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Freedom of Information: State-by-State Evaluation of Alternative Dispute Resolution Processes

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Executive Summary

While all 50 states have laws concerning open records and open meetings, the states provide different processes for challenging violations under those laws. In many states, litigation is the only option available when a government agency wrongly denies a records request or improperly bars access to a public meeting. In these states, the cost and delay of dealing with the court system frustrates meaningful access to information.¹ States with alternative dispute resolution (ADR) processes for freedom-of-information (FOI) appeals increase the effectiveness of their sunshine laws by holding violators accountable.

Effective ADR Processes

States have pursued various measures to reduce the burden on FOI requesters and deliver a more efficient and effective process for handling disputes. Some states give the attorney general specific responsibilities pertaining to freedom of information. In these states, the attorney general's involvement in FOI disputes typically is discretionary and, therefore, fluctuates with the ideology and predilection of the sitting attorney general. Other states allocate the responsibility of handling FOI disputes to specially created government entities, such as an ombudsman or an administrative office.

¹ 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, 997. [hereinafter *Danielson*]

The primary purpose of FOI is to weave transparency into the workings of government so that the public has access to information necessary for participating in the democratic process.² Creating an ADR procedure to handle FOI disputes prior to litigation can serve this purpose by providing a quick, cost-effective alternative for records requesters and those who challenge closed-door meetings. Doing so also may ease the burden on the judiciary and government bodies subject to FOI laws.³ At least 25 states (and soon Ohio⁴) have some sort of appeals process in place as an alternative to immediate litigation. Though the process in each state is unique, all successful ADR processes share certain characteristics. To be successful, an entity entrusted with an FOI ADR process should have independence, neutrality, enforcement capabilities and a progressive approach.

Independence

In order to provide an effective appeals process, the body carrying out the process must have independence from government agencies subject to FOI laws. States can achieve this independence by placing the FOI body in a place in the government hierarchy that does not report to the executive branch. For instance, Arizona placed its Ombudsman-Citizens' Aide office in the legislative branch and Tennessee placed its Office of Open Records Counsel in the Comptroller of the Treasury to insulate them from corrupting influences.

Another way to ensure independence is by preventing the executive branch from terminating FOI appointees without just cause. In Hawaii, the governor can fire the director of the Office of Information Practices, who is an at-will employee, eroding the independence of the office. In an important Pennsylvania case, the Commonwealth Court found that the governor did not have the power to remove Office of Open Records appointees at-will under the Right to Know Act. Organizing an independent office or position to administer appeals increases the public's confidence in the integrity of the process.

Neutrality

Some states seek neutrality – another important element of success – by incorporating a diverse set of stakeholders in the decision-making process. The Iowa Public Information Board has representation from the news media and local government.⁵ Its membership also is balanced with respect to political

² Mitchell W. Pearlman, "Piercing the Veil of Secrecy: Lessons in the Fight for Freedom of Information," 30 (2010).

³ Danielson, *supra* note 1, at 1032.

⁴ Dennis Hetzel, Ohio Coalition for Open Government, "Open Government Report," Summer 2016.

⁵ Public Information Board website, <https://www.ipib.iowa.gov/about-ipib>. "About IPIB," Iowa

party and gender.⁶ Utah makes sure the seven members of its State Records Committee represent different constituencies, including government, media and the general public.⁷ The Connecticut Freedom of Information Commission takes the additional neutrality-protecting step of ensuring that multiple people in government are responsible for appointing members.⁸ Maintaining neutrality avoids alienating significant stakeholders.

Enforcement Capabilities

An oft-cited criticism of alternative FOI appeals processes is that the body administering the appeal does not have the authority to enforce its decisions or opinions. The Connecticut Freedom of Information Commission, widely regarded as one of the strongest state open-records administrative agencies, has the authority to hear disputes, issue binding opinions and impose penalties on non-complying agencies. The more recently created Iowa Public Information Board also has the power to issue subpoenas, issue orders with the force of law, require compliance with Iowa's Freedom of Information Act, impose appropriate remedies and represent itself in judicial proceedings to enforce or defend its orders.⁹

State judiciaries that give deference to the findings of an alternative appeals process also help to provide legitimacy and public confidence in an ADR method. For example, records requesters are more likely to use services provided by the Indiana Public Access Counselor because, if they do not, they will forfeit an award of attorney's fees in any subsequent litigation.¹⁰ When Illinois overhauled its FOI laws in 2009, the Public Access Counselor was given the ability to issue binding opinions after investigating a dispute.¹¹ Administrative bodies that can enforce an alternative ADR process provide the public leverage to ensure that FOI laws are upheld.

Progressive Approach

Governments run on limited budgets and understandably are apprehensive about allocating resources to a new administrative body charged with carrying out FOI. However, appeals processes that apply a progressive, flexible approach to dispute resolution can end up saving a state time and money by reducing the burden on the judiciary and government agencies subject to FOI laws. A progressive

⁶ *Id.*

⁷ UTAH CODE ANN. § 63G-2-501(1).

⁸ CONN. GEN. STAT. § 1-205(a).

⁹ IOWA CODE ANN. § 23.6.

¹⁰ IND. CODE § 5-14-4-10 (2012).

¹¹ 5 ILCS 140/9.5.

approach is one that applies a sliding scale of dispute resolution methods to different types of FOI disputes. Many states have a system in place to provide FOI explanations, guidelines and assistance to government bodies and the public. The state of Washington's Open Government Ombudsman helps public agencies and citizens comply with the Public Disclosure Act¹² and the Open Public Meetings Act.¹³ Some states provide mediation to efficiently resolve FOI disputes. The Florida Attorney General has supported the state's Open Government Mediation Program, citing "the saving of tax dollars that may otherwise have been used to pay extensive legal fees and costs."¹⁴ Only after informal processes fail to resolve a dispute should a state proceed with a more costly formal investigation.

Arizona

In 2006, the Arizona legislature created a public records access role within the Arizona Ombudsman-Citizens' Aide office.¹⁵ The office is intended to be a neutral resource for both citizens and government officials. It sits in the legislative branch and has the authority to investigate any government bodies other than the judiciary and state universities.¹⁶ Providing a structural buffer between the Ombudsman-Citizens' Aide office and the executive branch gives the office the independence to challenge government agencies without being beholden to them for future resources. The statute creating the public access duties added two assistant ombudsmen to the office, one of whom must be an attorney.¹⁷ The head of the ombudsman's office is appointed to a five-year term and has control over staffing and resource decisions within the office.¹⁸

The Ombudsman-Citizens' Aide office takes complaints related to public records and open meetings. Another group in the attorney general's office, the Open Meeting Law Enforcement Team (OMLET), handles questions and conducts investigations and enforcement proceedings related to alleged violations of the Open Meeting Law.¹⁹ The ombudsman's office often refers severe complaints to OMLET for enforcement.²⁰

¹² WASH. REV. CODE ANN. § 42.56 *et seq.*

¹³ WASH. REV. CODE ANN. § 42.30 *et seq.*

¹⁴ Daxton R. Stewart, "Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems," *J. 1 Media L. & Ethics* 49, 85 (2009).

¹⁵ Daxton R. Stewart, "Evaluating Public Access Ombuds Programs: An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising under Open Government Laws," *2 J. Dispute Resolution* 437, 468 (2012). [hereinafter *Stewart*].

¹⁶ ARIZ. REV. STAT. ANN. § 41-1371(2).

¹⁷ *Id.* § 41-1376.01(A) (2008).

¹⁸ ARIZ. REV. STAT. ANN. § 41-1375 (2008).

¹⁹ Arizona Attorney General, "Open Meeting Law," <https://www.azag.gov/sgo>.

²⁰ Stewart, *supra* note 4, at 480.

ADR Process: The ombudsman office has three approaches to resolving public access disputes: coaching, informal assistance and investigation.²¹ In most cases, the office guides the party requesting assistance through the dispute process. But sometimes coaching alone is not sufficient to resolve a dispute. Here, the office can provide informal assistance, usually by getting in touch with the relevant government agency. If coaching and informal assistance fail to resolve a dispute, the ombudsman has discretion to pursue a more formal investigation, which can involve holding hearings.²² Every member of the ombudsman office undergoes mediation training and applies these skills to the dispute resolution process.²³

Remedies and Appeals: The Ombudsman-Citizens' Aide office does not have the power to write legally binding opinions. Therefore, a government agency can ignore the recommendations of the office and a citizen or member of the news media will need to litigate the complaint.

Results and Perceived Success: The 2015 State Integrity Investigation (coordinated by the Washington, D.C.-based Center for Public Integrity) gave Arizona an F for public access to information partly because the ombudsman merely serves as a liaison between a requester and the government agency and doesn't have real authority.²⁴ Therefore, appeals still need to go through the superior court system.

In 2014, the Ombudsman-Citizens' Aide office reported receiving 349 calls,²⁵ 243 related to public records and 106 open meetings.²⁶ There were 137 inquiries from the public, 14 from media and 98 from government agencies.²⁷

For a case study on FOI ADR methods, Daxton Stewart interviewed several people influential in developing the public records function within the Ombudsman-Citizens' Aide office.²⁸ Before finally settling on the ombudsman office, supporters considered placing it in the State Library, Archives and

²¹ Arizona Ombudsman-Citizens' Aide, "2014 Ombudsman Semi-Annual Report," 1 (2014), <http://www.azoca.gov/documents/2014-semiannual-report.pdf>.

²² ARIZ. REV. STAT. ANN. § 41-1376.01(C).

²³ Stewart, *supra* note 4, at 476.

²⁴ "Arizona – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18332/arizona-gets-d-grade-2015-state-integrity-investigation>.

²⁵ *Id.* at 18.

²⁶ *Id.* at 19.

²⁷ *Id.*

²⁸ See Stewart, *supra* note 1.

Public Records division, and in the attorney general's office.²⁹ Some were concerned that placing the public access function under the attorney general, who represents state agencies, would compromise its independence.³⁰

Stewart's study also commented on the success of the attorney appointed to handle public access disputes in the ombudsman office. Both governments and citizens said the attorney was helpful in providing informal assistance. One criticism was that mediation provided by the office tended to aim solely for a middle ground, which can be problematic and unsatisfying for news media in many cases.³¹ Many critics feel the public access ombudsman has been a more helpful resource for citizens and government agencies than for the news media that lobbied for its existence.³²

Others are not convinced that having a public access function in the ombudsman's office has had an effect on the amount of litigation. The primary criticism is the ombudsman's lack of enforcement power and an inability to write legally binding opinions.³³

| Pluses | Minuses |
|--|--|
| Sits within the legislative branch, allowing for independence and impartiality | Unsuccessful in resolving news media disputes that require short deadlines |
| Three-pronged approach allows many disputes to be resolved informally | Lack of enforcement power |
| Successful in establishing cooperative environment between citizens and government | |

Arkansas

Since the Arkansas Freedom of Information Act's passage in 1967, the attorney general has played a role in defending it.³⁴ The attorney general has the authority to issue legal opinions on certain matters of state law to the governor, executive department heads, legislators, prosecuting attorneys and other state officials.³⁵ Public officials may ask the attorney general questions about FOIA. The written opinions are not binding but may possess persuasive value.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 477.

³² *Id.*

³³ Stewart, *supra* note 1, at 484.

³⁴ Arkansas Attorney General, FOIA, <http://arkansasag.gov/media-center/foia>.

³⁵ ARK. Code Ann. § 25-16-706.

ADR Process: The attorney general has a specific role, which is to review custodians’ decisions concerning the release of “personnel records” or “employee evaluation or job performance records” that a records custodian has identified as responsive to a request.³⁶ The custodian, requester or the subject of the records may ask the attorney general to issue an opinion on whether the records can be disclosed. In such cases, the records cannot be disclosed until the attorney general has issued an opinion, which is required within three working days of a request.

Remedies and Appeals: A records requester denied rights under the Arkansas Freedom of Information Act may seek judicial review of a custodian’s decision or an attorney general’s decision in Pulaski County Circuit Court or in the circuit court of the residence of the aggrieved party.³⁷

Results and Perceived Success: The Arkansas attorney general has very limited authority compared with other states’ attorneys general who get involved in FOI disputes. Unless the records concern personnel or employee evaluations, a records requester must take any disputes straight to court, which can be costly and time consuming. In “Arkansas Freedom of Information Act: A Treatise on FOIA Practice,” the authors write that a citizen’s only real chance of winning a FOI complaint against a state agency is hiring an attorney and bringing the case to court.³⁸

| Plusses | Minuses |
|--|--------------------------|
| Attorney general can provide some guidance | Not really an ADR method |

Connecticut

Connecticut’s Freedom of Information Act³⁹ (CFOIA) established the nine-member Connecticut Freedom of Information Commission (CFOIC), which covers access to government records and public meetings.⁴⁰ The governor appoints five members upon consent of either house of the state legislature.⁴¹ One member is appointed by the president pro tempore of the Senate, one by the minority leader of the

³⁶ ARK. CODE ANN. § 25-19-105.

³⁷ *Id.* § 25-19-107; ARK. CODE ANN. § 25-19-105.

³⁸ John J. Watkins & Richard J. Peltz-Steele, “The Arkansas Freedom of Information Act,” Arkansas Law Press (Oct. 28, 2009).

³⁹ CONN. GEN. STAT § 1-200.

⁴⁰ CONN. GEN. STAT § 1-205 and 1-206.

⁴¹ *Id.*

Senate, one by the House speaker and one by the House minority leader.⁴² No more than five members can be from the same political party.⁴³ The commissioners serve four-year staggered terms.⁴⁴

ADR Process: The commission provides an appeals process outside of the courts, and its decisions have the force of law.⁴⁵ The CFOIA authorizes the commission to take complaints from any person who has been denied access to records or meetings of public agencies.⁴⁶ The person denied access may file a complaint against the public agency within 30 days of the denial. Upon receiving a timely complaint, the CFOIC conducts hearings attended by the complainant and the public agency. Often, a hearing is unnecessary because the parties are able to resolve the dispute with the assistance of a CFOIC staff attorney, acting as an ombudsman.

Remedies and Appeals: A hearing may either find a public agency in violation of the CFOIA or the complaint will be dismissed. If the CFOIC finds that a public agency violated the CFOIA, it can order the disclosure of public records, nullify a decision made during a public meeting or impose other appropriate relief.

Results and Perceived Success: Seventy-two percent of all cases brought in 2012 were resolved through mediation.⁴⁷ The CFOIC bears the cost and effort of litigating an appeal, increasing the accessibility of this dispute resolution mechanism to the entire population of Connecticut.

In 2013, the governor created the Office of Governmental Accountability, combining administrative functions at several state offices, including the FOI commission.⁴⁸ This move shrank the CFOIC's budget and staff, and critics feared it would reduce the CFOIC's independence. The 2015 State Integrity Investigation validated these fears when it lowered Connecticut's previously high score for public access to information.⁴⁹ The report noted that the CFOIC previously was able to resolve FOI complaints in as

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Viktoria Sundqvist, "Sunshine Week: Q&A with the Connecticut FOI Commission," The MiddleTown Press (March 16, 2014), www.middletownpress.com/general-news/20140316/sunshine-week-qa-with-the-connecticut-foi-commission. [Hereinafter Sundqvist]

⁴⁶ The Connecticut Freedom of Information Commission Website, *available at*: www.ct.gov/foi/cwp/view.asp?a=3171&q=488272.

⁴⁷ *Supra* Sundqvist, at n. 3.

⁴⁸ Mark Pasniokas, "Howls as Malloy tries to shorten leash on watchdogs," CT Mirror (Feb. 12, 2013), ctmirror.org/2013/02/12/howls-malloy-tries-shorten-leash-watchdogs/.

⁴⁹ "Connecticut – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18352/connecticut-gets-c-grade-2015-state-integrity-investigation>.

little as 10 weeks. Staff shortages in 2014 and 2015 increased that time to as much as a year. The appeals process took a year in one case; by the time the issue was resolved the information had been legally deleted.⁵⁰

The New York Committee on Open Government expressed doubts that Connecticut’s model could be reproduced in a larger state. A 2007 report noted: “Connecticut is one-tenth the size of New York, and our population is more than five times as great. The staff of the Committee on Open Government in New York is four; Connecticut’s FOI Commission has 20 employees. The cost of implementing a similar program in New York, with an independent agency having the power to enforce the law, would be many millions of dollars.”⁵¹

| Plusses | Minuses |
|---|--|
| Accessible and affordable dispute resolution | Expensive program for the state to run |
| Timely dispute resolution | Budget cuts have hampered the commission’s effectiveness |
| Resolution of disputes without litigation saves the state money | |

Florida

In Florida, the Office of the Attorney General administers a formal mediation program.⁵² State law calls for the attorney general to employ one or more mediators charged with resolving public records disputes. In addition, Florida created an Office of Open Government that provides complementary services, including spreading information and awareness of sunshine laws.⁵³

ADR Process: The goal of the program is to “provide an informal process that allows a citizen and a governmental agency to resolve a public access controversy without having to resort to expensive and time-consuming litigation.”⁵⁴ When an agency denies a request, or takes an unreasonably long time to respond, the requester has three options for seeking to have the denial reviewed: File a complaint with

⁵⁰ *Id.*

⁵¹ New York Committee on Open Government, *Report to the Governor and State Legislature 2007*, available at <http://www.dos.state.ny.us/coog/2007report.htm>.

⁵² FLA. STAT § 16.60.

⁵³ Office of the Governor of the State of Florida, *Executive Order No. 07-01* (Jan. 2, 2007), available at <http://www.flgov.com/pdfs/orders/07-01-outline.pdf>.

⁵⁴ <http://myfloridalegal.com/pages.nsf/main/d99b17eb63c2f12085256cc7000be171!opendocument>

the local state attorney, who is empowered to prosecute suits in violation of the Public Records Act; file a writ of mandamus in court to challenge the agency's denial of the request and enforce compliance;⁵⁵ or seek mediation through the attorney general's Open Government Mediation Program.

Remedies and Appeal: The program is voluntary and both parties must consent to the mediation. In 2005, the attorney general mediated 124 cases and resolved 99.⁵⁶ The attorney general has made timeliness of review a priority and attempts to resolve disputes within three weeks.⁵⁷

Results and Perceived Success: Florida's mediation program has received mixed reviews. A perceived strength is the passion of those running the program. Special Counsel Pat Gleason, who has overseen the attorney general's open-government mediation program for many years, has received positive reviews for her work.⁵⁸ Gleason takes a personal approach, typically calling public officials herself to make sure that laws are followed, and has been effective in resolving numerous disputes.⁵⁹

Critics say mandatory mediation would make the program more effective.⁶⁰ Because it is voluntary, many government agencies choose not to participate. In the 2015 State Integrity report, Gleason observed that unresolved cases typically result when the government agency refuses mediation, forcing the requester to go through the court system if they want to resolve the dispute.⁶¹

The Florida attorney general has supported the state's Open Government Mediation Program, citing "the saving of tax dollars that may otherwise have been used to pay extensive legal fees and costs."⁶²

| Plusses | Minuses |
|---|---|
| When mediation is pursued, cases typically are resolved quickly | Voluntary program means many agencies can opt out |
| Resolution of disputes without litigation saves the state money | |

⁵⁵ www.dmlp.org/legal-guide/access-public-records-florida

⁵⁶ 2005 Year in Review, 22, [http://www.myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/\\$file/2005YIR.pdf](http://www.myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/$file/2005YIR.pdf)

⁵⁷ Office of Attorney General Charlie Crist, *2005 Year in Review*, 22-23 (May 2006), available at [http://www.myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/\\$file/2005YIR.pdf](http://www.myfloridalegal.com/webfiles.nsf/WF/MRAY-6SNRSU/$file/2005YIR.pdf).

⁵⁸ Email from Thomas Julin.

⁵⁹ Pat Gleason, *Mediation Program Resolves Access Disputes, The Brechner Report (March 2000)*, available at <http://www.brechner.org/reports/2000/03mar2000.pdf>.

⁶⁰ http://articles.sun-sentinel.com/2013-03-10/news/fl-florida-public-records-0305-20130310_1_public-records-sky-high-fees-open-government-mediation-program; <http://www.spjflorida.com/2013/04/april-shine-on/>

⁶¹ "Florida – Public Access to Information," 2015 State Integrity Investigation, available at: <https://www.publicintegrity.org/2015/11/09/18362/florida-gets-d-grade-2015-state-integrity-investigation>.

⁶² Daxton R. Stewart, "Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems," *J. 1 Media L. & Ethics* 49, 85 (2009).

Georgia

Since 1997, Georgia's attorney general has been empowered to help citizens and government agencies mediate public records and open meetings disputes without resorting to litigation.⁶³ The mediation program also helps citizens with questions related to government meetings or records.

ADR Process: When the attorney general's office receives a complaint from a citizen, it works with local governments to educate them about the law and resolve the issue. If a local government refuses to comply with Georgia's sunshine laws, the attorney general is authorized to bring both civil and criminal actions to enforce compliance.⁶⁴

Remedies and Appeals: The attorney general's office commences actions in the superior courts and, therefore, has access to the same menu of remedies and appeals as any citizen bringing an action in the same court.⁶⁵ If an agency acted without substantial justification in not complying, the complaining party can recover reasonable attorney's fees and other litigation costs.

Results and Perceived Success: In a 2012 interview, Assistant Attorney General Stefan Ritter said the attorney general's office mediates about 500 disputes per year, but the effort is not specifically funded or legally mandated.⁶⁶ In these mediations the government's goal is to obtain compliance, rather than punish, which incentivizes local governments to defy the law or delay handing over information.⁶⁷

A 2011 article noted that since the attorney general's office began mediating cases in 1998, the state had not criminally prosecuted any open records or open meetings complaints.⁶⁸ Most of the cases were resolved after attorneys explained the law, resulting in the agency handing over the records.⁶⁹ However, in several cases where the office found probable violations it declined to pursue the matter in court and

⁶³ Attorney General of Georgia, "Open government Mediation Program," <http://law.ga.gov/open-government-mediation-program>.

⁶⁴ O.C.G.A. § 50-14-5(a).

⁶⁵ *Id.*

⁶⁶ Jim Gaines, "A look at Open Government in Macon, Georgia," Sunlight Foundation (Sept. 28, 2012), <https://sunlightfoundation.com/blog/2012/09/28/a-look-at-open-government-in-macon-georgia/>.

⁶⁷ *Id.*

⁶⁸ Greg Bluestein, "Georgia not prosecuting sunshine law cases," Online Athens (Mar. 13, 2011), http://onlineathens.com/stories/031311/new_798776529.shtml#.VU5Z_PIViko.

⁶⁹ *Id.*

instead advised the complainant to hire independent counsel.⁷⁰ Defending this finding, the assistant attorney general noted that his office does not have the resources to pursue these cases.⁷¹

| Plusses | Minuses |
|---|--|
| Provides a resource to help citizens with public-records disputes | Lack of enforcement resources |
| | Individuals may still need to hire independent counsel |

Hawaii

In Hawaii, the Uniform Information Practices Act (UIPA) created the Office of Information Practices (OIP), which resides in the lieutenant governor's office.⁷² The governor has sole discretion to appoint the OIP director,⁷³ who essentially is an at-will employee with no set term length. The director has the power to staff the OIP within budget constraints set forth by the legislature. In fiscal year 2014, the OIP operated on a budget of \$539,757, although this number typically is closer to about \$400,000 annually.⁷⁴ The OIP has 8.5 full-time equivalent staff positions.⁷⁵

ADR Process: An objective of the OIP is to "provide an informal dispute resolution process as an alternative to court actions filed under the UIPA and Sunshine Law, and resolve appeals arising from the Department of Taxation's decisions concerning the disclosure of the text of written opinions."⁷⁶ The OIP also offers a unique "attorney-of-the-day" service, which advises members of the public and government agencies on UIPA and Sunshine Law matters.⁷⁷

Remedies and Appeal: The OIP has the power to order agency compliance with UIPA and the Sunshine Law and to review agency denials of access to information.⁷⁸ In 2009, Hawaii's courts allowed an agency

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Haw. Rev. Stat. Chapter 92F.

⁷³ Haw. Rev. Stat. § 92F-41.

⁷⁴ Office of Information Practices, *Annual Report 2014 11*, available at <http://oip.hawaii.gov/wp-content/uploads/2013/04/ANNUAL-REPORT-2014-FINAL.pdf>.

⁷⁵ *Id.*

⁷⁶ Office of Information Practices, *Annual Report 2014 11*, available at <http://oip.hawaii.gov/wp-content/uploads/2013/04/ANNUAL-REPORT-2014-FINAL.pdf>.

⁷⁷ State of Hawaii, Office of Information Practices Website, <http://oip.hawaii.gov>.

⁷⁸ Haw. Rev. Stat. § 92F-15(a).

to challenge an OIP decision.⁷⁹ This ruling was important at the time because it eroded OIP's authority as the last word for determining whether an agency should release records; OIP issued only "advisory" opinions for three years following the court decision.⁸⁰ In 2012, the legislature enacted a new law and administrative rules governing OIP appeals.⁸¹ The new law requires courts to defer to OIP's UIPA decisions requiring disclosure of records unless the factual and legal determinations are found to be "palpably erroneous."⁸² The Hawaii legislature created the rules to ensure that the OIP's informal dispute-resolution process would remain a low-cost, simple and timely alternative to lawsuits filed in courts.⁸³

Results and Perceived Success: The 2015 State Integrity Investigation lauded Hawaii for offering a cost-free FOI appeals mechanism, but observed that the timeliness of the process has deteriorated in recent years due to decreased resources and budget cuts.⁸⁴ Most of the criticisms of Hawaii's FOI function focus on government agencies' lack of cooperation.⁸⁵ The main complaints about the alternative dispute system discuss the OIP's limited authority between 2009 and 2013.⁸⁶

While the OIP strongly advocates for a fair interpretation of Hawaii's UIPA and Sunshine Law, the agency struggles to reduce its backlog of cases.⁸⁷ The backlog has grown worse as OIP's responsibilities have increased and its budget has decreased.⁸⁸ OIP's annual report noted that "a disproportionately large number" of cases come from small groups of repeat requesters.⁸⁹ To tackle its backlog, OIP plans to

⁷⁹ Cnty. Of Kaua'i v. Office of Info. Practices, 120 Haw. 34, 43-44, 20 P.3d 403, 412-13 (App. 2009).

⁸⁰ Cheryl Kakazu Park & Jennifer Z. Brooks, "2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices," 36 U. HAW. L. REV. 271, 273 (2014), *available at*: <http://oip.hawaii.gov/wp-content/uploads/2014/04/Park-Brooks-law-review-article-winter-2014.pdf>.

⁸¹ HAW REV. STAT. §§ 92 to 92F (2012).

⁸² HAW REV. STAT. § 92F-43(c) (2012).

⁸³ STATE OF HAWAII OFFICE OF INFO. PRACTICES, IMPACT STATEMENT FOR PROPOSED RULES OF THE OFFICE OF INFORMATION PRACTICES ON ADMINISTRATIVE APPEALS PROCEDURES (2012), <http://files.hawaii.gov/oip/Appeals%20Rules%20Impact%20Statement.pdf>.

⁸⁴ "Hawaii – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18372/hawaii-gets-d-grade-2015-state-integrity-investigation>.

⁸⁵ Nanea Kalani, "Hawaii's Open Records Law Applies to You, Too, Honolulu," Honolulu Civil Beat (Sept. 20, 2010), <http://www.civilbeat.com/posts/2010/09/16/4578-hawaiis-open-records-law-applies-to-you-too-honolulu/>.

⁸⁶ Michael Levine, "New OIP Chief: Fighting Gov for Judge List 'Futile'," Honolulu Civil Beat (May 13, 2011), <http://www.civilbeat.com/posts/2011/05/13/10942-new-oip-chief-fighting-gov-for-judge-list-futile/>.

⁸⁷ Nathan Eagle, "Prying Public Records from Government's Grip: An Exercise in Patience," Honolulu Civil Beat (Dec. 15, 2014), <http://www.civilbeat.com/2014/12/prying-public-records-from-governments-grip-an-exercise-in-patience/>.

⁸⁸ Nathan Eagle, "Hawaii Public Records Agency Continues to Struggle with Slim Budget," Honolulu Civil Beat (Jan. 6, 2015), <http://www.civilbeat.com/2015/01/hawaii-public-records-agency-continues-to-struggle-with-slim-budget/>.

⁸⁹ "State of Hawaii Annual Report 2014," Office of Information Practices 8 (Apr. 2015), <http://oip.hawaii.gov/wp-content/uploads/2015/03/ANNUAL-REPORT-2014-revised-April-2015.pdf>.

prioritize cases not tied to litigation and those filed by the top three requester groups, and resolve remaining cases as resources permit.⁹⁰

Some critics are concerned about the impartiality of the OIP's director, who is a political appointee of the governor.⁹¹

| Plusses | Minuses |
|--|---|
| OIP provides clear rules, rights and obligations with respect to open records disputes | OIP lacks resources to promptly respond to all disputes |
| Resolution of disputes without litigation saves the state money | OIP director is an at-will employee with no set term length |

Illinois

In December 2004, Illinois created the Public Access and Opinions Division of the Office of the Attorney General. The division is led by the Public Access Counselor (PAC), appointed by the attorney general.

ADR Process: If a public body denies a non-commercial records request, the requester may ask the PAC to review the case within 60 days after the date of the final denial.⁹² The request must be signed by the requester and include a copy of the initial records request and any responses from the public body.⁹³ If the PAC determines that an alleged violation is unfounded, no further action will occur.⁹⁴ Otherwise, the PAC will forward a copy of the request to the public body within seven business days.⁹⁵ If the public body does not cooperate with the PAC, the attorney general can issue a subpoena to gather additional information.⁹⁶

Appeals and Remedies: The attorney general has discretion to make findings of fact and conclusions of law and issue binding opinions, subject to administrative review.⁹⁷ Upon receiving a binding opinion, a public body can comply or initiate administrative review. A binding opinion ensures the attorney

⁹⁰ *Id.*

⁹¹ Michael Levine, "Abercrombie Fires Head of Open Records Agency," Honolulu Civil Beat (Mar. 4, 2011), <http://www.civilbeat.com/2011/03/9420-abercrombie-fires-head-of-open-records-agency/>.

⁹² 5 ILCS 140/9.5.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

general's office involvement in any future legal action for non-compliant public bodies.⁹⁸ As of 2014, no binding opinion had been challenged in court.⁹⁹

The attorney general also can opt for mediation. The decision not to pursue a binding opinion is non-reviewable. The attorney general may issue advisory opinions.

Results and Perceived Success: The PAC received more than 4,000 requests for assistance in 2014¹⁰⁰ and issued 16 binding opinions.¹⁰¹ The 2015 State Integrity Investigation found that 1 percent of complaints resulted in a binding opinion and these opinions usually took two to three months to author.¹⁰² About 3,700 requests involved the Freedom of Information law and about 300 involved the Open Meetings Act. Members of the public made 3,400 requests, media outlets and other organizations made almost 600 and public bodies made about 40.

The PAC was granted the authority to issue binding administrative decisions in a 2010 overhaul of Illinois' sunshine laws. Binding opinions are rare because they require extended legal research.¹⁰³ In addition to the binding opinions, the PAC has mediated thousands of public records disputes.

Critics say the current attorney general's office has been reluctant to use its authority and does not respond to requests in a timely manner.¹⁰⁴

| Plusses | Minuses |
|---|--|
| Ability to issue binding opinions or pursue mediation | Opinions are not always timely |
| | Attorney general is reluctant to use authority |

⁹⁸ Jeff Bolek, "Griffin: Carpentersville is 'violating' state law, Attorney General says," Daily Herald (Oct. 29, 2014), <http://www.dailyherald.com/article/20141029/news/141028170/>.

⁹⁹ *Id.*

¹⁰⁰ Office of the Attorney General, State of Illinois, "Public Access Counselor Annual Report: An Overview of 2014," 1 (2014), http://foia.ilattorneygeneral.net/pdf/2015_PAC_Annual_Report.pdf.

¹⁰¹ *Id.* at 6.

¹⁰² "Illinois – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18382/illinois-gets-d-grade-2015-state-integrity-investigation>.

¹⁰³ Jeff Bolek, "Griffin: Carpentersville is 'violating' state law, Attorney General says," Daily Herald (Oct. 29, 2014), <http://www.dailyherald.com/article/20141029/news/141028170/>.

¹⁰⁴ "AG Lisa Madigan rendering FOIA Law Useless," Edgar County Watchdogs (Apr. 28, 2015), <http://www.edgarcountywatchdogs.com/2015/04/ag-lisa-madigan-rendering-foia-law-useless/>.

Indiana

In 1999, the Indiana General Assembly created the Office of the Indiana Public Access Counselor.¹⁰⁵ The governor appoints the counselor to a four-year term and can remove the counselor from office for cause.¹⁰⁶

ADR Process: The Public Access Counselor has the power to respond to informal requests from the public and public agencies.¹⁰⁷ Complaints may be filed with the counselor within 30 days of a denial of access to public records.¹⁰⁸ After the Public Access Counselor receives a complaint, a copy is forwarded to the public agency involved in the dispute.¹⁰⁹ The counselor is required to issue an advisory opinion within 30 days of receiving the complaint.¹¹⁰

Under the statute, public bodies must cooperate with the Public Access Counselor in investigations or proceedings.¹¹¹ Obtaining the opinion of the Public Access Counselor is different from the enforcement process that occurs in the courts, but is required in order to collect attorney fees if litigation becomes necessary.¹¹²

Remedies and Appeals: There is no administrative appeals process under the Indiana FOI Act.¹¹³ Any adverse decision must be appealed to the Indiana Court of Appeals.¹¹⁴ A party can appeal directly to the Supreme Court under Rule 56 of the Rules of Appellate Procedure.¹¹⁵

Results and Perceived Success: A study of the Indiana Public Access Counselor's office found that more than 90 percent of users believe the PAC should have the authority to enforce Indiana's public records and open meetings laws.¹¹⁶ The survey included 120 people who filed complaints with the Public Access Counselor's Office. Sixty-eight percent rated their experiences with the office as "excellent" or "good,"

¹⁰⁵ IND. CODE 5-14-4.

¹⁰⁶ IND. CODE 5-14-4-6; See Harry Hammitt, "Mediation Without Litigation," *The FOI Reports* 9 (2007).

¹⁰⁷ *Id.*

¹⁰⁸ IND. CODE 5-14-3-9(i).

¹⁰⁹ IND. CODE 5-14-5-8.

¹¹⁰ IND. CODE 5-14-5-9.

¹¹¹ IND. CODE 5-14-5-5.

¹¹² IND. CODE 5-14-3-9(i).

¹¹³ Open Government Guide, "Access to Public Records and Meetings in Indiana," Reporters Committee for Freedom of the Press (2011), <http://www.rcfp.org/rcfp/orders/docs/ogg/IN.pdf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Yunjuan Luo & Anthony L. Fargo, "Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study," 3 (2007), <http://www.nfoic.org/sites/default/files/ICOG-IU-2008-Survey.pdf>.

with only 17.5 percent saying the experience was “poor.”¹¹⁷ Adding enforcement was the most common suggested improvement.¹¹⁸

The 2015 State Integrity Investigation interviewed Public Access Counselor Luke Britt, who said that judges frequently cite his decisions in court.¹¹⁹ The State Integrity Investigation gave Indiana high marks for resolving cases within a reasonable time period and at no cost.¹²⁰

In 2014, the Public Access Counselor reported receiving more than 3,000 requests, with 1,049 coming from the public, 271 from media and 1683 from government.¹²¹ The office also issued 302 written formal advisory opinions.¹²²

| Plusses | Minuses |
|---|---|
| Gives the public an option before resorting to litigation | Lacks real enforcement power |
| Well researched and written advisory opinions | Too many opportunities for public officials to delay compliance |
| | May need more resources and staff to be effective |

Iowa

Iowa has two government bodies that devote time and resources to resolving public access disputes, the Office of Citizens’ Aide/Ombudsman and the Iowa Public Information Board (IPIB).

Office of Citizens’ Aide/Ombudsman

In 2001, Iowa added a position to the Office of Citizens’ Aide/Ombudsman specifically tasked with the “special responsibilities of public records and open meetings issues.”¹²³ This position did not require additional legislation but is subject to existing rules established by the Iowa Citizens’ Aide Act.¹²⁴

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ “Indiana – Public Access to Information,” 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18387/indiana-gets-d-grade-2015-state-integrity-investigation>.

¹²⁰ *Id.*

¹²¹ “Annual Report of the Indiana Public Access Counselor,” 3 (2014), http://222.in.gov/pac/files/Annual_report_FY_2014.pdf.

¹²² *Id.* at 4.

¹²³ Robert Anderson, “Message from Iowa’s First Public Records Ombudsman,” Annual Report of the Iowa Citizens’ Aide/Ombudsman, OMBUDSMAN’S REPORT 2001 2 (2002), https://www.legis.iowa.gov/docs/CAO/Annual_Reports/2002/CAWPA001.PDF.

¹²⁴ IOWA CODE ANN. § 2c.23 (2009).

The Iowa Citizens' Aide Act created the position of Citizens' Aide, appointed by the Legislative Council and confirmed by the House and Senate.¹²⁵ The Citizens' Aide serves four-year terms.¹²⁶ In addition to the Citizens' Aide, the Office of Citizens' Aide/Ombudsman typically has a staff that includes a senior deputy ombudsman and up to 11 assistants.¹²⁷

ADR Process: The ombudsman office is an independent state agency to which citizens can bring complaints about government.¹²⁸ It facilitates communications between citizens and government and makes recommendations aimed at improving administrative practices and procedures. The office also has the power to investigate complaints about state and local government and can subpoena witnesses.¹²⁹ If action is required after an investigation, the office is supposed to make recommendations to an agency.¹³⁰ If disciplinary action is necessary, the office is required to "refer the matter to the appropriate authorities."¹³¹ Therefore, the office has no formal enforcement powers.

After the ombudsman receives a citizen complaint, the office first tries to resolve it quickly and informally by speaking with the relevant government agency.¹³² If that approach fails, the office may notify the agency that an investigation has been opened. This process can take anywhere from a month to a year.¹³³

Remedies and Appeal: Because the Office of Citizens' Aide/Ombudsman does not have enforcement powers, official remedies and appeals were only available through litigation in the court system until the creation of the Iowa Public Information Board in 2012.

Results and Perceived Success: While some people see the office's lack of enforcement power as a drawback, former ombudsman Bill Angrick sees this as an advantage because prevention is emphasized. In an interview with Daxton Stewart, Angrick said this "softer" approach allows the Office of Citizens' Aide/Ombudsman to resolve more cases more quickly than they could through either an adjudicative or

¹²⁵ *Id.* § 2c.3.

¹²⁶ *Id.* § 2c.5.

¹²⁷ State of Iowa Office of Ombudsman, "Annual Report 2014," 40 (2014), <https://www.legis.iowa.gov/docs/publications/CA/656885.pdf>.

¹²⁸ State of Iowa Office of Ombudsman website, <https://www.legis.iowa.gov/Ombudsman>.

¹²⁹ Iowa Code Ann. § 2c.9(4)-(5).

¹³⁰ c.16.

¹³¹ *Id.* § 2c.19.

¹³² Stewart, *Supra* at 452.

¹³³ *Id.*

administrative enforcement mechanism.¹³⁴ Angrick also stressed the importance of independence in the role of ombudsman.¹³⁵ Despite Angrick's philosophy, the majority of sources interviewed by Stewart cited enforcement as the most troublesome area of Iowa's public records and open meetings laws.¹³⁶

A growing caseload is another challenge.¹³⁷ A formal investigation by the office can take up to a year. This delay may deter journalists from going through the ombudsman's office when they are challenging records disputes.¹³⁸ Additionally, compliance with open government laws remains sporadic.¹³⁹

While the office strives for impartiality, many believe it is partial to advocacy for citizens' rights to records, at the expense of government bodies.¹⁴⁰ For this reason, many government officials distrust the ombudsman's office and bring their public records issues to attorneys rather than seeking assistance from the ombudsman's office.¹⁴¹

| Plusses | Minuses |
|---|--|
| Non-partisan, independent agency | Not a real ADR method |
| Active role in preventing disputes before they happen | Formal disputes still need to be litigated |
| | May be too partial to citizens |
| | A formal investigation by the office can take up to a year |

Iowa Public Information Board

In 2012, Iowa created the nine-member Iowa Public Information Board (IPIB) to provide a free, efficient way for Iowans to receive information and resolve public records disputes.¹⁴² Members of the board are appointed by the governor and confirmed by the Senate. Three members represent the media and not more than three represent cities, counties or other local governments.¹⁴³ Board membership is balanced

¹³⁴ *Id.* at 452.

¹³⁵ *Id.*

¹³⁶ *Id.* at 462.

¹³⁷ *Id.*

¹³⁸ *Id.* at 457.

¹³⁹ *Id.* at 458.

¹⁴⁰ *Id.* at 460.

¹⁴¹ *Id.*

¹⁴² IOWA CODE ANN. § 23 *et seq.*

¹⁴³ "About IPIB," Iowa Public Information Board website, <https://www.ipib.iowa.gov/about-ipib>.

based on political party and gender, and members serve staggered four-year terms.¹⁴⁴ The IPIB also employs an executive director, who is an attorney admitted to practice in Iowa.¹⁴⁵

ADR Process: The IPIB reviews allegations to determine whether a complaint has merit, is within the board’s jurisdiction, and appears legally sufficient.¹⁴⁶ Following this determination, the board either accepts the complaint and notifies the parties or dismisses it and notifies the complainant.¹⁴⁷

Once the IPIB accepts a complaint it has the power to stay any court actions.¹⁴⁸ The majority of complaints are settled informally, usually within 24 hours, by board attorneys who negotiate compromises to satisfy both parties.¹⁴⁹ If an informal resolution is not possible, the board will engage in a contested case proceeding.¹⁵⁰ Formal cases are assigned a presiding officer, but parties can request to use an administrative law judge at their own expense.¹⁵¹ If there is not a quorum of the board present at the reception of evidence, then the presiding officer shall make a proposed decision. If there is a quorum of the board present, then any decision will be a final decision.¹⁵²

Remedies and Appeal: Unlike many similar agencies in other states, the IPIB is empowered to enforce its decisions with legal action and civil penalties. The IPIB also has the power to issue subpoenas, issue orders with the force of law, require compliance with Iowa’s Freedom of Information Act, impose appropriate remedies, and represent itself in judicial proceedings to enforce or defend its orders.¹⁵³ Parties that opt to use an administrative law judge can seek an intra-agency appeal to exhaust their administrative remedies.¹⁵⁴ Proposed decisions by the presiding officer can be appealed to the board within 30 days. A final IPIB order is subject to judicial review.¹⁵⁵

¹⁴⁴ *Id.*

¹⁴⁵ IOWA CODE ANN. § 23.6.

¹⁴⁶ *Id.* § 23.8.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 23.5.

¹⁴⁹ Iowa Public Information Board, “Status Report As Required by Code Subsection 23.6(12),” 1 (Jan. 15, 2015), https://ipib.iowa.gov/sites/default/files/2015%20IPIB%20Annual%20Report%20_0.pdf.

¹⁵⁰ 497—2.2(84GA,ch1115) Investigations—board action, <https://ipib.iowa.gov/administrative-rules-and-procedures>.

¹⁵¹ 497—4.5(17A) Presiding officer, <https://ipib.iowa.gov/administrative-rules-and-procedures>.

¹⁵² 497—4.25(17A) Final decision. <https://ipib.iowa.gov/administrative-rules-and-procedures>.

¹⁵³ IOWA CODE ANN. § 23.6.

¹⁵⁴ 497—4.5(17A) Presiding officer, <https://ipib.iowa.gov/administrative-rules-and-procedures>.

¹⁵⁵ IPIB Monthly Column, (Mar. 15, 2015), <https://www.ipib.iowa.gov/node/306>.

Results and Perceived Success: In 2015, the IPIB reported taking on a caseload that far surpassed expectations for the agency, resolving 92 formal complaints and answering 788 informal inquiries the previous year.¹⁵⁶

The IPIB's creation is a main reason why the 2015 State Integrity Investigation ranked Iowa first for public access to information.¹⁵⁷ Some requests for information are outside the board's jurisdiction, which kept Iowa from obtaining a perfect score for the cost and time required to resolve requests.¹⁵⁸

While the IPIB has successfully resolved many cases, it is not without its critics. A main criticism is that the IPIB is more likely to side with government agencies,¹⁵⁹ which contrasts with the pro-citizen criticisms directed at the Office of Citizens' Aide/Ombudsman. Part of the pro-citizen, pro-government argument may depend on who is running the IPIB. The executive director has discretion to set the tone for how the board will operate. The rules allow the board to delegate acceptance or rejection of formal complaints to the executive director.¹⁶⁰

| Pluses | Minuses |
|---|---|
| Has power to order compliant behavior with respects to records requests | May be too pro-agency |
| Able to efficiently and cheaply resolve disputes | Has power, but some argue they don't use it |
| Agency focuses solely on public records disputes | |

Kentucky

The attorney general serves as an impartial tribunal, issuing legally binding decisions in disputes related to the open records and open meetings laws.¹⁶¹

ADR Process: A citizen can file an appeal with the attorney general's office if an agency denies a requester access to either records or meetings, fails to deliver a response to a request in three working

¹⁵⁶ *Id.*

¹⁵⁷ "Iowa – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18392/iowa-gets-d-grade-2015-state-integrity-investigation>.

¹⁵⁸ *Id.*

¹⁵⁹ Erin Jordan, "Iowa Public Information Board hasn't shown teeth, critics say," *The Gazette* (Mar. 16, 2015), <http://thegazette.com/subject/news/iowa-public-information-board-yet-to-show-teeth-critics-say-20150315>.

¹⁶⁰ *Id.*

¹⁶¹ State of Kentucky, Office of the Attorney General, Open Records & Open Meetings, <http://ag.ky.gov/civil/orom/Pages/default.aspx>; Office of the Attorney General, "Protecting Your Right to Know: The Kentucky Open Records and Open Meetings Act," <http://ag.ky.gov/civil/orom/Documents/ProtectingYourRightToKnow.pdf>.

days, or charges more than 10 cents per page for copies.¹⁶² After reviewing the appeal, the attorney general issues a decision in 20 business days or, in unusual cases, 50 business days.¹⁶³ The attorney general's decision will explain whether the agency violated the Open Records Act in denying the request.¹⁶⁴

Appeals and Remedies: Both the records requester and the public agency may appeal the attorney general's decision in the circuit court of the county where the agency has its principal place of business or where the record is maintained. The appeal must be filed within 30 days or the attorney general's decision will have the force and effect of law and can be enforced in circuit court. The attorney general's office itself does not have the authority to force an agency to release records or enforce the decision after it is issued.

A complaining party can have the attorney general review denials under the Open Meetings Act.¹⁶⁵ Attorney general decisions on open meetings matters can be appealed to circuit court.¹⁶⁶

Results and Perceived Success: The State Integrity Investigation complimented the attorney general for promptly responding to requests for appeals.¹⁶⁷ The Kentucky Center for Investigative Reporting also praised the attorney general for the accessibility of its process.¹⁶⁸

Some journalists, however, said the process becomes less timely and affordable when attorney general opinions are appealed to the circuit court.¹⁶⁹ At that point, court costs, time and attorney's fees circumvent any savings from the attorney general's initial decision.

| Plusses | Minuses |
|-------------------------------------|--|
| Resolves appeals in a timely manner | If a public agency appeals an attorney general decision then the process involves the courts |
| Appeals process is free to citizens | |

¹⁶² KRS § 61.880.

¹⁶³ Office of the Attorney General, "Protecting Your Right to Know: The Kentucky Open Records and Open Meetings Act," <http://ag.ky.gov/civil/orom/Documents/ProtectingYourRightToKnow.pdf>.

¹⁶⁴ *Id.*

¹⁶⁵ KRS § 61.846.

¹⁶⁶ KRS § 61.848.

¹⁶⁷ "Kentucky – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18402/kentucky-gets-d-grade-2015-state-integrity-investigation>.

¹⁶⁸ Kristina Goetz, "Appeal to Attorney General Legal Opinion is a Free Option for Journalists in Some States," 18 IRE Journal.

¹⁶⁹ State Integrity Investigation, Kentucky – Public Access to Information, http://www.stateintegrity.org/kentucky_survey_public_access_to_information (interview with Tom Loftus, veteran state house reporter for the Louisville Courier-Journal).

Maryland

In 1991, the General Assembly established the Maryland Open Meetings Compliance Board (OMCB) as an independent government body.¹⁷⁰ The OMCB has three members, at least one of whom is an attorney appointed by the governor with the advice of the Senate.¹⁷¹ Members serve three-year staggered terms and may not serve more than two consecutive terms.¹⁷² The attorney general's office provides staff support. The board has no office or budget of its own.¹⁷³

In October 2015, amendments to the Maryland Public Information Act (PIA) created the State Public Information Compliance Board (PICB), which has the authority to resolve disputes concerning an "unreasonable" fee of more than \$350 sought by a custodian when responding to a PIA request.¹⁷⁴ The PICB is a five-member board with one member coming from a nonprofit that works on open-government issues and another who served as a records custodian.¹⁷⁵ The remaining three members are private citizens, at least one of whom is an attorney.¹⁷⁶ The governor, with the advice and consent of the Senate, appoints all five members.¹⁷⁷

The 2015 amendments also created a Public Access Ombudsman within the attorney general's office but independent from the attorney general.¹⁷⁸

ADR Process: The OMCB receives and reviews complaints concerning Open Meetings Act violations.¹⁷⁹ If a complaint contains sufficient information to make a determination, the OMCB will issue a written opinion within 30 days.¹⁸⁰ If there is insufficient information, the OMCB may schedule an informal conference to hear from the complainant, the public body and other relevant parties.¹⁸¹

¹⁷⁰ MD. GEN. PROVIS. § 3-101.

¹⁷¹ MD. GEN. PROVIS. § 3-202; Maryland Attorney General, Maryland Open Meetings Act, <http://www.oag.state.md.us/opengov/Openmeetings/index.htm>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ MD. CODE. ANN., General Provisions Article §§ 4-1A-01 to -10.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ "Summary of New PIA Provisions Effective October 1, 2015," Office of the Maryland Attorney General, https://www.oag.state.md.us/Opengov/Summary_PIA_Provisions.pdf.

¹⁷⁹ MD. GEN. PROVIS. at § 3-204.

¹⁸⁰ *Id.* at § 3-207.

¹⁸¹ *Id.*

The Public Access Ombudsman may review any dispute “relating to requests for public records” under the PIA.¹⁸² Examples of complaints from records requesters include agency denials or redactions, the failure of an agency to produce records in a timely manner and fee-waiver denials. Examples of complaints from agencies include overly broad requests; the amount of time a custodian needs, given available staff and resources, to produce public records; and repetitive or redundant requests. The ombudsman acts only as a mediator and has no authority to issue binding decisions.

Remedies and Appeals: Opinions issued by the OMCB are advisory; the OMCB will explain whether it thinks the public body violated the Open Meetings Act and the basis for its opinion.¹⁸³ Outside of issuing advisory opinions, the statute does not authorize the OMCB to require or compel any specific action by a public body.¹⁸⁴ If a public body complies with the OMCB’s advisory opinion, it is not an admission to a violation and cannot be used as evidence in later proceedings.¹⁸⁵

Results and Perceived Success: The Open Meetings Compliance Board reported resolving 24 of 32 complaints and issuing 19 opinions during fiscal year 2014.

One complaint is that requiring the Senate to confirm the governor’s appointments can lead to vacant board positions for extended periods of time.¹⁸⁶

The PICB and Public Access Ombudsman were only recently appointed.¹⁸⁷ While many advocates for freedom of information see these additions as a step in the right direction, others see the ombudsman’s lack of authority to bind agencies to decisions as a weakness. The 2015 amendments authorized a study to evaluate the division of responsibility for possible future changes.¹⁸⁸

| Plusses | Minuses |
|---|--|
| Counsel and opinion before going to court | Does not include public records within its scope |
| | Lacks enforcement power |

¹⁸² “Summary of New PIA Provisions Effective October 1, 2015,” Office of the Maryland Attorney General, https://www.oag.state.md.us/Opengov/Summary_PIA_Provisions.pdf.

¹⁸³ *Id.* at § 3-209.

¹⁸⁴ *Id.* at § 3-210.

¹⁸⁵ *Id.* at § 3-211.

¹⁸⁶ Doug Donovan, “Without members, open meetings board can’t meet,” *The Baltimore Sun* (May 9, 2015), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-sun-investigates-open-meetings-0510-20150509-story.html>.

¹⁸⁷ “Solicitation of Applicants for the State Public Information Act Compliance Board,” *The Office of the Governor* (accessed on 5/22/2016), <http://governor.maryland.gov/1161-2/>.

¹⁸⁸ Brian Heaton, “Maryland Revamps its Public Information Law,” *Government Technology* (May 14, 2015), <http://www.govtech.com/state/Maryland-Revamps-its-Public-Information-Law.html>.

Massachusetts

The Massachusetts Public Records Law established a hybrid administrative body that contains elements of both formal and informal resolution.¹⁸⁹ The Supervisor of Public Records, an administrative official in the Secretary of the Commonwealth's office,¹⁹⁰ is responsible for maintaining the commonwealth's public records and handling administrative appeals in disputes relating to the Public Records Law.

ADR Process: The supervisor handles formal, written appeals of records request denials.¹⁹¹ If a records custodian does not comply with a records request, the requester may ask the supervisor to determine if the record requested is public.¹⁹² The supervisor can order the records custodian to comply with the request.¹⁹³

If a records custodian fails to comply with an administrative directive from the Supervisor of Public Records, the supervisor can seek the attorney general's assistance to "take whatever measures he deems necessary to ensure compliance with the provisions" of the Public Records Law.¹⁹⁴ Upon receiving such a request from the supervisor, the attorney general will make an independent legal assessment of the public records dispute and act accordingly.

Remedies and Appeals: The administrative remedies provided by the Supervisor of Records do not limit the availability of judicial remedies otherwise available to a records requester.¹⁹⁵ If the records custodian refuses to comply with a request or an administrative order pursuant to the Public Records Law, the supreme judicial or superior court has jurisdiction to order compliance.¹⁹⁶

Results and Perceived Success: The Massachusetts Public Records Law was harshly criticized in early 2015. The Boston Globe discussed frustrating delays, opacity and governing laws that are easily ignored.¹⁹⁷ The 2015 State Integrity Investigation gave Massachusetts an F in public access to

¹⁸⁹ MASS. GEN. LAWS ANN. Ch. 66 § 32.08-2-5.

¹⁹⁰ Massachusetts Attorney General, Public Records, <http://www.mass.gov/ago/government-resources/public-records>.

¹⁹¹ Daxton R. Stewart, "Managing Conflict Over Access," 1 J. Media Law & Ethics 49, 76 (2009).

¹⁹² MASS. GEN. LAWS ANN. Ch. 66 § 10.

¹⁹³ *Id.*S

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ The Editorial Board, "With Mass. Public records law in tatters, it's time for reform," The Boston Globe (Mar. 13, 2015), <http://www.bostonglobe.com/opinion/editorials/2015/03/13/with-mass-public-records-law-tatters-time-for-reform/bxvKeY9koA6himuTqBUJ50/story.html>.

information, ranking the state 40th in this category.¹⁹⁸ A 2014 Boston Globe analysis of FOI appeals decisions reported that the Supervisor of Public Records ruled in favor of the agency denying records about 80 percent of the time.¹⁹⁹ Another complaint concerns the length of time required to resolve an appeal. Some appeals were pending for more than three months.²⁰⁰

| Plusses | Minuses |
|---|------------------------------------|
| The process costs almost nothing for citizens | Process takes a long time |
| | Supervisor lacks enforcement power |

Minnesota

The Information Policy Analysis Division of the Department of Administration provides an alternative appeal mechanism for FOI request denials.²⁰¹ Through this division the Minnesota Commissioner of Administration assists public agencies and citizens with questions about data practices and public meetings.²⁰² The governor appoints the commissioner, whose term ends with the governor's term of office.²⁰³ The commissioner has the authority to appoint staff, including two deputy commissioners.²⁰⁴

ADR Process: The commissioner receives requests for help from government entities and members of the public²⁰⁵ and may issue written advisory opinions on the questions posed.²⁰⁶ A public body or person requesting an opinion related to the Open Meeting Law must pay a fee of \$200.²⁰⁷ There is no fee for an advisory opinion concerning government data practices.

Remedies and Appeals: Opinions issued by the commissioner are not binding on the public entity, but an opinion must be given deference by a court proceeding involving the respective data.²⁰⁸ To compel compliance, a complainant will need to bring an action in court.²⁰⁹ If the complainant files an action with

¹⁹⁸ "Massachusetts – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18422/massachusetts-gets-d-grade-2015-state-integrity-investigation>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ "Advisory Opinions," Information Policy Analysis Division – Minnesota Department of Administration, *available at*: <http://www.ipad.state.mn.us/docs/opinionmain.html>.

²⁰² MINN. STAT. ANN. § 13.07

²⁰³ *Id.* at § 15.06.

²⁰⁴ *Id.* at § 16B.03.

²⁰⁵ *Id.* at § 13.072.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at § 13.08.

the Office of Administrative Hearings, the office must notify the commissioner.²¹⁰ If the court issues an order to compel compliance, the court forwards a copy of the order to the commissioner.²¹¹ A public body that acts in conformity with a commissioner’s opinion is not liable for compensatory or exemplary damages or attorney’s fees.

Results and Perceived Success: Similar to other states, the public perceives the lack of a strong enforcement mechanism as the main drawback of the Minnesota Commissioner of Administration’s handling of public records dispute appeals.²¹² The 2015 State Integrity Investigation noted instances where agencies refused to provide data even after receiving an advisory opinion to do so.²¹³ As a political appointee, the commissioner’s effectiveness may fluctuate with the political tides. The commissioner’s review process can take months, and there can be conflicts of interest.²¹⁴ Requesting the commissioner’s help is more cost effective than filing an action with the Office of Administrative Hearings, which charges a \$1,000 filing fee.²¹⁵

| Plusses | Minuses |
|--|---|
| Cheaper alternative than going straight to administrative or district courts | Not really an appeals process, no enforcement power |
| Commissioner’s opinions can clarify the law | Process can take months |

Nebraska

Nebraska’s attorney general has the authority to enforce and interpret provisions of the Open Meetings Act²¹⁶ and the Public Records Law.²¹⁷ Someone denied rights under either of these laws could request that the attorney general review the matter. The attorney general also issues decisions interpreting the Open Meetings Act and Public Records Law.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² “Minnesota – Public Access to Information,” 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18432/minnesota-gets-d-grade-2015-state-integrity-investigation>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Neb. Rev. Stat. §§ 84-1407 through 84-1414.

²¹⁷ Neb. Rev. Stat. §§ 84-712 through 84.712.09.

ADR Process: The attorney general can determine whether a record may be withheld from public inspection or whether the records custodian has otherwise failed to comply with the law.²¹⁸ The determination must be made within 15 calendar days after a petition is submitted. If the attorney general's office finds that a record was improperly withheld, it shall order the public agency to produce the record or comply. If the public agency still refuses, the records requester can bring suit or demand in writing that the attorney general bring suit in the name of the state within 15 days.

The attorney general also enforces provisions of the Open Meetings Act,²¹⁹ receiving complaints and making rulings.

Remedies and Appeals: After the attorney general has taken over a case, the requester shall have an absolute right to intervene as a full party in the suit at any time.²²⁰

Results and Perceived Success: The attorney general has produced many useful opinions relating to the Open Meetings Act and Public Records Law that have cleared ambiguities.²²¹ Watchdog organizations and members of the media are comfortable petitioning the attorney general for decisions when they feel that a public agency fails to comply with either law.²²²

The 2015 State Integrity Investigation noted that most appeals of FOI-related requests are handled in a timely fashion. It ranked Nebraska eighth for public access to information.²²³

| Plusses | Minuses |
|--|---|
| Attorney General handles requests in a timely and cost-efficient manner. | Nebraska is a state with a low population density; this model may not scale well. |
| Attorney General issues informative decisions. | |

²¹⁸ *Id.*

²¹⁹ *Id.* § 84-1414.

²²⁰ Neb. Rev. Stat. § 84-712.03.

²²¹ Doug Kennedy, "State senators hear from media about importance of open meetings," Nebraska Radio Network (Feb. 13, 2015), <http://nebraskaradionetwork.com/2015/02/13/state-senators-hear-from-media-about-importance-of-open-meetings/>.

²²² Deena Winter, "AG asked to rule on whether University of Nebraska broke open meetings law," Nebraska Watchdog (Mar. 31, 2015), <http://watchdog.org/209464/university-of-nebraska-2/>.

²²³ "Nebraska – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18452/nebraska-gets-d-grade-2015-state-integrity-investigation>.

New Jersey

The Open Public Records Act (OPRA), passed in 2002, created a Government Records Council (GRC) based on the model of Connecticut’s FOI Commission.²²⁴ OPRA allows the GRC to establish an informal mediation program for facilitating the resolution of records disputes; hear complaints concerning denials of access to records; issue advisory opinions; and prepare information for records requesters and custodians.²²⁵

ADR Process: After a requester files a formal complaint of denial of access, the GRC offers the parties the opportunity to resolve the dispute through mediation.²²⁶ The mediator is an impartial third-party attorney with knowledge of OPRA. The mediator does not have authority to determine the merits of the case and does not act as an advocate for either party.²²⁷ The mediator helps parties identify the issues, encourages joint problem solving and explores settlement alternatives with the parties.

Remedies and Appeals: Under GRC mediation, the parties to the dispute ultimately control whether and how the dispute is resolved. The mediation is voluntary, confidential and informal, and settlement is voluntary. The mediation occurs at no cost to either party and does not require representatives. In order to enter into mediation, both parties must sign an “agreement to mediate,” at which point a mediator will contact the parties to describe the process, collect information and schedule the mediation.²²⁸ If either party objects to mediation or if the mediation does not resolve the issues, the GRC initiates a more formal investigation, with the possibility for further mediation at a later date.²²⁹ The GRC does not have jurisdiction over the judicial or legislative branches of the government.²³⁰

Results and Perceived Success: New Jersey’s GRC offers no-cost mediation to parties filing complaints. The voluntary nature of GRC mediation means that reluctant records custodians can bypass this option and drag the process out through a more formal GRC investigation. In 2003, a year after OPRA was passed, the *New Jersey Law Journal* stated, “The system is rife with foot-dragging, bureaucratic

²²⁴ N.J. STAT. ANN. § 47 et seq.

²²⁵ N.J. STAT. ANN. § 47:1A-1-7b.

²²⁶ “GRC Mediation,” Government Records Council Website, State of New Jersey, *available at*: www.state.nj.us/grc-mediation/.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ N.J. STAT. ANN. § 47:1A-7e.

²³⁰ *Id.* at § 47:1A-7g.

browbeating, fee gouging and flat-out noncompliance.”²³¹ In 2010, 60 percent of the 262 cases opened by the GRC went unresolved by the end of the year.²³² In 2015, a representative for the GRC said the council now averages six to eight months to resolve disputes and the mediation process has seen a “significant uptick.”²³³

| Plusses | Minuses |
|--|---|
| GRC mediation is no cost to the parties | GRC mediation is voluntary, government agencies may be reluctant to participate |
| GRC mediation is gaining traction and a quicker resolution to disputes | By law, the GRC cannot handle complaints involving the judiciary or the legislature |

New York

New York created the Committee on Open Government in 1974 as a part of the New York Freedom of Information Law.²³⁴ The Committee sits within the Department of State and oversees and advises the government, public citizens and news media on Freedom of Information, Open Meetings and Personal Privacy Protection Laws.²³⁵ There are 11 committee members, including the lieutenant governor, secretary of state, general services commissioner and budget director.²³⁶ Five of the other seven members are appointed by the governor, two of whom are representatives of the news media, one a representative of local government. One member is selected by the temporary president of the Senate and one by the speaker of the Assembly. Members are appointed to four-year terms.²³⁷

ADR Process: The Freedom of Information Law gives the public the right to appeal a records request denial in writing to the head of the agency, who must respond within 10 business days.²³⁸ The agency is also required to forward the appeal to the Committee on Open Government.

Committee staff give advice, issue written advisory opinions and provide the public with resources to file records requests or appeal denials of records requests. Members of the public or news media can

²³¹ Jim Edwards, *Government Agencies Filter Rays of Open Public Records Act's Sunshine*, NEW JERSEY LAW JOURNAL (Mar. 17, 2003).

²³² www.stateintegrity.org/newjersey_servey_public_access_to_information

²³³ Josh Cornfield, “Public records not always easy to access in New Jersey,” NORTH JERSEY.COM (Mar. 15, 2015), *available at* <http://www.northjersey.com/news/public-records-not-always-easy-to-access-in-new-jersey-1.1289508>.

²³⁴ N.Y. PUB. OFF. LAW, Article 6 §§ 84-90.

²³⁵ New York Department of State, “Committee on Open Government,” <http://www.dos.ny.gov/coog/index.html>.

²³⁶ N.Y. PUB. OFF. LAW, Article 6 § 89.

²³⁷ Harry Hammitt, “Mediation Without Litigation,” *The FOI Reports* 5 (2007).

²³⁸ N.Y. PUB. OFF. LAW, Article 6 § 89.

request written advisory opinions by submitting the relevant facts and documents by mail or email.²³⁹ The committee will follow up with the agency involved and invite the agency to submit additional information. It can take up to four months to receive an advisory opinion.

Appeals and Remedies: The committee’s advisory opinions do not have the force of law and, therefore, a records requester dealing with a non-compliant government body will need to bring an action in court to secure enforcement.

Results and Perceived Success: In 2014, with two staff members, the committee responded to almost 4,800 telephone calls and more than 750 requests for guidance through email. It prepared 157 advisory opinions.²⁴⁰

The main criticism of the New York committee model is the lack of enforcement power. The Committee on Open Government combats this criticism by explaining that a more robust model, like Connecticut’s, is too expensive to be reproduced in a larger jurisdiction.²⁴¹

| Plusses | Minuses |
|--|---|
| Cost-effective solution for a well-populated state | Non-binding opinions means the public may still need to litigate records disputes |
| Productive staff | Not really an appeals method |

North Dakota

Any interested party may ask North Dakota’s attorney general for an opinion regarding an alleged violation of the Open Records²⁴² or Open Meetings law.²⁴³ The attorney general’s State and Local Government Division prepares open records and open meetings manuals and has the primary responsibility for all attorney general opinions.²⁴⁴

²³⁹ State of New York, Department of State, Contact the Committee on Open Government, <http://www.dos.ny.gov/coog/contact.html>.

²⁴⁰ State of New York, Department of State, Committee on Open Government, “Annual Report to the Governor and State Legislature,” (2014), <http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>.

²⁴¹ New York Committee on Open Government, *Report to the Governor and State Legislature 2007*, available at <http://www.dos.state.ny.us/coog/2007report.htm>.

²⁴² N.D.C.C. § 44-04-18.

²⁴³ N.D.C.C. § 44-04-19.

²⁴⁴ North Dakota Attorney General Website, State and Local Government Division, <http://www.ag.nd.gov/SL/SL.htm>.

ADR Process: Open records and meetings requests to the attorney general must be made within 30 days of an alleged violation, although requests pertaining to a meeting held without notice can be made within 90 days of an alleged violation.²⁴⁵ The opinion, which the attorney general issues to the public entity with a copy to the requester, is free of charge.

If the attorney general finds that the public entity violated the Open Records or Open Meetings law, the entity has seven days to address and correct the issue set forth in the opinion. Examples of corrective actions include releasing records or providing minutes of a closed meeting.

Consequences for failing to comply with the attorney general’s opinion include potential personal liability for the person or persons responsible for the noncompliance. The attorney general does not have the authority to change, void or overrule a decision of, or action taken by, the public entity.

Appeals and Remedies: At any time, the aggrieved party can bring a civil action in court.²⁴⁶

Results and Perceived Success: The 2015 State Integrity report for North Dakota commented positively on the timely and cost-free attorney general dispute process.²⁴⁷

The attorney general’s office responded to 5,000 letters and email requests for general information from 2011 to 2013, according to a biennial report.²⁴⁸ It is unclear whether the prompt response times and efficiency demonstrated by North Dakota's attorney general would scale with an increase in requests. Larger states like New York can receive more than 5,000 requests relating to freedom of information issues alone.²⁴⁹ Texas, which uses a similar attorney general model, has an entire division dedicated to open-government requests.

| Plusses | Minuses |
|---|--|
| Attorney general model works well for low-population states like North Dakota | Attorney general model might not scale |

²⁴⁵ N.D.C.C. § 44-04-21.

²⁴⁶ *Id.*

²⁴⁷ “North Dakota – Public Access to Information,” 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18487/north-dakota-gets-d-grade-2015-state-integrity-investigation>.

²⁴⁸ North Dakota Attorney General Biennial Report (2011-2013), <http://www.ag.nd.gov/Reports/BiennialReports/BiennialReport11-13.pdf>.

²⁴⁹ State of New York, Department of State, Committee on Open Government, “Annual Report to the Governor and State Legislature,” (2014), <http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>.

Pennsylvania

The passage of Pennsylvania’s Right to Know Act in 2008 created the Office of Open Records.²⁵⁰ The office, housed in the Department of Community and Economic Development, is an independent quasi-judicial agency, authorized to hear and decide appeals from requesters who have been denied access to records by state and local agencies. The office offers formal training on the Right to Know Law and Pennsylvania’s Sunshine Act.

The Right to Know law also required the Office of Open Records to “establish an informal mediation program to resolve disputes.”²⁵¹ The goal of the mediation program is to resolve disputes between requesters and agencies without undergoing a formal administrative review process and appellate litigation.²⁵²

The Office of Open Records is allowed to “promulgate regulations relating to appeals involving a commonwealth agency or local agency.”²⁵³

ADR Process: The Right to Know Act requires an administrative appeal process before any court action. All records-request denials from local and commonwealth agencies are appealable to the Office of Open Records; however, judicial and legislative agencies, the state treasurer, the auditor general, and the attorney general can appoint their own appeals officers.²⁵⁴ A complainant must file an appeal within 15 business days of the mailing date of a denial or within 15 business days of a deemed denial.

The Informal Mediation Program is only available to records requesters when a formal appeal is commenced in the Office of Open Records. All parties must agree to mediate a dispute for the mediation program to commence. Mediation sessions are private, and discussions, negotiations and materials created for the process are confidential.²⁵⁵

²⁵⁰ 65 Pa. Stat. § 66.1310; Pennsylvania, Office of Open Records, http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434.

²⁵¹ 65 Pa. Stat. § 67.1310(a)(6).

²⁵² Pennsylvania, Office of Open Records, http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/oor_informal_mediation_program/488137.

²⁵³ 65 Pa. Stat. § 66.504(a).

²⁵⁴ Pennsylvania News Media Association, <http://panewsmedia.org/legal/OpenRecords#09055e2f-b53e-4988-9957-8d7f57b8c0f6>.

²⁵⁵ 42 Pa. C.S. § 5949; Pennsylvania, Office of Open Records, “OOR Informal Mediation Program,” http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/oor_informal_mediation_program/488137.

If the parties are able to resolve the issues underlying the appeal and the requester is satisfied with the agency's compliance, the requester will withdraw the appeal. If the requester withdraws the appeal as a result of the Informal Mediation Program, the Office of Open Records will not issue a final determination. If the parties are unable to completely resolve the issues through mediation, the Office of Open Records will issue a final determination within 30 days, unless otherwise agreed to by the parties.

Appeals and Remedies: If the parties do not opt for mediation, the Office of Open Records has 30 days from the date of receipt of the appeal to issue a final determination.²⁵⁶ The office may conduct a hearing, which leads to a non-appealable decision or an *in camera* review. However, in most cases, the Office of Open Records issues a final determination without conducting a hearing based on information and evidence provided to the office.

The final determination is binding upon the agency and the requester. In order to enforce a final determination a requester must seek help from a court.²⁵⁷ Under special circumstances, the Office of Open Records may seek to enforce its own orders, but will only undertake enforcement actions in court at its discretion.

The agency or the requester may appeal the ruling to the appropriate court within 30 calendar days of the office's final determination.

Results and Perceived Success: The 2015 State Integrity Survey gave Pennsylvania high marks for efficiency and diligence of appeals for open records disputes.²⁵⁸ However, the Office of Open Records' lack of enforcement powers results in the public and press seeking resolution through the courts, limiting the true effectiveness of the right to information. The Office of Open Records has argued multiple cases in the Pennsylvania Supreme Court since 2011.²⁵⁹

²⁵⁶ Pennsylvania, Office of Open Records, "Citizen's Guide," <https://www.dced.state.pa.us/public/oor/rtkcitizensguidetoappeals.pdf>.

²⁵⁷ Pennsylvania, Office of Open Records, "Information Regarding Enforcement Action of an OOR Final Determination," http://openrecords.state.pa.us/portal/server.pt/community/open_records/4434/enforce_a_final_determination/933869.

²⁵⁸ "Pennsylvania – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18507/pennsylvania-gets-f-grade-2015-state-integrity-investigation>.

²⁵⁹ *Id.*

In early 2015, the governor fired the executive director of the Office of Open Records.²⁶⁰ Later that year, the Commonwealth Court ruled that the governor overstepped his authority. Open-government advocates applauded the decision as a victory for the independence of the Office of Open Records. The court found “clear legislative intent” in the Right to Know Act to shelter the Office of Open Records’ executive director from the governor’s power to remove appointees at will.

The Office of Open Records saw a 113 percent rise in the number of appeals from 2009 to 2013.²⁶¹ The office litigated or monitored 250 court cases, conducted four mediations and responded to thousands of citizen and agency inquiries in 2013. Due to the increasing workload, the executive director is seeking more resources for an approximately \$2 million budget.²⁶²

| Plusses | Minuses |
|--|--|
| Informal mediation program allows complicit parties to avoid appeals process | Lack of enforcement power |
| Independent office provides true oversight | Heavy workload requires more resources and funding |

Rhode Island

Rhode Island’s attorney general investigates complaints under both the Access to Public Records Act²⁶³ and the Open Meetings Act.²⁶⁴

ADR Process: The chief administrative officer for the agency responsible for the requested records handles administrative appeals following a denial.²⁶⁵ The chief administrative officer must make a final determination within 10 days.²⁶⁶

²⁶⁰ Andrew Staub, “Ousted PA open-records chief calls reinstatement victory for independence,” Watchdog.org (June 11, 2015), <http://watchdog.org/223590/open-records-arneson-wolf/>.

²⁶¹ Pennsylvania, Office of Open Records, “Annual Report,” (2013), <http://s3.documentcloud.org/documents/1094309/pennsylvania-office-of-open-records-2013-annual.pdf>.

²⁶² Amanda St. Hilaire, “Open Records Office on track for busiest month, looks for more resources,” ABC 27 News (June 23, 2015), <http://abc27.com/2015/06/23/open-records-office-on-track-for-busiest-month-looks-for-more-resources/>.

²⁶³ R.I. Gen. Laws § 38-2 *et seq.*

²⁶⁴ R.I. Gen. Laws § 42-46 *et seq.*

²⁶⁵ R.I. Gen. Laws § 38-2-8(a).

²⁶⁶ *Id.*

If the chief administrative officer determines the record is not subject to public inspection, the requester can file a formal complaint with the attorney general.²⁶⁷ Citizens may also file complaints with the attorney general in cases of alleged violations of the Open Meetings Act.²⁶⁸ If the attorney general finds merit in the complaint, the attorney general may file suit against the public body in superior court.²⁶⁹

Remedies and Appeals: If the attorney general decides not to take legal action, citizens may still file suit in superior court within 90 days of the attorney general closing the complaint or within 180 days of the alleged violation, whichever occurs later.

Results and Perceived Success: The 2015 State Integrity Investigation noted that appeals generally are handled promptly because the agency head often upholds the initial ruling.²⁷⁰

According to a 2014 annual report, the attorney general received 45 open meetings complaints and issued 40 findings.²⁷¹ The attorney general received 95 Access to Public Records Act complaints and issued 39 findings.

A reality of the attorney general model for handling freedom of information disputes is that the effectiveness of the program is dependent on the attorney general's commitment to prosecuting violations. Rhode Island Attorney General Peter Kilmartin filed more public records lawsuits than previous attorneys general.²⁷² However, ACLU Rhode Island Executive Director Steven Brown noted that some agencies have repeatedly violated Rhode Island's FOI laws and the attorney general has only issued warnings rather than prosecuting them.²⁷³ The ACLU cited an audit identifying 53 potential violations of Rhode Island's FOI laws in making the case that the attorney general can do more to uphold freedom of information laws.²⁷⁴

²⁶⁷ R.I. Gen. Laws § 38-2-8(b).

²⁶⁸ R.I. Gen. Laws § 42-46-8(a).

²⁶⁹ *Id.* § 42-46-8(c).

²⁷⁰ "Rhode Island – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18512/rhode-island-gets-d-grade-2015-state-integrity-investigation>.

²⁷¹ 2014 Annual Report Open Meetings Act and Access to Public Records Act, <http://www.riag.ri.gov/documents/2014AnnualReport.pdf>.

²⁷² Associated Press, "Freedom of Information, Access Issues in All 50 States," *The New York Times* (Mar. 13, 2015), http://www.nytimes.com/aponline/2015/03/13/us/ap-us-sunshine-week-state-summaries-1st-add.html?_r=0; AccessRI, "FOI Complaints," (Dec. 17, 2014), <http://www.accessri.org/foi-complaints.html>.

²⁷³ *Id.*

²⁷⁴ *Id.*

| Plusses | Minuses |
|------------------------------------|---|
| Offers affordable appeal mechanism | Attorney general model dependent on the agenda of each elected attorney general |
| | Can be a lengthy process |

South Dakota

The South Dakota legislature created the Open Meetings Commission in 2004 to handle disputes related to the open meetings law.²⁷⁵ The attorney general appoints five attorneys to the commission,²⁷⁶ which chooses a chair from among its members annually.²⁷⁷ An assistant attorney general is assigned to assist the board with procedural matters.²⁷⁸

The Office of Hearing Examiners handles disputes over public records.²⁷⁹

ADR Process: If citizens or journalists feel that a meeting should be open to the public, they can direct their complaints to a state’s attorney or the Office of the Attorney General.²⁸⁰ Upon receiving the complaint, the state’s attorney will choose whether to prosecute the case, determine if there is merit to prosecuting the case, or send the complaint and any investigation file to the South Dakota Open Meetings Commission for further action.²⁸¹

After receiving a referral from a state’s attorney or the attorney general, the Open Meetings Commission evaluates the complaint and issues a written determination on whether the conduct violates the law.²⁸² A majority of the commission makes the final decision and each member’s vote is recorded in the written decision.²⁸³ The commission publicly reprimands the offending official or government entity when a violation is found, rather than imposing criminal charges or a fine.²⁸⁴

²⁷⁵ S. D. CODIFIED LAWS § 1-25 *et seq.*

²⁷⁶ *Id.* at § 1-25-8.

²⁷⁷ *Id.*

²⁷⁸ South Dakota, Office of the Attorney General, Open Meetings Commission, <http://atg.sd.gov/OpenGovernment/OpenMeetingsCommission.aspx>.

²⁷⁹ S. D. CODIFIED LAWS § 1-27-38.

²⁸⁰ *Id.* at § 1-25-6.

²⁸¹ *Id.*

²⁸² *Id.* at § 1-25-7.

²⁸³ *Id.*

²⁸⁴ *Id.*

Citizens with public records access disputes can file a notice of review with the Office of Hearing Examiners.²⁸⁵ After reviewing the information, the office may hold a hearing. The office will make written findings of fact and conclusions of law when it decides a case.²⁸⁶

Remedies and Appeals: State’s attorneys or the attorney general do not prosecute any decisions made by the Open Meetings Commission.²⁸⁷ All of the findings and public censures of the commission will be public records.

A party that receives an unfavorable decision from the Office of Hearing Examiners relating to a public records request can appeal the decision to the circuit court.²⁸⁸

Results and Perceived Success: The 2015 State Integrity Investigation did not view South Dakota favorably, ranking it 47 out of 50 on the state corruption risk report card.²⁸⁹ A significant weakness: State law does not prescribe a deadline for the Office of Hearing Examiners to issue decisions.²⁹⁰

In 2011, Michelle Lea Rydell wrote a graduate thesis examining the implementation of the open meetings law in South Dakota.²⁹¹ Of 27 complaints analyzed by Rydell, seven were from the press, one was from an open-government group, four were from governmental bodies and 15 were filed by private citizens.²⁹² Nineteen of the 27 complaints decided by the Open Meetings Commission resulted in public reprimands.²⁹³

Rydell noted that significant delays in the ADR process limited its success. Part of the problem was a lack of established time limits for tasks and part of it was the geographic disparity of commission members. Journalists would like to see a stronger punishment than a public reprimand for violators of the open meetings law. Other citizens see the reprimand as a good middle ground that provides deterrence and education. The commission is composed entirely of lawyers and, therefore, lacks representation by

²⁸⁵ *Id.* at § 1-27-38.

²⁸⁶ *Id.* at § 1-27-40.

²⁸⁷ *Id.* at § 1-25-7.

²⁸⁸ *Id.* at § 1-27-41.

²⁸⁹ “South Dakota – Public Access to Information,” 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18522/south-dakota-gets-f-grade-2015-state-integrity-investigation>.

²⁹⁰ *Id.*

²⁹¹ See Michelle Lea Rydell, “Transparency in the balance: An examination of the implementation of the open meetings law in the state of South Dakota,” Iowa State University (2011), *available at*: <http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=3101&context=etd>.

²⁹² *Id.* at 39.

²⁹³ *Id.*

other stakeholders such as citizens, journalists and government officials. Despite these concerns, open-government advocates agree that the creation of the Open Meetings Commission represents progress for transparency and openness in South Dakota.

| Plusses | Minuses |
|---|---|
| Office of Hearing Examiners provides a quick, cheap appeals process | Open Meetings Commission process is subject to significant delays |
| Commission provides education | Commission lacks diversity |

Tennessee

In 2008, Tennessee revised its open records law and created the Office of Open Records Counsel to deal with local government open records issues.²⁹⁴ The Office of Open Records is located in the Comptroller of the Treasury²⁹⁵ and serves as the main contact for complaints related to the Tennessee Public Records Act.²⁹⁶ The office issues informal advisory opinions on open records issues, informally mediates disputes concerning records and works with the Advisory Committee on Open Government on open meetings and open records issues.

The 14-member Advisory Committee on Open Government provides guidance to the Office of Open Records Counsel.²⁹⁷ Members serving initial four-year terms are from: the Tennessee Coalition for Open Government; the Tennessee Press Association; the Tennessee Municipal League; the Tennessee County Services Association or the County Officials Association of Tennessee; the Tennessee School Boards Association; Common Cause; the League of Women Voters; the Tennessee Hospital Association; the Tennessee Association of Broadcasters; and the University of Tennessee board of regents. Members serving initial two-year terms are from: the Tennessee Association of Chiefs of Police; the Tennessee Sheriffs' Association; the Society of Professional Journalists; and AARP. Members are appointed by the Comptroller of the Treasury from a list of three nominees submitted by each group. The advisory committee also includes the attorney general (or a designee), the chair of the Senate's state and local government committee and the chair of the House of Representative's state government committee.

²⁹⁴ TENN. CODE ANN. § 8-4-601.

²⁹⁵ Tennessee Comptroller of the Treasury Office of Open Records Counsel, www.comptroller.tn.gov/openrecords/our_offic.asp.

²⁹⁶ TENN. CODE ANN. § 10-7-501 *et seq.*

²⁹⁷ *Id.* § 8-4-602.

ADR Process: The Office of Open Records Counsel mediates records disputes between local governmental entities and citizens, but does not mediate disputes involving state government. State officials consult with the attorney general.²⁹⁸ While citizens can consult with the Office of Open Records Counsel, they still must go to court if an agency refuses to hand over public records.

Remedies and Appeals: Any opinions issued by the Office of Open Records are advisory, and citizens seeking enforcement of public records or open meetings laws must go to court.

Results and Perceived Success: A 2014 annual report shows 1,697 inquiries for 2013-14, with 816 coming from citizens, 138 from the media and 743 from government sources.²⁹⁹ Of those inquiries, 1,432 related to public records, 216 to open meetings, and 37 to both public records and meetings. The number of inquiries has grown each year from 600 in 2008-09 to 1,408 in 2012-13.

While the Office of Open Records Counsel responds to many inquiries and offers informal mediation, many attorneys and journalists in Tennessee are dissatisfied.³⁰⁰ Elisha Hodge of the Tennessee Open Records Counsel says her office typically assists citizens facing records disputes within 24 hours and closes cases within three days on average. Ironically, the advisory committee that serves the Office of Open Records Counsel and the rest of the legislature is not subject to the open records law.³⁰¹

Many in Tennessee see the Open Records Counsel as a step in the right direction. Prior to the creation of the Office of Open Records Counsel there was no independent, third-party authority to assist citizens with records disputes and provide knowledge and transparency to citizens.³⁰² The major limitation of the office is its lack of enforcement power beyond the moral authority that comes with its affiliation with the Office of the Comptroller, the auditing arm of the government.

| Plusses | Minuses |
|---|--|
| Office of Open Records Counsel provides timely assistance to citizens with disputes | Still have to go to court for open records |
| Third-party assistance with public records | Lack of enforcement power |

²⁹⁸ TENN. CODE ANN. § 8-4-601(b).

²⁹⁹ State of Tennessee, Comptroller of the Currency, "Report to the General Assembly: Office of Open Records Counsel and Advisory Committee on Open Government," www.comptroller.tn.gov/openrecords/pdf/20140402Report.pdf.

³⁰⁰ "Tennessee – Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18527/tennessee-gets-d-grade-2015-state-integrity-investigation>.

³⁰¹ *Id.*

³⁰² "Open records counsel shows her worth," The Daily Herald (Oct. 7, 2012), <http://columbiadailyherald.com/sections/opinion/columns/open-records-counsel-shows-her-worth.html>.

Texas

The Texas Public Information Act establishes an open records steering committee consisting of representatives from five government agencies, members of the public and local government representatives appointed by the attorney general.³⁰³ In addition, the attorney general has a statutory interpretation role. Requesters and governmental bodies are required to consult the attorney general before claiming exemptions or proceeding to litigation.

Several divisions of the attorney general's office are involved in open government, including the Open Records Division, the Opinion Committee and the Public Information Coordinator.³⁰⁴ The Open Records Division is responsible for issuing decisions and rulings that determine whether information is public under Texas laws. The Open Records Division also enforces these decisions. The Opinion Committee issues advisory opinions on a variety of legal issues, including the Open Meetings Act. The Public Information Coordinator handles open records requests made of the attorney general.

ADR Process: If a governmental body wishes to withhold records from a requester, and there has not been a previous attorney general's determination on the disclosure of those records, it must ask the attorney general for a decision within 10 business days of receiving the request.³⁰⁵ The governmental body must notify the requester that it plans to withhold the requested information and provide a copy of the written communication to the attorney general.³⁰⁶ Within 15 days of receiving the request, the governmental body must provide reasons for withholding the information, evidence of the date of receipt of the request, a copy of the request and a copy of the requested information or a sample of the information. If the attorney general or a court has previously found the record type to be public, the statute prohibits a governmental body from asking the attorney general to rule.³⁰⁷

The attorney general issues a written opinion within 60 working days after receiving the request.³⁰⁸ This time period can be extended by 20 working days. If the attorney general determines that the information is public, the governmental body must file a cause of action seeking relief from compliance

³⁰³ Texas Government Code § 552.009.

³⁰⁴ Office of the Attorney General of Texas, Open Government, <https://www.texasattorneygeneral.gov/og/open-government#divisions>.

³⁰⁵ Texas Government Code § 552.301(b).

³⁰⁶ *Id.* § 552.301(d).

³⁰⁷ *Id.* § 552.301(f).

³⁰⁸ *Id.* § 552.306.

within 10 days after the receipt date of the decision in order to avoid criminal violation of the act.³⁰⁹ The governmental body may not sue the requester.³¹⁰

The attorney general's office can pursue civil actions in open-government cases but cannot prosecute those complaints in criminal court. The attorney general does not have jurisdiction over Texas Open Meetings Act violations. That responsibility remains with district courts and county or district attorneys.

Remedies and Appeals: A citizen can bring suit for writ of mandamus for refusal to request an attorney general's decision or refusal to supply public information or information that the attorney general determined is a public record.³¹¹

The governmental body or the requester may appeal an attorney general decision to Travis County district court.³¹² Third parties can appeal an attorney general decision to Travis County district court if the entity claims a proprietary interest in the information affected by the decision or a privacy interest in the information that a confidentiality law or judicial decision is designed to protect.

Results and Perceived Success: Texas scored an F in public access to information from the State Integrity Investigation, ranking 48 out of 50 states.³¹³ The main criticism is that after the attorney general has ruled on records-request denials, the only avenue for an appeal is the state district court, which can be a lengthy and expensive process. Despite legislating a unique and proactive approach to open government, in practice records requesters are often forced to go to court to resolve their appeals.

| Plusses | Minuses |
|--|--|
| Records are presumed to be open and the attorney general must approve exemptions | After attorney general ruling only option is court |

³⁰⁹ *Id.* § 552.353.

³¹⁰ *Id.* § 552.324, 325.

³¹¹ *Id.* § 552.321.

³¹² *Id.* § 552.008.

³¹³ "Texas - Public Access to Information," 2015 State Integrity Investigation, *available at*: <https://www.publicintegrity.org/2015/11/09/18532/texas-gets-d-grade-2015-state-integrity-investigation>.

Utah

The Government Records Access and Management Act (GRAMA) created the State Records Committee in 1992.³¹⁴ The seven-member committee is located within the Department of Administration.³¹⁵ Two *ex officio* members are the director of the Division of State History and the governor.³¹⁶ The governor appoints five other members with the consent of the Senate, including a private sector professional who creates or manages records that, if created by a governmental entity, would be private or controlled; two citizen members; one elected official representing political subdivisions; and one individual representing news media.³¹⁷ Members typically serve four-year staggered terms.³¹⁸

The Government Records Ombudsman program was created during the 2012 legislative session to serve as an additional resource for public records requesters.³¹⁹

ADR Process: Spurned requesters have two options to appeal denied records requests. First, they can appeal to the head of the state agency that denied their request. Second, they can appeal to the State Records Committee. If they still fail to obtain the relief they desire, they can appeal to district court.

The State Records Committee meets at least once a quarter to resolve disputes concerning requests made under Utah's Government Records Access and Management Act.³²⁰ The records committee creates its own rules to govern its proceedings.³²¹ There must be a quorum of five members available in order to proceed with business transactions.³²²

Remedies and Appeals: The State Records Committee serves as an appeals board when a public agency denies a public records request.³²³ A party that disputes the committee's order may petition for review in district court. The committee's legal counsel files briefs, conducts oral arguments and attends hearings.³²⁴

³¹⁴ UTAH CODE ANN. § 63G-2-501.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Utah, "State Records 2014 Annual Report," 1 (2014), <http://archives.utah.gov/src/SRC-2014-Annual-Report.pdf>.

³²⁰ Utah Department of Administrative Services, Division of Archives & Records Service, <http://archives.utah.gov/src/>.

³²¹ UTAH CODE ANN. § 63G, Chapter 3; Utah Administrative Rulemaking Act.

³²² Utah, "State Records 2014 Annual Report," 1 (2014), <http://archives.utah.gov/src/SRC-2014-Annual-Report.pdf>.

³²³ *Id.* at 2.

³²⁴ *Id.*

Results and Perceived Success: The State Records Committee’s 2014 annual report noted that 33 percent of the requested hearings were directly resolved through the Government Records Ombudsman program.³²⁵ The committee received 81 requests for hearings from the public, representing a 58 percent increase from the previous year.³²⁶ In 2014, the committee held 12 meetings.³²⁷

Many local ordinances previously suggested requesters could only appeal to district court and, therefore, allowed those entities to opt out of records committee appeals.³²⁸ This inconsistency was resolved in 2015 when the Utah legislature amended the GRAMA with a provision that requires all appeals from local jurisdictions go through the State Records Committee before they can go to court.³²⁹ The effectiveness of the State Records Committee, combined with the additional help provided by the Government Records Ombudsman, resulted in the 2015 State Integrity Investigation giving Utah a score of 70 for public access to information, good enough for second in the nation.³³⁰

| Plusses | Minuses |
|--|---------|
| Ombudsman provides information | |
| State Records Committee provides meaningful appeal mechanism | |

Virginia

Virginia created the Freedom of Information Advisory Council (FOIAC) in 2000 to encourage and facilitate compliance with the Virginia Freedom of Information Act (FOIA).³³¹ The FOIAC is a public access-specific agency within the legislative branch. Prior to the creation of the FOIAC, disputes were primarily resolved through litigation and judicial enforcement.³³²

³²⁵ *Id.* at 1.

³²⁶ *Id.*

³²⁷ *Id.* at 2.

³²⁸ Joel Campbell, “State panel, not courts, should handle appeals for records,” *The Salt Lake Tribune* (Dec. 10, 2010), <http://www.sltrib.com/sltrib/home/50852075-76/records-committee-state-government.html.csp>.

³²⁹ “Utah – Public Access to Information,” 2015 State Integrity Investigation, *available at*:

<https://www.publicintegrity.org/2015/11/09/18537/utah-gets-d-grade-2015-state-integrity-investigation>.

³³⁰ *Id.*

³³¹ VA. CODE ANN. § 30-178(A) (2009).

³³² VA. CODE ANN. § 2.2-3713(A) 2009).

The council has 12 members.³³³ The three permanent members are the attorney general or a designee, the Librarian of Virginia and the director of the Division of Legislative Services. The speaker of the House of Delegates appoints four members, including a member of the House of Delegates and three non-legislative citizen members, one of whom is a representative of the news media. The Senate Rules Committee appoints three members: one member of the Senate, one officer of local government and one citizen at-large member. The final two members are non-legislative citizen members, one of whom shall not be a state employee, appointed by the governor.³³⁴ The council is part of the Division of Legislative Services to protect it from direct political pressure.³³⁵

ADR Process: The FOIAC cannot compel the production of documents or issue orders, but instead renders advisory opinions that clarify the law and provide guidance to government agencies.³³⁶ The FOIAC does not have the authority to mediate disputes, but the public can call upon it as a resource to issue advisory opinions that have persuasive value.³³⁷ The FOIAC issues formal written opinions as well as informal opinions through email or telephone calls.³³⁸ During 2014, two FOIAC attorneys fielded 1,494 inquiries (873 government, 467 citizen, 148 news media) and issued six formal written opinions (one government, two citizen, three news media).³³⁹ The FOIAC issues written opinions upon request on a first-come, first-served basis.³⁴⁰

Remedies and Appeals: FOIAC opinions are merely advisory and not binding. Therefore, FOI disputes, appeals and remedies are still funneled through the courts systems.

Results and Perceived Success: Before the creation of FOIAC, costly and time-consuming litigation was the only mechanism for resolving records disputes, which frustrated advocates for journalists and citizens.³⁴¹ While the creation of the FOIAC does not provide an alternative to litigation, it does provide a powerful voice in the FOI conversation. One of the main consequences of the creation of the FOIAC has

³³³ Virginia Freedom of Information Advisory Council, "Report of the Virginia Freedom of Information Advisory Council," 1 (Dec. 17, 2014), <http://foiacouncil.dls.virginia.gov/2014ar.pdf>.

³³⁴ VA. CODE ANN. § 30-178.

³³⁵ VA. H. DOC. NO. 106 at 33.

³³⁶ *Id.* at 2.

³³⁷ *Id.*

³³⁸ The Freedom of Information Advisory Council, "2014 Annual Report," State of Virginia 24 (2014), <http://foiacouncil.dls.virginia.gov/2014ar.pdf>.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ Stewart, *supra* note 1, 443 (2012) (citing Telephone Interview with Forrest M. Landon, Council Member, Virginia Freedom of Advisory Council, Former Executive Director, Virginia Coalition for Open Government (Feb. 2, 2009)).

been increased legislation involving the FOIA.³⁴² Legislators turn to the FOIAC for advice and research regarding FOI issues.³⁴³

Some citizens still believe that a body besides the courts and the FOIAC is necessary to help handle FOI disputes. The Virginia Coalition for Open Government surveyed government officials, the news media and general public. One suggestion was the development of “an FOIA fairness organization that would take the ball on a few actions each year and drive the issue to conclusion.”³⁴⁴ Another suggestion: “A mediator to handle issues between citizens and public agencies. Having to go through an attorney and the courts is cumbersome and expensive and discourages people from pursuing their right to access public information.”³⁴⁵

| Plusses | Minuses |
|---|---|
| Increased awareness about FOI issues and a useful resource for government and members of the public | Non-binding opinions means the public may still need to litigate records disputes |
| | Not really an ADR method |

Washington

In 2005, the attorney general created the position of Open Government Ombudsman, also called the Assistant Attorney General for Open Government.³⁴⁶ The Washington Public Records Act does not contain a specific provision for the ombudsman. The position has fluctuated between a full-time and half-time role depending on the budget for the attorney general’s office.³⁴⁷

ADR Process: The ombudsman’s role is to help public agencies and citizens comply with the Public Disclosure Act³⁴⁸ and the Open Public Meetings Act.³⁴⁹ A citizen or public agency can call or email the

³⁴² *Id.* at 446.

³⁴³ *Id.*

³⁴⁴ The Virginia Coalition Open Government, “FOIA Survey,” 5 (June 2, 2014), http://www.opengovva.org/sites/default/files/file_attach/SurveyReport.pdf.

³⁴⁵ *Id.*

³⁴⁶ Harry Hammitt, “Mediation Without Litigation,” *The FOI Reports* 11 (2007).

³⁴⁷ Jordan Schrader, “Washington open-government job to return to full time,” *The Columbian* (Sep. 17, 2013), <http://www.columbian.com/news/2013/sep/17/state-open-government-job-to-return-full-time/>.

³⁴⁸ WASH. REV. CODE ANN. § 42.56 *et seq.*

³⁴⁹ WASH. REV. CODE ANN. § 42.30 *et seq.*

ombudsman, who may provide an informal written analysis and follow up with the agency and ask it to reconsider its position where appropriate.³⁵⁰

Remedies and Appeals: The opinions of the ombudsman are non-binding; however, they may be persuasive to the agency or to a court considering a public access dispute.³⁵¹

Results and Perceived Success: The ombudsman has been a useful and helpful mechanism in educating citizens and officials who are not familiar with the law.³⁵² The ombudsman also saves the state and local government money by providing information that helps avoid lawsuits and protracted court battles.³⁵³

The ombudsman’s opinions are non-binding and, therefore, many cases may ultimately head to litigation anyway. Also, while the ombudsman position is currently full time, it is easy for the government to reduce the role under budgetary constraints because it is not statutorily created role.

| Pluses | Minuses |
|--|----------------------|
| Saves government money | Lack of enforcement. |
| Provides valuable education on public access | Not a statutory role |

³⁵⁰ State of Washington, Office of the Attorney General, Open Government Ombuds Function, <http://www.atg.wa.gov/open-government-ombuds-function#OG1>.

³⁵¹ Harry Hammitt, “Mediation Without Litigation,” *The FOI Reports* 11 (2007).

³⁵² Editorial Board, “Attorney General makes good call in hiring ombudsman,” *Union Bulletin* (Nov. 29, 2013), <http://union-bulletin.com/news/2013/nov/29/attorney-general-makes-good-call-hiring-new-open-g/>.

³⁵³ *Id.*