



# The Journal of Civic Information

Volume 3 | Number 3

October 2021

Journal homepage: <https://journals.flvc.org/civic/>

ISSN (online): 2641-970X

## **Publisher**

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*University of Florida*

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The Journal of Civic Information is an interdisciplinary peer-reviewed open-access online journal published by the Brechner Center for Freedom of Information through the Public Knowledge Project and is supported by the University of Florida College of Journalism and Communications.

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DOI: <https://doi.org/10.32473/joci.v3i3>

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## Editor's Note

# Boo! Nothing Scarier than Transparency Barriers

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

Things go bump in the *night*, not in the *sunlight*.

On this Halloween, the *Journal of Civic Information* features two studies that illustrate scary spirits that inhibit the ability for citizens to help their communities through public-interest information.

The first study, “Ghosted by Government,” explores state public records laws’ provisions in requiring a response for requesters, or a specific agency deadline for agencies to respond. Amy Kristin Sanders of the University of Texas at Austin and Daxton “Chip” Stewart of Texas Christian University once again team up to produce outstanding work, earning first place in the National Freedom of Information Coalition [research competition](#) September 2021.

Sanders and Stewart lay out the states with specific deadlines, those with no deadlines, and those with the ambiguous “promptly” designation. More important, they provide specific recommendations for how state laws can be improved.

The second article explores the nature of exorbitant fees, another barrier to the free flow of information, and how fees could be waived for public-interest requests without significantly harming government agency budgets.

Virginia Hamrick, staff attorney for the First Amendment Foundation of Florida, examines the public record request logs of five state agencies in Florida to show that just a small percentage are from public-interest requesters, such as journalists, nonprofits, and the government itself. Based on her data, she makes a strong case that states should waive fees for requests in the public interest, much like is done for federal agencies through the Freedom of Information Act.

Indeed, Hamrick finds what we’ve seen in other research—that the bulk of public records requests are submitted by commercial interests and those who want the information for personal use.<sup>1</sup> For example, Margaret Kwoka of The Ohio State University just published a book outlining the massive amount of “first-party” requests at the federal level that bog down the system. She suggests that they should be separated from the FOIA process and automated, much like the Social Security Administration did with requests for social security benefits.<sup>2</sup>

<sup>1</sup> See, for example, Margaret B. Kwoka, *FOIA, Inc.* 65 DUKE L.J. 1361 (2016). See also Derigan Silver, *The News Media and the FOIA* 21 COMM. L. & POL’Y 493 (2016).

<sup>2</sup> Margaret B. Kwoka, *SAVING THE FREEDOM OF INFORMATION ACT*, Cambridge University Press (2021).

What is so valuable from these studies is that they provide specific and practical solutions to information barriers. Just like the 22 other peer-reviewed studies published in this journal during the past two years, since the launch of the first issue on Sept. 4, 2019.

In all, 31 authors contributed to that work, critiqued by the 14-member editorial board spanning various disciplines and methodologies. The December 2020 issue featured four research articles about the accessibility of COVID data—both timely and important.

Special thanks goes to the [Brechtner Center for Freedom of Information](#), housed in the [University of Florida College of Journalism and Communications](#), which founded the online open-access journal. The fact that all of this excellent work is available to anyone for free is a testament to Brechtner's mission. Brechtner Executive Director Frank LoMonte is a true champion for the free flow of civic information, and it would be ironic to shield this knowledge from the public through a paywall.

During the upcoming years, we welcome more worthy manuscripts, as well as suggestions for improving the journal. Let us know what we can do better, and what unexplored topics should be examined.

That is the spirit of freedom of information.

*DOI: 10.32473/joci.v3i3.129755*

*\* Please send correspondence about this article to David Cuillier, University of Arizona, [cuillier@arizona.edu](mailto:cuillier@arizona.edu). This work is licensed under the Creative Commons Attribution-NonCommercial 3.0 United States License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc/3.0/us/> or send a letter to Creative Commons, PO Box 1866 Mountain View, CA 94042, USA.*



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Volume 3 | Number 3

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ISSN (online): 2641-970X

## Ghosted by Government: Why Government Entities Should be Required to Respond to Public Records Requests

Amy Kristin Sanders & Daxton “Chip” Stewart \*

### Article Information

Received: Aug. 10, 2021

Accepted: Sept. 3, 2021

Published: Oct. 31, 2021

### Keywords

Freedom of information  
Public records  
Government transparency  
FOI compliance

### Abstract

Public records laws across the United States operate under the presumption that citizens should have access to government records, but obtaining this information is not always a simple undertaking. Although state public records laws vary, only a few establish a requirement that government entities acknowledge the existence of a request. And while some state laws mandate a time limit within which entities are supposed to produce records or issue a denial, those limits vary considerably from the specific three business days to the vague requirement of promptness. We analyzed these requirements in the 50 states and recommend policy changes that would hold government entities accountable to requestors and create a more level playing field for citizens seeking public records that should presumptively be open.

\* Amy Kristin Sanders, University of Texas at Austin and Daxton “Chip” Stewart, Texas Christian University. Please send correspondence about this article to Amy Kristin Sanders at [Amy.Sanders@austin.utexas.edu](mailto:Amy.Sanders@austin.utexas.edu). An earlier version of this work earned first-place paper at the [National Freedom of Information Coalition summit FOI Research Competition](#), Sept. 28, 2021.

*To cite this article in Bluebook:* Amy Kristin Sanders & Daxton “Chip” Stewart, *Ghosted by Government: Why Government Entities Should be Required to Respond to Public Records Requests*, 3(3) J. CIVIC INFO 1 (2021).

*To cite this article in APA:* Sanders, A. K., & Stewart, D. C. (2021). Ghosted by government: Why government entities should be required to respond to public records requests. *Journal of Civic Information*, 3(3), 1-13.

DOI: <https://doi.org/10.32473/joci.v3i3.129756>

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## Introduction

For requesters who seek access to government records under state or federal open government laws, one of the most dreaded outcomes is when nothing happens. A requester follows the law, submitting a formal letter to a government agency asking to review or inspect the documents in question, and the agency simply does not respond.

This is a common problem for freedom of information advocates who teach students and lead workshops for citizens and journalists. David Cuillier and Charles Davis, in their guide “The Art of Access,” recognized it as one of the most common types of denials that records requesters encounter: “‘Chirrrp, Chirrp.’ (Cricket in the Silence of the Agency’s Nonresponse).”<sup>1</sup> MuckRock, an online news organization that has built a tool for users to file public records requests, used its data to catalog the delays and backlogs in freedom of information requests in the 50 states. Although a handful of states (Vermont, Idaho, and Rhode Island) had an average response time of fewer than 15 days, MuckRock found others had much lengthier average delays for responses to records requests, in some cases well more than 100 days.<sup>2</sup> MuckRock noted that variance in response times could be a function of the laws in these states; some state public records laws have a clearly defined time limit for agencies to respond to requests, while others have vague terms such as requiring a “prompt” response, and others have no time limit built into the law.<sup>3</sup> At least one recent study suggested a correlation between shorter time limits in state open records laws and the average response time of agencies to requests.<sup>4</sup> The COVID-19 pandemic delayed response times in 2020, as many government agencies across the country postponed or entirely halted responses to records requests.<sup>5</sup> Government officials argued that the emergency response and the shift to remote work allowed suspension of the usual time limit requirements, even as advocates such as the Reporters Committee for Freedom of the Press noted that “the COVID-19 pandemic is not a reason for government agencies to stop accepting or processing records requests.”<sup>6</sup>

Government transparency is a central tenet of a functional democracy, but interminable delays make the laws that set out to ensure such transparency ineffective. State and local governments have discovered an effective way to dodge accountability by, in many cases, simply refusing to acknowledge that a request has been made, without facing any consequences. In this article, we set out to examine this problem by reviewing the required response time provisions in state open records laws to determine which states’ laws require agencies to acknowledge requests or provide responses within established time frames. After a review of scholarship on response times and compliance matters, we review the status of these provisions in each state and provide examples of how courts interpret and enforce them. Finally, we propose a model provision to

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<sup>1</sup> David Cuillier & Charles N. Davis, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS*, 2nd ed. 110 (2020).

<sup>2</sup> Jessie Gomez, *MuckRock Request Data Shows Big Difference in Backlogs Between States*, MUCKROCK (Mar. 21, 2019), <https://www.muckrock.com/news/archives/2019/mar/21/feature-state-data/>.

<sup>3</sup> Id.

<sup>4</sup> David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Record Statutes on Agency Transparency in the United States*, Proceedings of the 6th GLOBAL RESEARCH ON TRANSPARENCY CONFERENCE (June 26, 2019), p. 11, <https://drive.google.com/file/d/1R9PBJrjTreteD-epJEq-o8ZSWZPKRjv/view>.

<sup>5</sup> See, e.g., Amy Kristin Sanders, *COVID-19, Death Records and the Public Interest: Now is the Time to Push for Transparency*, 2 J. Civic Info. 1 (2020) (detailing state’s efforts to suspend public records laws during the pandemic).

<sup>6</sup> Reporters Committee for Freedom of the Press, “Press freedom and government transparency curing COVID-19” (2021), <https://www.rcfp.org/resources/covid-19/>.

update or enhance state open records laws for those jurisdictions that do not have detailed time limits built into their laws.

## Background

States have long recognized the importance of freedom of information laws to good governance. Statements of purpose found within these open records laws could not be clearer. “In a democracy, the people are vested with the ultimate decision-making power,” the Hawaii Uniform Information Practices Act begins. “Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.”<sup>7</sup> Texas, in its Public Information Act, opens with recognition that “the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that the government is the servant and not the master of the people,” thus entitling citizens “at all times to complete information about the affairs of government and the official acts of public officials and employees.”<sup>8</sup>

The language in many state freedom of information statutes guarantees broad access to records of public officials and agencies, but many states fail to live up to those guarantees. Iowa’s law, for example, states, “Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record,”<sup>9</sup> while Oregon makes a similarly broad promise, that “(e)very person has a right to inspect any public record of a public body in this state,” subject to the usual exemptions and limitations.<sup>10</sup> In spite of this language in their statutes, both states came up short in the aforementioned MuckRock review. Oregon had the longest average delay in response time of any state—at 145 days. Iowa had an average 121-day delay, and Texas averaged 95 days from records request to a decision.<sup>11</sup> And Hawaii Gov. David Ige, whose state statute has some of the most idealistic language in the country underlying its access provisions, suspended the entirety of its open records law in March 2020.<sup>12</sup> The Democrat, who was heavily criticized, only eased up on the restrictions in February 2021 after pressure from open-records advocates.<sup>13</sup> Hawaii was not alone, as the *New York Times* editorial board noted, recognizing that “far too many agencies have also interpreted the arrival of the coronavirus pandemic and necessary shelter-in-place orders as justification for either further delaying or failing entirely to respond to FOIA requests.”<sup>14</sup>

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<sup>7</sup> HAW. REV. STAT. §92F-2 (2021).

<sup>8</sup> TEXAS GOV’T CODE §552.001(a). The Texas statement of purpose language is almost identical to West Virginia’s Freedom of Information Act. See W.VA. CODE §29B-1-1.

<sup>9</sup> IOWA CODE §22.2(1) (2021).

<sup>10</sup> O.R.S. 192.314(1) (2021).

<sup>11</sup> Gomez, *supra* note 2.

<sup>12</sup> Nick Grube, *Suspension of Hawaii’s Open Government Laws More Extreme Than Other States*, HONOLULU CIVIL BEAT (Mar. 30, 2020), <https://www.civilbeat.org/2020/03/suspension-of-hawaiis-open-government-laws-more-extreme-than-other-states/>.

<sup>13</sup> David A. Lieb, *Governments Delay Access to Public Records During Pandemic*, WEST HAWAII TODAY (Mar. 14, 2021), <https://www.westhawaii.com/2021/03/14/hawaii-news/governments-delay-access-to-public-records-during-pandemic/>.

<sup>14</sup> *No, Your FOIA Request Cannot Wait ‘Until This Emergency Is Over*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/opinion/coronavirus-freedom-of-information.html>.



This duality of open records laws, which aim to satisfy the highest ideals of democratic governance rooted in transparency only to fall far short of those ideals in practice, is evident in modern critiques of the federal Freedom of Information Act. “Without a doubt, FOIA is a tremendously important statute that has done tremendously important things in its first fifty years,” wrote David Pozen and Michael Schudson in the introduction to a collection of essays recognizing that anniversary. “It is also a markedly inefficient, adversarial, and corporate-friendly response to the postwar rise of official secrecy, and one that interacts in complicated ways with the U.S. system of governance.”<sup>15</sup> Failure of state and federal open records laws to respond to the challenges and needs of citizens in a democratic government are common subjects of calls for reform, such as Jonathan Peters’ recommendation of a “radically reimagined First Amendment right to receive information” rooted in the constitutional structure and democratic norms the United States that would “compel access to government.”<sup>16</sup>

One of the primary inefficiencies Peters noted in the patchwork of state and federal access laws is delay, which has long been a troublesome hallmark of open records laws.<sup>17</sup> After FOIA became law in 1966, it became obvious that an overhaul was needed to address what a Senate committee recognized as lengthy delays—at the time, 33 days—that were making FOIA what they called a “freedom *from* information law.”<sup>18</sup> Fifty years after FOIA became law, the problem remained; a 2016 House committee report titled “FOIA is Broken” noted that the biggest barrier to effective transparency under the law was “Delay, Delay, Delay,” with months—and sometimes years—passing between the time a request is made and when it is fulfilled,<sup>19</sup> even though federal law mandates decisions to be made on FOIA requests within 20 days, with an extension of up to 10 days for “unusual circumstances.”<sup>20</sup> Ben Wasike demonstrated how FOIA processing has slowed in recent years. Under President Barack Obama, average processing time of simple FOIA requests took 23.7 days and complex requests took 99.7 days, while under President Donald J. Trump, the processing time increased to 30.2 days for simple requests and 143.5 days for complex requests.<sup>21</sup>

In a 2020 survey conducted by the National Freedom of Information Coalition, 84 percent of respondents said that “lack of response or delayed response” was the biggest obstacle they faced to receiving public records.<sup>22</sup> Agency non-responses to requests are common. For example, in a study of municipal government agencies in one New York county, Katherine Fink found that only 7 of the 32 municipalities responded to requests within the 5-business-day deadline of the state

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<sup>15</sup> David E. Pozen & Michael Schudson, *Introduction*, in David E. Pozen & Michael Schudson (eds), *TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 4* (2018).

<sup>16</sup> Jonathan Peters, *Reimagining Access Rights*, 65 WASH. U. J. LAW & POL’Y 135, 148 (2020).

<sup>17</sup> *Id.* at 139-40.

<sup>18</sup> S. REP. 93-854, 155 (1974) (emphasis added).

<sup>19</sup> U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, *FOIA IS BROKEN: A REPORT 34* (2016).

<sup>20</sup> 5 U.S.C. § 552(a)(6)

<sup>21</sup> Ben Wasike, *FOI in Transition: A Comparative Analysis of the Freedom of Information Act Performance Between the Obama and Trump Administrations*, 37 GOV’T INFO. Q. 101443, p. 5-6 (2019). A previous study by Wasike found mixed results between the Bush and Obama administrations in data collected from 2001 to 2013; in the sample studied under Bush, simple requests taking 28.1 days and complex requests taking 97.6 days, while under Obama, simple request processing time increased to 141.9 days while complex request processing time declined to 62.3 days. See Ben Wasike, *FOIA in the Age of ‘Open.Gov’: An Analysis of the Performance of the Freedom of Information Act Under the Obama and Bush Administrations*, 33 GOV’T INFO. Q. 417, 423 (2017).

<sup>22</sup> *Fewer Watchdogs, Uncooperative Public Officials are Biggest Challenge to Open Government Today, According to Open Government Survey*, NATIONAL FREEDOM OF INFORMATION COALITION (Mar. 13, 2020), <https://perma.cc/KA4N-SNEZ>.

Freedom of Information Law without a follow-up interaction such as an additional phone call or email by the requester.<sup>23</sup> Similarly, in interviews with several journalists who use FOIA regularly, Margaret Kwoka confirmed attitudes that “delay and administrative burden in using FOIA are hindering the full realization of FOIA’s goals,” which creates a particular challenge when journalists do not have the resources to challenge agency unresponsiveness.<sup>24</sup>

Such delays make transparency impractical for citizens and journalists seeking to provide oversight of government activities. Some of this may be traced to the structure of open records laws themselves. Although the federal FOIA has a statutory time limit for responses and fulfillment, there is no effective provision for enforcing it outside of litigation—which may delay responses even further. As one study noted, recent FOIA cases that have reached the Supreme Court have taken seven years (in the case of *FCC v. AT&T*) and eight years (in the case of *Food Marketing Institute v. Argus Leader*) from the time the initial request was made to when a final decision on access was delivered.<sup>25</sup> A.Jay Wagner found significant delays in response and processing time in a study of 1,002 public records requests filed across eight states, with agencies taking 11 days on average to make an initial response to a request and an average of 17 days to complete the request. Demographics including political affiliation (the more Republican a county voted in 2016, the longer the delay) showed correlation with the delayed responses.<sup>26</sup> The results were consistent with Cuillier’s study of MuckRock data and demographics, where he found that political culture of a state was the greatest predictor of compliance with freedom of information laws.<sup>27</sup> Post-hoc analysis of the data examining statutory provisions suggested that response times were faster in states with a requirement for the agency to respond in one to five days (with an average response time of 51 days), as compared to states with no deadline (average response time of 60 days) or states with a deadline between six and 30 days (average response time of 63 days), and the author urged further study to see if those mean differences would be significant in a larger sample.<sup>28</sup>

Cuillier’s study also found no direct relationship between agencies complying with open records laws and the strength of penalties or other enforcement remedies in those laws, but it did find a connection between the presence of attorney fee-shifting provisions in the statutes. In states that required agencies to pay attorney’s fees to prevailing plaintiffs, 45 percent of records requests were successful compared to just 39 percent of requests in states with no fee-shifting provision in the law.<sup>29</sup> Lack of enforcement and functional remedies for noncompliance have long hampered freedom of information laws; government officials know that they are unlikely to be punished or suffer any consequences for failing to follow the law, no matter how much the legislature says transparency and access are essential to the functioning of democracy.<sup>30</sup> Although most states permit fee-shifting, it is only mandatory when plaintiffs prevail in a handful of states, such as

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<sup>23</sup> Katherine Fink, *Freedom of Information in Community Journalism*, 7 COMMUNITY JOURNALISM 17, 23 (2019).

<sup>24</sup> Margaret Kwoka, SAVING THE FREEDOM OF INFORMATION ACT 175 (2021).

<sup>25</sup> See Daxton “Chip” Stewart & Amy Kristin Sanders, *Secrecy, Inc.: How Governments Use Trade Secrets, Purported Competitive Harm and Third-Party Interventions to Privatize Public Records*, 1 J. CIVIC INFO. 1, 28 (2019).

<sup>26</sup> A. Jay Wagner, *Piercing the Veil: Examining Demographic and Political Variables in State FOI Law Administration*, 38 GOV’T INFO. Q. 1, 6-8 (2021).

<sup>27</sup> Cuillier, *supra* note 4.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.*

<sup>30</sup> See Daxton R. “Chip” Stewart, *Let the Sunshine In, or Else: An Examination of the ‘Teeth’ of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL’Y 265 (2010).

Florida<sup>31</sup> and Illinois.<sup>32</sup> Outside of attorney fees or the rare penalty handed down by a judge, the main consequence a government agency is likely to face for wrongfully delaying or denying access to records is being embroiled in years of litigation as courts sort out the meaning of the word “promptly” in the jurisdictions that use vague standards for responding to requests. That litigation, of course, comes at a cost to the state’s taxpayers, who ultimately foot the bill when the government tries to deny access to records.

With radical reform recognizing a federal constitutional right of access unlikely any time soon, freedom of information advocates are left with the challenges of finding practical avenues to close loopholes that allow government agencies to drag their feet on acknowledging or meaningfully responding to legitimate records requests from citizens. In the next section, we review these response time provisions and courts’ interpretations of them.

## Methods

Using MuckRock’s open government maps and the Reporters Committee for Freedom of the Press’ Open Government Guide as a starting point, we located and reviewed each state’s open records statute to find relevant provisions that address required response. Most of the current statutes were publicly available on the state’s official website or Justia, but accessing some of them required use of subscription-based legal databases, such as Westlaw and LexisNexis, which are not typically available to the public. Of particular interest were provisions that 1) required government agencies to acknowledge public records requests within a specific timeframe and/or 2) provisions that established an expected response time for the production (or denial) of government records.

## Discussion and analysis

It does not take detailed study of state public records laws in the United States to quickly realize that a hodgepodge of provisions exists among the 50 states. How the states handle freedom of information requests varies dramatically—even among states that have constitutional rights of access or statutes that are considered particularly “strong.” As Jessica Terkovich and Aryeh Frank pointed out:

There certainly is no indication that requesters in California, Florida, or the other states that memorialize a right of access in their constitutions fare any worse than requesters in states without such rights. At least on the margins, the existence of the right appears to do some work, if only as a make-weight factor when judges balance the interests of disclosure and concealment. Though it cannot be said that states with constitutionally based access rights are categorically “more open,” neither is there any evidence that the existence of the right is in any way detrimental; nothing in the appellate case law suggests that

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<sup>31</sup> FLA. STAT. ANN. § 119.12 (2021).

<sup>32</sup> 5 ILL. COMP. STAT. 140/11(i) (2021).

requesters frequently bring unfounded constitutional claims or otherwise leverage the existence of the right for improper purposes.<sup>33</sup>

Despite this significant variance, we have divided state open records statutes into three categories with regard to their frameworks for responding to records requests: 1) laws that contain no mention of required times for acknowledging requests or producing records 2) laws that contain generalized requirements (“prompt” or “timely,” for example) for acknowledging requests or producing records and 3) laws that contain specific time frames for acknowledging requests or producing records.

#### Required response: Acknowledgement of requests

For open-government advocates, an agency’s mere acknowledgement of receipt of a public records request seems like the baseline for transparency. After all, if the agency does not acknowledge receipt of the request, how is a requestor supposed to establish the agency’s failure to meet statutorily imposed deadlines for the production of records? Yet, only four state open records laws contain provisions requiring the acknowledgement of a public records request.<sup>34</sup> The Florida Public Records Law, which is often lauded by freedom of information advocates, contains a weak version of an “acknowledgement provision” that includes no mandated time frame. Section 119.07 states: “A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly...”<sup>35</sup>

Maryland, which is not known for having a strong public records law, does have a very pro-requestor provision related to acknowledgement—but it only seems to apply when the request is misdirected. The Maryland Public Information Act requires that when government officials who are not the records custodians receive records requests, they must notify the requestor within 10 working days.<sup>36</sup> The statute goes further, requiring that officials must also provide the name of the custodian and likely location of the record sought, if they know. Michigan’s Freedom of Information Act contains an alternate version of the provision, requiring public officials to “promptly forward requests they receive to the freedom of information act coordinator.”<sup>37</sup> New

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<sup>33</sup> Jessica Terkovich & Aryeh Frank, *Constitutionalizing Access*, 3 J. CIVIC INFO 1, 15 (2021).

<sup>34</sup> See FLA. STAT. § 119.07(1)(c) (2021). “A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.” Maine’s Freedom of Access Act is similar: “The agency or official having custody or control of a public record shall acknowledge receipt of a request made according to this section within 5 working days of receiving the request and may request clarification concerning which public record or public records are being requested.” ME. CODE R. § 408-3(a) (2021). New York’s Freedom of Information Law contains a provision that requires either acknowledgement or production: “Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with subdivision five of this section.” N.Y. PUB. OFF. LAW § 89(3)(a)(2021). Oregon’s law is similar: “If an individual who is identified in a public body’s procedure described in subsection (7)(a) of this section receives a written request to inspect or receive a copy of a public record, the public body shall within five business days after receiving the request acknowledge receipt of the request or complete the public body’s response to the request.” See OR. REV. STAT. § 192.324(a)(2) (2021).

<sup>35</sup> FLA. STAT. § 119.07 (2021).

<sup>36</sup> MD. CODE ANN., GEN. PROV. § 4-202 (2021).

<sup>37</sup> MICH. COMP. LAWS § 15.233 (2021).

Jersey's law has a similar provision.<sup>38</sup> Given that government officials often having a working knowledge of internal operations that members of the public lack, these statutes seem to establish what might be considered a good-faith effort to help the public access information. If the presumption is that government records are open and available, these provisions create a bare minimum for upholding the objective of transparency.

Requiring that government agencies acknowledge the receipt of a public records request does not create a burden for government agencies and clearly represents a best practice in terms of government transparency. Many agencies that take requests via email or an online form could automate the process so that individual intervention is not required. In those cases, the system would automatically reply back with an email or on-screen message that tells the requestor that their request has been received. For agencies still processing paper requests, a form letter with a few fillable spaces would suffice. Either way, requiring government agencies to acknowledge the receipt of records requests would go a long way toward improving accountability.

Best practices for acknowledging receipt of a records request, however, requires more than the vague language the Florida statute contains. One might envision a statutory provision that mandates that public records custodians or their designees must acknowledge all requests to inspect or copy records in the same manner they were received within two business days if received electronically or within five business days if received through the mail. Acknowledgements of a records request should contain, at a minimum:

- The date the request was received.
- The name and contact information for the records custodian who most likely has access to the requested record, if the request was improperly filed.
- The statutorily imposed timeframe in which the government agency has to produce or deny access to the records.
- The remedy available to, and appropriate point of contact for, requestors should the government agency not meet the statutorily imposed time frame to produce or deny records.
- The remedy available to, and appropriate point of contact for, requestors should the government agency improperly deny access to the records sought by the requestor.

#### Required response: Production (or denial) of records

In much of the United States, it's legally possible for requestors to simply never hear back from a government entity after they've made a public records request. More than 20% of state public records laws have no specified time frame by which an agency must produce or deny records. Statutes in Alabama,<sup>39</sup> Alaska,<sup>40</sup> Arizona,<sup>41</sup> Hawaii,<sup>42</sup> Iowa,<sup>43</sup> Michigan,<sup>44</sup> Mississippi,<sup>45</sup>

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<sup>38</sup> "Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record." N.J. REV. STAT. § 47:1A-5(h) (2021).

<sup>39</sup> See ALA. CODE § 36-12-41 (2014).

<sup>40</sup> See ALASKA STAT. § 40,.25.10 (2021).

<sup>41</sup> See ARIZ. REV. STAT. ANN. § 39-121.01 (2021).

<sup>42</sup> See HAW. REV. STAT. § 92F-23 (2021).

<sup>43</sup> See IOWA CODE § 22.8 (2021).

<sup>44</sup> See MICH. COMP. LAWS § 15.233 (2021).

<sup>45</sup> See MISS. CODE ANN. § 25-61-1 (2021).

North Carolina,<sup>46</sup> North Dakota,<sup>47</sup> and South Dakota<sup>48</sup> fall into this category. Perhaps even more troubling is that some state laws that do not contain time frames consider a non-response to automatically constitute a denial. The failure to have a stated deadline for producing or denying records dramatically weakens the power of an open records law by allowing government entities to legally engage in stall tactics with no consequence.

Instituting a production and/or denial deadline is a step in the right direction, but it requires specificity of timeframe to be meaningful. Nearly one-fifth of states who require a response related to production or denial of records use vague language in their statutes. Florida,<sup>49</sup> Minnesota,<sup>50</sup> Ohio,<sup>51</sup> Oklahoma,<sup>52</sup> and Texas<sup>53</sup> all rely on some version of “prompt” in their public records laws. Although these laws plainly define other terms like “record” or “official,” they do not define “prompt.”

Further, courts have rarely weighed in to interpret what “promptly” means in these statutes. For example, the Texas Public Information Act requires government agencies to fulfill records requests “promptly,” which the statute defines as “as soon as possible under the circumstances, that is, within a reasonable time, without delay.”<sup>54</sup> Agencies may also seek an attorney general’s opinion within 10 business days of a request. During the COVID-19 pandemic, some offices in the state delayed responses under guidance from the attorney general that “business days” did not include days in which the offices were physically closed due to the pandemic. A Texas appellate court rejected this guidance, which allowed agencies to delay responses “without limit or regard to duration,” even if government officials worked remotely.<sup>55</sup> This kind of delay was thus “inconsistent with the TPIA as a whole” which “requires a governmental body to ‘promptly produce public information.’”<sup>56</sup> As a remedy, the court found that the government agency’s lack of response constituted a “refusal” under the Public Information Act.<sup>57</sup>

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<sup>46</sup> See N.C. GEN. STAT. § 132-6 (2021).

<sup>47</sup> See N.D. CENT. CODE § 44-04-18 (2021).

<sup>48</sup> See S.D. CODIFIED LAWS § 1-27-1 (2021).

<sup>49</sup> See FLA. STAT. § 119.07(1)(c) (2021) (“A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.”).

<sup>50</sup> “(a) The responsible authority in every government entity shall establish procedures, consistent with this chapter, to insure that requests for government data are received and complied with in an appropriate and prompt manner.” MINN. STAT. § 13.03(2)(b) (2021).

<sup>51</sup> “[A]ll public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.” OHIO REV. CODE ANN. § 149.43 (18)(b)(1) (2021).

<sup>52</sup> “A public body must provide prompt, reasonable access to its records but may establish reasonable procedures which protect the integrity and organization of its records and to prevent excessive disruptions of its essential functions. A delay in providing access to records shall be limited solely to the time required for preparing the requested documents and the avoidance of excessive disruptions of the public body's essential functions. In no event may production of a current request for records be unreasonably delayed until after completion of a prior records request that will take substantially longer than the current request. Any public body which makes the requested records available on the Internet shall meet the obligation of providing prompt, reasonable access to its records as required by this paragraph...” OKLA. STAT. TIT. 51, § 24A.5(6) (2021).

<sup>53</sup> “An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, “promptly” means as soon as possible under the circumstances, that is, within a reasonable time, without delay.” TEX. GOV’T. CODE ANN. § 552.221 (2021).

<sup>54</sup> TEXAS GOV’T CODE Sec. 552.221(a)

<sup>55</sup> *Houston Community College v. Hall Law Group*, 2021 Tex. App. LEXIS 4579, at \*35 (Tex. Ct. App. Jun. 10, 2021).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at \*36.

Even when courts find the delays to be unlawful, the available remedies are often lacking. In 2017, the Texas Supreme Court heard a case where the City of Dallas delayed until after the 10-day deadline in handling a pair of requests, with one request coming 26 days later and another coming 49 days later, with city saying the delay was due to “inadvertence.”<sup>58</sup> The requester asserted that the documents requested were now presumed to be open and must be disclosed. The court recognized the “public’s interest in the ‘prompt’ production of public information,” and found that the city now had the burden to establish a “compelling reason” not to disclose the materials requested.<sup>59</sup> Nevertheless, the court found that the interests in question—in this case, attorney-client communications—were “countervailing interests of the utmost importance” and thus allowed the city’s violation of timeliness language to go unremedied.<sup>60</sup> In 2010, the Texas Supreme Court also allowed a delay outside the 10-day limit for a request for an attorney general opinion to go without remedy, overturning lower court decisions that would have required the documents to be produced to the requester.<sup>61</sup> The court in essence invented a “bad faith” standard, finding that the government agency’s requests for clarification tolled the 10-day limit and were not made “in bad faith merely to delay production of public information” and thus were allowable. Two dissenting judges would have held the government agency to the “compelling reason” standard and pointed out that allowing government agencies to reset time periods in this manner “imposes no additional incentive to timely produce information sought within the original request that is also sought in the clarification.”<sup>62</sup>

Rather than “promptly,” Colorado<sup>63</sup> and Indiana<sup>64</sup> use the word “reasonable” to describe the required response time, while Montana<sup>65</sup> says production or denial must occur in a “timely fashion.” Iowa<sup>66</sup> takes a bit different approach, acknowledging that “(g)ood-faith, reasonable delay” is permitted, though that delay “shall not exceed twenty calendar days and ordinarily should not exceed ten business days.” All of these provisions present the same issue as the use of “prompt.” State courts, of course, could eventually interpret the vague language and determine an appropriate period of time for a response, but that leaves states with a lot of leeway until someone decides to sue to enforce their access rights.

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<sup>58</sup> Paxton v. City of Dallas, 509 S.W.3d 247, 253 (Tex. 2017).

<sup>59</sup> *Id.* at 264-65.

<sup>60</sup> *Id.*

<sup>61</sup> City of Dallas v. Abbott, 304 S.W.3d 380, 387 (Tex. 2010).

<sup>62</sup> *Id.* at 391 (J. Wainwright, dissenting)

<sup>63</sup> COLO. REV. STAT. § 24-72-203 (2016) states: “The date and hour set for the inspection of records not readily available at the time of the request shall be within a reasonable time after the request. As used in this subsection (3), a “reasonable time” shall be presumed to be three working days or less. Such period may be extended if extenuating circumstances exist. However, such period of extension shall not exceed seven working days. A finding that extenuating circumstances exist shall be made in writing by the custodian and shall be provided to the person making the request within the three-day period.” Colorado courts have not specifically clarified what a “reasonable delay” is, but one court noted without endorsement or objection a county policy allowing a records custodian to “delay processing voluminous requests made within twenty days of an upcoming election.” *Reno v. Marks*, 353 P.3d 866, 868 (Colo. Ct. App. 2014).

<sup>64</sup> “A public agency may not deny or interfere with the exercise of the right stated in subsection (a). Within a reasonable time after the request is received by the agency, the public agency shall either: (1) provide the requested copies to the person making the request; or...” IND. CODE § 5-14-3-3(b)(1) (2019). No Indiana appellate courts have clarified what constitutes a “reasonable time,” though one court noted that a requester “received all of the information as he requested in what must have been a reasonable time frame because he did not allege that it was unreasonable.” *Anderson v. Huntington County Bd. of Comm’rs*, 983 N.E.2d 613, 619 (Ind. Ct. App. 2013).

<sup>65</sup> See MONT. CODE ANN. § 2-6-1006(2) (2019).

<sup>66</sup> See IOWA CODE § 22.8 (2021).

The majority (60%) of state public records laws do contain a specific provision with deadlines for production or denial of records. Still, without a required acknowledgement of receipt, it is nearly impossible to prove when the clock should start running on a request. The allowable time frames vary dramatically from three working days to 30 days, with the most common time frame being five business or working days. Illinois<sup>67</sup>, Maine<sup>68</sup>, Nevada<sup>69</sup>, New Hampshire<sup>70</sup>, New York<sup>71</sup>, Oregon<sup>72</sup>, Pennsylvania<sup>73</sup>, Virginia<sup>74</sup>, Washington,<sup>75</sup> and West Virginia<sup>76</sup> have all adopted this standard. Another seven states have set a firmer deadline of three business or working days – which may be largely impractical for government entities that get large numbers of public records requests. MuckRock and other research has certainly suggested that government entities in most states are not adhering to these specified time frames.

Best practices for producing or denying public records, however, are about more than the time frame within which a state responds. One might envision a statutory provision that:

1. Mandates that after an agency has acknowledged a request, it must produce records or deny the request within 10 business days—similar to the Texas proposal discussed *infra*.
2. An agency's failure to respond to a request within the statutory timeframe cannot be considered a constructive denial under the public records law—as it currently is in both Pennsylvania and Vermont, discussed *infra*.
3. Penalties for non-compliance with the required time frame, including fines and/or even jail time for government employees who demonstrate bad-faith delays.
4. A process for requesting expedited processing in cases where the requested information is of public importance.
5. A requirement that any denial letter contains the specific exemption under which the request was denied rather than a blanket denial that the requested information is exempt from disclosure under state law.
6. The remedy available to, and appropriate point of contact for, requestors should the government agency improperly withhold the records sought by the requestor.

Many state statutes have been updated to include provisions that reflect changes in technology,<sup>77</sup> but they have not been drafted to include required response provisions that really support their stated commitments to openness and government transparency. Although it is desirable to ensure that records kept in an electronic format are provided in an electronic format, such a provision is meaningless if a government entity can merely ignore public records requests. At a minimum, statutes need acknowledgement and production provisions that support requestors in their search for records.

#### Case study: One state's effort to require response

<sup>67</sup> See 5 ILL. COMP. STAT. 140 et. seq. (2021).

<sup>68</sup> See ME. CODE R. § 408-3 (2021).

<sup>69</sup> See NEV. REV. STAT. § 239.0107 (2021).

<sup>70</sup> See N.H. REV. STAT. ANN. § 91-A:4 (2021).

<sup>71</sup> See N.Y. PUB. OFF. LAW § 89 (2021).

<sup>72</sup> See OR. REV. STAT. § 192.324 (2021).

<sup>73</sup> See 65 PA. CONS. STAT. § 67-901 (2019).

<sup>74</sup> See VA. CODE ANN. § 2.2-3704 (2021).

<sup>75</sup> See WASH. REV. CODE § 42.56.520(2021).

<sup>76</sup> See W. VA. CODE § 29B-1-3 (2021).

<sup>77</sup> See, e.g., Ralph A. DeMeo & Lauren M. DeWeil, *The Florida Public Records Act in the Era of Modern Technology*, 92 FLA. BAR J. 33 (2018).



In March 2021, state lawmakers introduced legislation to try to close the response loophole in the Texas Public Information Act. Section 552.221 requires “An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer.”<sup>78</sup> It continues, “In this subsection, ‘promptly’ means as soon as possible under the circumstances, that is, within a reasonable time, without delay.”<sup>79</sup> Yet, in the MuckRock experiment, Texas agencies averaged 69 days for responding to public records requests.<sup>80</sup> More than two months to respond hardly seems to comport with the intent of the statute’s language.

HB 3015, introduced during the 87th Legislature, attempted to add some stricter parameters to the state’s open records law by requiring a timelier response.<sup>81</sup> It included a requirement that agencies notify a requestor within 10 business days of the request being received when the agency determines it has no records relevant to the request. Further, if the entity determines the records requested are not subject to disclosure, it must notify the requestor within 10 business days, citing the specific provision being used to withhold the records. Finally, it would have provided requestors with recourse should the government entity not respond within 10 days, allowing the requestor to file a written complaint with the attorney general.

The legislation also contained provisions to deter bad-faith attempts to deny requests or withhold records. If a request were improperly withheld, the attorney general would have been able to require re-training on public records laws. Further, the agency would not have been able to charge costs for providing the records after they had been improperly withheld.

Transparency advocates in Texas, including attorneys, professors, and open government groups, have slowly established a cohort of allies within the legislature, allowing them to introduce numerous minor amendments each session with the hopes that some will be enacted. Although HB 3015 died in committee, it represented a strong, but practical, attempt to incrementally improve a state public records law. As has been the case with previous TPIA amendments in Texas, this bill will likely get re-introduced during subsequent legislative sessions with the hope it will make it to the floor for a vote. Even though it did not become law, bills like HB 3015 are an important tool for open government advocates because they keep government transparency on the legislative agenda.

## Recommendations and conclusion

Drafting freedom of information laws in ways that better serve the public is not necessarily challenging, but convincing state legislatures to adopt appropriate amendments is another story. In particular, legislatures should consider amendments that remove vague language related to time frames for expected compliance. State courts may have provided such guidance in the states whose open records provisions use words like “promptly” or “reasonably” – we did not review all state court decisions for this project – but leaving those terms up to court interpretation again places the burden on citizens to challenge government actions that seem unreasonable.

Even minor amendments can be meaningful, and we have suggested several with regard to required response: Public records statutes should contain specific (and separate) time frames both

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<sup>78</sup> TEX. GOV’T. CODE ANN. § 552.221 (2021).

<sup>79</sup> *Id.*

<sup>80</sup> <https://www.muckrock.com/place/>.

<sup>81</sup> H.B. 3510, 87th Leg. Sess. (Tex. 2021), <https://capitol.texas.gov/tlodocs/87R/billtext/html/HB03015E.htm>.

for acknowledgement of the request and for production and/or denial of the records.<sup>82</sup> Further, statutes should not be drafted in ways that permit government agencies' failure to respond to be construed as a denial. In Pennsylvania, for example, the Right to Know Act contains this provision: "If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied."<sup>83</sup> Vermont has a similar "constructive denial" provision that tilts the scales in favor of government agencies that drag their feet.<sup>84</sup> Defaulting the agency response to a denial when the mandated time for production expires contravenes the purpose of open records statutes by rewarding agencies for complacency. Too often, statutes with generalized requirements allow government officials to delay access to a point where requestors may simply abandon their efforts to obtain records.

Given the significant delays in records production that MuckRock and other researchers have documented across states, more must be done to pressure governments to comply with open records provisions. Required acknowledgement of requests empowers citizens to better enforce their rights under freedom of information laws. It prevents government officials from being able to argue they had not received a request, and it clearly starts a clock to help enforce production mandates. Combined with required response times for production and/or denial, requiring acknowledgement of records requests offers a more effective means for holding public officials accountable.

In addition, public records laws must provide clear remedies when governments fail to follow their stated requirements. Many statutes lack enforcement mechanisms, have no appeals process or include weak penalties. In situations where governments do not acknowledge requests or fail to produce records, requestors are often forced to foot the bill for litigation—assuming the freedom of information statute includes a right to appeal. For many requestors, this is simply not financially feasible unless they find pro bono representation. By placing the initial litigation costs squarely on citizens, governments know they can often insulate themselves (and their actions). Fee-shifting provisions may help deter intentional malfeasance on the part of government, but they still require the plaintiff or plaintiff's attorneys to make an initial outlay of legal costs. Perhaps most troubling is that these lawsuits burden taxpayers with the cost of paying for government malfeasance.

Requiring a judicial remedy, however, may not be the most beneficial for states or requestors. One possible approach would be the independent commission model that exists in Connecticut. "The Freedom of Information Commission's mission is to administer and enforce the provisions of the Connecticut Freedom of Information Act, and to thereby ensure citizen access to the records and meetings of public agencies in the State of Connecticut."<sup>85</sup> Creating such a commission and empowering the commission to assess fines or seek mandamus on behalf of requestors would help level the playing field. Although many state public records laws purport that records are presumed open, the reality is that citizens often bear the heavy burden of challenging officials who deny access to records.

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<sup>82</sup> The Oregon Public Records Law conflates acknowledgement and production, saying the entity has 5 business days to either acknowledge the request or produce the records. *See* OR. REV. STAT. § 192.324(a)(2) (2021).

<sup>83</sup> *See* 65 PA. CONS. STAT. § 67-901 (2019).

<sup>84</sup> "A custodian or head of the agency who fails to comply with the applicable time limit provisions of this section shall be deemed to have denied the request or the appeal upon the expiration of the time limit." VT. STAT. ANN. tit. 1, § 318 (2021).

<sup>85</sup> <https://portal.ct.gov/FOI>.



Volume 3 | Number 3

October 2021

Journal homepage: <https://journals.flvc.org/civic/>

ISSN (online): 2641-970X

## Eliminating a Barrier to Access: Waiving or Reducing Fees for Public Records in Florida

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### Article Information

Received: Aug. 4, 2021

Accepted: Sept. 3, 2021

Published: Oct. 31, 2021

### Keywords

Freedom of information

Public records

Fees

Requester composition

### Abstract

Florida, the Sunshine State, is one of the few states that includes a right of access to public records in its constitution. While Florida guarantees a right of access to every person, special service charges and high costs for public records restrict access to only requestors with the financial resources to pay for requests. Some agencies assert that waiving fees for requests that have a public interest would be significantly costly. This article builds on research showing that a fee waiver for requests made in the public interest would have minimal effect on Florida municipalities. This article analyzes agency public records logs to assess how a fee waiver for requests made for noncommercial purposes and in the public interest would affect state agencies. This article finds that only 14% of requests reviewed would be entitled to a fee waiver.

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*To cite this article in Bluebook:* Virginia Hamrick, *Eliminating a Barrier to Access: Waiving or Reducing Fees for Public Records in Florida*, 3(3) J. CIVIC INFO 14 (2021).

*To cite this article in APA:* Hamrick, V. (2021). Eliminating a barrier to access: Waiving or reducing fees for public records in Florida. *Journal of Civic Information*, 3(3), 14-22.

DOI: <https://doi.org/10.32473/joci.v3i3.129757>

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## Introduction

When the nonprofit human rights organization Coalition of Immokalee Workers (CIW) asked a Florida agency for three months of keyword-specific emails between another nonprofit and state officials, the agency said it would cost over \$42,000 to produce them.<sup>1</sup> CIW sought the records to better understand why state officials decided against participating in a cost-free COVID-19 contact tracing program with the international nonprofit, Partners in Health.<sup>2</sup> By collaborating with Partners in Health, the Coalition argued that local and state governments could effectively trace and limit the spread of the virus among farmworkers.<sup>3</sup>

Due to cost constraints, CIW was forced to narrow its request, reducing the fee to \$769.79.<sup>4</sup> The documents CIW was able to obtain informed its advocacy efforts, which were ultimately successful in helping create a comprehensive collaboration between Partners, CIW, the Healthcare Network, and the Department of Health to administer vaccines to thousands of farmworkers and provide and promote access to testing in Immokalee.<sup>5</sup>

Throughout the COVID-19 pandemic, as the public tried to acquire information on the spread of the coronavirus, state agencies withheld vital information related to cases in assisted living facilities, reports from the federal government, and information on virus variants.<sup>6</sup> Even when agencies acknowledged that the information was public, high fees prevented non-profit organizations, journalists, and members of the public from accessing it.<sup>7</sup>

Exorbitant fees are not limited to records related to coronavirus information. Department of Health records show a journalist was given an initial estimate of \$914 for copies of inspections at public school kitchens and cafeterias.<sup>8</sup> The Department of Business and Professional Regulation estimated that it would cost more than \$1,900 to fulfill a reporter's request for complaints against contractors and cosmetologists filed with the department in one county during a 26-month period.<sup>9</sup> The Florida Department of Transportation (FDOT) sent a journalist an invoice for \$2,000 for

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<sup>1</sup> Jenny Staletovich, *The High Cost of Sunshine: Public Records in Florida Can Cost More than a Year's Salary*, WLRN (Mar. 29, 2021), <https://www.wlrn.org/local-news/2021-03-29/the-high-cost-of-sunshine-public-records-in-florida-can-cost-more-than-a-years-salary>.

<sup>2</sup> *Id.*

<sup>3</sup> *Gov. DeSantis, Collier County: Take Action NOW to Protect Immokalee's Farmworkers from COVID-19 Ahead of the Harvest!* COALITION OF IMMOKALEE WORKERS (Sept. 3, 2020), <https://ciw-online.org/blog/2020/09/gov-desantis-collier-county/>.

<sup>4</sup> Email from CIW with invoice on file with author.

<sup>5</sup> See Janine Zeitlin, *'Who is Going to Help Me?': How a Florida Team Brings Healthcare to this Community*, NAPLES DAILY NEWS (Aug. 24, 2021), <https://www.naplesnews.com/in-depth/news/2021/08/23/healthcare-team-coronavirus-test-vaccine-assistance-immokalee-fl/7878537002/>.

<sup>6</sup> See Mary Ellan Klas, *Timeline: Florida's Dark Year for its Sunshine Law*, MIAMI HERALD (Mar. 1, 2021), <https://www.miamiherald.com/news/politics-government/state-politics/article249587018.html>, Katie Santich, *Florida Health Officials Agree to Release Variant Data, Pay Attorney Fees in Sentinel Lawsuit*, ORLANDO SENTINEL (Apr. 21, 2021), <https://www.orlandosentinel.com/news/os-ne-florida-department-of-health-settles-sentinel-lawsuit-over-variant-data-20210421-i5byxgkkrczfkellmalhzjv2q-story.html>.

<sup>7</sup> Emma Ockerman, *Florida Wants \$17,000 to Release Documents About COVID-19 Vaccine Rollout*, VICE NEWS (Jan. 5, 2021), <https://www.vice.com/en/article/dy84dw/florida-wants-dollar17000-to-release-documents-about-covid-19-vaccine-rollout>

<sup>8</sup> Invoice from Department of Health on file with author.

<sup>9</sup> Email from DBPR with estimate on file with author.

emails related to the structural integrity of a bridge.<sup>10</sup> These records were meant to shed light on the stability of a heavily trafficked bridge.

Excessive fees limit the media's ability to report on government agencies and matters that affect the wellbeing of the community—from school safety to infrastructure. Charges prevent many members of the public from obtaining government information. As a result, public oversight of agencies is significantly impaired, and the public is less informed about the government.

When given a high invoice, requesters may go back and forth with the records custodian to narrow the request and reduce the costs. This process delays a requester's access to information. Time spent debating over fees could be spent collecting and providing the records to the requester, who could then make the information known to the public at large. Meanwhile, for-profit businesses and requesters with the resources to pay for the records can immediately access the information.

Florida has a noted history of open government.<sup>11</sup> It is one of only seven states to guarantee a right of access to records and meetings in its constitution.<sup>12</sup> In reinstating the Governor's Office for Open Government, Governor Ron DeSantis proclaimed that Florida has "made a commitment within its Constitution and statutes to provide unprecedented public access to the records and proceedings of state and local government[.]"<sup>13</sup> In practice, fees undermine this unprecedented access.

Federal agencies subject to the Freedom of Information Act (FOIA) and many other states allow for a fee waiver for requests made in the public interest by journalists and non-commercial requesters. Such a waiver would reduce excessive fees for nonprofit organizations and reporters in Florida. Research has examined the effect of a fee waiver on Florida municipalities.<sup>14</sup> In fact, an analysis shows that a relatively small number of requests made to municipalities would be eligible for a fee waiver as requests made in the public interest.<sup>15</sup>

This article attempts to contribute to research on fee waivers in Florida and assess the effect of a waiver on state agencies by looking at five agencies. This article will first address the laws regarding fee waivers in Florida, other states, and the federal government to assess what type of requests are subject to a fee waiver. Then the study analyzes public record requests submitted to five state agencies to assess the number of requests that would be affected by a fee waiver—those indicating a public interest versus those for a requester's personal interest. Finally, based on the findings, this article argues for agencies to implement a waiver to make records more accessible to requesters seeking information in the public interest.

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<sup>10</sup> Joshua Solomon, *Portions of Alma Lee Loy Bridge in Vero Beach 'Unstable,' but State Wants Thousands for Detailed Records*, TC PALM, (Apr. 7, 2021), <https://www.tcpalm.com/story/news/local/2021/04/07/17th-street-alma-lee-loy-bridge-partly-unstable-fdot-says-its-safe/7068853002/>.

<sup>11</sup> See Kara M. Tollett, *The Sunshine Amendment of 1992: An Analysis of the Constitutional Guarantee of Access to Public Records*, 20 FLA. ST. U. L. REV. 525, 527 (1992).

<sup>12</sup> See Jessica Terkovich & Aryeh Frank, *Constitutionalizing Access: How Courts Weigh State Constitutional Claims in Open-Government Litigation*, 3(1) J. CIVIC INFO 1 (2021).

<sup>13</sup> Fla. Exec. Order No. 19-11 (Jan. 8, 2019), [https://www.flgov.com/wp-content/uploads/orders/2019/EO\\_19-11.pdf](https://www.flgov.com/wp-content/uploads/orders/2019/EO_19-11.pdf).

<sup>14</sup> Kelly Cox & Matthew Haber, *Does Freedom of Information Mean "Free"? How Hidden Costs of FOIA and Open Records Laws Impact the Public's Ability to Request Government Documents*, N.Y.U.J. LEGIS. & PUB. POL'Y QUORUM (2020).

<sup>15</sup> *Id.*

## Fees for accessing public records

The Florida Supreme Court has held that access to public records is a “cornerstone of our political culture.”<sup>16</sup> Access to public records is provided in statute—the Florida Public Records Act—and by the state constitution, which establishes a right for every person to inspect or copy any public record.<sup>17</sup> Public oversight of agencies is nearly impossible without access to public records. Despite the importance of public records, excessive fees can limit—or block—that access.

The Florida Public Records Act permits records custodians to charge for the cost of a certified copy of a record and for the duplication of records.<sup>18</sup> An agency can charge up to 15 cents for copies of not more than 14-by-8 ½ inches per page.<sup>19</sup> For all other copies, an agency may charge the actual cost of duplication.<sup>20</sup>

In addition, if the nature or volume of public records requested requires “extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved, or both...,” the agency can also charge for that time.<sup>21</sup> Fees must be reasonable and based on the labor actually incurred. Otherwise, the legislature provided little guidance for what is considered reasonable or how to calculate a special service charge. Agencies vary on what is considered extensive—some agencies start charging after fifteen minutes of work while others start charging after two hours of work.<sup>22</sup>

Frequently, excessive service charges are based on the estimated time it will take to review and redact the records for exempt or confidential information. That can include charging the requester the hourly rate of the agency’s attorney or, in the case of FDOT records, an engineer.

The Florida Attorney General has advised that providing access to records should not be considered a revenue-generating operation.<sup>23</sup> Similarly, the Florida Supreme Court has opined that excessive charges deter the public from seeking access to records to which they are entitled.<sup>24</sup> In practice, though, there is little a requester can do when given a costly invoice, other than attempt to narrow the scope of the request, sue the agency for an unreasonable excessive charge—or give up entirely. A special service charge costing thousands of dollars can inhibit nonprofit organizations and journalists with limited spending budgets from accessing records—a right guaranteed to every person in the state constitution and statutes.

Based on a review of statutes and policies from other states, along with the federal Freedom of Information Act, thirty-one states mention a waiver or reduction of fees.<sup>25</sup> Even where statutes

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<sup>16</sup> In re Report & Recommendations of Judicial Mgmt. Council of Fla. on Privacy & Elec. Access to Court Records, 823 So. 2d 712, 713 (Fla. 2002).

<sup>17</sup> FLA. CONST. art. I, § 24(a).

<sup>18</sup> FLA. STAT. § 119.07(4)(a).

<sup>19</sup> FLA. STAT. § 119.07(4)(a)1.

<sup>20</sup> FLA. STAT. § 119.07(4)(b).

<sup>21</sup> FLA. STAT. § 119.07(4)(d).

<sup>22</sup> For example, in response to requests for agency’s public records policies, the Florida Department of Health provided a document stating that a special service charge will be charged for work exceeding fifteen minutes. The Agency for Health Care Administration, Department of Lottery, and Executive Office of the Governor each charge fees after thirty minutes of labor. The Florida Department of Agriculture and Consumer Services defines extensive labor as more than two hours spent to respond to a request.

<sup>23</sup> 1985-03 Fla. Op. Att’y Gen. (1985).

<sup>24</sup> Bd. of Tr., Jacksonville Police & Pension Fund v. Lee, 189 So. 3d 120, 129 (Fla. 2016).

<sup>25</sup> Cox & Haber, *supra* note 14.

are silent as to a fee waiver, courts have ruled that agencies still have discretion to waive or lessen fees to permit greater access to records.<sup>26</sup>

Federal FOIA requires fees be waived or reduced when the requests are not sought for commercial purposes and the request is in the public interest.<sup>27</sup> A request is in the public interest if disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government....”<sup>28</sup> Many states use this or a similar definition for public interest.<sup>29</sup> Some states provide further guidance. For example, the Illinois Freedom of Information Act provides that waiver or reduction serves the public interest “if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public.”<sup>30</sup>

Under federal FOIA, requests from individuals seeking records on themselves generally do not qualify for a fee waiver.<sup>31</sup> Some states also clarify that records sought for personal use or for the requester’s interest in litigation are not made in the public interest and, therefore, not entitled to a fee waiver.<sup>32</sup>

## Method

To assess how a fee waiver might affect Florida agencies, public records request logs were requested from a number of state agencies to determine how many requests were made by for-profit businesses and individuals seeking their own records compared to journalists, nonprofits, and others who may qualify for a non-commercial fee waiver.

Requests were submitted for logs spanning Jan. 1, 2020, through April 30, 2021, for the following Florida state agencies: Agency for Health Care Administration (AHCA), the Department of Environmental Protection (DEP), the Department of Agriculture and Consumer Services (DACS), and the Department of Lottery (Lottery), and Executive Office of the Governor (EOG). These agencies provided the information without charge and within a month of receiving the request.<sup>33</sup>

The logs contained enough information to determine the name and organization or business of the requester. Except for the log provided by DACS, each log also included a description of the records requested. The DACS log contained more than 1,000 entries that included only a name, which made it difficult to verify the requester’s business in seeking the records. The dataset indicates requests made by lawyers, lobbyists, and for-profit businesses seeking records for commercial use, individuals asking for information for personal use, and journalists and nonprofits seeking records in the public interest.

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<sup>26</sup> See *N. Cty. Parents Org. v. Dep’t of Educ.*, 28 Cal. Rptr. 359 (Cal. Ct. App. 1994).

<sup>27</sup> 5 U.S. § 552(a)(4).

<sup>28</sup> 5 U.S. § 552(a)(4)(A)(iii).

<sup>29</sup> See, e.g., HAW. CODE R. § 2-71-32(b) (“A waiver of fees is in the public interest when: the requested record pertains to the operation or activities of an agency...the requester has the primary intention and actual ability to widely disseminate information from the government record to the general public at large.”).

<sup>30</sup> 5 ILL. COMP. STAT. 140/6(c) (2020).

<sup>31</sup> FOIA FAQ, <https://www.foia.gov/faq.html>.

<sup>32</sup> 5 ILL. COMP. STAT. 140/6(c) (2020); IDAHO CODE § 74-102(10)(f)(i)–(ii) (2020).

<sup>33</sup> The Florida Department of Law Enforcement responded to a request nearly three months after the author sent it and estimated that it would cost \$66 to complete the request. The Florida Department of Transportation provided a log with the name of requesters for free. The agency estimated that it would cost more than \$100,000 to also provide a description of the requests and whether any special service charges were imposed.

Requests deemed in the public interest included those from the media, academics, government, and nonprofit organizations. Journalists were noted as in the public interest based on the federal definition that a request is in the public interest if disclosure will likely contribute to the public understanding of the operations of government.<sup>34</sup> The label “media” includes requests from journalists at newspapers, public radio stations, television news stations, websites such as Politico, nonprofit news outlets such as ProPublica, and The Center for Investigative Reporting. Bloggers with few followers were not included. Requests made by 501(c)(3) nonprofit organizations, academic institutions, and governmental agencies also were noted as in the public interest. These entities all have non-commercial interests and responsibilities to educate and serve the public.<sup>35</sup> However, non-profit organizations seeking their own records—such as a nonprofit hospital seeking complaints about the facility submitted to AHCA—were not considered in the public interest because this information could be used for the entity’s own internal use.

Requests deemed not in the public interest included those from lobbyists, for-profit businesses, consulting firms, insurance companies, unions, individuals seeking their own records, anonymous requests, and requests with insufficient information to make a determination regarding the requester’s identity or purpose. These records would be considered commercial interests of the requester (or their client) or the personal interests of an individual. In coding the requesters, the category “legal” included lawyers and paralegals in private practice. “For-profit business” included for-profit companies based on filings available with Florida Department of State or other state business records sites. “Insurance” included businesses primarily providing insurance. “Lobbyists” included individuals or firms with the primary purpose of influencing legislation and government policy. “Individual/uncoded” indicated that the requester did not fit into a specific category or sought records about themselves.

## Results

In all, 2,312 requests out of 16,318—or 14%—would be entitled to a fee waiver for records sought in the public interest and not for commercial or personal use. Nearly one third of all requests came from for-profit businesses (see Table 1 and Figure 1, below). Many businesses sought information about agency contracts for services. For instance, printing companies sought records related to Lottery’s evaluation of bids and awarding a contract for printing lottery games. Businesses, attorneys, and paralegals (one-fifth of all requests) frequently asked for permit and licenses applications, particularly to DEP and AHCA.

A significant number of requests were individuals seeking their own records or records about themselves or their organization. For instance, many notaries public sought complaints filed against them to the Executive Office of the Governor and health care facilities asked AHCA for their own records.

Based on the requests with sufficient information, nearly one third of requests submitted to DACS could receive a fee waiver. The higher percentage might be attributed to the number of requests from government agencies, specifically from state attorney offices.

The EOG responded to the highest percentage of requests that would be entitled to a fee waiver. Of the 816 requests fulfilled during the applicable time period, more than half came from reporters, nonprofits, academic researchers, and other government agencies. Nonprofit

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<sup>34</sup> 5 U.S. § 552(a)(4)(A)(ii)(II).

<sup>35</sup> See I.R.C. § 501(c)(3).

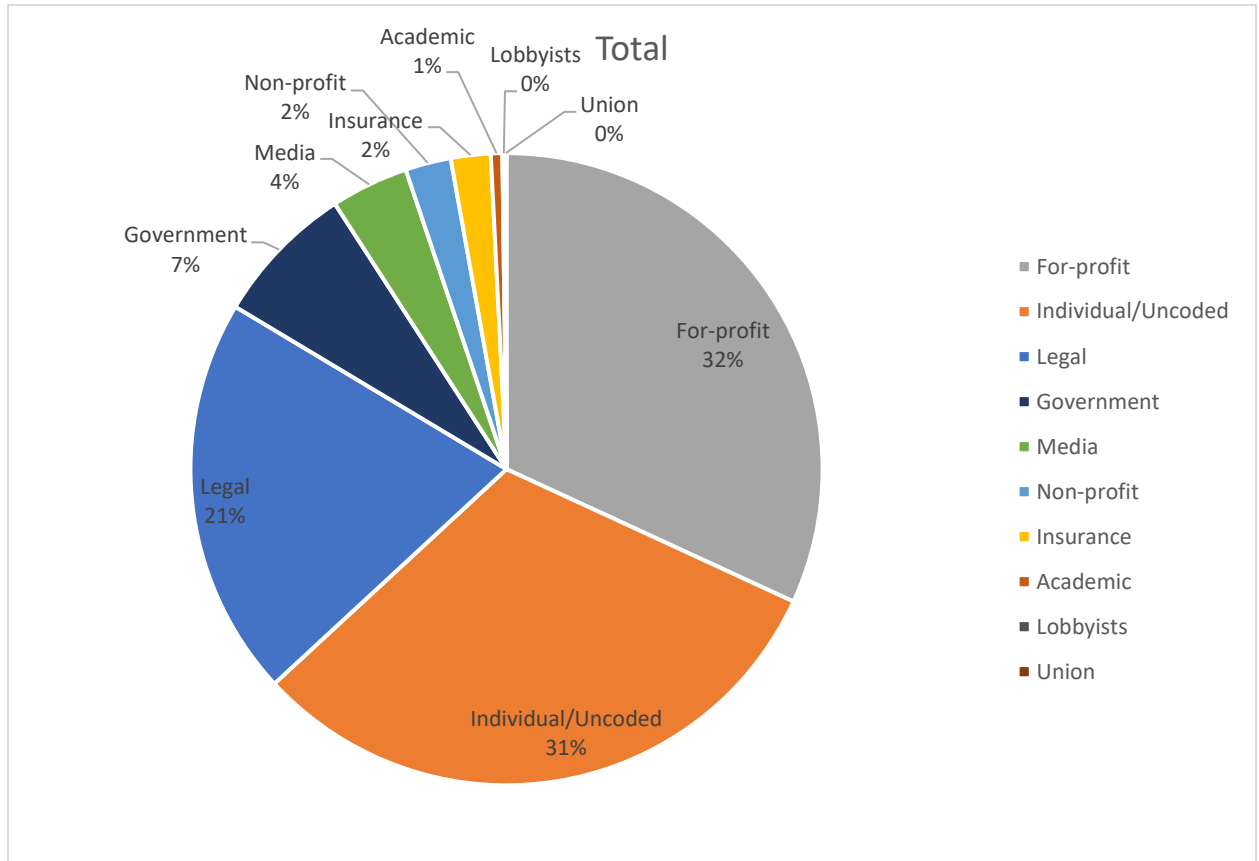


organizations like Earth Justice sought reports by the state’s Chief Resiliency Officer, who reports to the EOG and responsible for helping prepare the state for the effects of sea level rise in Florida. Journalists at newspapers and television stations asked for information about the administration’s plans for distributing vaccines. The agency had the highest percentage of requests from journalists—41%. No other agency had more than 7% of requests from journalists. A fee waiver would have the most effect on the EOG and its ability to impose special service charges for public records requests.

Table 1: Requester type by public interest versus nonpublic interest

		<b>ACHA</b>	<b>DEP</b>	<b>DACS</b>	<b>Lottery</b>	<b>EOG</b>	<b>TOTAL</b>
<b>Public Interest</b>							
	<b>Nonprofit</b>	170	91	46	2	72	381
	<b>Media</b>	153	58	67	38	332	648
	<b>Academic</b>	27	33	22	3	11	96
	<b>Government</b>	90	153	914	8	22	1,187
	<b>SUBTOTAL</b>	<b>440</b>	<b>335</b>	<b>1,049</b>	<b>51</b>	<b>437</b>	<b>2,312</b>
<b>Nonpublic Interest</b>							
	<b>Legal</b>	2,468	453	346	21	51	3,339
	<b>Individual</b>	2,306	930	1,309	270	284	5,099
	<b>Businesses</b>	510	3,955	450	254	33	5,202
	<b>Insurance</b>	311	5	8	1	7	332
	<b>Lobbyist</b>	11	4	4	1	4	24
	<b>Union</b>	3		3	4		10
	<b>SUBTOTAL</b>	<b>5,609</b>	<b>5,347</b>	<b>2,120</b>	<b>551</b>	<b>379</b>	<b>14,006</b>
<b>TOTAL</b>		<b>6,049</b>	<b>5,682</b>	<b>3,169</b>	<b>602</b>	<b>816</b>	<b>16,318</b>

Figure 1: Requester type



## Conclusion

Public records are essential to oversight of state agencies. Florida lawmakers and voters considered access to public information critical and provided a right of access to records both in statute and in the state constitution. Despite the importance of public records and guarantees of access for every person, charges preclude many individuals from seeking public records. Only requesters with the resources to pay thousands of dollars can reliably exercise their constitutional right to access public records.

This study was attempted to build on research showing that Florida municipalities would not be significantly affected by a fee waiver for records sought in the public interest, by analyzing data related to the impact of fee waivers on state agencies.<sup>36</sup> While this is a limited sample, the findings are in line with previous research.<sup>37</sup> Four of the agencies reviewed receive a majority of records requests from entities with commercial interests or individuals with personal interests in the records. When considering all requests made to four agencies, only 14% would be subject to a fee waiver for requests made in the public interest by nonprofit organizations and journalists or for noncommercial purposes, such as academic research.

<sup>36</sup> See Cox & Haber, *supra* note 14.

<sup>37</sup> *Id.*

Apart from the EOG, only a small percentage of requesters at agencies would be entitled to a fee waiver. An agency could still charge for extensive use of information technology resources or labor for a large majority of requests, particularly commercial requesters. The effect of a fee waiver or reduction for requests made in the public interest would have a minimal financial effect on the reviewed state agencies.

Agencies could consider policies to reduce fees for those seeking records in the public interest. For instance, an agency could charge a fee only if the request takes at least one, two, or four hours to complete—a practice in other states—rather than charging after fifteen or thirty minutes.<sup>38</sup> Several states permit a custodian to charge only for the time spent redacting exempt information from a record and not for the time an attorney or employee spends determining whether the record is exempt from disclosure—a common charge in Florida.<sup>39</sup> Even without waiving fees, agencies could reduce the costs of records requests if made in the public interest by revising what is considered “extensive” labor.

Waiving fees entirely for requests made in the public interest could ensure that information about the operations of government is available to the public and not limited by a requester’s ability to pay. A fee waiver, or changes to policies on special services charges, would ensure that reporters and nonprofit organizations with limited budgets are not denied access to information. Nothing prohibits agencies or municipalities from implementing a procedure to waive or reduce fees. Agencies are free to adopt a fee waiver today.

Alternatively, the Florida legislature could amend the public records law to provide a definition of requests made in the public interest and a mechanism to waive or reduce fees for such requests. Legislation requiring records custodians to waive or limit fees for requests made for noncommercial purposes and in the public interest would create uniformity of the application of fee waivers across state and local entities. Legislation should mandate a waiver or reduction of fees for requests made for non-commercial purposes of the requester and where disclosure of information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interests of the requester.<sup>40</sup>

As evidenced throughout the coronavirus pandemic, a lack of information can cause distrust and confusion. Access to information leads to a more informed public. A fee waiver and, in turn, greater accessibility to public information can dispel shade in the Sunshine State.

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<sup>38</sup> NEB. REV. STAT. §84-712 (3)(c) (allowing a custodian to charge only after four hours of labor). *See also*, IDAHO STAT. § 74-102(10)(b)(i) and N.Y. PUB. OFF. § 87(1)(c)iv. (permitting charge for search and review of records after two hours of labor).

<sup>39</sup> *See e.g.*, DEL. CODE ANN. tit. 29 § 10003(m)(2) (2020) (“Administrative fees shall not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt under FOIA.”) *See also* NEB. REV. STAT. §84-712 (3)(c); OR. REV. STAT. § 192.324(4)(b); 65 PA. STAT. ANN. § 67.1307(g); UTAH CODE ANN § 63G-2-203(5)(a).

<sup>40</sup> *See* 5 U.S.C. § 552(a)(4)(A)(iii).