

HOW FREE IS INFORMATION? TRANSPARENCY IN STATE GOVERNMENT

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How transparent are state governments in the United States? This Article explores the functioning of important, but often underappreciated, actors in the American constitutional system – state administrative agencies – and examines variation in the existence and implementation of transparency regimes across and within all 50 states.

This Article first highlights differences that exist among state freedom of information (“FOI”) laws, focusing on three components: who can submit requests; the requirements for and exemptions to public release; and the process for appeal of agency decisions not to disclose information. Because FOI laws require the public to request access to information and permit state agencies to refuse release of records, these laws constitute “passive” transparency and have little effect without a strong administrative apparatus to facilitate implementation. Simply, FOI laws rely on administrators to interpret statutory language in ways that provide access to government information.

Because passive transparency regimes like state FOI laws require high-quality administration in order to be effective, this Article presents a novel exploratory field experiment of administrative performance across all 50 states. Specifically, this Article evaluates state implementation of FOI laws using an original empirical study of 248 state agencies’ fulfillment of the same FOI request. This study illustrates that agency-level factors such as administrative function, policy mission, and leadership influence information disclosure.

As a whole, this Article suggests the stringency of transparency law in the states only partially explains government provision of information to the public. Instead, how administrators react to internal and external pressures as they utilize their discretion to fill FOI requests constitutes a key aspect of open government.

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INTRODUCTION

In June 2020, then-New York Governor Andrew M. Cuomo signed a series of police reform bills into law in response to the killing of George Floyd.¹ Among the most highly debated aspects of the legislation was a measure to repeal Section 50-a of the state's Civil Rights Law, which prohibited the public release of certain police records without legal permission.² New York police departments historically had used Section 50-a to prevent disclosure of disciplinary hearings against individual officers.³ The repeal sought to correct these practices and to provide greater transparency.

1. Alexa Lardieri, *Gov. Andrew Cuomo Signs 10-Bill Police Reform Package into Law*, U.S. NEWS & WORLD REP. (June 12, 2020).

2. N.Y. CIV. RTS. L. § 50-a (repealed 2020).

3. Luis Ferré-Sadurni & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Restrict Police*, N.Y. TIMES (June 17, 2020); Jeffrey T. Haxelton,

Since the repeal, the state's police departments have been flooded with public records requests as citizens, non-profit organizations, and researchers seek information on police misconduct.⁴ Yet, while New York's Freedom of Information (FOI)⁵ law applies equally across all departments, there has been variation in the departments' responses to records requests. In the wake of Section 50-a's appeal, many police agencies declined to provide requested documents, others sought labor costs of tens of thousands of dollars per request, and still others claimed to have no disciplinary records at all.⁶

This variation to public records requests responses in New York is hardly unique. In fact, state agencies across the country face criticism for their failure to provide information to citizens adequately and in a timely manner.⁷ When it comes to public records, "we're seeing increased secrecy throughout the country at the state . . . level [and] it's getting worse every year."⁸ Scholarly commentary has suggested that state FOI laws are ineffective, as administrative noncompliance and claims of legal exemptions from information provision have become the norm.⁹ Additionally, tensions in the partisan climate of the United States have prompted questions about whether government officials are willfully ignoring transparency laws and whether partisan polarization has led to an increasingly adversarial relationship between government and the public over access to government records and information.¹⁰

The People's Business: The Case for Amending New York Civil Rights Law Section 50-a, 85 BROOK L. REV. 913, 916-17 (2020).

4. C.J. Ciarabella, *New York Repealed Its Police Secrecy Law Two Years Ago. Departments Are Still Trying to Hide Misconduct Files*, REASON (Dec. 5, 2022).

5. Throughout this Article, we utilize the term "Freedom of Information." Some states use different names to describe public records laws.

6. Beryl Lipton & John Campbell, *Six Months after the Repeal of 50-a, NY Police Continue to Combat the Release of Disciplinary Records*, MUCKROCK (Dec. 22, 2022).

7. E.g., David Carson, *Missouri Leaders Promise Transparency. But Open Records Are Often Cloaked in Secrecy*, ST. LOUIS POST-DISPATCH (Oct. 3, 2022); Samantha J. Gross & Matt Stout, *Healey, Who Once Pledged to Not Claim Blanket Public Records Exemption as Governor, Refuses to Release Call Logs, E-mails*, BOSTON GLOBE (Feb. 20, 2023); Patrick Marley & Yvonne Wingett Sanchez, *Arizona Republicans Exempt Lawmakers from the State's Open-Records Law*, WASH. POST (Jan. 26, 2023); Henry Redman, *Dozens of Open Records Requests to Wisconsin DOJ Have Sat for More Than a Year*, WIS. EXAMINER (Mar. 1, 2023).

8. Nicholas Kusnetz, *Only Three States Score Higher than D+ in State Integrity Investigation; 11 Flunk*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/only-three-states-score-higher-than-d-in-state-integrity-investigation-11-flunk/> [<https://perma.cc/MT2Z-UVSV>].

9. Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA J. CONST. L. 1011 (2008).

10. Jacob Holzman & Benjamin J. Hulac, *Interior Held Back FOIA'd Documents After Political Screenings*, ROLL CALL (June 18, 2019); Ben Wasike, *FOI in Transition:*

This begs the question: how transparent are state governments in the United States?

Not only is transparency widely recognized as important for good governance, the concept is premised on the idea that liberal democracy necessitates citizens having knowledge of government workings.¹¹ Indeed, international human rights law requires governments to grant a right of access to information held by public entities. As of January 2022, 129 countries comprising over 80 percent of the world's population have enacted laws that provide for freedom of information.¹²

Most scholarly examination of transparency contemplates cross-national variation or explores access to government information at a national (as opposed to sub-national) level.¹³ For example, research on the development and implementation of federal law granting freedom of information in the United States is a critical part of understanding transparency.¹⁴ Indeed, judges and scholars interpreting *state public*

A Comparative Analysis of the Freedom of Information Act Performance between the Obama and Trump Administrations, 37 GOV'T INFO. Q. 101443 (2019).

11. Jonathan Anderson et al., *Policy Liberalism and Public Records Laws in the American States*, 27 COMM. L. & POL'Y 1, 4 (2022); GREGORY PORUMBESCU ET AL., GOVERNMENT TRANSPARENCY: STATE OF THE ART AND NEW PERSPECTIVES 3 (2022).

12. E.g., Claude Reyes v. Chile, Merits, Reparations, and Costs, Order of the Court, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006); Omar Humberto Maldonado v. Chile, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 300 (Sept. 2, 2015); Pueblos Kallina and Lokono v. Suriname, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015); Toktakunov v. Kyrgyzstan, UNHRC, U.N. Docs., Commc'n No. 1470/2006 (2011); XYZ v. Benin, No. 010/2020, Judgment, Afr. Ct. H.P.R. (Nov. 27, 2020); International Covenant on Civil and Political Rights, General Comment No. 34, Sept. 12, 2011, 4 UNHRC, U.N. Docs. (2011); Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655, 659 (2022).

13. E.g., Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight – Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157 (2009); Gbemende E. Johnson, *Government Transparency and Public Access*, 51 PRES. STUD. Q. 705 (2021); Karanicolas & Kwoka, *supra* note 12; Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361 (2016); Alan B. Morrison, *The Administrative Conference of the United States and Its Work on the Freedom of Information Act: A Look Back and a Look Forward*, 83 GEO. WASH. L. REV. 1540 (2015); Ema Ruijter & Albert Meijer, *National Transparency Regimes: Rules or Principles? A Comparative Analysis of the United States and the Netherlands*, 39 INT'L J. PUB. ADMIN. 895 (2016); Michael Schudson, *The Shortcomings of Transparency for Democracy*, 64 AM. BEHAV. SCI. 1670 (2020); Jennifer Shkabatur, *Transparency with(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79 (2012); Kristen Elizabeth Uhl, *The Freedom of Information and Post-9/11: Balancing the Public's Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261 (2003).

14. See, e.g., MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT* (2021) (defending the importance of federal FOI law in the United States, detailing empirical patterns in FOI requests at the national level, and discussing the need for FOI reform).

records laws routinely look to federal judicial interpretations of *national* law for guidance.¹⁵

Yet as state governments increasingly take on more policy responsibility, including the implementation of federal law,¹⁶ a focus on open government at the national level paints an incomplete picture of government transparency and accountability in the United States. The nation's federalist system diffuses and decentralizes governmental power across the states, making freedom of information laws in the 50 states essential for citizens to hold representatives accountable.

Thus, this Article explores the transparency of important, but often underappreciated, actors in our political system: state administrative agencies. Not only does the tremendous growth in state government size and responsibility in recent decades beg for analysis of access to public records at the state level, the transparency of state administrative agencies' relationships with citizens has remained largely unexplored.¹⁷ Ironically, this is due in part to a lack of information on state government; one of the most significant obstacles to the study of state administration generally, and transparency specifically, is the absence of data.¹⁸

This Article begins to close this gap by examining transparency laws in all 50 states and analyzing how similar agencies within those states interpret those laws. Because each of the 50 states has their own legal framework pertaining to open government, are structured by their own constitutions, and design their administrative agencies in different ways, the states are an ideal vehicle to study variation in transparency regimes.¹⁹

15. Christina Koningsor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1471 (2020); Joe Regalia, *The Common Law Right to Information*, 18 RICH. PUB. INT. L. REV. 89, 114 (2015). Furthermore, examination of federal laws also presents problems for generalization about transparency in government across the country, as over half of federal freedom of information requests relate to immigration records. Christina Koningsor, *Transparency Deserts*, 114 NW. U. L. REV. 1461, 1466 (2020).

16. E.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011); PAMELA J. CLOUSER McCANN, *THE FEDERAL DESIGN DILEMMA: CONGRESS AND INTERGOVERNMENTAL DELEGATION* (2016); Philip Rocco et al., *Stuck in Neutral: Federalism, Policy Instruments, and Counter-Cyclical Responses to COVID-19 in the United States*, 39 POL'Y & SOC'Y 458 (2020).

17. JAMES L. GARNETT, *REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH* (2019); GARY F. MONCRIEF & PEVERILL SQUIRE, *WHY STATES MATTER: AN INTRODUCTION TO STATE POLITICS* (2017); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 485 (2017); Miriam Seifter, *Further from the People?: The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 109 (2018).

18. Koningsor, *supra* note 15, at 1469.

19. Jeffrey J. Harden & Justin H. Kirkland, *Does Transparency Inhibit Political Compromise?*, 65 AM. J. POL. SCI. 493 (2021).

This Article utilizes an original audit of the existence and implementation of transparency regimes both across and within systems to explore freedom of information in the United States. The authors catalogued dozens of constitutional and statutory characteristics that structure the 50 states' public records laws including restrictions imposed on those who seek access to government information, requirements for and exemptions to state responses to public requests for information; and procedures for appeal of state decisions not to fulfill such requests. The authors then conducted an exploratory field experiment of each state's agriculture, budget, commerce, education, and health and human services agencies' fulfillment of the same FOI request. This Article explores empirical patterns in agency responses to that request and finds that administrative characteristics such as agency policy mission and design may have a stronger correlation to increased government transparency than the stringency of state law. Simply, how administrators react to internal and external pressures as they utilize their discretion within transparency regimes constitutes a key aspect of open government.

Section I begins with a brief discussion of transparency in government and the evolution of the right of access to public records in the United States. This Section then highlights the differences that exist among state FOI laws, focusing on three components: (1) who can submit requests; (2) the requirements for and exemptions to public release; and (3) the process for appeal of agency decisions not to disclose information. States vary across these three components, affecting the ability of people to request and receive information about government. Section I provides a rich account of this variation.

Section II places state FOI laws in the context of other transparency regimes. Specifically, because FOI laws require the public to request access to information and permit state agencies to refuse release of records, these laws constitute "passive" transparency and have little effect without a strong administrative apparatus to facilitate implementation. Yet, from the moment of passage, state administrators have faced serious FOI implementation challenges including a lack of organizational resources and capacity, hostile organizational cultures, and political climates that do not always incentivize transparency.

Recognizing that statutory provisions providing for open government do not always translate to transparent administrative practice, Section III presents an exploratory field experiment to evaluate implementation of FOI laws in agencies that perform five similar functions across all states. This Section presents an original study of 248 state agencies' fulfillments of the same FOI request for basic information about the agencies' organizational structures and compares the results of the audit to previous evaluations of open government in

the states. Section III finds FOI implementation varies widely across and within states. Notably, the stringency of state law and the culture of transparency in each state has little correlation with fulfillment of FOI requests. Instead, agency-level factors such as administrative function and policy type appear to influence information disclosure.

Section IV builds upon Section II's theoretical discussion and Section III's descriptive analysis to account for state- and agency-level factors that may influence implementation of state FOI law. This Section's empirical models indicate the internal political dynamics of an agency significantly and substantively affect transparency. State agencies led by individuals who receive and retain their jobs as a result of elections are more likely to respond to and fill FOI requests than those agencies led by political appointees. Section IV is an important addition to scholarship that explores the connection between political competition and transparency. In passive transparency regimes, the politics of implementation are just as important as the initial passage of FOI law.

I. TRANSPARENCY IN STATE GOVERNMENT

The concept of transparency encompasses a wide range of elements relating to the accountability of government officials and decisions.²⁰ Across disciplines, scholarly focus on transparency tends to build upon the understanding that a key characteristic of liberal democracy is government officials' responsiveness to the preferences of citizens. For this responsiveness to occur, citizens must have an opportunity to acquire information about government institutions and policies.²¹ Transparency can provide this information, increase government accountability, and serve as a standard by which citizens judge governments and those who operate within them.²²

Yet, one of the difficult aspects of transparency is that it is often up to government officials themselves to set up and administer transparent regimes. Transparency thus is a strategic decision, as governments have competing incentives to restrict and facilitate the amount of information made available to citizens.²³ As a result, transparency often connects to politics – the openness of government can affect who gets what, when,

20. Carolyn Ball, *What is Transparency?*, 11 PUB. INTEGRITY 293 (2009).

21. E.g., ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971); Stephen Kosack & Archon Fun, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65 (2014).

22. Ball, *supra* note 20; Vincent Mabillard & Raphael Zumofen, *The Complex Relationship between Transparency and Accountability: A Synthesis and Contribution to Existing Frameworks*, 32 PUB. POL'Y & ADMIN. 110 (2017).

23. James R. Hollyer et al., *Democracy and Transparency*, 73 J. POL. 1191, 1194 (2011).

and how.²⁴ The challenge in liberal democracies is to find the optimum amount, type, and process for transparency, as transparency laws create rules and norms that bind future political actors, generate new constituencies, and can change the balance of power in a governmental system.²⁵

Reflecting the importance of transparency for politics and policy, the vast majority of transparency research tends to focus on the political and normative implications for how and when transparency contributes to the quality of government.²⁶ Important research has examined the conditions under which open government is more likely and the effects of transparency on political actors.²⁷ Transparency can increase electoral responsiveness and trust in government, generate incentives for intra-elite monitoring, and promote civil, political, and social discourse.²⁸

24. Daniel Berliner, *The Political Origins of Transparency*, 76 J. POL. 479 (2014); Gregory Michener & Ben Worthy, *The Information-Gathering Matrix: A Framework for Conceptualizing the Use of Freedom of Information Laws*, 50 ADMIN. & SOC'Y 476 (2018).

25. Daniel Berliner, *Sunlight or Window Dressing? Local Government Compliance with South Africa's Promotion of Access to Information Act*, 30 GOVERNANCE 641 (2017); Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE 529 (2009); 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 (2016); Wasike, *supra* note 10.

26. Khalidoun AbouAssi & Tina Nabatachi, *A Snapshot of FOIA Administration: Examining Recent Trends to Inform Future Research*, 49 AM. REV. PUB. ADMIN. 21 (2019); Albert Meijer et al., *Assessing Government Transparency: An Interpretive Framework*, 50 ADMIN. & SOC'Y 501 (2018).

27. E.g., Berliner, *supra* note 24; Daniel Berliner & Aaron Erlich, *Competing for Transparency: Political Competition and Institutional Reform in Mexican States*, 109 AM. POL. SCI. REV. 110 (2015); Guy Grossman & Kristin Michelitch, *Information Dissemination, Competitive Pressure, and Performance between Elections: A Field Experiment in Uganda*, 112 AM. POL. SCI. REV. 280 (2018); Harden & Kirland, *supra* note 19; Gregory Michener, *How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws*, 28 GOVERNANCE 77 (2015); Ana-Maria Rios et al., *Budget Transparency and Legislative Budgetary Oversight: An International Approach*, 46 AM. REV. PUB. ADMIN. 546 (2016); Francisca Tejedo-Romero & Joaquim Filipe Ferraz Esteves de Araujo, *Determinants of Local Governments' Transparency in Times of Crisis: Evidence from Municipality-Level Panel Data*, 50 ADMIN. & SOC'Y 527 (2018).

28. John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Expansion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006); Berliner, *supra* note 24; Berliner, *supra* note 25; Berliner & Erlich, *supra* note 27; Stephan G. Grimmeliikhuijsen & Albert J. Meijer, *Effects of Transparency on the Perceived Trustworthiness of a Government Organization: Evidence from an Online Experiment*, 24 J. PUB. ADMIN. RSCH. & THEORY 137, 148 (2014); Gregory Michener, *How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws*, 28 GOVERNANCE 77 (2015); Qiushi Wang & Zhen Guan, *Can Sunlight Disperse Mistrust? A Meta-Analysis of the Effect of Transparency on Citizens' Trust in Government*, J. PUB. ADMIN. RSCH. & THEORY 1 (forthcoming) (manuscript at 14).

Comparatively less research has explored variation in the processing and management of transparency laws.²⁹ This is a consequential gap in the literature, as most conflict between a government and its citizens tends to take place in the administrative arena.³⁰ In order to understand transparency in government, one must account for the existence and content of transparency laws *and* their administration.

We do so by examining one of the most prominent policies designed to increase government transparency – freedom of information laws. In this Section, we begin with a discussion of the development of these laws and then identify common components across all FOI laws in the United States. We then use the subsequent sections to evaluate state agencies’ implementation of those laws.

A. *Evolution of a Right of Access to Information in the United States*

Historically, English common law recognized a limited right of the public to inspect government records for the purposes of litigation.³¹ Because courts construed this right narrowly and inspection was conditioned on demonstration of a direct and tangible legal interest in the records, public access was minimal.³² Early American courts followed this common law practice but eventually expanded the right to include public inspection for the monitoring of government function more generally.³³ Thus, in the first century of the republic, most states provided a common law right of public access to government documents.³⁴

29. AbouAssi & Nabatachi, *supra* note 26. *But see* Johnson, *supra* note 13; ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (2006); Abby K. Wood & David E. Lewis, *Agency Performance Challenges and Agency Politicization*, 27 J. PUB. ADMIN. RSCH. & THEORY 581 (2017).

30. *See* Lael R. Keiser & Joe Soss, *With Good Cause: Bureaucratic Discretion and the Politics of Child Support*, 42 AM. J. POL. SCI. 1133, 1133 (1988); Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 5 (1984).

31. HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* 25-26 (1953).

32. Andrea G. Nadel, *What Are “Records” of Agency Which Must Be Made Available Under State Freedom of Information Act*, 27 A.L.R. 4th 680 (1984); Regalia, *supra* note 15, at 95; Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1155 (2002).

33. Solove, *supra* note 32, at 1155-56; Peter Spáč, Petr Voda & Jozef Zagrapan, *Does the Freedom of Information Law Increase Transparency at the Local Level? Evidence from a Field Experiment*, 35 GOV’T INFO. Q. 408, 408 (2018).

34. William Randolph Henrick, *Public Inspection of State and Municipal Executive Documents: Everybody, Practically Everything, Anytime, Except . . .*, 45 FORDHAM L. REV. 1105, 1107 (1977). *See generally* Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 723 (1981); Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 69-70 (1996).

In the mid-nineteenth century, state legislatures in the United States began to codify the common law right of public access to information, albeit on a limited basis.³⁵ Wisconsin became the first state in the nation to grant a statutory right to certain information in 1849, followed by Massachusetts's enactment of a more expansive grant of public access government documents in 1851.³⁶ Illinois and Montana enacted similar legislation shortly thereafter.³⁷ Both freedom of information statutes and "sunshine" laws requiring open deliberation began to emerge more broadly at the turn of the century and, by 1940, twelve states had codified FOI laws.³⁸

Notably, the adoption of open access legislation tracks with the development of the administrative state. While state and local governments exercised broad regulatory powers in the early republic and there existed a common law assumption of accountability for administrative action, the concepts of liberalism and fairness largely did not extend to administrative governance until the mid-nineteenth century.³⁹ Prior to that time, few states retained public records.⁴⁰ As state governments expanded administrative action in, *inter alia*, licensing and entitlements, the need for recordkeeping grew.⁴¹ States then gradually replaced or supplemented common law recognition of public access to information with discrete statutory language.⁴²

35. Koningisor, *supra* note 15, at 1474. This largely predates the development of such laws in Europe, with the exception of Sweden's passage of the first known law recognizing freedom of information in 1766. His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (Dec. 2, 1766); John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Expansion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 88 (2006).

36. Koningisor, *supra* note 15, at 1474.

37. Emily Dowd, *Open Government Laws and Critical Energy Infrastructure*, NAT'L CONF. STATE LEGIS. (Jan. 30, 2018), <https://www.ncsl.org/research/energy/open-government-laws-and-critical-energy-infrastructure#opengovernment> [<https://perma.cc/EZN4-XXCF>].

38. Koningisor, *supra* note 15, at 1474; Michele L. Mekel, *A Hobson's Choice: Ensuring Open Government or Conserving Government Funds*, 66 MO. L. REV. 431, 431 (2001); Solove, *supra* note 32, at 1160. "Sunshine" laws require certain government meetings to be open to the public so that citizens may observe the decision-making process. Charles N. Davis, Milagros Rivera-Sanchez & Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 41 (1996).

39. JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 5 (2012); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 65-66 (2012); JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* 60 (2017).

40. Solove, *supra* note 32, at 1160.

41. *Id.* at 1143.

42. *Id.* at 1160. However, the common law right still exists. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

At the national level, the right to access to government records first appeared in statute in 1946 as a provision of the Administrative Procedure Act (“APA”).⁴³ However, the APA allowed the federal government to withhold information for good cause and agencies’ interpretations of the provision made it largely ineffective.⁴⁴ The government tended to argue that the law merely indicated agencies should release information, as opposed to establishing a firm requirement for disclosure of records.⁴⁵ Frustrated with the lack of openness, the U.S. House of Representatives launched an eleven-year investigation into government secrecy culminating in the passage of the federal Freedom of Information Act in 1966.⁴⁶

Most American states had not codified FOI regimes until that point – a total of 37 states that did not have open government legislation passed FOI laws after the enactment of the federal law.⁴⁷ New York, for example, was one of the first states to enact a law resembling the federal Freedom of Information Act.⁴⁸ The federal government’s move to strengthen public access to information prompted many of the American states either to amend existing legislation or to enact new FOI statutes that mirrored congressional action.⁴⁹

Currently, all 50 states have open records laws, although they vary in length, sophistication, and substance.⁵⁰ While previous studies have

43. 5 U.S.C. § 1002 (1946).

44. Matthew D. Bunker et al., *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 552-53 (1993).

45. HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* (1953); A. Jay Wagner, *Piercing the Veil: Examining Demographic and Political Variables in State FOI Law Administration*, 28 GOV’T INFO. Q. 1, 3 (2021).

46. BRUCE E. CAIN, PATRICK EGAN & SERGIO FABBRINI, *Towards More Open Democracies: The Expansion of Freedom of Information Laws*, in *DEMOCRACY TRANSFORMED?: EXPANDING POLITICAL OPPORTUNITIES IN ADVANCED INDUSTRIAL DEMOCRACIES* 115, 119 (Bruce E. Cain, Russell J. Dalton & Susan E. Scarrow eds., 2003). See Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

47. *Jurisdictions*, MUCKROCK, [https://www.muckrock.com/place/list/?level=s\[https://perma.cc/N62T-GZ6G\]](https://www.muckrock.com/place/list/?level=s[https://perma.cc/N62T-GZ6G]).

Enacted in 1966 and taking effect a year later, the federal Freedom of Information Act requires disclosure of previously unreleased government information upon request (with a number of exemptions). Public Information Act of 1966, Pub. L. 89-487 (1966). Congress amended FOIA post-Watergate, again during the Reagan Administration, and additionally after 9/11. Raymond M. Lee, *Research Uses of the U.S. Freedom of Information Act*, 13 FIELD METHODS 370, 371 (2001). Most recently, Congress amended the federal FOIA with the Open Government Act of 2007 (Pub. L. No. 110-81) and the FOIA Improvement Act of 2016 (Pub. L. No. 114-185).

48. Ralph J. Marino, *The New York Freedom of Information Law*, 43 FORDHAM L. REV. 83 (1974).

49. Emily Dowd, *Open Government Laws and Critical Energy Infrastructure*, NAT’L CONF. STATE LEGIS. (Jan. 30, 2018), <https://www.ncsl.org/energy/open-government-laws-and-critical-energy-infrastructure> [https://perma.cc/EZN4-XXCF]; Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65 (1996).

50. Koningsor, *supra* note 15, at 1480.

reviewed specific aspects of these laws or found common themes and discrepancies among them, to our knowledge, no academic research catalogues the components of each state's current laws with respect to provisions granting public access to records; the requirements for and exemptions to government disclosure; and the procedures for appeal of government records decisions.⁵¹ We fill this gap in the literature and further our contribution with an examination of how state administrators implement FOI statutes.

B. Description of Data Collection

To get a feel for each state's FOI law, we relied initially on the non-profit, collaborative news site MuckRock. MuckRock, a member of the Global Investigative Journalism Network, is dedicated to helping journalists, researchers, and citizens file records requests in the United States.⁵² MuckRock is among the most highly ranked digital public records tools and its FOI work is widely utilized by scholars across disciplines.⁵³ Among the organization's bountiful resources is a records guide that builds on and updates work by Miranda Spivack

51. See, e.g., John Bender, *Solid-Gold Photocopies: A Review of Fees for Copies of Public Records Established Under State Open Records Laws*, 29 URB. LAW. 81, 83 (1997); Braverman & Heppler, *supra* note 36; Bill F. Chamberlin et al., *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J. L. & PUB. POL'Y 415 (2007); Laura Danielson, *Giving Teeth to the Watchdog: Optimizing Open Records Appeals Processes to Facilitate the Media's Use of FOIA Laws*, 2012 MICH. ST. L. REV. 981 (2012); Koningisor, *supra* note 15; Chad G. Marzen, *Public Records Denials*, 11 N.Y.U. J. L. & LIBERTY 966 (2018); Daxton R. 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). The most comprehensive legal review of public records statutes that we could find was published by the Michigan Law Review in 1975. This impressive project detailed federal and state responses and statutory schemes regulating access to government information. *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971 (1975). Additionally, Roger Nowadzky's (1996) comparative analysis of state public records statutes is a great starting point for research in this area and American Law Reports has continually updated Andrea Nadel's original (1984) analysis of judicial decisions that address the states' treatment of particular records. Nowadzky, *supra* note 48; Andrea G. Nadel, *What Are "Records" of Agency Which Must Be Made Available Under State Freedom of Information Act*, 27 A.L.R. 4th 680 (1984). We found these resources incredibly valuable.

52. *About MuckRock*, MUCKROCK, <https://www.muckrock.com/about/> [https://perma.cc/RR84-77PX].

53. E.g., Muira McCammon, *Tweeted, Deleted: An Exploratory Study of the U.S. Government's Digital Memory Holes*, 24 NEW MEDIA & SOC'Y 741, 755 (2022); Paul Milhailidis & Adam Gamwell, *Designing Engagement in Local News: Using FOIA Requests to Create Inclusive Participatory Journalism Practices*, 16 JOURNALISM PRAC. 828, 834 (2022); Laurence Tai, *Fast Fixes for FOIA*, 52 HARV. J. ON LEGIS. 455, 463 (2015); Michael Schudson, *U.S. Freedom of Information Act and Democratic Accountability*, OXFORD RSCH. ENCYCLOPEDIA OF COMM'N (2020); A. Jay Wagner

in collaboration with the *Milwaukee Journal Sentinel*, students at Marquette University's Diederich College of Communication, and *Reveal* from The Center for Investigative Reporting to explore every state's public records laws.⁵⁴ The site provides guides to each state's laws and interactive overview maps that track key public records data such as the average time it takes for state agencies to fill a request. Thus, this site was a natural starting point for our own research.

In the first stage of our research, we utilized MuckRock's summaries of state laws to collect the Code citation to each state's public records law.⁵⁵ From there, we confirmed the citations; read the law's corresponding updated section in each state's Code; and extracted information about the law, making sure to catalogue a statutory reference for each feature. We also consulted each state's constitution and extracted provisions, if any, that governed citizens' rights to information. This process not only allowed us to identify the body of statutory and constitutional text that governs FOI in each state, but also document our analysis with specific citations. In total, we tracked dozens of characteristics including each state's open records language; requirements imposed on those seeking to access public records; requirements for state agency responses to requests; exceptions to and exemptions from open records requirements; and procedures for appeal of administrative decisions not to disclose information.

In the second phase of our data collection, we validated our work using a variety of different media and academic sources. Among the most valuable was the Reporters Committee for Freedom of the Press's *Open Government Guide*. This compendium, last published in 2019, details the rights of reporters and other citizens to obtain information about government.⁵⁶ Where discrepancies emerged between our coding and information provided in sources such as the *Open Government Guide*, we reread the statutes and a judgment was made about what source was correct.⁵⁷

& David Cuillier, *To Fee or Not To Fee: Requester Attitudes Toward Freedom of Information Charges*, 40 GOV'T INFO. Q. 101879, 5 (2023).

54. Michael Morisy, *How Open is Your Government? Find Out with Our Interactive Maps*, MUCKROCK, <https://www.muckrock.com/news/archives/2018/mar/14/state-public-records-data-map/> [<https://perma.cc/7DJL-E63W>].

55. *Jurisdictions*, MUCKROCK, <https://www.muckrock.com/place/list/?level=s> [<https://perma.cc/N62T-GZ6G>].

56. *Introduction to the Open Government Guide*, REP. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/introduction-to-the-open-government-guide/> [<https://perma.cc/KB5C-C4M8>].

57. A full codebook justifying coding for each state, as well as full data (including data in accessible formats, statutory references, and notes of discrepancies), will be provided upon publication.

We recognize that our focus on statutory provisions identified as part of a state's FOI act, as amended, does place limitations on the data. Statutory provisions located outside of the act may structure transparency. Returning to our introductory example, Section 50-a was part of New York's Civil Rights Law, as opposed to its Public Officers Law, where the state's FOI law is located.⁵⁸ While many states incorporate provisions such as Section 50-a into their FOI laws by reference, not all do. In addition, not all freedom of information policies are detailed in statute. Some are determined by agency action and each state's administrative jurisprudence clarifies others.

We made the choice to rely exclusively on constitutional and statutory language to catalogue each state's FOI laws for the sake of consistent coding across all states. We wanted to capture the current legal arrangement that exists between state citizens, legislatures, and the administrative state. It is our hope that our research will complement existing sources and inspire additional research.

C. Current FOI Laws in U.S. States

Current state open records laws in the United States vary in length from mere paragraphs to hundreds of pages. Yet, each FOI law contains the same three components that (1) outline who can submit requests; (2) establish requirements for and exemptions to the disclosure of information; and (3) define the procedures the public must follow to dispute an agency's decision to refuse a request for records. Each of these components affects the balance of power between citizens' rights to request records and the government's ability to withhold information.⁵⁹

1. Who Can Submit Requests

First, FOI laws define who has the ability to obtain government information. Some FOI laws operate with the presumption of public access and others grant greater discretion to the government when it comes to disclosure.⁶⁰ Whereas the federal FOI law allows for "any person" – including corporations and foreign entities – to request information,⁶¹ the states are not so open. Several states impose limitations on who can access public records, enacting laws that, *inter alia*, restrict the ability of incarcerated individuals, non-citizens (state or nation),

58. *Cf.*, N.Y. CIV. RTS. L. § 50-a (repealed 2020), and N.Y. PUB. OFF. L. § 84-90 (2023).

59. CAIN, EGAN & FABBRINI, *supra* note 46, at 119.

60. *Id.*

61. Fred H. Cate, D. Annette Fields & Hames K. McBain, *The Right to Privacy and the Public's Right to Know: the "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 48 (1994).

and those who are underage to request documents.⁶² For example, South Carolina law states that the right to access public records does not extend to people incarcerated in any state or federal correctional facility.⁶³ Tennessee restricts access to state citizens.⁶⁴

These types of provisions have been challenged under the Privileges and Immunities Clause and the Dormant Commerce Clause of the United States Constitution.⁶⁵ However, in 2013, the United States Supreme Court upheld states' abilities to craft FOI laws that limit information requests based on citizenship.⁶⁶ Notably, the Court stressed that it "has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."⁶⁷ While the Court has ruled conclusively on the relationship between state FOI laws and the federal Constitution, some states have established a state constitutional right to public access. For example, Montana explicitly provides that "no person shall be deprived of the right to examine" state public records, except in cases in which the demand for individual privacy clearly outweighs the benefits of disclosure.⁶⁸ Florida⁶⁹ and North Dakota⁷⁰ also recognize the right of inspection in their constitutions.

While jurisprudence recognizes the constitutionality of state decisions to place statutory limitations on who can request information, the number of states that do so has decreased over time. For example, 30 years ago, approximately 18 states required that a requester be a citizen of the state.⁷¹ Currently, only ten states – Alabama, Arkansas, Delaware, Idaho, Missouri, New Hampshire, New Jersey, South Carolina, Tennessee, and Virginia – impose limitations on who can submit requests for information. The other state statutes are either silent on who can submit requests (i.e., provide that every person has a right

62. SOPHIE WINKLER, NAT'L ASS'N COUNTIES, OPEN RECORDS LAWS: A STATE BY STATE REPORT 6 (2010).

63. S.C. CODE ANN. § 30-430(A)(1) (2023).

64. TENN. CODE ANN. § 10-7-503(2)(A) (2023).

65. *E.g.*, Jones v. City of Memphis, 531 Fed. Appx. 709 (6th Cir. 2013); Lee v. Minner, 458 F.3d 194 (3d Cir. 2006), *abrogated by* *McBurney v. Young*, 569 U.S. 221 (2013); *McBurney v. Young*, 569 U.S. 221 (2013).

66. *McBurney v. Young*, 569 U.S. 221 (2013).

67. *Id.* at 232 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978); *Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 588 (2011) (Breyer, J., dissenting)).

68. MONT. CONST. art. 2, § 9.

69. FLA. CONST. art. 1 § 24(a).

70. N.D. CONST. art. 11, § 6.

71. Braverman & Hepler, *supra* note 36, at 727. Those states were Alabama, Arkansas, California, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Missouri, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Tennessee, Utah, and Virginia. *Id.*

to inspect a public record in the state, but do not provide a definition of “person”) or specify that any natural person (including public employees), corporation, partnership, limited liability company, firm, or association may request information.

Of course, a mere request for information does not necessarily result in disclosure. FOI laws provide governments with discretion to interpret the law in ways that limit openness. Thus, it is important to examine the laws’ requirements for agency action.

2. *Requirements for and Exemptions to Disclosure*

In addition to specifying who has access to government information, FOI laws establish parameters for disclosure.⁷² They define what constitutes a public record and detail how an administrative custodian of such records must respond to a request. These provisions of public records statutes have received the most attention in both public and scholarly discourse.⁷³

Generally, state definitions of what constitutes a public record fall along a spectrum from open to restrictive.⁷⁴ The most open states define public records as all records held by a public entity, regardless of origin or branch of government. For example, Iowa defines “public records” to include all records preserved in any medium of or belonging to the state or any county, city, township, school corporation, political subdivision, or nonprofit corporation thereof.⁷⁵ More commonly, as in the case of Florida⁷⁶ and North Carolina,⁷⁷ states define “public records”

72. See Mark H. Grunewald, *E-FOIA and the Mother of All Complaints: Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345, 346-47 (1998) (describing freedom of information provisions as a system of delivery).

73. *E.g.*, Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1 (2011); Forsham v. Harris, 445 U.S. 169 (1980); Milner v. Dep’t of Navy, 562 U.S. 562 (2011); Nat’l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134 (2011); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978); Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002); Schindler Elevator Corp. v. U.S. ex rel. Krik, 563 U.S. 401 (2011); U.S. Dep’t. of Def. v. Fed. Lab. Rels. Auth., 510 U.S. 487 (1994); Cate, Fields & McBain, *supra* note 61, at 45-46; Adira Levine, *FOIA Disclosure and the Supreme Court*, 46 HARV. ENV’T L. REV. 261 (2022); Kristi A. Miles, *Shielding Agency Deliberations from FOIA Disclosure*, 57 GEO. WASH. L. REV. 1326 (1989); Susan Nevelow Mart & Tom Ginsburg, *[Dis-]Informing the People’s Discretion: Judicial Deference Under the National Security Exemption of the Freedom of Information Act*, 66 ADMIN. L. REV. 725 (2014); Deepa Varadarajan, *Business Secrecy Expansion and FOIA*, 68 UCLA L. REV. 462 (2021).

74. Andrea G. Nadel, *What Are “Records” of Agency Which Must Be Made Available Under State Freedom of Information Act*, 27 A.L.R. 4TH 680, § 2(a) (1984).

75. IOWA CODE ANN. § 22.1(3)(a) (2023).

76. FLA. STAT. § 119.011(12) (2023).

77. N.C. GEN. STAT. § 132-1(a) (2023).

to mean all records made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. Missouri is the most restrictive state in the country and only provides public access to those state, county, and municipal records that are kept pursuant to statute or ordinance.⁷⁸ Like with restrictions on who can request information, state definitions of public records have become more liberal over time – thirty years ago, nine other states had restrictive public records definitions like Missouri.⁷⁹

State laws also vary with respect to how quickly an agency must act upon receipt of a request for a public record. Most laws require the government to respond to a request for records within a certain number of working days unless unusual circumstances prevent processing.⁸⁰ This number can vary from three to twenty days. While one of the primary purposes of these deadlines is to expedite disclosure, courts generally have not enforced them when delay is a result of strained agency resources.⁸¹

Perhaps the most debate over interpretation of state public records statutes arises from the exceptions to and exemptions from disclosure. Tens of thousands of cases across the country have grappled with administrative decisions regarding how, when, and under what circumstances agencies may deny access to records.⁸² While states commonly restrict access to records that could compromise national or

78. MO. ANN. STAT. § 109.180 (2023).

79. Braverman & Heppler, *supra* note 36, at 735.

80. Inevitably, what constitutes an “unusual circumstance” is itself up to varied interpretation both across and within states.

81. Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 347 (1994). *See, e.g.*, Buzzfeed Inc. v. U.S. Dep’t. of Just., 2022 WL 1101767, at *6 (D.D.C. 2022); Dacosta v. U.S. Dep’t of Just., 782 F.Supp. 147 (D.D.C. 1992); Krielow v. La. State Univ. Bd. of Supervisors, 290 So.3d 1194 (La. Ct. App. 2019); Lisee v. CIA, 741 F.Supp. 988 (D.D.C. 1990); O’Dea v. City of Tacoma, 19 Wash.App.2d 67 (Wash. Ct. App. 2021); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976); Siegmeister v. Johnson, 240 So.3d 70 (Fla. Dist. Ct. App. 2018); State *ex rel.* Myers v. Meyers, 2022 WL 2069203 (Ohio 2022). However, if the delay is part of a larger pattern of willful nondisclosure, courts are much less accommodating. *E.g.*, Garland v. State, 361 Ga.App. 724 (2021); Pennsylvania Dep’t. of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121 (2015).

82. *E.g.*, Amster v. Baker, 145 A.3d 1 (Md. Ct. Spec. App. 2016); Braddy v. State, 219 So.3d 803, 819-822 (Fla. 2017); City of San Jose v. Super. Ct., 389 P.3d 848 (Cal. 2017); DR Partners v. Bd. of Cnty. Comm’rs of Clark Cnty., 6 P.3d 465 (Nev. 2000); Jackson v. Charlotte Mecklenburg Hosp. Auth., 768 S.E.2d 23 (N.C. Ct. App. 2014); Pa. State Univ. v. State Emps.’ Ret. Bd., 935 A.2d 530 (Pa. 2007); Salt River Pima-Maricopa Indian Cmty. v. Rogers, 815 P.2d 900 (Ariz. 1991); State *ex rel.* Cincinnati Enquirer v. Ohio Dep’t of Pub. Safety, 71 N.E.3d 258 (Ohio 2016); State v. Isbell, 985 So. 2d 446 (Ala. 2007); Town of Burlington v. Hosp. Admin. Dist. No. 1, 769 A.2d 857 (Me. 2001); Wichita Eagle & Beacon Publ’g Co. v. Simmons, 50 P.3d 66 (Kan. 2002).

state security, citizen privacy rights, trade secrets, or other privileged and confidential information, statutory provisions exempting records from disclosure vary widely across the country.⁸³

These provisions reflect the broad nature of state policy responsibilities. Because state governments perform such diverse tasks – from regulating the vast majority of our nation’s election law and policy, to establishing the structure of public education, to licensing the food and beverage industry – state legislatures carefully craft FOI laws that strategically preserve states’ ability to operate in these varied policy spaces. For example, states regularly include provisions specifying that certain records prepared by elections officials shall not be deemed public records or be open to public inspection.⁸⁴ Most states also exempt from disclosure records that contain testing or examination material used in academics or licensing.⁸⁵ Other common exemptions include records that contain districting decisions (including designations and histories of Native American and tribal lands), air pollution control data, or are the result of eminent domain proceedings.

Some exemptions even reflect the unique nature of a state’s culture. For example, Georgia statutory law specifically prohibits public access to the names of people under consideration for employment as executive head of units within the University of Georgia (including its football team and athletic department) until shortly before final action or a vote is to be taken on the open position.⁸⁶

Cataloguing these exceptions and exemptions in each state is a laborious process requiring careful thought regarding how to translate statutory language to data in a way that enables meaningful analysis.⁸⁷ Each state law has a unique cadence; some states use one broad exemption to limit disclosure of large numbers of records and other states utilize hundreds of provisions containing detailed language to restrict access to the same material. This variation exists both across the country and within states over time. For example, Tennessee’s public records statute contained only two exemptions when the law was enacted in 1957.⁸⁸

83. Braverman & Heppler, *supra* note 36 at 724-26; Wasike, *supra* note 25.

84. *E.g.*, CAL. GOV. CODE § 7924.110(a)(5) (2024).

85. *E.g.*, ARK. CODE ANN. § 25-19-105(b)(14); HAW. REV. STAT. § 92F-14(7) (2023).

86. GA. CODE ANN. § 50-18-72(a)(11) (2023).

87. One could be tempted to group statutory provisions in substantive buckets that correspond with the federal FOIA exemptions. *See* 5 U.S.C. § 552(b). Yet, as described in text, many of the state exemptions do not fit neatly into this framework.

88. JUSTIN P. WILSON & JASON E. MUMPOWER, TENN. COMPTROLLER OF THE CURRENCY, STATUTORY EXCEPTIONS TO THE TENNESSEE PUBLIC RECORDS ACT 3 (2018).

By 2018, there were 538.⁸⁹ Yet the substance of the records covered or exempted in Tennessee law largely remained constant over time.⁹⁰

3. *Procedures for Appeal*

Not only do states vary in the requirements for and exemptions to disclosure, but they also differ in the public's ease of appeal of administrative decision-making on records requests.

Upon receipt of a request for access, administrative officials make consequential decisions about whether the request falls within the legal requirements for disclosure. While many states, like Nebraska⁹¹ and Mississippi,⁹² require that administrators provide to the requester a written explanation upon denial of a request describing the legal basis for the decision, other states do not. For example, Colorado's statute places the burden on the requester to ask for a written statement of the grounds for denial.⁹³

Presuming the requester can obtain documentation of the grounds for non-disclosure, the requester may then seek to appeal that decision. Across all states, while the government has the burden of proving a record is not subject to inspection lies, the burden to challenge a denial in the first place falls with the requester.⁹⁴ However, in a few states, a designated official will work to enforce agency compliance. For example, Maryland has a Public Access Ombudsman.⁹⁵ While the Ombuds may not compel an administrative official to disclose public records, the Ombuds works to resolve disputes between requesters and agencies.⁹⁶ Designated public officials such as this help bridge the gap between requesters – who may not have specialized knowledge in the legal requirements for access – and state administrative agencies.⁹⁷

States tend to be split on what constitutes exhaustion of administrative remedies and on the process for appeal. Some state statutes,

89. Koningisor, *supra* note 15, at 1506.

90. *Id.* Legislators simply decided to clarify existing frameworks with more precise statutory language.

91. NEB. REV. STAT. § 84-712(4)(b) (2023).

92. MISS. CODE ANN. § 25-61-5(3) (2023).

93. COLO. REV. STAT. § 24-72-204(4)(b) (2023).

94. WINKLER, *supra* note 62, at 7.

95. MD. CODE ANN. GEN. PROVIS. § 4-1B-02(a) (West 2023).

96. MD. CODE ANN. GEN. PROVIS. § 4-1B-04(a) (West 2023).

97. See Alex Luscombe, Kevin Walby & Randy K. Lippert, *Brokering Access Beyond the Border and in the Wild: Comparing Freedom of Information Law and Policy in Canada and the United States*, 39 LAW & POL'Y 259, 263 (2017). For a general discussion of the role of ombuds to connect organizations and interested persons, see Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOT. J. 353 (1991).

like Alaska,⁹⁸ require that agencies establish procedures for making an administrative appeal of public agency action taken under FOI law. These states provide comparatively clear standards for contesting administrative decisions on access to public records. Other states may not require the establishment of clear process for appeal, but specify the importance of recordkeeping or identify the final administrative actor in the appeals process. For example, Mississippi requires that agencies maintain a file of all denials of requests for public records for not less than three years from the date such denials are made.⁹⁹ Utah specifies that the administrative appeals process ends with the decision of the chief administrative officer of the governmental entity which holds the contested records.¹⁰⁰ Of course, other state statutes, like Alabama,¹⁰¹ are silent on process, making it difficult to determine who is the final decisionmaker and what constitutes exhaustion of administrative remedy.

Regardless of administrative procedure, the majority of states specifically outline the requirements for judicial review of an agency's denial for public records.¹⁰² These provisions vary widely from mandating requesters file for a writ of mandamus,¹⁰³ to outlining the court of authority for appeal,¹⁰⁴ to requiring de novo review.¹⁰⁵ Much like with exemptions from disclosure, state laws dictating the parameters of judicial review differ in underappreciated ways.

In summary, our review of the three components of FOI laws across the United States suggests the strength of transparency regimes established by FOI vary with the legal ability of people to request and receive information. Stronger transparency regimes in the states include open access, set response times, and a clear appellate process. For example, Alaska allows any person to request public records, requires agencies to respond to requests within ten days, and outlines clear procedures for administrative appeal.¹⁰⁶ Weaker regimes include restrictions on citizenship, do not impose response requirements on agencies, and force requesters to file a lawsuit under nebulous standards to appeal administrative decisions not to disclose information. Missouri's is an example of a weak law – only citizens may submit requests and not

98. ALASKA STAT. § 40.25.123(e) (2023).

99. MISS. CODE ANN. § 25-61-5(3) (2023).

100. UTAH CODE ANN. § 63G-2-205 (West 2023).

101. Alabama Open Records Act, ALA. CODE §§ 36-12-41 (2023).

102. WINKLER, *supra* note 62, at 7.

103. *E.g.*, LA. STAT. ANN. § 44:35(A) (2023).

104. *E.g.*, VT. STAT. ANN. tit. 1, § 319(a) (2023).

105. *E.g.*, KAN. STAT. ANN. § 45-222(b) (2023).

106. ALASKA STAT. §§ 40.25.123(e), .120(c) (2023).

only must citizens sue to appeal, they must do so within one year of the denial of information.¹⁰⁷

Public records laws like those in Alaska and Missouri develop as a result of the conflicting interests of the public's right to acquire information on government and the government's right to protect that information in promotion of public interest. Given that administrative officials are the ones who make the prevailing decisions on the latter, any consideration of public records regimes requires analysis not only of the law, but also of the government's implementation efforts. Public official compliance with the law is a necessary condition of public access to information.¹⁰⁸

II. FREEDOM OF INFORMATION AS PASSIVE TRANSPARENCY

Recognizing that democratic citizens require access to information to form opinions and to evaluate their governments, FOI laws institutionalize transparency by creating legal rights for persons, civil society groups, media, and other political actors to inquire about the actions and policies of government officials.¹⁰⁹ Additionally, these laws promote access to records across governmental units.¹¹⁰ Whether facilitating information exchanges between a citizen and government or among administrative agencies, public records laws help provide information about how government works, illuminate political influence on government decision-making, and uncover waste, fraud, and abuse.¹¹¹

Yet, as Section I's review of FOI laws makes clear, rather than requiring government functions be open to public observation or mandating the automatic disclosure of information, FOI laws direct the public to request access to government information and permit governments to deny release of those records. They constitute what public administration scholars classify as *passive* transparency because administrators constrain the dissemination of information about government.¹¹² This means that

107. MO. REV. STAT. § 109.180 (2023).

108. Peter Spáč et al., *Does the Freedom of Information Law Increase Transparency at the Local Level? Evidence from a Field Experiment*, 35 GOV'T INFO. Q. 408, 408 (2018).

109. John M. Ackerman & Irma E. Sandoval-Ballestros, *The Global Expansion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 93-94 (2006); Berliner, *supra* note 24; Emily Dowd, *Open Government Laws and Critical Energy Infrastructure*, NAT'L CONF. STATE LEGIS. (Jan. 30, 2018), <https://www.ncsl.org/energy/open-government-laws-and-critical-energy-infrastructure> [<https://perma.cc/EZN4-XXCF>].

110. Koningisor, *supra* note 15, at 1489.

111. Karanicolas & Kwoka, *supra* note 12, at 665-66.

112. Stephan Grimmeli Khuijzen et al., *Do Freedom of Information Laws Increase the Transparency of Government? A Pre-Registered Replication of a Field Experiment*, 2(1) J. BEHAV. PUB. ADMIN. 1, 3 (2018); Mabillard & Zumofen, *supra* note 22.

FOI laws themselves are not sufficient for transparency. Rather, they are the starting point for a negotiation between information seekers and government officials.¹¹³ Indeed, governments can pass FOI laws in response to pressures for transparency with little practical effect if there is no administrative apparatus to facilitate implementation.¹¹⁴

In this way, one could view passive transparency as “law in the wild.”¹¹⁵ FOI statutes create a legal regime that requires both citizen and administrative knowledge and capacity for effective implementation. Those seeking and holding public records must engage in negotiation (often without legal training) over statutory language to facilitate open government.¹¹⁶ As a result, state administrators serve both as channels for information that guide citizen interaction with government and as gatekeepers of information relevant for citizen evaluation of government performance.¹¹⁷

A. *The Burden of Freeing Information*

Those who consider open government tend to focus on the external or statutory factors that govern the relationship between administrators and citizens.¹¹⁸ Rich debate over statutory language like the provisions outlined in Section I and well-developed theories of judicial interpretation of freedom of information are the hallmarks of legal discussions on the subject.¹¹⁹ However, how administrative agencies interpret their statutory mandates and implement policy in

113. Maximilian Heimstädt & Leonard Dobusch, *Politics of Disclosure: Organizational Transparency as Multifactor Negotiation*, 78 PUB. ADMIN. REV. 727 (2017); Kreimer, *supra* note 9; Mabillard & Zumofen, *supra* note 22; Suzanne Piotrowski et al., *Key Issues for Implementation of Chinese Open Government Information Regulations*, 69 PUB. ADMIN. REV. 129 (2009).

114. Berliner, *supra* note 25; Robert Hazell & Ben Worthy, *Assessing the Performance of Freedom of Information*, 27 GOV'T INFO. Q. 352 (2010); Gregory Michener, *FOI Laws Around the World*, 22 J. DEMOCRACY 145 (2011).

115. Luscombe et al., *supra* note 97, at 260-63.

116. *Id.* Indeed, entire books have been written on successful strategies for gaining access to public records. See, e.g., DAVID CULLIER & CHARLES N. DAVIS, *THE ART OF ACCESS: STRATEGIES FOR ACQUIRING PUBLIC RECORDS*, 2d Ed. (2020).

117. Daniel Berliner et al., *The Political Logic of Government Disclosure: Evidence from Information Requests in Mexico*, 83 J. POL. 229, 230 (2020).

118. Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1518 (2015).

119. See Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1004 (2019); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U.L. REV. 871, 874 (2015).

their day-to-day operations receives comparatively less attention.¹²⁰ This is problematic, as internal agency operations and practices control substantive administrative outcomes.¹²¹

This is particularly true when it comes to freedom of information. Passive transparency regimes delegate discretionary authority to administrators to make determinations on the release of information.¹²² While FOI statutes set the boundaries within which state administrators operate, even the most specific delegation of authority invites varying interpretation, if only in the procedural means by which an administrator should implement the clear intent of the statute.¹²³

In exploring the implications of administration for state public records law, this Article assumes that any legal framework (including exceptions and exemptions) governing freedom of information in the states *applies* uniformly across state agencies. However, these legal frameworks are not self-executing. Administrators exercise their discretion in interpreting the law on a case-by-case basis, often without the time, information, and other resources necessary to respond properly to each case.¹²⁴ The resulting administrative interpretation of FOI requirements can vary within and across legal boundaries and lead to seemingly unpredictable decision-making.¹²⁵ Simply, when interacting with the public, administrators *implement* legal frameworks in different ways.¹²⁶

While this variation can seem random at first glance, consideration of the burden public records laws impose on administrative agencies can explain why even the most generous public records laws may not result in transparency.¹²⁷ Most administrators strive to implement FOI policy in

120. Metzger, *supra* note 118, at 1520-21; Stack, *supra* note 119, at 874.

121. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 313 (2012).

122. Gimmelikhuijsen et al., *supra* note 112, at 3.

123. See, e.g., Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 22 (1994) (arguing that statutes are incomplete contracts that cannot eliminate all discretion in their delegation to agencies).

124. MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* (1980).

125. Luscombe et al., *supra* note 97, at 263.

126. Bryan Jones et al., *Service Delivery Rules and the Distribution of Local Government Services: Three Detroit Bureaucracies*, 40 J. POL. 332 (1978); LIPSKY, *supra* note 124; STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, *COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE* (2d ed. 2003).

127. See Evelyn Z. Brodtkin & Malay Majmunder, *Administrative Exclusion: Organizations and the Hidden Costs of Welfare Claiming*, 20 J. PUB. ADMIN. RSCH. & THEORY 827, 828-29 (2010); Barry C. Burden et al., *The Effect of Administrative Burden on Bureaucratic Perception of Policies: Evidence from Election Administration*, 72 PUB.

a fair, accessible, and respectful manner, yet the government interactions with citizens contemplated by FOI statutes generate costs.¹²⁸ Thus, administrators must balance the need for accessibility, dependability, and security against the financial and political challenges of doing so.

In this way, the democratic accountability afforded by passive transparency regimes is best understood through the logic of risk management.¹²⁹ Administrators face a variety of pressures when managing records requests and balance compliance (performing the minimal tasks as required by law) against concordance (fulfilling the spirit of the law).¹³⁰ Factors such as administrative capacity, commitment to the goals of transparency, and the threat of formal and informal sanctions all affect this balance.¹³¹

B. Explaining Implementation of FOI Laws

From the moment of passage, FOI laws have faced serious implementation challenges, from agency delay, to expansive interpretation of statutory exemptions to disclosure, to a lack of effective sanctioning mechanisms for non-compliance with statutory law.¹³² As the Department of Justice's Office of Information Policy Director recently explained before Congress, a high volume of requests, combined with requests requiring multiple searches, consultations, or the review of large numbers of records, create substantial challenges for agencies seeking to implement FOI laws successfully.¹³³ Viewed in this light, the public's legal right to request and receive information does not

ADMIN. REV. 741, 749 (2012); LIPSKY, *supra* note 124; Christopher Reenock et al., *Chain of Command vs. Who's in Command: Structure, Politics, and Regulatory Enforcement*, 50 POL'Y STUD. J. 797 (2022); Joe Soss et al., *The Organization of Discipline: From Performance Management to Perversity and Punishment*, 21 J. PUB. ADMIN. RSCH. & THEORY 203, 205-06 (2011); SAMUEL WORKMAN, *THE DYNAMICS OF BUREAUCRACY IN THE U.S. GOVERNMENT* 38 (2015).

128. Michele L. Meikel, *A Hobson's Choice: Ensuring Open Government or Conserving Government Funds*, 66 MO. L. REV. 431, 431 (2001).

129. Berliner et al., *supra* note 117, at 230.

130. Grimmelikhuijsen et al., *supra* note 112, at 3; Ben Worthy et al., *Transparency at the Parish Pump: A Field Experiment to Measure the Effectiveness of Freedom of Information Requests in England*, 27 J. PUB. ADMIN. RSCH. & THEORY 485, 486 (2017).

131. See Berliner et al., *supra* note 117, at 230; Evelyn Z. Brodtkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 SOC. SERV. REV. 1, 4 (1997); Koningisor, *supra* note 15, at 1466; Patrick G. Scott, *Assessing the Determinants of Bureaucratic Discretion: An Experiment in Street-Level Decision Making*, 7 J. PUB. ADMIN. RSCH. & THEORY 35, 37-39 (1997).

132. Karanicolas & Kwoka, *supra* note 12, at 669-70 (2022); Joan M. Katz, *The Games Bureaucrats Play: Hide and Seek under the Freedom of Information Act*, 48 TEX. L. REV. 1261, 1262 (1970); Regalia, *supra* note 15, at 92.

133. *The Freedom of Information Act: Improving Transparency and the American Public's Right to Know for the 21st Century: Hearing Before the S. Comm. on the*

necessarily translate to disclosure in practice. A review of the literature on transparency and policy implementation suggests that organizational and political factors should affect this difference.¹³⁴

Common barriers to effective implementation in any policy area include a lack of organizational resources and capacity.¹³⁵ Like with other administrative processes, financial constraints, expertise, and agency culture likely affect administrative compliance with FOI laws.¹³⁶ For example, when discussing the burden FOI laws place on state and local governments, the Senior Performance Auditor for the State of Washington stressed the sheer amount of “staff time needed to search, review, redact, and prepare public records.”¹³⁷ FOI administrators feel these constraints most acutely. Resource constraints can affect even the most well-meaning administrator in rudimentary (and often underappreciated) ways. As put by one public records officer explaining delays in responding to a request from the *Washington Post*, “I apologize for not getting the FOI response to you. . . [I] had to replace ink cartridges in my home office.”¹³⁸

While an amusing anecdote, the public records officer’s response highlights problems with administrative capacity to comply with

Judiciary, 117th Cong. 9 (2022) (statement of Bobak Talebian, Director of Office of Information Policy, Department of Justice).

134. SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM (2007); Elizabeth Shepherd et al., *Information Governance, Records Management, and Freedom of Information: A Study of Local Government Authorities in England*, 27 GOV’T INFO. Q. 337 (2010); Jay A. Wagner, *Piercing the Veil: Examining Demographic and Political Variables in State FOI Law Administration*, 38 GOV’T INFO. Q. 101541 (2021).

135. See, e.g., Brodtkin & Majmunder, *supra* note 127, at 827, 828-29; DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 15-25 (2001); ANTHONY DOWNS, INSIDE BUREAUCRACY (1967); James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 371 (1976); Hazell & Worthy, *supra* note 114; PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018); PIOTROWSKI, *supra* note 134; Piotrowski et al., *supra* note 113, at 131; Bryan D. Jones et al., *Bureaucratic Response to Citizen-Initiated Contacts: Environmental Enforcement in Detroit*, 71 AM. POL. SCI. REV. 148, 160 (1977); Selin, *supra* note 119, at 1006; Soss et al., *supra* note 127, at 209; WORKMAN, *supra* note 127, at 38.

136. Berliner, *supra* note 25; Alasdair S. Roberts, *Less Government, More Secrecy: Reinvention and the Weakening of Freedom of Information Law*, 60 PUB. ADMIN. REV. 925 (2000); Alasdair S. Roberts, *A Great and Revolutionary Law? The First Four Years of Indian’s Right to Information Act*, 70 PUB. ADMIN. REV. 925 (2010).

137. Daniel Bevarly, *Beast or Burden: Nuisance, Vexatious, or Burdensome Public Records Requests*, NAT’L FREEDOM OF INFO. COAL. (Dec. 3, 2018), https://www.nfoic.org/wp-content/uploads/pages/2018-12/NFOIC_WP_112818_Vexatious_PR_requests_0.pdf [<https://perma.cc/VXC9-9RW9>].

138. Nate Jones, *Public Records Requests Fall Victim to the Coronavirus Pandemic*, WASH. POST (Oct. 1, 2020).

requests. Not only do administrative needs relate to the sheer amount of time it can take to fulfill requests, the availability of simple necessities such as print materials, mailers, stamps, or even disk drives for files are real concerns. Some evidence suggests resources for meeting FOI requests make up less than .01 percent of an agency's budget.¹³⁹

Furthermore, administrative capacity to comply with FOI laws is a necessary but not sufficient condition for effective implementation. A lack of organizational commitment to transparency can undermine strong FOI laws as agencies divert resources away from FOI implementation or otherwise encourage a culture of non-compliance.¹⁴⁰ One administrator in Florida illustrated such a culture when he recounted a colleague saying "[P]ublic records? If it's important, they'll request it at least three times."¹⁴¹

While this administrator's attitude may be the result of personal characteristics, empirical patterns across agencies suggest that task motivation and efficacy affect administrative performance and that organizational culture plays heavily in reinforcing these factors.¹⁴² Organizational culture evolves over time and manifests itself in the basic assumptions and beliefs of administrators as they perform their jobs.¹⁴³ Among state agencies specifically, one of the key characteristics for improving performance is strong internal communication emphasizing the importance of statutorily mandated tasks.¹⁴⁴

Of course, a culture that deprioritizes FOI implementation may be the result of political factors. Both internal and external political pressures can shape administrative performance, and the prioritization of certain tasks results from an interaction of these pressures.¹⁴⁵ With respect to transparency initiatives, these pressures may work at cross-purposes. For example, a consistent finding in the literature is that greater political competition makes transparency more likely.¹⁴⁶

139. A.J. Wagner, *Essential or Extravagant: Considering FOIA Budgets, Costs and Fees*, 34 *GOV'T INFO. Q.* 388 (2017).

140. Berliner, *supra* note 25; PIOTROWSKI, *supra* note 134.

141. Andrew Britz et al., *The Cost of Sunshine: 2018 Audit*, WUFT NEWS (Dec. 3, 2018), <https://projects.wufl.org/the-cost-of-sunshine-2018-audit/> [<https://perma.cc/GY8K-B9TC>].

142. Gene A. Brewer & Sally Coleman Selden, *Why Elephants Gallop: Assessing and Predicting Organizational Performance in Federal Agencies*, 10 *J. PUB. ADMIN. RSCH. & THEORY* 685, 706 (2000).

143. *Id.* at 690.

144. Gavin P.M. Dick, *The Influence of Managerial and Job Variables on Organizational Commitment in the Police*, 90 *PUB. ADMIN.* 557 (2011); Donald P. Moynihan & Sanjay K. Pandey, *Creating Desirable Organizational Characteristics: How Organizations Create a Focus on Results and Managerial Authority*, 8 *PUB. MGMT. REV.* 119 (2007).

145. Sharon Gilad, *Political Pressures, Organizational Identity, and Attention to Tasks: Illustrations from Pre-Crisis Financial Regulation*, 93 *PUB. ADMIN.* 593 (2015).

146. Berliner, *supra* note 27; Berliner & Erlich, *supra* note 27; Michener, *supra* note 29; Grossman & Michelich, *supra* note 27; Rios et al., *supra* note 29.

However, evidence also suggests that administrative politicization can shift agency focus away from transparency and reduce incentives to disclose information.¹⁴⁷ To our knowledge, little research accounts for both types of political pressure when assessing passive transparency. This is puzzling, as scholars widely recognize political context affects administrative performance; an effectively implemented FOI regime requires commitment by both internal and external actors.¹⁴⁸

In sum, FOI laws are not self-administering. They constitute passive transparency and require the public to rely on administrators to interpret the law in ways that provide access to information. Thus, any consideration of public records regimes (or transparency regimes more generally) requires analysis of not only the law, but also of the government's implementation efforts.

III. AUDITING STATE FREEDOM OF INFORMATION PERFORMANCE

To evaluate implementation of FOI laws in the states, we conducted an exploratory field experiment. We sent a public records request to five similar agencies across all 50 states and evaluated the quality of the responses. After assessing both the content and timing of the responses across all states and agencies, we compare the results of our audit to previous evaluations of open government in the states.

A. Description of Audit

In the first stage of our audit, we utilized the 2018 *Book of the States* to identify five similar agencies (agriculture, budget, commerce, education, and health and human services) in each of the 50 states. We selected these five agencies because they perform some of the basic functions of state government, offer a range of organizational structures, and have varying constituencies.

On January 7, 2019, we sent a public records request through the U.S. Postal Service to each of the identified agencies. The dated request cited the state's FOI law and asked for the following records:

“A copy of the name, title, and work email address of any individual who, as of the date you receive this letter, works in the agency and performs one of the following functions: budget; government regulation, regulatory oversight, enforcement; policy, planning; purchasing, procurement; government affairs, lobbying; grants; public policy; regulatory affairs, compliance; or management.”

In addition, the request provided the principal investigator's contact information (including name, title, email, phone, and mailing address)

147. Johnson, *supra* note 13; Wood & Lewis, *supra* note 29.

148. Hazell & Worthy, *supra* note 114; Piotrowski et al., *supra* note 113, at S131-33.

and explicitly stated the information received would be used in an academic research project.¹⁴⁹ Finally, the request stated that researchers would pay the cost of any fees under \$50 incurred for searching or copying records but asked the agency to notify us if the fees would exceed this amount. We then catalogued each agency communication in response to our request.

Of the 248 agencies in our audit,¹⁵⁰ over 77 percent (193) acknowledged the request. The average time of confirmation was about nine working days, although the timing and form of acknowledgements varied widely. The quickest confirmations arrived less than two days after we sent the request (Illinois and New Hampshire's education agencies; Kansas's Department of Agriculture) and we received the latest confirmation over four months after mailing the requests (Montana's Office of Budget and Program Planning). Most agencies acknowledged receipt via email, although we also received confirmations over phone and postal mail.

In addition to acknowledging receipt, 18 agencies across 15 different states asked for clarification of some sort. Interestingly, over 70 percent (13) of those agencies were health agencies. Most of the requests for clarification resulted in a phone call between us and the administrator in charge of filling the request.¹⁵¹ The tone of these calls was almost always amicable. For the most part, administrators genuinely wanted to help us obtain the requested information and to ensure that their agency upheld their state's FOI standards. Several administrators went above and beyond the parameters of the initial request to direct us to statistics on their state's compliance with FOI laws or to stress their governor's commitment to open government.

Seven agencies across five states charged a fee of some sort. Four of the seven were agricultural agencies. The fees ranged from \$42.50 (Mississippi Department of Agriculture and Commerce) to \$830.08 (Michigan Department of Licensing and Regulatory Affairs). As indicated by the terms of our request, we did not pay any fee over \$50. Additionally, the Kansas Department of Agriculture asked us to complete a compliance certification document and have it notarized

149. At the time, the principal investigator was a Missouri citizen.

150. Mississippi combines agriculture and commerce administration into one agency (Department of Agriculture and Commerce) and our request to New Hampshire's Department of Resources and Economic Development was forwarded to – and subsequently filled by – the Department of Natural and Culture Resources, which performs interior (as opposed to commerce) functions.

151. The Alaska Department of Health and Social Services did not ask for clarification per se, but informed us that our letter arrived damaged and asked for a replacement copy to be emailed to the agency.

before the agency would proceed. We considered this to be equivalent to a fee over \$50 and did not go through that process.

While a large proportion of agencies confirmed receipt of our request, a much smaller number actually provided all the requested information. Approximately 20 percent (50) of agencies across 28 states denied the request. While there was no discernable pattern to these denials across agency type, the most common justification for denial was that an agency had no records responsive to the request.

Agencies in four different states denied our request because the principal investigator was not a citizen of the state. Interestingly, only the agencies in Tennessee uniformly denied or failed to answer all requests due to citizenship concerns. In the other states (Arkansas, Delaware, and Virginia), denial for lack of citizenship varied across agencies. Arkansas provides a nice example. While one agency denied our request due to citizenship (Agriculture Department) and two agencies failed to respond at all (Departments of Finance and Administration; Human Services), one agency sent us all requested information (Department of Education) and one agency said they had no responsive records – even though we subsequently found the requested information on a publicly available website (Economic Development Commission). The responses from the Virginia agencies were similarly intriguing. Three agencies denied or failed to answer our request due to citizenship concerns (Departments of Agriculture and Consumer Services and Planning and Budget; the Secretary of Commerce and Trade) and one agency sent us all requested information (Department of Education). In the final agency (Department of Health), one administrator initially denied our request due to citizenship, but then four days later another administrator who was lower in the agency's hierarchy filled the request.

Approximately 54 percent of agencies (134) provided us with at least some of the requested information and about 45 percent (112) provided us with all the requested information. Most commonly, agencies emailed us a list of the names, titles, and work email addresses for the pertinent individuals. However, instead of providing a list, some agencies sent us an organizational chart and employee directory so that we could identify the individuals who satisfied the requested criteria. Our favorite response was from the West Virginia Department of Health and Human Services, which sent us two burned CDs of data on hundreds of employees. Of the agencies that only provided us with partial information, the most common defect was a failure to provide email addresses.

In addition to cataloguing the content of each agency's response, we documented the time of response. On average, for those agencies that provided some information, the number of working days from the

time we mailed the request until the agency deemed the request filled was 17.27 days (minimum of 4, maximum of 268).

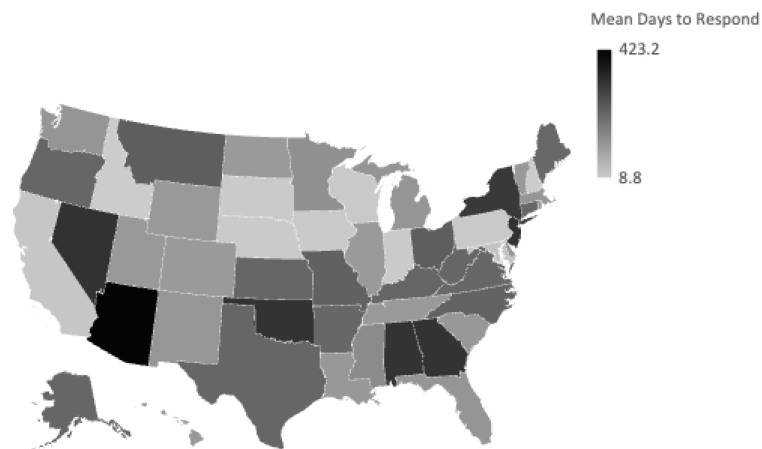
B. Identifying Patterns in Implementation

Our description of the audit suggests that transparency varies widely both across and within states. We explore empirical patterns in agency responses to our request in several ways. First, we simply examine the average number of days it took for all of each state's agencies to respond to our request. Second, we examine variation across agency type. Finally, we compare our results to other studies of transparency in the states.

1. Delays in Responses and Compliance with the Law

Figure 1 illustrates the average number of working days for each state's agencies to close the file on our request.¹⁵² If an agency failed to indicate closure, we coded that agency's response as 524 working days (two calendar years from the date we mailed the request). While this may seem like an inordinate amount of time, it largely reflects the FOI process – we were still receiving communications from agencies over a year and a half after we mailed our request.¹⁵³

Figure 1. Mean Number of Days to Close FOI Request



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152. We considered responses of “no records” or any other denial to indicate closure.

153. In addition, responses slowed significantly in the spring of 2020 (a little over a year after we mailed our request) when states began to issue stay-at-home orders due to the COVID-19 pandemic.

Figure 1 does not suggest any discernable geographic or demographic patterns across states, with a possible exception of slower responses in southern states. This corresponds with research that finds agency location in the southern region of the United States is the strongest and most consistent indicator of negative FOI results in the United States.¹⁵⁴ Across all states, the mean number of days to closure was about 156, with an approximate minimum of 9 and maximum of 423.

2. Responses by Agency Type

Our initial description of responses to our request suggests that agency-, as opposed to state-, level factors may influence how administrators respond to requests for public information. This is consistent with scholarship that finds agency function and policy type influence information disclosure.¹⁵⁵ In order to explore this possibility descriptively, we assessed the content of agency responses and analyzed them by agency policy area.

On average, commerce and health agencies provided the fewest acknowledgements and the least amount of information in response to our requests. In contrast, education agencies provided the least number of denials and the most amount of information. This tracks with previous research finding unusually high responsiveness in the educational sector when compared to other policy areas.¹⁵⁶

Education agencies may have been uniquely positioned to answer our requests for two reasons. First, because state departments of education oversee public school districts, they are more closely connected to democratic accountability mechanisms such as voting and cooperative governance. This close connection means many state education systems build upon citizen involvement in local policymaking, making education agencies more sensitive to transparency. Second, as a result of this sensitivity, the records we requested may have been more readily available to the administrators filling our request. In comparison to agencies operating in other policy realms, state education agencies likely more frequently provide citizens with the contact information of those who perform key agency functions.

We also explored the average number of working days it took for each agency type to close our request. Figure 2 depicts this distribution across the country. Like in Figure 1, if an agency failed to indicate

154. Wagner, *supra* note 134.

155. See generally Jeong Min Choi, *Factors Influencing Public Officials' Responses to Requests for Information Disclosure*, 35 GOV'T INFO. Q. 30 (2018).

156. Benjamin E. Bagozzi, Daniel Berliner & Zack W. Almquist, *When Does Open Government Shut? Predicting Government Responses to Citizen Information Requests*, 15 REGUL. & GOVERNANCE 280, 294 (2021).

closure, we coded that agency's response as 524 working days. However, in contrast to Figure 1, Figure 2 reveals important variation within states and across policy areas.

Figure 2. Mean Number of Days to Close Request by Agency Type

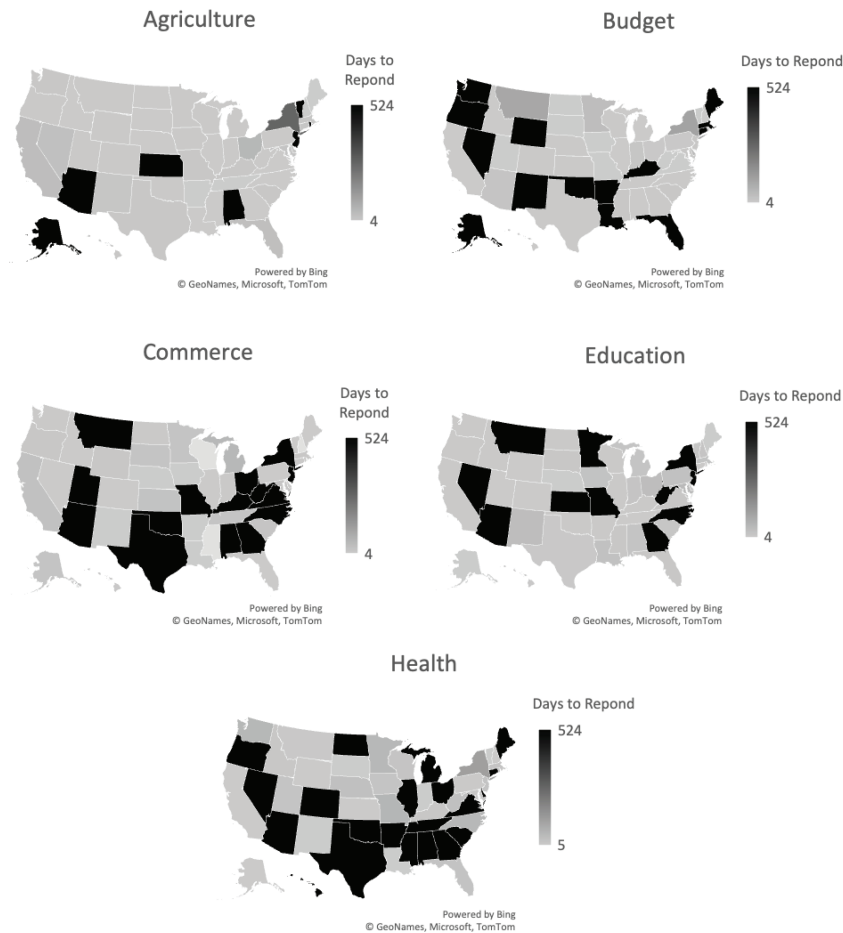


Figure 2 suggests that, despite operating under the same FOI framework, not all agencies within each state are uniformly responsive. For example, while in almost all policy areas Washington ranked among the quickest to respond, the state's Office of Financial Management did not even acknowledge our request. On the opposite end of the spectrum, on average, Georgia was one of the states that took the longest to close our requests. Yet, the state's Office of Planning and Budget fully responded to our request within eight days.

These patterns reinforce the notion that factors beyond FOI laws themselves affect responsiveness and that some types of agencies are quicker to respond than others. For example, agricultural agencies seem to be the quickest to respond, while health and commerce agencies seem to be the slowest. This likely results from both the agencies' issue environments and workload.

First, agricultural agencies historically operate in defined policy communities composed of sophisticated and interrelated policy actors (e.g., elected officials, corporations, industry associations) who are familiar with each other and seek to organize public policy for instrumental reasons.¹⁵⁷ As a result, records with the contact information for key agency officials not only likely exist, but likely are readily accessible to the average administrator.

Second, and in contrast, health and commerce agencies tend to involve a wider range of interests and therefore have policy communities which are less defined. This means these agencies' resources and capacity are less likely to be able to accommodate FOI requests like ours. For example, health agencies likely not only receive more overall requests, but those requests may be more sensitive and detailed in nature. Organization of agency records reflects this practical reality; the names and contact information of key agency officials may not be readily accessible. Furthermore, given the nature of the average request, administrators in health and commerce agencies must spend more time answering each request, creating a larger backlog than in agencies that have fewer or less detailed requests.

3. *Comparison to Other Studies*

As part 2 recognizes, our request was relatively simple and likely had few political ramifications. While we sought information about administrative organization, many public records requests are much more sensitive. For example, in Massachusetts, over 77 percent of the requests processed by the agencies that receive the most FOI requests relate to criminal justice.¹⁵⁸ Thus, we were curious to see how our results compared with all open government requests in the states.

157. See, e.g., Hugh T. Miller & Tansu Demir, *Policy Communities*, in HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS AND METHODS 137, 143 (Frank Fischer & Gerald J. Miller eds. 2007).

158. *Massachusetts Public Records Guide*, MUCKROCK, <https://www.muckrock.com/place/united-states-of-america/massachusetts/> [<https://perma.cc/2G6F-QJ4T>] (last visited Dec. 31, 2020). We calculated this descriptive statistic by summing the number of requests reported by MuckRock in 2020 as submitted to criminal justice agencies and dividing that number by the total number of requests MuckRock catalogued as being submitted to Massachusetts state agencies. Today, of the agencies that receive the most

a. *Collaborative Journalism Projects*

Using data provided by MuckRock, we compared our results to the average number of days for agencies to complete all requests catalogued by the organization. As discussed in Section I of this Article, MuckRock is a nonprofit, collaborative news site and public resource dedicated to helping journalists, researchers, and citizens request, analyze, and share information about government.¹⁵⁹

In addition to providing important information regarding how to “make you a transparency master,”¹⁶⁰ MuckRock conducts a series of investigative projects that use information acquired through FOI requests to highlight key issues in American politics.¹⁶¹ For example, the organization’s investigative series on implementation of the Clean Air Act utilizes 94 FOI requests from state and federal agencies to highlight how regulators evaluate and address compliance with air-quality standards.¹⁶² In total, the organization has tracked 135,041 requests across 24,262 agencies.¹⁶³

Interestingly, our requests took longer to close than other requests catalogued by the organization – MuckRock’s average number of days is 66. This finding supports our intuition about policy environments. Given the nature of our request, it may be that agencies deprioritized it in favor of more policy- or constituent-relevant demands.

MuckRock tends to prioritize and publicize FOI inquiries that are politically salient. For example, in a recent article on nuclear waste exposure, *The New York Times* relied on a “blockbuster” report by MuckRock.¹⁶⁴ When investigating Amazon’s claims that the company’s expansion promotes economic development and creates jobs, *The Wall Street Journal* relied on MuckRock’s data to argue that public records laws enable states to make the terms of “economic development” deals with companies like Amazon secret.¹⁶⁵

requests for public information in Massachusetts, approximately 79 percent of those requests involve criminal justice agencies. *Id.*

159. About MuckRock, MUCKROCK, <https://www.muckrock.com/about/> [<https://perma.cc/73WP-6ZLD>].

160. *FOIA 101: Tips and Tricks to Make You a Transparency Master*, MUCKROCK, <https://www.muckrock.com/project/foia-101-tips-and-tricks-to-make-you-a-transparency-master-234/> [<https://perma.cc/N2EQ-S4KM>].

161. *MuckRock Projects*, MUCKROCK, <https://www.muckrock.com/project/> [<https://perma.cc/JN4X-38T3>].

162. *Smoke, Screened: The Clean Air Act’s Dirty Secret*, MUCKROCK, <https://www.muckrock.com/project/smoke-screened-the-clean-air-acts-dirty-secret-1117/> [<https://perma.cc/9W5C-VRPR>].

163. MUCKROCK, <https://www.muckrock.com>.

164. Catie Edmondson, *Fund for Nuclear Waste Exposure Victims in Limbo as Congress Balks at Cost*, N.Y. TIMES (Dec. 8, 2023).

165. Nathan M. Jensen, *The Amazon HQ2 Fiasco Was No Outlier*, WALL ST. J. (Dec. 14, 2018).

To the average FOI administrator, a request by a self-identified academic research team for the name, title, and work email address of certain agency officials may seem less important than, for example, a request for records by policy advocates regarding health and human service delivery in Delaware's youth correctional facilities.¹⁶⁶

Yet our request for public records is no less important. Who has authority to make administrative decisions has a direct effect on the substance in state administrative decisions. More fundamentally, in order for citizens to hold government officials accountable for their actions, citizens must know who those officials are.

b. Stringency of FOI Law

To explore further how our audit compares with other estimates of open government at the state level, we utilize Professor Adriana Cordis and Patrick L. Warren's (2014) evaluation of each state's legal framework providing access to public records.¹⁶⁷ Noting that there is substantial variation in statutory FOI provisions across states, Professors Cordis and Warren relied on data from the Open Government Guide, which is published by the Reporters Committee for Freedom of the Press.¹⁶⁸ The Guide contains information on state statutes, case law, and Attorney Generals' opinions interpreting public records law. Professors Cordis and Warren read each state's entry in the guide and scored the state's legal framework based on eleven criteria largely concerning fee structures and penalties for administrative noncompliance with the state's FOI law.¹⁶⁹

166. *Health and Mental Healthcare and Juvenile Justice (Department Of Services For Children, Youth, And Their Families)*, MUCKROCK, <https://www.muckrock.com/foi/delaware-236/health-and-mental-healthcare-and-juvenile-justice-department-of-services-for-children-youth-and-their-families-146136/> [https://perma.cc/9EHR-NUYH] (submitted May 23, 2023).

167. Adriana Cordis & Patrick L. Warren, *Sunshine as a Disinfectant: The Effect of State Freedom of Information Laws on Public Corruption*, 115 J. PUB. ECON. 18 (2014). We use the most recent measure, which accounts for the law in 2009.

168. *Id.*; *Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/> [https://perma.cc/7XP2-H95R].

169. Law contains a provision that creates a presumption in favor of disclosure and identifies specific records as exempt from public access; the lack of a generic public interest exemption provision; a provision that limits the fees charged for processing FOIA requests; a provision that prohibits charging a fee for the time required to collect records; a provision for waiver of the cost of search for or duplication of records if the agency determines the disclosure is in the interest of the public; a provision for criminal penalties for an agency's noncompliance with disclosure obligation; a provision for civil penalties for an agency's noncompliance with its disclosure obligations; a provision for the award of attorneys' fees and costs to successful plaintiff in a public records case; a provision for administrative appeal of an agency's decision to deny a request for public records; and time to respond to public records requests.

The measure ranges from 1 to 11 (mean 6.629, std. dev. 2.402). States like Alabama and South Dakota (scores of 1) are considered “weak” FOI states because their legal frameworks transfer the cost of records fulfillment to the citizen and do not provide criminal, civil, and administrative sanctions for noncompliance with disclosure obligations. Agencies like Louisiana and Pennsylvania (scores of 10 and 11, respectively) are considered “strong” FOI states because their legal frameworks create a presumption of access.

Descriptively, our audit does not appear to reflect stringency in FOI law. There is little connection between the Cordis and Warren measure and the number of days an agency took to close our request or whether an agency confirmed receipt, denied our request, sent any information, or provided all requested information.¹⁷⁰ At minimum, this lack of correlation suggests that fee structures and threat of sanction may not drive differences in the responsiveness of public officials to FOI requests.

c. Culture of Transparency

It may be that other provisions of the law – such as those that define who may file requests and the requirements for and exemptions to disclosure – are more significant for improved performance, either because they set the substantive parameters of administrative action or because they create an expectation of transparency.

Professor Kreimer’s (2008) work on freedom of information indicates that agency compliance must be understood as part of a larger “ecology of transparency.”¹⁷¹ For example, our conversations with administrators who stressed their governors’ commitments to open government suggested that there is an extra-legal culture of transparency in some states. All agencies must cope with the predispositions of administrators, the technology of the organization, and situational factors when performing tasks.¹⁷² When these three aspects align, perhaps because of networks across the executive branch that encourage similar public records information disclosure practices, agencies are more likely to implement FOI laws effectively.¹⁷³

170. *See infra* Empirical Appendix.

171. Kreimer, *supra* note 9, at 1015-16.

172. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 93 (2000).

173. James ben-Aaron, Matthew Denny, Bruce Desmarais & Hanna Wallach, *Transparency by Conformity: A Field Experiment Evaluating Openness in Local Governments*, 77 PUB. ADMIN. REV. 68 (2017).

To evaluate each state's transparency culture, we relied on the Center for Public Integrity and Global Integrity's 2015 State Integrity Investigation.¹⁷⁴ This assessment developed transparency and accountability grades for all 50 states based on 245 questions that asked experienced journalists about key indicators of open government including the legal framework in each state and how each state enforces and implements that framework.¹⁷⁵ The measure for overall integrity ranges from 51 to 76 (mean 62.927, std. dev. 4.893) and the public access to information measure ranges from 23 to 73 (mean 45.944, std. dev. 12.206). States varied in their scores on both measures. For example, while New Hampshire performed relatively well in overall integrity (score of 61), it ranked 49th in terms of public access to information (score of 24).

In several states, poor rankings coincided with scandals that prompted calls for public records reform.¹⁷⁶ For example, in the wake of several criminal sexual assault and financial misconduct scandals in the Michigan statehouse, Michigan ranked last among all states in both measures of integrity.¹⁷⁷ These scandals, and the "F" ranking Michigan received for state integrity, prompted repeated legislative proposals to improve transparency in government through amendment of Michigan's FOI law.¹⁷⁸

Yet, neither the overall integrity nor the public access scores reflect descriptive patterns in our audit.¹⁷⁹ Like with the Cordis and Warren scores, this may be the result of the measure itself. The State Integrity scores develop out of the media's assessment of state transparency and accountability. Not only do experienced journalists likely have different interaction with state agencies than average citizens, their repeated

174. *State Integrity 2015*, CTR. FOR PUB. INTEGRITY (June 14, 2017), <https://publicintegrity.org/topics/state-politics/state-integrity-investigation/state-integrity-2015/> [<https://perma.cc/TF6B-GDQN>].

175. Kusnetz, *supra* note 8.

176. Nicholas Kusnetz, *State Integrity Investigation Brings Calls for Reform as Legislative Sessions Approach*, CTR. FOR PUB. INTEGRITY (Dec. 16, 2015), <https://publicintegrity.org/politics/state-politics/state-integrity-investigation-brings-calls-for-reform-as-legislative-sessions-approach/> [<https://perma.cc/5DAZ-G8AN>].

177. Jon King, *Dems, Republicans Push FOIA and Ethics Reforms During Sunshine Week*, MICHIGAN ADVANCE (Mar. 14, 2023) <https://michiganadvance.com/2023/03/14/dems-republicans-push-foia-and-ethics-reforms-during-sunshine-week/> [<https://perma.cc/WL5T-LNE5>].

178. M.L. Elrick, *In Latest Statehouse Scandal, Senate Stops Ethics Reforms – Again*, DETROIT FREE PRESS (Dec. 18, 2022) <https://www.freep.com/story/news/columnists/ml-elrick/2022/12/18/senatestops-ethicsreforms-again/69729511007/> [<https://perma.cc/NT8N-56YH>].

179. *See infra* Empirical Appendix.

contact with administrators in high-profile situations may lead to different perceptions of administrative performance.

IV. TRANSPARENCY, ADMINISTRATIVE STRUCTURE, AND POLITICS

A review of our audit in comparison to prior studies of transparency in the states could raise doubts as to whether our results were the result of random error. Simply, if our assessment of administrative compliance with FOI laws in the states does not correlate with high profile requests (as collected by MuckRock), the stringency of the law (as measured by Professors Cordis and Warren), or with the state's culture of transparency (as measured by the State Integrity Investigation), then perhaps variation in responsiveness to our public records request is a matter of unknown and unpredictable changes in the administrative environment.

Yet the literature on administrative performance would suggest otherwise. As explained by Professor Wilson in his seminal book on bureaucracy, the key differences between more or less successful agencies have "less to do with finances, client populations, or legal arrangements than with organizational systems."¹⁸⁰ Because organizational systems influence the choices administrators make, different agency-level political or organizational factors may result in differential implementation patterns.¹⁸¹

We explore this possibility by estimating a series of empirical models of agency responses to our requests that account for both state- and agency-level factors that may influence implementation.¹⁸² Holding constant the stringency of each state's legal FOI framework (as measured by Cordis and Warren) and each state's culture of transparency (as measured by the Center for Public Integrity), we assess whether agency design or politics affect agency responses to our requests.

Notably, previous research on administrative performance suggests that politicization can lead to poor agency responses to FOI requests.¹⁸³ Increased political influence in agencies not only can reorder agency priorities away from mundane tasks such as FOI fulfillment, but also can lead to management problems that reduce incentives for administrators to focus on tasks that benefit the public.

180. WILSON, *supra* note 172, at 23.

181. *See, e.g.*, Thomas H. Hammond, *Agenda Control, Organizational Structure, and Bureaucratic Politics*, 30 AM. J. POL. SCI. 379 (1986); Thomas H. Hammond & Paul A. Thomas, *The Impossibility of a Neutral Hierarchy*, 51 J. L. ECON. & ORG. 155 (1989); PIOTROWSKI, *supra* note 134; Shepherd et al., *supra* note 134; Wagner, *supra* note 134.

182. *See infra* Empirical Appendix.

183. Johnson, *supra* note 13; Wood & Lewis, *supra* note 29.

As a proxy for politicization, we evaluate how leaders in the agencies that received our request got their jobs. Specifically, we consider an agency to be more “politicized” as that agency’s leader is increasingly dependent upon the governor for employment. 39 agencies have heads that rely exclusively on the governor for employment. Of these agencies, 19 are budget and 11 are commerce agencies. A little less than half of the agencies in our sample (116 of 247) have heads that are appointed by the governor and approved by the legislature or other outside body. Most health agencies fall into this category (34 of 50).

Some agencies have elected leaders. Of the 28 agencies in our sample that have elected heads, 12 are agricultural and 14 are education agencies. Recall our descriptive statistics in Section III which indicate that agricultural agencies were the quickest to respond to our request and education agencies provided the least number of denials and the most information. There are policy specific reasons to suggest that agricultural and education agencies were better positioned to answer our request. Yet, it could be aggregate statistics on agricultural and education agencies indicate more responsiveness because those agencies have more democratically accountable administrative structures. Simply, the patterns we observe in the data may not be the result of policy type, but rather the result of the fact that the agencies’ leadership is elected.

Our models suggest this is the case. For example, agencies with elected leadership were much more likely to respond to our request and to provide some or all of our requested information. These results provide intriguing insight into the connection between agency design and administrative responsiveness to the public: agencies led by individuals who receive and retain their jobs as a result of elections may be more transparent than those who are led by political appointees.

As discussed in Section II, scholars consistently find that greater political competition increases the likelihood of government transparency.¹⁸⁴ However, few of these scholars simultaneously account for the external pressures on agencies created by a competitive political environment and the internal pressures on agencies created by politicized leadership. Our models do just that. To measure the level of political competition in each state, we utilize an update of the state legislative political competition index created by Professors Thomas M.

184. Berliner, *supra* note 24; Berliner & Erlich, *supra* note 27; Gregory Michener, *How Cabinet Size and Legislative Control Shape the Strength of Transparency Laws*, 28 GOVERNANCE 77 (2015); Grossman & Michelich, *supra* note 27; Rios et al., *supra* note 27.

Holbrook and Emily Van Dunk.¹⁸⁵ This measure includes the average percent of votes for the winner and the average margin of victory at the district level, as well as the percentage of open and uncontested seats in the state legislature.¹⁸⁶

Intriguingly, political competition – at least as measured – has little substantive or statistical effect on FOI implementation. There may be a few reasons our results conflict with prior research. Much of the scholarship on the connection between transparency and political competition explores the *presence*, not the *implementation*, of transparency laws. Our models provide an important supplement to this work by underscoring the importance of thinking through the process of passive transparency described in Section II. Establishing a passive transparency regime like FOI through statutory law introduces discretionary decision-making into open government. Under these regimes, administrators serve both as channels for information that can inform citizens about the inner workings of government and as gatekeepers of that information.

Our models indicate who oversees state administrators matters for how they exercise such discretion. Administrators who work with leaders who are more directly connected to the public through elections are, in fact, more transparent.

CONCLUSION

As our introductory example illustrated, a lack of transparency in the states has drawn the attention of citizens and scholars who seek to use FOI law to understand their government. When compared to federal statutes, state FOI laws are viewed as less effective.¹⁸⁷ This is in large part due to the fact that the intricacies of state government, particularly with respect to administration, remain a mystery to even the most astute observers.

This Article's original audit of the existence and implementation of those laws provides a new insight into why state governments vary in transparency. Not only do states vary tremendously when it comes to the statutory requirements of their FOI laws, but implementation of these laws varies as well. Simply, *de jure* transparency does not necessarily equate to *de facto* transparency.

185. Thomas M. Holbrook & Emily Van Dunk, *Electoral Competition in the American States*, 87 AM. POL. SCI. REV. 955 (1993).

186. Gregory Shufeldt & Patrick Flavin, *Two Distinct Concepts: Party Competition in Government and Electoral Competition in the American States*, 12 STATE POL. & POL'Y Q. 330, 331 (2012).

187. Koningisor, *supra* note 15, at 1466.

While this may seem an obvious observation, it establishes a foundational baseline upon which scholars should assess government transparency. In a race to examine the political and normative implications of open government for democracy, scholars largely have focused on the content of statutory law and neglected consideration of variation in administrative implementation of those laws. Intriguingly, our analysis suggests formal, direct connections between state administrators and the public may strengthen transparency regimes.

This Article has important implications for those who consider the design, effectiveness, and reform of transparency laws and highlights the connection between law, politics, and administration.

EMPIRICAL APPENDIX

This Appendix provides additional information about the empirical analysis discussed in Section IV of the Article.

In Table 1, we present three sets of models of agency responses to our FOI requests that evaluate agency provision of any response – even a simple confirmation of receipt – to our request (Models 1-3), agency provision of any information in response to our request (Models 4-6), and agency provision of all requested information (Models 7-9). Because our dependent variables are dichotomous, we estimate models using logit analysis. To account for the fact that the outcomes observed in the same types of agencies (health, education, etc.) may not be independent, we estimate models with robust standard errors clustered by agency type. We also include state fixed effects (Models 1, 4, and 7) to account for the dynamics within each state.

Table 1. Models of Responses to FOI Requests

| | Any Response | | Sent Any Information | | | | Sent All Information | | |
|-----------------------|--------------------|---------------------|----------------------|-------------------|---------------------|---------------------|----------------------|---------------------|---------------------|
| | <i>Model 1</i> | <i>Model 2</i> | <i>Model 3</i> | <i>Model 4</i> | <i>Model 5</i> | <i>Model 6</i> | <i>Model 7</i> | <i>Model 8</i> | <i>Model 9</i> |
| Total Pay | | | -0.000 (0.000) | | | -0.000** (0.000) | | | -0.001** (0.000) |
| FOI Strength | | 0.218** (0.065) | 0.225** (0.070) | | 0.063 (0.053) | 0.081 (0.052) | | 0.088* (0.044) | 0.112** (0.043) |
| Integrity | | | -0.001 (0.039) | | | 0.058** (0.010) | | | 0.061** (0.016) |
| Training | | -0.539 (0.427) | -0.421 (0.384) | | -0.277 (0.280) | -0.328 (0.347) | | -0.516** (0.186) | -0.515** (0.209) |
| Politicization | -0.300* (0.145) | -0.316** (0.115) | -0.300** (0.116) | -0.216 (0.148) | -0.164** (0.079) | -0.161** (0.077) | -0.228** (0.111) | -0.231** (0.114) | -0.222 (0.117) |
| Pol. Comp. | | | -0.015 (0.014) | | | 0.008 (0.012) | | | 0.004 (0.014) |
| Constant | 1.020 (0.790) | 0.661 (0.369) | 2.247 (1.990) | 0.018 (0.899) | 0.190 (0.229) | -2.206** (0.709) | 0.265 (0.265) | -0.199 (0.155) | -1.892 (1.307) |
| Obs. | 139 | 222 | 222 | 212 | 222 | 222 | 222 | 222 | 222 |
| Pseudo R ² | 0.109 | 0.062 | 0.070 | 0.113 | 0.011 | 0.033 | 0.014 | 0.024 | 0.057 |
| State FE | ✓ | | | ✓ | | | ✓ | | |

While we discuss our measurement of FOI strength, state integrity, and political competition in the main text, in this Appendix we provide a bit more detail about the other covariates included in our analysis.

Agency performance can reflect the number of resources an agency has at its disposal. Yet, despite the variation across and within

states in administrative professionalism, structure, and capacity,¹⁸⁸ there is almost no agency-level data on administrative environment and very little current state-level data. As a result, we use an admittedly blunt proxy measure in an attempt to account for the professional quality of state administrators and resources available to agencies. We include a variable from the U.S. Census Bureau that measures that average pay for all state employees during March 2018.

We also account for whether a state provides FOI training to its administrators.¹⁸⁹ Interestingly, the coefficient for FOI training is negative across all models. It may be that statewide training programs, at least as currently administered, perpetuate a non-responsive culture by highlighting the legal complexity of FOI law and making administrators less confident in responding to requests.¹⁹⁰

Finally, our politicization variable is coded (0) if the agency head is elected; (1) if the governor appoints the agency head with approval from the legislature or other outside body; (2) if an administration official appoints the agency head; (3) if an administration official appoints the agency head with approval from the governor; and (4) if the governor appoints the agency head.

188. *E.g.*, Charles Barrilleaux, Richard Feiock & Robert E. Crew, Jr., *Measuring and Comparing American States' Administrative Characteristics*, 24 STATE & LOCAL GOV'T REV. 12 (1992); Brendan F. Burke & Diel S. Wright, *Reassessing and Reconciling Reinvention in the American States: Examining State Administrative Performance*, 34 STATE & LOCAL GOV'T REV. 7 (2002); Jerrell S. Cogburn & Sandra K. Schneider, *The Quality of Management and Government Performance: An Empirical Analysis of the American States*, 63 PUB. ADMIN. REV. 206 (2003); Lee Siegelman, *The Quality of Administration: An Exploration in the American States*, 8 ADMIN. & SOC'Y 107 (1976).

189. Michele Bush Kimball, *Mandated State-Level Open Government Training Programs*, 28 GOV'T INFO. Q. 474 (2011).

190. *See id.*