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## Providing Public Assistance for the Sunshine Law

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# Providing Public Assistance for the Sunshine Law

## INTRODUCTION

**I**n 1992, Ryan Nees became interested in politics when he was in fifth grade, and by the time he was 15, he was suing his town's mayor for access to a city e-mail list.<sup>2</sup> Nees subscribed to the list to receive an e-mail magazine of city news. But he also received campaign material from Mayor Matt McKillip, and he believed the mayor was illegally using the list for political purposes.<sup>3</sup>

Nees won his case and \$11,000 in attorney fees in February 2006.<sup>4</sup> He secured his path to victory when he sought help from Indiana's public access counselor – a position created to help members of the public, media and government navigate public records and open meetings laws.<sup>5</sup> Governor Frank O'Bannon appointed the state's first public access counselor, Anne Mullin O'Connor, by executive order in 1998. In a memo to agency heads, he wrote, "for our system of government to work as it should, the people must be able to find out what their government is doing."<sup>6</sup>

Within the first three months on the job, O'Connor received 210 complaints, with 63% coming from citizens.<sup>7</sup> The following year, the Indiana Legislature established the Office of the Public Counselor in statute.<sup>8</sup> Since that time, complaints to the public access counselor's office have



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tripled. To date, the office has received more than 12,000 inquiries, and it has established itself as one of the model statutory plans in the nation.<sup>9</sup>

At least 15 other states offer similar help to their constituents in various ways. Efforts to create such an office are underway in Arizona and Ohio.<sup>10</sup> Missouri has no such office, but its citizens deserve to have this service made available to them. Missouri's open record laws ranked fourth in a March 2005 study by the Marion Brechner Citizen Access Project at the University of Florida.<sup>11</sup> However, the report found that Missouri and other states that provided the best access to citizens requesting records "also fail to adequately encourage officials to respond directly to the needs of the public."<sup>12</sup>

Missouri has an Office of the Public Counselor to help citizens in matters concerning utilities. The office acts as consumers' advocate and represents the public in utility cases before the Missouri Public Service Commission.<sup>13</sup> The Missouri "OPC plays an active role in developing long term energy and telecommunications policies that will bring lower rates for all customers."<sup>14</sup> In October 2005, the Missouri Office of the Public Counselor asked the PSC to issue emergency rules to help soften the drastic increases in winter heating bills.<sup>15</sup> It also

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<sup>2</sup> Ryan Nees, *Biography*, at <http://www.ryannees.com/> (last visited Feb. 12, 2007).

<sup>3</sup> *Nees v. McKillip*, Cause No. 34C01-0510-PL-00984 (Cir. Ct., Howard County, Ind.) (Feb. 20, 2006).

<sup>4</sup> *Id.*

<sup>5</sup> Indiana Public Access Counselor at <http://www.in.gov/pac/> (last visited Feb. 12, 2007).

<sup>6</sup> Memorandum from Office of the Governor (April 27, 1998), available at <http://Indianacog.org/documents/OBannonFOIletter.pdf>. (last visited Feb. 12, 2007).

<sup>7</sup> ANNE MULLIN O'CONNOR, QUARTERLY REPORT OF THE PUBLIC ACCESS COUNSELOR: JULY 13, 1998 – SEPTEMBER 30, 1998 available at [http://www.in.gov/pac/archive/0798\\_letter.html](http://www.in.gov/pac/archive/0798_letter.html) (last visited Feb. 12, 2007).

<sup>8</sup> IND CODE ANN. § 5-14-4 (West 1999).

<sup>9</sup> *Annual Reports to the Indiana General Assembly* at <http://www.in.gov/pac/reports/> (last visited Aug. 7, 2006).

<sup>10</sup> Arizona SB 1407 would authorize a state ombudsman to investigate open meetings and public records violations. See <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/47leg/2r/bills/sb1407p.htm> (last visited Feb. 13, 2007); Ohio HB 9 would create a Public Access Counselor. See [http://www.legislature.state.oh.us/bills.cfm?ID=126\\_HB\\_9](http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_9) (last visited Feb. 12, 2007).

<sup>11</sup> MARION BRECHNER CITIZEN ACCESS PROJECT, ONE LAW ACROSS ALL 50 STATES, available at <http://www.citizenaccess.org/> (last visited Feb. 13, 2007).

<sup>12</sup> UNIVERSITY OF FLORIDA, NEW UF STUDY RANKS STATES' RECORDS ACCESS LAWS, <http://news.ufl.edu/2005/03/11/access-2005/> (last visited Feb. 13, 2007).

<sup>13</sup> Missouri Office of the Public Counselor, *Who We Are*, <http://www.mo-opc.org> (last visited Feb. 13, 2007).

<sup>14</sup> Missouri Office of the Public Counselor, *More Consumer Topics*, <http://www.mo-opc.org> (last visited Feb. 13, 2007).

<sup>15</sup> Press Release, Missouri Office of the Public Counselor, Missouri Public Counselor Calls for Emergency Rule to Respond to Heating Crisis Expected With This Winter's Drastic Natural Gas Price Increases, [http://www.mo-opc.org/upload/opc\\_emergencycwrule10-21-05.pdf](http://www.mo-opc.org/upload/opc_emergencycwrule10-21-05.pdf) (last visited Feb. 13, 2007).

serves consumers by providing advice to consumers on relevant issues, such as the No Call Law and telecommunications scams.<sup>16</sup>

A similar office aimed at helping Missourians understand their rights under the Sunshine Law would offer additional benefits. As James Madison, one of the authors of the First Amendment, put it: "A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."<sup>17</sup>

Paying attention to public record laws at the state level becomes increasingly important as federal officials continue to limit public access despite the Freedom of Information Act, or FOIA, wrote Robert J. Freeman, executive director of the New York State Committee on Open Government in Albany.<sup>18</sup> "Too often, requests are ignored or answered months or years following their submission. Also disturbing is the fallout from 9/11 and the irony that federal agencies answered 3 million FOIA requests last year, but during the same period, 14 million new records were determined to be classified national security secrets."<sup>19</sup>

Across the nation, state public access counselors have various levels of power, responsibility, and independence. The offices might have statutory authority or be informally established under the

attorney general or another state office. Public access counselors can issue opinions that are either advisory or binding, or offer mediation. Their primary role is to guide the development of public access laws and to help interpret those laws, mediate disputes, and educate citizens and government agencies about the laws.<sup>20</sup> The public access ombudswoman in Illinois, for instance, operates under the state attorney general's office.<sup>21</sup> Such an arrangement could create at least a perceived conflict of interest because the attorney general's office often represents state agencies in disputes involving Sunshine laws.<sup>22</sup> When Virginia legislators were considering creating a public access counselor in their state in 1999, a joint subcommittee found that making such an office independent would best serve citizens because it "would not be subject to direct political pressure."<sup>23</sup> In Indiana, where 15-year-old Ryan Nees received assistance, the public access counselor's office has an efficient combination of autonomy and power, while still operating as an independent government agency.<sup>24</sup> Indiana's ombudswoman also has added job security – each counselor is appointed to four-year terms and can only be removed for cause.<sup>25</sup> The counselor issues advisory opinions and makes legislative recommendations to the General Assembly to improve public access rules.<sup>26</sup>

## II. STATE COMMISSIONS

Other states have created alternative

models to help the public. Some states have a single attorney who handles public access disputes; others have committees or offices dedicated to the issue with varying degrees of power and independence. Connecticut has one of the nation's oldest systems for helping members of the public gain access to public records and public meetings. The state established the Freedom of Information (FOI) Commission in 1975 to enforce the state's FOI Act.<sup>27</sup> It now has five members, a staff of 17 and an operating budget of nearly \$1.5 million.<sup>28</sup>

The FOI Commission is charged with hearing complaints from citizens who are denied access to public records or meetings.<sup>29</sup> A citizen can file a complaint within 30 days of the denial, after which the FOI Commission will hold a hearing with the complainant and the public agency. The commission then renders a decision, either dismissing the complaint or finding the agency in violation and ordering appropriate relief, such as the disclosure of public records or declaring null and void a decision taken at a meeting that was improperly closed.<sup>30</sup> "In many instances, a hearing is not necessary as the parties are able to resolve their differences with the assistance of an FOI staff attorney, who acts as an ombudsman."<sup>31</sup>

Critics have argued that if a similar commission was established in larger states, the bureaucracy could delay the public's access and become too costly. New York, for example, established the Committee on Open Government in 1974,

<sup>16</sup> Missouri Office of the Public Counsel, <http://www.mo-opc.org>.

<sup>17</sup> Quote DB, <http://www.quotedb.com/quotes/2708>.

<sup>18</sup> Robert J. Freeman, *Freedom of Information After 30 Years: Time for More Sunshine*, March 13, 2005, <http://www.sunshineweek.org> (last visited Feb. 12, 2007).

<sup>19</sup> *Id.*

<sup>20</sup> Forrest M. "Frosty" Landon, *Freedom of Information: Virginia Needs an Ombudsman*, VIRGINIA ISSUES & ANSWERS (Fall 1999) available at <http://www.via.vt.edu/fall99/ombudsman.html> (last visited Feb. 13, 2007).

<sup>21</sup> Illinois Attorney General, ENSURING OPEN AND HONEST GOVERNMENT, <http://www.ag.state.il.us/government/pac.html> (last visited Feb. 12, 2007).

<sup>22</sup> *Id.*

<sup>23</sup> HJR 501, JOINT SUBCOMMITTEE TO STUDY THE VIRGINIA FREEDOM OF INFORMATION ACT (June 2, 1999), <http://dls.state.va.us/pubs/legisrec/1999/HJR501A.htm> (last visited Feb. 13, 2007).

<sup>24</sup> *Id.*

<sup>25</sup> IND CODE ANN. §§ 5-14-4-6 and 5-14-4-7 (West 1999).

<sup>26</sup> IND CODE ANN. § 5-14-4-10 (West 1999).

<sup>27</sup> CONN. GEN. STAT. § 1-205 (2006). See REGULATIONS OF THE CONNECTICUT FREEDOM OF INFORMATION COMMISSION available at <http://www.state.ct.us/foi/Regs/regsIndex.htm> (last visited Aug. 7, 2006).

<sup>28</sup> Freedom of Information Commission, State of Connecticut, *Who We Are*, <http://www.state.ct.us/foi> (last visited Feb. 12, 2007).

<sup>29</sup> CONN. GEN. STAT. § 1-205(d) (2006).

<sup>30</sup> Freedom of Information Commission, State of Connecticut, *What We Do*, [http://www.state.ct.us/foi/What\\_We\\_Do.htm](http://www.state.ct.us/foi/What_We_Do.htm) (last visited Feb. 12, 2007).

<sup>31</sup> *Id.*

<sup>32</sup> See NEW YORK STATE COMMITTEE ON OPEN GOVERNMENT, YOUR RIGHT TO KNOW, at <http://www.dos.state.ny.us/coog/coogwww.html>.

but it issues only advisory opinions.<sup>32</sup> The group was created in the wake of the Watergate scandal as the public was calling for more transparency in government. It is responsible for providing advisory opinions related to the Freedom of Information Law and the Open Meetings Law.<sup>33</sup> The committee also is charged with preparing opinions concerning the Personal Privacy Protection Law for citizens who are subjects of records covered by the law or for state agencies seeking to comply with the statute.<sup>34</sup>

New York's 11-member committee has issued "nearly 20,000 written advisory opinions" in response to inquiries from "government, the public and the news media."<sup>35</sup> It has provided several thousand more opinions by telephone.<sup>36</sup>

In 2000, Virginia lawmakers created a committee similar to the one in New York.<sup>37</sup> The Virginia Freedom of Information Advisory Council has 12 members, including legislators, representatives of the news media and citizens, as well as two staff members.<sup>38</sup> It is charged with providing advisory opinions relating to Virginia's Freedom of Information Act and conducting training seminars.<sup>39</sup> Before it was created, the attorney general would issue opinions on FOI matters, but only to government

officials. Citizens' main recourse if they believed an agency violated FOI rules was to file a civil lawsuit.<sup>40</sup>

Recently, Virginia's council helped craft legislation to tighten disclosure rules for public-private partnerships, which had previously been developed in secret.<sup>41</sup> In 2005, the council responded to more than 1,600 inquiries and issued 16 written opinions.<sup>42</sup> One opinion, which came at the request of the public relations manager for the state police, clarified how the agency should treat motor vehicle accident reports concerning juveniles.<sup>43</sup> Another opinion responded to a citizen who was concerned about an action taken during a closed meeting of a county school board. The council found that a public body must take an affirmative vote in an open meeting for any agreement reached during a closed meeting to become effective.<sup>44</sup> While the opinions are not legally enforceable, they are respected as "impartial and authoritative."<sup>45</sup>

Iowa also has an independent office to help citizens in public access and other disputes. The Iowa general assembly created the Citizens' Aide/Ombudsman in 1972.<sup>46</sup> The office assists the state's residents in airing grievances, including concerns over public records and open meetings laws.<sup>47</sup> The office is responsible

for investigating complaints regarding administrative actions of state and local government agencies and issuing opinions or recommendations to resolve disputes.<sup>48</sup> Its scope is broad and with few exemptions. The office "has jurisdiction to investigate any administrative action of an agency, except" when a complaint comes from an employee regarding that person's "employment relationship with the agency."<sup>49</sup> The office also is responsible for "serv[ing] on the child support enforcement program advisory committee."<sup>50</sup>

Hawaii offers similar advice and guidance to its citizens with the Office of Information Practices, which is attached for administrative purposes to the lieutenant governor's office.<sup>51</sup> The state Legislature created the office in 1988 to issue advisory opinions relating to public records laws to members of the public, media and government.<sup>52</sup> Ten years later, the office was given additional responsibility to administer the open meetings law.<sup>53</sup> The same year, the Legislature cut the office's budget dramatically to about \$350,000 annually from a high of more than \$827,000 in fiscal year 1994.<sup>54</sup> Staff was cut from 15 to 6.5 employees, including the director and one full-time attorney.<sup>55</sup> Despite the

<sup>33</sup> N.Y. PUB. OFF. LAW § 84-90 (2006) available at <http://www.dos.state.ny.us/coog/foi2.htm>.

<sup>34</sup> N.Y. PUB. OFF. LAW § 109 (2006) available at <http://www.dos.state.ny.us/coog/openmeetlaw.htm>.

<sup>35</sup> NEW YORK STATE COMMITTEE ON OPEN GOVERNMENT, YOUR RIGHT TO KNOW at [http://www.dos.state.ny.us/coog/right\\_to\\_know.html](http://www.dos.state.ny.us/coog/right_to_know.html).

<sup>36</sup> *Id.*

<sup>37</sup> VA. CODE ANN. § 30-179 (West 2000).

<sup>38</sup> VA. CODE ANN. §30-178 (WEST 2000).

<sup>39</sup> VA. CODE ANN. § 30-179 (West 2000).

<sup>40</sup> Frosty Landon, *The Freedom of Information Office*, 47 VIRGINIA LIBRARIES Number 1 (Spring 2001), [http://scholar.lib.vt.edu/ejournals/VALib/v47\\_n1/landon.html](http://scholar.lib.vt.edu/ejournals/VALib/v47_n1/landon.html).

<sup>41</sup> Frosty Landon, *Virginia Law Needs Improvements*, RICHMOND TIMES-DISPATCH, March 12, 2006, available at <http://www.opengovva.org/content/view/804/100/> (last visited Feb. 16, 2007).

<sup>42</sup> VIRGINIA FREEDOM OF INFORMATION COUNCIL, H.R. DOC. 105 at 5 (2005) available at <http://dls.state.va.us/groups/foiacouncil/2005ar.pdf>.

<sup>43</sup> AO-08-05 Op. Va. Freedom of Information Advisory Council (July 2005) available at [http://dls.state.va.us/groups/foiacouncil/ops/05/AO\\_08\\_05.htm](http://dls.state.va.us/groups/foiacouncil/ops/05/AO_08_05.htm).

<sup>44</sup> AO-01-05 Op. Va. Freedom of Information Advisory Council (February 2005) available at [http://dls.state.va.us/groups/foiacouncil/ops/05/AO\\_01\\_05.htm](http://dls.state.va.us/groups/foiacouncil/ops/05/AO_01_05.htm).

<sup>45</sup> Ryan Lozar, *Policing Compliance*, 29 THE NEWS MEDIA & THE LAW 12 (Spring 2005), available at <http://www.rcfp.org/news/mag/29-2/cov-policing.html>.

<sup>46</sup> IOWA ADMIN. CODE r.141-1.1 (2C) (1994).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> IOWA ADMIN. CODE r.141-2.5 (2C) (1994).

<sup>50</sup> IOWA ADMIN. CODE r.141-1.1 (2C) (1994).

<sup>51</sup> HAWAII REV. STAT. ANN. §§ 92F-41 and 92F-42 (2006).

<sup>52</sup> *Id.*

<sup>53</sup> Hawaii Office of Information Practices, ANNUAL REPORT 2005, at 3, available at <http://www.state.hi.us/oip/reports.html>.

<sup>54</sup> *Id.*, at 5

<sup>55</sup> *Id.*

<sup>56</sup> Office of Information Practices, UNIFORM INFORMATION PRACTICES ACT (MODIFIED), Director's Message, available at <http://www.state.hi.us/oip/UIPABooklet-Word.doc>.

<sup>57</sup> MASS. GEN. LAWS ch. 66, § 1 (2002) at <http://www.sec.state.ma.us/pre/prepdf/pubreclaw.pdf> (last visited Feb. 14, 2007).

budget cuts, the office reported in 2005 that it continues to fulfill its obligations: “educating the public of its rights and agencies of its responsibilities, assisting the public in gaining access to records, and guiding agencies in the application of the statute’s provisions.”<sup>56</sup>

While Hawaii’s office did not start out handling public records and open meetings disputes, Massachusetts’ sunshine office still only deals with matters relating to records. The Public Records Division exists under the Office of the Secretary of the Commonwealth to help administer the state’s Public Records Law.<sup>57</sup> The supervisor of public records issues only advisory opinions.<sup>58</sup> The office provides citizens the opportunity to appeal a denied public records request and has the power to investigate those appeals and issue written decisions on the matter at the supervisor’s discretion.<sup>59</sup>

Utah is another state with a committee devoted solely to open records issues. The State Records Committee hears appeals when a public record is denied.<sup>60</sup> The committee falls under the Department of Administrative Services, and includes representatives from government, media and the public.<sup>61</sup> The committee’s duties are outlined in the state’s Government Records Access Management Act, which went into effect in 1992.<sup>62</sup>

New Jersey also created a committee focused on public records when legislators

revised the state’s Open Public Records Act in 2001.<sup>63</sup> The Government Records Council is an independent agency that oversees compliance with the open records law and helps parties resolve disputes out of court.<sup>64</sup> The council has a staff that includes an executive director, five case managers and a deputy attorney general.<sup>65</sup> It has five members: “the Commissioners of the Departments of Community Affairs and Education . . . and three members of the public.”<sup>66</sup> In addition to mediation, the council “maintains a toll-free help-line” and provides training.<sup>67</sup>

Maryland’s sunshine office is devoted to one aspect of FOI rules as well. An advisory board of three members deals only with open meetings regulations.<sup>68</sup> The board’s chief duty is to review and resolve complaints from anyone alleging a violation of the open meetings act and to “issue a written opinion as to whether a violation” occurred.<sup>69</sup> It also is expected to offer recommendations to the General Assembly for amending open meetings rules.<sup>70</sup> The board is affiliated with the state attorney general’s office.<sup>71</sup>

West Virginia offers similar oversight of open meetings rules. The state ethics commission has a Committee on Open Governmental Meetings that provides written advisory opinions on the open meetings law.<sup>72</sup> “The Ethics Commission’s Executive Director and Legal Counsel also provide informal advice by

telephone.”<sup>73</sup> But it “has no authority to investigate complaints about violations” and only issues opinions on proposed or ongoing actions.<sup>74</sup>

### III. ATTORNEY GENERAL

In states where there is no sunshine office, phone inquiries regarding public access disputes are typically directed to the offices of the attorney general. But citizens will not find help in every state. “Historically, many state attorneys general, as the lawyers for their states, have counseled government officials on access disputes but not the public.”<sup>75</sup> New Mexico’s attorney general, for example, only answers inquiries relating to public access from elected officials.<sup>76</sup>

Missouri’s attorney general is authorized to issue formal opinions to certain government officials in questions of law, including the Sunshine Law. But under § 27.040, RSMo, he is not allowed to issue opinions to ordinary citizens.<sup>77</sup>

Kentucky also has no public access counselor, but the state’s attorney general is legally obligated to respond to citizens’ concerns relating to public records and meetings.<sup>78</sup> Kentucky requires the attorney general to issue legally binding decisions in disputes involving the open records law and the open meetings law, respectively.<sup>79</sup>

In Illinois, Attorney General Lisa Madigan has created a formal position for

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> STATE RECORDS COMMITTEE DIVISION OF STATE ARCHIVES, <http://www.archives.state.ut.us/main/index>.

<sup>61</sup> UTAH CODE ANN. § 63-2-501 (West 2006).

<sup>62</sup> *Id.*

<sup>63</sup> N.J. STAT. ANN. § 47:1A-1 (2002), P.L. 2001.

<sup>64</sup> GOVERNMENT RECORDS COUNCIL, <http://www.nj.gov/grc/general.html>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> MD. CODE ANN., STATE GOV’T § 10-502.1 to 10-502.6 (2006).

<sup>69</sup> MD. CODE ANN., STATE GOV’T § 10-502.4 (a) (2006).

<sup>70</sup> MD. CODE ANN., STATE GOV’T § 10-502.4 (c) (2006).

<sup>71</sup> See MARYLAND ATTORNEY GENERAL OPEN MEETINGS COMPLIANCE BOARD, available at <http://www.oag.state.md.us/opengov/openmeetings/board.htm>.

<sup>72</sup> W. VA. CODE § 6-9A-1 through 6-9A-12 (2006).

<sup>73</sup> WEST VIRGINIA ETHICS COMMISSION, OPEN MEETINGS INFORMATION, <http://www.wvethicscommission.org/open.htm>.

<sup>74</sup> *Id.*

<sup>75</sup> Ryan Lozar, *Policing Compliance*, 29 THE NEWS MEDIA & THE LAW 12 (Spring 2005), available at <http://www.rcfp.org/news/mag/29-2/cov-policing.html>.

<sup>76</sup> *Id.*

<sup>77</sup> MO. REV. STAT. § 27.040 (2002).

<sup>78</sup> Ryan Lozar, *Policing Compliance*, 29 THE NEWS MEDIA & THE LAW 12 (Spring 2005), available at <http://www.rcfp.org/news/mag/29-2/cov-policing.html>.

<sup>79</sup> KY. REV. STAT. ANN. § 61.880 and 61.846. (West 2006)

<sup>80</sup> Illinois Attorney General, PUBLIC ACCESS COUNSELOR ANNUAL REPORT available at [http://www.ag.state.il.us/government/Public\\_Access\\_Counselor\\_Annual\\_Report.pdf](http://www.ag.state.il.us/government/Public_Access_Counselor_Annual_Report.pdf) (last visited Feb. 12, 2007).

public access counselor within her office to help the state comply with the Freedom of Information Act and the Open Meetings Act.<sup>80</sup> The public access counselor handled 1,011 cases that dealt with the state Freedom of Information and Open Meetings acts in its first year.<sup>81</sup> “The Public Access Counselor’s role is to ensure that public bodies understand the requirements of these laws, government business is conducted openly, and the public has access to the governmental information to which they are entitled.”<sup>82</sup>

Most of the complaints brought to the public access counselor came from citizens, including one woman whose FOI request was denied by the Illinois State Police.<sup>83</sup> The citizen asked for a “police report concerning the police response to an incident at a nursing home in which her father subsequently died.”<sup>84</sup> The public access counselor intervened and the record was released.<sup>85</sup> In another case, the counselor found that a school district violated the Open Meetings Act when it held a closed-door session and approved a 5.5 percent pay raise.<sup>86</sup> The school board later rescinded the vote and took another vote in a public meeting approving a 3.2 percent raise.<sup>87</sup>

In Florida, the public also can get assistance concerning the Sunshine Law from within the attorney general’s office. A mediation program is established in § 16.60, Florida statutes, as an alternative

for the resolution of public access disputes.<sup>88</sup> Both sides must agree to participate in the program, which is voluntary. In 2003, the Florida mediation program handled 149 disputes and resolved 74 percent successfully.<sup>89</sup> One case involved a homeowner who was concerned about new stadium lighting at a nearby high school and asked the school district for records on whether it obtained the proper zoning variance.<sup>90</sup> The district tried to withhold the records, arguing that the lighting plans were confidential under an exemption passed in response to the September 11, 2001 terrorist attacks.<sup>91</sup>

Florida’s attorney general touts the program as “a cost-effective and efficient way to achieve positive results for both sides.”<sup>92</sup> The office avoids potential conflicts of interest because it does not represent state agencies in Sunshine Law disputes, leaving the task instead to attorneys for the respective agencies.<sup>93</sup>

In Texas, the attorney general’s office also has taken steps to help the public and government understand their rights under the state’s Public Information Act. “*The Open Records Division* issues [opinions] and decisions that determine whether information is open to the public,” and it “educate[s] citizens and government officials about” the state’s Sunshine Laws.<sup>94</sup> The division operates a “hotline staffed by investigators” who “can help resolve disputes involving the open

government laws,” though they “cannot provide legal advice” to members of the public or government.<sup>95</sup>

Also offering help through the attorney general’s office is North Carolina. In 1993, then-Attorney General Michael F. Easley established the Sunshine Office under the Citizens Rights Section of his office.<sup>96</sup> The attorney general’s office can help mediate disputes but the program is voluntary and does not have enforcement authority.<sup>97</sup>

Some states have chosen to separate their sunshine office or officer from the attorney general but have stopped short of creating a commission. In Minnesota, the commissioner of administration can issue advisory opinions to members of government or the public who have complaints relating to the state’s Sunshine Law, known as the Minnesota Government Data Practices Act.<sup>98</sup> The opinions are not binding, but a court must defer to them.<sup>99</sup> Anyone who complies with an opinion will not be “liable for compensatory or exemplary damages[,] . . . awards of attorney fees” or penalties under the state Sunshine Law.<sup>100</sup>

#### IV. CONCLUSION

Across the nation, public officials who violate public access rules rarely face serious sanctions.<sup>101</sup> Disputes over public records or open meetings laws often drag on for years and include costly legal

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.* at 4-6.

<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 7.

<sup>87</sup> *Id.*

<sup>88</sup> Florida Attorney General, OPEN GOVERNMENT MEDIATION PROGRAM, <http://myfloridalegal.com/pages.nsf/main/d99b17eb63c2f12085256cc7000be171!OpenDocument> (last visited Feb. 12, 2007).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Ryan Lozar, *Policing Compliance*, 29 THE NEWS MEDIA & THE LAW 12 (Spring 2005), available at <http://www.rcfp.org/news/mag/29-2/cov-policing.html>.

<sup>94</sup> Texas Attorney General, OPEN GOVERNMENT, <http://www.oag.state.tx.us/opinopen/opengovt.shtml> (last visited Feb. 12, 2007).

<sup>95</sup> *Id.*

<sup>96</sup> Letter from Attorney General Michael F. Easley to R. Samuel Hunt, III, Secretary of Transportation (September 15, 1993) at [http://www.ncdot.org/doh/PRECONSTRUCT/traffic/tepp/Topics/P-24/P-24\\_m2.pdf](http://www.ncdot.org/doh/PRECONSTRUCT/traffic/tepp/Topics/P-24/P-24_m2.pdf) (last visited Feb. 13, 2007). Michael F. Easley is currently the governor of North Carolina.

<sup>97</sup> North Carolina Department of Justice at [http://www.ncdoj.com/victimscitizensservices/vscs\\_open\\_government.jsp](http://www.ncdoj.com/victimscitizensservices/vscs_open_government.jsp) (last visited Feb. 12, 2007).

<sup>98</sup> MINN. STAT. ANN. § 13.072 (West 2006).

<sup>99</sup> Minnesota Department of Administration Information Policy Analysis Division, <http://www.ipad.state.mn.us/opinions/index.html> (last visited Feb. 12, 2007).

<sup>100</sup> MINN. STAT. ANN. § 13.072.2 (West 2006).

<sup>101</sup> Katrina Hull, *Violating Government-Access Laws Rarely Results in Punishment for the Offenders*, 27 THE NEWS MEDIA & THE LAW 22 (Summer 2003) available at <http://www.rcfp.org/news/mag/27-3/foi-violatin.html>.

settlements. In 2003, the University of Missouri agreed to pay *The Kansas City Star* more than \$77,000 in legal costs, which at the time was the largest known award in a Sunshine case against a state agency.<sup>102</sup> The parties waited more than five years for such a resolution. If a public access counselor was available in Missouri to intervene, an opinion could have been issued within weeks to resolve the dispute. Without such an office, members of the public and media are forced to court when they believe a government agency is violating Sunshine laws.

Other states have established a wide-ranging framework to develop such an office and provide the assistance citizens deserve to help government function as it was intended. Missouri is shortchanging its citizens by failing to offer such support in this area of the law.

After consideration of all of the above plans, the authors believe that the plans of two states offer the best guidance to Missouri in adopting a similar system for handling open meeting/open record issues. Elements of both the Minnesota plan and the Indiana plan should be combined to create an ideal plan for

Missouri. While the office needs autonomy, it should not operate independent of all other government entities, but would fit best within the office of the secretary of state. The office should be led by a public records counsel selected by a committee made up of one member named by the Missouri Senate, one member named by the Missouri House of Representatives, one member appointed by the Missouri Broadcasters' Association, one member appointed by the Missouri Press Association, and two citizens appointed by the governor of the State of Missouri. Funds for the salaries would come from the secretary of state's technology trust fund account, or other general appropriation from the legislature. The public records counsel would be permitted to give written opinions on questions of right of access under a set time frame established by statute, which allows for input from both sides of the dispute, and would have the right to issue administrative subpoenas for records needed for the matter. While such opinions would not be binding on the public governmental body, it would be given deference by a court of law in a subsequent

proceeding. A public governmental body acting in conformity with such a written opinion would not be held liable for payment of civil fines or attorney fees if later found in violation of the open meetings/open records law. And the opinions of the state attorney general would take precedence over an opinion by the public records counsel.

Such a plan would clearly require some state funding, which represents a challenge in tight budget times. But among the biggest benefits of such a plan would be that the selection process for the counsel would be removed from a purely political process, such as that which is present when the director of the office is selected by a sitting governor or other political leader. By housing it in the secretary of state's office, it would avoid much of the conflict that arises when it is housed with the state attorney general, who has the duty to represent all state agencies in such disputes.

<sup>102</sup> *Kansas City Star Co. v. Curators of the University of Missouri*, No. 98CCo78044 (Mo. Cir. Ct., Boone County) (April 1, 2003) available at <http://web.missouri.edu/~foiwww/starsuit798.pdf>.



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