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Editor's Note
Retaining Control Over the Instruments we Created

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

Someone needs to police the police.

Protests throughout the United States this year sent a message to those in power that a large proportion of citizens are unhappy with their government. Citizen commissions and inspectors general are not enough.

It is up to those who created those agencies, and to those who oversee them.

Us.

In the early 1970s, Common Cause and others pushed for model state public record laws throughout the country, which is why so many statutes share this similar prologue:

"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 retain control over the instruments they have created."[1]

The articles in this issue of the *Journal of Civic Information* focus on the people's oversight – through public record laws – over critical institutions that affect everyday lives, including the police.

Josh Moore, a program attorney at the Reporters Committee for Freedom of the Press, offers an effective legal argument, applying a functional test, for why police employed by private universities should be subject to public records laws in the same way as their brethren in blue in the public sector.

This isn't a new area for Moore, a former journalist who served as a legal intern with the Student Press Law Center,[2] among other places. This is the same nonprofit that has produced such valuable guides as the Clery Act Guide, Covering Campus Crime and Covering Protests. Moore now works for an organization that has recently issued a new guide, Police, Protesters, and the Press, and has long tracked local policies on access to police body camera video.

We know that accessing public records from public police departments can be challenging, but try to get a police report from a private university. Not easy.

[1] See, for example, prologues to the public records laws enacted in Texas, California, West Virginia, and Washington state.

[2] In full disclosure, the publisher of this journal, Frank LoMonte, served as executive director of the Student Press Law Center 2008-2017.

Yet, those officers often have the same powers of arrest and use of force, and can detain, jail and assault anyone within their sphere of influence, student or not. It's that power that has so many groups demanding transparency, not just this year, but for some time. Private university police are functionally acting in the same capacity as those at public universities. They should not be able to hide in the shadows.

Police departments are not the only agencies that require transparency oversight.

The second article in this issue is an analysis by two Canadian researchers of FOI audits conducted in the United States, Canada, and throughout the rest of the world. Kevin Walby, from the criminal justice discipline, and Jeff Yaremko, an independent researcher, review 29 audits conducted for more than 20 years to show the power they have to hold agencies accountable and effect change.

Many readers of this journal have been involved in such audits, where journalists, advocates or "average Joes" fan out to request specific records of agencies within a specific geographical region. They record the results, and then explain to the public what they found, often reporting fees charged, time it took for agencies to respond, and the percentage of agencies that provided the records as requested.

The two authors conclude that audits often result in reform and increased transparency. They also note that audits incorporating a diversity of constituents can be very effective. They lay out six recommendations for those considering audits in the future.

This form of citizen oversight might be one of our last hopes if we wish to hold onto some semblance of government transparency. Public record statutes that include criminal penalties are rarely enforced. Miniscule civil fines are meaningless. Most independent records commissions and ombudsman offices have no teeth. Many public officials know they can ignore the law and get away with it, and an eviscerated legacy media is less likely to sue than it was just 10 years ago.

That is why, if we truly embrace a strong civic information culture, we need to explore other forms of government oversight, including FOI audits, nonprofit advocacy, and public education. Yes, we should continue to work on improving the laws, but attention also should focus on rebuilding our collective civic psyche, so that we may remain in control of those instruments we have created.

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Out from the Curtains of Secrecy: Private University Police and State Open Records Laws

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Abstract

The role of police officers on college campuses has grown in the past 40 years from that of "glorified custodians" to full-fledged police officers, often with powers to search, detain, arrest, and even to use deadly force. Yet most state open records laws have not kept up, failing to require disclosure of records about crimes reported to or arrests made by sworn police officers at private universities. This article provides a full national picture by identifying the statutes and analyzing the cases to address whether state open records laws apply to private university police. It then suggests that the "functional equivalency test" provides courts a method to require transparency at these police departments.

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Introduction

In November 2013, journalists at Houston television station KPRC received a tip about a controversial story: Leaked portions of patrol car footage showed police officers beating a suspected bicycle thief with batons as he lay on a public street. Viewers can hear the suspect, Ivan Joe Waller, screaming while he was struck 13 times within 20 seconds.[1] It was an important local story about how police approached law enforcement in their community, and it came on the heels of the 2012 fatal shooting of Florida teenager Trayvon Martin and a national conversation about police use of force against people of color. KPRC ran into an unexpected hurdle, though, in obtaining more information about the incident: The police officers who beat and arrested Waller on that public street were employed not by the Houston Police Department, but by Rice University. This distinction was important because Rice, despite being empowered by the Texas legislature to hire police officers with countywide jurisdiction,[2] asserted that the state's laws requiring some law enforcement transparency did not apply to the private university's police department.[3]

Open records laws, while not perfect, are meant to be one powerful tool for the public to understand the actions of government, to ferret out corruption, or to pinpoint other causes of concern with those in positions of public trust.[4] There is perhaps no greater position of public trust, of course, than that of a police officer, relied upon to keep the community safe and entrusted with the quintessential governmental authority to detain, search, and arrest.[5] Police officers at private universities today are often on the same footing as officers employed directly by the government; legislatures or other government bodies grant officers the power to arrest, and even the authority to use deadly force when necessary.[6] In fact, one piece of the national conversation around police accountability and race in recent years involved an off-campus traffic stop in which a white University of Cincinnati officer fatally shot Samuel DuBose, a Black man who was not connected to the university, after stopping him for a missing front license plate.[7] Yet, in this era of intense scrutiny of police accountability and of the relationship between law enforcement agencies and their communities,[8] these private university police departments are often left to patrol themselves.

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[1] Robert Arnold, *Local 2 Investigates Controversial Arrest Involving Rice University Police*, KPRC-TV (Nov. 27, 2013), https://perma.cc/N7UM-G5LP.

[2] ABOUT RUPD: OUR AUTHORITY, https://perma.cc/LWC5-QF2D (last visited May 31, 2020).

[3] Robert Arnold, *Controversial Police Arrest Prompts Movement to Change Law*, KPRC-TV (March 6, 2015), https://perma.cc/7DK8-6NAS (noting that Rice eventually released the full patrol car video after initially refusing to provide it or any additional records about the incident).

[4] *See, e.g.*, TEX. GOV'T CODE § 552.001 ("The people insist on remaining informed so that they may retain control over the instruments they have created.").

[5] *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 J. OF CONST. L. 745, 793 (2007).

[6] *See* State *ex. rel.* Schiffbauer v. Banaszak, 33 N.E.3d 52, 54 (Ohio 2015) (noting that private university police in Ohio have the authority to confiscate property, search, arrest, and carry deadly weapons).

[7] *See The Shooting Of Samuel Dubose*, 129 HARV. L. REV. 1168, 1168–69 (2016).

[8] *See, e.g.*, Grace Sparks, *Polls Show Widespread Support of Black Lives Matters Protests and Varied Views on How to Reform Police*, CNN (June 18, 2020), https://perma.cc/G4J7-85L2 (summarizing multiple public opinion polls conducted in 2020 showing support for various proposals to increase police accountability and transparency following nationwide protests sparked by a white Minneapolis police officer killing George Floyd, a Black man); Samuel Walker, *"Not Dead Yet": The National Police Crisis, A New Conversation About Policing, and the Prospects for Accountability-Related Police Reform*, 2018 U. ILL. L. REV. 1777, 1784–90 (2018) (describing the national movement for police structural reforms and transparency sparked by multiple incidents of a white police officer killing a black teenager).

In the past 40 years, the role of campus police officers has grown from that of "glorified custodians" [9]—their greatest power originating from a heavy set of keys giving them access to all parts of campus—to full-fledged police officers carrying handcuffs, a baton, and often even a pistol. Their role has not just evolved at public institutions; statistics from a 2011–2012 survey of campus police—the most recent data available—showed that nearly 40 percent of the nation's private colleges and universities employed police officers with full arrest powers, known as "sworn" officers, and most of those carry batons and sidearms.[10] Reflecting these officers' concentration at universities with larger enrollments, almost half of the students attending private universities in the United States—45 percent—had sworn and armed police officers on campus.[11]

Since that 2012 survey, states have permitted more private universities to create police departments, and these departments are increasingly large and sophisticated law enforcement agencies. Johns Hopkins University in Baltimore, for example, announced plans to hire about 100 armed officers after it received permission from the Maryland legislature in 2019 to create a police force.[12] By comparison, only 5% of all local police departments in the United States employed 100 or more sworn officers in 2013.[13] Of the nation's 10 largest campus police departments in 2012, seven were at private universities, ranging from 86 to 133 sworn officers.[14] And these private university police officers often do not just patrol university grounds; a large majority of sworn officers have arrest jurisdiction beyond campus, and many have statewide authority.[15] The University of Chicago, for example, employs about 100 officers patrolling an area with 65,000 residents, only about 15,000 of whom are students.[16] Yet the private university refused to release records on the number of stops its officers had made to students and nearby residents investigating whether the department was racially profiling neighborhood residents.[17]

States have only recently begun to take notice of these police officers' unchecked but growing influence on and off campus. Texas, for example, passed legislation in 2015 explicitly applying the state's open records law to private university police departments in response to the incident at Rice.[18] But while most open records laws have long granted the public access to certain

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[9] *See* Jamie P. Hopkins & Kristina Neff, *Jurisdictional Confusion That Rivals Erie: The Jurisdictional Limits of Campus Police*, 75 MONT. L. REV. 123, 126–27 (2014) (describing the initial role of these police officers as "watchmen" with mostly "maintenance-related tasks" (citations omitted)).

[10] BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, CAMPUS LAW ENFORCEMENT, 2011–12, 1, 9 (Jan. 2015), https://www.bjs.gov/content/pub/pdf/cle1112.pdf. This article addresses only these "sworn" officers at colleges and universities possessing arrest powers, and will refer to them generally as "private university police officers."

[11] *Id.*

[12] Pamela Wood, *Maryland General Assembly Gives Final OK to Armed Johns Hopkins University Police Force*, BALTIMORE SUN (Apr. 2, 2019), https://perma.cc/Q83J-6ZH9. However, after nationwide public outcry over police violence led to protests throughout the spring and summer of 2020, the university hit "pause" on its plans and decided to wait two years. *See* Lilah Burke, *Johns Hopkins Says No Private Police, for Now*, INSIDE HIGHER ED (June 15, 2020), https://www.insidehighered.com/news/2020/06/15/johns-hopkins-presses-pause-private-police-force-plans.

[13] BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 3 (May 2015), https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf.

[14] Jonah Newman, *Police Departments at Illinois Private Universities Get Pass on Releasing Data*, CHI. REPORTER (July 7, 2015), https://perma.cc/A6LJ-W878.

[15] REAVES, CAMPUS LAW ENFORCEMENT, *supra* note 10, at 4 (finding 20 percent of sworn private university police have statewide arrest powers).

[16] Hannah K. Gold, *Why Does a Campus Police Department Have Jurisdiction Over 65,000 Chicago Residents?*, VICE (Nov. 12, 2014), https://perma.cc/E9D8-ALWY.

[17] *Id.*; *see also* Imani J. Jackson & Frank LoMonte, *Policing Transparency*, A.B.A. HUMAN RIGHTS MAGAZINE (Jan. 6, 2020), https://perma.cc/LZ6B-3B3S.

[18] TEX. EDUC. CODE § 51.212; Arnold, *supra* note 3.

records—such as arrest reports, jail booking logs, or body-camera video—of law enforcement agencies operated by cities and counties,[19] most states' laws do not yet explicitly require that transparency from sworn officers at private universities.[20] The result in those states is often that secrecy prevails when these officers make an arrest or respond to a crime,[21] as it did originally at Rice. However, activity over the past few years signals the tide may be changing, with eight states now securing public access to at least some private university policing information through statute or judicial decision.[22]

Part I of this article examines the importance of open records laws and how courts have used the functional equivalency test to effectuate the legislative intent behind those laws. It also explains how private universities receive their police powers from the government. Part II provides a picture of the emerging issue of transparency at private university police departments by analyzing cases to confront the issue. Part III argues that open records laws should apply to private university police officers, who perform an essential state function and exercise powers bestowed by and regulated by the government. It suggests that the functional equivalency test provides courts a clear method to require transparency at these police departments even when they are not explicitly listed in a particular state's open records law.

Chapter I. The principles of openness and government authority

A. The important role of open records in a democratic society

America's state and federal governments have long recognized the importance of transparency on the part of government agencies. In 1966, President Lyndon B. Johnson signed the Freedom of Information Act ("FOIA") into law, declaring "[n]o one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."[23]

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[19] *See generally* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, POLICE RECORDS: A REPORTER'S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS 1 (2008), https://www.rcfp.org/wp-content/uploads/imported/POLICE.pdf ("RCFP GUIDE") (noting that most states require the release of information about arrests and criminal convictions).

[20] The federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (1990), imposes some requirements on private colleges and universities participating in federal financial aid programs. *Id.* § 1092(f)(1). The Clery Act requires them to release: (1) annual campus crime statistics and policies, (2) timely notice to the campus community when a crime is considered to be a threat to others, and (3) a daily crime log. *Id.* § 1092(f). However, this does not go as far as open records laws; these crime logs could be as simple as listing the charge, time, and location of the arrest. *Id.* § 1092(f). Furthermore, this survey does not include statutes that require little or no more than the federal Clery Act. For example, Kentucky's Michael Minger Act mostly mirrors the Clery Act in requiring a daily crime log and a timely report of crimes deemed a threat to public safety. KY. REV. STAT. 164.948-.9485.

[21] When the Student Press Law Center submitted open records requests to 30 private universities, the only three to provide police records were required to do so by law. Madeline Will, *Despite Public Interest in Increased Police Transparency, Most Private Universities Shield Police Reports*, STUDENT PRESS L. CTR. (Mar. 16, 2016), https://perma.cc/M6DA-8XK3.

[22] This article only addresses ways to put private universities police departments on the same transparency footing as public departments as relates to open records laws. This is not to suggest that there are not much needed reforms to open records laws to increase transparency of police generally. *See, e.g.*, Marc Levy, *Lawmakers Urged to Make Police Discipline Records Public*, ASSOC. PRESS (June 19, 2020), https://apnews.com/508f480d6950688cefbd62469bac33b6 (describing calls for public access to records regarding police officer misconduct in Pennsylvania and elsewhere).

[23] Presidential Statement on Signing the Freedom of Information Act, 2 PUB. PAPERS 316 (July 4, 1966).

Congress, citing James Madison on the importance of an informed electorate, passed FOIA to create a policy of full disclosure of public information.[24] The previous federal public information statute had not kept up with the "machinery which makes that society work."[25]

Similarly, all 50 state legislatures enacted statutes ensuring the public's right to access information about their governments.[26] These laws accomplish three tasks: they (1) define what entities and records are subject to disclosure, (2) construct the procedure for requesting and providing the records, and (3) list any exceptions to disclosure.[27] Legislatures often direct that state open records law be interpreted liberally,[28] and courts in turn read them to apply as widely as possible.[29]

In particular, public access to police records is an important check on governmental power. The public interest requires full transparency on crime and law enforcement so that citizens can know the risks of living or working in a particular neighborhood or attending a particular school, as well as evaluate the success rates and policies of policing agencies. For example, almost every state's open records law requires the disclosure of some type of "incident report" with various amounts of details about a crime or arrest.[30] Among many other public uses, those details help journalists, like those covering Waller's arrest by Rice police, report details of the incident and perhaps track down witnesses who can corroborate—or contradict—the police's account. The details also help determine whether universities are reporting accurate crime statistics to prospective and current students.[31]

B. The functional equivalency test's strong judicial history with open records laws

During the past three decades, courts have increasingly relied on some version of a functional equivalency test to ensure they accomplish the legislative intent behind open records laws.[32] The test has been a useful tool in determining whether many "private" entities stand in place of public agencies sufficiently to possess the public's information—including a community

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[24] S. REP. NO. 89-813, at 45 (Oct. 4, 1965) (stating that secrecy in government "injures the people it seeks to serve" and "breeds mistrust").

[25] H.R. REP. NO. 89-1497, at 33 (May 9, 1966).

[26] Alexa Capeloto, *Transparency on Trial: A Legal Review of Public Information Access in the Face of Privatization*, 13 CONN. PUB. INT. L.J. 19, 19 (2013); *see, e.g.*, CAL. GOV'T CODE § 6250 ("[A]ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person . . . ."); IND. CODE § 5-14-3-1 ("Providing persons with the information is an essential function of a representative government . . . .").

[27] For a detailed look at each state's open records law, see REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE, http://www.rcfp.org/open-government-guide.

[28] *See, e.g.*, NEB. REV. STAT. § 84-712.01(3) (stating the law should be "liberally construed" so citizens "have the full right to know of and have full access to information on the … public bodies and entities created to serve them"); TEX. GOV'T CODE § 552.001 (stating twice that the Public Information chapter is to be "liberally construed").

[29] *See, e.g.*, Herald Ass'n, v. Dean, 816 A.2d 469, 474 (Vt. 2002) (stating that the Access to Public Records Act must be "liberally construed in favor of public access").

[30] *See generally* RCFP GUIDE, *supra* note 19, at 1 (noting that most states require the release of information about arrests and criminal convictions).

[31] For example, journalism students at Tarleton State University used public records to discover that the university failed to disclose several serious incidents—including forcible sex offenses, assaults, and burglaries—in its crime data required by the federal Clery Act. Sydni Dunn, *Tarleton State Hit With $110,000 Fine for Violating Clery Act*, STUDENT PRESS L. CTR. (June 8, 2012), https://perma.cc/3VB4-VCCX.

[32] *See* Ry. Labor Execs.' Ass'n v. Consol. Rail Corp., 580 F. Supp. 777, 778 (D.D.C. 1984) (using a functional analysis because the legislative history of FOIA demonstrated it was intended to include "those entities . . . which perform governmental functions and control information of interest to the public" (citing H.R. REP. NO. 93-876 (Mar. 5, 1974))).

fire company (yes),[33] a corporation managing a public arena (yes),[34] a humane society (no),[35] an economic development board (no),[36] and a public access television nonprofit (yes).[37] The analysis is also useful, of course, beyond the open records context; courts have long used a functional analysis to determine what entities are subject to other governmental responsibilities, including Fourth Amendment constraints.[38]

Functional equivalency in the open records context traces its roots to a series of federal FOIA cases.[39] Those courts found statutory definitions were of limited help in determining what was a "public agency" because of the "myriad organizational arrangements for getting the business of the government done," and therefore the courts examined each entity in its own context.[40] State courts—needing a useful tool in an era of privatization—adopted the analysis in various forms.[41]

At least twenty-four states now employ a version of the functional equivalency test, either as a single question or as a multi-factor test.[42] Some open records laws explicitly require a functional analysis,[43] but other courts have adopted the test without direct legislative invitation.[44] Some states look exclusively to whether the entity performs a public function,[45] while other states

[33] State *ex rel.* Freedom Commc'ns, Inc. v. Elida Cty. Fire Co., 697 N.E.2d 210, 213 (Ohio 1998) (per curiam) (holding that that a nonprofit company that contracted to provide firefighting services to townships was subject to the state's open records law in part because it was providing a "uniquely governmental" function (citation omitted)).

[34] Allen v. Day, 213 S.W.3d 244, 261 (Tenn. Ct. App. 2006) (finding the private management company to be functionally equivalent to a public agency).

[35] Conn. Humane Soc'y v. Freedom of Info. Comm'n, 591 A.2d 395, 397-99 (Conn. 1991) (deciding the Connecticut Humane Society failed the functional equivalency test because it was not subject to governmental regulation).

[36] Frederick v. City of Falls City, 857 N.W.2d 569, 578-79 (Neb. 2015) (determining the nonprofit was not the functional equivalent of a public office because the function it served—promoting development—could be done by private entities without the involvement of the government).

[37] State *ex rel.* Toomey v. City of Truth or Consequences, 287 P.3d 364, 370-71 (N.M. Ct. App. 2012) (concluding the nonprofit operating the city's public access cable channel was the equivalent of a public office because it was acting on behalf of the city).

[38] *See* Evans v. Newton, 382 U.S. 296, 299 (1966) ("[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.").

[39] *See Conn. Humane Soc'y*, 591 A.2d at 397 n.3 (noting that the Connecticut Supreme Court used federal case law to develop their test because the state's open records law is about the same subject matter as the federal statute).

[40] Wash. Research Project v. Dep't of Health, Educ. & Welfare, 504 F.2d 238, 245–46 (D.C. Cir. 1974); *see also* Irwin Mem'l Blood Bank of S.F. Med. Soc'y v. Am. Nat'l Red Cross, 640 F.2d 1051, 1057–58 (9th Cir. 1981) (holding that the Red Cross was not functionally equivalent because its purpose was to be independent from government); Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523, 527–32 (S.D.N.Y. 1977) (finding a federal grant recipient was not functionally equivalent to a government agency).

[41] *See generally* Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U.L. REV. 825 (2000) (attempting to classify states' different approaches to privatization).

[42] *See* Capeloto, *supra* note 26, at 28 (finding, as of 2013, thirteen states use a totality of factors approach and eleven use a public function approach to applying open records laws to private entities, an increase since a similar analysis had been conducted in 1999).

[43] *See, e.g.*, CONN. GEN. STAT. § 1-200 (defining a public agency as any executive, administrative, legislative, or judicial office or any "deemed to be the functional equivalent").

[44] *See, e.g.*, Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc., 87 S.W.3d 67, 78 (Tenn. 2002) (rejecting two other approaches—based on legislative determination or agency law—in favor of the functional equivalency test to determine when records were "made or received . . . in connection with the transaction of official business by any governmental agency" (citing TENN. CODE § 10-7-301)).

[45] *See*, *e.g.*, Bryan v. Yellowstone Cty. Elementary Sch. Dist. No. 2, 60 P.3d 381, 387 (Mont. 2002) (finding a committee charged with advising a school district on school closures "performed a legislatively designated governmental function" and thus was a public body).

use a totality-of-the-circumstances approach considering additional factors.[46] Among those multi-factor states, the Connecticut test has been the most influential.[47] It determines equivalency based on the degree of (1) governmental function, (2) government funding, (3) government involvement or regulation, and (4) government creation.[48] This article will be framed around that analysis, primarily because the Connecticut test's factors are shaped broadly enough to encompass the additional factors used by other courts,[49] and it will also cover those states that only weigh the public function factor.

C. How private university police departments receive their arrest authority

Police powers are "fundamental power[s] essential to government,"[50] retained by the states through the Tenth Amendment of the U.S. Constitution.[51] They refer to the government's inherent authority "to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments."[52] These enforcement powers include the ability to search, detain, and arrest.[53] Similar to firefighting, taxation, or the exercise of eminent domain, police powers are "uniquely governmental."[54]

Thus, private universities do not possess police enforcement powers unless a government entity confers the powers onto them. A handful of states statutorily delegate police enforcement

[46] *See, e.g.*, State *ex rel.* Oriana House, Inc. v. Montgomery, 854 N.E.2d 193, 199 (Ohio 2006).

[47] *See, e.g.*, *Cherokee*, 87 S.W.3d at 78 (adopting the Connecticut test in Tennessee); Telford v. Thurston Cty. Bd. of Comm'rs, 974 P.2d 886, 894 (Wash. 1999) (adopting the Connecticut test); Jeffrey A. Ware, *Clarke v. Tri-Cities Animal Care & Control Shelter: How Did Private Businesses Become Government "Agencies" Under the Washington Public Records Act?*, 33 SEATTLE U. L. REV. 741, 749–50 (2010) (noting Washington state adopted Connecticut's test (citing 1991 Op. Wash. Att'y Gen. No. 5)).

[48] Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n, 436 A.2d 266, 270–71 (Conn. 1980); *see* Andrew C. Helman, *Judicial Performance and Policy Implications in Moore v. Abbott*, 61 ME. L. REV. 587, 605 (2009) (arguing the broader Connecticut test better achieves legislative intent than the narrower Maine version).

[49] For example, Florida's nine-factor test includes three factors related to public funding. News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., 596 So. 2d 1029, 1031 (Fla. 1992). All three can fold into "how much government funding the entity receives." *See also Telford*, 974 P.2d at 894 (determining that two extra factors used by Oregon courts are "not particularly relevant" and can be considered under the other four factors).

[50] POLICE POWER, BLACK'S LAW DICTIONARY (11th ed. 2019).

[51] Hamilton v. Ky. Distilleries & Warehouse, 251 U.S. 146, 156 (1919).

[52] POLICE POWER, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* 56 AM. JUR. 2D MUNICIPAL CORPORATIONS, ETC. § 168 (2020) ("The governmental functions of a municipal corporation include the promotion of the public peace, health, safety, and morals . . . .").

[53] *See* State v. Walker, 138 P.3d 113, 117 (Wash. 2006) ("The legislature, under its police powers, may grant police officers authority to arrest for certain crimes subject to public policy and constitutional limitations."); Legarre, *supra* note 5, at 793 (tracking the evolution of the term "police power" from a broad meaning of sovereignty to a narrower meaning of protecting public health, safety, and morals).

[54] Univ. of the Incarnate Word v. Redus, 518 S.W.3d 905, 911 (Tex. 2017) (finding a private university police department to be a "government unit" for purposes of interlocutory appeals under the Texas Tort Claims Act because of the "uniquely governmental" function of law enforcement); Krantz v. City of Hutchinson, 196 P.2d 227, 231 (Kan. 1948) (including "police regulations" and the "suppression of crime" among a list of governmental functions). *Cf.* Ayres v. Indian Heights Volunteer Fire Dep't, Inc., 493 N.E.2d 1229, 1235 (Ind. 1986) (finding that—unlike paving streets or building schools or bridges—"firefighting is a service that is uniquely governmental").

powers to private universities,[55] whether by directly conferring it onto the universities,[56] or by requiring state police colonels or others to appoint the officers at the request of the university.[57] In states without an enabling statute, a private university may gain police powers through municipal deputization, whereby the city trains and commissions the officers, who then operate as employees of the university. An agreement between the city and the university governs the officers' patrol area and authority.[58]

Chapter II. The status of the states

Eight states so far have explicitly required private universities to provide the public access to police records at a similar level as other police departments, while two states have judicial precedent to the contrary. The remaining states appear to have not yet directly faced the question. All 10 states addressing the issue have done so within the past 15 years. Among the eight states ensuring at least some access, six were accomplished by statute: Georgia (2006), North Carolina (2013), Wisconsin (2014), Texas (2015), Virginia (2015), and Utah (2019).[59] Two of those statutes—Georgia and North Carolina—were seemingly in response to an opposing court decision, while Utah was in response to pending litigation, and the Texas statute was in direct response to the incident at Rice University. Various judicial or administrative decisions added two more pro-access states. The decisions addressing the issue are analyzed below.

A. Court decisions subjecting private university police to open records laws

1. State ex rel. Schiffbauer v. Banaszak (Ohio)

In 2015, the Ohio Supreme Court found a private university's police department to be a "public office" under the state's Public Records Act[60] and therefore subject to the statute's disclosure requirements.[61] Otterbein University had argued its police department was not subject to the open records law because it was a subdivision of a private university, which is not a public entity.[62] In rejecting that argument, the Ohio high court relied upon the plain language of the law, which declares an "entity established by the laws of this state for the exercise of any function of government" to be a public office.[63] The court held that the department was created under state law because Otterbein could not employ police officers without the Campus Police Departments

[55] *See* Hopkins & Neff, *supra* note 9, at 129 (discussing the various types of authorization statutes, including the variation in powers and physical jurisdictional boundaries granted).
[56] *See, e.g.*, 110 ILL. COMP. STAT. 1020/1 (stating that private university police departments should have the same powers as municipal officers and county sheriffs—"including the power to make arrests"—"for the protection of students, employees, visitors and their property").
[57] *See, e.g.*, VA. CODE ANN. § 23.1-812 (authorizing private universities to petition the local circuit court to appoint campus police officers).
[58] Jeffrey S. Jacobson, *The Model Campus Police Jurisdiction Act: Toward Broader Jurisdiction for University Police*, 29 COLUM. J.L. & SOC. PROBS. 39, 65–67 (1995).
[59] GA. CODE ANN. § 20-8-7; N.C. GEN. STAT. § 74G-5.1; WIS. STAT. ANN. § 19.32; TEX. EDUC. CODE § 51.212; VA. CODE ANN. § 2.2-3701; UTAH CODE ANN. § 63G-2-103.
[60] OHIO REV. CODE ANN. § 149.43.
[61] State ex. rel. Schiffbauer v. Banaszak, 33 N.E.3d 52, 55 (Ohio 2015).
[62] *Id.* at 53.
[63] § 149.011.

Act,[64] which gave these sworn, state-certified officers the same powers as public officers.[65] Additionally, Otterbein's department was formed to engage in a function of government, "namely the basic police power of enforcing laws and maintaining the peace."[66]

The court did not have to address the plaintiff's alternative argument that the Otterbein police department was the "functional equivalent" of a public office,[67] but the statute's definition of public office mirrored two factors of the test already.[68] Otterbein pushed back against the government-creation factor, arguing that, if its enabling statute counted in the analysis, all private corporations created through the state's business laws would be considered public offices because they, too, were created under statute and subject to government regulation.[69] The court soundly rejected that, however, finding that courts have long considered private corporations to be public offices when they perform a government function.[70]

2. Salt Lake Tribune v. State Records Committee (Utah)

A Utah trial court held in 2018 that the police department of Brigham Young University was subject to the state's open records law, and the state legislature enacted a statute codifying that result while an appeal was pending at the Utah Supreme Court. In a detailed decision, the Third Judicial District Court of Salt Lake County found the private university's police department to be a government entity under the Government Records Access and Management Act ("GRAMA").[71] Using the analysis called for in the statute's definitions (and again mirroring two of the Connecticut functional equivalency test's four factors), the court found, among other things, the department was "an agency of the state or a political subdivision established by the government [through its enabling statute] to carry out the public's business of policing."[72] Legislation codifying that holding was passed in 2019 while the matter was on interlocutory appeal to the Utah Supreme Court, which subsequently declined to decide the matter on an interlocutory basis because the statute's passage presented the new question of whether it applied retroactively.[73]

3. In re Perrotti v. Chief, Police Department, Yale University (Connecticut)

The Connecticut Freedom of Information Commission ("the Commission") made explicit use of the state's functional equivalency test in 2008 in *In re Perrotti v. Chief, Police Department,*

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[64] § 1713.50.
[65] *Schiffbauer*, 33 N.E.3d at 54; *see also* Brief for Ohio Att'y Gen. as Amici Curiae at 1, *Schiffbauer* (No. 2014-0244) (arguing the department was not "established by" Otterbein, but only through Ohio's delegation of its power).
[66] *Schiffbauer*, 33 N.E.3d at 54.
[67] *Id.*
[68] *Compare* § 149.011 (defining a public office as entities "established by the laws of this state" to perform "any function of government") *with* Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n, 436 A.2d 266, 270–71 (Conn. 1980) (listing two factors of the test as whether the entity was created by government and whether it performs a government function).
[69] *Schiffbauer*, 33 N.E.3d at 54.
[70] *Id.* (citing Freedom Commc'ns v. Elida Cmty. Fire Co., 697 N.E.2d 210 (Ohio 1998)).
[71] The Salt Lake Tribune v. Utah State Records Comm., No. 160904365, at 23 (Utah Third Judicial Dist. Ct. July 17, 2018).
[72] *Id.* at 23.
[73] Salt Lake Tribune v. State Records Comm., 456 P.3d 728, 731 (Utah 2019).

Yale University[74] to subject private university police to the state's Freedom of Information Act.[75] Yale University's police department at least partially met all four factors, but the Commission was particularly persuaded by the government function factor.[76] The department possessed the power to detain and arrest throughout the City of New Haven, which meant it was capable of having a "profound impact" on individuals.[77] In looking at the government-funding factor, the Commission noted that the department received "minimal direct government funding" but its tax-exempt status was a "significant" level of indirect funding.[78] As for government involvement and regulation, the Commission found it was "significant" because the City appointed the officers, who were subject to state training and certification requirements.[79] City police also provided a number of services to Yale.[80] Finally, the Commission found that the police department was essentially created by, and dependent on, the government because the Yale officers were originally empowered by the City through a City-University agreement.[81] Thus, as applied to its law enforcement functions, the Yale police department is subject to the open records law.[82]

B. Court decisions rejected by the state legislature

1. Ochsner v. Elon University (North Carolina)

The North Carolina Court of Appeals held in *Ochsner v. Elon University*[83] in 2012 that private university police departments were not subject to the state's Public Records Act,[84] but the now non-precedential decision may have been based on a legislative oversight. At the time, the open records law defined a "public law enforcement agency" to include a specific list of entities, such as police departments commissioned through the Company Police Act.[85] It did not, however, include those commissioned through the Campus Police Act,[86] which was enacted in 2005 and authorized Elon University's and other private universities' police departments. Because those departments were not enumerated in the definition's list, the Court of Appeals held that they were

[74] Docket No. DUX 2007-370, ¶ 39 (Feb. 2008).
[75] CONN. GEN. STAT. § 1-200(1) (declaring that any person "deemed to be the functional equivalent of a public agency" is considered a public agency).
[76] *Perrotti*, at ¶ 39.
[77] *Id.* at ¶ 15. The Commission differentiated *Connecticut Humane Society v. Freedom of Information Commission*, in which the Humane Society played only a minor role in the state's objective of preventing animal cruelty. 591 A.2d 395, 399 (Conn. 1991).
[78] *Perrotti*, at ¶¶ 31, 38.
[79] *Id.* at ¶¶ 24–25.
[80] *Id.* at ¶ 28 (noting, for example, that City police supervised Yale police on major cases).
[81] *Id*. at ¶¶ 18-19. The legislature later formalized the City-University agreement in 1984. *Id.*
[82] The department is not, however, subject to the open records law for its non-law enforcement functions, such as setting salaries and benefits. Simons v. Freedom of Info. Comm'n, No. CV106007012S, 2011 WL 5304156, at *6 (Conn. Super. Ct. Oct. 17, 2011).
[83] Ochsner v. Elon Univ., 725 S.E.2d 914 (N.C. Ct. App. 2012), *affirmed*, 737 S.E.2d 737 (N.C. 2013) (per curiam).
[84] N.C. GEN. STAT. § 132.
[85] *Ochsner*, 725 S.E.2d at 919. The open records law also includes in its "public law enforcement" definition a city or county police department, a sheriff's department, and a state or local unit that deals with violations of the law. *Id.* The Company Police Act allows the state's attorney general to certify police agencies of hospitals, state institutions, and corporations. § 74E-2.
[86] § 74G-2 (giving the state attorney general the authority to certify private universities' police departments and commission campus police officers).

not subject to the open records law.[87] The court acknowledged in a footnote, however, that prior to 2005, university police departments were authorized under the Company Police Act instead and would have been subject to the open records law.[88]

Ochsner's effect, however, was limited on appeal and quickly nullified by statute. The North Carolina Supreme Court split 3-3 on review, which left the Court of Appeals ruling standing but without precedential value.[89] In 2013, as the case was pending before the state supreme court, the North Carolina legislature added a lengthy provision to the state's Campus Police Act that makes the disclosure of some records a condition for certification.[90]

2. Mercer University v. Barrett & Farahany, LLP (Georgia)

The Georgia Court of Appeals determined in 2005's *Mercer University v. Barrett & Farahany, LLP*[91] that private university police departments were not subject to the state's open records law because "there is nothing in the plain and unambiguous language of the Open Records Act that supports such an outcome."[92] The plaintiff's argument—which the trial court endorsed[93]—was a functional equivalency one: Mercer University's police department was a public agency because it was created through and delegated a public function by the legislature in the Campus Policemen Act.[94] While the Court of Appeals found this to be "a compelling argument," it determined that the precise language of the Georgia open records law required that private entities carrying out a public purpose must do so at the express request of a public office or agency to be subject to the law's transparency requirements.[95]

Just a year after the court's decision, however, the Georgia legislature added an open records section to its Campus Policeman Act.[96] The statute was the first to explicitly and meaningfully require private university police departments to make its records available to the public.

C. Decisions that failed to subject private university police to open record laws

1. ESPN, Inc. v. University of Notre Dame Security Police Department (Indiana)

The Indiana Supreme Court held in 2016 that the state's private university police departments were not subject to the Indiana Access to Public Records Act,[97] overruling the state's

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[87] *Ochsner*, 725 S.E.2d at 920–21.
[88] *Id.* at 920 n.2. The open record law's language was in place before 2005. *See* § 132-1.4(b).
[89] *Ochsner*, 737 S.E.2d at 738.
[90] § 74G-5.1(c).
[91] 610 S.E.2d 138 (Ga. Ct. App. 2005).
[92] *Id.* at 140–41. The law defined a public agency as a political subdivision of the state; a city, county, or other authority established according to law; or an entity receiving a specified level of government funding. GA. CODE § 50-18-70(a).
[93] Barrett & Farahany, LLP v. Mercer Univ., 2004 WL 5905148 (Ga. Super. Ct. 2004), *rev'd*, 610 S.E.2d 138 (Ga. Ct. App. 2005).
[94] § 20-8-2. The records at issue in this case, relating to rapes and sexual assaults on campus, would have been subject to disclosure had they been created by a local or state police department. §§ 50-18-70, 72.
[95] *Mercer Univ.*, 610 S.E.2d at 141–42 (citing Dep't of Human Res. v. Ne. Ga. Primary Care, 491 S.E.2d 201 (Ga. Ct. App. 1997)). The open records law, however, states that public records may belong to private entities "in the performance of a service or function for or on behalf of an agency." § 50-18-70.
[96] 2006 GA. LAWS Act 616 (H.B. 1302), now codified at § 20-8-7.
[97] IND. CODE § 5-14-3.

Court of Appeals decision that they were.[98] In determining that the University of Notre Dame's police department was not a "law enforcement agency"—defined as "[a]n agency or a department of any level of government that engages in" an enumerated list of police functions[99]—the Supreme Court acknowledged the department performed police functions, but it found that the statute's phrase "any level of government" excluded private entities.[100] The court declined to use a functional equivalency test, like that of Ohio, because based on that language, "[t]here is no evidence that our General Assembly intended a functional equivalency analysis" under the open records law.[101]

The court also found that the Notre Dame police department was not a "public agency." In what sounds like an analysis dependent on function, the Access to Public Records Act defines "public agency" as any "department, division, bureau, committee, agency, office . . . exercising any part of the executive . . . power of the state," or any "other entity, or any office thereof . . . exercising in a limited geographical area the executive . . . power of the state."[102] The court held, however, that the Norte Dame police officers themselves were not exercising the power of the state. Instead, in the court's view, it was the university trustees who were entrusted with state powers and who had ultimate control of the police officers.[103] Because the officers were not directly controlled by the government, the court said the department was not a "public agency."[104] According to the court, the opposite conclusion would have the "absurd" result that "the entire University" could potentially be subject to disclosure requirements, because the police department was not a separate entity from the university.[105] The court did not address the fact, however, that the statute itself contemplates that an office within an entity could potentially be subject to disclosure while the entity itself is not.[106]

The Indiana Court of Appeals, however, had explained that finding Notre Dame's police department to be a public agency for its law enforcement functions would not transform the university as a whole into a public agency.[107] The intermediate court, instead, held that the department was the functional equivalent of a public agency because it was "acting as a government entity by exercising a governmental function."[108] The state delegated private university police officers the same sovereign powers that governmental officers possessed, and they could potentially exercise those powers throughout the entire state.[109] The Court of Appeals found it irrelevant that the department was controlled and financed by Notre Dame's Board of Trustees.[110]

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[98] ESPN, Inc. v. Univ. of Notre Dame Police Dep't, 62 N.E.3d 1192 (Ind. 2016) ("*ESPN II*"); ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dep't, 50 N.E.3d 385 (Ind. Ct. App. 2016) ("*ESPN I*"), *vacated by ESPN II*, 62 N.E.3d 1192.
[99] § 5-14-3-2(q)(6), previously at (n)(6).
[100] *ESPN II*, 62 N.E.3d at 1197.
[101] *Id.*
[102] § 5-14-3-2(q)(1), (2)(c), previously at (n)(1), (2)(c).
[103] *ESPN II*, 62 N.E.3d at 1198–99; *see* § 21-17-5-2 (permitting the governing board of universities to appoint police officers).
[104] *Id.*
[105] *Id.* at 1199–20.
[106] § 5-14-3-2(q)(2)(c), previously at (n)(2)(c) (defining a "public agency" to include "any . . . other entity, *or any office thereof* . . . exercising in a limited geographical area the executive . . . power of the state" (emphasis added)).
[107] *ESPN I*, 50 N.E.3d at 398 (noting that a private entity is only a public agency while performing a government function, and the university's primary function—providing educational services—is not uniquely governmental) (citing State *ex. rel.* Schiffbauer v. Banaszak, 33 N.E.3d 52, 55 (Ohio 2015)).
[108] *ESPN I*, 50 N.E.3d at 395.
[109] *Id.*
[110] *Id.* at 398 n.8.

In 2017, the Indiana legislature passed a bill over the governor's veto that ostensibly classified private university police departments as public agencies, thus rejecting the Indiana Supreme Court's ruling.[111] However, transparency advocates have said that the law—backed by the private universities themselves—failed to live up to its promise of transparency because it merely required private universities to disclose what they already were mandated to disclose under the federal Clery Act.[112] Indeed, the law only requires the departments to release only a small fraction of the records other police agencies are required to release.[113] Therefore, despite the legislative rejection of the idea that private university police departments are not public agencies, this article does not count Indiana among the states that mandates transparency from them.

2. Harvard Crimson, Inc. v. President and Fellows of Harvard College (Massachusetts)

In an opinion that harkens back to a mid-20th century view of campus police, the Massachusetts Supreme Judicial Court held in 2006 that private universities' police records were not subject to the state's open records law.[114] The party seeking access had argued that Harvard University's police records were public because the state police colonel appointed many of the university's officers as special state police officers under a statute providing them the same arrest powers as other state police officers.[115] The court disagreed, basing its decision on the fact that the powers were granted, not to the police department as a whole, but to the special officers themselves, whom the state never employed.[116] The court also pointed out that the special officers' jurisdiction was more limited to a specific geographic area—that of the university's land and structures—than that of regular officers.[117] The court framed the issue, however, as one relating to "privately employed security guards" with powers "far less extensive than the powers of regular police officers."[118] Today, however, the Harvard police department's brochure and website indicate that its approximately 85 sworn officers "are armed, have arrest powers" and can respond to any "breach of the peace" on the city streets of Cambridge, Somerville, and Boston.[119]

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[111] IND. CODE § 5-14-3-2.
[112] James Hoyt, *Experts Say Indiana's Private University Police Transparency Law Has No Teeth*, STUDENT PRESS L. CTR. (March 3, 2017), https://perma.cc/7B83-KLBB.
[113] § 5-14-3-2.2; *see* Margaret Fosmoe, *Indiana Lawmakers Override Pence Veto on Campus Police Measure*, SOUTH BEND TRIBUNE (Feb. 15, 2017), https://bit.ly/2YIWzDD.
[114] Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 840 N.E.2d 518, 523 (Mass. 2006); *see* MASS. GEN. LAWS ch. 4, § 7.
[115] MASS. GEN. LAWS ch. 22C, § 63; *Harvard Crimson*, 840 N.E.2d at 523.
[116] *Id.* at 523–24. The state police colonel's regulations require university police departments to submit monthly reports of search and arrest warrants issued to the department and of any felonies on campus. *Id.* at 525. In the colonel's possession, those reports would be public records. *Id.*
[117] *Id.* at 524.
[118] *Id.* at 523–24.
[119] *About*, HARVARD UNIV. POLICE DEP'T, https://perma.cc/2RW7-4RDU; HARVARD UNIV. POLICE DEP'T, HUPD OVERVIEW PAMPHLET, https://perma.cc/Z8YJ-YLPZ ("The only real difference between a Harvard officer and a Cambridge officer is jurisdiction.").

Chapter III. The public's need for access to private universities' police records

Sworn private university police officers are performing many of the same important functions as their local and state counterparts,[120] so it follows that these departments should be subject to the same responsibilities of transparency. While there are other methods to get to this result,[121] the functional equivalency test has a robust judicial history of safeguarding the legislative intent of transparency in the public's affairs amidst a changing world.

A. Open records laws demand transparency from all exercising governmental authority

Government is "the people's business,"[122] and state legislatures recognized that providing access to that business is fundamental to preventing abuses of the power bestowed by the people.[123] The legislatures therefore created open records laws with the same objective as FOIA: to create transparency among those entities that "perform governmental functions and control information of interest to the public."[124]

The powers that private university police departments possess are rife with the potential for the very kind of abuse these laws are intended to guard against.[125] In just the two examples discussed previously, Rice University officers were accused of using too much force against a suspect of a nonviolent crime,[126] and University of Chicago officers were accused of systemically targeting and arresting members of a certain race or social class.[127] These accusations—even if the exact facts are in contention—represent how unchecked police power can be abused and how the public can come to mistrust it.[128] Both situations occurred off campus and primarily to people who were not the universities' students, proving that these are records very much "of interest to the public" generally, not just the student and campus population.

The public cannot—and should not have to—depend on others to supervise these police forces. State and local governments, which grant these private universities their police power, have little authority, resources, or incentive to monitor these departments on any ongoing basis.[129] At

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[120] *See, e.g.*, GA. CODE § 20-8-2 (stating that private university police officers have the same authority as the local government's police when patrolling the university's land or structures); 110 ILL. COMP. STAT. 1020/1 (providing these police the same powers as municipal officers, including making arrests and enforcing laws, except serving civil process).

[121] This article argues a judicial remedy already exists, but explicit statutes would be a welcome—and more expedient—solution.

[122] CAL. GOV'T CODE § 6250.

[123] *See* WIS. STAT. § 19.31 (stating that a "representative government is dependent upon an informed electorate").

[124] H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 8 (1974); *see also* Capeloto, *supra* note 26 (noting that many state open records laws were modeled after the federal version).

[125] *See* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("[L]aw enforcement officials . . . are granted substantial discretion that may be misused to deprive individuals of their liberties.").

[126] Arnold, *supra* note 1.

[127] Gold, *supra* note 16.

[128] *See* Doe v. Marsalis, 202 F.R.D. 233, 238 (N.D. Ill. 2001) (explaining that there are many victims of police misconduct in addition to the immediate victim, including other law enforcement officers and agencies, law enforcement efforts generally, and the community at large).

[129] Malcolm K. Sparrow, *Managing the Boundary Between Public and Private Policing*, NEW PERSP. IN POLICING BULL. (Nat'l Inst. of Justice), Sept. 2014, at 21 n.1 (noting that police at many private universities are not directly accountable to any public official).

most, governments may require regular reports on the number of crimes these departments see,[130] but self-reported statistics are not a sufficient or reliable check on such broad powers. Indeed, greater transparency is necessary to ensure these reported crime statistics are accurate and to hold universities accountable when they are not.[131] Even the most well-intentioned college administrator has an incentive not to call much attention to officer abuse or high crime rates, because those revelations would likely hurt the university's public image, affecting enrollment and donations—the two major revenue drivers of private universities.[132] In those situations, the interests of the private university police departments are "diametrically opposed to the public interest."[133] The Rice University and University of Chicago incidents are just two examples in which the universities were not originally willing to provide records unless they were required to by law. Fortunately for the public, the spirit and tradition of open records laws, if not the letter of the laws, require these police records be made available to the public to the same extent they would be from a public police department.[134]

B. The functional equivalency test finds these records are public

Many courts have recognized that a functional equivalency test helps achieve legislative intent,[135] while being flexible enough to handle the wide range of factual scenarios presented by open records laws and private university police departments.[136] States' definitions of "public agencies" or other operative terms vary dramatically, [137] and the various enabling statutes or

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[130] *See* Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 840 N.E.2d 518, 525 (Mass. 2006) (noting that Massachusetts regulations require university police departments to submit monthly reports of warrants and felonies to the state police colonel).

[131] *See* Collin Binkley et al., *Reports on College Crime are Deceptively Inaccurate*, THE COLUMBUS DISPATCH (Sept. 30, 2014), https://perma.cc/G58W-P7SN (finding that crime statistics at most universities are "so misleading that they give students and parents a false sense of security").

[132] *See* Sparrow, *supra* note 129, at 19 (explaining that a university has a strong interest in "painting a rosy picture" by downplaying or hiding crime).

[133] *Id.*; *see also* Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 DUQ. L. REV. 41, 69 (1995) ("Consigning the provision of municipal functions to private organizations is akin to asking the wolf to guard the henhouse.").

[134] Critics might be concerned that the federal Family Educational Rights and Privacy Act ("FERPA") prevents the disclosure of these types of records. However, FERPA explicitly excludes law enforcement records from its protection. 20 U.S.C. § 1232g(a)(4)(B)(ii); *see also* 34 C.F.R. § 99.8(d) (stating that FERPA does not require nor prohibit the release of law enforcement records). For the purposes of FERPA, law enforcement units are defined as any office or other component of an educational institution designated to enforce local, state, or federal law or to maintain the security of the campus. 34 C.F.R. §99.8(a)(l)(i)–(ii). *But see* United States v. Miami Univ., 91 F. Supp. 2d 1132, 1153 n.22 (S.D. Ohio 1995) (citing Rules and Regulations, Dep't of Educ., 60 Fed. Reg. 3464–66) (distinguishing law enforcement records from disciplinary records).

[135] *See supra* Part I-B (finding that versions of the functional equivalency test have been adopted by federal courts, plus courts in Connecticut, Maine, Washington, Oregon, and other states).

[136] *See* Frederick v. City of Falls City, 857 N.W.2d 569, 576 (Neb. 2015) (concluding "that the four-part functional equivalency approach is the appropriate analytical model" to determining if a private entity is subject to the state's public records laws). Of course, courts do not need to rely on the test if the open records law's language clearly includes private entities that act with state authority. In *State ex. rel. Schiffbauer v. Banaszak*, the court used the language of the statute, though it used many of the same arguments related to public function and government regulation. 33 N.E.3d 52, 55 (Ohio 2015).

[137] *Compare* CONN. GEN. STAT. § 1-200 (listing a long definition that includes any executive, administrative, legislative, or judicial office of the state or any person "deemed to be the functional equivalent of a public agency") *with* CAL. GOV'T CODE § 6252 (defining "public agency" as simply "any state or local agency").

municipal deputization agreements create numerous types of police department structures even within the same state. The single question or totality-of-factors tests provide courts a standard but flexible method to keep up with the ever-changing "machinery which makes [this] society work"[138] by supplementing the static, less-than-helpful statutory definitions.[139] Indeed, that is precisely what the legislatures instructed the courts to do: interpret open records laws liberally to ensure transparency in the public's affairs.[140] Reading "public office" to include an entity *acting* as a "public office" achieves that legislative directive for a broad interpretation.[141]

Functional equivalence permits courts to successfully balance the policy of transparency with the competing interest of privacy for purely private entities. It is well aimed at identifying those entities so intertwined with the public's business that they necessarily give up some claims to privacy.[142] Private companies with only a minor relationship with government[143] or that perform functions belonging to both the private and public sectors[144] do not pass the test and would not be subject to open records laws. However, those entities that are government bodies posing as a private agency[145] or that assume profoundly public functions[146] are correctly found to be functionally equivalent and subject to open records laws. Critics argue that requiring some semi-private entities to open their records to the public would unduly burden the entity and defeat productivity in governmental services.[147] That argument, however, ignores the fact that, from the beginning, our multi-branch, multi-layered system of government was shaped around the notion that safeguards against abuses of power outweigh the need for speed and efficiency.[148] State legislatures deliberately chose to enact broadly applicable open records laws—including the

[138] H.R. REP. NO. 89-1497, at 33 (May 9, 1966) (describing the goal of FOIA).
[139] The *Harvard Crimson* court limited itself to a very static understanding of the statute in 2006 when it stopped its inquiry at the finding that Harvard is a private entity. Harvard Crimson, Inc. v. President and Fellows of Harvard Coll., 840 N.E.2d 518, 523 (Mass. 2006). However, the line between public and private has blurred dramatically over the past decades. Hopkins & Neff, *supra* note 9, at 126–27. The functional equivalency test maintains the tradition and legislative intent that police records are open to the public.
[140] *See, e.g.*, TEX. GOV'T CODE § 552.001(a) (stating that the provision should be "liberally construed" to implement the legislature's policy that the people are entitled to "complete information about the affairs of government").
[141] The *Ochsner* court based its decision on specific statutory language that more likely reflected legislative oversight than legislative intent. *See supra* Part II-B-2 (discussing the *Ochsner* case). The functional equivalency test would have kept police records public—as they traditionally were and as the legislature intended them to be. *See* News & Observer Pub. v. Poole, 412 S.E.2d 7, 13 (N.C. 1992) (declaring that "the legislature intended to provide that, as a general rule, the public would have liberal access to public records").
[142] *See* Moore v. Abbott, 952 A.2d 980, 983 (Me. 2008) (using the test to determine if an entity becomes the equivalent of a public agency because of their "activities related to government").
[143] *See, e.g.*, Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523, 527 (S.D.N.Y. 1977) (determining a federal grant recipient was not the functionally equivalent of a public office without more).
[144] *See, e.g.*, Frederick v. City of Falls City, 857 N.W.2d 569, 579 (Neb. 2015) (finding an economic development board was not the functional equivalent because the function it served—promoting development—could be done by private entities without government involvement).
[145] *See, e.g.*, Telford v. Thurston Cty. Bd. of Comm'rs, 974 P.2d 886, 894 (Wash. 1999) (holding county officials' membership groups were public because they served a public purpose, were publicly funded, and were run by government employees in their official capacities).
[146] *See, e.g.*, Town of Burlington v. Hosp. Admin. Dist. No. 1, 769 A.2d 857, 863 (Me. 2001) (declaring a hospital administrative district was the functional equivalent of a government agency because, among other reasons, it had the power to tax).
[147] *See* Ware, *supra* note 47, at 766.
[148] *See* Bond v. United States, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

administrative burden involved—because they knew transparency thwarts corruption and thus leads to more effective representative government.[149]

In the context of private university police departments, the analysis of the factors unquestionably determines these departments are the functional equivalent of public agencies. Three of the four factors are highly relevant and are discussed below. The remaining factor—government funding—depends heavily on the facts of each case. Even assuming *arguendo* that the funding factor does not aid the argument,[150] private university police departments will still be the functional equivalent of a public office under this totality-of-factors test. Because courts evaluate each situation on a case-by-case basis,[151] the absence of one or two factors is not dispositive. Instead, coupled with the argument of government creation, the weight of the public function and government regulation factors—if not the public function factor alone—should be dispositive in these cases.[152]

1. Private university police departments perform an essential governmental function

Enforcing laws and maintaining the peace are not just *minor* government functions, but some of the most *fundamental* government functions.[153] Indeed, it is "essential to government."[154] Private university police officers have the ability to detain and arrest those they suspect of violating the law, and they are often authorized to use deadly force when necessary.[155] Those are not mere advisory tasks,[156] but roles that affect the lives of thousands within the confines of campus,[157] and often throughout the city, county, or state.[158]

While courts already place great weight on the government function factor,[159] the presence of the police function should alone be enough, as the Indiana Court of Appeals found in *ESPN*, to

[149] *See* W. VA. CODE § 29B-1-1 ("The people insist on remaining informed so that they may retain control over the instruments of government they have created.").
[150] Admittedly, the government does not often provide direct funding to these police departments. *But see* Perrotti v. Chief, Police Dep't, Yale Univ., Docket No. DUX 2007-370, ¶ 38 (finding the Yale police department's tax-exempt status to be a "significant" level of government funding).
[151] Telford v. Thurston Cty. Bd. of Comm'rs, 974 P.2d 886, 894 (Wash. 1999).
[152] *See* Brief for Ohio Att'y Gen. as Amici Curiae at 1, State *ex. rel.* Schiffbauer v. Banaszak, 33 N.E.3d 52 (Ohio 2015) (No. 2014-0244) (arguing that police power is such a fundamental public function that it alone creates functional equivalence).
[153] *Schiffbauer*, 33 N.E.3d at 55; *see also* United States v. Morrison, 529 U.S. 598, 618 (2000) ("Indeed, we can think of no better example of the police power [entrusted to the states] than the suppression of violent crime and vindication of its victims."). *But cf.* Ry. Labor Execs.' Ass'n v. Consol. Rail Corp., 580 F. Supp. 777, 778 (D.D.C. 1984) (holding that providing rail service is traditionally a private function).
[154] POLICE POWER, BLACK'S LAW DICTIONARY (11th ed. 2019).
[155] *Perrotti*, at ¶¶ 9, 13.
[156] *See* Moore v. Abbott, 952 A.2d 980, 983 (Me. 2008) (determining an advisory panel was not functionally equivalent of a public agency because it possessed no decision-making authority).
[157] *See, e.g.*, GA. CODE § 20-8-2 (providing college police officers the same authority as local police when that university police officer is "on the campus").
[158] *See* Reaves, *supra* note 10, at 4 (reporting that more than 60 percent of sworn officers at private universities have authority off campus, and 20 percent have authority throughout the state).
[159] *See* Wash. Research Project v. Dep't of Health, Educ. & Welfare, 504 F.2d 238, 248 (D.C. Cir. 1974) (declaring the most important consideration in the forerunner to the functional equivalency test was "whether [the entity] has any authority in law to make decisions"); *Perrotti*, at ¶ 39 (acknowledging that the Yale police department was a public agency "based on all the factors, *especially* the YUPD's exercise of full police powers") (emphasis added).

establish functional equivalence even when using a totality of the circumstances.[160] The private university police departments often respond to a report of crime on campus in place of public police and perform the same investigatory and peacekeeping tasks those public officers would perform.[161] Recognizing this functional equivalence, federal and state courts have repeatedly held private university police to the same constitutional standards.[162] The constitutional state-action analysis is framed differently than the functional equivalency test, but both seek to answer the same question: whether the action or function is infused with governmental authority.[163] Thus, the situations are analogous.[164] If a police officer's function, powers, and constitutional limitations do not depend on whether she is employed by a government agency or a private university police department, the openness of the records generated by her should not either.[165] Courts should be extremely cautious to let governments delegate such broad, grave authority without also applying long-valued, existing statutory safeguards on that power.[166]

2. Private university police officers are subject to continuing government involvement

These departments are almost always subject to substantial government involvement and regulation.[167] Enabling statutes and municipal agreements often require private universities' officers to be trained and certified by the same authorities that a city, county, or state police officer

[160] *See* ESPN, Inc. v. Univ. of Notre Dame. Sec. Police Dep't, 50 N.E.3d 385 (Ind. Ct. App. 2016) (finding a private university police department performing a government function to be a "public agency," irrespective of being created, controlled, and funded by the university), *vacated by* ESPN, Inc. v. Univ. of Notre Dame Police Dep't, 62 N.E.3d 1192 (Ind. 2016); Attorney General Brief for Ohio Att'y Gen. as Amici Curiae at 8, State *ex. rel.* Schiffbauer v. Banaszak, 33 N.E.3d 52 (Ohio 2015) (No. 2014-0244) ("Attorney General Brief") (asserting that "plenary police power is so fundamental to public safety, personal liberty, and law enforcement accountability" that the function factor is sufficient by itself to establish functional equivalence).

[161] *See* Attorney General Brief, supra note 160, at 11 (stating that prior to the Otterbein Police Department, the city police and county sheriff were the primary responders to campus crime). *But cf.* Conn. Humane Soc'y v. Freedom of Info. Comm'n, 591 A.2d 395, 399 (Conn. 1991) (finding the group played only a minor role in the state's objective of preventing animal cruelty and thus was not functionally equivalent).

[162] *See, e.g.*, Henderson v. Fisher, 631 F.2d 1115, 1118 (3d Cir. 1980) (finding University of Pittsburgh police officers to be state actors under 42 U.S.C. § 1983 because their delegated police powers were infused with a governmental character); Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003) (holding Butler University police officers are state actors subject to the Fourth Amendment because their state-delegated police powers are "a traditionally public function"). These cases ignore the irrelevant distinction made by the *Mercer* court that the private agency must be carrying out the public purpose at the express request of the government. Mercer Univ. v. Barrett & Farahany, LLP, 610 S.E.2d 138, 142 (Ga. Ct. App. 2005).

[163] *See* M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 542 (2009) (arguing that the functional analysis produces a more consistent and correct result than when it is framed through state action).

[164] *See ESPN I*, 50 N.E.3d at 397 (citing constitutional cases for support and finding that, while the open records law "is not constitutional in nature, the same premise applies").

[165] In *ESPN II*, the Indiana Supreme Court said that police officers must be under government control to be subject to the state's open records law, ESPN, Inc. v. Univ. of Notre Dame Police Dep't, 62 N.E.3d 1192, 1199 (Ind. 2016), but that requirement is simply not in the statute. *See* IND. CODE § 5-14-32(q)(2)(c) (defining a "public agency" to include "any . . . entity, or any office thereof . . . exercising in a limited geographical area the executive . . . power of the state").

[166] *See ESPN I*, 50 N.E.3d at 397 ("[T]here is a danger that the public will be denied access to important public documents when a private agency is exercising a public function if we construe APRA to categorically exclude such agencies.").

[167] *See Attorney General Brief* at 10 (arguing that Otterbein's police department was subject to regulation because of the state training and certification requirements).

would.[168] These state-mandated and state-controlled training and recertification programs unquestionably represent continuing government involvement in and regulation of the affairs of the police department.[169] The private university police departments receiving their authority through municipal agreements must also maintain their relationship with the corresponding public police department, which has the right to terminate the agreement.[170] The right to terminate does not mean that the city "controls" the university police department, but it implies that the city is the dominant party in the relationship. Lines between the two departments are further blurred when the local agency provides essential, day-to-day services to the private university police.[171]

3. Governments are involved in the creation of private university police departments

Private universities could not operate police departments without the city or state government expressly delegating its authority. In the statutory model, the state and the university must both act before a department is created.[172] Under a municipal agreement, the city and university are both parties to the creation. Courts have held that both methods result in private university police departments that are government creations.[173]

In sum, these factors make clear that private university police departments are the functional equivalents of public agencies: (1) the departments perform a traditional and essential government function; (2) the government consistently regulates the departments through training and certification programs, and the government agencies sometimes share resources and otherwise maintain even closer relationships with these departments; and (3) the government is an essential party to the departments' creation. Therefore, private university police departments are carrying out "the people's business"[174] and are subject to open records laws.

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[168] *See, e.g.*, IND. CODE § 21-17-5-5 (stating that university police officers can only exercise their authority after meeting the state's training requirements); *Perrotti*, at ¶ 11.

[169] *See id.* at ¶¶ 24-25 (finding that the City of New Haven maintained "significant" control of Yale's police department through the training requirements).

[170] *Perrotti*, at ¶ 11.

[171] *See id.* at ¶ 28 (noting that the city police provide major case supervision, file processing, crime scene services, prisoner transportation and detention, and other services to Yale's police).

[172] The Indiana Supreme Court seemed to imply in *ESPN* that delegating state authority to university trustees, rather than police officers, nullified the state's role in the process. *See* ESPN, Inc. v. Univ. of Notre Dame Police Dep't, 62 N.E.3d 1192, 1198–99 (Ind. 2016) ("All this is accomplished by the legislature's grant of power *to the trustees.* The Department is not exercising the power of the State; rather, the trustees are exercising power granted to it by the State to appoint police officers to protect and oversee their campus."). But the quintessential power of the state at issue here is not the act of appointing campus overseers. Instead, it is the ability to search, detain, arrest, and use deadly force—activities that implicate an individual's liberty. The private university police officers could not do these functions without express delegation of that authority from the state, regardless of what form that delegation takes.

[173] *See* State *ex. rel.* Schiffbauer v. Banaszak, 33 N.E.3d 52, 55 (Ohio 2015) (determining Otterbein's police department was "established by the laws of this state" because the enabling statute allowed for the department's creation); *Perrotti*, at ¶ 19 (holding that the City of New Haven effectively created Yale's police department through its municipal deputization program).

[174] CAL. GOV'T CODE § 6250.

Conclusion

Law enforcement powers, such as the ability to detain, arrest, and use deadly force if necessary, are some of the most important of government's functions. With such power comes the need for strong accountability,[175] and there is an ever-increasing demand for accountability from police departments. Providing the public access to police records gives the public—and the press, the public's surrogate—the ability to audit the department's performance and take them to task for wrongdoing. Do the university's crime statistics submitted under the Clery Act add up?[176] Did the department cover up officer misconduct in the beating of a suspect?[177] Is the department mistreating racial minorities in the neighborhoods surrounding the university?[178] Those records could provide the answers to these questions and more, but only if they are open for public inspection.

As more states begin to confront the issue of police records at private universities, the functional equivalency analysis—or at least the underpinning arguments, no matter what name it takes—will provide a proven method to ensure that courts uphold the legislative's liberal intent of transparency in open records laws. The departments perform the essential state function of enforcing laws and arresting violators, often with broad powers and jurisdictions. Their authority comes directly from governments, whether through statute or municipal deputization, and they are subject to continuing regulation through state-organized training and certification programs. No matter what language the state's open records law employs, these factors make the department the functional equivalent of a public office and accountable under open records laws. Opening up these records prevents private universities from subverting state open records laws[179] and starts the process of bringing campus crime out from behind the "curtains of secrecy."[180]

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[175] *See* Randy Ludlow, *Dispatch Special Report: Private Cops Being Shielded From the Public*, THE COLUMBUS DISPATCH (Jan. 19, 2014), https://perma.cc/6RTD-RSS6 (listing the arguments for why private police, which have a lot of power in Ohio, should face the same transparency requirements as public police).

[176] *See* Binkley, *supra* note 131 (detailing the pervasive inaccuracies of crime statistics at most colleges across the country).

[177] *See* Arnold, *supra* note 1 (discussing the case at Rice University).

[178] *See* Gold, *supra* note 17 (discussing the accusation against the University of Chicago).

[179] *See* ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dep't, 50 N.E.3d 385, 398 (Ind. Ct. App. 2016) ("It would not be appropriate for the Police Department, having availed itself of its statutory right to exercise these public functions, to then be able to circumvent public records requirements to which all other entities exercising these same functions are required to adhere."), *vacated by* ESPN, Inc. v. Univ. of Notre Dame Police Dep't, 62 N.E.3d 1192 (Ind. 2016).

[180] Presidential Statement on Signing the Freedom of Information Act, 2 PUB. PAPERS 316 (July 4, 1966).

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Freedom of Information Audits as Access Advocacy

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Abstract

To evaluate the performance of FOI regimes, associations of journalists and other groups undertake FOI audits. These audits assess the depth of disclosure, the use of exemptions, among other indicators of the health of FOI laws. Drawing on a thematic analysis of FOI audits, we examine how these audits are conducted and what the audits reveal about FOI in multiple jurisdictions. We discern four themes in these audits: (1) law enforcement and security hindrance of FOI, (2) a link between FOI advocacy and struggles for government transparency, (3) gross abuses of FOI, and (4) the potential for social change. Arguing that FOI audits are a form of access advocacy, we suggest future FOI audits could be more community-based and participatory. We also provide recommendations for those undertaking future FOI audits.

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Introduction

Even for Western nations that are thought to be open and democratic, government secrecy has posed a significant problem in recent years (Aldrich & Moran, 2019; Potolsky, 2019; Luscombe & Walby, 2017). Freedom of information (FOI) laws have been enacted around the world as a means of granting citizens access to government records, such as draft reports, internal statistics, and even emails of government workers. Citizens are entitled to public records and information on government activities, politician salaries, varied statistics, among others. Some FOI laws provide access to more types or classes of records than others (Martin & Lanosga, 2010; Michener, 2011; Mulvey & Valvo, 2019). FOI has often been used by investigative journalists in shining light on abuses of power in government (Cuillier, 2019). FOI is also important for social science research (Brownlee, 2015; Sheaff, 2019), especially in sociology and criminology. For those involved in public interest journalism and critical research, there are simply no other ways to access some of these records. Yet as Birkinshaw (2010) notes, the actuality of FOI practice and administration often diverges from the spirit of the law. While the enactment of an FOI law is often celebrated as a watershed moment for transparency, compliance does not typically match the ideal (Darch & Underwood, 2005). The challenges in confronting secrecy are precipitous. It therefore remains important to conduct research on FOI and to perform audits of how well FOI regimes are working.

FOI audits help researchers to investigate government conduct. FOI audits entail an investigation into government transparency based on the systematic submission of FOI or public record requests and the analysis and comparison of outcomes and disclosures. There is a history of FOI audits that overlaps with social science research. For example, Ralph Nader (1970) had dozens of FOI users submit requests on a variety of topics, and then assessed the results. Nader concluded already in 1970 that government agencies across the United States were not complying with the letter of FOI law. News media organizations, watchdog organizations, university groups, and arms-length government bodies have since undertaken FOI audits for different reasons. Some audits are annual, others are intermittent. There is also related literature on FOI in comparative context that involves an audit component and compares levels of compliance and performance (Hazell & Worthy, 2010). FOI research that incorporates an audit component tells us something about how government agencies relate to FOI law and FOI users, but also reveals patterns in how FOI regimes function and change over time. Contributing to international literature on FOI and government transparency (Capeloto, 2014; Cuillier & Pinkleton, 2011; Grimmelikhuijsen et al., 2018; Wasike, 2016; Worthy et al., 2017), we assess FOI audits performed by journalism agencies as well as access advocacy groups to assess how these audits are designed and what trends appear. By examining trends in FOI audits, we hope to further reveal their importance as a form of research but also as a way of advocating for citizens and social change through identifying and addressing problems with FOI regimes and other government processes.

First, we review relevant literature on FOI performance and compliance by governments as well as literature on FOI audits. We situate FOI audits as one of a number of kinds of investigations that fit the definition of audits of government processes (e.g., Kells, 2010). Second, we discuss the parameters of our search and the characteristics of the audits we analyzed. Third, we examine four themes apparent in how these audits are performed and what the audits reveal about the functioning of FOI laws. Law enforcement and security are used in multiple jurisdictions to block access to government records, even when the notion of public interest is invoked. Audits are described as fulfilling an important role in providing transparency and accountability. There

are many continuing abuses of power and process in governments discovered or highlighted by FOI audits. As well, some FOI audits lead to social change. Arguing that FOI audits are a form of access advocacy, we conclude with a discussion of what our findings mean for the literature on FOI and information rights and activism. We suggest that future FOI audits could be more participatory, which will enrich the audit by shaping the audit's request wording and by boosting the connection to struggles for social justice. Finally, we provide recommendations for those undertaking FOI audits in the future.

Context and relevant literature

FOI is notable as a research tool used by a wide range of professionals and scholars from a variety of backgrounds, including sociology, political science, law, and journalism. It also cuts across government institutions in ways that few other laws or policies do. Ackerman and Sandoval-Ballesteros (2006) trace the rise of FOI worldwide, which they refer to as an explosion of records laws and right to information movements. Challenges remain in accessing government records. In Canada at the federal level, the Access to Information Act has also become less efficacious over time due to a number of amendments and administrative regressions as well as lack of resources (Roziere & Walby, 2020; Roberts, 2006). There are ways that FOI can be undermined from inside government if the promotion of access to information is not accepted throughout (Elliot & Thomas, 2018; Roberts, 2006, 2002). Despite more training and professionalization of FOI coordinators (Kimball, 2011), there are many ways that political workers and even non-partisan bureaucrats undermine FOI and the disclosure of government records (Gilbert, 2000). FOI office coordinators face challenges in meeting the requirements of FOI law and the demands of FOI users (Shepherd et al., 2010). The relationship between FOI users and FOI coordinators can be antagonistic (Kimball, 2012). Johnson (2020) found FOI coordinators to be paternalistic, which can translate into an attitude that promotes professionalism over transparency.

When FOI compliance is low or when abuses of FOI laws are discovered, there are few remedies other than appealing to an FOI Commissioner/Ombudsperson, an administrative tribunal, a judicial tribunal, or the courts (Phillips & Dill, 2019; Yeager, 2006; Rowat, 1993). Digital, online access to records or digital pre-emptive disclosure can provide more access to records, though this may not boost perceptions of government transparency (Capeloto, 2019). FOI is one of the only mechanisms for access, but this assumes the records are there in the first place. Destruction of records (Banton, 2012) or failure to produce records to begin with is a large problem in government but is not something that an FOI audit would detect. There is also an emerging FOI industry (Goldberg, 2006) comprised of paid access advocates and technology companies that aim to promote transparency as a kind of product rather than a movement or a means to justice (also see Capeloto, 2014).

FOI compliance is part of a bigger story regarding the relationship between information, the state, and citizens. Given the drastic differences in political and administrative cultures and funding for government transparency initiatives, Michener (2015) notes how it is difficult to compare FOI performance and compliance from one country to the next. There is variability as it regards different classes of records and different areas of government. Almanzar et al. (2018) show that FOI disclosures for security-related records are released at lower rates with less depth of disclosure. There is also variability in FOI performance depending on size of government agency, awareness of the technicalities of FOI, and ideology of government leaders (Saez-Martin et al., 2017). Looking at data on FOI performance and compliance in Mexico, Lagunes and Pocasangre

(2019) show that performance and compliance improved between 2005-2015, though a number of regressive tendencies such as lack of depth of disclosure and lack of duty to assist also emerged. Guy and Oberlin (2009) use FOI audits conducted by the National Security Archive in the USA to examine the performance of FOI and compliance with FOI law by various government agencies. Our approach is similar, though we include additional audits performed by investigative journalists and other access advocates. Our focus is less on compliance with FOI law and more on the themes appearing in the audits.

Some social science and journalism studies using field experiments have further investigated access regimes and FOI performance. These methodologies have an audit component built into them. For example, Koch (2019) conducted a field experiment to assess whether identity or status of the FOI user was a factor in response time and depth of disclosure by the Danish municipal agencies that the FOI requests were sent to. The author found no evidence of bias, but notes that these findings cannot be generalized to other jurisdictions. Koch calls for more research using FOI field experiments and research on FOI compliance through audit-type research designs. Cuillier (2010) has conducted important field experiments on the effects of different tactics that FOI users can use to assess whether these boost compliance by FOI offices or not. In this sense, social science research on FOI can incorporate an audit component, which can result in valuable findings on FOI performance. With this understanding of the variation of audit design in mind, below we explore the following questions. How have FOI audits been organized? What are the main findings of these FOI audits? How can FOI audits be used to encourage public awareness of the problem of government secrecy and to foster information advocacy and activism? By answering these questions we aim to contribute to multi-disciplinary literature on FOI as well as literatures on information rights and activism.

Method

We were aware of the annual FOI audits such as the National Security Archive's FOI audits and the News Media Canada's FOI audits. To extend our sample, we continued searching for audits published since 1999. We searched largely for audits conducted by groups outside of university settings and searched primarily for audits conducted in conjunction with journalism associations. However, some of the audits we located are not linked with journalism associations. These audits take the form of published reports with appendices. We did not reject audits based on political or normative stance taken. We wanted to focus on a diverse sample, rather than recounting all the annual (and more well known) audits in their entirety. We arrived at a sample of 29 audits for analysis in this paper (see list starting on page 27). This sample allows us to assess and compare FOI audits from Canada, the United States, the United Kingdom, and other countries. We acknowledge that we have not analyzed all FOI audits appearing between 1999-2020, which is one limit of this study. We conducted a thematic analysis of these audits (Braun & Clarke, 2019). Thematic analysis allows for patterns, trends, and commonalities to be located in a number of texts. Each audit was scrutinized for commonalities, differences, and distinguishable moments, with four main themes emerging: (1) law enforcement and security hindrance of FOI, (2) a link between FOI advocacy and struggles for government transparency, (3) gross abuses of FOI, and (4) the potential for social change.

FOI audits in context

We found several common characteristics, methods, and themes across the FOI audits. Governments and their departments are targeted for these types of audits by large annual audits such as News Media Canada's FOI audits on the Canadian federal, provincial, and municipal governments or the National Security Archive's FOI audits on the United States federal government. However, depending on which agencies are added to the schedule of the Act in any jurisdiction, a number of other organizations such as nonprofits and universities could also be sent FOI requests that they would be required to respond to.

The most common foci of FOI audits are timeliness of responses to the FOI requests, fees charged for search and disclosure, amount of information disclosed, number of requests responded to, and the compliance with FOI laws. These foci are prevalent throughout audits internationally. The News Media Canada FOI audits from 2005 to 2017 assessed these factors on an annual basis with expanded focuses and analyses year by year. The News Media Canada and Canadian Newspaper Association FOI audits were recognized by newspapers, magazines, national broadcasts, and radio interviews across Canada (News Media Canada FOI Audit, 2005). These FOI audits highlight gaps, performance issues, and inconsistencies with FOI compliance and timeliness in Canada's federal, provincial, and municipal FOI systems, as well as areas of improvement for adequate information access for citizens. Michael McEvoy (2018) also focused on these issues in an audit of British Columbia's City of White Rock in 2018, where the goal was to ensure that the City of White Rock was complying with the FOI requests submitted under the Freedom of Information and Protection of Privacy Act. Organizations in the United States such as the National Security Archive, the New Mexico Press Association, the Tennessee Coalition for Open Government, and the Des Moines Register in Iowa, among others, have undertaken audits looking at different levels of governments using comparable foci. FOI audit reports throughout the United Kingdom, Australia, and Mexico also focus on disclosure, compliance, fees, and timeliness.

Additional factors assessed in audits include the need for releasing records in machine-readable formats, the requirement for identification, building security compliance with those requesting public records, and biased treatment of some FOI users (Fisher et al., 2018; Georgia Audit, 2004; Hammitt, 2001). The identification requirement along with the building security compliance factor were found to be of common concern for FOI requesters in the Tennessee, Connecticut, and New Mexico audits. Surveyors and requesters were required to provide their name, driver's license, and the reason they were wanting to view the records, and there were various other roadblocks for those seeking public records (Fisher et al., 2018; Hammitt, 2001; Massey, 2000). The "average person" and "influential figure" approach was also used in Lagunes and Pocasangre's FOI audit of compliance with Mexico's FOI Act. This audit analyzed the disclosure, compliance, fees, and timeliness factors by sending FOI requests by an "average person" and an "influential figure," then investigated for any potential biased treatment between the two groups (Lagunes & Pocasangre, 2019).

FOI audits can also highlight improvement or regression within FOI regimes over time. For example, governments are required to respond to FOI requests from citizens within legislated timelines (such as 30 days), but government bodies can issue an extension. Assessing the time to disclosure as well as analyzing the obstacles that hinder timely access to records were common objectives of FOI audits (Fisher et al., 2018). Examples of this can be seen in the National Security Archive audits, with audit variations such as "the ten oldest pending FOIA requests," where FOI request backlogs dating back to the late 1980s were analyzed (Blanton et al., 2004). This type of

audit reveals backlogs and neglected requests throughout a number of federal agencies. Since the early 2000s, several FOI audits have also tested agencies on their use of technologies and online systems. An example includes the National Security Archive and their 2007 and 2015 audits focusing on online information in relation to the 1997 Electronic Freedom of Information Act amendments (Blanton et al., 2007; Jones & Harper, 2015). The 2013-2014 FOI audit by News Media Canada focused on electronic and open data (Vallance-Jones, 2014). We now turn to an analysis of the main themes we encountered in these audits.

Table 1: Audits grouped by main themes
(Links provided to available files, and provided in reference list at end)

Trends	**Audits**
FOI, Security, and Law Enforcement	• Iowa Audit 2005
	• State Agency FOI Compliance in Connecticut
	• New Mexico Public Records Access Audit 2000
	• FOI Hawai'i Audit 2006
	• Californians Aware FOI Audits – "2007 Law Enforcement Audit Follow up" and "2011 State Agency Follow-up Audit"
	• News Media Canada FOI Audits – "2015 FOI Audit" and "2017 FOI Audit"
	• The National Security Archive FOI Audits – "The Ashcroft Memo (2003)," "Justice Delayed is Justice Denied (2003)," "Eight Federal Agencies Have FOIA Requests a Decade Old (2011)," and "25-Year-Old FOIA Request Confirms FOIA Delays Continue Unabated (2019)"
FOI Advocacy, Rights, and Awareness	• Tennessee Public Records Policy Audit 2017-2018
	• OIPC Audit and Compliance Report 2018 (City of White Rock)
	• Administration of the FOI Act 1982 in Australia
	• Iowa Audit 2005
	• ECT Audit in England, 2011-2015
	• State Agency FOI Compliance in Connecticut
	• Audit of Access to Information at the Canadian Space Agency 2018
	• Canadian Border Services Agency Audit 2016
	• New Mexico Public Records Access Audit 2000
	• Medicines and Healthcare Products Regulatory Agency FOI Audit, UK
	• FOI Hawai'i Audit 2006
	• Employment and Social Development Canada 2015-2016 Audit
	• Audit of Mexico's FOI Act
	• Californians Aware FOI Audits
	• City of Vancouver FOI Audit 2016
	• News Media Canada FOI Audits
	• The National Security Archive FOI Audits

FOI Abuses	• Iowa Audit 2005
	• Georgia Audit 2004
	• State Agency FOI Compliance in Connecticut
	• Audit of Mexico's FOI Act
	• City of Vancouver FOI Audit 2016
	• News Media Canada FOI Audits – "2009-2010 FOI Audit"
	• The National Security Archive FOI Audits – "Justice Delayed is Justice Denied (2003)," "An FOIA Request Celebrates its 17th Birthday (2006)," and "25-Year-Old FOIA Request Confirms FOIA Delays Continue Unabated (2019)," and "How Transparent is President Trump? (2020)"
FOI Audits and Social Change	• Iowa Audit 2005
	• Administration of the FOI Act 1982 in Australia
	• Californians Aware FOI Audits – "2007 Law Enforcement Audit Follow up"
	• News Media Canada FOI Audits
	• City of Vancouver FOI Audit 2016
	• City of White Rock FOI Audit
	• The National Security Archive FOI Audits

Law enforcement, security, and FOI

The first theme in the FOI audits is the terse relationship between law enforcement, security and FOI. Law enforcement and security agencies have often been found to be the worst performers in terms of access to information. There has been frequent resistance to information access for those attempting FOI requests, especially in the United States. In the United States, there have been incidences with use of force, interrogation, denying entrance, and threats by the building security or law enforcement officials against those (citizens and surveyors) attempting to gain access to public information by the building security or law enforcement officials. These types of occurrences were observed in (but not limited to) Connecticut, Iowa, and New Mexico (Hammitt, 2001; Massey, 2000). Indeed, Krantz et al. (2005) recognized that law enforcement officials can be "overly cautious" and the agencies can "breed secrecy" due to the belief that the public is better served in secrecy. This observation was in regard to an FOI audit undertaken in counties throughout Iowa that included law enforcement agencies and school districts. Additionally, in the 2007 and 2011 audits by Californians Aware, the security was observed to have failed in understanding FOI guidelines and had a "general ignorance" to public record laws with several law enforcement agencies noted as being well below norms (Public Access to Law Enforcement Information, 2007; State Agencies Audit, 2011). This lack of awareness of FOI Acts, guidelines, and procedures as well as the need for improved training in FOI controls was found to be widespread throughout the different FOI audits. In a 2016 internal audit, the Canadian Border Services Agency found insufficient training in FOI systems for staff members (Audit of Access to Information and Privacy, 2016). There can also be a culture of secrecy, as observed with the

general lack of transparency of the federal government in Canada and the Ashcroft Memorandum in the United States.

In the United States, the Ashcroft Memorandum released on October 12, 2001, contributed to heightened secrecy and problems with accessing public records. After the events of 9/11, government secrecy rose dramatically, and security measures increased substantially under the administration led by President George Bush. A month after the 9/11 attacks, Attorney General John Ashcroft's FOI Act Memorandum allowed government agencies to withhold records more easily with the assistance of the Department of Justice (Blanton et al., 2003). This memorandum emphasized the protection of "fundamental values," including national security, law enforcement agency effectiveness, personal privacy, and sensitive business information (Ashcroft, 2001). Based on the protection of these "fundamental values," government agencies were encouraged to withhold information and public records from citizens. In 2008, President Bush's executive order called for a "citizen-centered" and "results orientated" federal FOI system. The National Security Archive's 2008 federal FOI audit revealed that there were only limited improvements provided by the executive order, with no changes or improvements in some agencies. The National Security Archive audits found some improvements after President Obama's FOI openness orders in their 2011 federal audit after President Obama's FOI openness order, despite some agencies still noted to be lagging. However, another 2011 audit by the National Security Archive found that several U.S. agencies, including the Army, Central Intelligence Agency, Department of Justice, Department of State, Drug Enforcement Agency, and the Transportation Security Administration (among others), still failed to comply by addressing the many backlogged requests. These denials and non-responses opened the door to legal action for the National Security Archive (Blanton & Jones, 2011a, 2011b; Blanton et al., 2008), advocating for greater access.

At the state and county levels in the United States, FOI audits have uncovered resistance to information disclosure and transparency from police forces in several states. Barry Massey notes how police forces and law enforcement agencies throughout New Mexico were the worst performers in releasing public records (Massey, 2000). In Iowa, Colleen Krantz describes requests to police forces being denied and threats against the requesters, including a threat of arrest because a requester did not provide their personal information for the request. By law, requesters in Iowa were not required to respond after requesting public records (Krantz et al., 2005). Similarly, a surveyor who was requesting information in the 2001 Connecticut audit was detained by a vigilante victim advocate who threatened that the police would be involved (Hammitt, 2001). This incident in Connecticut will be discussed in the "Abuses to FOI" section. FOI audits assist in revealing these types of mistreatments toward taxpayers who have a right to view the public records.

In the Canadian context, the 2017 national FOI audit performed by Vallance-Jones and Emily Kitagawa (2017) mentioned that the Royal Canadian Mounted Police and National Defence failed to respond to any requests by the end of the audit, while the Canada Border Services Agency (CBSA) had only responded to only one out of five requests. The 2015 FOI audit by Vallance-Jones and Kitagawa focused on police forces throughout Canada, noting that municipal police forces were the least transparent public bodies. Police forces across Canada as a whole were pinpointed as being reluctant to release information for the 2015 audit, with municipal police forces recognized as the overall least transparent public agencies in 2015. According to Vallance-Jones and Kitagawa (2015), the Saskatoon, Regina, and Charlottetown police forces had refused any access to information because at the time police forces were not included in the Saskatchewan and Prince Edward Island FOI legislation, further displaying how law enforcement and security

agencies can often be the worst violators in complying with FOI laws and guidelines. Through various forms of access advocacy since, those police agencies have been brought under FOI legislation. Law enforcement and security agencies that continue to deny citizens' rights to information access may begin to lose public trust over time.

FOI advocacy, rights, and awareness

The second theme in the FOI audits is the relationship between FOI, information rights, and awareness of transparency. FOI audits frequently involve different forms of advocacy, protecting citizens' rights, and raising awareness of those rights. As noted, FOI audits are often conducted by watchdog organizations, university groups, news media organizations, and different government bodies. Examples of watchdog organizations include the Tennessee Coalition for Open Government, the New Mexico Foundation for Open Government, the Society of Professional Journalists, Californians Aware, and the National Security Archive. These examples of watchdog organizations consist of access advocates who assist in and lead the execution of different FOI audits, among the organizations' other functions.

The common goals of these different FOI audits are to advocate for easier and enhanced access to public records for citizen requesters, government transparency and accountability, as well as ensuring the lawful compliance to information requests (Fisher et al., 2018; McEvoy, 2018). This even includes the University of East Anglia's Climate Research Unit's failure to comply with information requests from climate change skeptics such as Stephen McIntyre from the "climate audit," as noted by the Science and Technology Select Committee. The Science and Technology Committee criticized the University of East Anglia for misconduct with FOI requests and for supporting the Climate Research Unit in withholding information from climate change skeptics. The director and scientists of the Climate Research Unit viewed the requests from McIntyre and his followers as time consuming, overwhelming, and disruptive to their research. Yet, the Science and Technology Committee noted that the reputation of climate science could have been harmed by the lack of disclosure from the Climate Research Unit. McIntyre claimed that he wanted data to be publicly available (Cosh, 2009; Disclosure of Climate Data from the Climate Research Unit, 2010; Heffernan, 2009).

A general ignorance of FOI requirements on the part of government officials was noted in several audits. The report on the 2006 Hawai'i audit by the Society of Professional Journalists advised that average citizens should not need to keep returning to obtain the information that was requested, as the information should be released during the first visit and citizens should not require their identification as well as the reason they want to view the public records to be scrutinized (Freedom of Information Compliance Audit, 2006). If security personnel are denying entrance to individuals seeking access to public records, then there are competing interests that arise in administering the FOI Act (Hammitt, 2001). Krantz et al. (2005) recognized the need for more training to raise awareness on FOI/open-record rights, laws, and policies. While there can be frequent roadblocks and difficulties in accessing public information, the audits also detect various forms of access advocacy. The *Gwinnett Daily Post* stated that taxpayers are entitled to the access of public records and information, and that public officials' jobs are to serve the people efficiently, willingly, and completely (Georgia Audit, 2004).

Whether someone is "influential," a journalist, or an "average" citizen, requesters should be treated equally throughout the FOI request and disclosure process. This has been tested in several cases. The Georgia audit in 2004 by the *Gwinnett Daily Post* tested for unequal response

times of requests between an "average joe" and a reporter (Georgia Audit, 2004). The 2016 audit on the City of Vancouver also found media requesters to be treated differently and given "special treatment" compared to other applicants (Lupick, 2016). Lagunes and Pocasangre's (2019) audit of Mexico found that the "average" and "influential" groups were treated equally, regardless of political and socioeconomic status. Furthermore, the 2006 Hawai'i audit utilized citizen volunteers to evade any biased treatment toward journalists (Freedom of Information Compliance Audit, 2006). Several other FOI audits involved a participatory approach, including the 2000 New Mexico audit, the 2005 Iowa audit, the (Californians Aware) 2009 Sacramento Public Education Audit, and the Tennessee Public Records Policy audit in 2018. These audits utilized the participation of journalism students, civic groups (such as League of Women Voters), and citizen volunteers. The narratives of the participants were often highlighted within an audit's report (Massey, 2000). This participatory approach was used to avoid favorable treatment toward journalists (Freedom of Information Compliance Audit, 2006). While seeking to avoid biased treatment toward journalists, the citizens and students volunteering can learn more about the laws and their rights regarding access to information and FOI.

Proper systems, policies, guidelines, and frameworks need to be in place for FOI compliance to be heightened. The Canadian Space Agency and CBSA were audited to determine if their information management systems met the FOI and access to information requirements (Audit of Access to Information at the Canadian Space Agency, 2018; Audit of Access to Information and Privacy, 2016). In the last three decades, both the Conservative Party and Liberal Party have claimed during campaigns that they will be the more transparent and accountable governments. The 2006 News Media Canada FOI audit observed the federal conservative government as being one of the worst performers, despite the conservatives' campaign promises of transparency and accountability (News Media Canada FOI Audit, 2006). Similarly, Justin Trudeau's Liberal campaign featured promises of transparency, yet the findings of the 2017 national audit by Vallance-Jones and Kitagawa (2017) revealed a worse FOI performance by the Trudeau government than the previous Harper government. The federal government was given a letter grade of "F" for the lack of disclosure in 2017. Jim Bronskill (2017) noted how the audit found "trouble spots" throughout municipal, provincial, and territorial levels of government, regarding the federal system as incredibly "gummed up." From 2005 onward, the News Media Canada (and Canadian Newspaper Association) audits have aimed to expand public awareness about the condition of the Canadian FOI system and have consistently achieved national coverage.

In Mexico, Human Rights Watch recognized the FOI Act enacted in 2002 as an "unambiguous achievement." Lagunes and Pocasangre (2017) noted that the FOI Act can be a tool for unearthing corruption in the Mexican government. Indeed, the FOI Act has uncovered cases of corruption in Mexico. Independent FOI audits such as Lagunes and Pocasangre's FOI audit of the Mexican government help to ensure that the FOI act is effective and that agencies are complying with it. This is also the case for FOI audits elsewhere. In England, an FOI audit report on the use of electroconvulsive therapy (ECT) by John Read et al. (2018) mentioned that national audits should be re-established and that independent monitoring (on ECT outcomes in this particular case) is needed. Nonetheless, independent monitoring is crucial for holding agencies accountable as well as creating transparency of the agencies. Massey stated that citizens can sue if denied the requested public records, with entitlement to court fees, attorney fees, and damages if they win (Massey, 2000). Denials and non-responses to requests opened the doors to legal action for the National Security Archive in 2011 against several U.S. agencies (Blanton and Jones, 2011a).

FOI audits allow access advocates to test FOI acts, policies, and guidelines that are in place for citizens to access public records. The National Security Archive stated that the U.S. government should consider compliance with the law as a "duty to American democracy" (Elias et al., 2006). In an audit on the Medicines and Healthcare Products Regulatory Agency in the United Kingdom, Grigg et al. (2019) advised how transparency can be improved if every FOI request and response was made available to the public. Moreover, the Australian National Audit Office referred to a recommendation from the Belcher Red Tape Reviews noting that there should be minimal burden and active publication of information in the government entities' practices in Australia (Administration of the Freedom of Information Act, 1982). In an audit-based study of the government of Mexico, Lagunes and Pocasangre (2017) discussed how the Mexican government should invest in improving the management of information and provide government entities with more resources to maintain transparency. In addition, McEvoy's (2018) report on the City of White Rock audit recommended for governments such as the City of White Rock to provide the full documentation of every FOI request, forward requests to departments to find the records speedily, and provide responses to FOI requests within legislated timelines without delay. Ensuring that FOI requests and responses are publicly available can increase transparency and openness (Grigg et al., 2019). Therefore, FOI audits are significant across international boundaries for ensuring the transparency and openness of governments and to assist in protecting citizens against abuses of power and corruption.

Abuses of FOI systems

The third major theme in the FOI audits is the revelation of abuses of FOI systems, and patterns in these abuses across jurisdictions. There can be instances during FOI audits when rules and guidelines are ignored by or unknown to those responding to FOI users. This can lead to different abuses of FOI and access to information. We found cases where citizens or surveyors wanting to gain access to public records were harassed, intimidated, threatened or interrogated by building security or public officials (Hammitt, 2001; Krantz et al., 2005). One example of this was described in the 2001 Connecticut audit, where a surveyor for the audit who requested the attendance records of a victim advocate named James Papillo was approached by Papillo himself. Hammitt (2001) noted how the surveyor was questioned by the victim advocate, then grabbed while being called "full of shit." The victim advocate also threatened to call the police on the surveyor. This type of ignorance of FOI laws and bullying behavior toward a surveyor in the Connecticut audit was not an isolated case. In the same audit, building security was also found to be denying the surveyors' rights to view certain public records and denying entrance of surveyors. The 2001 FOI audit in Connecticut uncovered these types of problematic findings after the events of 9/11 and the Oklahoma bombings which (in part) led to more stringent security. Hammitt (2001) noted that the statutory rights provided by the law were disregarded by building security with requesters not allowed access past the lobby or being denied entrance altogether, which hindered access to public records.

The National Security Archive has observed different abuses, such as the dramatic increase in government secrecy since the events of 9/11 and U.S. agencies having pending requests that are over a decade or two old (dating back to the 1980s and 1990s). As noted, government secrecy, security, and enforcement became increasingly prevalent after the startling events in New York on September 11, 2001. The administration during the events of 9/11 allowed for the Ashcroft Memorandum to undermine the FOI Act and encouraged more influence for U.S. agencies over

Freedom of Information Act systems (Blanton et al., 2003). In addition, federal agencies were found to have request backlogs that were highly troublesome. An example of a backlogged request found in the second phase of the 2003 audit included a pending request to the Department of Defense in 1989 that was from a graduate student who became a professor while still awaiting a response. Another pending request that was sent in 1987 was from a reporter named Seth Rosenfield regarding FBI activities. In a follow-up audit in 2007, many of these dated requests remained unfulfilled and incomplete. In 2019, the National Security Archive once again analyzed the U.S. agencies' oldest pending requests dating back to the 1990s and early 2000s, highlighting the problematic backlogs that were not resolved (Blanton et al., 2003; Harper et al., 2019; Nielson, 2007). Additionally, the National Security Archive had been tracking progress in compliance during different presidencies since 2003. An audit by the National Security Archive in 2020 assessed President Donald Trump's pro-transparency and pro-secrecy decisions since his presidency, with decisions such as making phone calls private, keeping his tax returns secret, and classifying the coronavirus talks. Through their audit, the National Security Archive found that President Trump made three times as many pro-secrecy decisions compared to pro-transparency decisions since 2017 (Harper & Harvey, 2020).

In other cases, there may have been biased treatment toward citizens and reporters making requests. Biased treatment was observed in the 2004 Georgia Audit, for example (Georgia Audit, 2004). The *Gwinnett Daily Post* recognized roadblocks and difficulties for the "average Joe" in accessing public information in several Georgian cities. In particular, the mayor's son in the City of Norcross experienced these difficulties when requesting access to information on how much money the city had spent on attorney fees, whereas reporters had an easier time accessing the same information. Reporters from the *Gwinnett Daily Post* had sent similar requests (as the requests sent by the mayor's son) to several government departments. The information requested by the mayor's son was sent to the *Post,* while the mayor's son (recognized as an "average Joe") was still waiting on the information (Georgia Audit, 2004). As mentioned, an audit conducted in Mexico by Lagunes and Pocasangre (2017) with a similar experimental test had shown opposite results with relatively equal treatment between "influential figures" and "average citizens" (but also see Carroll, 2016).

Making access to public records more difficult for citizens can deter and discourage requesters from wanting to go through the process. Fee charges have been observed to be subject to abuse when attempting to access public records. Lagunes and Pocasangre (2017) noted that the fee charges in Mexico have been trending upwards and fee charges have been placed on requests sporadically and strategically, which was found to be suspicious and burdensome. Their audit of Mexican government agencies found fees to be placed strategically for the purpose of discouraging requesters from seeking certain public records and information (also see Kingston et al., 2018; Wagner, 2017). In an outrageous case, the 2009-2010 FOI audit conducted by News Media Canada observed how British Columbia's Ministry of Transportation was charging $98,603 for an FOI request on how much the agency had spent on cell phones (News Media Canada, 2010). In another instance, Lupick (2016) mentioned how the 2016 audit of the City of Vancouver found concerns over the "alleged deletion of records and evasion of FOI laws," as well as city staff allegedly instructed to change naming conventions to make public records more difficult to find. At the time of the report, the City of Vancouver offered an investigation into these issues if the Office of the Information and Privacy Commissioner of B.C. provided further detail and findings. Certain governments and their agencies may take different measures to deter citizens' access to

information, including actions that disregard FOI laws. Overall, FOI audits assist in uncovering abuses of FOI that can be obstacles to information access and transparency.

FOI audits and social change

The final theme is societal change emerging as a result of FOI audits. In many cases, FOI audits provide a method to maintain pressure on government agencies to improve FOI regimes or create social change more broadly. The National Security Archive demonstrates this through yearly FOI audits focusing on the compliance of U.S. government agencies. The audits conducted by the National Security Archive in 2008, 2010, and 2011 focus on changes to information accessibility under President Bush (in 2008) and President Obama (in 2010 and 2011), tracking improvements and shortcomings in agency compliance. The National Security Archive also monitored the changes and guidance provided to agencies by President Bush's executive order as well as President Obama's 2009 memoranda for open government. As mentioned, agency compliance was found to be improved in the 2011 audit report compared to the 2010 audit report, with early improvements to the law in the Obama administration compared to previous administrations (Blanton, 2010; Blanton et al., 2008; Blanton & Jones, 2011b; but see Arnold, 2015). The National Security Archive works toward change through publishing results from these audits and continuously monitoring government approaches to the law and information accessibility.

Krantz et al. (2005) notes how a reporter (who was attempting to request public records) was threatened with arrest by the Indianola police during a 2000 audit in Iowa. By the 2005 audit, Krantz et al. (2005) found that the Indianola police chief had taken more appropriate steps toward compliance. The story mentioned how the police force "had a certain degree of embarrassment at the time" (Krantz et al., 2005). This "embarrassment" sparked change toward a less authoritative and more transparent police force in Indianola as well as for other county law enforcement agencies throughout Iowa. The Californians Aware follow-up audit in 2007 on law enforcement agencies also found improvements in compliance with many agencies when compared to their 2006 audit, observing that many of the agencies mastered the essentials despite a minority of agencies' performances being incredibly poor (Public Access to Law Enforcement Information, 2007). Despite the poor performances of some agencies, other agencies found ways to increase their transparency with the aid of FOI audits after compliance gaps were located and recommendations were made for greater transparency.

Since 2005, the Canadian Newspaper Association and News Media Canada FOI audits have created change with news coverage of the audit findings being aired across Canada. In the 2017 audit, Vallance-Jones and Kitagawa recognized Nova Scotia's provincial government as providing the most user-friendly online system, while they denounced the Canadian government for failing to utilize online FOI systems. Vallance-Jones and Kitagawa (2017: 47) noted how "old ways are starting to give way" despite the slow progress to incorporate an online system for FOI requests similar to Nova Scotia's system. Now FOI regimes across Canada are following this example to promote easier access.

After the 2016 City of Vancouver FOI audit that made 12 recommendations on how FOI systems can be improved, an agreeable response came from the City Manager stating that the City will be "committed" to implementing all 12 recommendations (Johnston, 2016). Likewise, the Information and Privacy Commissioner of B.C. offered recommendations for the city to follow after auditing the City of White Rock, and the Commissioner stated that it would follow up three

months later. McEvoy expressed confidence that the City of White Rock would achieve full compliance with the recommendations mentioned in the FOI audit (McEvoy, 2018). A similar example occurred with the audit on Australian FOI performance. The Australian National Audit Office advised that the Australian Information Commissioner publish a statement on its regulatory approach, which the government agencies that were audited signed on to. FOI audits can thus encourage governments to ensure their FOI regimes are well functioning. Beyond change in government, FOI audits could also be a vehicle for broader social change (and see Society of Professional Journalists, 2020).

Discussion and conclusion

Analyzing trends and patterns with FOI audits conducted across Canada, the United States, the United Kingdom, and Mexico, we have found four major themes. First, criminal justice and security is an impediment to access to government records across jurisdictions. Second, despite challenges, FOI audits are touted as important to working toward government transparency and accountability. Third, FOI audits have highlighted government corruption, malpractice, or scandals that are important to investigate further and that have implications for justice. Fourth, FOI audits have the capacity to influence social change in the domain of government transparency and beyond.

Despite challenges involved in accessing government records and the limits of law, FOI can have pro-democratic effects (Worthy, 2017) and feed into social movements for justice. Access to government records is an important dimension of democracy, though the access is never total and the struggle for greater access continues (Martin & Lanosga, 2010). People can also push for changes to FOI as part of a broader mobilization involving data activism and politics. Pozen (2016) is more critical, arguing that the U.S. FOIA is a regressive, reactionary form of transparency that entrenches government power and control over records. This may be the case, and we are partial to Pozen's critique. However, this is no reason to abandon the domain of FOI laws as a way of seeking records or a way of mobilizing for transparency and justice, since there are few other ways to collect such data and the records can be used to inform social movements of any kind. Access to government records must also be situated in a social and cultural context, which should include awareness of the history of oppression and racism (van Wyk, 2019). In this way, access to information can be a form of access to justice. A genuine approach to creating open government would enhance transparency to a greater degree (Berliner et al., 2019; Beyer, 2014), however, open government in most countries is little more than rhetoric at this time since the records made available under proactive disclosure are hand-picked by political staffers or not as open as they appear (Wang & Shepherd, 2020). Yet FOI laws remain crucial to access advocates who wish to change the relationship between citizens and government, which at this time remains mediated by secrecy and obscurity.

Despite the barriers and the challenges, which we agree are regressing further over time based on our analysis of FOI audits as well as our experience as FOI users (see Walby & Luscombe, 2018, 2017), we argue that FOI audits are one form of access advocacy that is important to undertake but also communicate widely, not only in regards to the specific findings but also in relation to the broader politics of accessing information and data activism. As Bennett (2010) notes in his research on the privacy movement, privacy advocates vary by strategy, size of group, and the networks they are a part of. Access advocates are similarly positioned in terms of strategy, groups, and networks. As a strategy and a resource, the FOI audit is important because of its

specific findings but also as a symbol of accountability and transparency. The audit can hook new people and groups into the movement for improved access to government records, or could politicize people to think differently about the state and government conduct. There is a need to educate more people about FOI and the possibilities of accessing government records (Weiler, 2017). Audits are another way of demonstrating benefits as well as challenges with FOI.

Finally, we think it is important that the 2000 New Mexico audit, the 2005 Iowa audit, the (Californians Aware) 2009 Sacramento Public Education Audit, and the Tennessee Public Records Policy audit in 2018 involved a participatory component. Future FOI audits should aim to be collaborative, participatory, and empowering. We know that some audits conducted by journalism professors involve students, which is already inclusive. We are envisioning a direction that is even more community-involved, and that involves multiple community stakeholders. FOI audits conducted by journalists or academics should also be inclusive of local communities impacted by the government practices or policies being investigated. FOI audits could be undertaken more along the lines of community-based research and participatory action research. This may add time and effort to the process, but it will enrich the audit by shaping the audit's request wording and focus and by hooking a greater number of community groups and citizens into the audit process, thereby revealing the interconnected nature of access advocacy and struggles for social justice. What we are pointing to is a more definite connection to be made between FOI research and social movements. The FOI audit could be a small part of quests not only for information justice, but for social and economic justice. Making audits even more participatory would also help to grow the movement for information rights and activism and help people realize how important access to government information is for everyone in society no matter their social position or status.

Recommendations for FOI audits

- **Study previous audits.** This will provide ideas regarding how to phrase FOI requests and what to explore. It will allow a conversation with those previous audits, increasing the scope and resonance of the work.
- **Collaborate with local journalists, if possible.** This would enhance the capacity of the team and perhaps increase the size and the depth of the audit. Doing so may also provide greater opportunities for getting the word out about the findings to multiple audiences, as well.
- **Collaborate with local social movement groups and community groups.** This will provide additional ideas for FOI requests and will boost the credibility and reach of the work.
- **Communicate.** Make sure to keep lines of communication open with FOI coordinators, and do so for every request in the audit. Make sure to keep lines of communication open among everyone on the team.
- **Empower local social movement groups and community groups to take ownership of the audit.** Doing so may invite more people to partake in government transparency initiatives and build cross-movement solidarity and empathy.
- **Be creative with knowledge mobilization.** A report and a story in the news are good, but consider zines, podcasts, pamphlets, and social media strategies as well.

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