonte, who directs the Brechner Center for Freedom of Information at the University of Florida, provides a thoughtful essay examining the extensive actions by government to become more secretive because of the pandemic. He provides a convincing argument that government should become more transparent, not less, during these times.

Ultimately, people crave accurate information that will help them understand the health risks they face, and take appropriate precautions to protect themselves and their loved ones.

More than ever, this is not the time for excessive secrecy and obfuscation.

This is not the time for arbitrary denials.

This is not the time for fences.

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Essay
Casualties of a Pandemic: Truth, Trust and Transparency

Frank LoMonte, J.D., Publisher, *University of Florida*

> *MICHELLE MARTIN: How important is accurate public information even though it might be frightening?*
>
> *STANLEY MCCHRYSTAL: I think it's critical because if you think about it, what we don't know leaves a vacuum in our mind, and we fill it with the most terrifying ideas. And so I think it's much better for us to get the best information we can, give transparency as best we can. People can handle bad news or frightening news if it's put into context for them and they believe it's accurate.*[1]

In an April 1 interview with NPR's "Morning Edition," retired U.S. Army Gen. Stanley A. McChrystal, former commander of U.S. forces in Iraq, explained that, in a crisis situation, accurate information from government authorities can be crucial in reassuring the public – and in the absence of accurate information, speculation and rumor will proliferate. Joni Mitchell, who's probably never before appeared in the same paragraph with Stanley McChrystal, might have put it a touch more poetically: "Don't it always seem to go; That you don't know what you've got 'til it's gone."[2]

The outbreak of the coronavirus strain COVID-19, which prompted the U.S. Department of Health and Human Services to declare a public health emergency on Jan. 31, 2020,[3] is introducing Americans to a newfound world of austerity and loss. Professional haircuts, sit-down restaurant meals and recreational plane flights increasingly seem like memories from a bygone golden age (small inconveniences, to be sure, alongside the suffering of thousands who've died and the families they've left behind).

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[1] *How To Take A Leadership Role During A Crisis*, NPR MORNING EDITION, Apr. 1, 2020, https://www.npr.org/2020/04/01/825056988/how-to-take-a-leadership-role-during-a-crisis.

[2] Joni Mitchell, *Big Yellow Taxi*, on LADIES OF THE CANYON (Reprise Records 1970).

[3] Sara G. Miller & Erika Edwards, *HHS secretary declares coronavirus a public health emergency*, NBCNEWS.COM, Jan. 31, 2020, https://www.nbcnews.com/health/health-news/u-s-declares-public-health-emergency-over-coronavirus-n1127856.

Access to information from government agencies, too, is adapting to a mail-order, drive-through society. As public-health authorities reached consensus that the spread of COVID-19 could be contained only by eliminating non-essential travel and group gatherings, strict adherence to open-meeting and public-records laws became a casualty alongside salad bars and theme-park rides. Governors and legislatures relaxed, or entirely waived, compliance with statutes that require agencies to open their meetings to in-person public attendance and promptly fulfill requests for documents.[4]

As with all other areas of public life, some sacrifices in open-government formalities are unavoidable. With agencies down to a sustenance-level crew of essential workers, it's unrealistic to expect that decades-old paper documents will be speedily located and produced. And it's unsafe to invite people to congregate at public hearings to address their elected officials. But the public shouldn't be alone in the sacrifice.

Public officials can expedite fulfillment of requests for public records by relaxing some of their own review procedures. A not-insubstantial part of the delay that requesters experience when awaiting fulfillment of freedom-of-information requests is attributable to agencies parsing through dozens of non-mandatory exemptions to see how much can discretionarily be withheld.[5] For instance, nearly two dozen states mirror the federal Freedom of Information Act in allowing, but not requiring, agencies to discretionarily withhold "pre-decisional" records that reflect deliberations within the agency, the so-called "deliberative process" exemption.[6] Nothing requires agencies to conceal that category of records from the public. Concealment is a luxury option, not a necessity. Reviewing records to see which of them may – not must – be withheld from public disclosure is a textbook "non-essential" government function. Like other non-essential functions, it should be suspended as long as the state of emergency exists, so that the public receives everything but the records that, by law, cannot be disclosed.

The power of public data

It's said that crisis brings out the best and the worst in people. COVID-19 has shown us unforgettably selfless acts of valor alongside ruthless price-gouging[7] and retaliatory discharges of whistleblowers.[8] The same might be said of government transparency.

We are witnessing the power of state and municipal "open data" portals to provide valuable datasets to an audience hungry for up-to-date, trustworthy facts. In recent years, more and more states and cities have created data dashboards that make high-value datasets accessible to the

[4] For a rundown of the initial wave of state reactions, *see* Rachael Jones, *Open government in a WFH world: How public-records and open-meeting requirements are adapting to the COVID-19 threat*, MEDIUM.COM, https://medium.com/@UFbrechnercenter/open-government-in-a-wfh-world-how-public-records-and-open-meeting-requirements-are-adapting-to-7d9c566db7ef.

[5] For an explanation of the distinction between a mandatory versus discretionary public-records exemption, see Courtney Abshire, *Public Business is the Public's Business:* Koch*'s Implications for Indiana's Access to Public Records Act*, 52 IND. L. REV. 455, 457-58 (2019).

[6] 5 U.S.C. § 552(b)(5) (allowing agencies to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency").

[7] Jessica Guynn & Kelly Tyco, *Gouge Much? Purell for $149, face masks for $20: Coronavirus price hikes are making everyone mad*, USA TODAY, Mar. 3, 2020, https://www.usatoday.com/story/money/2020/03/03/coronavirus-hand-sanitizer-face-masks-price-gouging-amazon-walmart-ebay/4933920002/.

[8] Joe Garofoli, Tal Kopan & Matthias Gafni, *Navy captain of coronavirus-infected aircraft carrier relieved of command*, S.F. CHRONICLE, Apr. 2, 2020, https://www.sfchronicle.com/bayarea/article/Navy-expected-to-relieve-captain-of-15175190.php.

public, California's Department of Health and Human Services maintains an online dashboard enabling visitors to see positive and suspected COVID-19 cases by county and by hospital location, as well as how many people are hospitalized in intensive care.[9] One of the most detailed is in Michigan, where the state provides a daily breakdown of cases by age, race and ethnicity, as well as the number of positive and negative test results.[10]

Journalists can add real value when they're given access to the same data the government is working with. In Florida, reporters detected irregularities in the county-by-county tallies of COVID-19 cases, suggesting that the state health department may not be getting full and accurate reports from the counties.[11] *The New York Times* built an interactive worldwide map, updated daily, that helps people understand the spread of the pandemic and which countries have the most acute known problems.[12] This is the best of what technology, plus transparency, makes possible.

At the same time, we are witnessing the collapse of antiquated public-records systems in agencies from the FBI to Pennsylvania's Department of Community and Economic Development to the San Diego health department, where officials have thrown up their hands and quit even trying to keep up with requests.[13] Agencies habitually shortchange spending on public-records compliance even in the flushest of times, creating slowdowns that are now becoming outright stoppages.

Since 1996, federal agencies have been required to affirmatively produce high-interest records in online "FOIA reading rooms" without requiring requesters to keep asking for them.[14] This isn't, to be sure, a cure-all. Agency compliance is spotty; in 2015, the nonprofit National Security Archive looked at E-FOIA compliance at 165 federal agencies and found only 67 with updated online libraries.[15] And authorities can't be trusted to disclose scandalous, self-incriminating records without being forced to. But it's a start, and it's better than what most state laws require.

Few states have matched E-FOIA's affirmative-disclosure requirements, but the pandemic provides both an opportunity and a need to play catch-up. Agencies know, or should know, what records requesters most commonly ask for, and that's doubly predictable today with Coronavirus-related stories monopolizing the news cycle. Research by the nonprofit Sunlight Foundation demonstrates that agencies can realize net savings by voluntarily posting documents online instead

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[9] Calif. Dept. of Health & Human Serv., *California COVID-19 Hospital Data and Case Statistics*, https://data.chhs.ca.gov/dataset/california-covid-19-hospital-data-and-case-statistics.

[10] Coronavirus: Michigan Data, Michigan.gov, https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html.

[11] Diane Rado, *Coronavirus infections and death counts don't always add up in FL*, FLORIDA PHOENIX, Apr. 2, 2020, https://www.floridaphoenix.com/2020/04/02/coronavirus-infections-and-deaths-counts-dont-always-add-up-in-fl-data.

[12] THE NEW YORK TIMES, *Coronavirus Map: Tracking the Global Outbreak*, https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html.

[13] John Finnerty, *State dragging feet on releasing list of business waiver*s, THE (SUNBURY, PA.) DAILY ITEM, Apr. 4, 2020, https://www.dailyitem.com/news/state-dragging-feet-on-releasing-list-of-business-waivers/article_7956c73a-03ba-5194-8e40-c7b8947e605a.html; JW August & Tom Jones, *Closed To The Public? Local Governments Respond Slowly – or Not at All – To Requests For COVID-19 Information and Records*, NBCSANDIEGO.COM, Mar. 31, 2020, https://www.nbcsandiego.com/news/investigations/closed-to-the-public-local-governments-respond-slowly-or-not-at-all-to-requests-for-covid-19-information-and-records/2296678/.

[14] *See* 5 U.S.C. § 552(a)(2)(D) (requiring federal agencies to publish any previously disclosed records that have been requested three or more times and are deemed likely to be the subject of future requests).

[15] National Security Archive, *Most Agencies Falling Short on Mandate for Online Records*, Mar. 13, 2015, https://nsarchive2.gwu.edu/NSAEBB/NSAEBB505/.

of incurring fulfillment costs to respond to repetitive freedom-of-information requests.[16] Never in modern history has it been more essential for agencies to allocate staffing resources economically, so voluntarily publishing plans, assessments, memos and correspondence relating to CORVID-19 is not just good public policy; it's good business management.

The myth of 'private statistics'

We're also reaping the consequences of badly drafted privacy statutes and regulations, as well as some fundamental "statistical illiteracy," that has resulted in some states, counties and cities withholding vital statistics about who's getting sick and where.

HIPAA, the Health Insurance Portability and Affordability Act of 1996, requires healthcare providers or insurers who transmit claims electronically for federal reimbursement to keep patients' identifiable medical records confidential.[17] Note all of the qualifiers in that definition: it applies to the release of identifiable patient information, gathered by a medical provider or insurer that does business with Medicare or Medicaid. Most significantly, once personal identifiers are removed from medical data, the data no longer qualifies as "protected health information" for HIPAA purposes.[18] That means, if the information is in a document or database that is subject to state public-records law, it must be disclosed on request.

Yet, HIPAA frequently is misunderstood – by agencies that plainly do not fit the statutory definition of a covered provider – to foreclose saying anything health-related. Any journalist who covers issues of health and public safety has at least one war story about a false-positive misinterpretation of HIPAA. The law has been (inaccurately) cited to conceal public records that refer to public officials' health,[19] to withhold the names of law-enforcement officers injured in the course of newsworthy events,[20] to conceal information about the deaths of people in custody,[21] and even to harass or jail journalists who take photos of medical emergencies.[22]

The federal Department of Health and Human Services, which administers and enforces HIPAA, did the public no favors in issuing recent interpretive guidance responding to questions about COVID-19.[23] In a February 2020 bulletin, HHS described the permissible contexts in which covered entities may disclose patients' confidential records – such as when sharing them with public-health agencies when necessary for public safety – but said nothing about what constitutes

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[16] Alena Stern, *Research: Cities can save time on records requests by doing open data right*, SUNLIGHT FOUNDATION, Oct. 9, 2018, https://sunlightfoundation.com/2018/10/09/research-cities-save-time-on-records-requests-by-doing-open-data-right/.

[17] 42 U.S.C. § 1320d–6(a)(3).

[18] *See* U.S. Dep't of Health & Human Serv., *OCR Privacy Brief, Summary of the HIPAA Privacy Rule*, https://www.hhs.gov/sites/default/files/privacysummary.pdf at 4 ("There are no restrictions on the use or disclosure of de-identified health information.").

[19] Jim Schutze, *Did Chief Hall Get Released From the Hospital or Just Climb Out a Window?*, DALLAS OBSERVER, July 22, 2019, https://www.dallasobserver.com/news/where-has-dallas-police-chief-u-renee-hall-gone-11713590.

[20] Scott Broden, *Inmate accused of assaulting Rutherford County jailer*, THE (MURFREESBORO) DAILY NEWS JOURNAL, Apr. 11, 2019, https://www.dnj.com/story/news/2019/04/11/inmate-michael-wallace-duncan-accused-assaulting-officer-rutherford-county-jail-chris-fly/3434736002/.

[21] Steve King, *Inmate dies at Guilford Co. Jail, cause under investigation*, WXII12.COM, May 4, 2018, https://www.wxii12.com/article/inmate-dies-at-guilford-co-jail-cause-under-investigation/20190917.

[22] Sam Tabachnick, *Denver officers disciplined for handcuffing journalist photographing arrest*, DENVER POST, Feb. 5, 2019, https://www.denverpost.com/2019/02/05/denver-police-offers-discipline-handcuffing-journalist/.

[23] U.S. Dept. of Health & Human Serv., Ofc. for Civil Rights, *HIPAA Privacy and Novel Coronavirus*, Feb. 2020, https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf.

an individually identifiable record, or what must be done to make a record sufficiently de-identifiable to be made public. By failing to address that issue, HHS missed the opportunity to reassure state and county health departments that there will be no penalty for disclosing anonymized patient statistics and demographics.

Lacking authoritative federal guidance, state and local governments have reached diverging and irreconcilable interpretations of what data is and is not releasable. Florida Gov. Ron DeSantis cited patient privacy in refusing to name the nursing homes at which patients have tested positive for the virus; instead, the state is reporting aggregate numbers of confirmed infections and deaths in nursing homes statewide, a practice one advocate compared to a deadly game of Russian Roulette.[24] The same is true in Georgia, where the state Department of Public Health declined to identify the elder care homes where more than 50 CORVID-19 cases were reported as of the start of April 2020, leaving journalists to piece the picture together by calling around to the owners of the facilities.[25] Other states, including Illinois and Maryland, have made the names of the institutions public.[26] In Massachusetts, the state has instructed municipalities to withhold the number of positive tests and deaths on privacy grounds,[27] even though neighboring Connecticut made the same information available online.[28] These states all are governed by the same federal privacy law. It cannot mean two different things.

Withholding statistics on privacy grounds is, at best, illogical. Confirmation that one, two, or twelve people in Brockton, Massachusetts, are hospitalized with Coronavirus does not enable anyone not already familiar with a patient's condition to deduce the patient's name. A person who suspects that her co-worker or neighbor might be sick with Coronavirus is no more able to confirm her suspicion from a numeral than she was without the numeral. That so many regulators in positions of authority are convinced otherwise speaks to a widespread cultural problem of "data illiteracy."

As many commentators have observed since the start of the COVID-19 outbreak, over-compliance with privacy laws is no longer just an inconvenient annoyance for journalists; it puts people at greater risk of harm. The editors of Raleigh's *News & Observer* took their state to task for being slow to reveal demographic information about COVID-19 patients, explaining that disclosure "can help improve understanding of the virus and its spread among North Carolinians,

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[24] Carol Marbin Miller, *Like playing 'Russian roulette': DeSantis won't say which elder care homes have coronavirus*, MIAMI HERALD, Mar. 25, 2020, https://amp.miamiherald.com/news/coronavirus/article241487396.html; Rafael Olmeda, Florida continues to conceal the names of senior facilities with coronavirus, THE (FORT LAUDERDALE) SUN-SENTINEL, Mar. 31, 2020, https://www.sun-sentinel.com/local/palm-beach/fl-ne-nursing-home-coronavirus-secrecy-20200331-5ars2ak7r5g4pozx3uu5mqzarm-story.html.

[25] Brad Schrade & Carrie Teegardin, *Coronavirus cases now reported at 58 Georgia senior care facilities*, Apr. 2, 2020, ATLANTA JOURNAL-CONSTITUTION, https://www.ajc.com/news/state--regional-govt--politics/coronavirus-cases-now-reported-georgia-senior-care-facilities/BRPt7AIobRRAYKvw3SF6aJ/.

[26] Madeline Buckley, *2 more nursing home residents die after contracting COVID-19 as DuPage County cases surpass 600*, CHICAGO TRIBUNE, Apr. 4, 2020, https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-dupage-deaths-nursing-homes-20200404-bckmjn3m6bgi3kvjpvrmnfgc64-story.html; Matthew Stabley, *9 Residents Dead in COVID-19 Outbreak at Maryland Nursing Home*, NBCWASHINGTON.COM, Apr. 4, 2020, https://www.nbcwashington.com/news/local/9-residents-dead-in-covid-19-outbreak-at-maryland-nursing-home/2264528/.

[27] Cody Shepard, *Massachusetts DPH asks cities, towns not to release coronavirus numbers*, THE (BROCKTON) ENTERPRISE, Mar. 28, 2020, https://www.enterprisenews.com/news/20200328/massachusetts-dph-asks-cities-towns-not-to-release-coronavirus-numbers.

[28] *See Coronavirus Disease 2019 (COVID-19)*, CT.gov, https://portal.ct.gov/Coronavirus, at 10 (providing daily chart of location, by town, of positive test results).

and it can accentuate issues and dispel myths that contribute to that spread."[29] The *Baltimore Sun* called for tracking and publishing CORVID-19 deaths by race, as Michigan has begun doing, so public-health professionals can more intelligently target prevention and response efforts to those most in need.[30]

When federal regulators become aware that privacy laws are causing confusion, they should act to dispel the confusion -- and when the information is a time-urgent as the number and location of life-threatening infectious diseases, they should act with urgency. Federal privacy laws do not take adequate account of the public interest in access to information embodied in the 50 state open-records statutes. Exceptions to disclosure are always supposed to be construed narrowly with a presumption in favor of public access,[31] and HIPAA is no different. If state and local authorities find HIPAA's privacy constraints too confining and too confusing, Congress can act with the same dispatch that saw $2 trillion in relief aid approved in a matter of days.[32]

Conclusion

At a time when prompt access to accurate information could literally mean the difference between life and death, the laws mandating disclosure of information to the public are being relaxed in the name of government efficiency, while those mandating secrecy are being applied rigidly (and at times, inaccurately over-applied). This isn't just a problem for journalists and researchers. As Harvard University health-law professor I. Glenn Cohen told *The New York Times*: "Public health depends a lot on public trust. If the public feels as though they are being misled or misinformed their willingness to make sacrifices – in this case social distancing – is reduced."[33] Perhaps the lasting legacy of the COVID-19 pandemic – and it will be a relief to speak of the pandemic in the past tense – will be a generational recommitment to restore custody of critical health-and-safety information to its rightful public owners.

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[29] *Editorial: There's a lot you can learn about coronavirus in other states that you can't in North Carolina*, THE (RALEIGH) NEWS & OBSERVER, Mar. 27, 2020, https://www.newsobserver.com/opinion/editorials/article241555071.html.

[30] *Commentary: Coronavirus deaths should be tracked by race*, BALTIMORE SUN, Apr. 3, 2020, https://www.baltimoresun.com/opinion/editorial/bs-ed-0403-coronavirus-race-disparity-20200403-npngxilobfa2hm3aishcwuj6ui-story.html.

[31] *See, e.g.*, Office of Gov. v. Scolforo, 65 A.3d 1095, 1100 (Pa. Commonw. 2013) ("Exemptions from disclosure must be narrowly construed"); Daniels v. City of Commerce City, 988 P. 2d 648, 650 (Colo. App. 1999) ("Exceptions to the [Open Records] Act should be narrowly construed.").

[32] Eric Wasson & Billy House, House Approves $2 Trillion Virus Relief Bill, Sends to Trump, BLOOMBERG NEWS, Mar. 27, 2020, https://www.bloomberg.com/news/articles/2020-03-27/house-approves-2-trillion-virus-relief-bill-sends-to-trump.

[33] Thomas Fuller, *How Much Should the Public Know About Who Has the Coronavirus?*, THE NEW YORK TIMES, Mar. 8, 2020, https://www.nytimes.com/2020/03/28/us/coronavirus-data-privacy.html.

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Public Records Officers' Perspectives on Transparency and Journalism

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Abstract

Public records officers are often the first point of contact for citizens and journalists requesting public records through state and federal sunshine laws. Very little research has explored the opinions of public records officers about the process of open records requests, particularly in the context of journalism. Adopting a theoretical framework synthesizing the sociology of law with journalistic discursive institutionalism, this study applies an exploratory survey to better understand this aspect of the open government process. Findings suggest that public records officers exhibit a high level of paternalism, challenging journalists' foundational discursive role as government watchdogs. These findings offer guidance for journalists and public records officers on how to better cooperate with each other in the transparency process.

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Introduction

Public records laws, such as the federal Freedom of Information Act (FOIA) and state sunshine laws, have helped journalists retrieve millions of important documents from government agencies. However, a big part of the problem with public records laws is the complicated and fraught process of negotiations that they set up between journalists and public records officers. By having the responsibility of administering public records laws, public records officers become "gatekeepers of government information" (Kimball, 2003, p. 314). Government officials in Missouri,[1] Kansas,[2] and Georgia[3] recently have been scrutinized for attempting to stall journalists' requests for information. Due to examples like these, journalists often are taught that public records officers are adversaries to the transparency process, and that reporters must be persistent and push back against denials of records requests (Cuillier & Davis, 2020). However, little is known in the journalism studies literature about how public records officers view the requesting process. Do they, like journalists, see the requesting process as essentially combative? Do they see journalists as their enemies? Do they see their main duty being to transparency, or to the interests of their agency?

The purpose of this study is to better understand public records officers' attitudes toward the process of government transparency in general—and, in particular, their perceptions of the role of journalists within that process—by way of an exploratory survey. This study contributes to journalism studies literature by opening a window for journalism students, educators, and researchers to see into the minds of their traditional "adversaries," public records officers. The study is also valuable to the field of communication law and policy because it offers a sociological view of the workings of laws that are central to the practice of journalism. Indeed, because of its value to both of these fields, and because it focuses on the function of a legal institution and its integral relationship with the function of the press in American democracy, this study adopts a theoretical framework that combines elements from the sociology of law and the theory of journalistic discursive institutionalism. This study is exploratory in nature; its findings are designed to spark future research devoted to revealing generalizable findings on the behaviors of public records officers rather than come up with those generalizations itself (Cresswell & Plano Clark, 2007; Johnson & Dade, 2019).

Literature review

Sociology of law in mass communication

The sociology of law is a field with a rich history devoted to applying theories, methods, and values of various schools of sociological knowledge to the study of law. Deflem (2008) contends the purpose of the field is "to unravel the patterns and mechanisms of law in a variety of social settings" (p. 2). Treviño (2008) offers an even broader mandate for the field, "explaining the relationship between law and society" (p. 1). Abel (2010) sees sociology of law as studying

[1] Jason Hancock, "Greitens' Office's Response to Public Records Requests: Deny, Delay, Set High Fees," *Kansas City Star* (November 21, 2017).
[2] Laura Bauer, Judy L. Thomas & Max Londberg, "'One of the Most Secretive, Dark States': What is Kansas Trying to Hide?" *Kansas City Star* (November 12, 2017).
[3] Richard Fausett, "'Drag This Out as Long as Possible': Former Official Faces Rare Criminal Charges Under Open-Records Law," *The New York Times* (July 7, 2019), A13.

the distinctions between "law on the books" versus "law in action" (p. 5), and Hopman (2017) urges scholars to study "law in action" with an appreciation for nuances, such as the role of community norms and (often contradictory) customs in interpreting the "law on the books." Meanwhile, Griffiths (2017) contends that sociology of law is about something more specific: studying social control by understanding the circumstances under which people follow legal rules. Understanding how public records officers interpret public records laws evokes the norms and customs of their community and their interpretations of public records laws. Importantly, these norms and customs include public records officers' attitudes toward journalists and journalism, and the role of transparency and secrecy within democracy.

The sociological study of law has a rich history within the field of journalism and mass communication. In a seminal chapter on legal research methods, Gillmor and Dennis (1981) called for scholars to study the law of mass communication in terms of how it operates in society. The purpose of studying legal issues in mass communication through such a lens is to diminish the isolation of mass communication law within its academic home of mass communication (Gillmor & Dennis, 1981).

The sociological study of communication law has proven fruitful in the context of understanding government transparency: the process through which citizens can view and assess how government operates in an effort to hold public officials accountable for their actions (Piotrowski, 2007, p. 10), most frequently via state or federal freedom of information laws (Roberts, 2001). Kimball (2003) observed and interviewed public records officers at Florida sheriff's offices, finding that several factors—such as ambiguity in the language of the Florida sunshine law, fear of releasing confidential information, and sympathy for certain vulnerable classes of requesters—led public records officers to act subjectively and inconsistently when fulfilling records requests. Elsewhere, Kimball (2011) interviewed individuals who conduct training sessions for public records officers about their experiences working with these officers. She found that trainers generally perceived the public records officers they worked with as harboring hostile attitudes toward the press and toward government transparency in general. They especially remarked about how public records officers detested burdensome requests (those requiring extra time for searching and sorting), which they viewed as malicious and which led them to want to know why requesters (journalists or otherwise) wanted government information—something laws forbid public records officers from asking. Such perceptions are significant and deserve further exploration in a way that can capture them directly rather than through second-hand accounts.

Kimball (2012) surveyed government records custodians and found that these professionals often complained about annoying interactions with records requesters, and has documented frustration among public records officers responding to vague requests for voluminous amounts of documents (Kimball, 2016). All told, Kimball has documented that factors other than the letter of the law can have an impact on the disclosure process—their fear of making mistakes and their attitudes toward the press and toward open government in general being foremost among them. The present study seeks to expand upon Kimball's work by exploring public records officers' perceptions of and attitudes toward the transparency process, particularly within the context of working with journalists.

Other studies on the sociology of the transparency process have focused on specific extralegal factors that could potentially influence public records officers in disclosing records. Such studies are founded on the notion that government transparency in the United States operates "in an administrative environment that increasingly favors the cost-effective achievement of

results and views procedurally oriented public administration with skepticism" (Piotrowski, 2007, p. 10). Cuillier (2010) found that the tone used in a letter requesting access to information could influence the speed with which documents were disclosed, reinforcing the notion that the form and style of interaction between journalists and public records officers are worthy of continued study. Studies by Wagner (2017) and Wasike (2016) have shown how extralegal factors such as fee structures, backlogs and lack of resources hamper the transparency process. Meanwhile, journalistic organizations like the Center for Public Integrity have criticized state governments on their level of transparency using metrics that assess such factors as whether public records officers routinely give reasons for denying requests for records or whether public records officers who routinely deny access in an unreasonable fashion are monitored and penalized (Center for Public Integrity, 2015).

Another important area of sociological research on the transparency process involves public opinion toward transparency. In a survey of a random sample of the U.S. population, Cuillier (2008) found that support for the press and its role in democracy is associated with higher levels of favorability toward granting access to public records. In another study relying on a random-sample survey of residents in the U.S. state of Washington, Cuillier and Pinkleton (2011) found that political liberalism, skepticism, and cynicism were strongly correlated with support for government transparency. These studies beg the question of whether similar opinions and psychographics could influence public records officers' attitudes toward transparency—and, concomitantly, their actions within the transparency process. Although public records officers are obligated by law to treat all requests for records equally (i.e., regardless of whether they come from journalists or not), little is known about whether public records officers' attitudes toward the press might influence their decisions on granting access for requests from journalists. Furthermore, the relationship between political ideology and other psychographic characteristics and public records officers' attitudes toward transparency deserves exploration. Chief among the psychographic characteristics is paternalism, which McLeod, Detenber, and Eveland (2001) define as a disposition toward "treating or governing people in a fatherly manner, especially by providing for their needs without giving them rights or responsibilities" (p. 683). McLeod and colleagues found paternalism to be highly correlated with a willingness to censor. Although public records officers do not play a censorial function in the traditional sense of the term, the extent to which these officers harbor paternalistic tendencies could influence how they exercise their power over the release of records.

The (external) discursive construction of journalism

Although the primary goal of this study is to understand how public records officers perceive of their roles within the process of government transparency, a related secondary goal is to understand public records officers' perceptions of journalism and journalists within that process. Properly placing this sociological legal study within the field of journalism studies requires the recognition that journalism is a discursively constructed field (Vos & Thomas, 2018). According to this theory, journalism, by not being a "traditional" profession such as medicine or law that is defined by licenses and other state regulations, must assert itself—its norms, boundaries and exemplars—through discourse (Carlson, 2016; Hanitzsch & Vos, 2017). Put differently, the *profession* of journalism is what its practitioners say it is. This discourse is fundamentally normative: the definitions and precepts of journalism are organized within a discourse on how journalism *ought* to be practiced (Ryfe, 2006; Hanitzsch & Vos, 2017). Vos and Thomas (2018)

contend that the central focus of the discursive construction of journalism is *authority*: over the definition of the field, over the standards of journalistic practice, and over the role journalism should play in democracy. Similarly, Carlson (2016) contends that journalism must necessarily be studied "within a field of discourse that continually constructs meaning around journalism and its larger social place" (p. 350). That is, journalism's *role as a pillar of democracy* is what its practitioners say it is.

Carlson identifies one specific locus for the discursive construction of journalism: "metajournalistic discourse," which is made up of "public expressions evaluating news texts, the practices that produce them, or the conditions of their reception" (2016, p. 350). He views such metajournalistic discourse as "a complex site where actors *inside and outside* of journalism debate the context of what the news ought to look like through presenting definitions, setting boundaries, and seeking legitimacy" (p. 361, emphasis added). Thus, part of the discursive nature of journalism is that the boundaries of the field are sites of contention (Carlson, 2016), meaning that journalists must defend the definitions and values of their field from (often critical) discourses from outside actors (Reich & Hanitzsch, 2013; Vos & Craft, 2016). That is, the field of journalism is as much what *non-journalists* say it is as what journalists say it is. Thus, this study expands the scope of the discursive analysis of journalism to argue that journalistic discourse can also be found in the opinions of non-journalists who deal with journalists on a regular basis—such as public records officers.

Although journalistic requests make up a fraction of all requests for government records—and, thus, dealing with journalists may not be the top priority of many (if not most) public records officers—the requesting of public records is widely seen as essential to public affairs journalism. Therefore, understanding how public records officers discursively construct journalism in the context of the requesting process offers a window into how non-journalists define journalism. Understanding this phenomenon can, in turn, offer a clearer understanding of the complicated relationship between public records officers and journalists.

Although anecdotal accounts exist of the often adversarial relationship between public records officers and journalists (Berry, 2009; Cuillier & Davis, 2020), scholars have not deeply explored this relationship. Such research could add to the literature on the discursive construction of journalism's essential identity as an adversary of government (Gans, 1979; Weaver & Wilhoit, 1996; Hanitzsch & Vos, 2017). In particular, one of the goals of this study is to explore perspectives about this relationship from officials on the other side of this adversarial relationship. This discursive site is especially significant given that public records officers, unlike public relations officials for government agencies, do not play a purely adversarial role when dealing with requests for information (Grusin, 1990; Carlson & Kashani, 2016; Carlson & Cuillier, 2017), but rather straddle the line between agents of government and neutral arbiters of transparency. In an ideal world, these officers are supposed to be helpful to journalists, but the reality is sometimes they are not. This study seeks to explore why that is. In particular, the extent to which public records officers describe their relationship with journalists as adversarial could reveal a potential flashpoint in the discursive battle over constructing journalism's role in democracy.

Research questions

Based on the relative scarcity of research regarding public records officers' attitudes toward transparency and journalists, this study seeks to address the following research questions:

RQ1: What are public records officers' attitudes toward government transparency?
RQ2: What are public records officers' attitudes toward their job role?
RQ3: What are public records officers' attitudes toward journalists?
RQ4: What are public records officers' attitudes toward handling journalists' requests?
RQ5: What role does paternalism play, if any?

Method

This study employed two surveys of federal and state/local public records officers, one by mail and one by email, conducted from January 2018 through July 2018.

Survey procedures

The first survey, from January 2018 to April 2018, involved 271 paper surveys mailed to federal FOIA officers whose office addresses were listed on government websites.[4] A $2 incentive was included with the survey. The Institutional Review Board at the author's university approved the study design and use of the $2 incentive, provided in advance as a token of appreciation for considering to complete the survey. All participation was voluntary. In general, paper surveys sent through the mail and surveys that include incentives tend to be returned at a higher rate than surveys sent via email (Fan & Yan, 2010). However, this wave yielded only 13 valid responses (4.8% response rate). Most of the returned surveys included statements that the FOIA officer could not complete the survey due to an internal policy prohibiting him or her from completing outside surveys, and/or federal law prohibiting him or her from receiving outside payment. These responses came in varying degrees of formality, ranging from official letters from the department's general counsel, to sticky notes with a one-sentence declaration of inability to complete the survey. In each of these responses, the $2 incentive was returned. One response cited the laws in question that generated the concern: 18 U.S.C. § 209, and 5 CFR § 2635.807. In particular, the latter stipulates that an employee of the federal government "shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties."

In the second wave, from May 2018 to July 2018, the survey was emailed to 3,779 members of the American Society of Access Professionals (ASAP), a non-government organization made up of highly professionalized public records officers "dedicated to bringing government FOIA and Privacy Act personnel in touch with the requester community."[5] The 3,779 potential subjects included both state and federal public records officers. Of these, 498 opened the email (13.2%), 56 clicked on the link to the survey (1.5%) and 39 completed all or most of the survey (1%). This response rate is far below most standards for response rates in survey research (Fan & Yan, 2010). Despite these results, studies by Pew Research Center have shown that little relationship exists

[4] https://www.foia.gov/report-makerequest.html (note: this site is no longer updated, but it was available at the time work on this project began.)
[5] https://www.accesspro.org/about-asap/who-we-are/

between survey response rate and accuracy of survey data (Kennedy & Hartig, 2019). More importantly, the highly specialized knowledge of the participants still makes the results valid data for exploratory research (Cresswell & Plano Clark 2007, p. 76; Cresswell & Hirose, 2019; Malterud, Siersma, & Guassora, 2016).

Survey questions

The survey included 59 questions, most indicating agreement to a series of statements using a five-point Likert scale. The initial version of the survey was shared with several faculty members from other academic institutions who had an expertise in the area of studying transparency. The feedback from these faculty members was used to adjust the wording of several of the survey's questions to give them greater resonance with public records officers. Questions were clustered into several areas, measuring several key concepts:

Attitudes toward government transparency

The first group of statements explores opinions toward government transparency in general. These statements are based on studies by Cuillier (2008; Cuillier & Pinkleton, 2011) that have explored attitudes toward transparency among the general public. In particular, statements seek to address the extent to which public records officers feel a duty toward transparency versus a duty toward protecting their agency through keeping records secret (see Table 2, below, for questions).

Attitudes toward job structure

Questions (Table 3) probed how public records officers' agencies handle records requests, as well as how factors such as fees, potential promotions, and legal repercussions affect the transparency process. These statements are based off of Kimball's (2003; 2011; 2012) work documenting the role that fear of punishment plays in leading public records officers to be more likely to withhold records. They are also based on findings from Wagner (2017) and Wasike (2016) about the roles that extralegal factors play in hampering the transparency process, such as insufficiency or resources or pressures from supervisors to withhold or delay the release of information. Participants also were asked to self-report their political ideology on a seven-point Likert scale (1 being very liberal, 7 being very conservative), as well as indicate their trust in the news media on a seven-point scale (1 being very low, 7 being very high).

Attitudes toward journalists in general

The third group of statements (Table 4) explores opinions toward journalists in general. These statements borrow from the work of Cuillier (2008; Cuillier & Pinkleton, 2011) regarding the role of public support for the press in shaping attitudes toward transparency.

Attitudes toward handling journalists' requests

This group of statements (Table 5) explores opinions toward handling journalists' records requests. The statements reflect the Cuillier (2010) study of the role that tone and forcefulness can

play in the process of requesting records, and on Kimball's (2011; 2012; 2016) findings on the role that hostile relationships between public records officers and journalists (especially, "nosy" ones who request reams of documents) play in the transparency process.

Paternalism

Participants were asked to indicate their agreement to five statements (Table 6) designed to assess their level of paternalism, borrowed from McLeod, Detenber and Eveland (2001).

Open-ended questions

Finally, the survey invited participants to respond to three open-ended questions about their jobs:

- What types of records do journalists most routinely request from your office?
- What advice would you give to journalists requesting records?
- What changes, if any, would you make to the FOIA/your state's public records law?

The purpose of the first question was to gather specific information on requests public records officers receive, thereby supplementing responses to statements in the survey about the process of working with journalists' requests. The second and third questions were framed in a way that would elicit prescriptive, normative responses from participants. The goals of gathering such responses were to collect valuable information to share with early-career journalists and journalism students about the requesting process, and to elicit opinions from public records officers about working with journalists and about the transparency process in general.

Analysis

An undergraduate research assistant compiled the responses to the survey in a spreadsheet, and transcribed the participants' free written responses in a word processing document. The author then coded the responses in the spreadsheet into the distinguishable constructs noted above. Participants' responses to open-ended questions were inductively coded and grouped by theme (Lindlof & Taylor, 2011, p. 247). All data and open-ended responses are on file with the author and available upon request.

The software SPSS was used to organize the data and calculate descriptive statistics. Responses to the questions are reported via the means for each individual item as well as in the aggregate in the form of overall means. Because some statements are framed using negative language while opposing statements are framed using positive language, responses to negative statements were reverse-coded to calculate aggregate means. These statements are indicated below in the tables of means to responses to each statement.

Findings

Of the 52 respondents, 28 were federal employees, while 24 were state public records officers. Responses are explored in tables and narrative detail below. As is standard practice in qualitative research, exemplar quotes are cited throughout as a means to interpret the descriptive statistics (Nowell, et al., 2017).

Overall characteristics

Table 1 below reports the means of participants' characteristics and aggregate means of their opinions on the main concepts assessed in this study. Overall, the participants in this study self-reported as politically moderate (M = 3.43 on a seven-point scale). Participants reported relatively high aggregate means for transparency in general, job structure, and journalists.

Table 1: Descriptive statistics for participants' overall characteristics

	N	Min.	Max.	Mean	Std. Dev.
Political ideology (1 being very liberal, 7 being very conservative)	51	1	6	3.43	1.5
Paternalism (5-point scale)	52	3	5	3.97	0.54
Overall trust in the news media (1 = very low, 7 = very high)	50	1	7	4.40	1.63
Increase in trust in the news media over past year (1 = decreased a lot, 5 = increased a lot)	53	1	5	2.51	1.01
Attitudes toward Government Transparency	53	2.45	4.64	3.79	0.55
Attitudes toward Journalists	53	2.14	4.64	3.46	0.65
Attitudes toward Job Structure	53	1.94	4.06	3.30	0.39
Valid N (listwise)	48				

Attitudes toward government transparency

In answering the first research question, the highest aggregate mean for the main concepts explored here was indeed for support for government transparency in general (M = 3.79). This should perhaps not be very surprising given that the subjects of this study are access professionals. However, a look at means to responses to individual questions within this concept can reveal some more interesting conclusions (see Table 2, below). For example, participants tended to not see two otherwise opposite primary functions of the transparency process as mutually exclusive: protecting information that should not be made public (M = 2.79) and providing access to as much information as possible (M = 4.28). Although the difference between these means is substantial, the fact that these means are not located on diametrically opposite sides of the midpoint of the five-point scale reveal that the two functions of transparency and protecting information still must coexist to some degree.

Table 2: Attitudes of public records officers toward government transparency

	N	Min.	Max.	Mean	Std. Dev.
Secrecy can help government run more efficiently.*	53	1	5	2.08	1.11
In general, I think less information should be made available to the public.*	52	1	5	2.08	1.20
Some information just should not be made public, even if the law says it should be.*	52	1	5	2.23	1.44
I see the main purpose of my job as protecting information that should not be made public.*	53	1	5	2.79	1.43
In general, I think more information should be made available to the public than is currently allowed.	53	1	5	3.25	1.18
There is less wrongdoing in government than journalists think there is.*	53	1	5	3.43	1.05
Those who leak classified government information should be prosecuted even if the information is found to serve the public interest.*	53	1	5	3.60	1.25
I see the main purpose of my job as providing access to as much information as possible.	53	1	5	4.28	1.01
My job is important to democracy.	53	1	5	4.43	.84
Providing access to government information is important for a strong democracy.	51	1	5	4.49	.95
Valid N (listwise)	51				

NOTE: The responses to statements denoted with a (*) were reverse-coded to calculate the aggregate means in Table 1.

Attitudes toward job structure

In addressing the second research question, regarding attitudes toward job structure, participants tended to have favorable opinions toward their own ability to follow the law and properly undertake their function in the transparency process, as well as their agency's ability to foster a culture that promotes transparency (see Table 3, below). In particular, there was a very high level of agreement with the statement "my office operates with a culture that promotes transparency and the releasing of records as often as possible" ($M = 4.23$). Consistent with these highly favorable opinions, very few participants leveled criticism on themselves or their agencies when asked about what they would change with public records laws. Rather, coding of responses revealed the most frequent criticism they gave (n = 26) involved the insufficiency of resources that their offices had to do their jobs. Officer 16 lamented that his or her office had to "fight for scraps" from Congress, and that more funding should be devoted in particular to search and retrieval systems—mechanisms at the heart of the issue of dealing with backlogs of requests (Wasike, 2016). Officer 44 argued that a major part of the problem with securing funding was the fact that there is "not enough public awareness of FOIA."

Through some illustrative examples, participants seemed to argue that flaws within the requesting process were systemic and related to top-down mismanagement. Officer 50 suggested that mechanisms need to be put in place to "enforce … accountability—there is none at the Federal level and … the complete lack of it is used as a justification to routinely and systemically violate the law." Officer 1 admitted that "we FOIA Officers are hampered by other employees in our organization that don't want to release records, even if we tell them that we are legally compelled

to do so." Officer 28 called on authorities to "find out why each agency is not meeting its statutory deadlines, especially if they were able to meet those deadlines in the past," appearing to imply that such delinquencies were common. Officer 35 criticized the transparency culture coming from Trump administration:

> The admin[istration] sets the tone for FOIA and public disclosure. [The] current admin is clearly anti-disclosure, and this is the first admin since Johnson which didn't issue an Atty General memo on implementation of the FOIA. That tells you something.

Table 3: Attitudes of public records officers toward job structure

	N	Min.	Max.	Mean	Std. Dev.
I know records custodians who routinely use tricks to keep journalists from gaining access to records.*	53	1	5	1.38	0.81
My supervisor encourages me to withhold as much information as possible.*	53	1	5	1.40	0.84
My office operates with a culture that promotes secrecy and withholding records as often as possible.*	53	1	5	1.49	0.85
If I release records more frequently than not, I am more likely to get a promotion.	53	1	3	1.62	0.86
If I release records more frequently than not, I am more likely to get a raise.	53	1	3	1.62	0.86
The exemptions in the FOIA/my state's public record law are broad enough to allow for withholding almost any record.*	53	1	5	1.91	1.11
At least once, I have been asked to stretch the interpretation of exemptions in the FOIA/my state's open records law to withhold information that otherwise could be made public.*	53	1	5	1.94	1.37
It is common for my office to ask requesters to pay fees to search for documents to dissuade journalists from pursuing a records request.*	53	1	5	2.00	1.32
The threat of jail time or paying a fine for improperly withholding information makes me more likely to disclose information.	53	1	5	2.30	1.30
When fulfilling requests for journalists, I worry that they (the journalists) will report on me unfairly or give my office bad publicity if I withhold the records they request.*	53	1	5	2.51	1.37
The threat of getting my agency sued for improperly withholding information makes me more likely to disclose information.	53	1	5	2.64	1.29
I regularly worry that I will disclose information that should not be disclosed according to the law.*	53	1	5	2.68	1.45
If I withhold information that should have been disclosed under the law, I will be punished.	53	1	5	2.83	1.30
If I release information that should not be disclosed according to the law, I will be punished.*	53	1	5	3.36	1.18
In my opinion, the FOIA/my state's open records law does a good job of balancing disclosure of information and protecting information that should not be made public.	53	1	5	3.66	1.06
My office operates with a culture that promotes transparency and the releasing of records as often as possible.	52	1	5	4.23	1.04
Valid N (listwise)	52				

NOTE: The responses to statements denoted with a (*) were reverse-coded to calculate the aggregate means in Table 1.

Attitudes toward journalists in general

Participants tended to harbor positive opinions toward journalism in general. For example, participants reported high levels of agreement with statements about the value of journalism to democracy (see Table 4, below).

However, results from responses to several statements reveal specific sources of criticism that participants have about journalists. Respondents tended to agree that "journalists care more about getting the story than about the potential harms the story could cause" ($M = 3.43$), and that journalists did not take concerns for individuals' privacy ($M = 3.36$) or national security ($M = 3.06$) seriously enough. Although these criticisms are interesting and deserving of future exploration, it is also possible that self-reporting bias can explain the differences between the relatively high favorability toward journalism overall and the relatively high unfavorable opinions toward journalists in specific contexts.

Table 4: Attitudes of public records officers toward journalists in general

	N	Min.	Max.	Mean	Std. Dev.
I detest working with journalists.*	53	1	4	1.49	.78
In general, journalists are just out to get people.*	53	1	5	2.21	1.12
Journalists request too much information from my agency.*	52	1	5	2.58	1.36
Overall, the news media have an anti-government bias.*	53	1	5	2.92	1.37
In general, journalists do not take matters of national security seriously enough.*	53	1	5	3.06	1.34
In general, journalists have a good understanding about how the FOIA/our state's open records law works.	53	1	5	3.13	1.16
In general, journalists do not take matters of individuals' privacy seriously enough.*	53	1	5	3.36	1.19
Most journalists try to cover the news in a way that serves the public interest.	53	1	5	3.38	1.08
Journalists care more about getting the story than about the potential harms the story could cause.*	53	1	5	3.43	1.25
Journalists are the eyes and ears of the people.	53	1	5	3.68	1.22
The public should be grateful for the work that journalists do.	53	1	5	3.70	.91
Most journalists who work for the mainstream news media are dedicated professionals.	53	1	5	3.83	.96
It is important for our democracy that the news media act as a watchdog on government.	53	1	5	3.91	1.20
Journalists play an indispensable role in safeguarding democracy.	53	1	5	3.98	1.05
Valid N (listwise)	52				

NOTE: The responses to statements denoted with a (*) were reverse-coded to calculate the aggregate means in Table 1.

Attitudes toward handling journalists' requests

When it comes to attitudes toward journalists' records requests (research question 4), the most common response, coming from nearly half of respondents (n = 26), was the recommendation that journalists be more specific about the records they are requesting. This finding is consistent with past findings from Kimball (2016). Participants argued that not only would they be able to complete the requests more quickly, but more specific requests would make things better for all requesters as they would help free up time and resources. As Officer 47 noted, "When you ask for a broad set of information it can bring up tens of gigs worth of data, [and] it is humanly impossible to fulfill that in a timely manner without forsaking every other FOIA request and making every other requester wait months longer."

Participants strongly suggested that they do not prefer informal modes of fulfilling requests (see Table 5, below). This could suggest that public records officers prefer that requests be made within the legal parameters of the requesting process, with all requests documented so that accountability of the process is assured.

Most interestingly, some of the respondents accused reporters of bad journalism by making overly broad requests. For example, Officer 52 responded, "Transparency is important but please stop asking for records just out of nosiness or trying to be a detective. Media rarely gets the full story and they are doing more harm than good." Officer 20 noted that most requests from journalists dealt with what he or she perceived as a nosy desire to see public officials' emails. He or she argued that public records requests "should be [about] topics of importance, but they [journalists] just want to see employee emails." Officer 2 agreed: "Too many requests we get are from agency personnel for 'any and all' emails concerning this or that—people wanting to be in another person's personal business not all about showing operations/activities of the government." Several participants went so far as to call for updates to the FOIA or state sunshine laws that would outlaw overly broad requests.

A couple of participants went even further on the issue of specificity and called on journalists to share with them what their stories were about. Officer 44 suggested, "When possible, indicate what the story is about so that FOIA officers could produce all documents relevant to their requests." Officer 13 agreed, saying, "For transparency it should be stated why the request is made." These opinions were outliers, matching the relatively low levels of agreement with the statements "journalists should have to give a reason for making requests" ($M = 2.21$) and "when journalists request records, I want to know why" ($M = 2.64$), and the high level of agreement with the statement "it does not matter why people ask for records" ($M = 3.96$). However, criticism from Officer 36 about journalists' ability to make sense of the many documents they receive suggest that a paternalistic disposition undergirds these sentiments. "Too many reporters don't understand the records that they receive, resulting in misinforming the public when using FOIA," Officer 36 said. "Use public relations whenever possible."

A few participants argued that the specificity issue was easily solvable by journalists doing their homework and understanding more about the unique workings of each agency. "Learn more about what records are generated and maintained," Officer 34 suggested. Officer 16 echoed that sentiment, and offered some very specific advice for journalists who frequently request government emails: "Learn how agency email system works, e.g. Gmail v. Outlook and how that may impact search and retrieval capabilities." Officer 46 noted that "the FOIA does not supersede any existing statute, and it makes no difference that it might be in the public interest."

Several participants also criticized journalists for being too pushy, which they saw as coming from undue skepticism among journalists that public records officers were hiding information from journalists. Officer 3 mused, "Never ceases to amaze me how everyone expects we have records of everything!" Officer 44 urged journalists to "refrain from assuming that FOIA Officers are 'covering up' information." Officer 39 similarly lamented the pushback he or she received from skeptical journalists, saying, "Trust me if I tell you it's not there!" These responses could be seen as consistent with the high levels of paternalism reported by participants, as well as the relatively high level of agreement with the statement "there is less wrongdoing in government than journalists think there is" ($M = 3.43$; see Table 2). That could also simply reflect a high degree of frustration with journalists for their perceived lack of knowledge of the requesting process.

Many (n = 23) respondents called on journalists to be more respectful of the process of requesting records. Some of these respondents argued that the journalists they work with are indifferent toward the feasibility of fulfilling large requests, especially in a timely fashion. Officer 32 offered the following advice: "Be patient. … Be considerate of our time. Our staff is small. Your request is not the only one we have to process. Stop asking for mountains of documents and expect it to be processed in 20 days." Officer 17 criticized journalists for believing they deserved special treatment: "Don't be so forceful and aggressive [about] what you think you should have because of your position." Officer 39 echoed this sentiment: "I dislike working with journalists who aren't realistic about backlogs, or who expect different customer service than any other requester." Several other participants suggested that public records laws were to blame for journalists feeling such a sense of entitlement, arguing that these laws should no longer give journalists special treatment through fee waivers. They argued that ending this provision would solve the problem of journalists making broad requests for numerous documents by making such requests costlier. These sentiments further point toward the notion that journalists can potentially do more harm than good to the transparency process, according to many participants.

For several respondents, respecting the transparency process simply meant being treated with respect when being asked to fulfill requests for records:

> Please be nice!! I get so many nasty requests. We feel like everyone hates us (requestors, congress, the public). We fulfill all requests the same, but if you seem approachable, we are more likely to call [you back] with questions and updates. (Officer 7)

> Be kind, work with us, we are severely short staffed and lack technology that works efficiently, we want to fulfill requests, we just don't have the resources to do it as fast as we would like. (Officer 18)

> Refrain from being antagonistic with FOIA Officers. (Officer 44)

Table 5: Attitudes of public records officers toward handling requests from journalists

	N	Min.	Max.	Mean	Std. Dev.
I am more able to help fulfill a journalist's request for records if he or she asks for it in person rather than through an official FOIA/Open Records request.	52	1	4	1.44	.80
I prefer dealing with records requests from journalists informally and in person rather than through an official FOIA/Open Records request.	52	1	4	1.81	.99
Journalists use official FOIA/Open Records requests too often. They should ask for records face-to-face more instead.	52	1	5	1.83	1.18
Journalists should have to give a reason for making a records request.	53	1	5	2.21	1.50
I only consider a request to be from a journalist if the requester works for a professional media outlet, like a newspaper, TV station or a reputable news website.	53	1	5	2.38	1.44
When journalists request records, I want to know why.	53	1	5	2.47	1.30
To me, a "citizen journalist" is not a journalist when it comes to requesting public records.	53	1	5	2.75	1.33
I have a good working relationship with members of the news media.	52	1	5	3.63	.91
Journalists don't appreciate how difficult my job is.	53	1	5	3.68	1.28
It does not matter why people ask for records.	53	1	5	3.96	1.30
I treat requests from journalists no differently from requests from non-journalists.	52	1	5	4.08	1.28
Valid N (listwise)	51				

NOTE: These statements are not designed to make up a scale. Rather, they are meant solely for gathering information about public records officers' experiences with the requesting process. Furthermore, not every item in this category from the original survey is reported here due to space limitations.

Paternalism

Table 6 reports means for the five statements used to build the paternalism scale. Participants reported high levels of paternalism ($M = 3.97$ on a five-point scale).

Table 6: Paternalism

	N	Min.	Max.	Mean	Std. Dev.
Just because people are unable to help themselves doesn't mean the government should step in and try to help them.*	52	1	5	3.60	1.03
If people are unable to help themselves, it is the responsibility of others to help them.	52	2	5	3.77	.88
Sometimes it is necessary to protect people from doing harm to themselves.	52	2	5	4.02	.85
Some people are better than others at recognizing harmful influences.	52	2	5	4.19	.79
It is important for the government to take steps to ensure the well-being of citizens.	52	2	5	4.29	.75
Valid N (listwise)	52				

NOTE: The responses to statements denoted with a (*) were reverse-coded to calculate the aggregate means in Table 1.
Source: McLeod, Detenber, & Eveland, 2001

Discussion and conclusion

This study has important implications for both scholarship and practice. In the context of law and sociology, participants' opinions toward the transparency process suggest that the focus of study should not be on whether or not public records officers follow the letter of the law (Hopman, 2017). Rather, they point toward Griffiths' (2017) notion that the operation of the law is all about power relationships; in the context of the operation of FOIA or state sunshine laws, findings here suggest that public records officers may seek to wrest authority from journalists as primary agents of the transparency process. Indeed, findings from this study point toward a strong sense of paternalism among public records officers that may lead them to contend that they (not journalists) know best about how to make government transparency work for democracy.

Viewed in the context of journalistic discursive institutionalism, public records officers staking such a claim suggests that journalists' fundamental role as watchdogs of government (Hanitzsch & Vos, 2017) is more of a site of discursive struggle than we might commonly believe. This implication adds a new dimension to Vos and Thomas' (2018) notion of the discursive struggle over journalistic *authority*. Indeed, many of the sentiments shared by participants in this study point toward the existence of a somewhat antagonistic relationship between journalists and public records officers, which corroborates work by Kimball (2011; 2012; 2016) and adds a new perspective to studies on journalism's essential adversarial role vis-à-vis government (Gans, 1979; Weaver & Wilhoit, 1996; Hanitzsch & Vos, 2017). It is especially significant that participants appear to suggest that journalists are to blame for causing this antagonistic relationship with records officers. Not only do the participants in this study see journalists' perpetuation of this relationship as morally wrong, they also argue that it is counterproductive, as it could unnecessarily harm the goal of furthering government transparency. Thus, to the extent that journalists see

themselves as adversaries of government, they would be wise to understand that performing this adversarial role does not necessarily require being adversarial with public records officers.

These theoretical implications beget several practical implications, as well, both for journalists and public records officers (see Table 7, below). Journalism students are taught to doggedly pursue public records using the federal FOIA or state sunshine laws (Cuillier & Davis, 2020). This pursuit comes from a spirit of journalists being the primary agents of the transparency process (Cuillier, 2008). The results of this study suggest that journalists should approach the transparency process with the understanding that they are at least equals in the transparency process with public records officers. This does not in any way mean that journalists should be less assertive or give up their pursuit of records at the first "no" from public records officers. Rather, it suggests that cooperation might be more helpful to the transparency process than not, and that cooperation is not necessarily the same as compromise. Following the advice offered here by participants—be respectful of the process, treat public records officers with dignity, be specific in your requests, know what kinds of records agencies produce before you request them—is a good place to start to build this spirit of cooperation. Indeed, another interpretation of the findings of this study could be that any sense of enmity of public records officers toward journalists is the result of the former having a pretty thankless job, with requests from journalists only exacerbating the pressures public records officers face from backlogs and a lack of resources. Greater empathy among journalists toward public records officers could go a long way in improving the requesting process.

Table 7: Practical takeaways for public records officers and journalists

Advice for Public Records Officers	*Advice for Journalists*
1. Be prepared to educate journalists on the transparency process.	1. Treat public records officers as equals in the transparency process.
2. Become more familiar with what journalists actually do.	2. As a journalist, you have to assume all officials are hiding critical things, unless you can prove differently. But you can still be polite when acting on skepticism.
3. Understand that many journalists are operating in the same context of diminished resources as many public records officers are.	3. Treat public records officers with dignity.
	4. Be specific in requests.
	5. Know the kind of records agencies produce before requesting them.

Meanwhile, the results of this study can also offer advice for public records officers when working with journalists. First, public records officers should try to empathize with journalists (particularly less experienced reporters) when it comes to their lack of knowledge about the requesting process, as these reporters are spread just as thin as public records officers when doing their jobs. Second, just as journalists should seek to better educate themselves about the requesting process, public records officers should better educate themselves about what journalists actually do beyond their own day-to-day interaction with reporters. Doing so could give public records officers a greater appreciation for journalists' claims to be arbiters of transparency in American democracy, which could, in turn, lead to greater cooperation between the two parties.

This study is limited by several factors. First, the low response rate of the study's survey means that the findings of this study cannot be generalized to the greater population of public records officers. The low response rate could be indicative of self-reporting bias, whereby only the most opinionated or vocal public records officers were motivated to respond. Second, this survey was designed to gather a broad range of information without inducing fatigue that could lead to a decline in participation or a drop in the thoroughness of participation. Thus, invitations for open-ended responses from participants were limited to three questions designed to simultaneously elicit advice for journalists and honest opinions about the working with journalists in the transparency process.

Despite these limitations, the responses here contain a high degree of information power (Malterud, et al., 2016), and thus they should be seen as offering insights into future research on the opinions of public records officers toward the transparency process and journalists' role in it. In particular, more attention should be paid to studying specific instances in which public records officers' paternalistic attitudes might affect their relationships with journalists or their willingness to release information.

Future research should seek to more deeply study the concepts addressed here through a more sophisticated instruments or through more thorough qualitative interviews. Further research also should be done to corroborate public records officers' opinions with opinions of journalists about the transparency process. For instance, if overly broad requests for documents are truly a problem, scholars should investigate what the driving forces are that prompt journalists to continue making such requests. One avenue for future research here is to test journalists' knowledge of which kinds of records exist and which do not, as well as which agencies are responsible for which records.

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Washington State's Public Records Act: A Battle in the 2018 Legislature and Beyond

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Abstract

This case study documents the battle over the Washington State Public Records Act, which raged from 2017 through the end of 2019, reaching a crucial point through an extraordinary combination of citizen activism, journalistic pressure, and court action. The act, adopted in 1972 by a voter initiative, covers all "agencies," but state legislators rejected the classification and refused to honor records requests. Journalists successfully challenged the Legislature in court, and in response lawmakers attempted to update the act to allow for secrecy, but failed. Lessons learned from the scuffle may be applied by legislators and transparency advocates in Washington state and throughout the country.

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Introduction

One key to preserving a healthy democracy is for the governed to have the right of access to government information, and thus oversight. The 1976 U.S. Supreme Court ruling *Buckley v Valeo*, regarding disclosure of campaign contributions and election expenditures in a post-Watergate America, quoted a Supreme Court justice of a previous generation, Louis Brandeis, observing that "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman" (Brandeis, 1976, p. 62).

Besides the Freedom of Information Act covering federal agencies, all 50 states and the District of Columbia have some sort of public records laws, of varying history and effectiveness. A recent examination by Mulvey and Valvo shows that only 12 states do not permit access to legislative records, either by statute or legal precedent. Thirty-eight have statutes that provide at least some access to legislative records (Mulvey and Valvo, 2019). Many of the earliest access laws came about after prodding by media and citizen activists. For example, newspaper associations in California advocated for open-records legislation approved in 1953, and a chapter of Sigma Delta Chi (now the Society of Professional Journalists) in Florida promoted the first legislation in 1957 (Jones, 2011).

This paper examines the status of access to legislative records in Washington state, focusing on the impact of a recent battle that saw the people of the state exercise their right to speech, press, and petition inspired by the same spirit with which the people enacted the state's Public Records Act (PRA) nearly 50 years ago.

The first section of this article reviews the history and origin of the Act, which provides insight into the motivation and methodology of the citizenry seeking to ensure their continued knowledge and the means of acquiring it. The second section describes the Legislature's recent effort to categorically exclude itself from disclosure laws, and the response of the people to that action, which was reminiscent of the campaign that brought the Public Records Act into existence. The third section examines the effect of this recent effort by Washingtonians, as well as the likely ongoing application of such populist energy in the issue of access to legislative records.

The article concludes with lessons learned from this experience, both in Washington state and in other jurisdictions where legislators attempt to exclude themselves from public disclosure laws.

Initiative of the people

Washington's Public Records Act (RCW 42.56) was enacted in 1972 as part of a broad government transparency ballot initiative in 1972 (Kramer, 1972a). Initiative 276 was written and promoted by citizen activists in the early days of Watergate on the national stage, and the people of the state demanded government accountability. The PRA's intent is eloquently declared in its preamble, which states that:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. (RCW 42.56)

This introduction describes the intent and motivation of the proposal that became the PRA, and it was introduced as a ballot issue covering a number of related issues. The descriptive title of the initiative was as "an act relating to campaign financing, activities of lobbyists, access to public records, and financial affairs of elected officials and candidates." It proposed disclosure of the origin of campaign contributions, setting limits on donation amounts, regulating lobbyist activities and establishing the Public Disclosure Commission that continues to operate to this day (Kramer, 1972b).

"Our whole concept of democracy is based on an *informed* and involved citizenry. Trust and confidence in governmental institutions is at an all time low," the advocates wrote in the voters pamphlet, invoking without naming the scandal unfolding in the other Washington (Kramer, 1972b, p. 10). They emphasized its oversight of campaign contributions, adding: "Initiative 276 makes all public records and documents in state and local agencies available for public inspection and copying. Certain records are exempted to protect individual privacy and to safeguard essential governmental functions" (Kramer, 1972b, p. 10). The committee that wrote the voters pamphlet statement included two state legislators, Democratic Sen. Nat Washington and Republican Rep. Art Brown; as well as representatives of the League of Women Voters of Washington, the American Association of University Women, the Washington Environmental Council, and the Washington State Council of Churches.

The fourth major part of Initiative 276 related to "public records," a term defined as including "…any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics" (Kramer, 1972b, p. 56). The initiative proposed making all such "public records" of both state and local agencies available for public inspection and copying by any person, subject only to certain exceptions relating to individual rights of privacy or limited other situations. Agencies were also expected to maintain an index all of their records. The assumption of the organizers and foes alike was that the law would apply to all three branches of government in the state – executive, judicial, and legislative (Cuillier, Dean, & Ross, 2004).

The secretary of state's office analysis of Initiative 276 at the time noted that in 1972 access to public records was generally provided primarily through court orders, and that otherwise officials generally had sovereignty over their records: "in the case of records which the official having custody is not required by law to maintain, the disclosure or nondisclosure of information contained therein is largely within the discretion of this official" (Kramer, 1972b, p. 11).

Opposition to Initiative 276 was voiced by two Republican legislators, Rep. James Kuehnle and Sen. Charles Newschwander. Their statement against the initiative warned that "Initiative 276 threatens individual privacy" notably by requiring "public identification of everyone making a political contribution of $5.00 or more; such personal support then becomes a matter of public records, before the election!" (Kramer, 1972b, p. 11). They predicted that the "reporting burdens of Initiative 276 and constant threat of frivolous or acrimonious citizen suits" would discourage citizen participation in politics as either candidates or supporters, writing, "It will definitely destroy incentive for anyone to run and serve in low-paying part-time offices." The Statement Against did not address the section that became the Public Records Act.

Voters did not buy the opponents' warnings, approving Initiative 276 with 72% of the vote.

Media sue Legislature

Since its adoption, the PRA has largely retained its core language of 1972, and certainly maintains its spirit. When the law took effect in 1973, only 10 narrow exemptions were specified, but over time hundreds more were added through legislative action, and the Public Records Act (PRA) itself has been amended and clarified, notably to accommodate digital records and to insist agencies treat them the same as any other records. Over time, the Legislature deemed itself exempt from the law, eventually coming to blows with the media in 2017.

In 2017, media representatives submitted public records requests to all legislators, seeking their calendars and specified email messages. Only a handful of legislators complied; most claimed exemption from disclosure. In September of that year, in response to the denials, a consortium of media sued the Legislature, led by The Associated Press and accompanied by Northwest News Network (public radio), KING-TV, KIRO 7, *The Seattle Times*, *The News Tribune* in Tacoma, *The Spokesman-Review* in Spokane, Allied Daily Newspapers of Washington (representing all Washington dailies), Sound Publishing (which publishes 46 community newspapers in Washington), and The Washington Newspaper Publishers Association (representing more than 100 community newspapers). The attorney general of the state filed an amicus brief supporting the journalists. Representing the group was Seattle attorney Michele Earl-Hubbard, a former journalist who has litigated numerous public records cases and attorney of record for a number of news organizations, including the WNPA.

Judge Chris Lanese of Thurston County Superior Court, in *Associated Press, et. al. v. Washington State Legislature,* ruled January 19, 2018, in favor of the media, citing "the plain and unambiguous language of the Public Records Act," and stating that RCW 42.56 applies to the offices of the state's senators and representatives (Thurston County Superior Court, 2018). Judge Lanese noted "the mandate that the Public Records Act be liberally construed" when declaring individual legislators' offices were "agencies" that were in violation of the PRA by failing to respond to the media's records requests that launched the litigation. Even if the definition of "agency" could be argued in 1972, a 1995 amendment to the PRA had applied the law to "all state agencies" including "every state office" (Revised Code of Washington, 1995, Ch 397, 1(1)), which was reinforced in subsequent amendments.

Granted, while individual legislators' offices were deemed subject to the PRA, the court stated that the Washington State Legislature as a body overall is not an "agency," but rather a branch of government, and therefore not subject to the PRA; this is one of the Legislature's most vehement ongoing arguments that it is not subject to the PRA. Likewise, this is the status of the judiciary. In lieu of abiding by the PRA, Washington's courts adopted in 2004, after several years of hearings and discussion, General Rule 31, which essentially affirms the same spirit of access, stating, "It is the policy of the courts to facilitate access to court records" and prohibits fees for viewing records at a courthouse (Washington Courts, General Rules)**.**

Legislative battle of 2018

The Legislature, a part-time governing body that convenes annually in Olympia starting in January, had been in session for about three weeks when Judge Lanese issued his order in *Associated Press, et. al. v. Washington State Legislature*. While the state would appeal the decision

to a higher court, legislators were not going to wait around; they got to work quickly, intent on passing legislation that would negate the court ruling.

One of the legislators' concerns about the PRA applying to the Legislature was that they would have to disclose their "work product" – the behind-the-scenes discussions, drafts, and other sausage-making that lead to the proposed legislation before it "drops," or is formally introduced as a bill and assigned a number (Legislative Task Force, 2018a). One can only imagine the behind-the-scenes flurry that preceded introduction of Senate Bill 6617, which stated in its description, "An act relating to records disclosure obligations of the legislative branch." It was introduced for first reading on Thursday, February 22, 2018, when the Senate suspended the rules to place the bill on the second reading calendar immediately. Since the bill zoomed to second reading status, it was not assigned for review and scrutiny by a legislative committee; rather, the Senate immediately convened a legislative work session that provided the only opportunity for citizen comment in person in a legislative gathering. The haste of the Legislature's action did not allow dissemination of the schedule, and so only those who were nearby were likely to be able to attend and watch the proceedings.

Senate Bill 6617 stated that the Legislature was not an agency ("like the judiciary, is a branch of government") and was exempt from the PRA's disclosure requirements. It touted the Legislature's practices of transparency, noting that "the state Constitution requires the doors of the chambers to remain open" and that "presiding officers must sign legislation in open session." The legislation stated that the secretary of state was charged with maintaining "records of the official acts of the Legislature" and acknowledged that "the state Constitution also protects the right of the people to petition and communicate with their elected representatives." These obligations and practices, the bill's sponsors contended, affirmed its commitment to access. The text of the bill included this statement:

> For these reasons, the Legislature intends to establish records disclosure obligations that preserve the independent deliberation of the people's representatives while providing access to legislative public records. The legislative records disclosure obligations in this act establish continued public access to specified records of the Legislature as originally codified in the public records act in 1995, as well as additional records as provided in this act. (Washington State Legislature, SB 6617)

This proposed legislative public records act mirrored some of the existing PRA provisions, such as making public records available for public inspection and limiting fees for copying documents. It would also follow the PRA standards of requiring a response within five business days, either to release the document, seek clarification, request additional time for specified and standard reasons, or to deny access and cite the legal exemption. SB 6617's specific list of coverage was:

(a) Correspondence, amendments, reports, and minutes of meetings, made by or submitted to legislative committees or subcommittees;

(b) Transcripts, other records of hearings, or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions;

(c) Internal accounting and financial records, such as records of payments in lieu of per diem or reimbursement of member expenses;

(d) Personnel leave, travel, and payroll records;

(e) Records of legislative sessions such as journals, floor amendments and recordings of floor debate;

(f) Bills and bill reports;

(g) Reports submitted to the Legislature;

(h) Final dispositions of disciplinary proceedings by the facilities and operations or executive rules committees;

(i) Legislators' calendar notations of dates, events, and names of individuals or organizations, for meetings or events that are related to official legislative duties and that occur July 1, 2018, and thereafter;

(j) Legislators' correspondence dated July 1, 2018, and thereafter on legislative business to and from persons outside the Legislature who are not constituents; and

(k) Any other record designated a legislative public record by any official action of the Senate or the House of Representatives.

It is important to note that many of these items, such as bills and bill reports, transcripts and recordings of hearings, submitted testimony and reports, budget and payroll records were already treated as public records and are proactively available on state and legislative websites. The only significant addition was the Legislature's offer to make public its members' calendars and their communications with lobbyists, who were the "non-constituents" referenced in item j, and to release the final dispositions of investigations. However, the legislation would keep a range of emails confidential, including correspondence between legislators and constituents, as well as email among legislators, or between lawmakers and their staff. The bill, if passed, was to take effect immediately, limiting access to some of the documents sought by the media plaintiffs and essentially an attempt to "reverse the effect of a court ruling," according to Hugh Spitzer, acting professor at the University of Washington School of Law (O'Sullivan, 2018). The legislation didn't mention the *AP et. al.* litigation, but its threat clearly loomed above the brief discussion in the legislative chambers.

Although the Legislature touted SB 6617 as promoting access to government, the process of its introduction and consideration was hardly transparent. Because SB 6617 was not available for review until it was introduced, and then legislative action was accelerated to limit discussion and outside testimony, citizens groups were caught with short notice of the proposed law. Media reported on the bill promptly and widely, recognizing it as an attempt to address the court case. "Washington state lawmakers make speedy move to shield their records from the public," was the headline in *The Seattle Times* article posted on February 23, 2018. The subhed read, "Ever seen legislation in Olympia move this fast? With no debate, the Washington state House and Senate approved a bill Friday that makes some legislative records public starting in July — but shields records that already exist." The report from Olympia bureau reporter Joseph O'Sullivan suggested, "Forget everything you ever learned about how a bill becomes a law. Forget those public hearings, floor debates and deliberations." He traced SB 6617's race through the chambers, and related the status of the *AP et. al.* case, to which the *Times* was a party (O'Sullivan, 2018).

The Spokesman-Review, a Spokane daily newspaper, offered a biting headline: "Legislature quickly passes bill exempting itself from much of state Public Records Act." The February 23, 2018, article noted the opposition, and hinted of leadership pressure to stifle debate and keep opposition quiet: "Although 14 House members voted against the bill, none of them spoke against it or objected when the rules were set aside to bring the bill to the floor. Rep. Melanie Stambaugh, R-Puyallup, one of those who voted no, said opponents were told not to speak against it," wrote Olympia correspondent Jim Camden. "In an email to the Washington Policy Center, a

group that opposes the bill, Stambaugh wrote she was disappointed at what she called 'a blatant disregard for transparency in the legislative process'" (Camden, 2018).

The brief deliberation and hasty process drew eloquent ire from Toby Nixon, a Kirkland city councilmember and former state legislator. "What do legislators have to hide? Why should this be done in secret, outside the normal legislative process, well after cutoffs when bills are supposed to be dead? Is it that they know this is terrible public policy and are afraid to do it in the light of day?" (T. Nixon, personal communication, February 21, 2018). He was especially distressed that the Legislature was allowing "public comment" but not testimony during the "work session," which was not a full hearing, and that the event was scheduled with less than 24 hours of notice. Nixon called the legislators' schedule "an abuse of process."

Nixon also served as president of the Washington Coalition for Open Government, a nonprofit, nonpartisan organization that promotes information and use of Washington's sunshine laws. The organization provides training, resources, referrals, and information about pending legislation – and the mild-mannered Nixon was incensed that the Legislature was acting so quickly that WCOG could not effectively alert its members, and he would also be unable to attend and take advantage of the thin opening for direct input by the public.

Only five constituents were present and allowed to speak at the brief Senate session on February 22: Kasia Pierzga, former publisher of the *Whidbey Record* newspaper who lived in Olympia; Navy retiree Gordon Padget of Vancouver, Washington; *The News Tribune* Publisher and President David Zeeck; Rowland Thompson, lobbyist for Allied Daily Newspapers of Washington and the Washington Newspaper Publishers Association; and political gadfly and ballot initiative promoter Tim Eyman. The way the bill was sneaked through needed to be addressed, Padget said, for whom the matter was a First Amendment issue (G. Padget, personal communication, September 21, 2018). "There would be 20 publishers here, had we had more notice," Zeeck told the legislators (*Times*, 2018).

The Senate heard the spare but adamant comment from constituents on February 22, approved SB 6617 on February 23 by a vote of 41-7 with one absent, and sent the bill to the House, which acted within 20 minutes of the Senate passage. The House accepted the bill for first reading and, just as the other chamber had done, suspended the rules to place the legislation on second reading immediately. After the second reading, the House accelerated the proceedings and scheduled SB 6617 for its third reading. After comments from two representatives who, with no apparent irony, praised the legislation as an example of improved access for citizens to their elected officials, the House approved the bill by a vote of 83-14 with one member excused from voting. The leaders of both chambers immediately signed the measure. On the same day, February 23, SB 6617, which exempted the Washington State Legislature from the voter-initiated Public Records Act but made public the members' calendars and some of their correspondence, went to the governor's desk to await his signature less than 48 hours after its introduction. Gov. Jay Inslee, a second-term Democrat, was out of town but was expected to return within days.

Activists sprang to work. The WCOG sent emails to their members and mailing lists, and told the story on social media. Alerts also went out from other civic organizations. Thompson alerted members of Allied Dailies and WNPA, which he also represented as a lobbyist in Olympia. The constituents and lobbyists were under a tight deadline; Washington law gives the governor five business days to sign or veto legislation.

Some legislators were distressed at the media response. Democratic Rep. Gerry Pollet, an open government advocate who had introduced a broader bill in the House that he said was supported by only six of his colleagues, released a lengthy statement to constituents on February

26, explaining that he supported SB 6617 as an initial step toward greater accountability. He pointed out that he was one of just three legislators to release his emails and calendar to the media in response to the PRA request that was the basis of the *AP et. al.* lawsuit. On the House floor on February 23, he said, "There are things we need to move further in the future. I hope we will take this as a first step. Let's all go forward into the sunshine." (Washington House of Representatives, 2018)

But the news coverage was not the most striking response from the media. On Tuesday, February 27, readers all over the state awoke to an unusual sight on the front pages of their local newspapers. Thirteen Washington dailies took the unusual step of running page one editorial commentary urging Gov. Inslee to veto the theoretically veto-proof SB 6617, and rallying their readers to send the same message. Two university newspapers, the *Daily Evergreen* at Washington State University and *The Western Front* at Western Washington University, joined the campaign with front-page editorials urging students to contact the governor's office, and explaining why public records matter to college students. Nearly all of the state's community weeklies ran editorials, although most of those ran inside on the editorial page.

"Governor, citizens: Please stand up for open government," exhorted the *Skagit Valley Herald* in an opinion piece spread vertically across the front page of the community daily. "They decide. That's the message from state lawmakers to the public last week when they made changes to the Public Records Act at break-neck speed. They weren't speaking for We the People." The newspaper, like its colleagues across the state, urged readers to tell the governor to veto the bill, saying the legislation made a mockery of the transparency it purported to promote. The Legislature's hometown newspaper, *The Daily Olympian*, published a page one editorial headlined, "Inslee should veto public records bill" and explained that publishing an editorial on the front page is an unusual step taken in solidarity with other newspapers. It described the Legislature's action as "a shocking display of secrecy, stealth and a Big Brother's twist of truth." Several television stations repeatedly ran short editorials describing the Legislature's action on SB 6617 and urging viewers to contact the governor's office in opposition to the legislation.

The Seattle Times, whose editorial page editor, Kate Riley, helped organize the media's effort, wrote an editorial for the front page, only the second time in 110 years the newspaper had published a page one editorial. "Gov. Inslee, stand up for the people and veto bill on legislative secrecy," was the headline over the piece that described "an egregious breach of the public trust" and supplied the governor's email address and telephone number. The governor's office reported receiving more than 19,000 calls and emails since passage of SB 6617, the vast majority of them urging the governor to veto the measure both for its content and for the process of its passage.

Not only the governor's office got calls; legislators were hearing from their constituents, as well. Many legislators in favor of SB 6617 sent or posted statements to their constituents that were remarkably similar to each other. Their message was that SB 6617 was necessary to protect constituents' privacy and referenced the media lawsuit as the impetus to take quick action. They claimed that the Thurston County Superior Court ruling designating legislative offices as "agencies" that needed to follow the PRA created an untenable burden on each individual legislative staff. And they echoed Rep. Pollet's claim that this legislative action represented progress toward transparency. For example, the office of Democratic Sen. Jamie Pedersen released a message on February 26 explaining his support for the bill as a new scope of accountability by legislators. The statement to constituents read:

> The bill does not merely codify the Legislature's current interpretation of the Public Records Act. It also adds substantial new categories of records, including legislators' calendars and letters and emails from lobbyists, that will be subject to public disclosure. These documents have never been public before. (Pederson, 2018)

The motivations of the legislators who voted against the bill were neither uniform nor clear. Some indicated it was an insufficient gesture of transparency, although some legislators who advocated greater disclosure, such as Rep. Pollet, supported it as a first step. Some expressed dismay at the bill's rapid process through the legislative chambers, and a few were so wary of mandated access that they did not wish to release even their office calendars for public scrutiny.

Resolution

As is fitting a legislative confrontation, a series of compromises brought resolution – at least for this chapter of the story. A way needed to be found for the legislators to save face. The governor's office reached out to the leadership of both houses, a legislator who asked not to be identified confirmed for this research.

The governor's office received separate letters dated March 1, 2018, from the House Democratic Caucus, the House Republicans Caucus and the Senate Democrats, all urging him to veto SB 6617. Correspondence from the minority party House Republican Caucus expressed their frustration that the Democratic leadership had refused to schedule hearings on an alternative bill also addressing public access to legislative records. In their correspondence to the Governor, the House Republican Caucus members explained their concerns, writing:

> As members of the minority caucus we don't get to choose which bills run or when they run. We only get to choose to vote yes or no. While SB 6617 was the only solution allowed by the Democrats, many of our members thought this was at least a step in the right direction. However, all 48 of our members wished they could have voted for a better bill. (Republican Caucus, 2018)

The Democrats were also blunt, but took a different approach. Correspondence from the Senate and House were identical, and their letter to Gov. Inslee said:

> We have heard loud and clear from our constituents that they are angry and frustrated with the process by which we passed ESB 6617, the Legislative Public Records Act. We supported the bill because of the important transparency reforms that it would enact. … However, we made a mistake by failing to go through a full public hearing process on this very important legislation. The hurried process has overshadowed the positive reforms in the bill. The Democrats joined the thousands of constituents by asking, 'we think that the only way to make this right is for you to veto the bill and for us to start again.' (Democratic Caucus, 2018)

Another ingredient of the sausage-making was the group of media plaintiffs. Attorney Earl-Hubbard wrote to the Governor also urging a veto on behalf of her clients, suggesting a

compromise may be possible, and expressing willingness to "work collaboratively with legislators and other stakeholders to resolve our differences transparently. It is our belief the public has the right to weigh in on any potential changes to public records law before it is enacted." (Earl-Hubbard, March 1, 2018) The plaintiffs offered to jointly with the defendants seek a stay of proceedings in the trial court, and promised to not seek to enforce the order during appeal. They also agreed to not launch an initiative or referendum, the very method that had provided voter relief 45 years earlier and enacted the Public Records Act, during the stay and while the plaintiffs worked with the Legislature on new legislation or another remedy.

This truce took effect on March 1, 2018, when Gov. Inslee issued a statement vetoing the beleaguered bill in its entirety "so that the Legislature can engage with the public and stakeholders in a transparent process to discuss and consider legislative public records issues." As a further nod to legislators, he acknowledged that SB 6617 was well-intentioned but its path through the legislative process allowed insufficient comment from interested parties. His statement noted that "while a wide majority of lawmakers voted for [SB 6617] as a genuine effort to create clarity and increase transparency, the process was seriously flawed." The constituents, too, got a shout-out in recognition of the extraordinary effort: "I applaud Washingtonians for making their voices heard as well as legislators' thoughtful reconsideration."

Stakeholders were pleased but wary, and eager to participate in any discussion of future legislation. Washington Coalition for Open Government's Nixon released a statement on behalf of the organization, expressing both its contention that the Legislature should be covered by existing law, but willingness to meet with lawmakers and discuss their concerns. He said:

> When the people enacted Initiative 276, they intended for it to apply to every branch of state and local government. WCOG looks forward to actively participating in a thorough and deliberative stakeholder process, as should have taken place before the introduction of SB 6617, to provide the greatest possible access to legislative records under the Public Records Act while addressing concerns raised by legislators about constituent privacy and other matters. (Nixon, 2018)

The ubiquity of interest among Washingtonians is aptly illustrated with an anecdote shared by Jason Mercier, director of the Center for Government Reform, who tracks legislation for this branch of the Washington Policy Center, an independent, nonprofit think tank. Mercier, who reports on legislative action through his "Olympia Watch" newsletter, shared that his Uber driver to the airport the week of the veto told him, "Did you hear about that Washington Legislature public records thing? That wasn't right. I contacted the governor to tell him it was wrong." (J. Mercier, personal communication, March 9, 2018) Clearly, the news media's coverage and unusual editorials had drawn widespread attention; the people were indeed insisting on "remaining informed so that they may maintain control over the instruments that they have created," as the preamble to the PRA states, and they had spoken up to remind the Legislature of their expectation.

In the wake of the 2018 legislative session, a Legislative Task Force of 15 legislators, media representatives and other stakeholders met four times in late 2018 to discuss their concerns about access to legislative records and try to reach a common ground for legislation in the 2019 session. No draft legislation resulted; the task force issued a short list of eight consensus statements that identified issues to address in any potential legislation involving access to records, such as ensuring constituent privacy, setting procedures for responses and disputes, and a resource for independent guidance. Six Task Force members released independent statements in the appendix

of the report, generally expressing support for the process but also voicing their particular concerns, ranging from protection of the deliberative process to a call for legislative compliance with the broad access described in I-276. It should be noted that the first Task Force finding was "The Legislature should strive for greater transparency" (Task Force, 2018c).

The 2019 legislative session concluded without addressing the Legislature's role under the Public Records Act. Only SB 5784, invoking the original language of the initiative, ventured into this territory, seeking to clarify the definition of the Legislature and its committees as a branch of government and not a state agency, which was essentially the Legislature's argument in the *AP, et. al.* lawsuit. SB 5784 had one brief hearing in the Senate Committee on State Government, Tribal Relations & Elections, which did not vote on the bill (Washington State Legislature, SB 5784).

Arguments in *AP, et. al. v. Washington State Legislature* were heard in the Supreme Court of the State of Washington on June 11, 2019, and on December 19, 2019, the court ruled 7-2 that while the Legislature itself – as a branch of government – is not an "agency," that individual state legislators' offices are agencies subject to the state Public Records Act. The legislators are subject to the PRA's "narrower public records disclosure mandate by and through each chambers' respective administrative officer," according to the ruling, (*AP, et. al. v. Washington State Legislature (2019),* which affirmed the logic in the January 2018 ruling by Thurston County Superior Court Judge Lanese, who referenced the clear intent of the people in the 1972 initiative that enacted the Public Records Act.

Discussion

This examination of legislative action and the reaction of Washingtonians in 2018 yields several lessons for this and other jurisdictions.

The most straightforward finding is that legislation purportedly promoting transparency will not succeed if it is presented without oversight; that the people expect to be informed about proposed changes in the law and have the opportunity to share their concerns, suggestions and perhaps even praise to the legislators before they take action. However, this expectation can be thwarted; SB 6617 did in fact pass both houses of the Washington State Legislature and landed on the governor's desk, where he initially was expected to sign it into law because the legislative votes of approval were larger than needed to override a veto.

This experience reinforces the importance of the component participants in the process of governing: The courts, which were both weighing challenges to existing laws and casting a foreboding shadow on the legislative targets of the media's litigation; the Legislature, which was moved to take action before a new process might be thrust upon them through a court ruling; the executive, who was willing to reach out to the Legislature and consider an alternative, even compromise action; and the people, who eagerly and vehemently exercised their right to petition their representatives. The law under consideration in this study is the Public Records Act, but also highly relevant to the scenario described here is Article 1, Section 4 of the Washington State Constitution, which asserts the Right of Petition and Assemblage. It states: "The right of petition and of the people peaceably to assemble for the common good shall never be abridged" (Washington State Constitution). This section precedes the right to free speech, which is affirmed in Section 5 of the same document. Of course, another relevant balance is found in Article 2, part a, which states that "the first power reserved by the people is the initiative" (Washington State Constitution).

It should be acknowledged that both the right to petition and the act of alerting citizens to practice their rights are enhanced by a broad base of communications options and technologies. Even though Washington did not have as many traditional news media outlets in 2018 as it did in 1972, other media was an effective component of this experience. Activists spread the word about SB 6617 via social media; newsletters went out on email instead of paper, and were received in time for people to take action. News organizations posted coverage online more quickly than it could appear in print, and also promoted their coverage on social media. Broadcast media repeatedly ran short announcements. The governor and legislators received constituent communications not only by telephone but also by email and through web-based forms on their own websites. Washington experienced an effective 21st-century lobbying effort that offers a striking example for any jurisdiction, that shining light on clandestine legislative action through coordinated media coverage and citizen activism using social media and other quick communications technology can jolt elected officials into responsiveness.

Although state laws and legislative procedures differ, many principles and procedures are in common and this case study should provide ideas, guidance, and encouragement for other jurisdictions. Further research is possible by continuing to monitor the action in Olympia, Washington, and also in watching for similar efforts in other states.

The uprising of Washingtonians against SB 6617 is reminiscent of the citizen activist spirit that enacted the PRA, and the people of the state will likely need to draw on that resolve and energy to continue that fight for access to legislative records. The Supreme Court of the State of Washington ruled for the plaintiffs in *AP et. al. v Washington State Legislature,* and state legislators are adjusting their office practices to comply with their responsibilities under the PRA. They may try again to pass relevant new law, addressing some aspect of the PRA they dislike or find difficult to comply with. Shoving through legislation in the dead of night during the 2018 session didn't work because media and activists paid attention, which is also a lesson that crosses jurisdictions. Legislature-watchers are likely to keep a closer eye on Olympia given their experience in 2018.

Conclusion

This case study is offered as an examination of the fate of proposed changes to the Washington State Public Records Act that revived the spirit and power of petition that enacted the sunshine law 45 years earlier. Ironically, the incident shines a light on how *not* to pass sunshine legislation – that is, in the dark – but determines that 2018 legislative action failed for exactly the same reason the state has a relatively strong Public Records Act today: The vigor of the people in exercising their right to petition their elected officials and demand accountability from them. Initiative 276 passed in 1972 and took effect in 1973; decades later the Legislature sought to clarify its role in sunshine laws of Washington and again felt the power of the petition of the people. The experience demonstrates that the people's voice remains as effective in 2018 as it was in 1972.

This incident also suggests that the Legislature may have lost its best shot at taking control of the scope of transparency rules that it now must follow, given the 2019 ruling of the State Supreme Court in *AP et. al*. The people of Washington rose to the occasion in unprecedented numbers and vigor and are unlikely to ignore future similar scenarios (with a little nudge from the media and activists). In fact, this story didn't have to unfold this way. At least two other bills addressing sunshine laws for the state Legislature languished during the 2018 session; either of them, or even SB 6617, might not have met the same fate had the Legislature followed its

proscribed process of introduction, hearings, and deliberation, which sees a bill wind through the legislative process in weeks, not in hours, and welcomes analysis and public comment.

Despite the state Supreme Court ruling, this story is still unfolding; state legislators are struggling to change their practices and policies to comply with the PRA. They may seek new exemptions to record disclosure under the PRA, perhaps revisiting some of the concerns voiced during the meetings of the Legislative Task Force. Media, activists, and other stakeholders would do well to scrutinize legislation for actions that chip away at the newly-won access to legislative records.

This scenario remains an admonition to every jurisdiction of the power of petition by the people. It demonstrates the successful strategy of forcing acknowledgement of accountability in a jurisdiction that has a history of supporting transparency in most of its government, and it shows what happens when the people exercise their authority, which is a key principle behind any access laws.

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